COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

MASSACHUSETTS COMMISSION
AGAINST DISCRIMINATION &
CHERYL MICHAELS-IACHETTI,
Complainant

v. DOCKET NO. 08-BEM-00379

SLEEK INCORPORATED
Respondent

Appearances: Cheri L. Crow, Esq. for Complainant
Howard I. Wilgoren, Esq. for Respondent

DECISION OF THE HEARING OFFICER

I. INTRODUCTION

Complainant, Cheryl Michaels-Iachetti, filed a complaint with this Commission on February 7, 2008, alleging that she was discriminated against by her former employer, Sleek, Inc., on account of her gender. Complainant specifically alleged that her employment as the New England Area Director of Respondent was terminated in April of 2007, a few months after she informed Respondent that she was pregnant. The Investigating Commissioner found probable cause to credit the allegations of the complaint and conciliation efforts were unsuccessful. A Hearing was held before the undersigned hearing officer on September 7 and 8, 2011. The only two witnesses to testify were the Complainant and Andrew Rudnick, Respondent's CEO. The parties submitted post-hearing briefs. Having reviewed the record of the proceedings and the submissions of the parties, I make the following Findings of Fact and Conclusions of Law.

II. FINDINGS OF FACT

1. Complainant, Cheryl Michaels-Iachetti is a thirty-six year old female who currently resides in Glen Rock, New Jersey, is married and the mother of two children, ages 4 and 2 ½ at the time of the hearing.
2. Respondent, Sleek Inc., is the parent company to a chain of medical spas which provide advanced body and facial rejuvenation services including hair removal and other cosmetic services. Prior to 2006 Respondent performed non-invasive procedures such as botox injections, vein removal, skin tightening and hair removal, which a physician was not required to perform. Respondent's corporate office is located in Boca Raton, Florida and it operates facilities in Massachusetts, New York and Florida. Respondent's CEO is Andrew Rudnick. Rudnick resides in and works primarily out of the Boca Raton, Florida corporate headquarters. Rudnick testified that in 2007 the business model changed to include surgical procedures and that this change began at its New York facility.
3. Complainant's employment with Respondent began in September of 2004 as a call center employee. She was promoted to salesperson at the Newton, MA location and after several months, in the Spring of 2005, she was again promoted to manager of that location. Complainant also acted as a salesperson at the newly opened Burlington MA location while managing the Newton location. In the summer of 2005, Complainant became district manager, responsible for hiring and training at the spas in Boston, Natick, Burlington and Weymouth. Complainant hired managers for all four locations.
4. In July of 2006 Complainant was promoted to the position of Northeast Area Director for Respondent. She held that position until her termination on April 30, 2007. In the summer of 2006 complainant was asked to assist with Respondent's newly acquired

facility on 5th Avenue in New York City. Prior to that time she had assisted with the opening of the location in Boca Raton Florida and resided in Florida for 2 ½ months.

5. Complainant worked in New York City assisting with the opening of the 5th Avenue location from July 6 to September of 2006. During that time she conducted business with the Massachusetts locations by phone or email. While living and working in New York City, Complainant met her future husband who worked in the hospitality industry. She returned to Massachusetts in September of 2006 and continued her duties as Area Director, but continued to visit New York frequently.
6. As Area Director, in addition to her annual compensation of $75,000, Complainant received bonuses that were factored on the sales quotas met by each location. She testified that her bonuses ranged from $900-$1200 every two weeks. In addition, she was also provided with health insurance, a car allowance for travel and a company issued blackberry.
7. In February of 2007, Complainant informed Rudnick that she was pregnant and due in September. She testified that she was concerned about telling him, because when another manager had announced she was pregnant, Rudnick directed her to find a replacement. There is no evidence regarding whether that employee was in fact terminated, replaced or granted a maternity leave. Moreover it is unclear what Rudnick intended by this comment. Rudnick congratulated Complainant and said they would discuss her plans the following week when she was in Florida. Complainant also sent an email to the Human Resources Director on February 28, 2007 advising her she was pregnant. Complainant testified that she informed Rudnick that she wanted to stay with the company after she had the baby and he told her that was not a problem and that he assumed that she wanted

to move to New York City where her boyfriend was. According to Complainant she responded that she was not certain about moving to New York.

8. Rudnick testified that Complainant moved up quickly in the company and was a very valuable asset. He stated that she was a fantastic sales person who had tremendous motivation. According to Rudnick, he began considering eliminating the Northeast Area Director position in 2006, when Complainant was spending a great deal of time in New York and she no longer had a highly visible presence at the Massachusetts facilities where the managers were more or less independent. He and Javier Baptista, the company's Chief Operating Officer, began to realize that the position was no longer needed as the facilities were managing on their own. Rudnick stated that he heard from the Massachusetts location managers that Complainant was not around much and it was his understanding that Complainant wanted to move to New York. At the same time, he had to focus on filling the General Manager position at the New York location. He testified that having Complainant in New York City as the General Manager of that location made sense for the company and for Complainant whose personal life was now focused on New York. He also testified that the GM position in New York represented a tremendous financial opportunity for Complainant and that she could have earned more in that position than being the Area Director for the other facilities combined. Rudnick testified that in 2007 the New York facility during its better months generated roughly 400-500 thousand dollars per month in gross revenues, more than all the Massachusetts locations combined. I credit this testimony. Complainant agreed that there was great potential for increased revenue at the New York facility and admitted that she had

facilitated $267,000 worth of sales in a two week period in New York some three months before her separation from the company.

9. Complainant testified that in her initial discussions about her future plans with Rudnick, he agreed that she could continue as North East Area Director after her maternity leave even though she preferred to have her base of operations as Area Director in New York. She claims Rudnick told her that if she wanted to work out of New York that would be fine. By the end of March, 2006 Rudnick informed Complainant that he wanted her to step in as manager of the New York location, but she understood that she would remain the Northeast Area director and continue to earn commissions on the sales at the Massachusetts locations.

10. On April 4, 2007, Complainant sent an email to Rudnick regarding a conversation she'd had with Javier Baptista about her position after September. (Ex. J-1) In the email Complainant states that Baptista told her she would not be guaranteed a position in New York, nor would she be getting a new bonus structure if she decided to stay in Massachusetts through September 2007. In the email Complainant expressed her displeasure at not having received a new bonus structure and the withdrawal of what she viewed as the promise of a position in New York after she had her baby. She claimed that Rudnick was not treating her as well as other loyal employees.

11. On that same day, Rudnick responded to Complainant by email stating that she would always be guaranteed a position, but not as Area Manager or General Manager, as those positions in New York had to be filled prior to September. (Ex. J-1) In the email Rudnick laid out the options for Complainant. She could move to New York in April and take on the role of General Manager of the New York facility at her current salary or

remain in Boston and continue in the role of Area Manager, with the proviso that if she continued to oversee New York she would have to visit that facility at least one time per week.

12. Rudnick testified that there were ongoing discussions between April 4 and 24 about Complainant moving to New York and becoming the General Manager of the 5th Avenue facility. Rudnick testified that Complainant had accepted the New York position. On April 24, 2007 Rudnick sent an email to Complainant re: NY, stating that they were not in agreement on her compensation in New York and that she needed to call him right away. (Ex. J-2) Complainant testified that she'd had a phone conversation with Rudnick prior to receiving this email wherein they discussed her New York compensation. Complainant testified that she wanted to retain the bonus structure from the Massachusetts stores for 60 days. There was also discussion of her no longer having a car allowance and company issued cell phone, but receiving an increase of $5000 to her base salary. According to Complainant, in discussions with Rudnick and Baptista her compensation options changed and this led to the April 24th email from Rudnick. After receiving the email from Rudnick that there was no agreement on her New York compensation, she called him and they had a heated argument in which Complainant told Rudnick she did not want to go to New York and wanted to stay in Massachusetts and keep the Area Director position. Immediately after that conversation, Rudnick sent Complainant a second email informing her that he was eliminating the Area Director position as of May 12, 2007 and giving her the option to accept the New York General Manager position at a base pay of $75,000 + bonus or be terminated. (Ex. J-3) This message was re-iterated in a letter to Complainant from Baptista that same day, which

noted that the elimination of the Area Director position was due to a company reorganization and new strategic direction. (Ex. J-4) Complainant was also offered a moving allowance of $2,600 and was asked for her decision. Complainant testified that she considered the New York General Manager position a demotion. Rudnick testified that the New York position was not one of diminished responsibility.

13. On April 27, 2007, Complainant sent an email to Baptista that she would be unable to move to New York by May 13th and would remain in her current position until that date when she would consider her employment with Respondent terminated.

14. On Monday April 30, 2007, Complainant sent an email to Baptista confirming that he had informed her by telephone that she was terminated effective that day and seeking salary and bonuses for an additional two weeks plus her car allowance through the month of May, plus vacation pay and promised severance pay. (Ex. R-2) Her cell phone service was terminated as of that date with no advance notice and she no longer had access to Respondent's computer system as of April 28, 2007. Baptista responded that the company would pay Complainant three weeks of severance pay plus two weeks of accrued vacation time and bonuses pro-rated through April 28, 2007, with medical benefits paid through the month of May and a COBRA option thereafter.

15. On June 19, 2007, Respondent offered the position of Area Manager for New England to an employee who had been manager of the Natick facility at a salary of $60,000 with a car allowance and bi-weekly commissions of 0.5% for each store contingent upon sales quotas being met. Complainant testified that this was the position she was terminated from and that her job was not eliminated. Rudnick testified that it was a different position with primary responsibility for training through the Natick location. The person

in that position went back on the road in the 4th quarter of 2007 to learn and implement the liposuction surgery model that was introduced first in New York and then at the Natick facility. After a stint in Florida, she became the National Spa Director and then was returned to the Newbury Street location in 2009. She also did not receive bonuses or commissions from the New York or Florida facilities, as Complainant had.

16. Complainant moved in with her parents in May 2007 after being terminated. After three months she moved to New Jersey to live with her boyfriend. Complainant was married on August 28, 2007 and gave birth to son in September 2007. She testified that she had to continue to pay over $500 per month on the 3-year lease of the BMW she was driving with a car allowance at the time of her termination.
17. Complainant testified that she suffered from sleeplessness and depression after losing her job and felt betrayed by Rudnick, since they were friends and she trusted him. She stated that he had promised her a piece of the company one day but once she got pregnant she felt he had no use for her anymore. She testified that prior to her termination she "lived, ate, and breathed Sleek." According to Complainant she suffered from anxiety attacks and panic attacks and did not enjoy her pregnancy. After the baby was born she took paxil for anxiety and depression and continues to suffer from feelings of anger and betrayal.
18. Rudnick testified that the vast majority of his employees are young women of child bearing age and that it is not unusual for a Sleek employee to become pregnant. He testified that this is an accepted part of the business, given the demographic in the industry and that he has never denied an employee maternity leave and that some female

employees chose not to return to work after maternity leave but a number of others did return to work for Sleek and were welcomed back.

III. CONCLUSIONS OF LAW

As a pregnant female, Complainant was a member of a protected class. There is long-standing precedent that "pregnancy and childbirth are sex-linked characteristics and any actions of an employer which unduly burden an employee because of her pregnancy or the requirement of a maternity leave are considered sex discrimination." *School Committee of Braintree, v. MCAD,* 377 Mass. 424, 430 (1979); *Massachusetts Electric Co. v. MCAD*, 375 Mass. 160, 167 (1978); *Mercurio v. Atamian Volkswagon, Inc., et al.* 25 MDLR 55, 60 (2003); *Carmichael v. Wynn & Wynn,* 17 MDLR 1641, 1650 (1995); *Gowen-Esdaile v. Franklin Publishing Co.,* 6 MDLR 1258 (1984). Therefore it is unlawful for an employer to terminate a pregnant female's employment on account of her pregnancy.

Proof of a claim of discrimination may be established using the three-stage order of proof and burden shifting framework set forth in both federal and state court decisions. *McDonnell-Douglas Corp. v. Green,* 411 U.S. 792(1973); *Abramian v. President & Fellows of Harvard College,* 432 Mass. 107, 116 (2000); *Wheelock College v. MCAD,* 371 Mass. 130(1976). Complainant must first establish a prima facie case by demonstrating that (1) she was a member of a protected class; (2) she was performing her job at an acceptable level; (3) she was terminated from her employment or otherwise subject to an adverse employment action; and (4) her employer sought to fill the position by hiring another individual with qualifications similar to Complainant's. *Abramian, supra*., 432 Mass. at 116; *Wynn & Wynn v. MCAD,* 431 Mass. 655, 665 (2000).

Complainant has established a prima facie case of gender discrimination in that she was a pregnant female who suffered an adverse employment action, termination from her employment, within a few short months of informing her employer that she was pregnant. Complainant was performing her job in an acceptable manner at the time of her termination. While her employer claimed that her position as Northeast Area director for Sleek was eliminated, there is evidence that Respondent sought to fill a same or similar position not long after Complainant was terminated.

Complainant would have me find that she suffered an earlier adverse job action when Respondent compelled her to accept the New York General Manager position which she viewed as a demotion. However, the credible evidence is that this job was not a demotion, with no financial hardship nor diminution in responsibility. Rather the job offered Complainant the potential to significantly enhance her earnings and to shine as the General Manager of an expanding and growing facility. The evidence was that Respondent's Fifth Avenue facility was the flagship facility with a large clientele, and managing that facility would be a significant responsibility. Moreover, Complainant had lived and worked in New York for months and had lived outside of Massachusetts for long periods of time. Her partner and husband-to-be, whose child she was expecting, lived and worked in the New York area. It was entirely reasonable for Respondent to assume that Complainant would welcome the opportunity to work in New York, and though she denied it, Rudnick claimed that she had made it known that this was her plan. I do not find credible Complainant's assertion that she viewed this position as a demotion and that she was not prepared to move to New York. She stated that she wanted to be in Massachusetts to be close to her elderly parents, but this assertion is belied by her extensive travel for the company and long periods of living outside the state for work in the year prior to her becoming pregnant.

Indeed, I believe Complainant accepted the New York position and that the details of her remuneration were being negotiated with the only unsettled issue being whether she would continue to receive income from the Massachusetts facilities.

If Complainant establishes a prima facie case, at the second stage of the analysis the burden of production shifts to Respondent to articulate a legitimate non-discriminatory reason for its action. Respondent testified that Complainant was terminated because she refused to accept the New York City General Manager position at the compensation offered, insisting that she remain as the Northeast Area director and continue to receive income from the Massachusetts facilities while retaining the option to move to New York. I found this reason to be credible. Respondent asserted that the Northeast Area position was being eliminated because all the Massachusetts facilities and managers and had become more or less independent with less need for oversight by an area manager. Nonetheless, it posted a position for Area Manager for New England shortly after Complainant was terminated, which it claimed was a different position. While this assertion lacks credibility giving rise to the inference that Complainant was a victim of unlawful discrimination, the employer may counter the effect of this evidence by showing that even if this articulated reason is untrue, he had no discriminatory intent, or his action was based on different, non-discriminatory reason. *Abramian, supra*. at 118. Respondent has articulated a non-discriminatory reason.

At the final stage of the analysis, Complainant must prove by a preponderance of the evidence that Respondent's reasons were a pretext for discrimination. She may do so by proving that Respondent "acted with discriminatory intent, motive or state of mind." *Lipchitz v. Raytheon Co.*, 434 Mass. 493, 504 (2001). In order to demonstrate pretext, Complainant must prove that the asserted lawful reason, was not the real reason for the decision, but masked a

discriminatory reason. *Id.* I conclude that Complainant has failed to prove that Respondent acted out of an unlawful motive related to her pregnancy.

The evidence here suggests that Complainant's termination was motivated by the Complainant's refusal to accept the offer of the New York position, with its potential for significant increased income, while reserving the option to take the New York position after her baby was born, and her refusal to relinquish substantial income from the Massachusetts facilities for which she would have minimal to no oversight once she became the New York manager. I conclude that these are legitimate non-discriminatory reasons for the termination, which are unrelated to her pregnancy.

I credit Rudnick's testimony that he believed Complainant to be a very valuable employee who was terrific at generating sales and earning the company significant amounts of money. She had proven herself to be indispensable to the New York and Boca Raton operations as those facilities were starting up operations. The New York location was emerging as the flagship facility for the company, and I found credible Rudnick's assertion that he wanted Complainant directing that operation solely for business reasons, that she was unrivaled in generating sales income for the company, and her serving as General Manager of that facility would be a great financial boon to her and Respondent. As a proven and trusted manager, Complainant was the likely candidate to manage the New York facility. Moreover, Rudnick believed it was imperative to fill the New York General Manager position in the Spring of 2006 and told Complainant that she would always have a position in New York but he could not hold the G.M. job open for her until September. I am also persuaded that Rudnick genuinely believed Complainant wanted to be in New York and to be living with the father of her unborn child with whom she had indicated she was in love. I conclude that Rudnick made a business

decision that happened to coincide with Complainant becoming pregnant. However mercenary it may sound, Rudnick was motivated by the company's finances and bottom-line, not punishing Complainant because she became pregnant. I believe Rudnick was on course to make the same decisions regardless of Complainant's pregnancy.

I also conclude that ultimately Complainant's termination, and the harsh and unkind manner in which it was carried out, resulted from an angry altercation that she and Rudnick had on the phone after she had accepted the New York position in principle but insisted on not relinquishing her title and income as the Northeast Area Director. There was testimony that Rudnick was quick to anger and act impulsively when angry and that he fired Complainant out of anger and frustration at her refusal to agree to the terms of what he viewed as a generous financial package. The evidence suggests that Rudnick believed the New York job would consume Complainant's time and energy and required her full time presence in and commitment to New York. He testified that while she was in New York full time, he had fielded complaints from some of the Massachusetts facilities managers that she was no longer present and available to assist them with their operations and he came to conclude that she could not effectively manage the Massachusetts facilities from New York.

Ultimately Complainant's termination resulted from a business decision and her refusal to compromise. I am not persuaded that Rudnick acted with discriminatory intent or motive, but out of a view that Complainant wanted to keep all her options open and was being intransigent. I believe that he thought it was in her interest to manage the New York store and relinquish responsibility for Massachusetts and that he was doing her a favor by offering her the opportunity to live and work near her husband-to-be and the father of her unborn child. He viewed the opportunity as a win-win for everyone. I also credit Rudnick's testimony that the

vast majority of his employees were young women of child bearing age and that a number of his employees requested and were granted maternity leaves and returned to work after giving birth. The comment Rudnick is alleged to have made regarding replacing a pregnant employee constitutes a stray remark that is insufficient evidence that he acted with a discriminatory motive or intent towards Complainant. Given all of the above, I conclude that Complainant's termination was not unlawful discrimination and that Respondent did not violate G.L. c. 151B. Accordingly, the Complaint must be dismissed.

IV. ORDER

For the reasons discussed above, the complaint is hereby dismissed. This decision represents the final order of the Hearing Officer. Any party aggrieved by this Order may appeal this decision to the Full Commission. To do so, a party must file a Notice of Appeal of this decision with the Clerk of the Commission within ten (10) days of receipt of this decision and a Petition for Review within thirty (30) days of receipt.

So Ordered this 22nd day of June, 2012.

Eugenia M. Guastaferri
Hearing Officer