ANDREW M. CUOMO
GOVERNOR

NEW YORK STATE
DIVISION OF HUMAN RIGHTS

NEW YORK STATE DIVISION OF HUMAN RIGHTS
on the Complaint of

HAROLD A. ALLEN,

Complainant,

v.

BRENTWOOD UNION FREE SCHOOL DISTRICT,

Respondent.

NOTICE AND FINAL ORDER

Case No. 10138076

PLEASE TAKE NOTICE that the attached is a true copy of the Alternative Proposed Order, issued on May 23, 2012, by Peter G. Buchenholz, Adjudication Counsel, after a hearing held before Margaret A. Jackson, an Administrative Law Judge of the New York State Division of Human Rights ("Division"). An opportunity was given to all parties to object to the Alternative Proposed Order, and all Objections received have been reviewed.

PLEASE BE ADVISED THAT, UPON REVIEW, THE ALTERNATIVE PROPOSED ORDER IS HEREBY ADOPTED AND ISSUED BY THE HONORABLE GALEN D. KIRKLAND, COMMISSIONER, AS THE FINAL ORDER OF THE NEW YORK STATE DIVISION OF HUMAN RIGHTS ("ORDER"). In accordance with the Division's Rules of Practice, a copy of this Order has been filed in the offices maintained by the Division at One Fordham Plaza, 4th Floor, Bronx, New York 10458. The Order may be

inspected by any member of the public during the regular office hours of the Division.

PLEASE TAKE FURTHER NOTICE that any party to this proceeding may appeal this Order to the Supreme Court in the County wherein the unlawful discriminatory practice that is the subject of the Order occurred, or wherein any person required in the Order to cease and desist from an unlawful discriminatory practice, or to take other affirmative action, resides or transacts business, by filing with such Supreme Court of the State a Petition and Notice of Petition, within sixty (60) days after service of this Order. A copy of the Petition and Notice of Petition must also be served on all parties, including the General Counsel, New York State Division of Human Rights, One Fordham Plaza, 4th Floor, Bronx, New York 10458. Please do not file the original Notice or Petition with the Division.

ADOPTED, ISSUED, AND ORDERED.

DATED: 6/14/12
Bronx, New York

Galen D. Kirkland
GALEN D. KIRKLAND
COMMISSIONER

ANDREW M. CUOMO
GOVERNOR

NEW YORK STATE
DIVISION OF HUMAN RIGHTS

NEW YORK STATE DIVISION OF HUMAN RIGHTS
on the Complaint of

HAROLD A. ALLEN,

Complainant,

v.

BRENTWOOD UNION FREE SCHOOL DISTRICT,

Respondent.

ALTERNATIVE PROPOSED ORDER

Case No. **10138076**

SUMMARY

Respondent unlawfully discriminated against Complainant when it refused to hire him. Complainant is awarded $66,488 for lost wages and $5,000 for emotional distress damages. Because the record does not support the age discrimination claim, that charge is dismissed.

PROCEEDINGS IN THE CASE

On December 1, 2009, Complainant filed a verified complaint with the New York State Division of Human Rights ("Division"), charging Respondent with unlawful discriminatory practices relating to employment in violation of N.Y. Exec. Law, art. 15 ("Human Rights Law").

After investigation, the Division found that it had jurisdiction over the complaint and that probable cause existed to believe that Respondent had engaged in unlawful discriminatory practices. The Division thereupon referred the case to public hearing.

After due notice, the case came on for hearing before Margaret A. Jackson, an Administrative Law Judge ("ALJ") of the Division. A public hearing was held on September 21, 2011. Complainant and Respondent appeared at the hearing. The Division was represented by Bellew S. McManus, Senior Attorney. Respondent was represented by Devitt, Spellman, Barrett, LLP, by Thomas J. Spellman, Jr., Esq. of Counsel.

On February 9, 2012, ALJ Jackson issued a recommended Findings of Fact, Decision and Opinion, and Order ("Recommended Order"). No Objections to the Recommended Order were received by the Commissioner's Order Preparation Unit.

FINDINGS OF FACT

1. On September 28, 2009, Complainant applied for a full-time custodial position with Respondent. As part of the application process, Complainant was required to attend a pre-employment physical examination with the school nurse, Mary Clare Pirro. (Tr. 12, 17-18, 110)

2. At the time of his application, Complainant was employed as a bartender at both the Knights of Columbus and the VFW, where he had been working for many years. His duties included moving half-barrels of beer, painting, plumbing, carpentry, repairs, changing light bulbs, landscaping, repairing ceilings, and cleaning, stripping, waxing and mopping floors. The half-barrels of beer weighed up to 110 pounds. (Tr. 10-12, 27-28)

3. As custodian with Respondent, Complainant would have been responsible for duties with similar physical demands including, cleaning, moving furniture, cutting grass, stripping floors, cleaning windows, replacing ceiling tiles, lifting as much as 85 pounds, changing light bulbs, climbing ladders and shoveling snow. (Tr. 141, 191-92)

4. On October 8, 2009, Complainant met with Pirro for the physical. Because Complainant was a heavy smoker, Pirro was "suspicious" of the "possibility" he had damaged

his lungs. Pirro also observed that Complainant was "barrel-chested" and had a family history of heart disease. On this basis, when she filled out Respondent's "Medical Examiner's Confidential Report," she checked "no" as to Complainant's fitness for employment. (Respondent's Exhibits 8, 9; Tr. 122-23, 125, 128-29, 134, 145-47)

5. However, Pirro admitted that at the time, she required more information to determine Complainant's fitness. Consequently, she directed Complainant to make an appointment with his personal physician. She also discussed him taking stress and pulmonary tests. No evidence was introduced showing that stress or pulmonary tests would reveal anything about Complainant's ability to perform the activities of the job. (Tr. 124-25, 134-36, 146, 138)

6. On October 12, Complainant was examined by Dr. Suryakant Parikh. Dr. Parikh had been his primary care physician for several years. Dr. Parikh filled out a form provided by Pirro entitled "Medical Referral/Follow-up." The form was ordinarily used by Respondent to determine if a student needed school program modifications. In a section inquiring whether modifications might be needed, Dr. Parikh checked "no" and indicated that Complainant could "resume full Physical Education" immediately. Pirro had hand-written "is PT able to perform stated job activities?" above this section. When Pirro reviewed the completed form, she was unsure if by checking "no," Dr. Parikh meant to indicate that Complainant was unable to perform the job duties or if he meant that Complainant required no modifications. (Respondent's Exhibit 4; Tr. 25-27, 71-72, 131-32; 141-44)

7. However, Dr. Parikh submitted a letter to Respondent along with the Medical Referral Form that stated, "[Complainant] is in satisfactory health to do full physical activities. He does have Chronic Obstructive Pulmonary Disease. But he is able to do lots of physical activities on a

daily basis including lifting heavy weights, landscaping, . . . etc." (Complainant's Exhibit 3; Tr. 133-34, 141)

8. Despite Dr. Parikh's assessment that Complainant could perform full physical activities, Pirro believed the "job could kill [Complainant]." According to Pirro, she discussed Complainant's health with the school doctor who agreed Complainant should have additional testing. Notwithstanding this fact and her own belief that further tests were necessary, Pirro told Dr. Parikh to hold off conducting further tests. Respondent stopped the application process at that point. (Tr. 133-34, 136-38, 141-44)

9. On October 28, 2009, Complainant was notified he was not being hired based on the school nurse's recommendation. He was "shocked. His "knees buckled." Complainant went from feeling "ecstatic" about the prospect of being hired to feeling rejected, as if "he was being told he was too old to do anything." (Tr. 29-34, 41-42, 44, 100)

10. The custodial position with Respondent paid $37,000 per year. After Complainant learned he was not being hired, he searched for other employment. He applied for a position as custodian at the Central Islip School District. He applied for a position at ELM, a warehouse. He also made many inquiries with his colleagues and friends to no avail. Complainant was eventually hired to work as an on-call custodian with the Central Islip School District. He commenced work in April 2010. The salary for the position was ten dollars per hour. Complainant's job duties in that position were similar to those he would have performed with Respondent. From the beginning of his employment until the date of the public hearing, Complainant earned $4,000. (Tr. 31, 35-38, 60-62)

11. Complainant was born on June 10, 1940. Although Complainant's age was never discussed during the application process, he believed Respondent wanted him to take a stress test due to his age. (Tr. 6, 39-40, 101)

OPINION AND DECISION

Respondent unlawfully discriminated against Complainant when it refused to hire him. Complainant is awarded $66,488 for lost wages and $5,000 for emotional distress damages.

Human Rights Law § 296.1(a) prohibits an employer from discriminating against a prospective employee based on disability. The term disability is defined by the Human Rights Law, in relevant part, as a physical or medical impairment demonstrable by medically accepted clinical or laboratory techniques or a condition regarded by others as such impairment. *See* Human Rights Law § 292.21; *see also, State Div. of Human Rights v. Xerox Corp.*, 65 N.Y.2d 213 (1985). Complainant had a covered disability as defined by the Human Rights Law. Though Pirro was unaware when she examined Complainant that he had been diagnosed with Chronic Obstructive Pulmonary Disease – a medically demonstrable impairment – she was "suspicious" at the time of the "possibility" he had lung damage. This was based on her observation that he was barrel-chested, smoked and had a family history of heart disease. At any rate, it is undisputed that several days later, before the hiring process was halted, Pirro was made aware of Complainant's specific condition.

Respondent's argument that Complainant did not suffer a disability as defined by the Americans with Disabilities Act ("ADA") (requiring an impairment to substantially limit a major life activity) is inapposite. *See* Respondent's November 1, 2011, proposed Findings of Fact and Conclusions of Law, p. 13. The Human Rights Law definition of disability does not require an

impairment to substantially limit a major life activity and provides broader protection than that of the ADA. *See Vig v. New York Hairspray Co., L.P.*, 67 A.D.3d 140, 145 (1st Dept. 2009).

Under the Human Rights Law, an employer's refusal to hire an applicant based on disability may not be founded "on speculation and mere possibilities, especially when such determination is premised solely on the fact of an applicant's inclusion in a class of persons with a particular disability rather than upon an individualized assessment of the specific individual." *Granelle v. City of New York*, 70 N.Y.2d 100, 107 (1987). An expectation that Complainant would be unfit to perform the duties some time in the future is similarly not sufficient. *See Id.* "[T]he "*particular* disability must be such that it prevents the *particular* individual from performing in a reasonable manner the *particular* activities involved in the job or occupation . . ." (emphasis in original) *Antonsen v Ward,* 77 N.Y.2d 506, 513 (1991) (*citing Miller v Ravitch*, 60 N.Y.2d 527, 534 (1983) (Jasen, J., concurring)).

In this matter, Respondent introduced no evidence that at the time of his disqualification, or thereafter, Complainant was unable to perform the duties of custodian, or that his disability would be an impediment. Instead, Respondent speculated as to hypothetical risks. *See New York State Dept. of Corr. Services v. New York State Div. of Human Rights*, 57 A.D.3d 1057, 1059 (3rd Dept. 2008) (speculative and hypothetical risks of ability to function in job are insufficient to support disqualification from employment).

Respondent had Complainant examined on one occasion. The examination was not performed by the school doctor. The school nurse speculated that the job could kill Complainant but admitted that Complainant required further testing for her to determine his fitness. "Respondent may, of course, rely on the opinion of its duly appointed medical examiner. But such reliance is not a substitute for the adequate address of legally pertinent questions. Nor is such reliance rendered

efficacious when the record indicates that the medical examiner's opinion may well be ill-founded." *Carrero v. New York City Housing Auth.*, 116 A.D.2d 141, 146 (1st Dept. 1986). Here, Complainant's own doctor, whom he had been seeing for years, examined him and determined that Complainant was fully physically able to perform the job functions with no restrictions. Further, the record shows Complainant had been performing duties similar to those required by Respondent at two separate jobs prior to applying for employment with Respondent and he was eventually hired as a custodian for another school district. *See State Div. of Human Rights v. Xerox Corp.*, 65 N.Y.2d at 216-217 (confirming Commissioner's disability discrimination determination based, in part, on finding that both before and after employer rejected complainant's application, she held comparable positions without apparent difficulty).

In its defense, Respondent relies on medical evidence to which it was not privy at the time it denied Complainant the position. For instance, Respondent cites stress and bronchial tests Complainant underwent in 2011 and EKGs taken between 2007 and 2009. However, because Respondent was unaware of those results when it considered Complainant's application, this evidence offers no insight into Respondent's decision-making process. *See State Div. of Human Rights v. S.A. Cook,* 132 A.D.2d 935, 936 (4th Dept. 1987) ("[Employer's] medical report, based on complainant's medical records, did not form the basis of [employer's] decision but was developed solely for presentation at the public hearing" (citations omitted)). In any event, Respondent failed to show that these records demonstrate any impediment to Complainant's ability to perform the activities of the position.

This record is devoid of evidence that Complainant was actually unable to perform the duties of the job or would be in the future. Because Respondent failed to demonstrate that

Complainant's disability prevented him from performing in a reasonable manner the job activities, when it disqualified him on this basis, it violated the Human Rights Law.

In light of this violation, Complainant is entitled to an award of damages as compensation for lost wages. *See* Human Rights Law § 297.4(c). Complainant credibly testified that he actively sought employment after Respondent declined to hire him. He applied for a position as custodian at the Central Islip School District. He applied for a position at ELM, a warehouse. He also made many inquiries to his colleagues and friends to no avail. Complainant demonstrated that he made diligent efforts to mitigate his damages and Respondent failed to prove otherwise. *See Walter Truck Co. v. New York State Human Rights Appeal Bd.*, 72 A.D.2d 635 (3rd Dept. 1979) (burden on Respondent to prove Complainant's lack of diligent efforts to mitigate damages); *see also, New York State Div. of Human Rights v. Wackenhut Corp.*, 248 A.D.2d 926 (4th Dept. 1998), *appeal denied*, 92 N.Y.2d 812 (1998) (same). Complainant's efforts led to his being hired as an on-call custodian with the Central Islip School District, a job with similar duties to those he would have performed with Respondent. From the beginning of this employment until the date of the public hearing, Complainant earned $4,000. From the time Complainant was denied the position with Respondent (October 28, 2009) through the date of the public hearing (September 21, 2011), Complainant would have earned $70,488 ($37,000 per year or $712 per week for 99 weeks). Therefore, Complainant's total lost wages are $66,488.

An award of compensatory damages to a person aggrieved by an illegal discriminatory practice may include compensation for mental anguish, which may be based solely on the complainant's testimony. *See Cosmos Forms, Ltd. v. State Div. of Human Rights*, 150 A.D.2d 442 (2d Dept. 1989). Here, Complainant credibly testified that he went from feeling ecstatic at the prospect of being hired by Respondent to feeling shocked and rejected. His knees buckled. He

felt as if "he was being told he was too old to do anything." Accordingly, Complainant is entitled to $5,000 for the mental anguish he suffered as a result of Respondent's discriminatory actions. *See Mohawk Valley Orthopedics, LLP v. Carcone,* 66 A.D.3d 1350 (4th Dept. 2009) ($7,500 award supported by Complainant's testimony she felt humiliated and attacked); *see also, Niagra Falls v. New York State Div. of Human Rights*, 94 A.D.3d 1442 (4th Dept. 2012) ($4,000 supported by Complainant's testimony he was frustrated and angry, but no evidence related to depth of experience); *New York State Div. of Human Right v. Caprarella,* 82 A.D.3d 773 (2d Dept. 2011) ($7,500 supported by Complainant's testimony she was upset, hurt, disappointed and felt violated).

Because Complainant produced no evidence that Respondent discriminated against him based on his age, that claim is dismissed.

ORDER

On the basis of the foregoing Findings of Fact, Opinion and Decision, and pursuant to the provisions of the Human Rights Law and the Division's Rules of Practice, it is hereby

ORDERED, that the age discrimination claim is hereby dismissed; and it is further

ORDERED, that the disability discrimination claim is hereby sustained; and it is further

ORDERED, that Respondent, its agents, representatives, employees, successors, and assigns, shall cease and desist from discriminating against any employee or prospective employee in the terms and conditions of employment; and it is further

ORDERED, that Respondent, its agents, representatives, employees, successors and assigns shall take the following affirmative action to effectuate the purposes of the Human Rights Law:

1. Within sixty days of the date of this Order, Respondent shall pay to Complainant the sum of $66,488 as compensatory damages for lost wages. Pre-judgment interest shall accrue on the award at the rate of nine percent per annum, from October 12, 2010, a reasonable intermediate date, until the date of this Order. Post-hearing interest shall accrue on this award at the rate of nine percent per annum, from the date of this Order until payment is actually made by Respondent.

2. Within sixty days of the date of this Order, Respondent shall pay to Complainant the sum of $5,000 as compensatory damages for the mental anguish Complainant suffered as a result of Respondent's unlawful discrimination. Interest shall accrue on this award at the rate of nine percent per annum, from the date of this Order until payment is actually made by Respondent.

3. Payment shall be made by Respondent in the form of a certified check, made payable to the order of Harold Allen and delivered by certified mail, return receipt requested, to Complainant at his home address. A copy of the certified check shall be simultaneously provided to Caroline Downey, Esq., General Counsel of the Division, at One Fordham Plaza, 4th Floor, Bronx, New York 10458.

4. Respondent shall cooperate with the representatives of the Division during any investigation into compliance with the directives contained in this Order.

DATED: May 23, 2012
Bronx, New York

Peter G. Buchenholz
Adjudication Counsel