ANDREW M. CUOMO
GOVERNOR

NEW YORK STATE
DIVISION OF HUMAN RIGHTS

NEW YORK STATE DIVISION OF HUMAN RIGHTS
on the Complaint of

JUAN T. ALMONTE,

Complainant,

v.

WILD BY NATURE, INC., SUBSIDIARY OF KING KULLEN GROCERY CO., INC.,

Respondent.

Federal Charge No. 16GB103045

NOTICE AND FINAL ORDER

Case No. 10148433

PLEASE TAKE NOTICE that the attached is a true copy of the Recommended Findings of Fact, Opinion and Decision, and Order ("Recommended Order"), issued on October 4, 2012, by Robert M. Vespoli, 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 Recommended Order, and all Objections received have been reviewed.

PLEASE BE ADVISED THAT, UPON REVIEW, THE RECOMMENDED 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: 11/16/2012
Bronx, New York

GALEN D. KIRKLAND
COMMISSIONER

ANDREW M. CUOMO
GOVERNOR

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DIVISION OF HUMAN RIGHTS

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JUAN T. ALMONTE,
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WILD BY NATURE, INC., SUBSIDIARY OF KING KULLEN GROCERY CO., INC.,
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RECOMMENDED FINDINGS OF FACT, OPINION AND DECISION, AND ORDER

Case No. **10148433**

SUMMARY

Complainant alleged that Respondent unlawfully discriminated against him based on his religion by refusing to allow him to take off from work on Saturdays to observe the Sabbath. Because Complainant could not establish a prima facie case of discrimination, the instant complaint must be dismissed.

PROCEEDINGS IN THE CASE

On May 10, 2011, 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 Robert M. Vespoli, an Administrative Law Judge ("ALJ") of the Division. A public hearing was held on May 21, 2012.

Complainant and Respondent appeared at the hearing. The Division was represented by Darin Bazar, Esq. Respondent was represented by Megan T. Gillen, Esq.

At the public hearing, the presiding ALJ amended the caption in this case to reflect Respondent's correct legal name as follows: "Wild by Nature, Inc., Subsidiary of King Kullen Grocery Co., Inc." (Tr. 5-6)

Permission to file post-hearing briefs was granted. Respondent filed a timely post-hearing brief.

FINDINGS OF FACT

1. In 2004, Complainant began working for Respondent as a full-time deli cook at its store located in Huntington, New York ("the Store"). (Tr. 24-25, 28, 53)

2. Complainant is one of three full-time cooks working at the Store. (Tr. 27-28, 58)

3. At the time of the public hearing, Complainant was still working for Respondent as a full-time cook. (Tr. 25)

4. Since 2004, Complainant has been asked to work on Saturdays. (Tr. 44)

5. In the summer of 2010, Complainant and his wife became members of the Seventh-day Adventist Church. (Tr. 16, 18, 24)

6. Prior to that, Complainant was a member of the Catholic Church. (Tr. 15-16)

7. As a member of the Seventh-day Adventist Church, Complainant is required to observe the Sabbath, which begins at sunset on Friday and ends at sunset on Saturday, by devoting his time exclusively to religious pursuits. (Tr. 17, 21-22; Complainant's Exh. 1)

8. By letter dated June 7, 2010, Complainant formally asked Joseph Scilla, the manager of the Store since April 2010, to be excused from work on Saturdays as a religious accommodation. (Tr. 29, 53, 58, 92; Complainant's Exh. 1)

9. At that time, Louis Vasquez, one of the three full-time cooks working at the Store, did not work on Saturdays because he was attending culinary school. (Tr. 58)

10. After Scilla received the June 7, 2010, letter, he sent it to Respondent's corporate office for a determination. (Tr. 60)

11. At that time, Scilla believed that he could not run the store efficiently with fewer than two full-time cooks working on Saturdays because that was one of Respondent's busiest days. As a result, Scilla met with Complainant, Vasquez and the manager of the Deli Department in order to craft a workable resolution. (Tr. 59)

12. At that meeting, Complainant and Vasquez agreed to work on alternating Saturdays. (Tr. 59, 61)

13. Complainant was happy with this arrangement. (Tr. 61-62)

14. Scilla informed Complainant and Vasquez that he could not promise that this arrangement would continue if business at the Store increased. (Tr. 61)

15. In the fall of 2010, Scilla concluded that the Store needed its strongest workers on its busiest days: Saturdays and Sundays. (Tr. 55, 63-64, 66-67, 86-87)

16. Scilla believed that having two full-time cooks working on Saturdays was insufficient to meet the contingencies that arose during the busy weekends. (Tr. 68-69, 86-87) As a result, Scilla asked all three of the Store's full-time cooks to work on Saturdays. (Tr. 63-64, 69)

17. Although Sundays are also very busy, it is too costly for Respondent to have its entire full-time staff working on Sundays due to increased payroll costs associated with mandatory overtime payments. (Tr. 66; Respondent's Exh. 1)

18. Scilla wanted all of the Store's full-time cooks working on Saturdays in order to prepare enough food to accommodate the heavy weekend sales volume at the Store. (Tr. 63, 66-67, 70, 86-87)

19. Complainant asked Scilla if he could change his day off from Tuesday to Saturday. (Tr. 28, 40-41, 71)

20. Scilla denied this request because Tuesdays are slow days at the Store. Scilla wanted to schedule days off for important full-time employees only on days that the Store was doing the least business. (Tr. 70-77)

21. Scilla could not replace Complainant on Saturdays with any existing workers at the Store because Complainant is a skilled, experienced cook, and no other staff members could effectively replace him on a regular basis. (Tr. 64-65, 77-78, 81)

22. Respondent realized that it would be too costly to hire a part-time worker to replace Complainant's eight-hour shift on Saturdays. If Respondent hired a part-time cook to replace Complainant on Saturdays, it would have to follow the protocols established in the collective bargaining agreement ("CBA") between Respondent and Complainant's union, the United Food and Commercial Workers Union, Local 1500 ("Local 1500"). (Tr.102-03; Respondent's Exhibits 1, 2)

23. John Santoro, Respondent's director of labor relations, determined that the CBA mandates that a part-time employee cannot work less than sixteen hours per week. (Tr. 103)

24. On or about April 1, 2011, Santoro contacted Anthony Speelman, the Secretary and Treasurer of Local 1500, and asked him if the union would allow a part-time Local 1500 worker to work less than the sixteen-hour minimum. (Tr. 106; Respondent's Exh. 3)

25. Speelman told Santoro that Local 1500 would not allow that to happen. (Tr. 107; Respondent's Exh. 3)

26. Santoro did not follow-up on his conversation with Speelman. (Tr. 107)

27. In addition to the wages Respondent would have to pay a newly hired part-time employee, the CBA also requires Respondent to pay medical, pension, vacation, holiday, sick time, and other benefits for that employee. (Tr. 103; Respondent's Exh. 2)

28. Santoro calculated that the total cost to Respondent to hire a part-time employee to replace Complainant on his Saturday shift would be $15,877.92 per year. (Tr. 104-05; Respondent's Exh. 2)

29. Even if the union agreed to waive the minimum sixteen-hour weekly work requirement, Respondent would still have to pay a total of $9,174.72 per year in wages and benefits to a part-time worker hired to cover Complainant's eight-hour Saturday shift. (Respondent's Exh. 2)

30. Complainant never refused to work on a Saturday when he was scheduled to work. (Tr. 43)

31. Respondent did not take any disciplinary action against Complainant because of his religious beliefs. (Tr. 43)

OPINION AND DECISION

Complainant did not assert a claim of disparate treatment based on his religion. Rather, Complainant alleged that Respondent failed to accommodate his sincerely held religious beliefs.

N.Y. Exec. Law, art. 15 ("Human Rights Law") § 296.10(a) states, in pertinent part:

> It shall be an unlawful discriminatory practice for any employer, or an employee or agent thereof, to impose upon a person as a condition of obtaining or retaining employment, including opportunities for promotion, advancement or transfers, any terms or conditions that would require such person to violate or forego a sincerely held practice of his or her religion, including but not limited to the observance of any particular day or days or any portion thereof as a sabbath or other holy day in accordance with the requirements of his or her religion, unless, after engaging in a bona fide effort, the employer demonstrates that it is unable to reasonably accommodate the employee's or prospective employee's sincerely held religious observance or practice without undue hardship on the conduct of the employer's business.

The standards for establishing unlawful discrimination under the Human Rights Law are identical to the federal standards under Title VII of the Civil Rights Act of 1964 ("Title VII"). *Rainer N. Mittl, Ophthalmologist, P.C. v. New York State Div. of Human Rights*, 100 N.Y.2d 326, 330, 763 N.Y.S.2d 518, 520 (2003). To establish a prima facie case, a complainant alleging a violation of Human Rights Law § 296.10 must show that: "(1) he or she has a bona fide religious belief that conflicts with an employment requirement; (2) he or she informed the employer of this belief; (3) he or she was disciplined for failure to comply with the conflicting employment requirement." *Bowles v. New York City Transit Auth.*, 285 Fed.Appx. 812, 813 (2d Cir. 2008) (citations and internal quotation marks omitted).

If the complainant establishes a prima facie case, "the burden shifts onto the employer to show that it cannot reasonably accommodate the [complainant] without undue hardship on the

conduct of the employer's business." *Philbrook v. Ansonia Bd. of Educ.*, 757 F.2d 476, 481 (2d Cir. 1985).

Complainant cannot establish a prima facie claim for discriminatory failure to accommodate because he was not threatened with discipline if he did not come to work on Saturdays. *Siddiqi v. New York City Health & Hosp. Corp.*, 572 F. Supp. 2d 353, 370 (S.D.N.Y. 2008) (reviewing cases where courts have limited a complainant's ability to establish a claim of religious discrimination for failure to accommodate if there is no adverse employment action).

In *Bowles*, a station supervisor told the plaintiff seeking a religious accommodation that he should seek a job in the private sector if he wanted to take off on weekends. The court found that this was not an adverse employment action sufficient to establish the third prong of the prima facie case because the supervisor's comments never adversely affected the terms and conditions of the plaintiff's employment.

In the instant case, Complainant never refused to work on a Saturday when he was scheduled to work. Furthermore, Complainant acknowledged that Respondent did not take any disciplinary action against him because of his religious beliefs.

Had Respondent threatened Complainant with disciplinary action, Complainant may have been able to establish the third prong of the prima facie case. *Siddiqi*, 572 F. Supp. 2d at 370. However, the record is devoid of evidence showing that Respondent threatened to do so. The Division cannot speculate or infer that Respondent would have subjected Complainant to discipline if he had refused to work on Saturdays. *Id.*

Because Complainant has not established a prima facie case of discrimination, the complaint must be 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 instant complaint be, and the same hereby is, dismissed.

DATED: October 4, 2012
Hauppauge, New York

Robert M. Vespoli

Robert M. Vespoli
Administrative Law Judge