



ANDREW M. CUOMO
GOVERNOR

NEW YORK STATE
DIVISION OF HUMAN RIGHTS

NEW YORK STATE DIVISION
OF HUMAN RIGHTS

on the Complaint of

PATRICIA AMMERMAN,

Complainant,

v.

FESHOH-MACEKUR CLUB, INC., A/K/A
FESHOH-MACEKUR CATHOLIC WAR
VETERANS CLUB, INC.,

Respondent.

NOTICE AND
FINAL ORDER

Case No. 10153582

Federal Charge No. 16GB201924

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 November 25, 2013, by Edward Luban, 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 HELEN DIANE FOSTER, ACTING 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: **JAN 08 2014**
Bronx, New York



HELEN DIANE FOSTER
ACTING COMMISSIONER



ANDREW M. CUOMO
GOVERNOR

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Respondent.

**RECOMMENDED FINDINGS OF
FACT, OPINION AND DECISION,
AND ORDER**

Case No. **10153582**

SUMMARY

Complainant alleged that Respondent terminated her employment because of her age. Because the evidence does not support Complainant's allegation, the complaint is dismissed.

PROCEEDINGS IN THE CASE

On March 1, 2012, 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 Edward Luban, an Administrative Law Judge (“ALJ”) of the Division. A public hearing session was held on May 1, 2013.

Complainant and Respondent appeared at the hearing. The Division was represented by Richard J. Van Coevering, Esq. Respondent was represented by Adam M. Gee, Esq.

At the hearing, the caption of the proceeding was amended to reflect Respondent’s correct legal name. (Tr. 5) Without objection from the Division, the presiding ALJ permitted Respondent to make an oral answer to the complaint on the record, pursuant to the Division’s Rules of Practice. *See* 9 N.Y.C.R.R. §465.11 (e). (Tr. 8)

FINDINGS OF FACT

1. Complainant was born on September 6, 1947. Complainant was 63 years of age during the relevant time period. (Tr. 13)

2. Feshoh-Macukur Post 1178, Catholic War Veterans (“the club”), is a private club for military veterans in Elmira Heights, New York. The club has a bar, a banquet hall with a kitchen, and a smaller room that is used for bingo. Respondent is the corporate entity that operates the club. (Tr. 180-81, 184-85)

3. In or about April 1996, Complainant began employment with Respondent as a bartender. (Tr. 10-11)

4. In 2011, Complainant was Respondent’s only full-time employee. Complainant worked Monday through Friday, from 2:00 p.m. to 10:00 p.m. On occasion, she also helped at private parties held in the banquet hall on Saturdays. (Tr. 15, 103)

5. Respondent also had four part-time employees: Chris McKlevis, the Saturday bartender; Gloria Edwards, the bookkeeper; John Corsaro, who ran a lottery ticket machine; and “Kenny” (last name unknown), the janitor. (Tr. 15, 62-63, 101-02)

6. From 2002 to 2011, Donald Narde was Respondent’s president and treasurer. Narde was also commander of the club. (Tr. 99, 100-01, 147)

7. Narde, who is 80 years of age, is the youngest member of Respondent’s board of directors (“the board”). (Tr. 173)

8. At its peak the club had approximately 200 members. From 2002 to 2011, its membership declined from approximately 110 to approximately 65. (Tr. 100, 147-48)

9. The bulk of the members are veterans of World War II, the Korean War, and the Vietnam War. Veterans of more recent conflicts have not joined the club in similar numbers. (Tr. 99)

10. On repeated occasions during Complainant’s employment, Narde spoke to her about “overpouring” drinks, i.e., pouring more than a one-ounce shot of liquor into a drink. Narde told Complainant to measure the amount of liquor she poured. (Tr. 51-52, 114, 118, 120, 187)

11. On occasion, Francis Gordon, who has been Respondent’s president and treasurer and the club’s commander since October 2012, also observed Complainant overpouring drinks. (Tr. 185, 187, 190)

12. The overpouring of drinks reduced the club’s profitability. (Tr. 119, 188)

13. Complainant admitted that sometimes she did not comply with Narde’s directive to measure the amount of liquor she poured. (Tr. 52-53)

14. In or around 2009, the club began losing money. These losses continued through 2010 and 2011. The club was losing \$400 to \$1,800 per month. (Tr. 109, 148, 171)

15. From January to April 2011, the club's revenues ranged from \$4,289 to \$4,883 per month. Revenues declined in subsequent months. In August 2011, the club took in only \$2,932. (Tr. 103-05, 106; Respondent's Exh. 1)

16. In August 2011, the board reviewed the club's financial situation and decided it had to reduce operating expenses. The board decided to eliminate garbage and linen service and to lay off Complainant, Corsaro, and "Kenny." (Tr. 111-12, 167, 193-94)

17. The board also decided to reduce the bar's hours by opening only on Thursday, Friday, and Saturday. If that proved to be successful, the board hoped to open the bar on Wednesdays as well. (Tr. 113, 175)

18. On September 5, 2011, Narde told Complainant that he was giving her two weeks' notice and would give her one week's severance pay. (Tr. 11, 64, 112-13, 138)

19. I do not credit Complainant's testimony that Narde told her "Patty, you'll soon be 64 years old and I think you should retire." Complainant did not rebut Narde's credible testimony that he did not know her age or her birthday. (Tr. 12, 135, 137, 170-71)

20. Narde credibly denied the testimony of Lori Kerbein, a good friend of Complainant and associate member of the club, that on one Saturday in June or July 2011 while sitting at the bar, he told her that Complainant would be 64 on her next birthday and "needs to go." Kerbein acknowledged that while Narde has known her all her life, he had never before discussed club or personal business with her. (Tr. 76-78, 79-80, 82, 83, 93, 95, 135-37)

21. In October, November, and December 2011, the bar was open fewer days and the club's income was significantly lower than in previous months. (Respondent's Exh. 1)

22. From January through March 2012, the club was open only on Friday and Saturday, except for one Thursday in January. In April and May 2012, the club was open Thursday

through Saturday and on one Wednesday. From June through September 2012, the club was generally open Wednesday through Saturday. (Tr. 146; Respondent's Exh. 2)

23. Although the club has continued to lose money since it laid off employees and reduced expenses, its losses are more manageable. (Tr. 168, 172)

OPINION AND DECISION

It is an unlawful discriminatory practice for an employer to discriminate against an employee in the terms and conditions of employment on the basis of age. Human Rights Law §296.1(a). Complainant has the initial burden to prove a prima facie case of discrimination. She must show that she is a member of a protected class, that she was qualified for her position, that she suffered an adverse employment action, and that the adverse action occurred under circumstances giving rise to an inference of discrimination. *Ferrante v. American Lung Association*, 90 N.Y. 2d 623, 629, 665 N.Y.S. 2d 25, 29 (1997). If Complainant makes such a showing, the burden shifts to Respondent to present a legitimate, non-discriminatory reason for its action. If Respondent does so, Complainant must show that the reason Respondent has presented was merely a pretext for discrimination. *Id.*

Complainant is a member of a protected class based on her age. Complainant was qualified for her position as a bartender, which she held for approximately 15 years. Complainant suffered an adverse employment action when Respondent terminated her employment. Complainant presented evidence that Narde mentioned her age when he terminated her employment. Thus, Complainant has established a prima facie case of unlawful discrimination, the burden of which has been described as "de minimis." *Schwaller v. Squire Sanders & Dempsey*, 249 A.D.2d 195, 671 N.Y.S.2d 759 (1st Dept. 1998).

However, Respondent has presented legitimate, non-discriminatory reasons for its decision to terminate Complainant's employment. Respondent terminated Complainant's employment because the club was losing money. Complainant was Respondent's only full-time employee. At the same time Respondent terminated Complainant's employment, it also terminated the employment of two of its four part-time employees, eliminated garbage and linen service, and decided to close the bar on Monday, Tuesday, and Wednesday.

Complainant failed to show that Respondent's explanation for its actions was a pretext for unlawful discrimination. Complainant offered no evidence that Narde or other members of Respondent's board, who are significantly older than Complainant, bore her any animus because of her age or that they treated her differently because of her age. Complainant failed to rebut Narde's credible testimony that he did not know her age or her birthday. In addition, Complainant did not rebut the evidence that the club was losing money.

Complainant has the ultimate burden of proof to establish that Respondent's actions constituted unlawful discrimination. *Ferrante* at 630, 665 N.Y.S.2d at 29. Complainant has failed to meet this burden. Accordingly, her 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 complaint be, and the same hereby is, dismissed.

DATED: November 25, 2013
Syracuse, New York

A handwritten signature in black ink, appearing to read 'Edward Luban', with a long horizontal flourish extending to the right.

Edward Luban
Administrative Law Judge