



ANDREW M. CUOMO  
GOVERNOR

NEW YORK STATE  
DIVISION OF HUMAN RIGHTS

NEW YORK STATE DIVISION  
OF HUMAN RIGHTS

on the Complaint of

THOMAS BELLE,

Complainant,

v.

MILAN MAINTENANCE, INC., DAVINCI  
CLEANERS CORP., CHRISTOPHER  
MARTIRANO, INDIVIDUALLY, DENNIS  
HELLIWELL,

Respondents.

NOTICE AND  
FINAL ORDER

Case No. 10121725

**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 January 31, 2011, by Lilliana Estrella-Castillo, 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”), WITH THE FOLLOWING AMENDMENT:**

- Respondents are directed to deliver the payment ordered herein by registered mail, Return Receipt Requested, to the attention of David Abrams, Esq., at 299 Broadway, Suite 1700, New York, New York 10007

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: **FEB 28 2011**  
Bronx, New York

  
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GALEN D. KIRKLAND  
COMMISSIONER



ANDREW M. CUOMO  
GOVERNOR

NEW YORK STATE  
DIVISION OF HUMAN RIGHTS

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HUMAN RIGHTS

on the Complaint of

THOMAS BELLE,

Complainant,

v.

MILAN MAINTENANCE, INC., ADIDAS  
PROMOTIONAL RETAIL OPERATIONS, INC.,  
DAVINCI CLEANERS CORP., CHRISTOPHER  
MARTIRANO, Individually, and DENNIS  
HELLIWELL, Individually,

Respondents.

RECOMMENDED FINDINGS  
OF FACT, OPINION AND  
DECISION, AND ORDER

Case No. 10121725

SUMMARY

Respondents violated the Human Rights Law, when they terminated Complainant's employment within hours of his hire because Complainant had a prior criminal conviction.

PROCEEDINGS IN THE CASE

On November 14, 2007, Complainant filed a verified complaint with the New York State Division of Human Rights ("Division"), charging Respondents 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 Respondents 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 Lilliana Estrella-Castillo, an Administrative Law Judge (“ALJ”) of the Division. A public hearing session was held on August 25, 2008.

Complainant and Respondents appeared at the hearing. Complainant was represented by David Abrams, Esq. Respondent Adidas Promotional Retail Operations, Inc., was represented by Ferber, Chan, Essner & Coller, LLP, by Robert N. Chan, Esq. Milan Maintenance, Inc., appeared by Christopher Martirano, Chief Financial Officer, *pro se*.

A Recommended Order in favor of Complainant was issued on February 20, 2009, which also dismissed the complaint against Adidas Promotional Retail Operations, Inc., because it was not Complainant’s employer. On December 15, 2009, the Commissioner adopted the recommended order and issued a Final Order awarding Complainant \$10,000 in compensatory damages. (Tr. 14-15)

On August 10, 2010, a compliance hearing was held pursuant to the Compliance Unit directive. (Tr. 15) Respondent Milan Maintenance, Inc. did not appear and its absence was not excused. (Tr. 15) The record made during the Compliance hearing established that Respondent Milan Maintenance had not complied with the Commissioner’s Final Order, and that it was no longer in business. (Tr. 15)

On September 28, 2010, the Commissioner issued an Order amending the complaint to include DaVinci Cleaners Corp., Christopher Martirano and Dennis Helliwell as proper parties to the complaint. The Order also directed that the proceedings be re-opened to “provide

Respondent DaVinci Cleaners Corp. an opportunity [to] answer the charge that it is a successor-in-interest to the originally named respondent or respondents and to provide Respondents Martirano and Helliwell an opportunity to examine witnesses and present evidence in defense of the merits of the complaint.” (Tr. 16; ALJ Exhibit 6)

On December 10, 2010, the Calendar Unit mailed to all the parties a Notice of Hearing which provided notice that the hearing was scheduled for December 20, 2010 at 9:00 a.m. (ALJ Exhibit 9) The Notices of Hearing mailed to the parties were not returned to the Calendar Unit, and are therefore presumed to have been received by Respondents. (Tr. 14; ALJ Exhibit 9)

A public hearing was held on December 20, 2010. Complainant was represented by David Abrams, Esq. Respondents failed to appear. Neither, Respondents, nor a representative for Respondents, appeared at the hearing or asked for an adjournment or extension. Respondents failed to appear and are therefore found in default. (Tr. 16)

After Respondents' failure to appear was noted on the record, Complainant's counsel requested that the previous testimony of August 25, 2008, be adopted and a recommended order be issued based on the previous transcript. (Tr. 17) Mr. Abrams' request was granted. Therefore, all references to the transcript that appear in the Findings of Fact are to the transcript dated August 25, 2008.

## FINDINGS OF FACT

1. Complainant was convicted of third degree robbery in 2001, and served an eight month sentence which ended in September 2001. (Tr. 16, 71; ALJ Exhibit 1)

2. Milan Maintenance, Inc., (Milan) contracts with various customers, including Adidas Promotional Retail Operations, Inc., (Adidas), to provide cleaning/janitorial services. (Tr. 105, 174)

3. On October 25, 2007, Complainant was interviewed by Nicolina, a Milan employee, in Milan's offices. (Tr. 14) Milan did not provide Complainant with an employment application and did not inquire whether Complainant had any prior convictions. (Tr. 16, 21, 124, 128-29)

4. Complainant reported to the Adidas store the following Monday, October 29, 2007, and started to work. (Tr. 15-16)

5. Christopher Martirano, Milan's chief executive officer, met Complainant at the Adidas store and, after Complainant worked two and one half hours, hired Complainant to do cleaning/janitorial services at the Adidas store. (Tr. 14, 16-18, 22, 27)

6. Martirano offered Complainant \$9.00 per hour and told Complainant to report to the Adidas store the following day. (Tr. 16-18, 29, 71)

7. Complainant understood that he was hired by Milan, and would work between two and four hours per day at the Adidas store, five days per week. (Tr. 28-29, 32, 60, 62)

8. Complainant was not employed by Adidas. (Tr. 130)

9. After Martirano told Complainant that he was done for the day, he then asked Complainant whether he wanted to continue working and transported Complainant and two other employees to another location serviced by Milan. (Tr. 18)

10. Shortly after arriving at the new location, Milan was informed by another employee that Complainant had a criminal conviction. (Tr. 118-120)

11. Martirano confronted Complainant about the criminal conviction, asking Complainant to tell him “about the burglary.” (Tr. 19)

12. Complainant truthfully responded that his conviction was a robbery charge, not burglary. (Tr. 19)

13. Martirano immediately terminated Complainant’s employment. Martirano told Complainant, “we can’t have that, I can’t allow you here because you don’t fit with the people here you won’t be accepted...” (Tr. 19-20, 56, 56-58, 151, )

14. Martirano terminated Complainant’s employment because Milan has a practice of “not hiring individuals who were convicted of [*sic*] Burglary.” (Complainant’s Exhibit 1) According to Milan’s witness, Milan’s “customers don’t want to hear that you have people working for you that have issues of theft and burglary.” (Tr. 106)

15. Martirano admitted that Milan did not take into consideration any of the factors enumerated in Correction Law Article 23-A, until after Complainant’s employment was terminated. (Tr. 184-87)

16. Complainant was very emotional while he testified about losing the job with Milan because “all I want to do is work.” (Tr. 20) Complainant became emotional and tearful when Martirano told him that he “had to go” after Complainant informed him about his criminal conviction. (Tr. 58) Complainant felt hurt because Martirano, after he had offered him employment, now “didn’t even walk me to the elevator and tell me at least I appreciate your work that you did for me, none of that, [Martirano] just - - everybody else ya’ll looking at me like I am some fool. . . .” (Tr. 58)

17. Complainant testified that he has been looking for work unsuccessfully, but provided absolutely no evidence as to the efforts that he has made to mitigate his damages. Furthermore, Complainant had been unemployed since his release from prison, with the exception of a temporary job of a couple of weeks, just prior to his employment with Milan. (Tr. 23, 46, 71-73)

18. Complainant has stayed home taking care of his children, and gets paid \$200.00 per month to babysit a nephew. (Tr. 23)

### **OPINION AND DECISION**

The Human Rights Law, §296 (15) makes it

. . . an unlawful discriminatory practice for any person, agency, bureau, corporation or association, including the state and any political subdivision thereof, to deny any license or employment to any individual by reason of his or her having been convicted of one or more criminal offenses, or by reason of a finding of a lack of “good moral character” which is based upon his or her having been convicted of one or more criminal offenses, when such denial is in violation of the provisions of article twenty-three-A of the correction law.

Moreover, it is the public policy of the State of New York that employment not be denied because of an individual’s prior conviction without consideration of the factors enumerated in Correction Law Article 23-A.

Correction Law Article 23-A, §752 prohibits discrimination against “persons previously convicted of one or more criminal offenses...” The statute makes it clear that no application for employment shall be denied by reason of the applicant’s previous conviction of one or more criminal offenses, unless, “(1) there is a direct relationship between one or more of the previous criminal offenses and the specific license or employment sought; or (2) the issuance of the

license or the granting of the employment would involve an unreasonable risk to property or to the safety or welfare of specific individuals or the general public.”

Correction Law Article 23-A, §753 outlines the factors to be considered in making a determination pursuant to §752:

- (a) The public policy of this state, as expressed in this act, to encourage the licensure and employment of persons previously convicted of one or more criminal offenses.
- (b) The specific duties and responsibilities necessarily related to the license or employment sought.
- (c) The bearing, if any, the criminal offense or offenses for which the person was previously convicted will have on his fitness or ability to perform one or more such duties or responsibilities.
- (d) The time which has elapsed since the occurrence of the criminal offense or offenses.
- (e) The age of the person at the time of the occurrence of the criminal offense or offenses.
- (f) The seriousness of the offense or offenses.
- (g) Any information produced by the person, or produced on his behalf, in regard to this rehabilitation and good conduct.
- (h) The legitimate interest of the public agency or private employer in protecting property, and the safety and welfare of specific individuals or the general public.

The evidence produced at the hearing shows that Milan did not consider the factors set forth in Correction Law Article 23-A, §753. There is absolutely no evidence that Milan considered anything other than the fact that Complainant had been convicted of theft. Based on that information Milan decided to terminate Complainant’s employment, just hours after he was hired. Milan admits that it has a policy against offering employment to applicants with theft convictions. It also admitted that Complainant’s employment was terminated because of the theft conviction. This is a violation of the Human Rights Law.

The law is clear that an employer is under no duty to give ex-convicts preferred treatment. However, the law’s intent is to remove the prejudice that exists against former criminals obtaining jobs. Such prejudice is not only widespread but is also unfair and

counterproductive. *See, Pisano v. McKenna*, 120 Misc.2d 536, 466 N.Y.S.2d 231 (1983). Therefore, in light of the current law and the public policy of the State of New York, when rejecting an ex-convict the employer must consider the factors outlined in Correction Law Article 23-A, §753 to determine whether an offer of employment should be made, notwithstanding the existence of a “direct relationship” under Correction Law Article 23-A, §752 (1) between the applicant’s criminal offense and the specific employment. *See, Bonacorsa v. Van Lindt*, 71 N.Y.2d 605, 528 N.Y.S.2d 519 (1988). In other words, it is not enough for the employer to look at the nature of the crime and based on that alone determine that there is a “direct relationship” between the crime and the job sought. The employer is expected to consider the factors outlined above and then make a determination as to whether or not an applicant should be considered for employment.

Milan, by its own admission, did not engage in this process. Milan simply terminated Complainant’s employment based on the fact that he had a prior conviction. As a result, Milan violated the Human Rights Law and is liable to Complainant for the pain and suffering that he endured as a result of its unlawful discrimination.

DaVinci Cleaners Corp. is also liable to Complainant as a successor-in-interest to Milan. *See, Buja v. KCI Konecranes International PLC*, 12 Misc. 3d 859, 862, 815 N.Y.S.2d 412, 414 (2006), citing, *Schumacher v. Richards Sheer Co.*, 59 N.Y.2d 239, 245, 464 N.Y.S.2d 437 (1987); *E.E.O.C. v. Macmillan Bloedel Containers, Inc.*, 503 F.2d 1086, 1094 (6th Cir. 1974). Christopher Martirano and Dennis Helliwell, who have been individually named, are also liable. *See, Patrowich v. Chemical Bank*, 63 N.Y.2d 541, 483 N.Y.S.2d 659, 473 N.E.2d 11 (1984).

Although Complainant is entitled to damages for the unlawful discrimination he suffered as a result of Milan’s discriminatory practice, Complainant is not entitled to an award of back

pay. Complainant only worked with Milan for two and one half hours. Complainant provided no proof to support his claim that “there is no reason to believe [Complainant] would not have become a full time employee.” (Complainant’s Post-Hearing Submission, September 26, 2008, page 2). Complainant’s employment history, just one four week job since his release from prison in 2001, makes it difficult to believe that he would have remained employed with Milan for a specific amount of time. Any award for back pay would be speculative and would therefore be impermissible. *Mizrahi v. Taic*, 266 A.D.2d 59, 698 N.Y.S.2d 635 (1<sup>st</sup> Dept. 1999). Furthermore, Complainant has not shown that he mitigated his damages. He testified that he looked for work, but did not testify about where or if he applied and the outcome of those applications. Moreover, Complainant has taken himself out of the job market by choosing to stay home and take care of his children, and babysit a nephew for whom he gets paid \$200.00 per month.

Complainant is entitled to an award for mental anguish and humiliation. An award of compensatory damages to a person aggrieved by an illegal discriminatory practice may include compensation for mental anguish and humiliation and that award may be based solely on the Complainant’s testimony. *See, Matter of Cosmos Forms v. State Division of Human Rights*, 150 A.D.2d 442. Here, the only evidence of mental anguish and humiliation was Complainant’s tearful testimony as he recalled how he felt when Martirano terminated his employment because of his prior conviction. Complainant felt hurt because Martirano did not even walk him to the elevator nor show any appreciation for the work that he did. Instead, everyone was looking at him “like I am some fool.” In the absence of evidence of any medical treatment, an award of Ten Thousand Dollars (\$10,000) is appropriate. *Bayport-Blue Point School District v. State Division of Human Rights*, 131 A.D.2d 849, 517 N.Y.S.2d 209 (1987).

## ORDER

Based on the foregoing Findings of Fact, Decision and Opinion, and pursuant to the provisions of the Human Rights Law, it is

**ORDERED**, that Respondents Milan Maintenance, Inc., DaVinci Cleaners Corp., Christopher Martirano, and Dennis Helliwell, their agents, representatives, employees, successors and assigns shall cease and desist from discriminating in violation of the Human Rights Law; and it is further

**ORDERED**, that Respondents Milan Maintenance, Inc., DaVinci Cleaners Corp., Christopher Martirano, and Dennis Helliwell, their agents, representatives, employees, successors and assigns shall take the following affirmative actions to effectuate the purposes of the Human Rights Law:

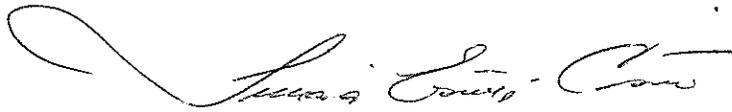
1. Within 60 days of receipt of the Commissioner's Final Order, Respondents Milan Maintenance, Inc., DaVinci Cleaners Corp., Christopher Martirano, and Dennis Helliwell shall pay to Complainant the sum of Ten Thousand Dollars (\$10,000), without any withholding or deductions, as compensatory damages for mental anguish and humiliation suffered by Complainant as a result of Milan's unlawful discrimination. Interest shall accrue at the rate of 9% per annum from 60 days of receipt of the Commissioner's Final Order until payment is made to Complainant.

2. The aforesaid payment shall be made by Respondents Milan Maintenance, Inc., DaVinci Cleaners Corp., Christopher Martirano, and Dennis Helliwell in the form of certified check made payable to the order of Thomas Belle and delivered by registered mail, Return Receipt Requested, to David Abrams, Esq., at 305 Broadway, 5<sup>th</sup> Floor, New York, New York 10007.

3. Respondents Milan Maintenance, Inc., DaVinci Cleaners Corp., Christopher Martirano, and Dennis Helliwell shall transmit a memorandum to their employees, agents and officers, notifying them that they have a policy of non-discrimination. It shall also provide formal training to all their personnel regarding the process for handling applicants with prior criminal conviction(s).

4. Respondents Milan Maintenance, Inc., DaVinci Cleaners Corp., Christopher Martirano, and Dennis Helliwell shall furnish written proof of its compliance with the directives herein contained, and shall cooperate with representatives of the Division during any investigation into the compliance with the directives of this Order.

DATED: January 28, 2011  
Bronx, New York



Lilliana Estrella-Castillo  
Administrative Law Judge