



ANDREW M. CUOMO  
GOVERNOR

**NEW YORK STATE  
DIVISION OF HUMAN RIGHTS**

**NEW YORK STATE DIVISION  
OF HUMAN RIGHTS**

on the Complaint of

**RACHEL BUTERA,**

Complainant,

v.

**LMA FOODS, INC., ANTHONY J.  
FRALLCCLARDI,**

Respondents.

**NOTICE AND  
FINAL ORDER**

Case No. 10154753

Federal Charge No. 16GB202768

**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 March 5, 2013, by Michael T. Groben, 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: 4/12/2013  
Bronx, New York

  
GALEN D. KIRKLAND  
COMMISSIONER



ANDREW M. CUOMO  
GOVERNOR

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on the Complaint of

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**LMA FOODS, INC., ANTHONY J.  
FRALLCCLARDI,**

Respondents.

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

Case No. **10154753**

**SUMMARY**

Complainant alleges that she was subjected to unlawful discrimination in employment because of age, disability and race/color. Respondents did not appear, and defaulted on the complaint. Complainant has failed to prove unlawful discrimination, and the complaint is dismissed.

**PROCEEDINGS IN THE CASE**

On April 26, 2012, 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 Michael T. Groben, an Administrative Law Judge (“ALJ”) of the Division. The public hearing session was held on December 3, 2012.

Complainant appeared at the hearing. The Division was represented by Senior Attorney Rosalind M. Polanowski. Respondents did not file an answer to the complaint and did not appear at the public hearing. On application of the Division, ALJ Groben declared a default and proceeded to hear evidence in support of the complaint in accordance with § 465.11 (e) of the Division's Rules of Practice.

### **FINDINGS OF FACT**

1. The Division’s Calendar Unit sent Notices of Hearing to Respondents by regular mail. (ALJ's Exhibit 4). The Notice of Hearing sent to corporate Respondent LMA Foods, Inc., was not returned and is presumed to have been received.
2. The notice sent to individual Respondent Fralllclardi was returned by the post office as undeliverable. (ALJ's Exhibit 10)
3. Respondent Fralllclardi was well aware of the date, time and place of the public hearing, having been involved in several telephone discussions with the Division Attorney, and

one telephone conference with the Division Attorney and ALJ Groben. The Division Attorney also sent the Notice of Hearing to Respondent Fralllclardi by e-mail. (Tr. 3-4)<sup>1</sup>

4. Respondent Fralllclardi is the owner of corporate Respondent LMA Foods, Inc. (Tr. 12, 13; Complainant's Exhibit 1)

5. Complainant was hired by Respondents on April 4 or 5, 2011. (Tr. 11-12)

6. There was no proof submitted at the public hearing as to Complainant's race or color. I observed that Complainant appeared to be white.

7. There was no proof submitted at the public hearing regarding any disability suffered by Complainant, and I observed nothing in Complainant's appearance which would indicate a disability.

8. Complainant's verified complaint listed her birth date as December 21, 1981, which would make her 31 years old at the time of the public hearing. (ALJ's Exhibit 4) There was no proof submitted at the public hearing regarding Complainant's age.

9. When she was hired, it was Complainant's understanding that she would work as a waitress or hostess at Respondents' restaurant La Casa D'Italiana, in Syracuse, New York. The restaurant was not yet in operation. (Tr. 12, 13, 15, 17-18)<sup>2</sup>

10. While Respondents were preparing the restaurant for its initial opening, Complainant and at least three other persons were employed cleaning and painting in order to get the restaurant "up to code." (Tr. 12-13, 14-15, 17-18)

11. "Tanya" occasionally acted as Complainant's supervisor during this work. (Tr. 13, 14)

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<sup>1</sup> The transcript of the public hearing bears an incorrect index number. (Tr. 1) On one occasion, the transcript erroneously attributes a remark by the Division Attorney to a "Mr. Marcus." There was no such person present at the hearing. (Tr. 6, line 16)

<sup>2</sup> The transcript of the public hearing incorrectly states the name of the restaurant as "LaPasa D'Ataliana." (Tr. 13)

12. Complainant was so employed for nearly two weeks. (Tr. 13-14) Complainant's wage was \$8.50 per hour. (Tr. 19, 21)

13. Complainant testified that she was hired with the understanding that once the restaurant opened, she would receive \$8.50 per hour plus tips as a waitress. (Tr. 21-22) Based on the demeanor and behavior of the Complainant at the public hearing, I found this claim to be not credible.

14. In April 2011, Fralllclardi, in the presence of Tanya and Complainant's co-worker Christina Barnes, told Complainant that he would get both Complainant and Barnes fitted for uniforms. Complainant believed that Fralllclardi was referring to waitress uniforms. (Tr. 14, 15, 16-17)

15. During this same discussion, Fralllclardi then told Tanya, in sum and substance, to find pretty young white girls that were slender in order to serve as waitresses, so that he could get his restaurant "popping." (Tr. 15-16)

16. Fralllclardi also told Tanya that he would not use Complainant or Barnes as waitresses, because they were "too fat" and not pretty enough. (Tr. 16, 17)

17. Fralllclardi then told Complainant that she could go home, and that he would call her when it was time to have her fitted for a uniform. Complainant never received a call, and never went back to work for Respondents. (Tr. 18-20)

18. The restaurant never opened while Complainant was working there. (Tr. 15)  
Complainant believed that it did open for "maybe a week or two," and then closed. (Tr. 22)

19. Complainant's verified complaint stated while Respondents' restaurant was open, she observed that all of the employees were black persons. (ALJ's Exhibit 4) There was no proof submitted at the public hearing regarding this allegation.

## OPINION AND DECISION

Pursuant to N.Y. Exec. Law, art. 15 (the "Human Rights Law"), it is an unlawful discriminatory practice for an employer "because of an individual's age, race... color (or)... disability... to refuse to hire or employ or to bar or to discharge from employment such individual or to discriminate against such individual in compensation or in terms, conditions or privileges of employment." Human Rights Law § 296.1 (a).

To make out a prima facie case of unlawful discrimination under the Human Rights Law, a complainant must show: (1) she is a member of a protected class; (2) she was qualified for the position; (3) she suffered an adverse employment action; and (4) the adverse employment action occurred under circumstances giving rise to an inference of unlawful discrimination. *Ferrante v. American Lung Ass'n*, 90 N.Y.2d 623, 629, 665 N.Y.S.2d 25, 29 (1997); *Forrest v. Jewish Guild for the Blind*, 3 N.Y.3d 295, 305, 786 N.Y.S.2d 382, 390 (2004).

In the instant case, Complainant did submit proof that she was accepted by Respondents as qualified for a position as a waitress, and that she suffered an adverse employment action when she was not called back to work as a waitress when the restaurant opened.

However, the Complainant failed to set forth sufficient evidence regarding the first and fourth prongs of her prima facie case. Complainant alleged that although she was hired with the understanding that she would assume the duties of a waitress once Respondents' restaurant opened, Respondents reneged and refused to so employ Complainant because she was "too fat" and not pretty enough. With respect to Complainant's claim of disability discrimination, it is well settled that under appropriate circumstances, obesity can be considered a disability pursuant to the Human Rights Law. *McDermott v. Xerox Corp.*, 65 N.Y.2d 213, 491 N.Y.S.2d 106 (1985).

However, Complainant submitted no evidence of disability, and thus did not demonstrate that she belonged to the protected class of disabled persons. With respect to Complainant's claim of age discrimination, Complainant submitted no proof of her age at the public hearing. She submitted no proof that Respondents actually hired waitresses during the brief life of Respondents' restaurant, or that, if they did, those waitresses were younger than Complainant. Complainant also alleged that she was not hired by Respondents because of her race. Complainant is white, and so is a member of a protected class. However, she failed to submit evidence that she was not hired as a waitress because of her race, and, in fact, testified that Respondent Frallclardi voiced a preference for hiring women of Complainant's race as waitresses. Finally, Complainant cannot show that the adverse employment action occurred under circumstances from which one can infer discriminatory intent, because she was hired and laid off by the same individual. When the person who made the decision to hire the complainant is the same individual who fired the complainant, one can usually infer that discrimination was not the reason for the adverse action. *Dickerson v. Health Mgt. Corp. of America*, 21 A.D.3d 326, 329, 800 N.Y.S.2d 391, 394 (1st Dept. 2005).

Complainant has failed to prove a prima facie case, and the complaint 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 complaint be, and hereby is, dismissed.

DATED: March 5, 2013  
Bronx, New York

A handwritten signature in black ink, appearing to read "Michael T. Groben". The signature is stylized with a large loop at the end.

Michael T. Groben  
Administrative Law Judge