



ANDREW M. CUOMO
GOVERNOR

NEW YORK STATE
DIVISION OF HUMAN RIGHTS

NEW YORK STATE DIVISION
OF HUMAN RIGHTS

on the Complaint of

JOSÉ LUIS DEL RIO MÉNDEZ,

Complainant,

v.

C.Y.L. BAIS OIFEH,

Respondent.

NOTICE AND
FINAL ORDER

Case No. 10141617

Federal Charge No. 16GB003557

PLEASE TAKE NOTICE that the attached is a true copy of the Alternative Proposed Order, dated March 29, 2014, and issued on May 29, 2014, by Peter G. Buchenholz, Adjudication Counsel, after a hearing held before Robert J. Tuosto, 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 HELEN DIANE FOSTER, COMMISSIONER, AS THE FINAL ORDER OF THE NEW YORK STATE DIVISION OF HUMAN RIGHTS (“ORDER”) WITH THE FOLLOWING AMENDMENTS:

- In objections to the Alternative Proposed Order, Respondent argues that “the

evidence suggests” that non-Jewish employees were provided a reasonable accommodation of “an alternative area for themselves” for lunch/breaks. *See* Respondent’s June 18, 2014, letter, p. 4. However, there is no evidence in this record to support that contention. Further, in this record, Respondent presents no legal justification of its disparate treatment of certain employees based on creed. Perhaps there is good reason for Respondent’s behavior, however, it has not been explained. It is not clear, for instance, why Respondent did not simply prohibit all employees, regardless of creed, from bringing forbidden food into the matzo preparation area. Respondent submitted no evidence demonstrating that either its policies or the termination of Complainant’s employment were lawful or permissible pursuant to an exception to the Human Rights Law. Accordingly, the Alternative Proposed Order is adopted.

- Complainant conceded his employment was to end after Passover in 2010. (Tr. 112) Official notice is taken that in 2010, Passover ended on April 6th. Accordingly, Respondent is liable to Complainant for lost wages for the four-week period following Respondent’s unlawful termination of his employment on March 12th through April 6th, 2010. Calculated at the rate of \$265 per week, Respondent is liable to Complainant for \$1,060, plus interest at a rate of nine percent per annum from March 22, 2010, a reasonable intermediate date, until payment is made.
- The remainder of the Alternative Proposed Order is adopted as the Final Order of the Division.

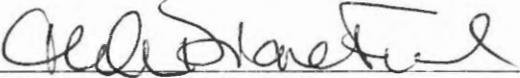
In accordance with the Division's Rules of Practice, a copy of this Order has been filed in

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: **JUN 23 2014**
Bronx, New York



HELEN DIANE FOSTER
COMMISSIONER



ANDREW M. CUOMO
GOVERNOR

**NEW YORK STATE
DIVISION OF HUMAN RIGHTS**

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HUMAN RIGHTS**

on the Complaint of

JOSÉ LUIS DEL RIO MÉNDEZ,

Complainant,

v.

C.Y.L. BAIS OIFEH,

Respondent.

**ALTERNATIVE
PROPOSED ORDER**

Case No. **10141617**

SUMMARY

Respondent discriminated against Complainant when it terminated his employment because he drank coffee in a work area where only Jewish individuals were permitted to eat. Accordingly, Complainant is entitled to \$5,600 in lost wages and \$2,500 for the mental anguish he suffered, plus interest.

PROCEEDINGS IN THE CASE

On May 17, 2010, 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 J. Tuosto, an Administrative Law Judge ("ALJ") of the Division. A public hearing was held on November 4, 2013.

Complainant and Respondent appeared at the hearing. The Division was represented by Robert Alan Meisels, Esq., Senior Attorney. Respondent was represented by Barry R. Feerst & Associates, Brooklyn, New York, by Barry R. Feerst, Esq.

On January 8, 2014, ALJ Tuosto issued a Recommended Findings of Fact, Opinion and Decision, and Order ("Recommended Order"). Thereafter, Complainant, *pro se*, filed objections to the Recommended Order with the Commissioner's Order Peperation Unit.

FINDINGS OF FACT

1. Upon hearing the testimony and after consideration of all of the evidence, the ALJ determined that Respondent prohibited only non-Jewish employees from eating in an area in its bakery where matzo was prepared. David Rosenberg, Respondent's manager, terminated Complainant's employment for drinking coffee in that area. (Tr. 18-21) There is nothing in the record to refute these findings. Respondent had an opportunity to contest Complainant's evidence and present its own defense.
2. Though Respondent's representative, Hershey Rosenberg, was at the hearing, Respondent presented only one witness who provided no testimony relevant to the termination of Complainant's employment or Respondent's policies. Respondent provided no evidence or argument contradicting Complainant's testimony. The record supports the ALJ's findings and they are adopted herein.
3. Complainant earned approximately \$265 per week while he was employed by Respondent. (Complainant's exhibit 1; Tr. 14, 20, 122) After his employment was terminated on March 12, 2010, Complainant looked for work as a handyman and was eventually hired to work

in a summer camp during July and August where he earned \$400 per week. In September of 2010, he was employed by a demolition company earning \$500 per week. (Tr. 61-64, 120-22)

DECISION AND OPINION

It is an unlawful discriminatory practice for an employer to discriminate against an employee because of his creed. *See* Human Rights Law § 296.1(a)

Respondent discriminated against Complainant in violation of the Human Rights Law when it discharged Complainant's employment for drinking coffee in an area of the bakery where only Jewish individuals were permitted to eat. Accordingly, Complainant is entitled to an award of compensatory damages. *See* Human Rights Law § 297.4(c). A complainant has a duty to exercise diligence to mitigate his damages by making reasonable efforts to obtain comparable employment. *See Rio Mar Rest. v. New York State Div. of Human Rights*, 270 A.D.2d 47, 704 N.Y.S.2d 230 (1st Dept. 2000) (citing *State Div. of Human Rights v. North Queensview Homes*, 75 A.D.2d 819, 427 N.Y.S.2d 483 (2d Dept. 1980)). The burden is on Respondent to prove Complainant's lack of diligent efforts to mitigate damages. *See Walter Motor Truck Co. v. New York State Human Rights Appeal Bd.*, 72 A.D.2d 635, 421 N.Y.S.2d 131 (3rd Dept. 1979). Complainant earned approximately \$265 per week while employed by Respondent. After his employment was terminated on March 12, 2010, Complainant looked for work and, in July of 2010, found employment and fully mitigated his damages. *See 121-129 Broadway Realty, Inc. v. New York State Div. of Human Rights*, 48 A.D.2d 975, 369 N.Y.S.2d 837 (3rd Dept. 1975). Complainant is, therefore, entitled to \$4,240 in lost wages calculated at a rate of \$265 per week for the sixteen-week period from March 12 through July 1, 2010.

It is well-settled that 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, 541 N.Y.S.2d 50 (2d Dept. 1989). Respondent's discriminatory conduct saddened Complainant and caused him to feel humiliated. He felt isolated during the months he was looking for work. He suffered from insomnia, lost his appetite and felt depressed. (Tr. 59-60, 65, 121) Considering this together with the short duration of his employment, \$2,500 is appropriate to compensate him for the mental anguish he suffered as a result of the discrimination. *See State Div. of Human Rights v. Crown Gourmet Deli Corp.*, 278 A.D.2d 112 (1st Dept. 2000).

Complainant's remaining allegations are hereby dismissed for the reasons set forth in the ALJ's Recommended Order.

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 of discrimination based on race, color and national origin is dismissed; and it is further

ORDERED, that the complaint of discrimination based on creed is sustained; and it is further

ORDERED, that Respondent, its agents, representatives, employees, successors and assigns shall cease and desist from discriminating in employment in violation of the Human Rights Law; and it is further

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

1. Within sixty days of the date of the Final Order, Respondent shall pay to Complainant \$2,500, without any withholdings or deductions, as compensatory damages for the anguish he suffered as a result of Respondent's discriminatory actions. Interest on the award shall accrue at a rate of nine percent per annum from the date of the Final Order until the date payment is made.
2. Within sixty days of the date of the Final Order, Respondent shall pay to Complainant the sum of \$4,240 for lost wages, without any withholdings or deductions. Interest shall accrue on this amount at a rate of nine percent per annum from May 9, 2010, a reasonable intermediate date, until the date payment is made by Respondent.
3. The payments shall be made in the form of a certified check made payable to the order of Complainant and delivered to him at his home address by certified mail, return receipt requested.
4. Within sixty days of the date of the Commissioner's Final Order, Respondent shall prominently post a full-sized copy of the Division's poster (available at the Division website at www.dhr.ny.gov/sites/default/files/doc/poster.pdf) in places on Respondent's premises where employees are likely to view it.
5. Respondent shall simultaneously furnish written proof of its compliance with the directives contained in the Final Order to the New York State Division of Human Rights, Attn: Barbara Buoncristiano, One Fordham Plaza, 4th Floor, Bronx, New York 10458.
6. Respondent shall cooperate with the Division during any investigation into compliance with the directives contained in the Final Order.

DATED: *March 29, 2014*
Bronx, New York



Peter G. Buchenholz
Adjudication Counsel