

NEW YORK STATE
DIVISION OF HUMAN RIGHTS

NEW YORK STATE DIVISION
OF HUMAN RIGHTS

on the Complaint of

SHANE A. FULLER,

Complainant,

v.

TOSHA RESTAURANTS, LLC D/B/A DENNY'S,

Respondent.

NOTICE AND
FINAL ORDER

Case No. 10116907

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 February 5, 2009, by Christine Marbach Kellett, 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: **MAR 27 2009**
Bronx, New York



GALEN D. KIRKLAND
COMMISSIONER

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

Case No. 10116907

SUMMARY

Complainant charged Respondent with illegal discrimination based upon disability, when Respondent told Complainant his employment was terminated because of complaints about his appearance. Respondent denied illegal discrimination. Complainant established that the Respondent's explanations were a pretext for illegal discrimination. Complainant is entitled to damages.

PROCEEDINGS IN THE CASE

On April 3, 2007, 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 Christine Marbach Kellett, an Administrative Law Judge (“ALJ”) of the Division. A public hearing session was held on May 7, 2008.

Complainant and Respondent appeared at the hearing. The Division was represented by Lawrence J. Zyra, Esq.. Respondent was represented by Jonathan G. Schopf, Esq. and Rachael E. Kruse, Esq.

Permission to file post-hearing briefs was granted. Post-hearing submissions were received from the Division and from the Respondent.

FINDINGS OF FACT

1. Complainant charged Respondent with discrimination based upon disability in violation of the Human Right Law sec. 296.1 when Respondent terminated his part-time employment as a dishwasher. (ALJ Exh. 1)
2. Respondent, which operates a restaurant in Queensbury, New York, denied the charge. (ALJ Exh. 4.)
3. On January 13, 2007, after an in-person interview with Complainant, Lori Smith (“Smith”), Respondent’s restaurant manager, offered Complainant a position as part-time dishwasher. (Tr. 13, 15-19, 27, 77-78)
4. The duties of part-time dishwasher included washing dishes, cleaning bathrooms, wiping down walls, taking out the garbage, and other tasks as assigned by the restaurant manager. (Tr. 43)
5. Complainant earned \$7.15 an hour as a dishwasher, and was to be scheduled for 12-15 hours a week. (Tr. 23)

6. Complainant has scarring on the back of his head from psoriasis and cellulitis.
(Complainant's Exhibits 4, 5, 6; Tr. 9-12, 33)
7. Neither psoriasis nor cellulitis is contagious. (Complainant's Exh. 3; Tr. 34)
8. The scarring is not visible from the front or side of Complainant's head. (Complainant's Exh. 4; Tr. 14)
9. At the time of Complainant's in person interview, Smith did not ask any questions about Complainant's medical condition. (Tr. 18-19)
10. At the time of Complainant's hire, Complainant indicated he was available at any time.
(Tr. 20)
11. However, at the same time as Respondent hired Complainant for part-time work, Complainant was also hired by Lowe's Home Improvement Center ("Lowe's") in Queensbury for full-time work, on the overnight shift. (Tr. 20)
12. Two weeks later, Lowe's offered Complainant a delivery position from 6 a.m. to 3 p.m., an offer Complainant accepted. (Tr. 19-20, 29)
13. This full time position limited Complainant's availability to work for Respondent. (Tr. 26)
14. Complainant would give Respondent's manager, Sue Ellsworth ("Ellsworth"), his Lowe's schedule so she could schedule his work hours around his availability. (Tr. 23-24, 29)
15. Complainant also made himself available to cover for other employees. (Tr. 28)
16. Consequently, although hired for 12-15 hours a week, Complainant actually averaged 20 hours a week working for Respondent, with at least one week of 31 hours. (Tr. 23)
17. The steam in the kitchen began irritating Complainant's psoriasis and scarred skin. (Tr. 45)

18. The scarred skin became infected with boils, that is, with open draining sores. (Tr. 12-13, 42, 45)

19. No one said anything to Complainant about his head, the open sores or about the cover-up policy. (Tr. 22-23, 83)

20. However, when the owner, Paul Amash ("Amash") came to the store and observed Complainant's head, Amash directed Ellsworth to terminate Complainant. (Tr. 54-56)

21. NYS Health Department regulations do prohibit food handlers from working when ill with a contagious medical condition. (Respondent's Exh. 2; Tr. 49, 51)

22. Respondent had a policy for employees with open sores: either send them home until medically cleared to work, or require that the open sore be covered. (Tr. 70-71)

23. Complainant was never sent home, given the option of covering his head, nor even asked about his condition. (Tr. 58-59, 88).

24. Instead, on February 24, 2007, Ellsworth, on Amash's directions, simply terminated Complainant, telling him that many customers and co-workers had complained about the appearance of his head. (Tr. 25)

25. Complainant was not told his limitation on availability would cause him to be terminated; in fact, Complainant had made himself available whenever possible, and Ellsworth, who did the scheduling, was able to accommodate his availability. (Tr. 85-86)

26. Although Amash testified about the Health Code prohibiting contagious employees from working, he admitted he did not know the exact provisions of the code when he directed Complainant be terminated (Tr. 60); admitted he knew nothing about Complainant's condition (Tr.58); admitted he would not have hired Complainant if he had seen the condition (Tr. 61); and admitted he takes appearances of scars into consideration when hiring waitresses (Tr. 62). In

light of these admissions, I find his testimony, that he directed Complainant be terminated due to his availability issues only, unworthy of belief.

27. Complainant was quite upset at being terminated. He began to doubt his abilities. He felt suicidal, depressed, and consulted with a therapist between February and November 2007. (Tr. 35-36) Complainant paid the therapist on a sliding fee of ten dollars a session, and went approximately twenty times, for a cost of \$200. (Tr. 37) Complainant's relationship with his fiancée was negatively affected. (Tr. 36) Complainant continues to feel upset at being terminated. (Tr. 37)

28. Complainant continued to work full time at Lowe's. (Tr. 37)

29. Complainant sought part-time work to replace his employment with Respondent obtaining another part-time position at the rate of \$8.00 an hour on October 17, 2007. (Complainant's Exh. 2; Tr. 30-33)

OPINION AND DECISION

Human Rights Law sec. 296.1(a) declares it to be an unlawful discriminatory practice for an employer because of the disability, or the perception of a disability, of any individual to discriminate against such individual in the terms or conditions or privileges of employment..¹
NYS Executive Law sec. 296.1(a)

Complainant, whose head is heavily scarred, charged Respondent with illegal discrimination based upon disability, when Respondent told Complainant that he was being terminated because of complaints about the appearance of his head. The evidence presented at the public hearing established Respondent violated the Human Rights Law when it terminated

¹ While this complaint was presented as a case of simple disability discrimination, and no request for reasonable accommodation was made by Complainant, the record also established that Respondent violated its own

Complainant from employment as a part-time dishwasher. Complainant is entitled to damages in terms of lost wages and for emotional pain and suffering.

Complainant has the burden of proof in discrimination complaints.

First a complainant must produce enough evidence to support a finding of a prima facie case. In order to establish a prima facie case of discrimination, Complainant must establish he was a person in a protected class, that he was otherwise qualified for the position, that he suffered adverse employment action, and that the circumstances give rise to an inference of unlawful discrimination. *Forrest v. Jewish Guild for the Blind*, 3 N.Y.3rd 295, 786 N.Y.S.2d 382 (2004)

Complainant established his prima facie case: he has two diagnosed medical conditions, psoriasis and cellulitis which had scarred his head; and that the scarred areas of his head had become infected as a result of the heat of dishwashing. Complainant was qualified for the position of dishwasher and was in fact hired for a part-time position. It is undisputed that complainant was fired after the owner noticed the condition of the back of Complainant's head. The explanation that Complainant was fired because of the appearance of sores on the back of his head gives rise to an inference of disability discrimination.

Once Complainant established a prima facie case, a burden of production required the employer to offer a legitimate explanation for its actions. Respondent offered three explanations: one, that co-workers and customers were complaining about Complainant's appearance; two, that the health regulations prohibited Complainant from working; and three, that adjusting the work schedules to accommodate Complainant's full time position was too difficult. Respondent having proffered his explanation for his decision, the burden of proof

policies regarding sick and injured employees, and failed to reasonably accommodate Complainant's disability, as required under the Human Rights Law.

requires Complainant to establish that the explanations offered were pretexts for illegal discrimination. *Forrest v. Jewish Guild for the Blind*, 3 N.Y.3rd 295, 786 N.Y.S.2d 382 (2004)

Complainant was successful in establishing he was the victim of unlawful discrimination.

The first proffered explanation was that co-workers and customers complained about Complainant's appearance. Complaints from customers about Complainant's appearance, an appearance created by disabilities, are not legitimate, non-discriminatory reasons for termination.

The second proffered explanation was that the State's Health Department prohibited Complainant from working while having open sores. While it is true that the State's Health code contains restrictions on food handlers' working when infectious or ill, Respondent's owner, Amash, testified at some length to a policy and practice for dealing with workers ill or injured. The policy did not require termination. Workers who were ill were to be sent home until certified well, or if injured, given an opportunity to cover-up the injured site. Respondent's witnesses admitted neither of the options of going home until cleared by a doctor or covering up the infected area were offered or even discussed with Complainant. Respondent made absolutely no effort to find out the nature or extent of Complainant's condition. Respondent's failure to follow its own established policy regarding employees who were ill or injured fully supports a determination that this explanation was a pretext for illegal discrimination.

Regarding Respondent's third explanation, that the Complainant's availability to work changed, and it became too difficult to accommodate his availability, the testimony of Respondent's own witness establishes this is a pretext. This was a part-time position, with the hours needed by Respondent varying from week to week, in addition to the availability of Complainant varying from week to week. Respondent's witness asserted she was accommodating Complainant's availability. More significantly, Respondent's records

established that Complainant made himself available for additional hours as needed by Respondent. Under the circumstances presented here, Complainant successfully established this explanation also was a pretext for illegal discrimination.

Having established the Respondent's explanations were a pretext for illegal discrimination, Complainant is entitled to compensatory damages, both economic and for emotional pain and suffering. .

Complainant worked for Respondent for five weeks, averaging 20 hours a week at \$7.15 an hour. This amounts to \$143.00 a week on average. Complainant was able to find alternative part-time employment by October 17, 2007, some 32 weeks later. Complainant therefore is entitled to damages of \$ 4576.00 for lost wages. Complainant is entitled to pre-judgment interest on the back pay award from a reasonable intermediate date. *Aurecchione v. N.Y.S. Div. of Human Rights*, 98 N.Y.2d 21, 744 N.Y.S.2d 349 (2002). A reasonable intermediate date is June 15, 2007. Complainant is also entitled to post-judgment interest on this amount.

Complainant reported he was so depressed he sought counseling at a cost of \$10.00 a session for 20 sessions. Complainant is entitled to the reimbursement of this cost, or \$200.00 as damages. Complainant is entitled to pre-judgment interest on this amount from the same reasonable intermediate date. *See: Aurecchione v. N.Y.S. Div. of Human Rights*, 98 N.Y.2d 21, 744 N.Y.S.2d 349 (2002). Complainant is also entitled to post-judgment interest on this amount.

Complainant also testified to his upset, doubts, suicidal thoughts, and depression requiring counseling for a period of nine months between February and November 2007 as a result of Respondent's abrupt termination. Complainant's relationship with his fiancée was negatively affected. Complainant continues to feel upset at being terminated. Complainant is entitled to compensatory damages for emotional pain and suffering. The amount of \$10,000 is

consistent with prior awards of the Commissioner under similar circumstances and will fulfill the goals and objectives of the Human Rights Law. Complainant is entitled to post-judgment interest on this amount from the date of the final Commissioner order, in accord with Division practice and CPLR 5002.

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 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 the Respondent, its agents, representative, employees, successors and assigns shall take the following affirmative actions to effectuate the purposes of the Human Rights Law and the findings and conclusions of this Order:

1. Within 60 days of receipt of the Final order of the Commissioner, Respondent shall pay to Complainant the sum of \$4,776.00 as economic damages, calculated as \$4,576.00 in lost wages and back pay, and \$200 in out of pocket expenses for counseling. Pre-judgment interest on this amount shall be paid, calculated from a reasonable intermediate date of June 15, 2007.
2. Within 60 days of receipt of the Final Order of the Commissioner, Respondent shall pay to Complainant the sum of \$10,000 as compensatory damages for emotional pain and suffering.
3. Post-judgment interest on the damages awarded shall accrue and be owed from the

date of the final Commissioner Order in accordance with CPLR 5002.

4. The aforesaid payments shall be made by Respondent in the form of a certified check made payable to the order of the Complainant, Shane Fuller, and delivered by certified mail, return receipt requested to the New York State Division of Human Rights, Office of General Counsel, One Fordham Plaza, 4th Floor, Bronx, NY 10458.
5. Respondent shall furnish written proof to the New York State Division of Human Rights, Office of General Counsel, One Fordham Plaza, 4th Floor, Bronx, New York 10458, of its compliance with the directives contained in this Order
6. Respondent shall cooperate with the representatives of the Division during any investigation into compliance with the directives contained in this Order.

DATED: February 5, 2009

Bronx, New York



Christine Marbach Kellett
Administrative Law Judge