



DAVID A. PATERSON
GOVERNOR

NEW YORK STATE
DIVISION OF HUMAN RIGHTS

NEW YORK STATE DIVISION
OF HUMAN RIGHTS

on the Complaint of

SHMUEL HANUKA,

Complainant,

v.

TWENTY ONES INCORPORATED, D/B/A 40/40
CLUB,

Respondent.

NOTICE AND
FINAL ORDER

Case No. 10126841

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 15, 2010, by Thomas J. Marlow, 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.

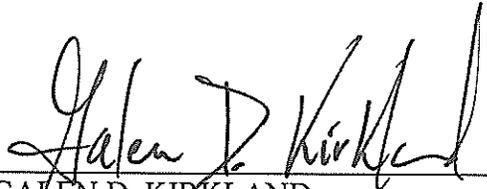
PLEASE BE ADVISED THAT, UPON REVIEW, THE RECOMMENDED ORDER IS HEREBY ADOPTED AND ISSUED BY THE HONORABLE GALEN D. KIRKLAND, COMMISSIONER, AS THE FINAL ORDER OF THE NEW YORK STATE DIVISION OF HUMAN RIGHTS ("ORDER"). In accordance with the Division's Rules of Practice, a copy of this Order has been filed 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: **APR 28 2010**
Bronx, New York



GALEN D. KIRKLAND
COMMISSIONER



DAVID A. PATERSON
GOVERNOR

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**TWENTY ONES INCORPORATED, D/B/A
40/40 CLUB,**

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

Case No. **10126841**

SUMMARY

Complainant alleged that Respondent discriminated against him because of his creed and because he opposed unlawful discrimination. Because the evidence does not support the allegations, the complaint is dismissed.

PROCEEDINGS IN THE CASE

On July 10, 2008, 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 Thomas J. Marlow, an Administrative Law Judge ("ALJ") of the Division. A public hearing session was held on November 9, 2009.

Complainant and Respondent appeared at the hearing. Complainant was represented by William J. Sipser, Esq., of Tuckner, Sipser, Weinstock and Sipser, LLP. Respondent was represented by Daniel F. Lynch, Esq.

At the end of the public hearing on November 9, Mr. Sipser and Mr. Lynch made closing statements in lieu of submitting proposed findings of fact and conclusions of law.

FINDINGS OF FACT

1. Respondent is a New York City nightclub with private rooms that are rented for parties. (Tr. 36, 187-88, 190)
2. In August of 2007, Respondent's Managing Partner, Desiree Perez ("Perez"), wanted to expand Respondent's marketing endeavors into the area of sports, hoping to attract sports figures and sports fans to the club and to rent the private rooms to sports fans where they could watch games. (Tr. 36-37, 442-43)
3. In August of 2007, Nikisha Turner ("Turner"), an African-American woman, was in charge of marketing for Respondent. Perez, however, wanted to find someone familiar with sports to work with Turner. (Tr. 442)

4. In August of 2007, Perez interviewed Complainant, an Orthodox Jew who is a sports enthusiast and was in a Masters program for Sports Marketing, and hired Complainant at a salary of \$37,000 per year to do the marketing expansion. (Complainant's Exhibit 8; Tr. 18-21, 24-25, 35, 151, 435-36, 442-43)

5. In September of 2007, Complainant began his employment with Respondent working in a small office (1,000 square feet) ("the office") with ten other employees. Complainant's responsibilities included visiting websites on the internet, such as Facebook and My Space, to market Respondent. (ALJ's Exhibit 1; Complainant's Exhibits 2, 3, 8, 12; Tr. 24-25, 35, 436, 442-43, 515-16)

6. Complainant understood that his work week was a 40 hour work week, Monday through Friday, between the hours of 9:00 am and 5:30 pm. Respondent understood and agreed that Complainant would, for religious reasons, leave early on Fridays and would take time off for certain religious holidays. (ALJ's Exhibit 1; Tr. 20-22, 440-41)

7. On several occasions during the last week of September and the first week of October in 2007, Complainant either left early or took the day off for religious holidays. Respondent understood and agreed with Complainant taking this time off. (Complainant's Exhibit 3; Tr. 24, 45-58)

8. Shortly after Complainant started his employment, Perez began receiving complaints about Complainant's behavior from Turner and other employees. It was reported to Perez that Complainant, at times, was belligerent, and, at times, he was bothering others by talking on his cell phone while they were working. (Tr. 444-46) Complainant, at times, bothered Shawn Porat ("Porat"), Perez' personal assistant who is Jewish, by trying to engage Porat in personal conversations while Porat was working. (Tr. 281, 283-84, 290-91) Since these complaints came

early in Complainant's employment, Perez wanted to give Complainant more time to acclimate himself to the work environment before Perez addressed any work performance issues.

(Tr. 444-45)

9. In September of 2007, Respondent purchased two new computers for employees with sales responsibilities in the office. Around the time of this purchase, Complainant complained to Perez that his computer was slow and that "it would freeze." (Tr. 489)

10. On October 11, 2007, Complainant sent an e-mail message to Perez saying, "Please let me know if I will be getting my new computer." (Respondent's Exhibit 1; Tr. 143-47)

11. On October 11, 2007, Yonit Ibrahimian ("Ibrahimian"), an Israeli Jew employed by Respondent as its manager, was informed that Complainant had agreed to take Respondent's mail to the post office. All of the employees in the office were expected to be available to go to the post office if necessary. This would be the first time Complainant took the mail to the post office. Ibrahimian was asked to give Complainant money for postage. When Ibrahimian approached Complainant, Complainant was upset. In Complainant's opinion, he was "a little frustrated because [he] didn't want to go in the rain and be a gopher and go to the post office. [He's] there to do sports marketing." Ibrahimian considered Complainant's behavior with her to be irate, abrasive, and inappropriate for the workplace. As Ibrahimian continued to speak with Complainant, Complainant told Ibrahimian that he felt that he was being asked to go to the post office because he is Jewish. (Tr. 71, 74-77, 91, 117, 309-10, 342, 345, 348-49, 396) Ibrahimian reported Complainant's behavior to Perez. (Tr. 330-31, 345-49)

12. On October 12, 2007, a Friday, Ibrahimian checked Complainant's time and attendance record and determined that Complainant had worked much less than the 40 hours he was supposed to work that week. For the week ending October 12, there were no religious holidays

for which Complainant either left early or took a day off. On October 12, Ibrahimian met with Complainant and gave him two written warnings. One warning was for his inappropriate behavior toward Ibrahimian on October 11. Complainant signed that warning, indicating that he had read it and understood its implications. The other warning was for failing to fulfill his agreement to work 40 hours during the week ending October 12. Complainant refused to sign this warning. Both written warnings indicated that repetition of those infractions would result in termination of employment. Complainant became angry and told Ibrahimian that she was discriminating against him because he was Jewish. He further said that he had to take days off for religious holidays. Ibrahimian told Complainant that there were no holidays that week. Complainant gathered his belongings and began to leave work. Ibrahimian was walking and talking with Complainant as he was leaving work. While leaving, Complainant told Ibrahimian that she was "just like the rest of them" and that she was "a bad Jew." Ibrahimian then ended her conversation with Complainant, telling him to leave. (ALJ's Exhibit 7; Complainant's Exhibits 3, 4; Respondent's Exhibit 4; Tr. 65-74, 311-14, 329-30, 389-91, 396, 402-03, 418-20)

13. After Ibrahimian spoke with Complainant on October 12, she called Perez and explained what had happened. On October 12, after speaking with Ibrahimian, Perez had a telephone conversation with Complainant. During the conversation Complainant complained to Perez that the other employees were ignoring him at work and "not acting nicely." Complainant told Perez that one employee, Candice Sealey ("Sealey") who was a salesperson for Respondent, made a comment about Complainant's yarmulke. Perez spoke with Complainant about his behavior with Ibrahimian. According to Complainant, Perez told him, regarding his behavior with Ibrahimian, "If [you] don't settle this issue, [you] [will] get fired from [your] job." (Respondent's Exhibits 2, 3; Tr. 83-84, 95-100, 175-89, 371-72, 447-50)

14. On October 12, Perez spoke with Sealey. Sealey admitted to asking Complainant, during a friendly conversation, why he wore his yarmulke on his forehead. Sealey told Perez that she was curious and meant no offense. Perez gave Sealey a written notice of disciplinary action formally informing her that it was an infraction of company policy to comment about a co-worker's yarmulke and if it was repeated it could result in termination of employment. (Respondent's Exhibit 5; Tr. 450-55) By October 12, Perez had spoken to several employees regarding their interactions with Complainant. (Tr. 469-71, 491-505, 546-47)

15. Respondent never told Complainant that his employment was terminated or that he should not return to work. After October 12, Complainant never returned to Respondent. (Tr. 175, 459-60, 472) "The way he left, it was apparent that he wasn't coming back." (Tr. 543-44)

16. On July 10, 2008, Complainant filed his complaint (Case No. 10126841) with the Division, which included allegations that Respondent subjected him to ridicule because of his religious beliefs, that employees used curse words in his presence, that Respondent denied Complainant the use of a computer because he is Jewish, that, upon returning from being out of work due to religious holidays, Respondent disciplined him for failing to work the necessary hours, and that Respondent retaliated against him for opposing unlawful discrimination by terminating his employment. (ALJ's Exhibit 1)

17. Complainant's testimony was, at times, inconsistent with regard to the allegations of unlawful discrimination. (ALJ's Exhibit 1; Tr. 71, 98, 135, 142, 174, 177-78, 267-70)

OPINION AND DECISION

The Human Rights Law makes it an unlawful discriminatory practice for an employer to discriminate against an individual in the terms, conditions, or privileges of employment because of that individual's creed or to retaliate against an individual in the terms, conditions, or privileges of employment because that individual opposed unlawful discrimination.

See Human Rights Law §§ 296.1(a), 296.7.

Complainant raised an issue of unlawful discrimination, alleging that Respondent unlawfully discriminated against him in the terms, conditions, and privileges of employment because of his creed at various times over a three week period, including when an employee asked him a question about his yarmulke, when employees used curse words in his presence, when he was denied a new computer, when he was given a written warning for failing to fulfill his agreement to work 40 hours during the week ending October 12, and when his employment ended.

The credible evidence established that Complainant had a difficult time adjusting to the work environment of Respondent, a small office where employees were busy, with little time for chit-chat. He bothered some with his cell phone use and another with his attempts at friendly conversation while that employee was trying to work. He felt that the other employees were ignoring him and "not acting nicely." I find, however, that the actions of the other employees had nothing to do with the fact that Complainant is an Orthodox Jew. The credible evidence established that Complainant was feeling frustrated in this work environment when, on a rainy October 11, he was asked, for the first time, to take the mail to the post office, something all of the employees were expected to do when necessary. Although at first he agreed, he became

upset, thinking that such a task was below him since he was hired to do “sports marketing” not to be a “gopher.” In his frustration, his behavior with Ibrahimian was inappropriate and the next day he was given a written warning for his behavior and for failing to work the appropriate amount of hours in a week without Jewish holidays. The credible evidence further established that, on October 12, again acting in frustration, Complainant ended his work experience with more inappropriate behavior with Ibrahimian and Respondent was correct in assuming that “he wasn’t coming back.”

Complainant also raised an issue of unlawful discrimination by alleging that Respondent retaliated against him because he opposed unlawful discrimination. Complainant presented no proof of a causal connection, however, between any action alleged to have been taken by Respondent and any alleged protected activity by Complainant. *See Forrest v. Jewish Guild for the Blind*, 3 N.Y.3d 295, 786 N.Y.S.2d 382 (2004). The credible evidence has established that the actions attributed to Respondent had nothing to do with any engagement by Complainant in a protected activity.

After considering all of the evidence presented and evaluating the credibility of the witnesses, I find that the credible evidence does not support a finding that any actions attributed to Respondent constituted unlawful discrimination. No actions of Respondent were taken because Complainant is an Orthodox Jew. Conclusory allegations, unsupported by credible evidence, are insufficient to establish unlawful discrimination. *See Gagliardi v. Trapp*, 221 A.D.2d 315, 633 N.Y.S.2d 387 (2d Dept. 1995). Complainant has the burden to establish by a preponderance of the evidence that unlawful discrimination occurred. *See Ferrante v. American Lung Assn.*, 90 N.Y.2d 623, 630, 665 N.Y.S.2d 25, 29 (1997). Since Complainant has failed to meet this burden, the 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: March 15, 2010
Bronx, New York

A handwritten signature in black ink, appearing to read "Thomas J. Marlow". The signature is written in a cursive style with a large, looped initial "T".

Thomas J. Marlow
Administrative Law Judge