

NEW YORK STATE
DIVISION OF HUMAN RIGHTS

NEW YORK STATE DIVISION
OF HUMAN RIGHTS

on the Complaint of

RONALD HEGMANN,

Complainant,

v.

VILLAGE 99 CENTS STORES,

Respondent.

NOTICE AND
FINAL ORDER

Case No. 10106482

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 December 11, 2008, 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: **JAN 22 2009**
Bronx, New York



GALEN D. KIRKLAND
COMMISSIONER

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

Case No. **10106482**

SUMMARY

Complainant alleged that Respondent discriminated against him by refusing to hire him because of his sex. Respondent did not appear at the hearing. The evidence supports a finding of discrimination. Complainant is entitled to relief in the form of compensatory damages for mental anguish in the amount of \$10,000.00.

PROCEEDINGS IN THE CASE

On June 27, 2005, 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.

The case came on for hearing before Rosalie Wohlstatter, an Administrative Law Judge (“ALJ”) of the Division. Public hearing sessions were held on March 24 and June 27, 2008.

Complainant appeared at the hearing. The Division was represented by Darin Bazar, Esq. Respondent did not appear at the hearing. Pursuant to 9 N.Y.C.R.R. 465.11(e), ALJ Wohlstatter entered a default and the hearing proceeded on the evidence in support of the complaint.

Permission to file proposed findings of fact and conclusions of law was granted.

On November 7, 2008, pursuant to 9 N.Y.C.R.R. § 465.12(d)(2), the Division assigned Thomas J. Marlow to review the record and render recommended findings of fact, opinion and decision, and order.

FINDINGS OF FACT

1. Complainant is male. (ALJ’s Exhibit 2; Tr. 6)
2. On February 9, 2005, Respondent operated a store (“the store”) in Smithtown, New York. On said date, Respondent displayed a “help wanted” sign in a window of the store. On said date, Complainant observed the sign, entered the store, and asked the woman working behind the cash register about the type of help wanted. (ALJ’s Exhibit 2; Tr. 8-9)
3. On February 9, 2005, the woman working behind the cash register spoke with a man who was stocking shelves and then told Complainant that the position available was a cashier’s position but that Respondent would only hire a female. (ALJ’s Exhibit 2; Tr. 8-9)
4. Complainant has work experience as a cashier. (Tr. 8-9)
5. Complainant felt confused, upset, and hurt emotionally by Respondent’s refusal to hire him. (ALJ’s Exhibit 2; Tr. 10)

6. On February 10, 2005, James Kokindo (“Kokindo”), an investigator for the Suffolk County Human Rights Commission, went to the store, observed the help wanted sign, entered the store, and asked the woman working behind the cash register about the type of help wanted.

(Tr. 16-18)

7. On February 10, 2005, the woman working behind the cash register spoke with a man who was behind the counter of the store and then told Kokindo that the position available was a cashier’s position but that Respondent would only hire a woman. (Tr. 16-18)

8. On February 13, 2005, Complainant was hired as a cashier at pharmacy near his home. (ALJ’s Exhibit 2; Tr. 11-12)

9. Complainant presented no evidence of lost income.

OPINION AND DECISION

The Human Rights Law makes it an unlawful discriminatory practice for an employer to refuse to hire an individual because of that individual’s sex. *See* Human Rights Law § 296.1(a).

Complainant alleges that Respondent discriminated against him based on his sex when it refused to hire him. Complainant has presented evidence that because he is a male, Respondent would not hire him as a cashier even though he had experience as a cashier. Further, the evidence shows that Respondent’s desire to hire only a female cashier was confirmed by an investigator for the Suffolk County Human Rights Commission. Complainant has produced sufficient evidence to establish unlawful discrimination. *See City of Los Angeles, Dept. of Water and Power v. Manhart*, 435 U.S. 702, 98 S.Ct. 1370 (1978); *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 105 S.Ct. 613 (1985). Because Complainant presented credible evidence of sex discrimination and Respondent has not rebutted it, the complaint is sustained.

Complainant is entitled to recover compensatory damages caused by the unlawful discriminatory conduct of Respondent. *See* Human Rights Law § 297.4(c)(iii). The evidence establishes that, within a few days of seeking employment with Respondent, Complainant was hired as a cashier at pharmacy near his home. Complainant has presented no evidence of lost income because of Respondent's actions. An award for mental anguish, however, is appropriate. It is well-settled that an award of compensatory damages to a person aggrieved by an illegal discriminatory act may include compensation for mental anguish, which may be based solely on the complainant's testimony. *See Marcus Garvey Nursing Home, Inc. v. New York State Div. of Human Rights*, 209 A.D.2d 619, 619 N.Y.S.2d 106 (2d Dept. 1994). Complainant testified that, as a result of Respondent's unlawful discriminatory behavior, he felt confused, upset, and hurt emotionally. Accordingly, in consideration of the mental anguish caused by Respondent's discriminatory behavior, \$10,000 will effectuate the purposes of the Human Rights Law. *See Consolidated Edison Co. of New York, Inc. v. State Div. of Human Rights*, 77 N.Y.2d 411, 568 N.Y.S.2d 569 (1991); *Close v. State Div. of Human Rights*, 43 A.D.3d 574; 840 N.Y.S.2d 660 (3d Dept. 2007); *Walker v. Wal-Mart Stores East, L.P.*, DHR Case No. 10111967 (January 22, 2008); *Peterman v. Kelly Services Inc.*, DHR Case No. 4704621 (May 24, 2006).

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 the complaint with regard to discrimination by refusing to hire Complainant because of his sex be, and hereby is, sustained; and it is further

ORDERED, that Respondent, its agents, representatives, employees, successors, and assigns shall cease and desist from discriminating against any individual in the hiring process 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 of the Commissioner, Respondent shall pay to Complainant the sum of \$10,000 without any withholding or deductions, as compensatory damages for the mental anguish he suffered as a result of Respondent's discrimination against him. Interest on the compensatory damage award shall accrue at a rate of nine percent per annum from the date of the Commissioner's Final Order until the date payment is made.

2. Payment shall be made by Respondent in the form of a certified check made payable to the order of Ronald Hegmann and delivered to him by certified mail, return receipt requested, at his address at 393 Eagle Way, Smyrna, DE 19977. Respondent shall furnish written proof of such payment to Barbara Buoncristiano, Director of Compliance, New York State Division of Human Rights, One Fordham Plaza, 4th Floor, Bronx, New York 10458.

3. Within sixty days of the date of the Final Order of the Commissioner, Respondent shall prominently post a copy of the Division's poster (available at the Division's website at www.dhr.state.ny.us under the homepage heading, "NYS Division of Human Rights Is...") in places on Respondent's premises where employees are likely to view it.

4. Respondent shall cooperate with the representatives of the Division during any investigation into compliance with the directives contained in this Order.

DATED: December 11, 2008
Bronx, New York

A handwritten signature in cursive script, appearing to read "Thomas J. Marlow".

Thomas J. Marlow
Administrative Law Judge