ANDREW M. CUOMO
GOVERNOR

NEW YORK STATE
DIVISION OF HUMAN RIGHTS

NEW YORK STATE DIVISION OF HUMAN RIGHTS
on the Complaint of

JOSHUA HORTON,

Complainant,

v.

ST. JOHN'S DRYDEN REALTY CORP. D/B/A A1 RESTAURANT,

Respondent.

Federal Charge No. 16GB200328

NOTICE AND FINAL ORDER

Case No. 10151462

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 November 30, 2012, 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: 1/14/2013
Bronx, New York

GALEN D. KIRKLAND
COMMISSIONER

ANDREW M. CUOMO
GOVERNOR

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RECOMMENDED FINDINGS OF FACT, OPINION AND DECISION, AND ORDER

Case No. **10151462**

SUMMARY

Complainant alleges that Respondent unlawfully refused to employ him because of his sex. Respondent denies the allegations. Because Complainant has not sustained his burden of proof, the complaint must be dismissed.

PROCEEDINGS IN THE CASE

On October 25, 2011, 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 Michael T. Groben, an Administrative Law Judge ("ALJ") of the Division. The public hearing session was held on September 19, 2012.

Complainant and Respondent appeared at the hearing. The Division was represented by Senior Attorney Anton Antomattei. Respondent was represented by Dirk A. Galbraith, Esq.

FINDINGS OF FACT

1. At all times relevant to the complaint, George Michelis ("Michelis") was the manager of Respondent's restaurant, located in Dryden, New York. (Tr. 9-10, 66-67)

2. In August and through mid-September, 2011, Complainant lived with Christina Daniels ("Daniels"), his girlfriend and the mother of his child, in an apartment at a premises owned by Michelis. (Tr. 10, 11, 22-23, 30-31, 33-34, 42, 66-68, 76-77, 96-98)

3. At all times relevant to the complaint, Michelis lived in a separate apartment at the same premises, and was aware that Complainant and Daniels lived together. (Tr. 34, 42-43, 67-68)

4. From May, 2011, through September, 2011, Daniels was employed as a waitress at Respondent's restaurant. (Tr. 30-31, 49)

5. At all times relevant to the complaint, Jennifer Case ("Case") lived in a separate apartment at the same premises as Complainant and Michelis. (Tr. 11, 33-34, 48)

6. At all times relevant to the complaint, Case was employed the "front end manager" and head waitress at Respondent's restaurant. Her duties included supervising Respondent's hostesses and waitresses, and hiring and firing personnel. Michelis was Case's supervisor. (Tr. 11, 32, 34, 48)

7. Case normally hired front-end personnel, such as servers, upon Michelis' approval. However, on rare occasions, Case hired employees on her own authority. (Tr. 34, 50, 87-92, 95)

8. In August 2011, Complainant discussed with Case the possibility of employment at Respondent's restaurant. Complainant filled out an application, which was delivered to Case. (Tr. 11-12, 25, 32)

9. Complainant had some limited experience at waiting tables. (Tr. 13-14)

10. Pursuant to instructions, Complainant purchased a black shirt and pants, black shoes, a tie, and an apron, in order to be properly attired as a server at Respondent's restaurant. (Tr. 12-13, 20, 27-28)

11. On September 1, 2011, Complainant arrived at Respondent's restaurant, attired for work, to begin his training. (Tr. 14, 39, 44, 49, 55-56)

12. At the public hearing, Case denied that she had advised Complainant that he had been hired and that he should show up for work on September 1. (Tr. 49, 60-61) Respondent's claim that Complainant simply arrived at the restaurant, attired for work, with no prompting from Respondent, and then began working, defies logic and common sense. Case's testimony on this point was not credible.

13. Shortly after Complainant arrived, Michelis arrived at the restaurant. Michelis was surprised to see Complainant working at the restaurant, and he asked Complainant what he was doing there. (Tr. 14, 24, 52, 68-69)

14. When Complainant advised that he was there to work, Michelis advised him that he could not have girlfriends and boyfriends working together at the same position, and that Complainant should leave. (Tr. 52-53, 68-69)

15. Based on my observation of the demeanor and behavior of the witnesses, I do not credit the testimony of Complainant and Daniels that Michelis stated to them that he refused to employ male servers. (Tr. 14, 24, 40)

16. Respondent has a policy against couples working together at the same job at the same time, because of concerns regarding couples bringing their disagreements to work, and arguing at the workplace. (Tr. 53, 57-58, 59, 72-73, 92-94)

17. Michelis offered Complainant positions in Respondent's kitchen or delivery staff, which Complainant declined. (Tr. 52-53, 59, 70-71, 73, 92-93)

18. Complainant then left Respondent's restaurant. (Tr. 14-15, 42, 54)

19. Complainant never filled out a W-4 tax withholding form or an I-9 employment eligibility form. (Tr. 17, 25, 50)

20. Complainant did not know what his hours would be as a server. (Tr. 17, 25)

21. Complainant testified that his name had appeared on Respondent's server work schedule list for the week of September 1. However, no such document was placed in evidence at the hearing, and Michelis and Case credibly denied this claim. (Tr. 14, 16-17, 55, 82-83, 84)

22. In 2010, Respondent employed three male servers. (Respondent's Exhibit 1; Tr. 51, 57, 72) Respondent did not employ any male servers in 2011. (Complainant's Exhibit 3; Tr. 40, 74-76)

23. Respondent did not have a policy against employing male servers. (Tr. 51, 57, 71)

OPINION AND DECISION

N.Y. Exec. Law, art. 15 (the "Human Rights Law") § 296(1)(a) makes it an unlawful discriminatory practice for an employer "because of an individual's...sex... 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."

To make out a prima facie case of unlawful discrimination under the Human Rights Law, a complainant must show (1) he is a member of a protected class; (2) he was qualified for the position; (3) he 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 was male and a member of a protected class, and he appears to have been qualified for the position in question. Complainant suffered an adverse employment action when he was denied employment by Respondent, and Complainant proffered evidence that Respondent had refused to employ him because of his sex. Complainant established a prima facie case.

However, the record evidence demonstrates that Complainant was not denied employment because of his sex, but because of Respondent's policy against employing members of a couple in the same position at the same time. Respondent's policy is based on its experience, and resultant concerns, regarding the employment of couples working in the same job, at the same time. Respondent had, in the past, employed male servers, and Respondent offered

Complainant a different position, which he declined. Respondent did not unlawfully discriminate against Complainant, and 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 hereby is, dismissed.

DATED: November 30, 2012
Bronx, New York

Michael T. Groben
Administrative Law Judge