

**NEW YORK STATE
DIVISION OF HUMAN RIGHTS**

**NEW YORK STATE DIVISION
OF HUMAN RIGHTS**
on the Complaint of

WILLIAM R. JOHNSON,

Complainant,

v.

JOHN BRYSON, NATIONAL HOTEL,

Respondents.

**NOTICE AND
FINAL ORDER**

Case No. 10119554

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 July 9, 2009, by Spencer D. Phillips, 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.

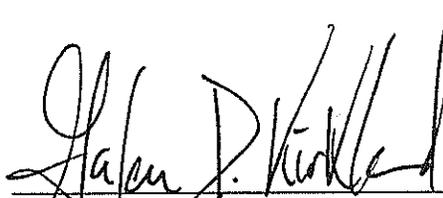
PLEASE BE ADVISED THAT, UPON REVIEW, THE RECOMMENDED ORDER IS HEREBY ADOPTED AND ISSUED BY THE HONORABLE GALEN D. KIRKLAND, COMMISSIONER, AS THE FINAL ORDER OF THE NEW YORK STATE DIVISION OF HUMAN RIGHTS (“ORDER”). In accordance with the Division's Rules of Practice, a copy of this Order has been filed 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: **SEP 18 2009**
Bronx, New York



GALEN D. KIRKLAND
COMMISSIONER

**NEW YORK STATE
DIVISION OF HUMAN RIGHTS**

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HUMAN RIGHTS**

on the Complaint of

WILLIAM R. JOHNSON,

Complainant,

v.

NATIONAL HOTEL; JOHN BRYSON,

Respondents.

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

Case No. 10119554

SUMMARY

Complainant claims that Respondents subjected him to unlawful discrimination on the bases of age, race and disability. Complainant's age and race claims are not supported by the evidence and are dismissed. However, Complainant was subjected to unlawful discrimination because of his disability, and is hereby awarded damages.

PROCEEDINGS IN THE CASE

On August 13, 2007, Complainant filed a verified complaint with the New York State Division of Human Rights ("Division"), charging Respondents 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 Respondents had engaged in unlawful discriminatory practices. The Division thereupon referred the case to public hearing.

After due notice, the case came on for a public hearing before Spencer D. Phillips, an Administrative Law Judge (“ALJ”) of the Division. A public hearing session was held on May 21, 2009. Complainant and Respondents appeared at the hearing. The Division was represented by Richard VanCoevering, Esq. Respondent John Bryson represented both himself and Respondent National Hotel, ‘pro se.’

Permission to file post-hearing briefs was granted. Both sides declined to submit post-hearing briefs.

FINDINGS OF FACT

1. Complainant walks with a pronounced limp, is afflicted with cirrhosis of the liver and high blood pressure, and is diabetic. (Tr. 18-19)
2. Complainant is African-American. (Tr. 18)
3. Complainant was sixty-five years old at all times relevant to this matter. (Tr. 10, 18-19)
4. Respondent Bryson owns Respondent National Hotel, a small hotel offering lodging and restaurant services in Bath, New York. (Tr. 4)
5. For more than twenty years, Respondents have continually posted an advertisement in a local newspaper stating: **“HELP WANTED: National Hotel, 13 E. Steuben Street, Bath. Please apply in person.”** Respondents continued to run this advertisement at the time of the public hearing. (Joint Exh. 2; Tr. 29-30)
6. Respondents continuously interview individuals who respond to the advertisement. Based upon these interviews, Respondents compiled a list of potential hires for all future vacancies. (Tr. 29-31, 34)

7. In or about July 2007, Complainant saw Respondents' advertisement. Complainant called Respondents by telephone and stated that he was interested in a cook position.

Respondents invited Complainant to a job interview. (Tr. 47, 49, 51)

8. Complainant had several years' experience as a cook while serving in the U.S. Army. Complainant also had experience as the primary cook for his family. (Tr. 20)

9. In or about July 2007, Bryson interviewed Complainant for a cook position. (Tr. 19-20, 29, 50)

10. Respondents had no open cook positions at the time of Complainant's interview. However, Bryson interviewed Complainant with the intention of deciding whether to place Complainant on the list of potential hires for future cook vacancies. (Tr. 29, 30-31, 46)

11. During the interview, Bryson made an assumption that Complainant's limp would prevent him from performing the duties of the cook position. Bryson did not engage Complainant in a discussion about his ability to perform the duties of the position with or without reasonable accommodation. (Tr. 34-35, 37, 39-41)

12. Bryson ended the job interview by telling Complainant that there was "no way" that Complainant could perform the duties of the cook position. Complainant asked "You don't think I can do the job?" Bryson again responded that there was "no way" that Complainant could perform the duties of the cook position. Complainant then told Bryson "Thank you very much" and left the hotel. (Tr. 19, 29, 37)

13. During the interview, Bryson also asked about Complainant's age. Complainant responded that he was sixty-five years old. Bryson did not ask any questions relating to Complainant's race. (Tr. 10, 19-20, 24)

14. After Complainant's job interview, Respondents continued posting the above-described job advertisement and interviewing potential workers for cook positions. (Tr. 29-30)

15. Complainant has not engaged in paid employment at anytime during the twenty years prior to the day he interviewed with Respondents. After he left the interview, he submitted job applications to three fast-food restaurants located on the same block as Respondents' hotel. Complainant made no other efforts to look for other job opportunities after interviewing with Respondents. (Tr. 24-25)

16. Complainant felt disappointed and "really bad" as a result of the treatment he received during the job interview. Complainant did not seek medical treatment or psychological counseling as a result of Respondents' actions. (Tr. 26-27)

OPINION AND DECISION

Complainant claims that Respondent subjected him to unlawful discriminatory conduct by refusing to "hire or employ" him because of his age, race, and disability. Human Rights Law §296.1(a). In order to establish a prima facie "failure to hire" case, Complainant must show that: 1) he was a member of a protected class; 2) he applied for and was qualified for a position for which Respondents were seeking applicants; 3) he did not obtain the position; and 4) his failure to obtain the position occurred under circumstances giving rise to an inference of discrimination. *McDonnell Douglass v. Green*, 411 U.S. 792, 802; *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981).

Complainant is a sixty-five year old African-American. Complainant has multiple physical impairments which prevent the exercise of normal bodily functions, including walking. As a result of these impairments, Complainant walks with a limp. Therefore, Complainant is

protected from employment discrimination on the bases of age, race and disability. Human Rights Law §§ 296.1(a); 292.21.

For more than twenty years, Respondents have continuously posted a job advertisement in a local newspaper stating: **“HELP WANTED: National Hotel, 13 E. Stuben Street, Bath. Please apply in person.”** Respondents post this advertisement irrespective of whether any positions are vacant. Respondents regularly interview individuals who respond to the advertisement and thereby compile a list of potential hires for future vacancies.

After seeing Respondents’ job advertisement, Complainant contacted Respondents by telephone and stated that he wanted a job as a cook. Respondents scheduled a time for Complainant to interview with Bryson. On the appointed day and time, Complainant met with Bryson to discuss his interest in working as a cook. Although Complainant had several years’ experience working as a cook, Respondents did not require the possession of specific skills or experience as minimum qualifications for the cook position. Therefore, the proof establishes that Respondent was seeking applicants for the cook position, and that Complainant applied, and was qualified for, a cook position.

Bryson refused to consider Complainant for a cook position. The record contains no evidence suggesting that Complainant’s age or race influenced Bryson’s decision. However, during the job interview, Bryson twice told Complainant that there was “no way” Complainant could perform the duties of the position. Bryson admits that he made these statements because he assumed that Complainant’s limp would prevent him from performing the duties of the job.

The Human Rights Law prohibits an employer from discriminating against a job applicant with a disability unless that disability precludes that applicant from performing the essential duties of the job with or without reasonable accommodation. Human Rights Law

§296.1(a); *Miller v. Ravitch*, 60 N.Y.2d 527, 470 N.Y.S.2d 558 (1983). Bryson did not engage Complainant in a discussion about whether Complainant could perform the duties of the position with or without reasonable accommodation. Rather, after seeing that Complainant had a disability, Bryson abruptly ended the interview and refused to consider Complainant for a cook position. Complainant politely thanked Bryson for the job interview and then left the hotel. After the interview, Respondents continued to seek applicants through the job advertisement described above. Therefore, Complainant failed to receive consideration for a cook position under circumstances giving rise to an inference of disability discrimination.

Complainant satisfied his prima facie burden of disability discrimination. Therefore, the burden shifts to Respondents to present a legitimate, non-discriminatory reason for its action. *Forrest v. Jewish Guild for the Blind*, 3 N.Y.3d 295, 305, 786 N.Y.S.2d 382, 390 (2004).

The record demonstrates that Respondents turned Complainant away because he had a disability. Bryson frankly admitted that he observed Complainant's limp and automatically assumed that Complainant could not perform the duties of the position. Bryson's uninformed, stereotypical assumption about Complainant's disability, and Bryson's resulting refusal to consider Complainant for a cook position, epitomize the type of conduct which the Human Rights Law aims to abolish. Therefore, Respondents failed to present a legitimate, non-discriminatory reason for their action and are liable for engaging in unlawful disability discrimination.

Complainant presented no evidence of lost income. Complainant had not engaged in paid employment at any time during the twenty-year period preceding his job interview with Bryson, and he made only minimal efforts to find employment after the job interview. However, an award for mental anguish is appropriate. Human Rights Law § 297.4(c)(iii). 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 disappointed and "very bad." However, Complainant did not require medical treatment or psychological counseling as a result of Respondents' discriminatory actions. Accordingly, Complainant is awarded \$5,000 as an amount which is reasonably related to the discriminatory conduct he experienced, and is consistent with case law in this regard. *Quality Care, Inc. v. Rosa*, 194 A.D.2d 610, 599 N.Y.S.2d 65 (2d Dep't. 1993) (award could not exceed \$5,000 in absence of, among other things, any medical treatment); *Port Washington Police Dist. v. State Div. of Human Rights*, 221 A.D.2d 639, 634 N.Y.S.2d 195 92d Dep't. 1995) (award of \$5,000 after "brief" discussion by complainant as to her mental anguish).

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, and its agents, representatives, employees, successors, and assigns, shall cease and desist from discriminatory practices in employment; and

IT IS FURTHER ORDERED that Respondent shall take the following action to effectuate the purposes of the Human Rights Law, and the findings and conclusions of this Order:

1. Within sixty (60) days of the date of the Commissioner's Order, Respondent shall pay Complainant, William R. Johnson, the amount of \$5,000 without any withholding or deductions,

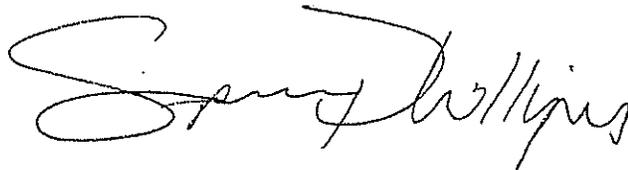
as compensatory damages for the mental anguish he suffered as a result of Respondents' discrimination against him. Interest on the compensatory damage award shall accrue at a rate of nine percent per annum from the date of the Commissioner's Final Order until the date payment is made;

2. The aforesaid payment shall be made by Respondent in the form of a certified check made payable to the order of Complainant, William R. Johnson, and delivered by certified mail, return receipt requested, to his address at 44 Belfast Street, Apt. 1, Bath, New York, 14810. Respondents 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 a place on Respondents' 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 within this Order.

DATED: July 9, 2009
Rochester, New York



Spencer D. Phillips
Administrative Law Judge