

NEW YORK STATE
DIVISION OF HUMAN RIGHTS

NEW YORK STATE DIVISION
OF HUMAN RIGHTS

on the Complaint of

DENNIS T. KEIMEL,

Complainant,

v.

MANCHESTER NEWSPAPERS D/B/A FREE
PRESS,

Respondent.

NOTICE OF FINAL
ORDER AFTER HEARING

Case No. 10102907

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 30, 2007, by Christine Marbach Kellett, an Administrative Law Judge of the New York State Division of Human Rights (“Division”).

PLEASE BE ADVISED THAT, UPON REVIEW, THE RECOMMENDED ORDER IS HEREBY ADOPTED AND ISSUED BY THE HONORABLE KUMIKI GIBSON, COMMISSIONER, AS THE FINAL ORDER OF THE NEW YORK STATE DIVISION OF HUMAN RIGHTS (“ORDER”) WITH THE FOLLOWING AMENDMENT:

- The ALJ’s calculation of damages based on the \$250 awarded in *Batavia Lodge* (a case decided in 1974) is not appropriate in the present day. While this Order rejects the logic and manner in which the emotional distress damages were calculated and assessed, an award of \$7,000.00 is not unreasonable given the duration and severity of the discrimination suffered, and will effectuate the goals

and objectives of the Human Rights Law. \$7,000.00 is, therefore, adopted, and the portion of the Recommended Order entitled "Order" shall remain in full force and effect, and applicable to all parties.

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, this 1st day of May, 2007.



KUMIKI GIBSON
COMMISSIONER

TO:
Dennis T. Keimel
181 Grove Street
Poultney, VT 05764

Manchester Newspapers
Attn: John Manchester
14 East Main Street
Granville, NY 12832

John R. Winn, Esq.
13 North Street
Granville, NY 12832

Hon. Andrew Cuomo, Attorney General
Attn: Civil Rights Bureau
120 Broadway
New York, New York 10271

State Division of Human Rights
Caroline J. Downey, Acting General Counsel
One Fordham Plaza, 4th Floor
Bronx, New York 10458

Caroline J. Downey
Supervising Attorney

Sara Toll East
Chief, Litigation and Appeals

Albert Kostelny
Chief, Prosecution Unit

Peter Buchenholz
Adjudication Counsel

Matthew A. Menes
Adjudication Counsel

Trevor G. Usher
Chief Calendar Clerk

weekly in Granville, New York and distributes the Free Press to the residents of Poultney, Vermont, without charge (Complainant's Exhibit 1).

In 1988 Respondent entered a service contract ("contract") with Direct Response Marketing (U.S.) ("DRMUS") for DRMUS, on behalf of Respondent, to administer a personal ad service through the Respondent's publications (Respondent's Exhibit 1). The service includes publishing personal ads in Respondent's newspapers including the Free Press and individualized voice mail box services (Tr. 169-171, Respondent's Exhibit 1). Revenue shared by both the Respondent and DRMUS was generated when people responded to the ads by calling a designated 900 phone number, and when persons who became members of the service checked into the 900 phone number to get responses to their personal ads (Tr. 168). The revenues generated by the membership and calls to the 900 phone number were divided between Respondent and DRMUS (Tr. 168).

In 2002, TP Partners (T.P.I.) assumed DRMUS' responsibilities for the contract (Respondent's Exhibit 1). The personal ads appeared in the Free Press under a banner of "Talking Personals Brought to You by Manchester Newspapers" (Complainant's Exhibit 2).

The print copy for the personal ads was prepared and submitted by T.P.I. (Complainant's Exhibit 2; Respondent's Exhibit 1).

Under paragraph IV of the contract, Respondent as publisher reserved the right to refuse to run any personal ad it found offensive or detrimental to its image (Respondent Exhibit 1). Manchester recalled instructing DRMUS at the time of the initial contract that it was not to submit personal ads that were wild, not fit for family newspapers, were connected to "S and M" or would embarrass his "parish priest" or the "ecumenical council" (Tr. 160, 179).

I find that the contract for the publication of the personal ad service created a place of public accommodation, as defined by section 292 (9) of the Human Rights Law. I find that the Respondent invited and offered its readers the opportunity to participate in the personal ad service by publishing the personal ads. I find that Respondent contracted for and benefited from the voice mail services connected with the personal ad service ultimately administered by T.P.I.

Complainant is a gay male (Tr. 16; ALJ Exhibit 1). On July 6, 2004, Complainant called the phone number for the personal ad service found in the Free Press in order to place a personal ad. (Tr. 22, 28-29; ALJ Exhibit 1). He spoke with a woman, identified as Naomi, who proceeded to enroll Complainant as a member of the personal ad service, and to charge Complainant's Visa account \$64.41 for "T.P.I Star Manchester News Mem" (Tr. 28-29; Complainant's Exhibit 3).

After enrolling Complainant in the personal ad service, and charging his credit card with the membership fee, Naomi told Complainant the text of his personal ad, which indicated a gay male seeking a gay male, would be rejected as it sought a same sex individual for dating (Tr. 30). Naomi told Complainant Respondent had instructed the personal ad service not to place same sex personal ads in Respondent's newspapers (Tr. 30, 34; ALJ Exhibit 1).

The term "gay" as used in the personal service ad is "a slang term for a homosexual" (Webster's New Word Dictionary, 2nd College Edition, 1982). The term "homosexual" is defined as "of or having sexual desire for those of one's own sex" (Webster's New Word Dictionary, 2nd College Edition, 1982). I find that Complainant's ad, which sought same sex individuals to respond, was not accepted because it implied same sex, that is, homosexual, orientation.

On July 30, 2003, Complainant called the number appearing in the Free Press for the personal ad service as his personal ad had not been run (Tr. 36). The individual answering the

phone identified himself as Brad (Tr. 36). Brad confirmed Complainant's membership in the personal ad service and told Complainant the ad would appear in a week (Tr. 36-39; ALJ Exhibit 1). But Complainant's personal ad did not appear (Tr. 40).

On October 1, 2003, Complainant noted that an ad containing his height, his age, and his word text appeared, except that where he had identified himself as a GWM (gay white male), it read GWF (gay white female) seeking GM (gay male) for dating (Tr. 46-49; Complainant's Exhibit 2). Complainant found this change in his text very insulting (Tr. 46).

Complainant called the same phone number appearing in the Free Press for the personal ad service as he had in the past to complain (Tr. 50). This time he spoke with an individual by the name of Todd, who identified himself as a supervisor (Tr. 50; ALJ Exhibit 1). Todd told Complainant that the personal ad had been incorrectly placed, and was being cancelled as the newspaper would not take same sex ads (Tr. 50; ALJ Exhibit 1). This call is documented in T.P.I records (ALJ Exhibit 5).

Running a personal ad was a "big thing" for Complainant (Tr. 64, 112-113). Poultney Vermont, where he lives is a very small community and finding people of similar interests is difficult (Tr. 64, 112-113). Complainant could not understand why anyone would deny him the right to place a personal ad (Tr. 64, 112-113). Complainant was upset, angry, depressed and embarrassed; and he continues to be upset, angry, and depressed each time he receives the newspaper (Tr. 46, 48, 55-57, 64-65). Complainant had feelings of isolation, loneliness and depression, and these feelings increased as a result of being unable to get his personal ad in the newspaper (Tr. 46, 48, 55-57, 64-65).

Complainant sought advice and counseling from his mother, a mental health professional in Florida, as he had no insurance coverage for counseling (Tr. 56, 127).

In its answer Respondent admitted its policy prior to January 2005 had limited personal ads to men seeking women and women seeking men (ALJ Exhibit 3). Respondent claimed to change the policy as of January 4, 2005, as a result of the Complainant's filing this complaint (Tr. 181-182, 184; ALJ Exhibits 3 and 5; Complainant's Exhibit 5). Manchester specifically remembered he had had a conversation with T.P.I. in which he changed his policy in connection with same sex personal ads after January 4, 2005 (Tr. 194). This is an admission that prior to January 4, 2005, the policy prohibited same sex personal ads.

In a January 4, 2005 letter to the Division, and copied to Complainant, Respondent's attorney advised the Division and the Complainant that the policy had been changed and "if Complainant desires to place a personal ad in the Free Press, he can call the number ..." (Complainant's Exhibit 5). Complainant, although he acknowledged receiving the letter, did not call (Tr. 202).

Although neither party produced witnesses from T.P.I. or its predecessors, employees from T.P.I. were interviewed during the Division's investigation (ALJ Exhibit No. 6). These employees confirmed to the investigator that Respondent had left instructions that no pornographic or sex ads or anything considered "adult" be accepted, and that Respondent may have had a policy against gay personal ads (ALJ Exhibit No. 5). Manchester had admitted to the investigator that Respondent did not print gay ads (ALJ Exhibit No. 5). These admissions corroborated the testimony at the public hearing regarding the Respondent's policy against same sex personal ads.

Complainant's ad still has not appeared, and the membership charge of \$64.41 remains on his credit card statement (Complainant's Exhibit 3). Complainant remains angry, depressed and upset (Tr.64-65).

Manchester reported that he had ceased running personal ads through the service in August or September 2006 as it was no longer profitable (Tr. 172).

OPINION AND DECISION

Complainant charged Respondent with violating the Human Rights Law when its agent refused to submit for publication his same sex personal ad in July 2004. Respondent admitted it had a policy preventing the publication of same sex personal ads. This policy violated the Human Rights Law. Complainant has met his burden of proof regarding liability and is entitled to compensatory damages.

In its analysis of discrimination complaints, New York State follows the federal Title VII analysis set forth in McDonell-Douglas v. Greene, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973). Mittl v. New York State Division of Human Rights, 100 N.Y.2d 326, 763 N.Y.S.2d 518 (2003).

A complainant establishes a prima facie case of discrimination by showing that he is a member of a protected class; that he was qualified, that he was subject to an adverse action under circumstances that create an inference of discriminatory conduct. *See: McDonell-Douglas v. Greene*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973). If the claimant establishes a prima facie case of unlawful discrimination, a burden of production shifts to the respondent. Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 101 S.Ct. 1089; 67 L.Ed.2d 207 (1981). If the respondent produces evidence of a legitimate, nondiscriminatory reason for its actions, the complainant must then show that the proffered reason is a pretext. *See: Miller Brewing Co. v. New York State Division of Human Rights*, 66 N.Y.2d 937, 498 N.Y.S. 2d 776 (1985); *see also: Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 120 S.Ct. 2097, 147 L.Ed.2d 105 (2000).

In connection with public accommodation cases, both an owner and an agent may be held separately and independently liable. Totem Taxi, Inc. v. New York State Human Rights Appeal Board, 65 N.Y.2d 300, 491 N.Y.S.2d 293, 480 N.E.2d 1075 (1985). There is no vicarious liability for an owner: the owner must acquiesce, condone or approve of an agent's discriminatory conduct. Totem Taxi, Inc. v. New York State Human Rights Appeal Board, 65 N.Y.2d 300, 491 N.Y.S.2d 293, 480 N.E.2d 1075 (1985).

Respondent Manchester Newspapers, Inc. contracted with DRMUS to offer its readers a personal ad service, from which service Respondent would receive income. As such, Respondent is an establishment dealing with goods or services and is therefore a place of public accommodation under N.Y. Executive Law section 292 (9). See: U. S. Power Squadrons v. State Human Rights Appeal Bd., 59 NY2d 401, 465 N.Y.S.2d 871, 452 N.E.2d 1199 (1983), *reargument dismissed* 60 N.Y.2d 682, 468 N.Y.S.2d 107, 455 N.E.2d 666, *reargument dismissed* 60 N.Y.2d 702, 468 N.Y.S.2d 1027, 455 N.E.2d 1267.

As a place of public accommodation Respondent may not discriminate on the basis of sexual orientation. N. Y. Executive Law section 296 subpara.2 (a). The Respondent had provided its agent with guidelines for the personal service ads; one of the guidelines provided by Respondent was that the ads had to be 'man seeking woman' or 'woman seeking man,' that is, opposite sex personal ads. Complainant sought to place a personal ad and was denied the public accommodation of publication of his personal ad because the personal ad he sought to place was a same sex personal ad. Complainant wanted to place a same sex personal ad because he is gay.

Sexual orientation is defined under the Human Rights Law as "heterosexuality, homosexuality, bisexuality or asexuality, whether actual or perceived." N.Y. Executive Law section 292 subpara. 27. Complainant self-identifies as a gay male. He is in a protected class in

that he has a perceived sexual orientation, homosexual, and he was denied the public accommodation offered to those not of his perceived sexual orientation by an agent following Respondent's directions to accept only opposite sex personal ads.

At the public hearing, Respondent attempted to suggest that it did not control the actions of T.P.I. employees, even disavowing connection with the phone numbers in the personal service ad located in the Free Press. This argument is not credible given the banner appearing in the Free Press identifying the personal ads as "Talking Personals Brought to You by Manchester Newspapers." This position is further contradicted by the plain language of the contract between the agent and Respondent. Under the contract, Respondent had absolute approval power over the presented copy for the personal service ads. Consistent with that authority, Respondent admitted to providing its agent with guidelines for personal ads: the personal ads must be 'man seeking woman' or 'woman seeking man'. Respondent is liable for the rejection of Complainant's same sex personal ad, because its agent was acting pursuant to its specific direction. See: Totem Taxi, Inc. v. New York State Human Rights Appeal Board, 65 N.Y.2d 300 (1985), 491 N.Y.S.2d 293, 480 N.E.2d 1075; see also: National Organization For Women v. State Division of Human Rights, 34 N.Y.2d 416 (1974), 358 N.Y.S.2d 124, 314 N.E.2d 867 where a newspaper is found liable under NY Executive Law section 296(6) as aider and abettor for publishing illegally discriminatory help wanted ads in separate gender categories.

Respondent's policy of accepting only opposite sex personal ads resulted in unlawful discrimination because individuals seeking to place opposite sex personal ad were treated differently than individuals seeking to place same sex personal ads. The difference in treatment was based upon perceived sexual orientation. As Respondent admitted to a policy that violated

Rights Law have been violated are entitled to damages.

Complainant is entitled to compensatory damages for the actual out of pocket cost he was charged to join the personal ad service. This cost was \$64.41. No interest appeared to have been assessed on the Visa charge. Complainant is also entitled to compensatory damages for emotional pain and suffering. Complainant was verbally denied access to the personal ad service on 3 separate occasions: July 6, 2004, July 30, 2004 and October 1, 2004. Additionally each Friday from July 13, 2004, through January 4, 2005, the Free Press was delivered to Complainant's door without his personal ad. That is a total of 25 weeks during which time his ad did not run, and 25 times Complainant was denied the services offered by Respondent as a public accommodation.

Complainant testified regarding his feelings of isolation in his small Vermont community and the importance to him of placing personal ads in order to meet persons of similar interests. It was a "big thing" that is important for Complainant to place personal ads. He lived in an isolated, small community and meeting persons with similar interests was difficult. Complainant testified that each occasion left him angry, embarrassed, frustrated and distraught. He sought guidance and advice from his mother who is a mental health professional. His sense of isolation and depression increased. He continues to experience anger, embarrassment, and the sense of isolation.

A single incident of a denial of access to a public accommodation on the basis of race resulted in an award of \$250 in 1974. Batavia Lodge No. 196, Loyal Order of Moose v. NYS Division of Human Rights, 35 N.Y.2d 145, 359 N.Y.S.2d 25, 316 N.E.2d 318 (1974). *See also: Father Belle Community Center, Inc. v. NYS Division of Human Rights*, 221 A.D.2d 44, 642

N.Y.S.2d 739 (4th Dept., 1996), *mot. for leave to appeal denied*, 89 N.Y.2d 809, 687 N.E.2d 502, 655 N.Y.S.2d 889 (1997). Complainant experienced 28 separate and distinct incidents of denial of access to the public accommodation offered by Respondent. An award of \$7,000.00, representing 28 times \$250, in compensatory damages for pain and suffering, is consistent with the goals and objectives of the Human Rights Law. Batavia Lodge No. 196, Loyal Order of Moose v. NYS Division of Human Rights, 35 N.Y.2d 145, 359 N.Y.S.2d 25, 316 N.E.2d 318 (1974).

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 Based upon the foregoing Findings of Fact, Decision and Opinion, and pursuant to the provisions of the Human Rights Law, it is

ORDERED that the Respondent shall cease and desist from discriminating in public accommodation; and it is further

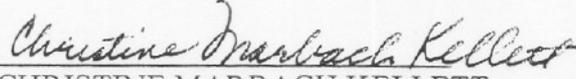
ORDERED that Respondent Manchester Newspapers, Inc., its agents, representatives, employees, successors and assigns shall take the following affirmative actions to effectuate the purposes of the Human Rights Law:

1. Within sixty days of the date of a final Commissioner order, Respondent shall pay to Complainant compensatory damages of \$64.41 for out of pocket expenses. Interest shall accrue at a rate of nine percent per annum from sixty days after the date of the Commissioner's final order until the date payment is made.
2. Within sixty days of the date of a final Commissioner order, Respondent shall pay to Complainant compensatory damages of \$7,000.00 for mental anguish and

humiliation. Interest shall accrue at a rate of nine percent per annum from sixty days after the date of the Commissioner's final order until the date payment is made.

3. The aforesaid payments shall be in the form of certified checks made payable to the order of Complainant, and sent to Complainant at 181 Grove Street, Poultney, Vermont 05764, by registered mail, return receipt requested.
4. Respondent shall simultaneously furnish written proof of the aforesaid payments to Caroline Downey, Acting General Counsel, New York State Division of Human Rights, One Fordham Plaza, 4th Floor, Bronx, NY 10458 by first class mail.
5. Respondent shall cooperate with representatives of the Division during any investigation into compliance with the directives contained herein.

DATED: March 30, 2007
Bronx, New York


CHRISTINE MARBACH KELLETT
Administrative Law Judge