



**Division of
Human Rights**

**NEW YORK STATE
DIVISION OF HUMAN RIGHTS**

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

**BOBBIE JO KIMBALL,
LISA PEREGOY**

Complainant,

v.

**AMERICAN CHILDREN'S CANCER
ASSOCIATION INC., D/B/A GIVE 2 KIDS,**
Respondent.

**NOTICE AND
FINAL ORDER**

Case Nos. **10180759, 10180952**

Federal Charge No. 16GB602162

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 August 17, 2017, by Edward Luban, 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.

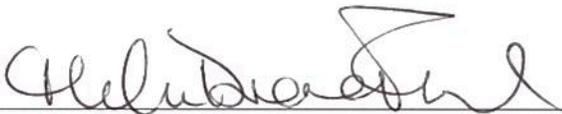
PLEASE BE ADVISED THAT, UPON REVIEW, THE RECOMMENDED ORDER IS HEREBY ADOPTED AND ISSUED BY THE HONORABLE HELEN DIANE FOSTER, COMMISSIONER, AS THE FINAL ORDER OF THE NEW YORK STATE DIVISION OF HUMAN RIGHTS (“ORDER”). In accordance with the Division's Rules of Practice, a copy of this Order has been filed 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 21 2017**
Bronx, New York


HELEN DIANE FOSTER
COMMISSIONER



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**AMERICAN CHILDREN'S CANCER
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Respondent.

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

Case Nos. **10180759, 10180952**

Federal Charge No.: 16GB602162

SUMMARY

Complainants alleged that Respondent posted an online employment advertisement that unlawfully discriminated against candidates with young children. Respondent did not answer the complaint or appear at the hearing, and a default was entered. Complainants have proven their cases and are awarded damages for mental anguish. A civil fine and penalty is also assessed against Respondent.

PROCEEDINGS IN THE CASE

On April 4, 2016 and April 12, 2016, respectively, Complainants Bobbie Jo Kimball and Lisa Peregoy filed verified complaints 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").

Complainant Kimball's complaint, but not Complainant Peregoy's, was dual filed with the United States Equal Employment Opportunity Commission.

After investigation, the Division found that it had jurisdiction over the complaints and that probable cause existed to believe that Respondent had engaged in unlawful discriminatory practices. The Division thereupon referred the cases to public hearing.

After due notice, the cases came on for a consolidated hearing before Edward Luban, an Administrative Law Judge ("ALJ") of the Division. A public hearing session was held on March 13, 2017.

Complainants appeared at the hearing. The Division was represented by Richard J. Van Coevering, Esq. Respondent did not appear. In accordance with Human Rights Law § 297.4(b) and the Division's Rules of Practice, 9 N.Y.C.R.R. §§ 465.11(e) and 465.12(b)(3), the presiding ALJ entered Respondent's default, and the hearing proceeded on the evidence in support of the complaints.

After the presiding ALJ reviewed the hearing record, pursuant to § 465.12(f)(13) of the Rules of Practice, he directed that another hearing session be held to take additional evidence related to Respondent's liability for the alleged unlawful discriminatory practice. (Tr. 41-42; ALJ's Exh. 5)

After due notice, another public hearing session was held on April 18, 2017. Complainants and Mr. Van Coevering appeared. Respondent did not appear. The presiding ALJ noted Respondent's default, and the hearing proceeded on the evidence in support of the complaints.

FINDINGS OF FACT

Complainant Kimball

1. Complainant Bobbie Jo Kimball resides in Fulton, New York. (Tr. 9; ALJ's Exh. 1)
2. Complainant Kimball has twin daughters. In March 2016, Complainant Kimball's daughters were eight years old. (Tr. 13, 19)
3. In March 2016, Complainant Kimball was employed at Fastrac, a gas station and convenience store in Fulton. Complainant Kimball worked from 7:00 a.m. to 3:00 or 3:30 p.m. (Tr. 17-18)
4. Three or four days per week, Complainant Kimball cared for a friend's three-year old daughter in her home. (Tr. 19-20)
5. At the time, Complainant Kimball was concerned that she might lose her job at Fastrac because at times, her children needed her at home. (Tr. 18)
6. On March 29, 2016, Complainant was looking online for a new job. On the website syracuse.craigslist.org ("Craigslist"), Complainant saw an advertisement entitled "Home Secretary – Must Be Experienced – No Young Kids at Home (Syracuse)." (Tr. 11; ALJ's Exh. 1)
7. The advertisement read as follows:

Non-Profit group looking for a Home Secretary to answer incoming calls for our car donation line and then later, returning calls from people who have called after business hours. No cold calling involved.

Must have proven experience professionally answering business calls. Must be very organized.

You will need:

-a phone that the calls can be forwarded to
-a computer with high speed internet.

You will also be required to mail and email tax forms to donors.

We cover all expenses. Great for a STAY AT HOME MOM with OLDER CHILDREN. Sometimes the younger children at home make it very hard to answer calls without distraction.

Please email me your RESUME with a COVER LETTER to Joe at:
jway@give2kids.net

Pay is commission with a guarantee \$350.00 per week (no taxes taken out).
Hours are: M-F 8-5 Sat 9-4

PLEASE ONLY reply if you meet the above qualifications!

(ALJ's Exh. 1)

8. Complainant Kimball had retail experience answering business calls, she was organized, she had a telephone to which calls could be forwarded, and she had a computer with high speed internet. (Tr. 16-17)

9. Complainant Kimball did not apply for the position because the advertisement said, "No Young Kids at Home." (Tr. 12-13; ALJ's Exh. 1)

10. Complainant Kimball felt "really upset and sickened that an employer could tell you that you can't have kids at home to apply for a job." She had "finally found a job" that would have enabled her to spend more time at home with her children. Because of the limitation expressed in the advertisement, she felt that she was not going to find a job that would enable her to be home and see her children more. (Tr. 15, 16)

11. Complainant continued working at Fastrac until May 2016, when she obtained other employment. (Tr.14-15, 19)

Complainant Peregoy

12. Complainant Lisa Peregoy resides in Cicero, New York. (Tr. 22; ALJ's Exh. 2)

13. Complainant Peregoy has a daughter with special needs. In March 2016, Complainant Peregoy's daughter was ten years old. (Tr. 23)

14. Complainant Peregoy has been employed at Syracuse Builders Exchange for 26 years. (Tr. 25-26)

15. In March 2016, Complainant Peregoy was considering a career change. Complainant Peregoy wanted to work fewer hours, and she wanted to spend more time at home with her daughter. (Tr. 23-24, 31)

16. On March 29, 2016, Complainant Peregoy was looking for jobs online and saw the same advertisement on Craigslist that Complainant Kimball saw. (Tr. 22-23, ALJ's Exh. 2)

17. At the time, Complainant Peregoy had 26 years' experience in telemarketing and business correspondence, including answering business calls. Complainant Peregoy also had a telephone to which calls could be forwarded and a computer with high speed internet. (Tr. 30-31)

18. Complainant Peregoy did not apply for the position because the advertisement said candidates could not have young children at home. (Tr. 24)

19. Complainant Peregoy had not looked for a job "in years." She thought the position would be "the perfect job" for her. Complainant Peregoy was "really disappointed" and "depressed" at the limitation in the advertisement. It "really upset" her. She was "on edge" and "a little snappy" with her family. (Tr. 27, 29)

20. Complainant Peregoy continues to be employed with Syracuse Builders Exchange. (Tr. 25, 26)

Respondent

21. From researching "give2kids.net" on the internet, Complainant Peregoy found that Give2Kids was associated with the American Children's Cancer Association. (Tr. 50-52)

22. On May 3, 2016, the Division's Rochester regional office received responses dated April 20, 2016 to both complaints. Both responses were on the letterhead of the American

Children's Cancer Association, identified Respondent as a "Non-profit NJ Corporation (Private). [sic] 501 (c)(3) IRS Exempt Corporation since 1999," and were signed by Joseph Way, director. The letterhead included the website GIVE2KIDS.COM. (Complainant's Exhs. 1, 2)

23. In his responses, Way acknowledged that in March 2016, Respondent placed an advertisement on "Claiigslist" [sic] for a home secretary. Way stated:

[W]e thought this would be a perfect job for a mother who is home with children to be able to work and care for her children. What we found in the women hired that had younger children, it was physically impossible for any of them to perform all day work requirements and meet the needs of their younger children, each quickly ended in termination and understandably so. We still didn't want to give up on all mothers, so we decided to mention that this would be a perfect job for someone with older children.

* * * * *

Unfortunately, it's physically impossible to take care of young children and perform this job at the same time. We are sorry, but this is really [sic], not discrimination.

(Complainants' Exhs. 1, 2)

OPINION AND DECISION

It is an unlawful discriminatory practice for an employer "to print or circulate or cause to be printed or circulated any statement, advertisement or publication . . . which expresses directly or indirectly, any limitation, specification or discrimination as to . . . familial status . . . unless based upon a bona fide occupational qualification." N.Y. Exec. Law, art. 15 ("Human Rights Law") § 296.1(d). Familial status includes "any person who . . . has a child." Human Rights Law § 292.26(a).

Respondent acknowledged placing an advertisement on Craigslist with the heading "No Young Kids at Home." The body of the advertisement reinforced this limitation with the

language “Great for a STAY AT HOME MOM with OLDER children.” This language expresses directly a limitation on and discrimination against candidates with younger children, in violation of Human Rights Law § 296.1(d).

In its responses to the complaints, Respondent asserted that it was “physically impossible” to perform the job in question and care for younger children. However, because Respondent did not appear at the hearing, it failed to present any evidence that the advertisement’s express limitation was based on a bona fide occupational qualification. Therefore, Respondent failed to rebut Complainants’ proof of unlawful discrimination.

Damages

Both Complainants were employed elsewhere at the time they viewed Respondent’s discriminatory advertisement. They continued in that employment after they viewed the advertisement. Neither Complainant lost any pay because of the discriminatory advertisement.

However, Complainants are entitled to recover compensatory damages for mental anguish caused by Respondent’s unlawful conduct. In considering an award of such damages, the Division must be especially careful to ensure that the award is reasonably related to the wrongdoing, supported in the record, and comparable to awards for similar injuries. *State Div. of Human Rights v. Muia*, 176 A.D.2d 1142, 1144, 575 N.Y.S.2d 957, 960 (3d Dept. 1991). Because of the “strong antidiscrimination policy” of the Human Rights Law, a complainant seeking an award for pain and suffering “need not produce the quantum and quality of evidence to prove compensatory damages [she] would have had to produce under an analogous provision.” *Batavia Lodge v. New York State Div. of Human Rights*, 35 N.Y.2d 143, 147, 359 N.Y.S.2d 25, 28 (1974). Indeed, “[m]ental injury may be proved by the complainant’s own testimony, corroborated by reference to the circumstances of the alleged misconduct.” *New York City*

Transit Auth. v. State Div. of Human Rights (Nash), 78 N.Y.2d 207, 216, 573 N.Y.S.2d 49, 54 (1991). The severity, frequency and duration of the conduct may be considered in fashioning an appropriate award. *New York State Dep't of Corr. Servs. v. New York State Div. of Human Rights*, 225 A.D.2d 856, 859, 638 N.Y.S.2d 827, 830 (3d Dept. 1996).

Complainant Kimball felt “really upset and sickened” by the discriminatory language in Respondent’s advertisement. Complainant Peregoy was “really disappointed” and “depressed.” She became “a little snappy” with her family and was “on edge.” In these circumstances, an award of \$1,500.00 to each Complainant for mental anguish is consistent with similar cases and will effectuate the remedial purposes of the Human Rights Law. *See Sullivan v. Animal Fair Media, Inc. and Diamond*, DHR Case No. 10122835 (March 15, 2011).

Civil Fine and Penalty

Human Rights Law § 297.4(c)(vi) authorizes the Division to assess civil fines and penalties, “in an amount not to exceed fifty thousand dollars, to be paid to the state by a respondent found to have committed an unlawful discriminatory act, or not to exceed one hundred thousand dollars to be paid to the state by a respondent found to have committed an unlawful discriminatory act which is found to be willful, wanton or malicious.” Any such civil penalty “shall be separately stated, and shall be in addition to and not reduce or offset any other damages or payment imposed upon a respondent pursuant to this article.” Human Rights Law § 297.4(e). In determining the amount of a civil penalty, the Division should consider the goal of deterrence, the nature and circumstances of the violation, the degree of the respondent’s culpability, any relevant history of the respondent’s actions, the respondent’s financial resources, and other matters as justice may require. *Gostomski v. Sherwood Terrace Apartments*, DHR Case

Nos. 10107538 and 10107540 (November 15, 2007), *aff'd*, *Sherwood Terrace Apartments v. New York State Div. of Human Rights*, 61 A.D.3d 1333, 877 N.Y.S.2d 595 (4th Dept. 2009).

A civil fine is appropriate in this matter. Respondent posted an online advertisement with language that expressly violated Human Rights Law § 296.1(d). Respondent's responses to the complaints demonstrate that its use of the discriminatory language was knowing and intentional. While the record contains no information showing that Respondent has a history of discriminatory actions and no information about its financial resources, I note that Respondent is a non-profit corporation, that it failed to file an answer in accordance with the Human Rights Law and the Rules of Practice, and that it failed to attend the public hearing.

Considering these factors, a civil fine in the amount of \$3,000.00 may act as an inducement to comply with the Human Rights Law in the future, may deter Respondent and others from future discriminatory action, and will present an example to the public that the Division vigorously enforces the Human Rights Law. *See Matter of Li v. New York State Div. of Human Rights*, 147 A.D.3d 1321, 1322, 46 N.Y.S.3d 345, 346 (4th Dept. 2017).

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 60 days of the date of the Commissioner's Order, Respondent shall pay to each Complainant the sum of \$1,500.00, without any withholdings or deductions, as compensatory damages for the mental anguish and humiliation suffered by Complainants as a result of Respondent's unlawful discrimination against them. Interest shall accrue on the award at the rate of nine percent per year from the date of the Commissioner's Order until payment is actually made by Respondent;

2. The aforesaid payments shall be made by Respondent in the form of certified checks made payable to the order of each Complainant, Bobbie Jo Kimball and Lisa Peregoy, and delivered by certified mail, return receipt requested, to Richard J. Van Coevering, Esq., Senior Attorney, New York State Division of Human Rights, Walter J. Mahoney State Office Building, 65 Court Street, Suite 506, Buffalo, New York 14202. Respondent shall furnish written proof to Caroline Downey, Esq., General Counsel, New York State Division of Human Rights, One Fordham Plaza, 4th Floor, Bronx, New York 10458, of its compliance with the directives contained within this order;

3. Within 60 days of the date of the Commissioner's Order, Respondent shall pay a civil fine and penalty to the State of New York in the amount of \$3,000.00. This payment shall be made in the form of a certified check made payable to the order of the State of New York and delivered by certified mail, return receipt requested, to Caroline Downey, Esq., General Counsel, New York State Division of Human Rights, One Fordham Plaza, 4th Floor, Bronx, New York, 10458. Interest on this award shall accrue at a rate of nine percent per year from the date of the Commissioner's Order until payment is actually made by Respondent; and

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

DATED: August 17, 2017
Syracuse, New York

A handwritten signature in black ink, appearing to read 'Edward Luban', with a long horizontal flourish extending to the right.

Edward Luban
Administrative Law Judge