



ANDREW M. CUOMO
GOVERNOR

**NEW YORK STATE
DIVISION OF HUMAN RIGHTS**

**NEW YORK STATE DIVISION
OF HUMAN RIGHTS**

on the Complaint of

**MELISA McCARTHY and JENNIFER
McCARTHY,**

Complainant,

v.

**LIBERTY RIDGE FARM, LLC, CYNTHIA
GIFFORD, ROBERT GIFFORD,**

Respondents.

**NOTICE AND
FINAL ORDER**

Case Nos. 10157952
10157963

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 2, 2014, by Migdalia Pares, 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") WITH THE FOLLOWING
AMENDMENTS:**

- Interest at a rate of nine percent per annum on both the mental anguish award and the civil fine and penalty shall accrue from the date of the Commissioner's Final Order until the date payment is made (not "from sixty days after the date of the Commissioner's Final Order or until the date payment is made," as stated in the Recommended Order).
- A civil fine and penalty of greater than \$50,000 for cases in which a respondent's actions were wilful, wanton and malicious is permissible by statute, not required, as stated in the Recommended Order. *See Human Rights Law § 297.4(c).*

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: **AUG 08 2014**
Bronx, New York

A handwritten signature in blue ink, appearing to read "Helen Diane Foster", is written over a horizontal line.

HELEN DIANE FOSTER
COMMISSIONER



ANDREW M. CUOMO
GOVERNOR

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**MELISA McCARTHY AND JENNIFER
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v.

**LIBERTY RIDGE FARM, LLC, CYNTHIA
GIFFORD, ROBERT GIFFORD,**

Respondents.

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

Case Nos. 10157952; 10157963

SUMMARY

Complainants, a same sex couple, alleged that they were unlawfully discriminated against when Respondents refused to allow them to use their place of public accommodation to be married. Complainants have proven their case and are awarded emotional distress damages. Additionally, a civil fine is assessed against Respondents and made payable to the State of New York.

PROCEEDINGS IN THE CASE

On October 11, 2012, Complainants filed verified complaints with the New York State Division of Human Rights ("Division"), charging Respondent Liberty Farm Ridge, LLC with unlawful discriminatory practices relating to a public accommodation, in violation of N.Y. Exec.

Law, art. 15 (“Human Rights Law”). The Division amended the Complainants to include Cynthia Gifford and Robert Gifford as Respondents.

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

After due notice, the case came on for hearing before Migdalia Parés, an Administrative Law Judge (“ALJ”) of the Division. A public hearing session was held on November 6, 2013.

Complainants and Respondents appeared at the hearing. Complainants were represented by the New York Civil Liberties Union Foundation (“NYCLU”), by Arthur Eisenberg and Mariko Hirose, Esqs. Respondents were represented by the law firm of Cutler, Trainor & Cutler, LLP, by James P. Trainor, Esq.

During the Public Hearing, ALJ Parés made a request for the Respondents to produce a copy of the lease between Liberty Ridge Farm, LLC and Robert and Cynthia Gifford (the “Lease”). On November 18, 2013, Respondents submitted a copy of the Lease. The Lease is hereby received in evidence as ALJ Exhibit 6.

Permission to file post-hearing briefs was granted. (Tr. 178)

On January 8, 2014, parties submitted their respective post-hearing submissions.

After filing the complaint with the Division, Melisa Erwin, changed her name to Melisa McCarthy after her marriage to Jennifer McCarthy. (Tr. 7, 83). The caption is hereby amended to reflect Melisa Erwin’s new surname.

FINDINGS OF FACT

The Parties

1. Complainants Melisa McCarthy, f/k/a Melisa Erwin, and Jennifer McCarthy are a same-sex couple. (ALJ's Exhibit 1)
2. Complainant Melisa McCarthy identifies as bisexual. (ALJ's Exhibit 1; Tr. 44, 79, 80)
3. Complainant Jennifer McCarthy identifies as a lesbian, i.e. as a homosexual. (ALJ's Exhibit 1; Tr. 44, 79, 80)
4. Respondents Robert and Cynthia Gifford ("the Giffords") own and operate a working farm of approximately 100 acres located at 29 Bevis Road in Schaghticoke, New York. (ALJ's Exhibits 1, 4, 5; Complainants' Exhibits 3, 7; Joint Exhibits 1, 2, 3; Respondents' Exhibit 1; Tr. 93, 96, 127)
5. The Giffords have operated the property as a farm and business for most of the 25 years they have lived there. (Tr. 130)
6. A portion of the farm is adjacent to the banks of the Hoosic River and is located on a cliff about fifty feet from the water level. (Tr. 102, 132)
7. In May 2011, the Giffords registered Respondent Liberty Ridge Farm, LLC as a New York State Limited Liability Corporation. (Respondents' Exhibit 1)
8. The Giffords leased their real property located at 29 Bevis Road, Schaghticoke, New York 12154 to Respondent Liberty Ridge Farm, LLC for \$12,000.00 a year. (ALJ's Exhibit 6; Tr. 164)
9. On January 1, 2012, a fifteen-year lease (the "Lease") commenced between the Giffords and Respondent Liberty Ridge Farm, LLC. (ALJ's Exhibit 6)

10. The Leased property is to be used for Liberty Ridge Farm, LLC purposes only. (ALJ's Exhibit 6).

11. The Giffords are the only signatories to the Lease. (ALJ's Exhibit 6)

12. The Giffords annually sign Respondent Liberty Ridge Farm, LLC's financial records. (Tr. 164)

Liberty Ridge Farm, LLC as a Business Open to the Public

13. Liberty Ridge Farm, LLC ("LRF") is open to the public in the fall during its "Fall Festival" for farm-related activities and games including "pick-your-own" blueberries and raspberries during harvest seasons, the sale of pumpkins during the fall. LRF also has a building where members of the public are invited to purchase produce harvested from the farm. (Tr. 103, 111, 136)

14. During its Fall Festival, LRF conducts a number of barnyard activities open to the public, including such things as pig races and pumpkin cannon shows. (Tr. 103)

15. Members of the public can enjoy LRF's corn maze, the entrance of which is a building the Giffords call "The Junction." (Tr. 99, 136)

16. When visiting or attending events at LRF, members of the public park their cars in a parking lot, which can accommodate up to 200 cars. (Tr. 161)

17. LRF is open to the public to host wedding ceremonies, wedding receptions, corporate parties, holiday parties, contracted lunches, dinners, corporate events, and team building events. (Complainants' Exhibit 7B; Tr. 135-36)

18. The Giffords built a 10,000 square foot, three-story structure, in LRF known as Gifford Barn. (Tr. 112, 132-34)

19. Gifford Barn is fenced in and gated. (Tr. 101, 132)

20. Gifford Barn is one of several barns on the LRF property. (Tr. 136)
21. Another barn on the property, which the Giffords call "Farm Market," is located adjacent to the parking lot. The Farm Market is where members of the public purchase produce from the farm. (Tr. 136)
22. Gifford Barn is a mixed-used building with both residential and commercial space. The first floor of Gifford Barn is 2,400 square feet of open space that has banquet tables and can hold contracted events, including wedding-related services. (Complainants' Exhibit 7C; Tr. 133, 136)
23. A room on the second floor of the Gifford Barn is utilized as a bridal suite for wedding receptions. (Tr. 134)
24. The Giffords reside on the third floor and a portion of the second floor of Gifford Barn. (Tr. 134)
25. Wedding ceremonies are held on a cliff over looking the Hoosic River. Wedding receptions are held in the outdoor venue, which the Giffords call the "Event Tent," or in Gifford Barn. (Complainants' Exhibit 7A, 7D; Tr. 101-02)
26. The Event Tent is rented to members of the public in the fall for school field trips and company parties. (Tr. 137)
27. The Event Tent is fenced in. (Tr. 137)
28. In addition to holding wedding ceremonies and receptions, Respondents offer a variety of wedding-related services including a trolley ride from the parking lot to the venue, the greeting of guests, providing a light beverage station to patrons and decorating and setting up services, floral options and event coordination. (Complainants' Exhibits 7A-7G; Tr. 114-15, 140, 142-44, 146)

29. LRF advertises its venue space, wedding-related services and Fall Festival on its website, Facebook page and Twitter pages. The Giffords have also participated in a bridal show. (Complainants' Exhibits 3, 7A-7G; Tr. 116, 118-19, 139, 161)

30. LRF advertises Gifford Barn as being open "year-round for parties, business meetings, holiday gatherings, retreats and weddings." (Complainants' Exhibit 7C)

31. The Bridal Suite is also advertised on LRF's website. (Complainants' Exhibit 7F)

32. Respondent hopes that, through the various advertisement methods used, couples will come to LRF to celebrate their weddings. (Tr. 119)

33. Respondent Cynthia Gifford works as LRF's event coordinator for wedding-related services. (Tr. 143)

34. Through a catering contract, LRF also offers catering services for wedding receptions. (Joint Exhibits 1, 3; Tr. 142)

35. Respondents have employees that work as catering, wait and kitchen staff. (Tr. 144)

36. Individuals and couples interested in the venue spaces can call, send an e-mail for information through the website or visit LRF. (Tr. 140)

37. After an initial e-mail request, Cynthia Gifford typically sends a standardized letter referring the interested party to LRF's website for its catering package and facility and price lists. (Tr. 140-41).

38. After the standardized letter is sent, "the next step is to make an appointment to come see the farm" and talk about pricing and other LRF offerings. (Tr. 141)

39. Cynthia Gifford will then e-mail a contract to the interested parties. This secures the requested date and venue once a signed contract is returned and a deposit is sent. (Tr. 141-42)

40. Respondents, when contacting a couple, do not inquire into their faith, whether the ceremony is a religious one, the couple's position or views on same-sex marriages, or political beliefs. (Tr. 154)

41. Respondents did not know any of the couples who married at their venue before the couples contacted them about having their weddings at LRF. (Tr. 121, 154)

42. Under Respondents' 2012 contract pricing list, services for the wedding ceremony site costs \$1,000.00 but, if the couple also rents a wedding reception venue at LRF, the price of the wedding ceremony site is reduced to \$550. (Joint Exhibit 3; Tr. 140)

43. Under Respondents' 2012 contract pricing list, a June to August wedding reception in the Event Tent costs \$2,250, plus the tent rental. A September or October reception in the Event Tent costs \$4,000, including the tent. (Joint Exhibit 3).

44. The Event Tent accommodates up to 400 people. (Complainants' Exhibit 7G)

45. Under the Respondents' 2012 contract pricing list a reception in the Gifford Barn for up to 150 people, costs \$2,500. (Joint Exhibit 3)

46. Gifford Barn accommodates up to 400 people. (Complainants' Exhibit 7G)

47. Respondents' 2012 contact pricing list included additional amenities couples could purchase, such as fireworks and an additional trolley. (Joint Exhibit 3)

48. A typical wedding ceremony and reception with 100 guests at LRF costs about \$12,000. (Tr. 162)

49. The only wedding-related service LRF does not offer is providing the official for the wedding ceremony. (Tr. 143)

50. As of 2012, 35 couples had held their marriage ceremonies and wedding receptions at LRF. (Tr. 119, 154)

51. All the couples who married at LRF were heterosexual. (Tr. 120)

52. Since the beginning of 2012, LRF received payment for providing wedding-related services from all the couples who married there. (Tr. 154)

53. LRF is not a membership corporation, a non-profit organization, or a religious entity. (Tr. 113)

Complainants Attempt to Rent Venue Space at Liberty Ridge Farm

54. In October 2011, Jennifer McCarthy proposed to Melisa McCarthy (Erwin), while apple picking at an orchard in the greater Albany area. (Tr. 15-16, 58-59)

55. Complainants wanted to continue the farm and “rustic” theme for their wedding because they wanted to incorporate the engagement to “honor the memory.” (Tr. 17, 59)

56. Complainants used the internet to search for “Barn Weddings in Albany, New York.” (Tr. 18, 59)

57. The first website listed was LRF. (Tr. 18-19, 59)

58. On the LRF website, Complainants found pricing packages for wedding services, information regarding catering, and photographs from previously held events and weddings. (Tr. 19)

59. When Complainants found the LRF website, they felt “very grateful and very excited” as if “this was meant to happen.” (Tr. 59-60)

60. Complainants first attempted to contact LRF about renting the wedding and reception venue spaces electronically. Complainants then left a phone message. (Tr. 21-22, 60)

61. In September 2012, Cynthia Gifford returned the phone call and left a voice message, which Melisa McCarthy returned. (Tr. 22, 60)

62. In September 2013, Melisa McCarthy and Cynthia Gifford spoke by telephone. Jennifer McCarthy listened in on the phone conversation. (Tr. 22, 24, 60)

63. During the phone call, Cynthia Gifford and Melisa McCarthy spoke about renting the Gifford Barn. (Complainants' Exhibits 4, 5; Tr. 23-24, 67, 148)

64. Melisa McCarthy expressed an interest in holding a wedding at LRF between June and August, 2013. (Complainants' Exhibits 4, 5; Tr. 65)

65. Cynthia Gifford invited Melisa McCarthy to visit LRF. (Complainants' Exhibits 4, 5; Tr. 23-24, 67, 148)

66. After being invited to visit LRF, Melisa McCarthy referred to her fiancé as "she" when discussing making an appointment to visit, and stated that "she works until 5:30." (Complainants' Exhibits 4, 5; Tr. 23-24, 67)

67. Upon hearing Melisa McCarthy refer to her finance as "she," Cynthia Gifford said there was "a little bit of a problem" because "we do not hold same sex marriages here at the barn." (Complainants' Exhibits 4, 5; Tr. 23-24, 67)

68. Melisa McCarthy first asked Cynthia Gifford whether it was legal for LRF to have a policy which did not allow same-sex marriages in the farm. (Complainants' Exhibits 4, 5; Tr. 67)

69. Cynthia Gifford responded, "Yeah" because "we are a private business." (Complainants' Exhibits 4, 5; Tr. 67)

70. Melisa McCarthy then asked Cynthia Gifford the reason for not allowing same-sex marriages. (Complainants' Exhibits 4, 5; Tr. 67)

71. Cynthia Gifford responded that the reason for the policy was that "it's a decision that my husband and I have made that that's not what we wanted to have on the farm." (Complainants' Exhibits 4, 5; Tr. 67)

72. Melisa McCarthy ended the phone call with Cynthia Gifford by stating that learning of the policy was “very disappointing” and that Complainants “won’t take up anymore of your time.” (Complainants’ Exhibits 4, 5; Tr. 68)

73. The Giffords have a “specific religious belief regarding marriage”, i.e. that it should be between a man and a woman. (Tr. 96, 121, 150)

74. Cynthia Gifford has an objection to having a same-sex wedding ceremony held on the farm. (Tr. 157)

75. Cynthia Gifford concedes that LRF’s policy is to not allow same-sex marriages on their property. (Tr. 156-57)

76. Respondents do not advertise that there is a policy of not allowing same-sex marriages on LRF. (Complainants’ Exhibits 3, 7A-7G; Tr. 116, 118-19, 139, 161).

77. Melisa McCarthy did not visit LRF once Cynthia Gifford disclosed the policy of not allowing same-sex wedding ceremonies on their property. Melisa McCarthy made this decision because the policy specifically excluded Complainants from using the venue for their wedding ceremony and reception. (Tr. 86)

Complainants’ Mental Anguish

78. Complainant Melisa McCarthy found the rejection disappointing and left her feeling “shell-shocked” and “horrible.” (Complainants’ Exhibits 4, 5; Tr. 67, 76)

79. Complainant Jennifer McCarthy found the rejection was “heartbreaking.” (Tr. 28)

80. Jennifer McCarthy had come out as a lesbian and had been getting more acceptance and “feeling a lot more comfortable” with herself. (Tr. 29, 44)

81. Jennifer McCarthy was “very upset by” the policy because it “was kind of blow” to the coming out process. (Tr. 28-29, 44)

82. Complainants were so upset that they stopped looking for wedding venues for several months. (Complainants' Exhibits 3 & 6; Tr. 29-30, 76)

83. It took Complainants additional months to find a farm venue in which to hold their wedding. (Complainants' Exhibits 3 & 6; Tr. 29-30, 76)

84. Complainants looked at venues in a different city because they were uncertain that they "would feel comfortable holding" their wedding in Albany. (Tr. 30)

85. It took Complainants two to three months after the rejection until they began looking for wedding venues in the Albany area again. (Tr.30)

86. On August 3, 2013, Complainants were married at the Olde Tater Barn in Central Bridge, New York. (Tr. 50-51)

OPINION AND DECISION

N.Y. Executive Law, art.15 (Human Rights Law), in pertinent part defines the protected class of sexual orientation as "heterosexuality, homosexuality, bisexuality or asexuality, whether actual or perceived." Human Rights Law § 296.27. Complainant Melisa McCarthy identifies as bisexual and Complainant Jennifer McCarthy identifies as a lesbian, i.e. as a homosexual. Complainants are a same-sex couple which has a perceived sexual orientation, homosexuality. Thus, Complainants are members of a protected class based on their actual and perceived sexual orientation.

N.Y. Executive Law, art. 15 ("Human Rights Law"), in pertinent part, makes it an unlawful discriminatory practice for "...any person, being the owner, lessee, proprietor, manager, superintendent, agent or employee of any place of public accommodation...because of the...sexual orientation...of any person, directly or indirectly, to refuse, withhold from or deny

to such person any of the accommodations, advantages, facilities or privileges thereof...or that the patronage or custom thereat of any person of or purporting to be of any particular...sexual orientation...is unwelcome, objectionable or not acceptable, desired or solicited.” Human Rights Law §296.2(a).

The record shows that Complainants sought to rent Respondents’ property to hold their wedding ceremony and reception. Respondents admitted that they did not allow Complainants to marry at LRF because it is their policy not to allow same-sex marriages.

Respondents assert that they are exempt from Human Rights Law § 296.9 (2) because LRF is not a place of public accommodation.

Human Rights Law § 296.9 (2) states as follows:

The term “place of public accommodation, resort or amusement” shall include, except as hereinafter specified, all places included in the meaning of such terms as: inns, taverns, road houses, hotels, motels, whether conducted for the entertainment of transient guests or for the accommodation of those seeking health, recreation or rest, or restaurants, or eating houses, or any place where food is sold for consumption on the premises; buffets, saloons, barrooms, or any store, park or enclosure where spirituous or malt liquors are sold; ice cream parlors, confectionaries, soda fountains, and all stores where ice cream, ice and fruit preparations or their derivatives, or where beverages of any kind are retailed for consumption on the premises; wholesale and retail stores and establishments dealing with goods or services of any kind, dispensaries, clinics, hospitals, bath-houses, swimming pools, laundries and all other cleaning establishments, barber shops, beauty parlors, theatres, motion picture houses, airdromes, roof gardens, music halls, race courses, skating rinks, amusement and recreation parks, trailer camps, resort camps, fairs, bowling alleys, golf courses, gymnasiums, shooting galleries, billiard and pool parlors; garages, all public conveyances operated on land or water or in the air, as well as the stations and terminals thereof; travel or tour advisory services, agencies or bureaus; public halls and public elevators of buildings and structures occupied by two or more tenants, or by the owner and one or more tenants.

Such term shall not include public libraries, kindergartens, primary and secondary schools, high schools, academies, colleges and universities, extension courses, and all educational institutions under the supervision of the regents of the state of New York; any such public library, kindergarten, primary and secondary school, academy, college, university, professional school, extension course or other education facility, supported in whole or in part by public funds or by contributions solicited from the general public; or any institution, club or place of accommodation which proves that it is in its nature distinctly private.

In no event shall an institution, club or place of accommodation be considered in its nature distinctly private if it has more than one hundred members, provides regular meal service and regularly receives payment for dues, fees, use of space, facilities, services, meals or beverages directly or indirectly from or on behalf of a nonmember for the furtherance of trade or business.

An institution, club, or place of accommodation which is not deemed distinctly private pursuant to this subdivision may nevertheless apply such selective criteria as it chooses in the use of its facilities, in evaluating applicants for membership and in the conduct of its activities, so long as such selective criteria do not constitute discriminatory practices under this article or any other provision of law.

For the purposes of this section, a corporation incorporated under the benevolent orders law or described in the benevolent orders law but formed under any other law of this state or a religious corporation incorporated under the education law or the religious corporations law shall be deemed to be in its nature distinctly private.

No institution, club, organization or place of accommodation which sponsors or conducts any amateur athletic contest or sparring exhibition and advertises or bills such contest or exhibition as a New York state championship contest or uses the words "New York state" in its announcements shall be deemed a private exhibition within the meaning of this section. (emphasis added)

Under Executive Law § 300, the provision of the Human Right Law "shall be construed liberally for the accomplishment of the purposes thereof" (see *U.S. Power Squadrons v. State*

Human Rights Appeal Bd., 59 N.Y.2d 401, 411-12, 465 N.Y.S.2d 871, 876 (1983); *City of Schenectady v. State Div. of Human Rights*, 37 N.Y.2d 421, 428, 373 N.Y.S.2d 59; and *Matter of Cahill v. Rosa*, 89 N.Y.2d 14, 651 N.Y.S.2d 344 (1996)).

A business that provides services to the public even on private premises is a place of public accommodation because “such places are generally open to all comers.” *Cahill*, 89 N.Y.2d 14, 21 (1996).

The record shows that Respondents provide both goods and services to the public. LRF is a working farm that is open to the public for farm-related activities and games including a produce market, a fall festival, and “pick-your own” blueberries and raspberries events. During its Fall Festival, LRF markets to members of the public the use and enjoyment of its corn maze. LRF sells produce to the public that it harvests on the farm. Respondents admit that LRF Farm Market is located on its property and sells produce to members of the public. Thus, Respondents provide both goods and services to the public.

LRF markets reception venues, event locations, catering services, parking spaces, transportation via a trolley from the parking lot to an event venue in the farm and event planning and coordination.

LRF rents its outdoor open spaces and indoor venue spaces as event locations. LRF offers a parking lot that can accommodate up to 200 cars. The indoor spaces marketed to the public include the Events Tent and Gifford Barn. Respondents market their catering services as part of an event and employ workers to work as catering, wait and kitchen staff. Outdoor events are held in the Event Tent, which can accommodate up to 400 people. Indoor events are held in the 2,400 square foot Gifford Barn open banquet space. The Gifford Barn venue offers the rental of a guest bedroom located on its second floor. Respondents offer their property for rent to members

of the public to hold events. The events held at LRF include corporate parties, holiday parties, school field trips, contracted events, corporate events, wedding ceremonies and wedding receptions.

For wedding ceremonies, Respondents offer a site on the banks of the Hoosic River. Respondents offer a variety of wedding-related planning and coordinating services including a trolley ride for the bridal party and guests from the parking lot to the ceremony and reception sites, a service to greet guests and provide a light beverage station, decorating and set up services and fireworks displays. A place of public accommodation does not necessarily only provide goods to the public; it may also provide services. Here, LRF provides both goods and services to the public. Therefore, it is a place of public accommodation.

Respondents argue that Gifford Barn is the private home of the Giffords and not open to the public. However, Gifford Barn is advertised on LRF's website as being open "year-round for parties, business meetings, holiday gatherings, retreats and weddings." The fact that the Giffords also reside at Gifford Barn does not render it private. It is, in fact, a mixed-use building.

Respondent Cynthia Gifford conceded during the public hearing that the first floor of Gifford Barn is used solely for contracted events, such as wedding receptions and corporate events. A room on the second floor is marketed as a guest bedroom and marketed as a bridal suite for wedding events and therefore, is an extension of the business. While the third floor and parts of the second floor of Gifford Barn are private living quarters, this is not enough to suggest that the entire structure is private. A portion of the building is used for business purposes, and is advertised on LRF's website, Facebook Page, and Twitter Pages as a venue space. In fact, LRF LLC leases the property from the Giffords for business purposes. In sum, there is no merit in the argument that LRF is not a place of public accommodation because portions of it are used for

private purposes. Respondents offer the Event Tent which as another venue offered to the public as an event location and offers open space in its property for events. Therefore, LRF is a place of public accommodation.

Third, Respondents asserted that LRF is “distinctly private.”

A place of public accommodation does not include “any institution, club or place of public accommodation which proves that its nature is distinctively private.” Human Rights Law § 296.9. Whether a place of public accommodation is “distinctly private” is a question of fact and depends on “whether the club (1) has permanent machinery established to carefully screen applicants on any basis or no basis at all, i.e., membership is determined by subjective, not objective factors; (2) limits the use of the facilities and the services of the organization to members and bona fide guests of members; (3) is controlled by the membership; (4) is nonprofit and operated solely for the benefit and pleasure of the members; and (5) directs its publicity exclusively and only to members for their information and guidance” *U.S. Power Squadrons*, 59 N.Y.2d 401, 412, 465 N.Y.S.2d 871 (1983).

Respondents do not own and operate a “distinctly private” institution. Respondents have not presented a screening process for applicants other than for sexual orientation. Before entering into a contract, Respondents do not inquire into a couple’s faith, position on same-sex marriage, political beliefs or even whether the wedding ceremony is a religious one. Respondent is a for profit business and directs its publicity to the general public.

LRF is not a membership organization and does not have members to limit the use of facilities and services. In fact, LRF engages in widespread marketing to the general public through advertising at a bridal show and on the internet through its website, Facebook page and Twitter pages. These advertisements are accessible to anyone with internet access. Respondents

conceded that they hope that couples will come to LRF to hold their weddings because of the various internet advertisements it utilizes. That is, LRF is encouraging members of the public to lease the use of its facilities and purchase its services. Thus, there is no exclusivity and LRF is not "distinctly private."

Therefore, Liberty Ridge Farm, LLC is a place of public accommodation and is not exempt from the Human Rights Law.

Human Rights Law §296.9 (2) states that "An institution, club, or place of accommodation which is not deemed distinctly private pursuant to this subdivision may nevertheless apply such selective criteria as it chooses in the use of its facilities, in evaluating applicants for membership and in the conduct of its activities, so long as such selective criteria do not constitute discriminatory practices under this article or any other provision of law. "

Respondents assert that the Giffords hold a "specific religious belief regarding marriage," namely, that it should be between a man and a woman. Respondents thus assert that they apply the selective criteria of only allowing heterosexual couples to rent their facilities for a wedding ceremony and reception.

A place of public accommodation may not discriminate on the basis of sexual orientation. Human Rights Law § 296.2(a). Respondents have a policy of denying same-sex couples the use of their property for wedding ceremonies and argued that they did not deny Complainants a visit to LRF and would have allowed them to hold only their wedding reception at the farm.

Complainants sought to rent event space for their wedding ceremony and reception and were offered an invitation to visit the farm. However, once Cynthia Gifford heard Melisa McCarthy refer to her fiancé as "she," and learned that Complainants were a same-sex couple, she told her that there was "a problem" because LRF has a policy of not allowing same-sex

marriages on the property.

Respondents argue that the invitation to visit LRF was never rescinded and, as such, no unlawful discrimination took place. Cynthia Gifford did offer to Melisa McCarthy an invitation to visit the farm. This invitation was offered before Cynthia Gifford learned that Complainants were a same-sex couple. Immediately upon learning this fact, Cynthia Gifford implicitly rescinded the invitation when she stated LRFs policy is to not allow same-sex marriages on the property. Whether or not an invitation to visit is explicitly rescinded is irrelevant because LRF concedes that its policy is to discriminate based on sexual orientation. Respondents' argument in this regard is misplaced. Complainants were not seeking an invitation to visit the farm and rent a venue for a reception. Instead, they were looking to rent LRF's venue for their upcoming wedding ceremony and reception which was denied because of LRF's policy to not allow same-sex marriages on the property. It is unlawful discrimination to deny a benefit to a member of a protected class based on being a member of that protected class. Here, the policy to not allow same-sex marriage ceremonies on LRF is a denial of access to a place of public accommodation.

Respondents asserted that Complainants' claims against the Giffords individually must be dismissed because they are individual members of LRF LLC. They assert that Complainants' claim is against a public accommodation operated exclusively by LRF LLC and not the Giffords individually. This claim is without merit. The Human Rights Law § 296.2(a) extends liability for discriminatory acts in a place of public accommodation to agents and owners of same. Even using Respondents' own logic that the Giffords are "agents" of LRF LLC, and acted as agents when applying a discriminatory policy to Complainants, they are nonetheless individually liable. The Giffords themselves committed unlawful discrimination against a same-sex couple. *Totem Taxi, Inc. v. New York State Human Rights Appeal Board*, 65 N.Y.2d 300, 491 N.Y.S.2d 293

(1985) (Human Rights Law expressly imposes liability on the person who actually commits the discrimination). However, the role of The Giffords goes beyond that of agents because they are the owners, managers, decision-makers and policy-makers of LRF LLC. The Giffords made the policy to discriminate against same-sex couples and applied it to LRF LLC. The Giffords decided to deny Complainants a place of public accommodation based solely on their sexual orientations. As owners, and not merely agents, the Giffords are individually liable for unlawful discrimination.

Respondents policy of denying access to same-sex couples from marrying on LRF, and applying that policy to Complainants, is unlawful discrimination because same-sex couples are treated differently than opposite-sex couples.

Damages

The “make whole” provisions of the Human Rights Law provide various remedies to restore victims of unlawful discrimination. *See* Human Rights Law § 297.4.c (i)-(iv); *Ford Motor Co. v. E.E.O.C.*, 458 U.S. 219 (1982). “[A]n award of...damages to a person aggrieved by an illegal discriminatory practice may include compensation for mental anguish.” *Cosmos Forms, Ltd. v. New York State Div. of Human Rights*, 150 A.D.2d 442, 541 N.Y.S.2d 50, 51 (2d Dep’t. 1989). That award may be based solely on a complainant’s testimony. *Id.*

Considering the nature and circumstances of the conduct and the degree of Complainants’ suffering, an award of \$1,500 to each aggrieved Complainant for mental anguish each suffered as a result of Respondents’ unlawfully discriminatory conduct is warranted. Further, such an award will effectuate the purposes of the Human Rights Law. *See Wal-Mart Stores East, L.P. v. NYS Div. of Human Rights*, 71 A.D.3d 1452 (4th Dep’t. 2010).

Civil Fine and Penalty

Human Rights Law § 297(4)(e) requires that “any civil penalty imposed pursuant to this subdivision 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.” The additional factors that determine the appropriate amount of a civil fine and penalty are the goal of deterrence; the nature and circumstances of the violation; the degree of respondent’s culpability; any relevant history of respondent’s actions; respondent’s financial resources; and other matters as justice may require. *See, Gostomski v. Sherwood Terr. Apts.*, SDHR Case Nos. 10107538 and 10107540, November 15, 2007, *aff’d*, *Sherwood Terrace Apartments v. N.Y. State Div. of Human Rights (Gostomski)*, 61 A.D.3d 1333, 877 N.Y.S.2d 595 (4th Dep’t. 2009); *119-121 East 97th Street Corp. et. al., v. New York City Commission on Human Rights, et. al.*, 220 A.D.2d 79; 642 N.Y.S.2d 638 (1st Dep’t.1996).

Human Rights Law §297 (4) (c) (vi) directs 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.” Statutory directives require a civil fine and penalty of greater than \$50,000.00 for cases in which a respondent’s actions were willful, wanton, and malicious.

Here, the goal of deterrence warrants a penalty. Respondents’ policy of not allowing same-sex marriages on their property unlawfully discriminated against Complainants solely on the basis of their sexual orientation.

The nature and circumstances of Respondents' violation of the Human Rights Law also warrants a penalty. Respondents admit they have a discriminatory policy based on sexual orientation. Complainants would not have been refused service if they were an opposite-sex couple. Cynthia Gifford disclosed Respondents discriminatory policy of not allowing same-sex marriages on their property once she learned of Complainants' sexual orientation..

The degree of Respondents' culpability also warrants a penalty. The Gifford are owners of the property and the business that is LRF. As such, they directly provide the rules, policies, and guidance upon which LRF is operated. Respondents' policy of not allowing same-sex marriages, and applying that policy to the Complainants, is unlawfully discriminatory conduct.

The record does not furnish evidence of Respondent's relevant history, financial resources, or other matters as justice may require that might also be considered in assessing a penalty.

Accordingly, a civil fine of \$10,000, payable to the State of New York, will effectuate the purposes of the Human Rights Law.

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 Respondents, their agents, representatives, employees, successors, and assigns, shall cease and desist from discriminatory practices in public accommodations; and

IT IS FURTHER ORDERED, that Respondents 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 Final Order, Respondents shall pay Complainants, Melisa McCarty and Jennifer McCarthy, an award of compensatory damages for mental pain and suffering in the amount of \$1,500.00 each. Interest shall accrue at a rate of nine (9) percent per annum from sixty days after the date of the Commissioner's Final Order or until the date payment is made;

2. The aforesaid payment to Complainants shall be made by Respondents in the form of two certified checks made payable to each Complainant, and delivered by certified mail, return receipt requested, to their attorneys Arthur Eisenberg and Mariko Hirose, Esqs at the New York Civil Liberties Union Foundation, 125 Broad Street, 19th Floor, New York, New York 10004. Respondents shall furnish written proof to the N.Y.S. Division of Human Rights, Caroline Downey, Esq., General Counsel, One Fordham Plaza, 4th Fl., Bronx, New York 10458, of its compliance with the directives contained in the Commissioner's Final Order.

3. Within sixty (60) days of the date of the Commissioner's Final Order, Respondents shall pay a civil fine and penalty to the State of New York in the amount of \$10,000.00 for having violated the Human Rights Law. Payment of the civil fine and penalty 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 N.Y.S. Division of Human Rights, Caroline Downey, Esq., General Counsel, One Fordham Plaza, 4th Floor, Bronx, New York 10458. In the event that Respondent fails to make timely payment of any of the aforementioned damages, all amounts shall be due within sixty (60) days of the date of the Commissioner's Final Order.

4. Respondents shall pay post-judgment interest;

5. Within sixty (60) days of the date of the Final Order of the Commissioner, Respondents shall prominently post in its place of business, where members of the public are

likely to view it, a copy of the Division's poster (available at the Division's website at www.dhr.ny.gov under the homepage heading, "News and Information");

6. Respondent shall establish in its place of business both anti-discrimination training and procedures. Respondent shall provide proof of the aforementioned to the Division upon written demand; and

7. Respondents shall cooperate with the representatives of the Division during any investigation into compliance with the directives contained within the Commissioner's final order.

DATED: July 2, 2014
Bronx, New York



Migdalia Parés
Administrative Law Judge