

**NEW YORK STATE
DIVISION OF HUMAN RIGHTS**

**NEW YORK STATE DIVISION
OF HUMAN RIGHTS**

on the Complaint of

LAURENCE MILLER,

Complainant,

v.

DR. LISA FREUDENBERGER,

Respondent.

**NOTICE OF FINAL
ORDER AFTER HEARING**

Case No. 3506631

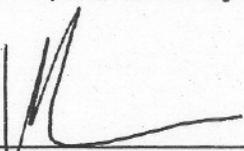
PLEASE TAKE NOTICE that the attached is a true copy of the Alternative Proposed Order, issued on April 24, 2007, by Peter G. Buchenholz, Adjudication Counsel, after a hearing held before Thomas S. Protano, an Administrative Law Judge of the New York State Division of Human Rights ("Division"). An opportunity was given to all parties to object to the Alternative Proposed Order, and all objections received have been reviewed.

PLEASE BE ADVISED THAT, UPON REVIEW, THE ALTERNATIVE PROPOSED 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"). 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 22nd day of May, 2007.



KUMIKI GIBSON
COMMISSIONER

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**STATE OF NEW YORK
DIVISION OF HUMAN RIGHTS**

STATE DIVISION OF HUMAN RIGHTS
on the Complaint of

LAURENCE MILLER,

Complainant,

-against-

DR. LISA FREUDENBERGER,

Respondent.

**ALTERNATIVE PROPOSED
ORDER**

Case No. **3506631**

Complainant alleged that Respondent discriminated against him based on the fact that he utilized a guide dog. The evidence supports a determination that Respondent discriminated against Complainant when it failed to lease him commercial space. Complainant is awarded \$7,500.00 for the mental anguish he suffered.

PROCEEDINGS IN THE CASE

On February 1, 2002, Complainant filed a verified complaint with the State Division of Human Rights ("Division"), charging Respondent with unlawful discriminatory practices in relation to his disability and the leasing of a commercial space in violation of the Human Rights Law of the State of New York.

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

After due notice, the case came on for hearing before Thomas S. Protano, an Administrative Law Judge ("A.L.J.") of the Division. A public hearing was held on August 9, 2006.

Complainant and Respondent appeared at the hearing. Complainant was represented by David G. O'Brien, Esq. and Frank Taddeo, Jr., Esq. Respondent was represented by Tilis & Lake, by, David N. Lake, Esq.

Permission to file post-hearing briefs was granted. Counsels for both parties filed timely briefs.

On February 5, 2007, ALJ Protano issued a recommended Findings of Fact, Decision and Opinion and Order ("Recommended Order"). Therein, the caption was amended to correctly name Respondent.

Objections to the Recommended Order were filed with the Commissioner's Order Preparation Unit by Respondent's counsel dated March 26, 2007.

Because the Human Rights Law has a provision which specifically prohibits discrimination against an individual because he utilizes a guide dog, the complaint is hereby amended to conform the pleadings to the proof. 9 NYCRR § 465.12(f)(14); *see also Town of Lumberland v. State Div. of Human Rights*, 229 A.D.2d 631, 634, 644 N.Y.S.2d 864 (3rd Dept. 1996).

FINDINGS OF FACT

1. Complainant, a licensed psychologist, is congenitally blind. He uses a guide dog. (Tr. 8, 9) Respondent is also a licensed psychologist, who owns a building in Hicksville on South Oyster Bay Boulevard, near the Plainview border. She leases out space in that building. (Complainant's Exhibit 1; Tr.108)

2. In September of 2001, Complainant sought space to begin a private practice as a psychologist. Before that, Complainant had not worked since 1993, when he ceased work at The Lighthouse as director of psychology. At that time, he intended to create a private practice. (Tr.

76, 101) He did not create a practice during the ensuing eight years. From 1993 through 2001, he worked toward that goal. He applied to networks and insurance companies and took classes at Helen Keller Services in order to learn how to function as a psychologist in private practice. (Tr. 75-77) He has since become provider for Magellan and Oxford insurance plans and is a provider for employee assistance programs, but he does not believe he ever received payment for services under any of these plans prior to 2002. (Tr. 78)

3. Complainant learned of an advertisement, placed in the September 2001 edition of "The Nassau County Psychologist," for "prime office space" that, according to the advertisement was a "great layout for a psychotherapist." (Complainant's Exhibit 1; Tr. 7) The advertisement was placed by Respondent. (Tr. 9, 109)

4. Complainant called Respondent to inquire about the space and left a message for Respondent, who returned the call, leaving a message on Complainant's answering machine. (Tr. 9) The message, left on September 19, 2001, indicated Respondent had "various offices available." Complainant returned the call the following day and spoke to Respondent. (Tr. 19, 21)

5. Complainant learned he could rent the furnished space for one day per week at \$175.00 per month. (Tr. 21) While discussing the terms of the possible rental agreement, he mentioned to Respondent that he was blind and used a guide dog. Respondent then expressed concern about the amount of space the guide dog might take up. Complainant explained that the dog could fit under a chair or desk. (Tr. 10, 114) According to Respondent, her "only concern was the size of his guide dog in regard to the size of office if he did groups and it was a large dog I thought he would be uncomfortable." The space was six feet by ten feet. (Tr. 109, 114) Respondent said she brought the size up "as a colleague since I am [a] person who does do groups. I have 10 to

12 people in some of my groups so I realize if you do group work groups can run from small to large...I didn't know at that point what kind of therapist he was..." (Tr. 115-116)

6. Respondent then told Complainant that two other prospective tenants had already looked at the space. She indicated that Complainant would be considered if neither of those individuals rented the space. (Tr. 114-115) Respondent asserted that one of those two prospective tenants took the space. Complainant was not offered any space from Respondent. (Tr. 117)

7. Respondent did not identify the person who took the space and could not remember whether the person took the space full-time or for one day per week. (Tr. 135) It is not Respondent's usual practice to employ a written lease. Instead, she rents space on a month to month, verbal basis. (Tr. 135)

8. After their phone conversation, Respondent asserted that she called Complainant to inform him that the space was no longer available. (Tr. 118) Complainant denied receiving any messages from Respondent after his September 20, 2001, phone conversation. (Tr. 84)

9. Respondent's advertisement continued to run in subsequent editions of "The Nassau County Psychologist." According to Respondent, she paid in advance for the advertisement to run three times "because it was cheaper than just running it once." (Tr. 110) Respondent said that the publication comes out three times per year. She paid for three advertisements on May 24, 2001. (Tr. 111) Complainant submitted publications containing Respondent's advertisement from September 2001, Winter 2002 and Winter 2003, which is beyond the one year term for which Respondent said she paid. (Complainant's Exhibits 1, 3 & 4; Tr. 121)

10. Respondent's testimony cannot be considered credible. The A.L.J. found it to be riddled with inconsistencies. For example, she left Complainant a message indicating she had

“various spaces” but, at hearing, she claimed to have had only one room that was taken before Complainant could rent it. (Tr.122) There were similar inconsistencies regarding the advertisements she placed and her questions about the Complainant’s dog. When her entire testimony is considered, it cannot be credited.

11. Complainant eventually rented an unfurnished space, full-time, in Hicksville, for \$300.00 per month. (Tr. 48, 107) He agreed to a one-year lease, despite the fact that he had no patients, no furniture, and no means to get to that part of Hicksville, which was further from his home and necessitated using the Long Island Railroad. He was unable to use the railroad because, at the time, his guide dog was aging and arthritic and was unable to negotiate the train. (Tr. 48-49, 74) Because of the inconvenience, he never used the Hicksville space. (Tr. 50) Complainant asserted that he would have been able to see six patients a day at \$100.00 each if Respondent had rented him her space. On cross-examination, however, he was asked if his calculations were “speculative in terms of what you might be able to do...” Complainant responded: “the answer is a quick yes.” (Tr. 53, 74)

12. After he was denied the rental in Respondent’s building, Complainant felt “angry” and “humiliated.” The incident caused him to recall prior experiences when he had been subjected to discrimination because of his disability. (Tr. 25) It reminded him of many other situations in which he felt “helpless” and unable to take control because of his disability. (Tr. 66) He stated that he was “very upset” but “not necessarily extremely upset.” (Tr. 65) He did not seek professional counseling to deal with the emotional distress he felt over this particular incident. (Tr. 96)

OPINION AND DECISION

Complainant alleged that Respondent discriminated against him when it failed to rent him

office space because of his guide dog. Because the evidence supports Complainant's allegations, the complaint is sustained.

N.Y. Exec. Law, Art. 15 (Human Rights Law) §296 makes it "an unlawful discriminatory practice for any person engaged in any activity covered by this section to discriminate against a blind person ... on the basis of his or her use of a guide dog, hearing dog or service dog." Human Rights Law § 296.14. It is further an unlawful discriminatory practice for an owner to refuse to rent or lease a commercial space to an individual because of his disability. Human Rights Law § 296.5(b).

In the instant case, it is undisputed that Complainant is blind and uses a guide dog. His qualifications to be a tenant in Respondent's building have, similarly, not been disputed by Respondent, and the fact that he was able to pay \$300.00 per month at a different location establishes that he would have been able to pay \$175.00 per month that Respondent sought. Finally, the circumstances under which Complainant was denied the rental give rise to an inference of discrimination based on Complainant's use of a guide dog – Respondent answered Complainant's call and, the following day, when they spoke, described the space to him; immediately after he mentioned his guide dog, she asserted that there were others interested in the space and did not rent him the space.

The A.L.J. did not credit Respondent's assertion that she rented the room to another tenant. Respondent called Complainant because he showed interest in the premises. She mentioned there were "various offices available." She discussed the details with him. It was not until Complainant mentioned he was blind and used a guide dog that Respondent told him about the obstacles associated with what was now only one available space. She then failed to offer him the space and continued to advertise for tenants. She also said her only concern was "the

size of the guide dog in regard to the size of the office.” She said that with respect to group therapy, she was trying to “find out what kind of a therapist” Complainant was. But she did not ask him what kind of a therapist he was. Instead, she asked whether his dog would fit in the room. Finally, she did not know whether the previous applicant rented the space full-time or for a lesser period of time. If the tenant rented the room for anything less than full-time, it would have been available for Complainant, who only wanted one day per week. It is incongruous that Respondent would know the room was unavailable for Complainant, but she would not know how many days per week the tenant rented that room. Her story is not credible and, in the absence of any other explanation, it is considered a pretext for discrimination. *See Pace College v. Commission on Human Rights*, 38 N.Y.2d 28, 377 N.Y.S.2d 471 (1975).

Complainant suffered emotional distress because of the discriminatory behavior of the Respondent. He recalled past slights and felt upset, angry and humiliated. He is, therefore, entitled to compensatory damages. An award of \$7,500.00 will compensate him for the discriminatory action of Respondent and effectuate the purposes of the Human Rights Law. *Matteo v. New York State Division of Human Rights*, 306 A.D.2d 484 (2nd Dept. 2003) (award of \$7,500 in mental anguish sustained in housing discrimination case); *School Bd. of Educ. of the Chapel of the Redeemer Lutheran Church v. NYCHR*, 188 A.D.2d 653, 591 N.Y.S.2d 531 (2d Dept. 1992) (award reduced to \$7,500 where complainant testified she became concerned about her economic hardship); *Alverson v. State Div. of Human Rights*, 181 A.D.2d 1019, 581 N.Y.S.2d 953 (4th Dept. 1992) (\$7,500 award for mental anguish and humiliation caused by real estate broker who discriminated).

Complainant asserted that he lost business because of Respondent’s actions. He admitted however, that the calculations were speculative. In fact, he had no business prior to this incident

and saw no clients in the year after it. A valid claim for damages under Human Rights Law cannot be based on speculation. There should be some certainty that the gain Complainant hoped for would have occurred in order for him to recover. *Zink v. Mark Goodson Prods., Inc.*, 261 A.D.2d 105, 689 N.Y.S.2d 87 (1st Dept, 1999), *appeal dismissed*, 94 N.Y.2d 858, 704 N.Y.S.2d 533 (1999) (claim for lost profits dismissed since it was “predicated not upon the requisite reasonably certain assessment but upon nothing more than assumptions, speculation and conjecture.”)

Complainant also was forced to pay an extra \$125.00 per month because he rented space for \$300.00 per month when Respondent denied him space in her building. Complainant had access to the office space he rented full-time, however, and his circumstances in this space are not comparable to those he would have operated under had he rented Respondent’s space, where he sought a rental for one day per week. He is not entitled to compensatory damages owing to his out-of-pocket expenses for the difference in rent. Compensatory damages can be awarded “only upon a factual basis appearing in the record.” *State Division of Human Rights (Errol Johnson) v. Maria Stern*, 37 A.D.2d 441, 443; 326 N.Y.S.2d 500, 503 (4th Dept. 1971).

Complainant has not established that the extra rent payment is a result of Respondent’s actions. The rent he did pay was, per day, less than what Respondent sought. Moreover, Complainant has made no showing that he looked for a similar, one day per week, arrangement. He did not find a space comparable to the one Respondent offered. Instead, he made a completely different deal in another area.

ORDER

On the basis of the foregoing Amended 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's motion to dismiss for failure to state a prima facie case is denied; and it is

ORDERED, that Respondent, its agents, representatives, employees, successors and assigns shall cease and desist from all discriminatory practices relating to individuals with guide dogs; and it is

ORDERED, that that within sixty days of the Commissioner's Final Order, Respondent shall pay to Complainant \$7,500.00 as compensatory damages due to his emotional distress. Payment shall be made in the form of a certified check made payable to Complainant and delivered to his attorney, Frank Taddeo, Jr., Esq., at 3 New York Plaza, New York, NY 10004. Interest on the award shall accrue from the date of the Commissioner's Final Order at a rate of nine percent per annum until the date payment is made; and it is

ORDERED, that the Respondent shall simultaneously furnish written proof of the payments to Caroline Downey, Acting General Counsel of the Division and shall cooperate with the Division during any investigation into its compliance with the directives contained in this Order.

DATED: **APR 24 2007**
Bronx, New York

STATE DIVISION OF HUMAN RIGHTS



PETER G. BUCHENHOLZ
Adjudication Counsel