



ANDREW M. CUOMO
GOVERNOR

**NEW YORK STATE
DIVISION OF HUMAN RIGHTS**

**NEW YORK STATE DIVISION
OF HUMAN RIGHTS**

on the Complaint of

ROBERT STARR,

Complainant,

v.

**JEFFREY HURLIMAN, CHEERS 2U LLC D/B/A
HURLIMAN'S PUB,**

Respondents.

**NOTICE AND
FINAL ORDER**

Case No. 10146477

Federal Charge No. 16GB101628

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 November 30, 2012, by Martin Erazo, Jr., an Administrative Law Judge of the New York State Division of Human Rights ("Division"). An opportunity was given to all parties to object to the Recommended Order, and all Objections received have been reviewed.

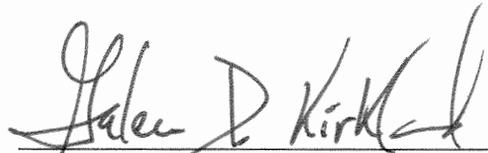
PLEASE BE ADVISED THAT, UPON REVIEW, THE RECOMMENDED ORDER IS HEREBY ADOPTED AND ISSUED BY THE HONORABLE GALEN D. KIRKLAND, COMMISSIONER, AS THE FINAL ORDER OF THE NEW YORK STATE DIVISION OF HUMAN RIGHTS ("ORDER"). In accordance with the Division's Rules of Practice, a copy of this Order has been filed in the offices maintained by the Division at One Fordham Plaza, 4th Floor, Bronx, New York 10458. The Order may be inspected by any

member of the public during the regular office hours of the Division.

PLEASE TAKE FURTHER NOTICE that any party to this proceeding may appeal this Order to the Supreme Court in the County wherein the unlawful discriminatory practice that is the subject of the Order occurred, or wherein any person required in the Order to cease and desist from an unlawful discriminatory practice, or to take other affirmative action, resides or transacts business, by filing with such Supreme Court of the State a Petition and Notice of Petition, within sixty (60) days after service of this Order. A copy of the Petition and Notice of Petition must also be served on all parties, including the General Counsel, New York State Division of Human Rights, One Fordham Plaza, 4th Floor, Bronx, New York 10458. Please do not file the original Notice or Petition with the Division.

ADOPTED, ISSUED, AND ORDERED.

DATED: 1/30/2013
Bronx, New York



GALEN D. KIRKLAND
COMMISSIONER



ANDREW M. CUOMO
GOVERNOR

**NEW YORK STATE DIVISION OF
HUMAN RIGHTS**

on the Complaint of

ROBERT STARR,

Complainant,

v.

**CHEERS 2U LLC D/B/A HURLIMAN'S PUB,
JEFFREY HURLIMAN**

Respondents.

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

Case No. **10146477**

SUMMARY

Respondents refused to consider Complainant for a bartender position because he is male. Complainant is entitled to relief in the form of an award for mental anguish in the amount of \$2,500. However, Complainant did not sustain any lost wages. Respondents would have not hired Complainant even if they not taken into account his protected class. Respondents are also liable to the State of New York in the amount of \$1,000 in civil fines and penalties.

PROCEEDINGS IN THE CASE

On January 31, 2011, Complainant filed a verified complaint with the New York State Division of Human Rights ("Division"), charging Respondents with unlawful discriminatory practices relating to employment in violation of N.Y. Exec. Law, art. 15 ("Human Rights Law").

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

After due notice, the case came on for hearing before Martin Erazo, Jr., an Administrative Law Judge (“ALJ”) of the Division. A public hearing session was held on July 11, 2012.

Complainant and Respondents appeared at the hearing. Complainant was represented by the Law Office of Sanders & Sanders, P.C., Harvey P. Sanders (“Sanders”), Esq., of counsel.

Respondent Jeffrey Hurliman (“J. Hurliman”) appeared pro se and for Respondent Cheers 2U LLC. ALJ Erazo gave J. Hurliman the opportunity, before and during the hearing, to obtain counsel. However, he declined. J. Hurliman chose to proceed pro se because he could not afford to retain counsel. J. Hurliman also understood that the allegations raised in this particular matter might establish personal liability. (Tr. 5-7)

Respondents initially informed the Division that Paul Wells (“Wells”), Esq., was their attorney. (Complainant Exhibit 4; Tr. 26) However, J. Hurliman stated at the public hearing that Wells never represented Respondents, although Wells’ name appeared as Respondents’ counsel in the Division case management system. (ALJ Exhibit 4; Tr. 6)

Pursuant to New York Code of Rules and Regulations (“NYCRR”) § 465.11(c)(2)e, ALJ Erazo received J. Hurliman’s oral answer to the verified complaint. (Tr. 12-18)

FINDINGS OF FACT

Parties

1. Complainant, Robert Starr, is a male. (ALJ Exhibit 1, p.6)

2. Complainant is a skilled bartender with approximately ten years of experience.

(Complainant Exhibit 3; Tr. 31)

3. Respondent Cheers 2U LLC d/b/a Hurliman's Pub is a small establishment that operates as a bar in Cheektowaga, New York. (Tr. 14)

4. Jeffrey Hurliman ("J. Hurliman") is the owner of Cheers 2U LLC d/b/a Hurliman's Pub. (Tr. 4, 12)

5. Respondents have a total of five employees. (Tr. 5)

6. Administrative notice is taken that Respondent J. Hurliman participated in the Division's investigatory and hearing process.

7. Anthony Hurliman (A. Hurliman) is Respondent J. Hurliman's father. (Tr. 27)

8. A. Hurliman is not Respondents' employee but assists his son in the operation of the business including handling Respondents' mail and managing its business ledgers. (Tr. 27)

Barmaid Advertisement

9. On October 29, 2010, Respondents posted an advertisement on the internet website, craigslist.com, seeking an "experienced barmaid." (Complainant Exhibit 1)

10. The October 29, 2010 advertisement stated: "Barmaid positions available for day and night shifts. Must have experience and be dependable. Please apply in person at Hurliman's Pub...no phone calls about this job..." (Complainant Exhibit 1)

11. Respondent J. Hurliman testified that the advertisement was placed on craigslist.com to replace the outgoing bartender, Suzette Kulaga ("Kulaga"). (Tr. 21, 46, 50-51, 53)

12. On October 31, 2010, Complainant responded to the job advertisement by transmitting an email indicating his interest in filling the bartender position. (Complainant Exhibit 2; Tr. 29-30)

13. Complainant attached his resume to the email communication. (Complainant's Exhibit 3; Tr. 30)

14. Complainant did not receive a response to his email inquiry about the job. (Tr. 30-31)

15. In November 2010, Complainant's attorney, Sanders, sent Respondents a certified letter, with a resume, asking them to consider Complainant's application for the bartending position. (Complainant Exhibit 4; Tr. 26-27)

16. On November 8, 2010, A. Hurliman responded to Complainant's attorney letter by leaving a voicemail message for Sanders that stated, in relevant part:

"this is Hurliman from Hurliman's Pub...I received some certified letter from you today... My two sons work the bar at night. They also have a young man who works nights. During the day it's strictly girls and you know I guess that's what they hire for days. So I've been doing this 40 years so I don't know whatever you're trying to pull here. If you go any farther my nephew is Paul Wells from Freeman Wexler... [He] will be the lawyer that that represents me...They can have who they want here during the day. They want women to be behind the bar, they certainly are entitled to that...." (Complainant Exhibit 4; Tr. 26-27, 47, 62)

17. Respondent J. Hurliman removed the advertisement from craigslist.com once he read Sanders' letter because it made him aware that his employment advertisement was unlawful. (Tr. 46)

18. Respondents did not hire a replacement for Kulaga because she decided not to leave. (Tr. 21, 46, 50-51, 53)

Mental Anguish Damages

19. Complainant testified that Respondents' actions made him feel "stressed" and "terrible" because he needed full time employment. (Tr. 38-39) Complainant testified that he was on medication from November, 2010 to June, 2011 for the stress and anxiety in his life due to taking care of his ill parents and the uncertainty in his life. (Tr. 39, 41-43)

OPINION AND DECISION

Amendment

The complaint is amended to properly name Jeffrey Hurliman, individually, as owner of Cheers 2U LLC. The amendment conforms the pleadings to the proof. 9 NYCRR §465.12(f)14.

Jeffrey Hurliman is properly added as a Respondent as per the relation back doctrine. Respondent Jeffrey Hurliman suffered no unfair surprise as to claims of his individual liability. Jeffrey Hurliman is the owner of Cheers 2U LLC and is united in interest with Cheers 2U LLC as the originally named Respondent. Respondent Jeffrey Hurliman made the decision to advertise and only hire females for a bartender position. Respondent Jeffrey Hurliman was clearly on notice that his decision as the owner of Cheers 2U LLC was at issue in this case. Respondent Jeffrey Hurliman participated in the Division's investigatory and hearing process. There is no proof that Respondent Jeffrey Hurliman suffered any prejudice in not having been originally named. *Rio Mar Restaurant et. al. v. State Div. of Human Rights*, 270 A.D.2d 47, 704 N.Y.S. 230 (1st Dept. 2000). Respondent Jeffrey Hurliman is individually liable, as the owner, for his own unlawful discriminatory conduct. *Patrowich v. Chemical Bank*, 63 N.Y.2d 541, 473 N.E.3d 11, 493 N.Y.S. 659 (1984).

Unlawful Employment Advertisement

Under Human Rights Law § 296.1(d), 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, or to use any form of application for employment or to make any inquiry in connection with prospective employment, which expresses directly or indirectly, any limitation, specification or discrimination as to ... sex...unless based upon a bona fide occupational

qualification..."

Respondents owned and operated a small bar with five employees. Respondents had an unlawful screening process in place. Respondents were seeking only female bartenders. On October 29, 2010 Respondents placed an advertisement on an internet website seeking a bartender. Respondents wanted to replace an outgoing female bartender with another female bartender. Respondents did not consider Complainant's application because he is male. Placing specifications on employment positions, such as limiting the gender of the applicants, violates the Human Rights Law unless based upon a bona fide occupational qualification ("BFOQ"). *see* HRL §296.1(a)(d) In this matter, Respondents did not seek a bona fide occupational qualification ("BFOQ") for their bartender position.

Failure to Hire

Respondents clearly violated the Human Rights Law when they failed to consider Complainant's application. However, it is a separate claim altogether whether Respondents would have selected Complainant if he had been properly considered.

Under Human Rights Law §296.1(a), it is an unlawful discriminatory practice for an employer "because of an individual's ... sex ... to refuse to hire or employ or to bar...from employment such individual ..."

A mixed motive case is one in which an employer has illegally taken into account the protected class of the individual, but in which an employer has also established that it would have made the same employment decision even had it not taken the protected class into account. *See Price Waterhouse v. Hopkins*, 490 U.S. 228, 258, 109 S. Ct. 1775, 104 L. Ed. 2d 268 (1989); *New York City Board of Education, Community School District No 1 v. Batista*, 54 N.Y.2d 379, 33384 n.1, 446 N.Y.S.2d 1, 430 N.E. 2d 877 (1981).

Complainant met his initial burden of showing that an illegitimate factor played a motivating or substantial role in Respondents' employment decision. The proof established that Complainant was qualified for the position of bartender. Complainant is a skilled bartender with over ten years of bartending experience. Complainant applied for Respondents' advertised bartender position. Respondents refused to consider him because he is male.

After Complainant established his prima facie case, the burden shifted to Respondents to show that the same employment decision would have been reached in the absence of the impermissible motive. *Allen v. Domus Development Corp.*, 273 AD2d 891, 709 NYS2d 776, 777 (4th Dep't, 2000), quoting *Michealis v. State of New York*, 258 AD2d 693, 694, 685 NYS2d 325, 326 (3d Dep't., 1999), *lv denied* 93 NY2d 806.

Here, Respondents met their burden of showing that Complainant would not have been hired as a bartender.

Respondents clearly articulated a legitimate non-discriminatory reason for their employment decision not to hire Complainant. Although Respondents were seeking female applicants, the proof established that there was no job available. Respondents had sought to replace an outgoing female bartender. However, that female bartender never left. Complainant could not be hired for a job position that was not vacated.

Lost Wage Damages

Complainant did not suffer any lost wages because Respondents did not have a job vacancy.

Compensatory Damages

Human Rights Law § 297.4(c)(iii) entitles a successful Complainant to recover compensatory damages for the discriminatory actions of a Respondent. For compensatory

damage awards, mental 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. N.Y. State Div. of Human Rights (Nash)*, 78 N.Y.2d 207, 216, 573 N.Y.S.2d 49, 54 (1991); *Cullen v. Nassau County Civil Service Commission*, 53 N.Y.2d 452, 442 N.Y.S.2d 470 (1981). Thus, it has been established that an award of compensatory damages to a person aggrieved by an illegal discriminatory act may include some compensation for mental anguish, which may be based solely on the complainant’s testimony. *See Marcus Garvey Nursing Home Inc. v. New York State Div. of Human Rights*, 209 A.D.2d 619, 619 N.Y.S.2d 106 (2d Dept. 1994).

The severity, frequency, and duration of the conduct may be considered in determining an appropriate award for compensatory damages. *New York State Dep’t of Corr. Servs. v. N.Y. State Div. of Human Rights*, 225 A.D.2d 856, 859, 638 N.Y.S.2d 827, 830 (3d Dept. 1996). Similarly, a compensatory award for mental anguish damages must be reasonably related to the wrongdoing, supported in the record, and comparable to awards for similar injuries. *N.Y. State Div. of Human Rights v. Muia*, 176 A.D. 2d 1142, 1144, 575 N.Y.S. 2d 957, 960 (3d Dept. 1991).

Respondents’ violation of the Human Rights Law had a negative effect on Complainant. Complainant testified that Respondents’ unlawful actions hire made him feel “stressed” and “terrible.” Complainant also testified that he was on medication for approximately eight months for stress and anxiety. However, the proof did not establish any connection between the medication and Respondents’ actions.

Given the Respondents’ conduct; the degree of Complainant’s suffering; and the duration of Complainant’s suffering; an award of \$2,500 for emotional distress is appropriate and would

effectuate the purposes of the Human Rights Law of making Complainant whole. *Goffe v. Alterra Healthcare Corp.*, SDHR 10113568 (April 5, 2010) (\$2,500 “nominal damages” for mental anguish based on inference that some damage was incurred by violation of the HRL); *Sevilla v. Gottlieb*, SDHR 10119299 (April 24, 2009) (\$2,500 award based on Complainant’s testimony that she “felt badly,” “hurt” and “disrespected”); *Nuzzo v. Unlimited Childcare, Inc.*, SDHR 6841358 (February 15, 2006) (\$2,500 award based on Complainant’s testimony that she felt “very upset” and “hurt”).

Civil Fines and Penalties

Human Rights Law § 297 (4)(c)(vi) permits 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.”

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.”

There are several factors that determine if civil fines and penalties are appropriate: 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; other matters as justice may require. *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 Dept.1996)

A penalty of \$1,000 is appropriate in this matter. *Jones v. NYS Office of Children &*

Family Services, SDHR Case No. 10137251, November 15, 2007, (\$1,000 civil fine); *Gostomski v. Sherwood Terr. Apts.*, SDHR Case Nos. 10107538 and 10107540, November 15, 2007, (\$8,000 civil fine), *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 Dept. 2009); *also see, H.O.M.E., Inc. v. Mosovich*, SDHR Case No. 10118849 (February 5, 2009) (\$5,000 civil fine); *Wilson-Shell v. Stennett*, SDHR Case No. 10113269, (November 30, 2007) (\$25,000 civil fine); *Simmons v. Stern Properties*, SDHR Case No. 10105887, (June 27, 2007) (\$10,000 civil fine).

The goal of deterrence; Respondents' degree of culpability; and the nature and circumstances of Respondents' violation warrant a penalty. Respondents cannot engage in a practice of hiring on the basis of gender. However, Respondents' actions are mitigated by a number of relevant factors. Respondents are a small employer with limited access to legal resources. Indeed, Respondents did not retain counsel because they could not afford to do so. The evidence suggests that Respondents believed they were acting within the bounds of the law until Complainant's own counsel brought it to their attention.

There was no proof that Respondents were adjudged to have committed any previous similar violation of the Human Rights Law or were incapable of paying any penalty.

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 further discrimination against any potential employee in its process of hiring; and it is further

ORDERED, that Respondents, their 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 the Commissioner's Final Order, Respondents, Cheers 2U LLC, and Jeffrey Hurliman, individually, shall pay to Complainant the sum of \$2,500 as compensatory damages for mental anguish, pain, and suffering the Complainant suffered due to Respondents' unlawful discrimination. Interest shall accrue on this award at the rate of nine percent per annum, from the date of the Commissioner's Final Order until payment is actually made by Respondents.
2. The payments shall be made by Respondents, Cheers 2U LLC, and Jeffrey Hurliman, individually, in the form of certified check, made payable to the order of Robert Starr, and delivered by certified mail, return receipt requested, to Complainant's attorney, Harvey P. Sanders, Esq., 401 Maryvale Drive, Cheektowaga, New York 14225. A copy of the certified checks shall be provided to Caroline Downey, Esq., General Counsel of the New York State Division of Human Rights, at One Fordham Plaza, 4th Floor, Bronx, New York 10458.
3. Within sixty days of the Commissioner's Final Order, Respondents, Cheers 2U LLC, and Jeffrey Hurliman, individually, shall pay to the State of New York, the sum of \$1,000 as a civil fine and penalty for their violations of the Human Rights Law. Interest shall accrue on this award at the rate of nine percent per annum, from the date of the Commissioner's Final Order until payment is actually made by Respondents.
4. The payment of the civil fine and penalty shall be made by Respondents, Cheers 2U LLC, and Jeffrey Hurliman, individually, 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 of the New York State Division of Human Rights, at One Fordham Plaza, 4th Floor, Bronx, New York 10458.

5. Within sixty days of the Commissioner's Final Order, Respondents, Cheers 2U LLC, and Jeffrey Hurliman, individually, and all of Respondents' employees, shall receive training regarding the prevention of unlawful discrimination in accordance with the Human Rights Law. Proof of training shall be provided to Caroline Downey, Esq., General Counsel of the New York State Division of Human Rights, at One Fordham Plaza, 4th Floor, Bronx, New York 10458.

6. Respondents shall cooperate with the representatives of the Division during any investigation into compliance with the directives contained in this Order.

DATED: November 30, 2012
Buffalo, New York

A handwritten signature in black ink that reads "Martin Erazo, Jr." in a cursive script.

Martin Erazo, Jr.
Administrative Law Judge