



ANDREW M. CUOMO
GOVERNOR

NEW YORK STATE
DIVISION OF HUMAN RIGHTS

NEW YORK STATE DIVISION
OF HUMAN RIGHTS

on the Complaint of

MARK J. SULLIVAN,

Complainant,

v.

ANIMAL FAIR MEDIA, INC., WENDY DIAMOND,
INDIVIDUALLY,

Respondents.

NOTICE AND
FINAL ORDER

Case No. 10122835

PLEASE TAKE NOTICE that the attached is a true copy of the Alternative Proposed Order, issued on February 18, 2011, by Peter G. Buchenholz, Adjudication Counsel, after a hearing held before Robert J. Tuosto, 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.

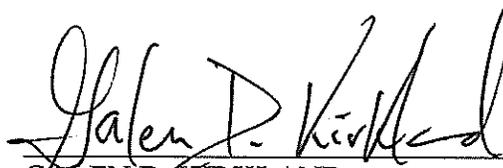
PLEASE BE ADVISED THAT, UPON REVIEW, THE ALTERNATIVE PROPOSED ORDER IS HEREBY ADOPTED AND ISSUED BY THE HONORABLE GALEN D. KIRKLAND, COMMISSIONER, AS THE FINAL ORDER OF THE NEW YORK STATE DIVISION OF HUMAN RIGHTS ("ORDER"). In accordance with the Division's Rules of Practice, a copy of this Order has 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: **MAR 15 2011**
Bronx, New York



GALEN D. KIRKLAND
COMMISSIONER



ANDREW M. CUOMO
GOVERNOR

**NEW YORK STATE
DIVISION OF HUMAN RIGHTS**

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MARK J. SULLIVAN,

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**ANIMAL FAIR MEDIA, INC., WENDY DIAMOND,
INDIVIDUALLY,**

Respondents.

**ALTERNATIVE
PROPOSED ORDER**

Case No. 10122835

SUMMARY

Complainant alleged that Respondent Animal Fair Media, Inc. ("Animal Fair") refused to hire him because of his age. The credible evidence reveals that Respondents did not discriminate against Complainant when Animal Fair declined to hire him, however, Respondents acted in violation of the Human Rights Law when Respondents posted a job vacancy advertisement requesting younger applicants. Complainant suffered mental anguish as a result of Respondents' discriminatory act and is entitled to compensatory damages in the amount of \$1,500.

PROCEEDINGS IN THE CASE

On January 17, 2008, Complainant filed a verified complaint with the New York State Division of Human Rights ("Division"), charging Respondent Animal Fair 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 Respondent Animal Fair 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 Robert J. Tuosto, an Administrative Law Judge ("ALJ") of the Division. A public hearing was held on June 10, 2009.

Complainant and Respondents appeared at the hearing. The Division was represented by Robert Meisels, Esq. Respondent Animal Fair was represented by its corporate president, Wendy Diamond.

On July 20, 2009, ALJ Tuosto issued a recommended Findings of Fact, Opinion, Decision and Order ("Recommended Order"). No objections to the Recommended Order have been received by the Commissioner's Order Preparation Unit.

FINDINGS OF FACT

1. Complainant alleged that Respondent Animal Fair did not to hire him because of his age. (ALJ's Exh. 1)
2. Animal Fair denied unlawful discrimination in its verified answer. (ALJ's Exh. 3)
3. Respondents publish a magazine four times per year which promotes animals, animal welfare issues and rescue groups. Diamond is Animal Fair's president and owner. (Complainant's Exh. 11; Respondent's Exh. 2; Tr. 5, 149, 153, 175)
4. Diamond admits that Respondents employed three workers during the relevant period; Allison Gregg, Alyssa Hastrich and Ashley Van Winkle. (Respondent's Exhs. 1, 2; Tr. 155, 160, 171) Animal Fair attached to its answer an e-mail printout that purports to analyze the number of workers Respondents employed during each quarterly period of 2007 and 2008. However, Respondents only produced into evidence one quarterly tax document for the fourth quarter of

2007. (ALJ's Exh. 3; Respondent's Exh. 2) This document lists Diamond as an employee in addition to the other three workers. Diamond admits she drew a salary from Animal Fair. (Respondent's Exh. 2; Tr. 153, 171)

5. Complainant was born on January 18, 1956, and, during the period relevant to this complaint, was 51 years old. (Complainant's Exh. 9; Tr. 46, 79)

6. Complainant responded to a December 2, 2007, advertisement Respondents placed on craigslist.org, an internet website, seeking a photo archivist at a rate of \$600 for the intended project. (Complainant's Exh. 1; Tr. 97, 100, 146, 157)

7. Complainant was interviewed and, after the interview, Complainant sent Respondents a three-page proposal stating, in pertinent part, that his services for the job would cost \$1,250 as a rough estimate, and that keywording would cost an additional \$1,500. (Complainant's Exhs. 2, 3, 4, 5; Tr. 49, 55, 63-64, 66, 102, 136, 147) Complainant had never previously performed commercial archive work. (Tr. 98-99, 102, 106, 109, 159)

8. Respondents received approximately 30 to 40 responses to the advertisement and interviewed approximately 12 people, including Complainant. However, Respondents did not hire anyone because none of the interviewees fit the requirements of the position. (Tr. 146-47)

9. On December 10, 2007, Respondents placed a second advertisement on craigslist.org for the same position. This advertisement stated that Respondents sought "a younger candidate." Diamond asserted Respondents requested younger candidates because they sought students whom they believed were more likely to be familiar with computer archiving technology, and willing to work for less money. (Complainant's Exh. 7; Tr. 52-53, 69-71, 147-48, 183, 189)

10. Diamond acknowledged that she drafted the advertisement. She testified that she was sorry she wrote "younger" and should have written "junior." (Tr. 189)

11. On reading the second advertisement, Complainant felt his self-confidence undermined. He felt unemployable. The advertisement prompted in him negative feelings regarding his being an “older” father to his 4-year old daughter. (Tr. 89-90)

OPINION AND DECISION

The caption and complaint are amended to read: “Mark J. Sullivan v. Animal Fair Media, Inc., Wendy Diamond, Individually.” See 9 NYCRR §§ 465.4 and 465.20. Diamond authored the discriminatory advertisement and thus is subject to individual liability. See *State Div. of Human Rights v. Koch*, 60 A.D.2d 777 (2d Dept. 2009) (owner who perpetrated unlawful conduct subject to individual liability); *Eastport Assoc., Inc. v. New York State Div. of Human Rights*, 71 A.D.3d 890 (2d Dept. 2010) (same). She may also be held liable as an aider and abettor. See Human Rights Law § 296.6; *Mitchell v. TAM Equities, Inc.*, 27 A.D.3d 703, 707 (2d Dept. 2006) (regarding aider and abettor liability).

Respondents assert that Animal Fair is not a covered employer as defined by the Human Rights Law. The Human Rights Law defines an “employer” as one that “does not include fewer than four or more employees in his employ.” Human Rights Law § 292.5. Diamond admits that Animal Fair employed three workers during the relevant period. “The Division has long taken the position that the shareholders of a corporation will be counted for jurisdictional purposes, if they are treated by the corporation as employees for payroll and taxation purposes” See General Counsel’s Legal Opinions No. 2009-08; see also *Copley v. Morality in Media, Inc.*, 1981 WL 118, *4 (S.D.N.Y.) (“when the person who is allegedly responsible for the discriminatory acts is acting on behalf of the defendant/employer, that person should be included in the jurisdictional¹

¹ In *Arbaugh v. Y & H Corp.*, 546 U.S. 500 (2006), the United States Supreme Court clarified that the number-of-employees requirement used to determine whether or not an employer is covered under federal law is not a jurisdictional requirement. It is a question of the adequacy of the claim for relief on the merits. This holding was adopted into New York law by the Second Department in *Argyle Realty Assoc. v. New York State Div. of Human*

count.”) Accordingly, Diamond, who perpetrated the conduct and who is listed on Animal Fair’s quarterly tax statement as an employee and drew a salary from Animal Fair, is also considered an employee, bringing Animal Fair within the Human Rights Law definition.

The pleadings are hereby amended to conform to the proof by adding a charge of discrimination in violation of Human Rights Law § 296.1(d) which makes it 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 age . . .” *See Exec. Law § 297(4)(a); 9 NYCRR §§ 465.4, 465.12(f)(14) and 465.20; see also Town of Lumberland v. New York State Div. of Human Rights, 229 A.D.2d 631 (3d Dept. 1996) (support of authority to amend complaint to conform pleadings to proof).*

In the instant case, Respondents issued an advertisement explicitly stating that younger applicants were preferred. This is in direct conflict with the prohibition stated in section 296.1(d) and thus, Respondent violated the Human Rights Law when it issued the second craigslist.org advertisement. Despite Diamond’s assertion that when using the term “younger,” she meant to state a preference for students, use of the term “younger” created the potential that the advertisement have a chilling affect against older individuals applying for the position. Interpreting the scope of a similar statute barring discriminatory advertising under the Fair Housing Act (“FHA”), the Second Circuit has held, in pertinent part, that “the statute prohibits all ads that indicate [an illegal] preference to an ordinary reader whatever the advertiser’s intent. . . . [T]he touchstone is . . . the message.” *Ragin v. The New York Times Co.*, 923 F.2d 995, 1000 (2d Cir. 1991); *see also Ragin v. Harry Macklowe Real Estate Co.*, 6 F.3d 898 (2d Cir. 1993).

Rights, 65 A.D.3d 273, 278, n. 1 (2d Dept. 2010).

Moreover, when Complainant viewed the advertisement, he was directly impacted. He credibly testified that he felt his self-confidence undermined. He felt unemployable. The advertisement prompted in him negative feelings regarding his being an "older" father to his 4-year old daughter. It is well-settled that an award of compensatory damages to a person aggrieved by an illegal discriminatory practice may include compensation for mental anguish and that an award may be based solely on the complainant's testimony. *See Cosmos Forms, Ltd. v. State Div. of Human Rights*, 150 A.D.2d 442 (2d Dept. 1989). Accordingly, Complainant is entitled to damages for the mental anguish he suffered. *See Human Rights Law § 297.4(c)*. Considering Complainant's testimony regarding the severity, duration and extent of his suffering, \$1,500 is deemed an appropriate award. *See Ragin v. Harry Macklowe*, 6 F.3d at 907 (\$2,500 deemed appropriate under similar FHA provision for readers who took offense, suffered indignation and humiliation as a result of viewing discriminatory advertisements).

Complainant's claim that Respondents discriminated against him based on his age when they failed to hire him is hereby dismissed. The credible proof demonstrates that Respondents passed Complainant over because he demanded more money than Respondents were willing to pay.

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 the claim regarding employment discrimination based on age be dismissed; and it is further

ORDERED, that claim regarding advertising discrimination based on age be sustained; and it is further

ORDERED, that Respondents, their agents, representatives, employees, successors and assigns shall cease and desist from discriminating in advertising in violation of the Human Rights Law; 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 Final Order of the Commissioner, Respondents shall pay to Complainant the sum of \$1,500, without any withholdings or deductions, as compensatory damages for the anguish he suffered as a result of Respondents' discriminatory actions. Interest on the compensatory damage award shall accrue at a rate of nine percent per annum from the date of the Commissioner's Final Order until the date payment is made.
2. The payment shall be made in the form of a certified check made payable to the order of Complainant, Mark Sullivan, and delivered to Complainant at his address at 1733 78th Street, Apt. 1F, Brooklyn, New York 11214 by certified mail, return receipt requested.
3. Within sixty days of the date of the Commissioner's Final Order, Respondents shall prominently post a copy of the Division's poster (available at the Division website at www.dhr.state.ny.us under the homepage heading, "NYS Division of Human Rights is...") in places on Respondents' premises where employees are likely to view it.
4. Respondents shall simultaneously furnish written proof of their compliance with the directive contained in the Final Order to the New York State Division of Human Rights, Attn: Barbara Buoncristiano, One Fordham Plaza, 4th Floor, Bronx, New

York 10458.

5. Respondents shall cooperate with the Division during any investigation into compliance with the directives contained in the Final Order.

DATED: February 18, 2011
Bronx, New York.



Peter G. Buchenholz
Adjudication Counsel