

**NEW YORK STATE
DIVISION OF HUMAN RIGHTS**

**NEW YORK STATE DIVISION
OF HUMAN RIGHTS**

on the Complaint of

**ZHENYU SUN and WEI HUANG INDIVIDUALLY,
AND ON BEHALF OF HER MINOR CHILD
XINYE FENG,**

Complainant,

v.

LUCKY JOY RESTAURANT, INC.,

Respondent.

**NOTICE AND
FINAL ORDER**

Case Nos. 10126349
10126474

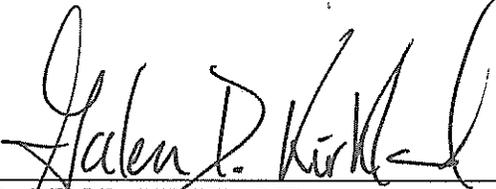
PLEASE TAKE NOTICE that the attached is a true copy of the Recommended Findings of Fact, Opinion and Decision, and Order (“Recommended Order”), issued on July 16, 2009, by Robert J. Tuosto, an Administrative Law Judge of the New York State Division of Human Rights (“Division”). An opportunity was given to all parties to object to the 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: **OCT 02 2009**
Bronx, New York



GALEN D. KIRKLAND
COMMISSIONER

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LUCKY JOY RESTAURANT, INC.,

Respondent.

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

Case Nos. 10126349, 10126474

SUMMARY

Complainants alleged that they were denied service at Respondent's restaurant because they are Falun Gong practitioners. Respondent defaulted. Complainants have proven their cases and are hereby awarded damages.

PROCEEDINGS IN THE CASE

On June 16, 2008 and June 24, 2008, Complainants filed verified complaints with the New York State Division of Human Rights ("Division"), charging Respondent with unlawful discriminatory practices relating to public accommodation in violation of N.Y. Exec. Law, art. 15 ("Human Rights Law").

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

On May 21, 2009, the complaint under case number 10126474 was amended to name both Complainant Huang and her minor child. (ALJ Exh. 5)

On June 2, 2009, Respondent's attorney, Jin Huang, transmitted to the undersigned a 'Consent to Change Attorney' signed by both Mr. Huang and one Xiao Rong Wu, acting "on behalf of" Respondent; said document did not name an incoming attorney as his replacement. (ALJ Exh. 6)

After due notice, the case came on for hearing before Robert J. Tuosto, an Administrative Law Judge ("ALJ") of the Division. A public hearing session was held on June 3, 2009.

Complainant appeared at the public hearing. The Division was represented by Bellew S. McManus, Esq. Respondent did not appear at the public hearing despite being served with a Notice of Hearing dated May 28, 2009. (ALJ Exh. 5) The Notice of Hearing was not returned to the Division by the U.S. Postal Service and is, therefore, presumed received. In accordance with 9 N.Y.C.R.R. § 465.11 (e) of the Division's Rules of Practice, the Respondent's default was noted and the public hearing proceeded on the complaint.

Permission to file a post-hearing brief was granted. The Division did not file a post hearing brief.

FINDINGS OF FACT

1. Complainants alleged that they were denied service at Respondent's restaurant because they are Falun Gong practitioners. (ALJ Exhs. 1, 2)
2. Respondent denied unlawful discrimination in its verified Answer. (ALJ Exh. 7)

Background

3. Falun Gong is a spiritual discipline or practice containing several components: meditation practice, slow motion exercise, and a system of beliefs laid out in a primary text known as 'Zhuan Falun'. Zhuan Falun centers on the principles of truthfulness, compassion and tolerance. (Tr. 27-28)

4. Complainant Sun has been a Falun Gong practitioner since 1977. Complainant Huang has been a Falun Gong practitioner since 1997. (Tr. 43, 53-54, 63)

An Unrelated Falun Gong Practitioner Suffers Unlawful Discrimination by Respondent

5. I credit the testimony of another Falun Gong practitioner, Amy Xue. On May 31, 2008 Xue and her party attended a Falun Gong rally which was located one or two blocks from Respondent's restaurant. Subsequently, Xue, and her party were refused service and ushered out of Respondent's restaurant after an employee inquired if they were Falun Gong practitioners. Xue, a Falun Gong practitioner for over 11 years, did not know Complainants. (Tr. 69-79)

The Events of June 1, 2008

6. On June 1, 2008 there had been a Falun Gong rally near a public library in Flushing, New York. (Tr. 43-44, 57)

7. At midday on June 1, 2008, Complainants entered Respondent's restaurant in Flushing to have lunch. Respondent's restaurant is across the street from the public library. Complainant Sun was wearing a t-shirt which bore the following in both English and Chinese characters: "FALUN DAFA IS GOOD"; underneath this phrase were the words "Truthfulness Compassion Tolerance" (Complainant's Exh. 1; Tr. 34-36, 52, 57, 64)

8. Complainants were met by two employees of Respondent who told Complainants, "We

are not going to serve food to you” because they did not serve food to Falun Gong members. Both employees identified themselves as being Chinese, and said that the decision not to serve Complainants was made by the owner. When Complainants asked to speak to the owner they were told he was not present. Both employees ushered Complainants out of Respondent’s restaurant. (Tr. 37-40, 48-50, 52-55, 58-62)

9. The minor child Xinye Feng was scared and crying when Complainants were ushered out of Respondent’s restaurant. (Tr. 40, 62)

10. Complainants attempted to engage both employees in a discussion in front of the restaurant after they were ushered out but were told “Don’t stay any longer. We want to do business.” (Tr. 61)

11. Complainant Sun credibly testified that it was a “very unpleasant” and “humiliating” experience to be ushered out of Respondent’s restaurant. Complainant Huang was “angry” as a result of this treatment, and was hurt because her daughter was crying. (Tr. 51, 54, 62)

OPINION AND DECISION

Respondent’s Default

After due notice, Respondent failed to appear before the Division to defend against the complaint. Pursuant to 9 NYCRR § 465.12 (b)(3), the public hearing proceeded on the evidence in support of the complaint. It is also noted that Respondent defaulted because it failed to answer the complaint in accordance with the Division’s Rules of Practice. 9 NYCRR § 465.11 (e).

Unlawful Discrimination

The 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, directly or indirectly, to withhold from or deny to any person the accommodations, advantages, facilities or privileges thereof on account of his or her creed. Human Rights Law § 296.2 (a).

Respondent's restaurant qualifies as a place of public accommodation under the Human Rights Law. Human Rights Law § 292.9.

Here, the credible and un rebutted proof showed that Respondent withheld or denied from Complainants the accommodations, advantages, facilities or privileges of its restaurant solely on account of their evident Falun Gong creed. Therefore, Respondent has violated the Human Rights Law.

Damages

A complainant is entitled to recover compensatory damages for mental anguish caused by a respondent's unlawful conduct. In considering an award of compensatory damages for mental anguish, the Division must be especially careful to ensure that the award is reasonably related to the wrongdoing, supported in the record and comparable to awards for similar injuries. *State Div. of Human Rights v. Muia*, 176 A.D.2d 1142, 1144, 575 N.Y.S.2d 957, 960 (3d Dept. 1991).

Because of the "strong antidiscrimination policy" of the Human Rights Law, a complainant seeking an award for pain and suffering "need not produce the quantum and quality of evidence to prove compensatory damages he would have had to produce under an analogous provision." *Batavia Lodge v. New York State Div. of Human Rights*, 35 N.Y.2d 143, 147, 359 N.Y.S.2d 25, 28 (1974). Indeed, "[m]ental injury may be proved by the complainant's own testimony, corroborated by reference to the circumstances of the alleged misconduct." *New York City Transit Auth. V. State Div. of Human Rights (Nash)*, 78 N.Y.2d 207, 216, 573 N.Y.S.2d 49, 54 (1991). The severity, frequency and duration of the conduct may be considered in fashioning

an appropriate award. *New York State Dep't of Corr. Services v. New York State Div. of Human Rights*, 225 A.D.2d 856, 859, 638 N.Y.S.2d 827, 830 (3d Dept. 1996).

Complainant Sun credibly testified that being thrown out of Respondent's restaurant was a "very unpleasant" and "humiliating" experience. Likewise, Complainant Huang was "angry" as a result of this treatment, and hurt that her daughter was crying. *Ante* at ¶¶ 8, 10. As a result, each Complainant is awarded \$7,000 for emotional pain and suffering. Such an award will effectuate the goals and objectives of the Human Rights Law, and is consistent with prior awards of the Commissioner in public accommodation cases. *See Keimel v. Manchester Newspaper d/b/a Free Press*, DHR Case No. 10102907 (May 1, 2007); *Swails v. Classic Fashion Resources, Inc., d/b/a Pittsford Pendleton Shop*, DHR case No. 10115313 (February 6, 2008).

ORDER

On the basis of the foregoing Findings of Fact, Opinion and Decision, and pursuant to the provisions of the Human Rights Law and the Division's Rules of Practice, it is hereby

ORDERED, that Respondent, and its agents, representatives, employees, successors, and assigns, shall cease and desist from discriminatory practices in public accommodation; and

IT IS FURTHER ORDERED that Respondent shall take the following action to effectuate the purposes of the Human Rights Law, and the findings and conclusions of this Order:

1. Within sixty (60) days of the date of the Commissioner's Order, Respondent shall pay Complainant, Zhenyu Sun, an award of compensatory damages in the amount of \$7,000. Respondents shall pay prejudgment interest on said award at the rate of nine per cent per annum from the date of the Commissioner's Order;

2. Within sixty (60) days of the date of the Commissioner's Order, Respondent shall pay

Complainant, Wei Huang, an award of compensatory damages in the amount of \$7,000.

Respondents shall pay prejudgment interest on said award at the rate of nine per cent per annum from the date of the Commissioner's Order;

3. Within sixty (60) days of the date of the Commissioner's Order, Respondent shall pay Complainant, Xinye Feng, an award of compensatory damages in the amount of \$7,000.

Respondents shall pay prejudgment interest on said award at the rate of nine per cent per annum from the date of the Commissioner's Order;

4. Respondent shall pay post-judgment interest;

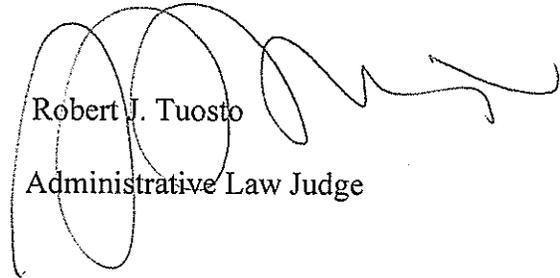
5. The aforesaid payments shall be made by Respondent in the form of certified checks made payable to the order of Complainants Zhenyu Sun, Wei Huang and Xinye Feng, and delivered by certified mail, return receipt requested, to the New York State Division of Human Rights, Office of Genral Counsel, One Fordham Plaza, 4th Floor, Bronx, New York 10458. Respondent shall furnish written proof to the N.Y.S. Division of Human Rights, Office of General Counsel, One Fordham Plaza, 4th Fl., Bronx, New York 10458, of its compliance with the directives contained in this Order;

6. Within sixty days of the date of the Final Order of the Commissioner, Respondent shall prominently post a copy of the Division's poster (available at the Division's website at www.dhr.state.ny.us under the homepage heading, "NYS Division of Human Rights Is...") in its restaurant where both patrons and employees are likely to view it. Respondent shall also establish in its workplace both anti-discrimination training and procedures. Respondent shall provide proof of the aforementioned to the Division upon written demand.

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

DATED: July 16, 2009

Bronx, New York



Robert J. Tuosto
Administrative Law Judge