



**Division of
Human Rights**

**NEW YORK STATE
DIVISION OF HUMAN RIGHTS**

**NEW YORK STATE DIVISION
OF HUMAN RIGHTS**

on the Complaint of

THOMAS R. WILLARD,

Complainant,

v.

**ROC HARD ENTERTAINMENT, LLC D/B/A
COMEDY @ THE CARLSON,**

Respondent.

**NOTICE AND
FINAL ORDER**

Case No. 10195576

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 June 9, 2021, by Michael T. Groben, 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.

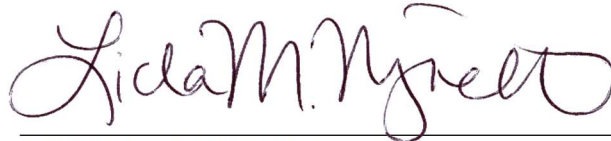
PLEASE BE ADVISED THAT, UPON REVIEW, THE RECOMMENDED ORDER IS HEREBY ADOPTED AND ISSUED BY THE HONORABLE LICHA M. NYIENDO, COMMISSIONER, AS THE FINAL ORDER OF THE NEW YORK STATE DIVISION OF HUMAN RIGHTS (“ORDER”). In accordance with the Division's Rules of Practice, a copy of this Order has been filed 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: **August 2, 2021**
Bronx, New York

A handwritten signature in dark ink, reading "Licha M. Nyiendo". The signature is written in a cursive style with a horizontal line underneath it.

LICHA M. NYIENDO
COMMISSIONER



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**ROC HARD ENTERTAINMENT, LLC D/B/A
COMEDY @ THE CARLSON,**

Respondent.

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

Case No. **10195576**

SUMMARY

Complainant alleges that Respondent subjected him to unlawful discriminatory treatment when it refused to provide him with adequate sign language interpretation services or closed captioning services during performances at Respondent's comedy club. Complainant also alleges that Respondent retaliated against him by banning him from the club. Complainant has failed to sustain his burden of proof, and the complaint is dismissed.

PROCEEDINGS IN THE CASE

On July 9, 2018, Complainant filed a verified complaint with the New York State Division of Human Rights ("Division"), charging Respondent Comedy at the Carlson with

unlawful discriminatory practices relating to public accommodation in violation of N.Y. Exec. Law, art. 15 (“Human Rights Law”).

On July 24, 2018, the Division amended the complaint to identify Respondent as “ROC Hard Entertainment, LLC d/b/a Comedy @The Carlson.” (ALJ Exhibit 2)

After investigation, the Division found that it had jurisdiction over the complaint and that probable cause existed to believe that Respondent 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 Michael T. Groben, an Administrative Law Judge (“ALJ”) of the Division. The public hearing was held virtually on January 27, 2021.

Complainant and Respondent appeared at the hearing. The Division was represented by Senior Attorney Catherine Ostrowski-Martin, Esq. Respondent was represented by Woods, Oviatt & Gilman, LLP (Lorisa D. LaRocca, Esq., of counsel).

The parties were granted permission to submit posthearing briefs. Respondent submitted a post hearing brief. On March 27, 2021, Complainant submitted an email with a letter attachment, which purported to provide additional testimony regarding his case. This document was not considered.

FINDINGS OF FACT

1. Complainant is profoundly deaf. (Tr. 11-12)
2. He has performed as a comedian since July 2016. (Tr. 11-12)
3. Respondent operates Comedy @ The Carlson, a comedy club in Rochester, New York. (ALJ Exhibit 2)

4. Mark Ippolito (“Ippolito”) has been Respondent’s director of operations since its opening in 2017. (Tr. 55, 93)
5. Cynthia Gilchrist (“Gilchrist”) is an interpreter of American Sign Language (“ASL”). Gilchrist is a staff interpreter for the Rochester Institute of Technology. She has provided interpretation services for several major comedy acts. (Tr. 39-40; Respondent’s Exhibit 16)
6. Mary Wambach has been profoundly deaf since adolescence. She has worked as an interpreter of ASL for 30 years, has trained interpreters, and has managed interpreter referral services. (Tr. 82, 86-87)
7. Wambach has attended several comedy shows at Respondent’s club, including one occasion as a performer. (Tr. 84)
8. Prior to his association with Respondent, Ippolito was the manager of The Comedy Club, a comedy venue in Webster, New York. (Tr. 16, 93)
9. In 2015 or 2016, while Ippolito was managing The Comedy Club, both Gilchrist and Complainant communicated with him to request that Gilchrist be permitted to provide ASL interpretation services at the venue. (Tr. 17-18, 40-41, 93-94; Respondent’s Exhibits 1 and 16)
10. Ippolito agreed to the suggestion and Gilchrist provided interpretation services at The Comedy Club. (Tr. 94)
11. In August 2016, Complainant was featured on Channel 8 News, a local television news program, during which he stated that he wanted ASL interpreters at Rochester’s comedy clubs as a reasonable accommodation, and that he had been denied same by the operators of the clubs. (Tr. 21-24, 49-50, 75-77)
12. Ippolito viewed Complainant’s appearance on Channel 8 News. (Tr. 124)

13. Shortly after Respondent's club opened in summer 2017, Respondent produced a comedy show in which Gilbert Gottfried was the main performer. (Tr. 87, 101)

14. Complainant, Wambach, and another deaf person, Mark King, were in the audience at the Gilbert Gottfried show. (Tr. 29-31, 87, 102)

15. Respondent routinely provided ASL interpreter services for deaf patrons upon request. (Tr. 87, 127-28; Respondent's Exhibit 16)

16. Gilchrist was the interpreter at the Gilbert Gottfried show. Ippolito generally used Gilchrist's services as an interpreter because she was a competent interpreter. (Tr. 27-28, 85, 87, 95-96; Respondent's Exhibit 16)

17. Ippolito also used an interpreter named Adrienne Howard, based on a recommendation from Complainant. (Tr. 96, 101)

18. After the Gilbert Gottfried show, Complainant made a public Facebook posting (the "Gottfried Facebook posting") in which he claimed that he, Wambach, and King were all seated "halfway back" in the audience and were thus unable to view the interpreter. (Tr. 107; Respondent's Exhibit 11)

19. Contrary to Complainant's claims, Complainant, Wambach, and King were all seated at that event within the first three rows of the audience, pursuant to Respondent's policy, so that they could easily observe the interpreter. (Tr. 102-03, 106-07; Respondent's Exhibit 11)

20. In the Gottfried Facebook posting, Complainant also claimed that Gilchrist was a poor interpreter and that Respondent used her for interpretation services because "they can hire her under the table for less than an agency would charge." (Tr. 107; Respondent's Exhibit 11)

21. Contrary to Complainant's claim, Respondent retains Gilchrist as a professional interpreter and issues an Internal Revenue Service form 1099 regarding her compensation. (Tr. 107-08; Respondent's Exhibit 11)

22. Complainant also complained about the adequacy of Gilchrist's services in other Facebook postings. (Tr. 69-73; Respondent's Exhibits 7-9)

23. Gilchrist is a competent interpreter. Complainant's complaints regarding Gilchrist's interpretation services were motivated by personal animus, rather than the adequacy of Gilchrist's interpretation. (Tr. 72-73, 87-88, 103; Respondent's Exhibit 9, p. 2; Respondent's Exhibit 16)

24. Complainant left the Gilbert Gottfried show early. Ippolito observed this and became concerned. He asked Wambach whether there had been any problem. (Tr. 88-89, 102)

25. Both Wambach and King assured Ippolito that Gilchrist had performed competently as the interpreter at the show. (Tr. 87-88, 103)

26. Approximately two weeks before the Gilbert Gottfried show, Complainant had asked Ippolito to provide him with real-time captioning as a spectator at the show. (Tr. 24-27, 32-33, 108-09; Respondent's Exhibit 11, p. 2)

27. Before the Gilbert Gottfried show, in response to Complainant's request, Ippolito researched the possibility of providing real-time captioning. (Tr. 109)

28. Ippolito called several real-time captioning providers and found that they required a monthly subscription for their services, with minimum hours, at a price of at least \$1,600 to \$2,000 per month. (Tr. 109)

29. At that time, Respondent's club was open only on Thursday, Friday, and Saturday nights. During the time relevant to the complaint, Respondent did not have the cash flow to pay \$1,600 to \$2,000 per month for real-time captioning services. (Tr. 109, 130-31, 138)

30. Respondent did not earn money exceeding its operating expenses until February, 2020. (Tr. 111-12, 126)

31. Except for a five week period, Respondent has been closed since March 2020. (Tr. 112)

32. In response to Complainant's request, Ippolito also researched a service known as "AVA" which translates speech into captions on a mobile device. Because AVA costs much less than real-time captioning, Ippolito was able to offer this service to Respondent's patrons. Ippolito purchased two tablets for patrons to use in accessing AVA. (Tr. 110)

33. Respondent began providing AVA in late 2017. Ippolito contacted Complainant and suggested that he visit the club and use the AVA service. (Tr. 35-36, 132, 138)

34. On one occasion, on an unspecified date, Complainant attended Respondent's club as a member of the audience, attempted to use AVA, and found that it did not work correctly. Complainant provided no proof that he had notified Respondent of this. (Tr. 33-37)

35. In July 2017, Respondent hosted a comedy contest called The Carlson Championships (the "2017 Championships") in which local comedians competed for the championship over the course of several evenings. Contestants were either eliminated from the competition or admitted to the next round, based on audience and judges' votes. (Tr. 84, 94-95; Respondent's Exhibit 16)

36. Vincent Paulino was associated with Respondent as the host of the show. He later became an employee of Respondent, beginning in 2018. (Tr. 14, 116, 130)

37. James M. Paulino II is an attorney, and a cousin of Vincent Paulino. Before the 2017 Championships were held, Ippolito and Vincent Paulino asked him to oversee the event to ensure that the championship was awarded fairly. (Tr. 96-97, 129-30; Respondent's Exhibit 15)

38. James M. Paulino II was asked to oversee the event because Complainant was pursuing legal action against a number of other venues, Complainant had previously engaged in a Facebook dialogue with Kelsey Claire Hagen ("Hagen"), another comedy performer who was scheduled to perform at the event, and because Respondent wished to avoid any conflict with Complainant. (Tr. 55, 96-97; Respondent's Exhibit 15)

39. Hagen was commonly believed to have been the victim of a previous sexual assault. In the spring of 2017, in Complainant's Facebook exchange with her, he stated, "going through life with a major disability is worse than being sexually assaulted once," "I think you got yourself sexually assaulted just so you can live off that one thing for the rest of your life," and, "fuck you." (Tr. 52-54, 133-34; Respondent's Exhibit 16)

40. Both Complainant and Wambach participated as contestants in the 2017 Championships. (Tr. 13-14, 20-21, 95; Respondent's Exhibit 16)

41. Gilchrist provided interpretation services for both the contestants and patrons at that event. (Tr. 55, 84-85, 95)

42. After the 2017 Championships, Complainant made several public Facebook postings in which he claimed that Respondent had cheated the contestants by not following its own rules in awarding the championship. Complainant implied that Respondent had cheated in order to benefit Hagen as a contestant. (Tr. 55-61, 98; Respondent's Exhibits 2, 4, and 5)

43. Complainant also referred to Vincent Paulino as a "tormentor" and claimed that he had assaulted Complainant after Complainant's performance as retaliation for Complainant's 2016

appearance on Channel 8 news. Contrary to Complainant's claim, Vincent Paulino did not assault him. (Tr. 21-23, 63-65, 98; Respondent's Exhibit 3, p. 4; Respondent's Exhibit 15)

44. Respondent presented several "open mic" comedy events in 2017. Respondent provided Howard as an interpreter at these events for Complainant's benefit. (Tr. 99, 101)

45. After the open mic events, Complainant made a public Facebook posting in which he indicated that he was not able to properly follow the proceedings, but admitted that the problem was his lack of skill with ASL, rather than Howard's performance as an interpreter. (Tr. 98 101; Respondent's Exhibit 10)

46. Respondent's other deaf patrons used the AVA service with no problems. (Tr. 111, 138-39)

47. On a second occasion, Complainant again attempted to use the AVA service to monitor a show at Respondent's premises. Because he was outside the building at the time, Complainant was not able to properly access Respondent's Wi-Fi signal and the AVA service did not work. (Tr. 37, 110-11)

48. In June 2018, Respondent hired a consultant to provide training for staff on how to best serve deaf patrons, including some limited training in ASL. (Tr. 119-22, 134; Respondent's Exhibit 14)

49. In July 2018, Respondent held the "Funniest Person in Rochester" comedy event. (Tr. 112)

50. Prior to that event, Vincent Paulino and Complainant were both present at a show in a different comedy club. Vincent Paulino advised Ippolito that Complainant had followed him around during the event, making him concerned for his safety. (Tr. 113-14, 130, 137-38, 140-41; Respondent's Exhibit 12)

51. Although Complainant signed up to perform in the “Funniest Person in Rochester” event, Ippolito did not allow him to perform because of Complainant’s public allegations that Respondent had broken its own rules and cheated contestants, because of Complainant’s false claim that Vincent Paulino had assaulted him, and because of Vincent Paulino’s concerns for his own safety. Hagen was scheduled to perform at that event. Ippolito was concerned that she and Complainant might encounter each other at the event, in light of Complainant’s previously expressed hostility towards her. (Tr. 112-16, 130; Respondent’s Exhibit 12)

52. Respondent has subsequently not allowed Complainant to attend its comedy shows, for the same reasons. Respondent did not do so because of Complainant’s accommodation requests. (Tr. 115-16, 132-34, 141-43)

53. Respondent has banned other people from its establishment for engaging in fights or other misbehavior. (Tr. 136-37, 139-40)

54. In testimony at the hearing, Complainant occasionally avoided answering questions directly. This behavior detracted from his credibility as a witness. (Tr. 46, 48, 68, 72)

OPINION AND DECISION

Pursuant to N.Y. Exec. Law art. 15 (the “Human Rights Law”) § 297.5, “any complaint filed pursuant to this section must be filed within one year after the alleged unlawful discriminatory practice.” Complainant filed his verified complaint on July 9, 2018. Events occurring prior to July 9, 2017, are outside the statutory period, and are referenced herein only as background.

It is an unlawful discriminatory practice for “any person, being the owner, lessee, proprietor, manager, superintendent, agent or employee of any place of public accommodation,

resort or amusement, because of the...disability...of any person, directly or indirectly, to refuse, withhold from or deny to such person any of the accommodations, advantages, facilities or privileges thereof..." Human Rights Law § 296.2 (a).

A disability is "...a physical, mental or medical impairment resulting from anatomical, physiological, genetic or neurological conditions which prevents the exercise of a normal bodily function or is demonstrable by medically accepted clinical or laboratory diagnostic techniques..." Human Rights Law § 292.21. In order to meet this definition, a person must only show he suffers from some diagnosable impairment. *See State Division of Human Rights v. Xerox Corporation*, 65 N.Y.2d 213, 491 N.Y.S.2d 106 (1985).

Complainant is profoundly deaf. Complainant has a disability as defined by the Human Rights Law.

The definition of a place of public accommodation, resort or amusement in the Human Rights Law is framed in illustrative rather than exclusive or limiting terms. It is clear that "the legislature intended that the definition of place of accommodation should be interpreted broadly." *United States Power Squadrons v. State Human Rights Appeal Bd.* 59 N.Y.2d 401, 410, 465 N.Y.S.2d 871 (1983). Respondent operates a comedy club at which comedians, both paid professionals and amateurs, perform for the entertainment of the public. Respondent's establishment is a place of public accommodation, resort or amusement as defined in Human Rights Law § 292.9.

As the operator of a place of public accommodation, resort or amusement, Respondent is required to refrain from discriminatory practices. Discriminatory practices include "...a refusal to take such steps as may be necessary to ensure that no individual with a disability is excluded or denied services because of the absence of auxiliary aids and services, unless such person can

demonstrate that taking such steps would fundamentally alter the nature of the facility, privilege, advantage or accommodation being offered or would result in an undue burden...” Human Rights Law § 296.2 (c) (ii). As both a member of the public attending Respondent’s comedy shows as a patron, and also as a member of the public performing in an unpaid capacity as a comedian, Complainant is entitled to the protections of the Human Rights Law.

Auxiliary aids and services include qualified interpreters or other effective methods of making aurally delivered materials available to individuals with hearing impairments, acquisition or modification of equipment or devices and other similar services and actions. Human Rights Law § 296.2 (d) (ii) (A), (C) and (D).

Human Rights Law § 296.2 (d)(iii) states as follows:

“Undue burden” means significant difficulty or expense. In determining whether an action would result in an undue burden, factors to be considered shall include:

- (A) the nature and cost of the action needed under this article;
- (B) the overall financial resources of the site or sites involved in the action; the number of persons employed at the site; the effect on expenses and resources; legitimate safety requirements that are necessary for safe operation, including crime prevention measures; or the impact otherwise of the action upon the operation of the site;
- (C) the geographic separateness, and the administrative or fiscal relationship of the site or sites in question to any parent corporation or entity;
- (D) if applicable, the overall financial resources of any parent corporation or entity; the overall size of the parent corporation or entity with respect to the number of its employees; the number, type, and location of its facilities; and
- (E) if applicable, the type of operation or operations of any parent corporation or entity, including the composition, structure, and functions of the workforce of the parent corporation or entity.

In the instant case, in or about 2016, Complainant advised Ippolito that he required the services of an ASL interpreter in order to enjoy the comedy acts at The Comedy Club, Ippolito’s employer at the time. Ippolito provided that service, both at the time of Complainant’s request and continuing throughout the time relevant to the complaint at Respondent’s comedy club. Ippolito provided Gilchrist, the interpreter who Complainant had requested, as well as at least

one other ASL interpreter. Complainant later became involved in a personal feud with Gilchrist and began criticizing her interpretive skills. However, the record demonstrates that Gilchrist was a competent interpreter and that Ippolito had fulfilled Complainant's accommodation request. Complainant conceded that his ASL skills were the reason for any problems. When Complainant made an additional accommodation request, this time for real-time captioning, Ippolito promptly researched the matter and discovered that he was unable to provide the requested service, due to Respondent's lack of financial resources. At that time, Respondent was open no more than three days per week, and it did not earn any money exceeding its operating expenses until February 2020, well after the time relevant to the complaint. Nevertheless, Ippolito attempted to satisfy Complainant's second accommodation request by providing AVA service. Respondent's other deaf patrons were able to use this service to access and enjoy comedy performances. On one occasion, Complainant attempted to monitor a comedy performance using AVA, and found that it performed poorly. However, Complainant did not demonstrate that he notified Respondent of his difficulty so that Respondent might assist him in using the service. On a second occasion, Complainant was unable to properly access the service because the device he used was outside Respondent's premises, and he was not within Respondent's Wi-Fi service area. Notably, Respondent attempted to further improve its service to deaf patrons when it hired a consultant to provide training to its employees, including limited training in ASL. Respondent's actions indicate a concern and motivation to allow deaf persons access to its comedy events. Respondent satisfied Complainant's various accommodation requests to the extent possible. Respondent did not unlawfully deny a reasonable accommodation request to Complainant. This claim is dismissed.

Pursuant to Human Rights Law § 296.7, it is an "unlawful discriminatory practice for any

person engaged in any activity to which this section applies to retaliate against any person” who has opposed discriminatory practices. As the operator of a place of public accommodation, Respondent is subject to the requirements of § 296.7. During 2016, prior to the opening of Respondent, Complainant alleged on a local television news show that Rochester-area comedy clubs failed to provide ASL interpreter services for deaf patrons. Complainant alleged that Paulino, a member of Respondent’s staff, assaulted him and that Respondent bore animus against him because of his complaints on the television show. Complainant further alleged that Respondent denied Complainant service at its comedy club when it refused to allow him to perform as a member of the public or to attend comedy shows as an audience member, and that Respondent’s actions constituted retaliation against Complainant because of his requests for accommodation and his complaints about the various accommodations provided by Respondent. It is noted that Complainant’s request for reasonable accommodation do not constitute opposition to a discriminatory practice and do not, in and of themselves, establish the predicate for a claim of retaliation.

In July 2018, Respondent did not allow Complainant to perform at its Funniest Person in Rochester event. Respondent did not do so because of Complainant’s generalized complaints during his 2016 appearance on Channel 8 News about the failure of Rochester-area comedy clubs to provide ASL interpretation services for deaf patrons. Complainant’s television appearance occurred prior to the opening of Respondent’s club in 2017, and Complainant failed to demonstrate that his complaints had anything to do with Respondent’s operation. Rather, Respondent barred Complainant from the event because of Complainant’s repeated public allegations that Respondent had broken its own rules during comedy contests, and Complainant’s false claim that Vincent Paulino had assaulted Complainant after a performance. In addition,

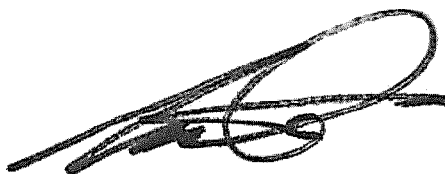
valid concerns existed about Complainant's possible future interactions with both Vincent Paulino, and Kelsey Claire Hagen, who was scheduled to perform at that show. For these reasons, Respondent found it necessary to forbid Complainant from performing at that show, and also from attending Respondent's shows as a patron. Respondent did not forbid Complainant from its premises because of his various complaints regarding ASL interpretation services and his other accommodation requests, but because Ippolito was concerned regarding the possibility of disruption and danger at Respondent's premises. This claim is also dismissed.

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 complaint be, and hereby is, dismissed.

DATED: June 9, 2021
Bronx, New York

A handwritten signature in black ink, appearing to read 'Michael T. Groben', with a large, stylized flourish extending from the end of the signature.

Michael T. Groben
Administrative Law Judge