Division of
Human Rights

NEW YORK STATE
DIVISION OF HUMAN RIGHTS

NEW YORK STATE DIVISION OF HUMAN RIGHTS
on the Complaint of

TIFFANY LANE-ALLEN,
Complainant,

v.

D AUXILLY NYC LLC,
Respondent.

Federal Charge No. 16GC001383

RECOMMENDED FINDINGS OF FACT, OPINION AND DECISION, AND ORDER

Case No. **10205884**

SUMMARY

Complainant alleges Respondent discriminated against her when Respondent refused to make a garment for Complainant's fiancée because the garment was to be used in a same-sex wedding. Complainant has proven her claims and is awarded damages owing to her emotional distress. Civil fines and penalties are also assessed.

PROCEEDINGS IN THE CASE

On September 17, 2019, Complainant filed a complaint 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 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.

Prior to the public hearing, both parties filed motions with the Division. On December 23, 2021, Complainant moved to add a second corporate entity to the caption as a respondent. Complainant's motion was denied on June 30, 2022. On June 28, 2022, Respondent made a motion to dismiss for lack of jurisdiction. Decision was reserved on Respondent's motion until after the public hearing.

After due notice, the case came on for hearing before Thomas S. Protano, an Administrative Law Judge ("ALJ") of the Division. A public hearing session was held via videoconference on July 13, 2022. At the hearing, the caption was amended pursuant to 9 N.Y.C.R.R. § 465.4 to reflect Complainant's current name, changing it from Tiffany Allen to Tiffany Lane-Allen.

Complainant and Respondent appeared at the hearing. Complainant was represented by Ian Shapiro, Esq., Kaitland Kennelly, Esq., Valeria M. Pelet del Toro, Esq., Kathleen Hartnett, Esq., and Brett Figlewski, Esq. Respondent was represented by Barry Black, Esq., and Sarah E. Child, Esq. At hearing, the parties jointly submitted "Stipulations of Facts" that were entered into the record as ALJ Exhibit 7.

FINDINGS OF FACT

1. Complainant is gay. (Tr. 20)

2. Complainant is a resident of Texas; when she filed this complaint she resided in Missouri. (ALJ Exhibit 2; Tr. 19-20)

3. Respondent was formed on December 30, 2010, in New York State by Dominique Galbraith (formerly known as Dominique Auxilly). (ALJ Exhibit 7)

4. Galbraith is the owner of Respondent. (ALJ Exhibit 7)

5. Respondent sells clothing items, including wedding attire, through a website, https://www.dauxilly.com/store-1. (ALJ Exhibit 7; Complainant's Exhibit 1)

6. On January 26, 2018, Complainant became engaged to her now-wife, Angel Lane-Allen. (Tr. 21)

7. After becoming engaged, Complainant and Angel Lane-Allen discussed their plans for a wedding. (Tr. 23)

8. Complainant did the majority of the wedding planning. (Tr. 23)

9. Complainant found a wedding dress "rather quickly," however, Angel Lane-Allen took "over a year" to find the outfit she wanted to wear at their wedding. (Tr. 23)

10. Complainant and Angel Lane-Allen eventually found a jumpsuit for Angel Lane-Allen on Respondent's website. (Tr. 25-26)

11. On June 13, 2019, Complainant emailed Respondent at info@dauxilly.com inquiring about the jumpsuit. Complainant explained that her "fiancée has fallen in love" with the garment and inquired whether Respondent accepted payments. (Complainant's Exhibit 2; Tr. 27)

12. On June 19, 2019, Galbraith responded as follows:

> Hi Tiffany!
>
> Thank you for reaching out! I apologize for the late response. Yes, we accept payments. 50% upfront and the remaining balance upon completion.
>
> However, I wouldn't be able to make a piece for a same-sex wedding. It goes against my faith in Christ. I believe Jesus died for our sins so that we would live for him according to His Holy word. I know you both love each other and that this feels right but I encourage you both to reconsider and see what the Lord has to say and the wonderful things He has in store for you both if you trust and obey Him.

God Bless and be with you both!

I'm available to talk and share more about Jesus if you'd like. Feel free to call me.

(Complainant's Exhibit 2)

13. Galbraith believes that the Bible defines marriage as between a man and a woman and that it would violate her religious beliefs to make an outfit for a same-sex wedding. (ALJ Exhibit 7)

14. Complainant initially felt "disbelief." She felt "hurt" that someone would tell her to "reconsider," given that marriage had not been available to her for many years and, after waiting for so long to find an appropriate outfit for Angel Lane-Allen, she felt "defeated" when she learned Respondent would not provide it. (Tr. 31-32)

15. Complainant did not respond to Respondent's email. She and Galbraith had no further communication with each other. (ALJ Exhibit 7; Tr. 31-32)

16. A few weeks later, Galbraith confirmed that she would not provide the jumpsuit to Complainant. An Instagram post inquired if Galbraith had refused to make a jumpsuit because Complainant "happened to be engaged to another woman," asking, "is that fake???" Galbraith replied, "it's not fake." (Complainant's Exhibit 6)

17. Complainant did not change her wedding plans. On October 23, 2019, Complainant and Angel Lane-Allen were married. (Tr. 40)

18. At the wedding, Angel Lane-Allen wore a jumpsuit that was somewhat similar to the one Respondent would not provide to Complainant. (Complainant's Exhibit 4)

OPINION AND DECISION

Jurisdiction

In the first instance, Respondent argues that as a non-resident of New York State, who

was not present in New York State when the transaction in question occurred, Complainant cannot establish jurisdiction under N.Y. Exec. Law, art. 15 ("Human Rights Law"). Citing *Hoffman v. Parade Publications*, 15 N.Y.3d 285, 289, 933 N.E.2d 744,746 (2010), Respondent argues that the Division lacks subject matter jurisdiction here, because the "impact" of the discrimination did not occur within the State of New York. *Hoffman*, as well as similar cases, such as *Hardwick v. Auriemma*, 116 A.D.3d 465, 983 N.Y.S.2d 509 (1st Dept. 2014), stand for the proposition that, for jurisdictional purposes, it is not sufficient, in an employment discrimination case, that an adverse employment decision was made in New York State when the plaintiff's job location was outside New York State. Those cases, though applicable here, are distinguishable from this case. This case is a public accommodation case, not an employment case. The transaction that was refused here would have occurred in New York; Respondent made its decision and would have done the required work in New York; and the monies paid would have landed in New York and, thus, the impact was felt in New York. Conversely, in an employment case, the work is done, and the monies are paid to the employee who is working and living outside of New York—the impact is in the opposite direction. So, by following the *Hoffman* rule regarding the impact of the discrimination, we conclude that the Division has subject matter jurisdiction in this case. If we accept Respondent's argument, any New York place of public accommodation would be able to discriminate against any non-New York resident without penalty as long as the prospective customer remained outside of New York State. Such a result would be contrary to the intent of the Human Rights Law, which "shall be construed liberally." Human Rights Law § 300.

First Amendment

Respondent also argues that requiring it to provide a garment for a same-sex marriage

would violate its right to free speech and the free exercise of religion under the First Amendment to the Constitution of the United States. Respondent's religious beliefs, and the right to object to the Human Rights Law, are protected under the Constitution[1], however "it is a general rule that such objections do not allow business owners … to deny protected persons equal access to goods and services under a neutral and generally applicable public accommodations law." *Masterpiece Cakeshop v. Colorado C.R. Commission*, 138 S. Ct. 1719, 1727 (2018); *see also, Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1876 (2021). A law is "generally applicable" and "neutral" when it applies equally to religious and secular conduct and is not seen as "targeting religious beliefs" or "infring[ing] upon or restrict[ing] practices because of their religious motivation." *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 533 (1993).

Citing the Division's Rules of Practice at 9 N.Y.C.R.R. §§ 465.20(a) and 465.5(e) (a/k/a "Rule 20" and "Rule 5.5," respectively), Respondent asserts that the Human Rights Law is not a neutral, generally applicable law. Under Rule 20, "the commissioner, or any designee of the commissioner, including those specifically referred to in these rules, may, on his or her own motion, whenever justice so requires, reopen a proceeding …" Under Rule 5.5, the Division may dismiss a complaint for "administrative convenience," when noticing the complaint would be "undesirable" or processing it "will not advance the State's human rights goals." Respondent claims these rules indicate that the Commissioner has discretion to grant "exemptions" which, under *Lukumi* and *Fulton* means that the Human Rights Law "does not pass strict scrutiny when applied to Respondent" and that "New York's interest in eradicating discrimination cannot be considered compelling when the Commissioner has the discretion to grant exemptions."

Respondent misinterprets the Division's Rules. Rule 5.5 outlines the process for

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[1] This protection applies to both Respondent and its owner. *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 707-08 (2014).

withdrawals, discontinuances and dismissals prior to hearing. Subsection (e) provides that the Division can dismiss a complaint for "administrative convenience," and lists several possible reasons for such a dismissal. However, administrative convenience dismissals are procedural and, significantly, are subject to judicial review should the determination be arbitrary or capricious or if one or both of the parties object. Human Rights Law § 298. The Commissioner does not have authority to grant "exemptions" under Rule 5.5, as Respondent suggests. Rule 20 provides the Commissioner, or the Commissioner's designee, the authority to reopen an investigation. A decision to reopen an investigation is not a final determination. It merely sends a case back to the investigatory unit for further consideration. Rule 20, like Rule 5.5, does not give the Commissioner, or any other Division employee, the authority to grant exemptions. The Human Rights Law is not intended to regulate religious conduct or beliefs. It is neutral and generally applicable. The Rules Respondent cites fail to support any contrary interpretation. *See, Gifford v. McCarthy*, 137 A.D.3d 30, 23 N.Y.S.3d 422, 430 (3d Dept. 2016). The Division is not requiring Respondent to either participate in, or give affirmation to, a same sex wedding and Galbraith is free to practice her faith as she sees fit. When her interest in practicing her religion is weighed against New York's "substantial interest in eradicating discrimination," we conclude that requiring her to serve Complainant is not an unreasonable interference with her religious freedom. *Id* at 431.

Finally, Respondent cites *Masterpiece Cakeshop*, 136 S. Ct. at 1728, to support its argument that the First Amendment protects its rights to refuse service for a same-sex wedding. In *Masterpiece Cakeshop*, the Court held that a cakemaker using "his artistic skills to make an expressive statement, a wedding endorsement in his own voice and his own creation," could lawfully refuse to bake a cake for a same-sex wedding under Colorado's anti-discrimination

statutes. Significantly, however, in *Masterpiece Cakeshop*, at 1728, the Court noted that "if a baker refused to sell any goods or any cakes for gay weddings, that would be a different matter and the State would have a strong case under this Court's precedents that this would be a denial of goods and services ... and is subject to a neutrally applied and generally applicable public accommodations law." That blanket refusal to sell any goods or services for a same-sex wedding is *exactly* what Respondent did here. Unlike that cakemaker, Respondent was not asked to make an "expressive statement." Complainant asked Galbraith to duplicate a jumpsuit Galbraith had already designed that Complainant and her fiancée found on Respondent's website, available for purchase. Galbraith refused because the jumpsuit was to be worn at a same-sex marriage. Here, we do *not* have the same scenario the Court encountered in *Masterpiece Cakeshop*. We *do* have the scenario the Court, by Justice Kennedy, warned would be subject to a neutrally applied and generally applicable public accommodations law.

Respondent Liability

The Human Rights Law 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...because of the...sexual orientation...of any person, directly or indirectly, to refuse, withhold from or deny to such person any of the accommodations, advantages, facilities or privileges thereof...or that the patronage or custom thereat of any person of or purporting to be of any particular...sexual orientation...is unwelcome, objectionable or not acceptable, desired or solicited." Human Rights Law § 296.2(a).

It is undisputed that Respondent refused to provide an outfit for Complainant because it was to be used for a same-sex wedding. Without question, Respondent has withheld and/or denied "the accommodations, advantages, facilities or privileges" of its public accommodation to

Complainant. However, Respondent argues that the reason for its denial of services was not because of sexual orientation but, rather, because the garment was to be used in a same-sex wedding. This is a distinction without a difference. Discrimination based on a same-sex marriage is discrimination based upon sexual orientation. Respondent discriminated against Complainant on the basis of sexual orientation when it refused to provide her with a jumpsuit because it was to be used for a same-sex wedding. *Gifford* at 430.

Damages

As a result of Respondent's discriminatory conduct, Complainant suffered emotional distress. Angel Lane-Allen found an outfit; she and Complainant married. However, there was at least some period of time during which Complainant felt "defeated" and "hurt," while she was forced to alter her wedding plans. Indeed, "such distress follows such bias and exclusion as night follows day." *300 Gramatan Avenue Associates, Respondent v. State Division of Human Rights*, 45 N.Y.2d 176, 184; 408 N.Y.S.2d 54, 59 (1978). The Human Rights Law provides remedies to compensate victims of unlawful discrimination for their emotional distress. Human Rights Law § 297.4.c (i)-(iv); *Ford Motor Co. v. E.E.O.C.,* 458 U.S. 219 (1982). "[A]n award of...damages to a person aggrieved by an illegal discriminatory practice may include compensation for mental anguish." That award may be based solely on a complainant's testimony. *Cosmos Forms, Ltd. v. New York State Div. of Human Rights,* 150 A.D.2d 442, 541 N.Y.S.2d 50, 51 (2d Dept. 1989).

Considering the nature and circumstances of the conduct and the degree of Complainant's suffering, an award of $5,000.00 to Complainant for mental anguish she suffered as a result of Respondent's discriminatory conduct is warranted. Such an award will effectuate the purposes of the Human Rights Law. *Gifford* at 433.

Civil Fines and Penalties

Human Rights Law § 297(4)(c)(vi) allows 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) states 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." The factors that determine the appropriate amount of a civil fine and penalty include 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; and other matters as justice may require. *See, Gostomski v. Sherwood Terr. Apts.,* SDHR Case Nos. 10107538 and 10107540, (November 15, 2007), *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); *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).

Here, the goal of deterrence, the nature and circumstances of Respondent's violation and the degree of Respondent's culpability warrant a penalty. Respondent's admitted refusal to provide Complainant with a garment for a same-sex marriage constituted unlawful discrimination against Complainant solely on the basis of her sexual orientation in violation of the Human Rights Law. Respondent would not have refused service to Complainant if Complainant were marrying a male, which Galbraith admitted when she wrote that she

"wouldn't be able to make a piece for a same-sex wedding," and suggested that Complainant "reconsider." Galbraith, as owner of Respondent, unambiguously stated her disapproval of same-sex marriages, and refused service to Complainant. She then confirmed to the public via Instagram that she had indeed refused to provide the garment because Complainant "happened to be engaged to another woman." Thus, Respondent's culpability is evident and indisputable. The record offers no evidence of Respondent's relevant history, financial resources, or other matters that might also be considered in assessing a penalty. Accordingly, a civil fine of $20,000.00, payable to the State of New York, will effectuate the purposes of the Human Rights Law. *Gifford* at 433.

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, its agents, representatives, employees, successors, and assigns, shall cease and desist from unlawfully discriminatory practices; 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 Final Order, Respondent shall pay Complainant an award of compensatory damages for mental pain and suffering in the amount of $5,000.00. Interest shall accrue at a rate of nine (9) percent per year from the date of the Commissioner's Final Order until the date payment is made;

2. Payment to Complainant shall be made by Respondent in the form of a certified check payable to Complainant, and delivered by certified mail, return receipt requested, to her attorneys at Cooley LLP, 55 Hudson Yards, New York, NY 10001-2157. Respondent shall furnish written proof to the New York State Division of Human Rights, Caroline Downey, Esq., General Counsel, One Fordham Plaza, 4th Floor, Bronx, New York 10458, of its compliance with the directives contained in the Commissioner's Final Order.

3. Within sixty (60) days of the date of the Commissioner's Final Order, Respondent shall pay a civil fine and penalty to the State of New York in the amount of $20,000.00 for having violated the Human Rights Law. Payment of the civil fine and penalty shall be made in the form of a certified check payable to the order of the State of New York and delivered by certified mail, return receipt requested, to New York State Division of Human Rights, Caroline Downey, Esq., General Counsel, One Fordham Plaza, 4th Floor, Bronx, New York 10458.

4. Within sixty (60) days of the date of the Commissioner's Order, Respondent is directed to post a copy of the Division's poster, which can be found at https://dhr.ny.gov/sites/default/files/pdf/posters/poster.pdf, in a prominent place in its offices. The poster must be in color, no smaller than 8.5 inches by 14 inches, and posted where all staff are likely to view it.

5. Respondent shall establish in its place of business both anti-discrimination training and procedures. Respondent shall provide proof of such training to the Division upon written demand; and

6. Respondent shall simultaneously submit proof of its compliance with these directives in the form of affidavit or attorney affirmation to Office of General Counsel, New York State Division of Human Rights, One Fordham Plaza, 4th Floor, Bronx, New York 10458.

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

DATED: September 26, 2022
Bronx, New York

Thomas S. Protano
Administrative Law Judge