

# ***Comm'n on Human Rights ex rel. Russell v. Chae Choe***

OATH Index No. 2617/09 (Sept. 25, 2009)

At a default hearing, petitioner established that respondent discriminated against complainant because of her disability, by refusing to grant her a reasonable accommodation - one that would have been at no cost to respondent - in the form of permission to replace her bathtub with a walk-in shower. ALJ recommends a civil penalty of \$50,000 and \$30,000 in compensatory damages, as well as affirmative relief in an order that respondent install a walk-in shower at his own expense.

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**NEW YORK CITY OFFICE OF  
ADMINISTRATIVE TRIALS AND HEARINGS**

*In the Matter of*  
**COMMISSION ON HUMAN RIGHTS EX REL.  
RUTH RUSSELL**  
*Petitioner*  
*-against-*  
**KONG CHAE CHOE**  
*Respondent*

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**REPORT AND RECOMMENDATION**

**JULIO RODRIGUEZ**, *Administrative Law Judge*

This proceeding was commenced by the petitioner, the New York City Commission on Human Rights, pursuant to section 8-119 of the Administrative Code and section 1-71(a) of the Commission's rules (47 RCNY § 1-71(a)). The verified complaint alleges that respondent, the owner of the building in which the complainant, Ruth Russell, resides discriminated against her by failing to accommodate her disability by rejecting her request to replace her bathtub with a shower, in violation of sections 8-107(5)(a) and 8-107(15)(a) of the Administrative Code (ALJ Ex. 1).<sup>1</sup>

Upon respondent's failure to appear for the hearing on August 3, 2009, petitioner submitted proof of service sufficient to show that it served the notice of trial upon respondent at a fruit store that Ms. Russell testified is owned and operated by respondent (Pet. Exs. 1, 2; Tr. 40). The fruit stand is located on the first floor of the building where Ms. Russell resides. The building is owned by respondent (Tr. 63). Based upon this evidence, respondent was found in default and the hearing proceeded in the form of an inquest.

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<sup>1</sup> Respondent did not file an answer to the verified complaint.

Petitioner presented the testimony of Ms. Russell and offered documentary evidence.

For the reasons set forth below, I find that the Commission established that respondent discriminated against complainant because of her disability, by refusing to grant her a reasonable accommodation in the form of permission to replace her bathtub with a walk-in shower, in violation of sections 8-107(5)(a) and 8-107(15)(a) of the Administrative Code.

### **ANALYSIS**

Ms. Russell is seventy-seven years old and resides in an apartment in a building owned by respondent. Ms. Russell has lived in the rent controlled apartment since 1968 (Pet. Ex. 7; Tr. 63). Respondent purchased the building approximately 20 years ago (Tr. 63). The building houses a business, a fruit store owned and operated by respondent, on the first floor, and four residential units (Tr. 63).

Ms. Russell testified and offered two letters from her treating physician, dated June 29 and July 31, 2009, to establish that she suffers from chronic obstructive pulmonary disease (emphysema), arteriosclerotic cardiovascular disease, peripheral vascular disease, osteoarthritis, rheumatoid arthritis of the knee, and sciatica (Pet. Exs. 4, 5; Tr. Xx). Ms. Russell testified that she suffered a heart attack while recovering from knee surgery in 2001 (Tr. 48). In 2006, she suffered a stroke (Tr. 49).

Ms. Russell's multiple medical conditions cause her difficulty and pain while walking and climbing stairs. She, therefore, must rely on a quad cane or walker to ambulate (Tr. 24). Getting in and out of the bathtub in her residence is particularly difficult for Ms. Russell (Tr. 25). She explained and offered photographs to establish that the bathtub, which rests on cinder blocks and pieces of wood, is elevated more than 25 inches off the ground (Pet. Exs. 6a-6d; Tr. 25). She explained that she uses a step stool and holds onto a bar, which she asked respondent to install several years ago, to pull herself into the bathtub (Tr. 26). Getting out of the bathtub is more difficult. To get out of the bathtub Ms. Russell must grab the side of a wall while lifting her leg over the side of the tub. This, according to Ms. Russell, is when it becomes especially dangerous because her foot gets caught in the shower curtain as she attempts to clear the tub. She is also fearful that her other leg, on which she is balancing herself, may slip from under her causing her to fall (Tr. 28). Ms. Russell testified that approximately two years ago, her foot got caught in the shower curtain as she attempted to get out of the tub. She started to fall but was able to regain her balance and avoid injury (Tr. 30-1).

After Ms. Russell's near fall getting out of the tub, she became scared and started taking extra precautions (Tr. 30-1, 40). Up until her near fall, Ms. Russell bathed every day. After that incident, she limits her bathing to every other day (Tr. 27). On the days that she does bathe, Ms. Russell employs a system that she developed with her children. Ms. Russell calls one of her children before she gets in the bathtub to let them know that she is going to bathe. When she is done bathing and safely exits the bathtub, she calls her children to let them know she is safe. If the children do not hear from her within a reasonable amount of time, they'll come to the apartment to check on her (Tr. 29). Ms. Russell relies on the procedure described above, but testified that she thinks that "it's ridiculous. . . it's my home, I should be able to take a shower in my own home" (Tr. 29).

Ms. Russell, worried about her safety, started looking for a resolution. On or about June 20, 2008, Jack Bikowski, of the North Brooklyn Development Corporation, submitted, on Ms. Russell's behalf, an application entitled "Access to Home" to the United Cerebral Palsy of New York City. In the application Ms. Russell explained her disability and requested assistance with removing the bathtub and installing a walk-in shower. Her application was subsequently approved (Tr. 33; Pet. Ex. 7).

By letter dated July 2, 2008, Ms. Russell wrote to respondent to request an accommodation. She explained to respondent that the issues with her bathtub had gotten "unbearable." Ms. Russell informed respondent that the United Cerebral Palsy of New York City had agreed to remove the bathtub and install a shower at no cost to him. Ms. Russell concluded by seeking respondent's permission to proceed with the work (Pet. Ex. 8). She provided the program's address and telephone number in case respondent had any questions.

Ms. Russell filed a complaint with the Commission after respondent failed to reply to her letter requesting an accommodation. By letter dated August 19, 2008, the Commission asked respondent to reconsider Ms. Russell's request for an accommodation and informed him that the "City's Human Rights Law makes explicit a landlord's obligation to accommodate a disabled resident unless he can show that the modification would create an undue hardship." The Commission reiterated that the modifications sought "would be the expense of a health care organization" (Pet. Ex. 9). Respondent similarly failed to respond. The Commission then commenced this action.

On May 11, 2009, respondent failed to appear for a scheduled pre-trial settlement conference. On May 18, 2009, the Commission's counsel called respondent using a telephone

number provided by Ms. Russell and spoke with someone who identified himself as respondent. Counsel informed respondent that the matter had been scheduled for trial and explained that under city law respondent was required to provide Ms. Russell with a reasonable accommodation for her disability. Respondent replied, in sum and substance, that he would not replace Ms. Russell's bathtub. Respondent stated that Ms. Russell only pays \$250 per month in rent and suggested that Ms. Russell go to a nursing home. Respondent concluded the conversation by hanging up the phone (affidavit of telephone conversation: Pet. Ex. 3). To date, respondent has neither given permission to have the shower installed nor taken any action pursuant to Ms. Russell's request for an accommodation.

The Commission alleged that respondent has discriminated against Ms. Russell because of her disability. Section 8-102(16) of the Administrative Code, in pertinent part, defines disability as "any physical, medical, mental or psychological impairment, or a history or record of such impairment." The term "physical, medical or mental, or psychological impairment" is defined as "an impairment of any system of the body; including, but not limited to: the neurological system; the musculoskeletal system; the special sense organs and respiratory organs, including but not limited to, speech organs; the cardiovascular system; the reproductive system; the digestive and genito-urinary systems; the hemic and lymphatic systems; the immunological systems; the skin; and the endocrine system." Admin. Code § 8-102(16)(b)(1).

Ms. Russell walks with an unsteady gate and must rely on a cane or walker to ambulate. Her difficulties walking stem a host of medical conditions including osteoarthritis, rheumatoid arthritis of the knee, and sciatica. I find that she suffers from a physical impairment as defined by section 8-102(16), and is therefore considered a person with a disability.

Section 8-107(5)(a)(2) of the Administrative Code makes it unlawful "to discriminate against any person because of such person's . . . disability . . . in the terms, conditions or privileges of the sale, rental or lease of any . . . housing accommodation or an interest therein or in the furnishing of facilities or services in connection therewith." Section 8-107(15)(a) imposes on landlords the duty to provide a reasonable accommodation for disabled tenants. Section 8-107(15)(a) in pertinent part provides that "any person prohibited by the provisions of this section from discriminating on the basis of disability shall make reasonable accommodation to enable a person with a disability to . . . enjoy the right or rights in question provided that the disability is known or should have been known by the covered entity." *See Torres v. Prince Management*

*Corp.*, OATH Index No. 301/98 (Aug. 14, 1997), *aff'd*, Dec. & Ord. (Oct. 27, 1997), *aff'd*, NYLJ, July 29, 1998, at 22, col.5 (Sup. Ct. N.Y. Co.).

Respondent is the owner of a housing accommodation which section 8-102(10) defines as including “any building, structure, or portion thereof which is used or occupied or is intended, arranged or designed to be used or occupied, as the home, residence or sleeping place of one or more human beings.” As such, respondent is prohibited from discriminating against Ms. Russell because of her disability and must make reasonable accommodations.

The evidence establishes that respondent was on notice of Ms. Russell’s disability and request for an accommodation since at least July 2, 2008, when Ms. Russell mailed a letter to respondent in which she explained her need for a shower and that an organization had agreed to install the shower free of cost to respondent. Ms. Russell’s doctor confirmed her need for a walk-in shower (Pet. Ex. 5). The July 2 and August 19, 2008 letters from Ms. Russell and the Commission put respondent on notice of Ms. Russell’s disability, request for an accommodation, and that legally he is required to provide her with a reasonable accommodation. Based on the record before me, respondent totally ignored Ms. Russell and the Commission.

Respondent was served with the verified complaint on December 8, 2008. He failed to file an answer. He failed to contact Ms. Russell or the Commission to discuss her needs. He failed to appear before this tribunal for a settlement conference on May 11, 2009 and for trial on August 3, 2009. According to Ms. Russell, despite seeing respondent everyday at the fruit store, including on the morning of trial, respondent no longer talks to her. Respondent’s involvement in this matter is limited to a telephone conversation with the Commission’s counsel in which respondent refused to accommodate Ms. Russell with a shower while suggesting that she go to a nursing home. I find that respondent unlawfully discriminated against Ms. Russell because of her disability by failing to provide her with a reasonable accommodation.

### **FINDINGS AND CONCLUSIONS**

Petitioner properly served respondent with the verified complaint and notice of hearing entitling the Commission to proceed in respondent’s absence.

The Commission proved by a preponderance of the evidence that:

1. Complainant, Ms. Ruth Russell, is a person with a disability as defined in section 8-102(16) of the Administrative Code;

2. Respondent is the owner of a housing accommodation as defined in section 8-102(10) of the Administrative Code; and
3. Respondent discriminated against Ms. Russell because of her disability by refusing to provide a reasonable accommodation after receiving notice of and demand for such accommodation, in violation of Administrative Code sections 8-107(5)(a) and 8-107(15)(a).

### **RECOMMENDATION**

Petitioner requested that I recommend a civil penalty of \$50,000 and \$30,000 in compensatory damages, as well affirmative relief in an order that respondent install a walk-in shower at his own expense. I find that appropriate.

Pursuant to section 8-120(a)(8) of the Administrative Code, the Commission may award damages to complainants who suffer mental anguish because of discrimination upon a sufficient showing of the existence and extent of such injury. The evidence must support a determination that “a reasonable person of average sensibilities could fairly be expected to suffer mental anguish from the incident.” *Batavia Lodge No. 196 v. N.Y.S. Division of Human Rights*, 43 A.D.2d 807, 810 (4th Dept. 1973), *rev'd on other grounds*, 35 N.Y.2d 143 (1974); *see also DaSilva v. New York Racing Ass'n., Inc.*, CHR Complaint No. E95-0668/16F-95-1041, rec. dec. & order (Apr. 16, 1996), *adopted*, dec. & order (June 25, 1996), *aff'd sub. nom. N.Y. Racing Ass'n, Inc. v. Comm'n on Human Rights*, N.Y.L.J., Jan. 10, 1997 at 25, col. 4 (Sup. Ct. Queens Co.). Among the facts to be considered are the number of instances of discrimination, the level of anguish caused by the misconduct, and prior awards for comparable discrimination. *See Comm'n on Human Rights ex rel. Campbell v. Personal Employment Services*, OATH Index No. 1579/07 at 6 (Aug. 20, 2007), *adopted*, dec. & order (Dec. 14, 2007). Further, “there must be some evidence of the magnitude of the injury, to assure that the Commissioner’s damage award is neither punitive nor arbitrary.” *New York City Transit Auth. v. State Division of Human Rights*, 78 N.Y.2d 207, 217 (1991).

There is no doubt that Ms. Russell suffered mental anguish as a result of respondent’s refusal to grant her a reasonable accommodation in the form of permission to replace her bathtub with a walk-in shower. She credibly testified that because entering and exiting the bathtub is extremely difficult and painful because of her osteoarthritis, rheumatoid arthritis, and sciatica,

she has been forced to reduce bathing to every other day so as not to overly inconvenience her children. On days that she does not bathe, she feels unclean and thus uncomfortable leaving her apartment and conducting her normal daily activities. Additionally, each time she does climb into and out of the bathtub, she experiences the very real and traumatic fear that she may fall and possibly injure herself. She testified that as a result of her fear, she experiences heart palpitations when she enters and exits her bathtub. As such, compensatory damages are warranted (Tr. 29, 37-38).

Ms. Russell indicated that she when she feels unclean, she does not like leaving her apartment, and therefore, has become depressed. While evidence of treatment by a mental health professional can be useful to provide “some evidence of the magnitude” of the mental distress claimed by a complainant, *New York City Transit Auth.*, 78 N.Y.2d at 217, it is not required for a finding of mental anguish. *119-121 East 97<sup>th</sup> St. Holding Corp. v. N.Y.C. Comm’n on Human Rights*, 220 A.D.2d 79, 85 (1st Dep’t 1996). A finding of mental anguish can be based solely on the complainant’s testimony. *Id.* (citing *Cullen v. Nassau County Civil Service Commission et al.*, 53 N.Y.2d 492 (1981)). Although there was no medical testimony here, I find that Ms. Russell has suffered a high level of mental anguish.

In *119-121 East 97<sup>th</sup> Street Corp.*, the Appellate Division sustained a compensatory award of \$100,000 in favor of an HIV-positive tenant who suffered mental anguish resulting from repeated written and verbal attacks and other abusive acts against him on the basis of his sexual orientation and disability by his landlord. The court explained that “decency and justice call out for redress” to the tenant, who testified that over the course of a year and a half, he suffered growing anger, outrage, horror, and depression as the result of the landlord’s conduct. *Id.* at 85-87. In addition, the award provided a “deterrent to others who might emulate [the landlord’s] actions,” demonstrating that such discriminatory behavior would “not be met with half-hearted sanctions or ‘slaps on the wrist.’” *Id.* at 88. Ms. Russell here, similar to the tenant in *119-121 East 97<sup>th</sup> Street Corp.*, has experienced long-term depression and severe emotional distress as a result of her landlord’s prolonged discriminatory conduct.

Ms. Russell’s situation is also similar to the two complainants in *Commission on Human Rights ex rel. De La Rosa v. Manhattan & Bronx Surface Transportation Operating Auth.*, OATH Index No. 1141/04 (Dec. 30, 2004), *aff’d*, Comm’n dec & order. (Mar. 11, 2005), where the Commission awarded two bus passengers, both of whom used wheelchairs, \$10,000 and \$12,000 in compensatory damages, respectively, after they were falsely imprisoned upon a bus

for two hours when the driver refused to assist them in getting off the bus. Ms. Russell, like the two bus passengers, has had her freedom violated by the actions of the respondent, as she is unable to take showers in her own apartment as often as she wants to. One key distinction, however, leads to the conclusion that Ms. Russell is entitled to even greater compensation—while the distress suffered by the two bus passengers was certainly severe, it resulted from a discrete, isolated incident. Here, on the other hand, the discriminatory conduct has extended over a lengthy period, resulting in a protracted, continuing mental distress to Ms. Russell. Additionally, Ms. Russell faces the very real possibility of injuring herself each time she bathes.

Considering all the circumstances of this case, as well as the relevant case law, I find that respondent's conduct has resulted in such mental anguish as to justify a compensatory damage award of \$30,000, as requested by the Commission.

Under section 8-126(a) of the Administrative Code, the Commission may impose a civil penalty not to exceed \$250,000 to “vindicate the public interest,” in the case of a willful, wanton, or malicious act of discrimination. The purpose of this provision is to “punish the violator” and to “strengthen and expand the enforcement mechanisms of the law so the Commission could prevent discrimination from playing any role in actions related to employment, public accommodations, housing and other real estate.” *119-121 East 97<sup>th</sup> St. Holding Corp.* 220 A.D.2d at 88.

In determining the appropriate amount, consideration should be given to “how egregious the violation is and its impact on the public.” *Comm'n on Human Rights ex rel Southgate v. United African Movement*, CHR Complaint Nos. MPA95-0851, PA95-0031, rec. dec. and order at 34 (June 30, 1999). Here, as a landlord, respondent deals with members of the public on a regular basis, meaning discriminatory acts on his part have a significant impact on the public. On the other hand, respondent owns only a small number of units, thus the impact on the public is not as great as if he owned many units. This case is therefore more similar to *119-121 East 97<sup>th</sup> Street Holding Corp.*, where the landlord also owned only a small number of apartments, rather than *Commission on Human Rights ex rel. Martin v. Hudson Overlook, LLC*, OATH Index No. 137/06 (Aug. 30, 2006), *adopted*, Comm'n dec. & order (Dec. 5, 2006), in which a landlord owned and managed close to 500 units. While a civil penalty of \$25,000 was imposed in both cases, the landlord's lesser real estate holdings in *119-121 East 97<sup>th</sup> St.* was offset by other aggravating factors, such as the egregiousness of the discriminatory misconduct, a factor also present here. Additionally, the impact of respondent's conduct on the public here is further

compounded by the involvement of the organizations North Brooklyn Development Corporation and the United Cerebral Palsy of New York City. Respondent's refusal to accommodate Ms. Russell impeded the efforts that these two organizations made to assist her.

Additional relevant considerations in assessing a civil penalty include whether the conduct was willful, the nature of the violations, and the presence of aggravating factors, such as offensive language. *See Comm'n on Human Rights ex rel. Gardner v. I.J.K. Service, Inc.*, OATH Index No. 1921/08 (Oct. 10, 2008), *aff'd in part, rev'd in part*, Comm'n dec. & order (Feb. 19, 2009); *Personal Employment Services*, OATH 1579/07; *Comm'n on Human Rights ex rel. Cherry, v. Stars Model Management*, OATH Index No. 1464/05 (Mar. 7, 2006), *adopted*, Comm'n dec. & order (Apr. 13, 2006). Here, although there is no evidence that respondent used offensive language in his interactions with Ms. Russell, there is no question that he willfully discriminated against her by refusing to consent to providing her with a reasonable accommodation—one that would have been at no cost to himself. His goal in refusing the accommodation appears to have been to make life as difficult as possible for Ms. Russell, without regard to any potential risks to her safety that he was causing. Respondent is unhappy with the low rent Ms. Russell currently pays and hoped that by not allowing her to properly modify her bathtub, she would vacate her unit.

Further, because it is in the public interest to have individuals respond and participate in a process designed to cure discriminatory practices in the City of New York, respondent's failure to respond to the Commission, file an answer, or appear at this proceeding is another aggravating factor. *See Hudson Overlook, LLC*, OATH 2094/04. Respondent failed to file an answer and to appear for the hearing. Therefore, there is nothing to mitigate the penalty here since respondent did not plead and prove any relevant mitigating factors as required by law. *See Admin. Code §§1-14(b), 8-126(b)*. Respondent's failure to appear shows a disregard for the Human Rights Law and the public policies expressed therein. *Hudson Overlook*, OATH 2094/04 at 11. Compounding his failure to appear is the May 18, 2009, telephone conversation petitioner's counsel affirmed to have had with respondent after respondent failed to attend a scheduled pre-trial settlement conference. During this conversation, petitioner's counsel informed respondent that the Human Rights Law required he provide Ms. Russell with a reasonable accommodation. Respondent replied that he would not replace her bathtub with a shower, that she only paid \$250 a month in rent, and that she should just move to a nursing home, before hanging up on petitioner's counsel.

In addition to the nature of the actual discrimination, whether there have been prior findings of discrimination against the same party may affect the amount of a civil penalty. *See Hudson Overlook*, OATH 137/06; *Comm'n on Human Rights v. Park West Realty*, CHR Compl. No. H-93-0877, rec. dec. & order (Sept. 26, 1995), *aff'd*, dec. & ord. (Dec. 12, 1995); *Comm'n on Human Right ex rel Thomas v. Space Hunters Inc*, OATH Index No. 997/04 (Mar. 31, 2005). Here, petitioner has not presented any evidence that there have been prior findings of discrimination against respondent.

The crux of this case is that respondent discriminated against Ms. Russell by refusing to provide a reasonable accommodation for her disability. The discrimination has had a continuous, long-term effect on Ms. Russell, seriously impinging on her life for a period of greater than one year. As discussed, the violation is of a willful nature and has a significant negative impact on the public interest. Although respondent does not have a history of past discrimination, his wanton failure to participate in this proceeding is particularly troubling. Based on the cited precedent and particular circumstances presented by this case, I recommend that respondent be fined a civil penalty of \$50,000, the amount requested by the Commission.

In sum, I recommend compensatory damages in the amount of \$30,000 and a civil penalty of \$50,000. Finally, the Commission also requested affirmative relief in the form of an order that respondent install the walk-in shower Ms. Russell has requested, at his own expense. Such an order is authorized under section 8-120(a) of the Administrative Code, and I find that it is appropriate here. Respondent was presented with the opportunity to have the shower installed at no cost to himself. Having rejected this offer, he now bears the burden of installing and paying for the reasonable accommodation requested by Ms. Russell.

Julio Rodriguez  
Administrative Law Judge

September 25, 2009

SUBMITTED TO:

**PATRICIA L. GATLING**

*Commissioner*

APPEARANCES:

**R. KEITH CHAPMAN, ESQ.**

**CARLOS VELEZ, ESQ.**

*Attorneys for Petitioner*

*No Appearance by or for Respondent.*