



ANDREW M. CUOMO
GOVERNOR

**NEW YORK STATE
DIVISION OF HUMAN RIGHTS**

**NEW YORK STATE DIVISION
OF HUMAN RIGHTS**

on the Complaint of

SHAMIM AKHTER,

Complainant,

v.

**BASIC PAY II, LLC, 130-10 FOOD CORP., TRADE
FAIR SUPERMARKETS, BASIC PAY, LLC,**
Respondents.

**NOTICE AND
FINAL ORDER**

Case No. 10141482

Federal Charge No. 16GB003457

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 March 31, 2015, by Martin Erazo, Jr., 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 HELEN DIANE FOSTER, 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: **JUL 13 2015**
Bronx, New York



HELEN DIANE FOSTER
COMMISSIONER



ANDREW M. CUOMO
GOVERNOR

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**BASIC PAY II, LLC, 130-10 FOOD CORP.,
TRADE FAIR SUPERMARKETS, BASIC
PAY, LLC,**

Respondents.

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

Case No. **10141482**

SUMMARY

Complainant alleges that, because of her disabilities, Respondents subjected her to a hostile work environment and then dismissed her. Complainant's claims against Trade Fair Supermarkets are dismissed because she failed to show that it discriminated against her. Complainant's claims against Basic Pay, LLC and Basic Pay II, LLC are dismissed as untimely. However, Complainant established that 130-10 Food Corp. unlawfully dismissed her. 130-10 Food Corp. is liable to Complainant for \$4,215.90 in lost wages and \$4,000 in emotional damages. 130-10 Food Corp. is also liable to the State of New York for \$5,000 in civil fines and penalties.

PROCEEDINGS IN THE CASE

On May 19, 2010, Complainant filed a verified complaint with the New York State Division of Human Rights (Division), charging Trade Fair Supermarkets with unlawful discriminatory practices relating to employment in violation of N.Y. Exec. Law, art. 15 (Human Rights Law). The Division complaint served on "Trade Fair Supermarkets Attention: Martin Jacobson President, 130-10 Metropolitan Avenue, Richmond Hill, NY 11418." (ALJ Ex. 4)

On February 21, 2012, the Division's Regional Office amended the complaint to include Basic Pay, LLC as a Respondent. (ALJ Exh. 4)

On May 16, 2012, after investigation, the Division found that it had jurisdiction over the complaint and that probable cause existed to believe that Trade Fair Supermarkets and Basic Pay, LLC had engaged in unlawful discriminatory practices. (ALJ Exh. 1) The Division thereupon referred the case to public hearing.

After due notice, the case came on for hearing before Migdalia Pares, an Administrative Law Judge (ALJ) of the Division.

On July 16, 2013, Complainant's counsel, David Abrams, Esq., amended the complaint to add Basic Pay II, LLC and 130-10 Food Corp. as Respondents. (ALJ Exh. 9) Trade Fair Supermarkets submitted Complainant's personnel records to the Division during the investigation. (Complainant Exh. 5) None of those documents identified 130-10 Food Corp. However, the proof at public hearing established that 130-10 Food Corp. was aware of this Division complaint prior to July 16, 2013. Trade Fair Supermarkets used documents completed by 130-10 Corp. management in its June 21, 2010 verified response to the Division complaint. (Tr. 286-87, 519-20; Complainant Exh. 5)

Public hearing sessions were held on September 16, 2013, October 1 and 3, 2013, November 12, 2013, March 10 and 11, 2014, June 2 and 3, 2014.

Complainant and Respondents appeared at the hearings. Complainant was represented by Abrams. Trade Fair Supermarkets, 130-10 Food Corp., and Basic Pay, LLC, were represented by Frank M. Graziadei, Esq. Basic Pay II, LLC was represented by Peter B. Fallon, Esq. The Division provided Bengali interpreters for Complainant during the proceedings.

After the public hearing, this matter was reassigned to ALJ Martin Erazo, Jr., pursuant to 9 New York Code Rule of Practice § 465.12(d).

FINDINGS OF FACT

1. Complainant has a diagnosis of diabetes and hypertension. (Tr. 64-65, 329, 352-53; ALJ Exh. 4)
2. 130-10 Food Corp. is a grocery retail store operating under the name Trade Fair Supermarkets located at 130-10 Metropolitan Avenue, Richmond Hills, New York. (Tr. 498; ALJ Exh. 4)
3. Trade Fair Supermarkets is also an association of grocery store merchants utilizing a common name for marketing purposes. (Tr. 9, 39)
4. 130-10 Food Corp. is a member of the Trade Fair Supermarkets. (Tr. 9, 498; ALJ Exh. 4)
5. 130-10 Food Corp. uses the commercial logo "Trade Fair Supermarkets" to promote its business. (Tr. 38-39)
6. "Trade Fair Supermarkets" appears outside the physical plant of the 130-10 Food Corp. store and in its circulars. (Tr. 277-78)

7. In November 2007, Complainant applied for a cashier position at 130-10 Food Corp. (Tr. 347)
8. Complainant spoke with and received all employment paperwork from Polly (last name unknown), the bookkeeper at 130-10 Food Corp. (Tr. 286-87; Complainant Exh. 5)
9. On November 30, 2007, 130-10 Food Corp. provided Complainant with employment application forms, some were captioned Basic Pay, LLC, others were labeled Trade Fair Supermarkets. (Tr. 347; ALJ Exhs. 11, 13; Complainant Exh. 5)
10. Basic Pay, LLC, was a “subcontractor” providing Trade Fair Supermarket members with “leased employees.” (Complainant Exh. 5)
11. On November 30, 2007, Complainant signed one document that states, “I will be considered a leased employee of Basic Pay, LLC...working...at various Trade Fair Supermarkets.” (Complainant Exh. 5)
12. Complainant also signed another document that indicates she received all anti-discrimination policies and materials as an employee of Trade Fair Supermarkets. (Complainant Exh. 5)
13. During the course of Complainant’s employment her pay stubs identified her employer as Basic Pay II, LLC. (Complainant Exhs. 3, 8, 9)
14. The parties were unclear when payroll responsibilities for Complainant transferred from Basic Pay, LLC to Basic Pay, II, LLC. (Complainant Exh. 3, 5, 8, 9)
15. At the public hearing, Basic Pay II, LLC also referred to itself as an “employee leasing company.” (Tr. 39)
16. Basic Pay II, LLC also “leases” employees to work at 130-10 Food Corp. (Tr. 39)

17. Complainant was unaware of the differences between Trade Fair Supermarkets, 130-10 Food Corp., Basic Pay, LLC or Basic Pay II, LLC. (Tr. 288-91, 297-99)

18. Complainant understood she worked at Trade Fair Supermarkets located at 130-10 Metropolitan Avenue, Richmond Hills, New York, when she filed the Division complaint. (Tr. 288, 347; ALJ Exh.1)

19. On November 30, 2007, Complainant started working as a part-time cashier at 130-10 Food Corp. (Tr. 59, 157, 165, 498; Complainant Exh. 5)

20. Complainant was directly supervised by Glory Madorri, Front End Supervisor. (Tr. 60-61, 509)

21. Complainant was also supervised by Assistant Managers Sam Balafrico, Monet (last name unknown) and Ahad (last name unknown), and Ali Fadli, Store Manager. (Tr. 61, 79-80, 186, 386, 498, 506)

22. Complainant informed her supervisors and co-workers that she suffered from diabetes. (Tr. 65, 219, 354)

23. Complainant's diabetes required her to take frequent bathroom breaks, two to three per shift. (Tr. 66-67, 354)

24. At the public hearing, Complainant testified that when her blood sugar was low, store managers allowed her to take a break to take medications, eat, or drink, as needed. (Tr. 65)

25. In June 2008, Madorri threatened to hit Complainant with a bottle if Complainant again asked for a price code on an item. (Tr. 67, 69, 79)

26. Madorri apologized after Complainant complained to manager Monet. (Tr. 79-80)

27. Shortly thereafter, on one particular day after Monet no longer worked at the store, Madorri allowed Complainant to go to the bathroom on only one occasion during an eight-hour period. (Tr. 80)

28. On or about January 23, 2010, Complainant informed Ahad that she felt faint. (Tr. 77, 78).

29. Complainant showed Ahad her medication for blood pressure. (Tr. 77-78, 206)

30. Complainant asked Ahad if she could go home. (Tr. 77-78, 206)

31. Ahad responded, in a joking manner, that if Complainant felt ill, they would call "4-1-1" and not "9-1-1," and did not allow Complainant to go home. (Tr. 77-78, 206)

32. On January 30, 2010, Complainant requested a bathroom break from Madorri. (Tr. 66, 72, 357)

33. Madorri denied the bathroom break request. (Tr. 66, 72)

34. Complainant then asked Balafrico for the bathroom break. Balafrico granted the request an hour later. (Tr. 66, 73)

35. The store policy was to provide two bathroom breaks per shift. (Tr. 329)

36. Employees were allowed to take these breaks with permission. (Tr. 354)

37. It was common practice for the store to immediately deny bathroom breaks but provide a break period shortly after request. (Tr. 354-55, 499)

38. When Complainant returned to her post, Madorri told Complainant to close out her cash drawer and head home. (Tr. 66, 75)

39. Madorri informed Complainant that the directive came from Ahad. (Tr. 66, 75)

40. Madorri also informed Complainant to call Ahad the next day for her work schedule. (Tr. 66, 75)

41. Complainant called Ahad the following day and was informed that she was not on the schedule for the incoming week and should call again the following week. (Tr. 66, 76, 434; Complainant Exh. 4, p.7)

42. When Complainant called Ahad the following week he informed her that the store would call her once she was back on the schedule. (Tr. 66-67, 329; Complainant Exh. 4, p.7)

43. Ahad never called Complainant. (Tr. 66)

44. Store Manager Ali Fadli claims that Complainant had resigned her position with 130-10 Food Corp. due to illness. (Tr. 517-19; Complainant Exh. 5, p.5)

45. However, Fadli was not credible when he testified that Complainant did not call 130-10 Food Corp. (Tr. 504-05; Complainant Exh. 4, p.7)

46. The Verizon telephone records show that Complainant called one of the store telephone numbers (718) 847-7713, on January 30 and February 3, 2010. (Tr. 513; Complainant Exh. 4, p.7)

47. January 30, 2010 was the last day that Complainant worked at 130-10 Food Corp. (Tr. 41, 59-60, 68, 69, 157, 198; ALJ Exh. 4; Complainant Exh. 6)

48. Complainant felt "sick" and "upset" after she lost her job. She had "difficulty sleeping" and was "crying" for three to four months. (Tr. 83)

49. Complainant's 2009 W-2 indicates that Complainant earned \$8,431.99. (Complainant's Exh. 9)

50. $\$8,431.99$ divided by 52 weeks = $\$162.15$ weekly. (Complainant's Exh. 9)

51. Since January 30, 2010, Complainant has not found employment. (Tr. 82)

52. Complainant stopped looking for work six months after her employment ended with 130-10 Food Corp. (Tr. 410-11)

53. Complainant would have earned \$4,215.90 if she had she remained employed at 130-10 Food Corp. for the period of six months after her dismissal. 26 weeks x \$162.15 = \$4,215.90.

54. Complainant did not apply for unemployment benefits. (Tr. 478)

OPINION AND DECISION

Named Respondents

130-10 Food Corp., Trade Fair Supermarkets, Basic Pay, LLC, and Basic Pay II, LLC, claim that they are not properly named Respondents. Trade Fair Supermarkets argues that it was never Complainant's employer. 130-10 Food Corp. also claims it was never Complainant's employer and that it was untimely added as a Respondent. Basic Pay, LLC and Basic Pay II, LLC concede they were Complainant's employers, but also argue that they were untimely added as Respondents.

Basic Pay, LLC and Basic Pay II, LLC were untimely added as Respondents. N.Y. Exec. Law, art. 15 ("Human Rights Law") § 297.5 provides that, "[a]ny complaint filed pursuant to this section must be so filed within one year after the alleged unlawful discriminatory practice." For claims involving termination of employment, the time starts to run from the date the employee is advised that he or she will be terminated. *See, Queensborough Cmty. Coll. v. State Human Rights App. Bd.*, 41 N.Y.2d 926, 394 N.Y.S.2d 625 (1977). Complainant's employment ended on January 30, 2010. Complainant filed this complaint on May 19, 2010. Basic Pay, LLC was not added as a Respondent until February 21, 2012, over two years after the date of violation. Basic Pay, II, LLC was not added as a Respondent until July 16, 2013, over three and a half years after the date of violation. In addition, there is no proof that any personnel from Basic Pay, LLC or Basic Pay, II, LLC had notice, interacted with Complainant, or condoned any of the

allegations raised by Complainant during her employment. Accordingly, the claims against Basic Pay, LLC and Basic Pay II, LLC, must be dismissed.

The claims made against the merchant association, Trade Fair Supermarkets, are timely, but it is not an employer. The Human Rights Law defines an “employer” in § 292.5, by making reference only to the number of persons in its employ. It does not offer a definition that would instruct whether an employer-employee relationship exists. However, there are four elements that should be considered in determining if such a relationship exists: (1) selection and engagement of the employee; (2) the payment of salary or wages; (3) the power of dismissal; and, (4) the power or control over the employee’s conduct. *See, State Div. of Human Rights (Emrich) v. GTE Corp.*, 109 A.D.2d 1082, 1083, 487 N.Y.S.2d 234, 235 (4th Dept. 1985). The key element is the fourth element, in that an employer-employee relationship can be found based upon evidence that the employer exercised “control over the results produced or over the means used to achieve the results.” *Scott v. Massachusetts Mutual Life Ins. Co.*, 86 N.Y.2d 429, 433, 633 N.Y.S.2d 754 (1995). Complainant correctly argues that she can have an employment relationship with more than one entity. Indeed, the association of merchants called “Trade Fair Supermarkets” maintains employees as evidenced by the documentation given to personnel upon hire. However, Complainant never interacted with or took direction from any association employees during her employment period. Accordingly, the claims against the association Trade Fair Supermarkets must be dismissed.

130-10 Food Corp. was clearly Complainant's employer under the Human Rights Law. Only 130-10 Food Corp. personnel hired, fired, and controlled all of Complainant's daily workplace activities.

Futhermore, 130-10 Food Corp. was properly added as a Respondent pursuant to the legal elements of the relation-back doctrine. *See, Matter of State Division of Human Rights (Hay) v. Steve's Pier One, Inc.*, 2014 WL 6778960 (2d Dept), *Sally v. Keyspan Energy Corp.*, 106 A.D. 3d 894, 896 (2d Dept 2013), *Matter of State Division of Human Rights v. A.R. Heflin Painting Contr.*, 101 A.D.3d 1442, 1445 (3d Dept 2012), *Matter of Murphy v. Kirkland*, 88 A.D. 3d 267, 275, 278 (2d Dept 2011). First, Complainant's claims against the association Trade Fair Supermarkets and 130-10 Food Corp. arose out of the same alleged conduct. Second, the proof clearly shows that Trade Fair Supermarkets and 130-10 Food Corp. are united in interest. The two entities have a close, unique, business relationship. When the Division served the May 19, 2010 verified complaint on Trade Fair Supermarkets at 130-10 Metropolitan Avenue, the association responded, in its June 21, 2010 verified answer, with information, documents, and materials, completed by 130-10 Food Corp. personnel. 130-10 Food Corp. was not prejudiced by its subsequent addition as a Respondent. 130-10 Food Corp. was aware of the complaint from the beginning and assisted Trade Fair Supermarkets in responding to the complaint. Third, a significant part of the confusion in naming the proper party arose from Trade Fair Supermarkets' own lack of clarity during the Division investigation. While Trade Fair Supermarkets, the association, is a separate entity, 130-10 Food Corp. conceded at the public hearing that it also uses "Trade Fair Supermarkets" as its commercial name. Trade Fair Supermarkets, the association, and 130-10 Food Corp., who share the same counsel, relied on the confusion. Under

the relation-back analysis, but for the mistake as to the identity of the Respondents, the actions against 130-10 Food Corp. would have been timely commenced.

Hostile Work Environment

Complainant argues that she was subjected to a hostile work environment based on her disability. Under Human Rights Law §296.1(a), it is an unlawful discriminatory practice for an employer "because of the ... disability...of any individual to discriminate against such individual in compensation or in terms, conditions or privileges of employment."

In order to sustain a claim of harassment on the basis of disability, Complainant must demonstrate that she was subjected to a work environment permeated with discriminatory intimidation, ridicule and insult that was sufficiently severe or pervasive to alter the conditions of her employment and create an abusive working environment. Complainant must subjectively view as unwelcome the conduct that creates a hostile environment. In addition, a reasonable person must objectively view the conduct as severe or pervasive enough to create an abusive environment. *Father Belle Community Center v. New York State Division of Human Rights*, 221 A.D.2d 44, 642 N.Y.S.2d 739 (4th Dept., 1996), *leave to appeal denied*, 89 N.Y.2d 809, 716 N.Y.S.2d 533 (1997). When assessing claims of hostile environment and its pervasiveness, the ultimate decision depends on the totality of the circumstances. *McIntyre v. Manhattan Ford, Lincoln-Mercury, Inc.*, 175 Misc.2d 795, 669 N.Y.S.2d 122 (N.Y. Sup. Ct. 1997), *appeal dismissed*, 256 A.D. 269, 682 N.Y.S.2d 167 (1st Dept. 1998), *appeal dismissed*, 93 N.Y.2d 919, 713 N.E.2d 418 (1999), *leave to appeal denied*, 94 N.Y.2d 753 722 N.E.2d 507 (1999).

Complainant established that during the course of her three year employment, supervisors at 130-10 Food Corp. made two negative comments to her. One comment was made in 2008, unrelated to her disability. In January 2010 Complainant asked a manager for permission to go

home because she felt faint and needed to take her blood pressure medication. The manager did not allow her to leave and responded that if she felt ill they would call “411” and not “911.” Complainant also alleged that in January 2010 a manager did not allow her to immediately use the bathroom and had to wait an hour after asking a second manager. Complainant’s diabetes often required her to go to the bathroom. However, Complainant conceded that during her employment, 130-10 Food Corp. had allowed her to use the bathroom as needed. Given the particular context of this case, Complainant failed to demonstrate that 130-10 Corp. subjected her to hostile work environment because of disability. “Isolated instances of harassment ordinarily do not rise” to a level that creates a hostile work environment unless extremely serious or “sufficiently continuous and concerted.” *see Cruz v. Coach Stores*, 202 F.3d 560, 570 (2d Cir. 2000), quoting, *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 21 (1993). Accordingly, Complainant’s claim of harassment based on disability must be dismissed.

Differential Treatment

Complainant alleges she was fired on January 30, 2010 because she asked to use the bathroom because of her diabetic condition. In order to establish a prima facie case of unlawful disability discrimination, a complainant must demonstrate that: (1) she meets the definition of an individual with a disability; (2) her disability did not prevent her from performing her duties in a reasonable manner with or without reasonable accommodations; (3) she suffered an adverse employment action; and (4) the adverse employment action occurred under circumstances giving rise to an inference of unlawful discrimination. *See, McEniry v. Landi*, 84 N.Y.2d 554, 558, 620 N.Y.S.2d 328 (1994); *Thide v. New York State Dep’t. of Transp.*, 27 A.D.3d 452, 811 N.Y.S.2d 418 (2d Dept. 2006).

If a complainant makes out a prima facie case of discrimination, the burden shifts to the

respondent to present a legitimate, non-discriminatory reason for its action. If the respondent does so, the complainant must show that the reasons presented were merely a pretext for discrimination. The ultimate burden of proof always remains with the complainant. *Ferrante v. American Lung Ass'n*, 90 N.Y.2d 623, 630, 665 N.Y.S.2d 25, 29 (1997).

Complainant established a prima facie case of unlawful disability discrimination.

Complainant met the first element of a prima facie case. Complainant established she had disabilities as she suffered from diabetes and hypertension. A “disability” is “... a physical, mental or medical impairment resulting from anatomical, physiological or neurological conditions which prevents the exercise of a normal bodily function or is demonstrable by medically accepted clinical or laboratory techniques” Human Rights Law § 292.21. In order to meet this definition, an employee must only show he suffers from some diagnosable impairment. *See, State Div. of Human Rights v. Xerox Corp.*, 65 N.Y.2d 213, 218-19, 491 N.Y.S.2d 106 (1985); *Reeves v. Johnson Controls World Servs., Inc.*, 140 F.3d 144, 154-56 (2d Cir. 1998).

Complainant met the second element of a prima facie case. The proof established that Complainant performed the duties of a cashier with the reasonable accommodation of being allowed to go to the bathroom as necessitated by her diabetic condition.

Complainant met the third and fourth elements of a prima facie case. Complainant suffered an adverse employment action under circumstances giving rise to an inference of unlawful discrimination. 130-10 Food Corp. removed Complainant from her cashier position on January 30, 2010 when she returned from the bathroom. 130-10 Food Corp. asked Complainant to go home and never placed her back on the work schedule.

130-10 Food Corp. articulated a reason for Complainant's separation from employment. 130-10 Food Corp. claims that Complainant resigned and that she never called back. Contrary to 130-10 Food Corp.'s claims, Complainant never testified that she quit her job as the Bengali interpreter conceded that an error was made in translation. Instead, Complainant established that 130-10 Food Corp.'s reasons are not worthy of belief. Complainant's phone records show that immediately after her last day of work she called 130-10 Food Corp. during two consecutive weeks. Complainant's proof is consistent with her version of events. 130-10 Food Corp. managers asked her to call-in to receive her work schedule and never placed her back on duty.

Lost Wage Damages

130-10 Food Corp. owes Complainant lost wages in the amount of \$4,215.90. Due to 130-10 Food Corp.'s discriminatory conduct, Complainant was unemployed for a period of six months following her separation on January 30, 2010. During the six month time period Complainant mitigated her losses by seeking employment. However, Complainant testified that she stopped looking for work after the six months. 130-10 Food Corp. is also liable to Complainant for predetermination interest on the back pay award at a rate of nine percent, per annum, from November 23, 2011, a reasonable intermediate date between January 30, 2010, when lost earnings caused by the unlawful discrimination commenced, and September 13, 2013, the date of the public hearing, through the date of the Commissioner's Final Order. *Aurecchione v. New York State Division of Human Rights*, 98 N.Y.2d 21, 744 N.Y.S.2d 349 (2002). In addition, Respondents are liable to Complainant for interest on the back pay award at a rate of nine percent, per annum, from the date of the Commissioner's Final Order until payment is made.

Mental Anguish Damages

Complainant is entitled to recover compensatory damages caused by 130-10 Food Corp.'s violation of the Human Rights Law. Human Rights Law § 297.4(c)(iii). The award of compensatory damages may be based solely on a complainant's testimony. 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. N.Y. State Div. of Human Rights (Nash)*, 78 N.Y.2d 207, 216, 573 N.Y.S.2d 49, 54 (1991); *Cullen v. Nassau County Civil Service Commission*, 53 N.Y.2d 452, 442 N.Y.S.2d 470 (1981). The severity, frequency, and duration of the conduct may be considered in fashioning an appropriate award. *New York State Dep't of Corr. Servs. v. N.Y. State Div. of Human Rights*, 225 A.D.2d 856, 859, 638 N.Y.S.2d 827, 830 (3d Dept. 1996). 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. *N.Y. State Div. of Human Rights v. Muia*, 176 A.D.2d 1142, 1144, 575 N.Y.S.2d 957, 960 (3d Dept. 1991).

Respondent's actions had a negative effect on Complainant. Complainant felt "sick," "upset," cried, and had "difficulty sleeping," for a period that lasted approximately three or four months. Accordingly, Complainant is entitled to \$4,000 for the pain and suffering she experienced for the period of January 30, 2010 to April 30, 2010 because of 130-10 Food Corp.'s discriminatory actions. The award is reasonably related to the wrongdoing, supported by the evidence, comparable with other awards for similar injuries, and, therefore, justified in this case. *See, Matter of City of Niagara Falls v. New York State Div. of Human Rights (Arya)*, 94 A.D.3d 1442, 1444, 943 N.Y.S.2d 321 (4th Dept. 2009).

Civil Fines and Penalties

Human Rights Law § 297 (4)(c)(vi) permits 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.”

There are several factors that determine if civil fines and penalties are appropriate: 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; other matters as justice may require. *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).

A penalty of \$5,000 is appropriate in this matter. *See, Pacheco v 185 East 163rd Street HDFC*, DHR Case No. 10149659 (October 26, 2012) (Commissioner issued a penalty of \$5,000 where Respondent failed to accommodate a disability), *see generally, Commissioner’s penalties affirmed, Matter of County of Erie v. New York State Div. of Human Rights (Pascale)*, 121 A.D.3d 1564, 993 N.Y.S.2d 849 (4th Dept. 2014), *Noe v. N.Y. State Div. of Human Rights (Martin), et.al.*, 101 A.D.3d 1756, 957 N.Y.S.2d 796 (4th Dept. 2012); *Johnston v. N.Y. State*

Div. of Human Rights, et.al., 100 A.D.3d 1354, 953 N.Y.S.2d 757 (4th Dept. 2012); *New York State Div. of Human Rights v. Stennett*, 98A.D.3d 512, 949 N.Y.S.2d 459 (2d Dept. 2012).

The goal of deterrence; 130-10 Food Corp.'s degree of culpability; and the nature and circumstances of 130-10 Food Corp.'s violation warrant a penalty. 130-10 Food Corp. violated the Human Rights Law when it fired Complainant because it no longer wanted to handle Complainant's requests for restroom breaks as occasioned by her diabetic condition. There was no proof that 130-10 Food Corp. was adjudged to have committed any previous similar violation of the Human Rights Law or was incapable of paying any penalty.

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 against Basic Pay, LLC and Basic Pay, II, LLC is dismissed as untimely; and it is further

ORDERED, that the complaint against Trade Fair Supermarkets is dismissed because it is not Complainant's employer; and it is further

ORDERED, that 130-10 Food Corp., its agents, representatives, employees, successors, and assigns, shall cease and desist from discriminating against any employee in the terms and conditions of employment; and it is further

ORDERED, that 130-10 Food Corp., its agents, representatives, employees, successors and assigns shall take the following affirmative action to effectuate the purposes of the Human Rights Law:

1. Within sixty days of the date of the Commissioner's Final Order, 130-10 Food Corp. shall

pay to Complainant, Shamim Akhter, the sum of \$4,215.90 as damages for back pay. Interest shall accrue on this award at the rate of nine percent per annum, from November 23, 2011, a reasonable intermediate date between January 30, 2010 and September 16, 2013, until the date payment is actually made by 130-10 Food Corp.

2. Within sixty days of the date of the Commissioner's Final Order, 130-10 Food Corp. shall pay to Complainant, Shamim Akhter, the sum of \$4,000 as compensatory damages for mental anguish and humiliation Complainant suffered as a result of 130-10 Food Corp.'s unlawful discrimination against her. Interest shall accrue on this award at the rate of nine percent per annum, from the date of the Commissioner's Final Order until payment is actually made by 130-10 Food Corp.

3. The payment shall be made by 130-10 Food Corp. to Complainant, Shamim Akhter, in the form of a certified check, made payable to the order of Shamim Akhter, and delivered by certified mail, return receipt requested, to Complainant's attorney, David Abram, Esq., Church Street Station, P.O. Box 3353, New York, New York 10008. A copy of the certified check shall be provided to Caroline Downey, Esq., General Counsel of the Division, One Fordham Plaza, 4th Floor, Bronx, New York 10458.

4. Within sixty days of the date of the Commissioner's Final Order, 130-10 Food Corp. shall pay to the State of New York the sum of \$5,000 as a civil fine and penalty for its violation of the Human Rights Law. Interest shall accrue on this award at the rate of nine percent per annum, from the date of the Commissioner's Final Order until payment is actually made by 130-10 Food Corp.

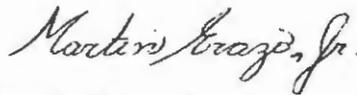
5. The payment of the civil fine and penalty shall be made by 130-10 Food Corp. in the form of a certified check, made payable to the order of the State of New York and delivered by certified

mail, return receipt requested, to Caroline Downey, Esq., General Counsel of the Division, One Fordham Plaza, 4th Floor, Bronx, New York 10458.

6. Within sixty days of the Final Order, 130-10 Food Corp. shall provide a training session to its managers in the proper review of reasonable accommodation requests in accordance with the Human Rights Law. Proof of the training session shall be provided to Caroline Downey, Esq., General Counsel of the New York State Division of Human Rights, One Fordham Plaza, 4th Floor, Bronx, New York 10458.

7. 130-10 Food Corp. shall cooperate with the representatives of the Division during any investigation into compliance with the directives contained in this Order.

DATED: March 31, 2015
Buffalo, New York



Martin Erazo, Jr.
Administrative Law Judge