

**NEW YORK STATE  
DIVISION OF HUMAN RIGHTS**

**NEW YORK STATE DIVISION  
OF HUMAN RIGHTS**

on the Complaint of

**KEITH S. ARNOLD,**

Complainant,

v.

**K. MERRITT AGENCY, INC.,**

Respondent.

**NOTICE AND  
FINAL ORDER**

Case No. 10113629

**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 February 3, 2009, by Margaret A. Jackson, an Administrative Law Judge of the New York State Division of Human Rights (“Division”). An opportunity was given to all parties to object to the Recommended Order, and all Objections received have been reviewed.

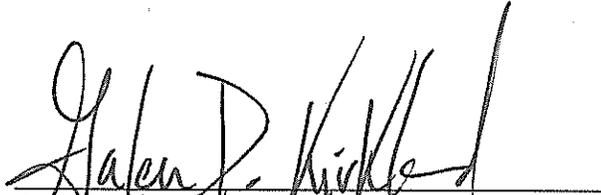
**PLEASE BE ADVISED THAT, UPON REVIEW, THE RECOMMENDED ORDER IS HEREBY ADOPTED AND ISSUED BY THE HONORABLE GALEN D. KIRKLAND, COMMISSIONER, AS THE FINAL ORDER OF THE NEW YORK STATE DIVISION OF HUMAN RIGHTS (“ORDER”).** In accordance with the Division's Rules of Practice, a copy of this Order has been filed in the offices maintained by the Division at One Fordham Plaza, 4th Floor, Bronx, New York 10458. The Order may be inspected by any member of the public during the regular office hours of the Division.

**PLEASE TAKE FURTHER NOTICE** that any party to this proceeding may appeal this Order to the Supreme Court in the County wherein the unlawful discriminatory practice that is

the subject of the Order occurred, or wherein any person required in the Order to cease and desist from an unlawful discriminatory practice, or to take other affirmative action, resides or transacts business, by filing with such Supreme Court of the State a Petition and Notice of Petition, within sixty (60) days after service of this Order. A copy of the Petition and Notice of Petition must also be served on all parties, including the General Counsel, New York State Division of Human Rights, One Fordham Plaza, 4th Floor, Bronx, New York 10458. Please do not file the original Notice or Petition with the Division.

**ADOPTED, ISSUED, AND ORDERED.**

DATED: **SEP 18 2009**  
Bronx, New York

  
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GALEN D. KIRKLAND  
COMMISSIONER

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**KEITH S. ARNOLD,**

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**K. MERRITT AGENCY, INC.,**

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

Case No. 10113629

**SUMMARY**

Complainant alleged that Respondent discriminated against him by terminating his employment because he was a recovering alcoholic. Respondent denied the charges and asserted that Complainant's work performance was poor. In the instant case, Complainant demonstrated that his termination from employment was based on Respondent's discrimination against him due to his disability. Therefore, I find that the Respondent's actions violated of the Human Rights Law.

**PROCEEDINGS IN THE CASE**

On September 5, 2006, Complainant filed a verified complaint with the New York State Division of Human Rights ("Division"), charging Respondent with unlawful discriminatory practices relating to employment 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.

After due notice, the case came on for hearing before Rosalie Wohlstatter, an Administrative Law Judge (“ALJ”) of the Division. Public hearing sessions were held on June 30, 2008 and July 1, 2008. Judge Wohlstatter left service of the Division and on October 7, 2008, the matter was re-assigned to Margaret A. Jackson, an Administrative Law Judge (“ALJ”) of the Division.

Complainant and Respondent appeared at the hearing. Complainant was represented by Jerold S. Slate, Esq. Respondent was represented by James F. O'Brien, Esq.

Permission to file post-hearing briefs was granted. Post-hearing Findings of Fact and Conclusions of Law were submitted by both parties.

### **FINDINGS OF FACT**

1. On June 21, 2001, Complainant was hired by Respondent, an Allstate insurance agency with offices in Somers, New York and Croton on the Hudson, New York. (Tr. 21, 26)
2. Kathleen Merritt owned and operated Respondent’s business. (Tr. 534)
3. Complainant’s annual salary was \$32,000. (Tr.100)
4. Complainant worked as a Customer Service Representative in the Somers office and transferred into sales training in Respondent’s Croton office in 2002. The Croton office was close to Complainant’s home; it was a forty minute commute, via car, from Complainant’s residence in Wappingers Falls. Maria Partland was the sales manager in charge of that office. (Tr. 21, 75, 540-42)

5. Complainant had a history of alcoholism prior to his employment with Respondent, as well as during his employment. (Tr. 34-5)

6. In May of 2004, Complainant received his license to sell insurance from the New York State Insurance Department. (Tr. 113-135)

7. Complainant did not meet his sales goals that Spring and Merritt contemplated terminating his employment but Partland advocated to give him a second chance citing several reasons why his goals may not have been met. Merritt agreed. (Tr. 275-77)

8. Complainant acknowledged that his drinking affected his job performance. In fact, Complainant may have met with clients or customers smelling of alcohol. He also made endorsement errors and sometimes failed to return customer calls. (Tr. 38, 141-42, 147-48, 263)

9. Merritt smelled alcohol on Complainant's breath and told him that he had an alcoholic's attitude and/or behavior. She said that she could identify these traits because her brother was an alcoholic. (Tr. 37)

10. Complainant felt humiliated and demeaned by Merritt's constant references and comparisons to her brother. (Tr. 220-22)

11. Respondent's sales staff was required to produce a minimum of ten policies per month. After completing ten policies per month, a separate check in the amount of ten dollars per application would be given to the employee as a bonus. (Tr.41-2)

12. Other than the Spring of 2004, Complainant met his goals and received a bonus every month except November and December of 2005 while he was in an alcohol rehabilitation program. (Tr. 224-225, 275-76)

13. On May 7, 2005, Complainant was charged for driving while intoxicated (DWI) and his driver's license was suspended. (Tr. 73)

14. Later that month, Complainant told Merritt that he was arrested and charged with DWI. He also confided in Maria McPartland, the Croton office manager, telling her that he was arrested for DWI and he was facing a possible three year jail term. (Tr.74, 113, 166-7)

15. A few months later, Merritt learned that Complainant was entering an alcohol rehabilitation program. Merritt told Complainant to disclose to his colleagues, via e-mail, that he would not be in the office between November 1, 2005 and November 28, 2005 because he was entering into an alcoholic rehabilitation program. Complainant was unnerved about telling his colleagues the reason for his upcoming absence but he complied. (Tr. 57-61, 570)

16. At Complainant's June 26, 2005 performance review, Merritt decided to terminate Complainant's employment. However, when Merritt learned of Complainant's DWI and anticipated three year incarceration she decided to let him continue working until he was incarcerated. (Tr. 82, 278-80)

17. On November 1, 2005, Complainant entered a 28 day inpatient alcoholic rehabilitation program. He successfully completed the program on November 23, 2005. (Tr.28-9, 713-14)

18. On November 28, 2005, Complainant pled guilty to DWI. (Tr. 190)  
Complainant returned to work on November 29, 2005, and was directed to report to the Somers office where there was a shortage of telephones, desks and computers. (Tr.45, 52, 72, 93)

19. The Somers office was a much longer commute from Complainant's home. Nonetheless, Complainant used public transportation to get to work. It was the middle of winter and Complainant was not given keys to the office so he often had to wait in the cold until someone arrived. (Tr.57, 187-191)

20. Complainant felt "intimidated" and "afraid" to ask why he was being transferred. (Tr.77-8)

21 . In December of 2005, the entire office was given a year-end Christmas bonus based on the office performance sales. All of the employees, except Complainant, received a Christmas bonus. (Tr. 66-8)

22. On January 10, 2006, Merritt learned that Complainant was not sentenced to three years jail time but five years probation on the DWI charge. She then informed Complainant that he was being terminated from his employment due to performance problems. (Tr. 284, 598-600)

23. Complainant was disturbed because he was not given the opportunity to show whether his performance improved after rehabilitation. (Tr. 313)

24. Subsequent to Complainant's termination from employment Complainant has suffered "severe anxiety" and "depression." He was prescribed paxil in 20 milligram tablet form as medication for the anxiety he and his family suffered in connection with the termination of his employment. (Tr.95-6)

25. Complainant testified that he looked for, but could not find comparable subsequent employment for nine months. (Tr. 98-9)

26. Complainant collected unemployment insurance benefits in the amount of \$365 per week for 26 weeks. (Tr. 101)

### **OPINION AND DECISION**

The Human Rights Law makes it an unlawful discriminatory practice for an employer to discriminate against an individual because of his disability. Human Rights Law §296.1(a). In the instant case, Complainant has demonstrated that Respondent's action of terminating him was the result of Respondent's discrimination against him on the basis of disability. Therefore, I find that

Respondent discriminated against Complainant on the basis of disability in violation of the Human Rights Law.

In order to make a prima facie case of disability discrimination under the Human Rights Law, Complainant must show that: (1) he was a member of a protected class; (2) he was qualified for the position; (3) he suffered an adverse employment action; and (4) the adverse employment action occurred under circumstances giving rise to an inference of disability discrimination. If Complainant establishes a prima facie case of discrimination, then Respondent must produce evidence showing that its action was non-discriminatory and for a legitimate business reason. Once Respondent has articulated a legitimate non-discriminatory reason for the adverse employment decision, the burden shifts back to Complainant to show that the legitimate, non-discriminatory reasons proffered by Respondent were pretext. *Pace College v. Commission on Human Rights of the City of New York*, 38 N.Y.2d 28, 39-40, 377 N.Y.S.2d 471 (1975), (citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973)).

Complainant has made out a prima facie case of disability discrimination. Complainant is disabled as that term is defined under the Human Rights Law §292 (21). *See, State Div. of Human Rights v. Xerox Corp.*, 65 N.Y.2d 213, 491 N.Y.S.2d 106 (1985). Complainant is a recovering alcoholic. This condition constitutes a disability under the Human Rights Law. Respondent had knowledge that Complainant was disabled and was aware that his performance was compromised because of his disability. Complainant obtained his insurance license and performed his job satisfactorily by maintaining his sales quota. After more than four years of employment with Respondent, Complainant entered into an alcohol rehabilitation program. After completion of the program, Complainant returned to work. Within six weeks Complainant's employment was terminated. He was not given an opportunity to demonstrate an improved job performance or to

prove that prior to rehab his job performance was compromised because of his disability.

Complainant suffered an adverse action when his employment was terminated. Complainant was discharged under circumstances giving rise to an inference of discrimination based on the fact that said discharge came subsequent to treatment for his alcoholism.

After a prima facie case has been established, the burden of production shifts to Respondent to articulate that the disability prevented the employee from performing the duties of the job in a reasonable manner or that the employee's termination was motivated by a lawful reason. Respondent's articulated reason for Complainant's termination was that his job performance was poor. Complainant acknowledged that there were occasions when his performance was not as it should have been because of his disability of alcoholism. However, Complainant took steps to rectify the problem, by entering a rehabilitation program. He returned to work and his employment was terminated within a six week period on the basis of his alcohol related work performance.

Complainant must also demonstrate that Respondent's proffered reason for termination was pretext. The record supports a finding of pretext. Respondent was prepared to terminate Complainant's employment in 2004 while he was disabled. Complainant continued working for two years. Merritt then learned that Complainant might be going to jail for three years and hoped that his employment would end with his incarceration. When Complainant only received probation on his DWI charge and returned to work after completion of his rehabilitation program, Merritt resorted to transferring him to another office that did not have the proper equipment for him to perform his job. There was a shortage of desk space, telephone access and computers. In addition, Respondent knew that Complainant was not driving and without explanation transferred him to an office that was much further from his residence. Complainant used public transportation only to learn that he was left out in the cold in the middle of winter because he was not given a key to enter the office.

Despite these obstacles Complainant continued to report to work. Therefore, I find that Complainant was able to perform the duties of his job and that terminating him for prior poor work performance that was causally related to his alcoholism is pretextual in nature. Thus, Complainant has met his burden of proof in showing that he was unlawfully discriminated against on the basis of his disability.

The Human Rights Law provides remedies to restore victims of unlawful discrimination to the economic position they would have held had their employers not subjected them to discriminatory conduct. As the victim of discrimination, Complainant is entitled to damages. The damages available under the Human Rights Law include compensatory damages for lost wages in the form of back pay. Complainant lost pay because Respondent unlawfully terminated his employment. Complainant mitigated his damages by searching for subsequent employment. Complainant testified that he continually looked for, but could not find, subsequent employment. Complainant is entitled to back pay damages from his removal from the payroll on January 10, 2006 through his date of re-employment in September of 2006. Complainant credibly attested that his annual salary was approximately \$32,000.00 at the time of his removal from the payroll on January 10, 2005. Complainant lost approximately \$24,000.00 for the nine month period that he was unemployed. Complainant received unemployment insurance benefits over the same time period totaling \$ 9,490.00. Respondent is entitled to offset unemployment insurance payments made to a complainant during the period covered by the back pay award against the amount of the award. This amount of benefits must be subtracted from what Complainant would have earned with Respondent over that time period. Complainant would have earned \$24,000 during that same time period if Respondent had not terminated him. He is therefore awarded \$14,510.00, the difference between what he collected in benefits and what he would have earned had he not been terminated.

Respondent is also liable to Complainant for predetermination interest on the back pay award at a rate of nine percent per annum from May 10, 2006, a reasonable intermediate date.

*Aurrecchione v. New York State Div. of Human Rights*, 98 N.Y.2d 21, 744 N.Y.S.2d 349 (2002).

Furthermore, Respondent is 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.

Complainant is therefore entitled to a total back pay award of \$14,510.00 plus interest and is hereby awarded that amount.

Making Complainant whole entails compensating him for the emotional suffering that he endured because of Respondent's unlawful conduct. Complainant is entitled to compensatory damages for the emotional distress, pain and suffering that Respondent's actions caused him. Such compensation may be based solely on Complainant's testimony. *Cosmos Forms, Ltd. v. State Div. of Human Rights*, 150 A.D.2d 442, 541 N.Y.S.2d 50 (2d Dept. 1989); *Wantagh Union Free School Dist. v. State Div. of Human Rights*, 122 A.D.2d 846, 505 N.Y.S.2d 713 (2d Dept. 1986), *appeal dismissed*, 69 N.Y.2d 823 (1987). It must be reasonably related to the discriminatory conduct. *New York City Transit Authority v. State Div. of Human Rights*, 78 N.Y.2d 207, 573 N.Y.S.2d 49 (1991).

Complainant testified to that he and his family suffered from the emotional distress he experienced from losing his job. Complainant testified that he was humiliated and demeaned during the course of his employment and suffered from "anxiety" and "depression" after his termination from employment. I find that the evidence in the record supports an award of \$15,000.00 for mental anguish.

## 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 discriminating against any employee in the terms and conditions of employment because of disability in violation of the Human Rights Law; and it is further

ORDERED that Respondent its agents, representatives, employees and assigns shall take the following affirmative actions to effectuate the purposes of the Human Rights Law:

1. Within thirty days of the date of the commissioner's final Order, Respondent shall pay to Complainant the sum of \$14,510.00 as damages for back pay. Interest shall accrue on the award at the rate of nine percent per annum from a reasonable intermediate date, May 10, 2006, until the date payment is actually made by Respondent.

2. Within thirty days of the date of the commissioner's Final Order, Respondent shall pay to Complainant the sum of \$15,000.00 without any withholdings or deductions, as compensatory damages for the mental anguish and humiliation suffered by Complainant as a result of Respondent's unlawful discrimination against him. Interest shall accrue on the award at the rate of nine percent per annum, from the date of the Commissioner's Final Order until the date payment is actually made by Respondent.

3. The aforesaid payments shall be made by Respondent in the form of two separate certified checks made payable to the order of Complainant Kieth S. Arnold, and delivered to Complainant's counsel, Jerold M. Slate, Esq., at his office address of 303 Mill Street, Poughkeepsie, New York 12601, by registered mail, return receipt requested. Respondent shall simultaneously furnish written proof of the aforesaid payments of the sums required by the Commissioner's

Final Order to Carolyn Downey, General Counsel, New York State Division of Human Rights,  
One Fordham Plaza, 4th Floor, Bronx, New York 10458.

4. Respondent shall cooperate with the Division during any investigation into compliance  
with the directives contained in this Order.

DATED: February 3, 2009  
Hempstead, New York

A handwritten signature in black ink that reads "Margaret A. Jackson". The signature is written in a cursive style with a large, sweeping initial "M" and a long, horizontal flourish at the end of the name.

Margaret A. Jackson  
Administrative Law Judge