



ANDREW M. CUOMO
GOVERNOR

**NEW YORK STATE
DIVISION OF HUMAN RIGHTS**

**NEW YORK STATE DIVISION
OF HUMAN RIGHTS**

on the Complaint of

VICKIE DEBERGER,

Complainant,

v.

**BADGER TECHNOLOGIES, INC., TCS
ELECTRONICS, INC.,**

Respondents.

**NOTICE AND
FINAL ORDER**

Case No. 10152901

Federal Charge No. 16GB201415

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 April 3, 2014, by Edward Luban, 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.

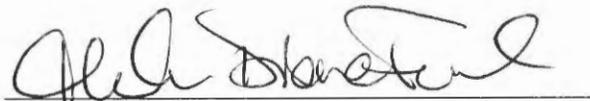
PLEASE BE ADVISED THAT, UPON REVIEW, THE RECOMMENDED ORDER IS HEREBY ADOPTED AND ISSUED BY THE HONORABLE HELEN DIANE FOSTER, ACTING COMMISSIONER, AS THE FINAL ORDER OF THE NEW YORK STATE DIVISION OF HUMAN RIGHTS (“ORDER”). In accordance with the Division's Rules of Practice, a copy of this Order has 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: JUN 23 2014,
Bronx, New York


HELEN DIANE FOSTER
COMMISSIONER



ANDREW M. CUOMO
GOVERNOR

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on the Complaint of

VICKIE DEBERGER,

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v.

**BADGER TECHNOLOGIES, INC., TCS
ELECTRONICS, INC.,**

Respondents.

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

Case No. 10152901

SUMMARY

Complainant alleged that Respondent Badger Technologies, Inc. terminated her employment because of her disability. Respondents did not answer the complaint or appear at the hearing, and a default was entered. Complainant has proven her case and is awarded damages against Respondent Badger Technologies, Inc. A civil fine and penalty is also assessed against Respondent Badger Technologies, Inc. The complaint against Respondent TCS Electronics, Inc. is dismissed.

PROCEEDINGS IN THE CASE

On January 23, 2012, Complainant filed a verified complaint with the New York State Division of Human Rights ("Division"), charging Respondent Badger Technologies, Inc.

("Badger") 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 Badger had engaged in unlawful discriminatory practices. The Division thereupon referred the case to public hearing. The case was assigned to Edward Luban, an Administrative Law Judge ("ALJ") of the Division.

On November 15, 2012, the Division notified Complainant and Badger that a hearing on the complaint was scheduled for November 28-29, 2012 at the Division's Rochester Regional Office. The Division sent the notice to Badger at 5829 County Road 41, Farmington, New York ("5829 County Road 41"). (ALJ's Exh. 1)

The hearing scheduled for November 28-29, 2012 was adjourned.

On June 10, 2013, the Division notified Complainant and Badger that the hearing was scheduled for July 10-11, 2013 at the Rochester Regional Office. The Division sent the notice to Badger at 5829 County Road 41. (ALJ's Exh. 2)

On July 10, 2013, Complainant and Richard Van Coevering, Esq., a Senior Attorney of the Division, appeared for the hearing as scheduled. Badger did not appear. The hearing was adjourned so the Division could amend the complaint to add a new respondent.

On July 11, 2013, the Division amended the complaint to add TCS Electronics, Inc. ("TCS") as a Respondent. (ALJ's Exh. 7)

On July 11, 2013, the Division served the amendment upon Badger at 5829 County Road 41. The Division served the amendment upon TCS at 5928 County Road 41, Farmington, New York ("5928 County Road 41"), an apparent transposition of the digits of 5829 County Road 41, TCS's actual address. (ALJ's Exh. 9)

On July 22, 2013, the Division notified the parties that a hearing on the complaint was scheduled for October 2-3, 2013 at the Rochester Regional Office. The Division sent the notice to Badger at 5829 County Road 41 and to TCS at 5928 County Road 41. (ALJ's Exh. 8)

On September 10, 2013, the Division served the parties with an amended notice that the hearing was scheduled for October 2-3, 2013. The Division sent the notice to Badger at 5829 County Road 41 and to TCS at 5928 County Road 41. (ALJ's Exh. 7)

On September 18, 2013, the Division notified the parties that the hearing scheduled for October 2-3, 2013 would begin at 10:00 a.m. The Division sent the notice to Badger at 5829 County Road 41 and to TCS at 5928 County Road 41. (ALJ's Exh. 10) The Division subsequently notified the parties by telephone that the hearing would begin at 10:00 a.m. on October 3, 2013, not October 2, 2013.

On October 3, 2013, Complainant and the Division attorney appeared for the hearing as scheduled. Neither Badger nor TCS appeared. Before opening the record, the presiding ALJ noticed that the Division had sent TCS's notices to 5928 County Road 41. The hearing was adjourned so the Division could serve TCS at the correct address.

On October 3, 2013, the Division served the parties with an amended notice that a hearing on the complaint was scheduled for October 23, 2013 at 10:00 a.m. at the Rochester Regional Office. The Division sent separate notices to Badger and TCS at 5829 County Road 41. (ALJ's Exh. 11)

None of the Division's notices have been returned. (Tr. 7) They are presumed to have been delivered.

After due notice, the case came on for hearing before ALJ Luban. A public hearing session was held on October 23, 2013.

Complainant appeared at the hearing. The Division was represented by Senior Attorney Van Coevering. Neither Respondent appeared.

In accordance with the Division's Rules of Practice, 9 N.Y.C.R.R. §§ 465.11(e) and 465.12(b)(3), the presiding ALJ entered the defaults of both Respondents, and the hearing proceeded on the evidence in support of the complaint. (Tr. 4-5)

At the conclusion of the hearing, the presiding ALJ granted the Division's request to keep the record open for two weeks so that Complainant could submit documentation of her earnings while employed by Badger and additional evidence of her income. (Tr. 32-33) On October 30, 2013, the Division submitted a copy of Complainant's Form W-2 Wage and Tax Statement for 2011 and a record of unemployment insurance benefits she received between July 31, 2011 and July 8, 2012. These documents have been received in evidence as Complainant's Exhibit 4.

FINDINGS OF FACT

1. Complainant was diagnosed with schizophrenia in 1996. Complainant takes medication for this condition. (Tr. 24)
2. Complainant is also known by her married name, Vickie Taylor. (Tr. 31)
3. Complainant has received services from Vocational and Educational Services for Individuals with Disabilities ("VESID"). (Tr. 24)
4. I take official notice that VESID, now called Adult Career and Continuing Education Services – Vocational Rehabilitation, is a program of the New York State Education Department that provides services to people with disabilities.
5. Badger is an active domestic business corporation with offices located at 5829 County Road 41. (Complainant's Exh. 3)

6. TCS is an active domestic business corporation with offices located at the same address, 5829 County Road 41. (Complainant's Exh. 3)

7. TCS's original corporate name was Badger Technologies Division, Inc. On November 19, 2012, it changed its name to TCS Electronics, Inc. (Complainant's Exh. 3)

8. In September 2011, TCS issued a press release announcing that Badger Technologies Division, Inc. had moved its electrical cable and wire harness assembly operations from Penn Yan, New York to TCS's facility at 5829 County Road 41. (Complainant's Exh. 1)

9. In or about August 2011, Complainant began employment with Badger as an electrical inspector. (Tr. 12-13, 25, 27-28)

10. Complainant inspected circuit boards. (Tr. 25)

11. In or about late October 2011, Debra Tiffany, Complainant's supervisor, called her into the office. Renee Strong of Respondent's human resources office was also present. (Tr. 15-16)

12. Tiffany said somebody had commented that Complainant was having "spasms." (Tr. 16-17, 28)

13. Complainant said the "spasms" were a side effect of medication she was taking for schizophrenia. (Tr. 15, 17, 28)

14. Complainant returned to work after this very brief conversation. (Tr. 17-18)

15. In late October 2011, Complainant was diagnosed with bronchial pneumonia and missed three days of work. Complainant submitted a doctor's note, and her absence was excused. (Tr. 26-27)

16. When Complainant returned to work, she was coughing. Tiffany asked if she had been to the doctor. Complainant said she had and that the doctor had prescribed antibiotics. (Tr. 26-27)

17. Tiffany told Complainant to wear rubber gloves and use hand sanitizer. (Tr. 19, 26-27)

18. Complainant “forgot once or twice” but otherwise complied with Tiffany’s instructions.
(Tr. 19)

19. Complainant had to take her medication with food. (Tr. 19)

20. On November 4, 2011, Complainant purchased Fig Newtons from a vending machine in Badger’s facility. She put the unopened package in her pocket, intending to eat the Fig Newtons later, when she took her medication. (Tr. 19-20)

21. Complainant did not eat the Fig Newtons at her desk. (Tr. 19)

22. After Complainant’s break, Tiffany said she had to see Complainant in the office at the end of the day. (Tr. 18)

23. Complainant went to the office as instructed. Tiffany and Strong were present. (Tr. 18)

24. Tiffany and Strong said that Badger was terminating Complainant’s employment for “personal hygiene”—failing to wear rubber gloves and use hand sanitizer while she was coughing—and eating in the work area. (Tr. 14, 18)

25. Complainant felt “degraded” to be told that she was fired for personal hygiene. The termination of her employment made her depressed for over a year. She felt “awful.” Complainant was unable to do things she enjoyed, like riding her bike or playing with her dog. She simply stayed in bed. (Tr. 23)

26. Complainant also experienced stress that was “very debilitating” because of her schizophrenia. As a result, she was found not psychiatrically stable and could not receive liver treatment she had been scheduled to receive. That treatment was delayed until after the hearing in this matter. (Tr. 22-23)

27. Complainant sought other work after Badger terminated her employment. It took her approximately seven months to find a job. (Tr. 21)

28. Complainant earned \$5,071.50 from Badger, an average of \$461.05 per week, in 2011. (Complainant's Exh. 4)

29. Complainant received unemployment insurance benefits ("UIB") in the amount of \$17,473.50 from November 2011 through July 2013. (Complainant's Exhs. 2, 4)

30. In 2012, Complainant earned \$8,542.80 from employment with Nesco Service Company. (Complainant's Exh. 2)

31. From January 2013 through September 27, 2013, Complainant earned \$5,212.82 from employment with Petr All Petroleum Corporation ("Petr All"). (Tr. 22; Complainant's Exh. 2)

32. At the time of the hearing, Complainant was still employed with Petr All at the rate of \$8.25 per hour. (Tr. 22) Complainant did not present evidence of her hours of employment or other evidence of her earnings between September 27, 2013 and October 23, 2013, the date of the public hearing.

33. Complainant has visited Badger's website and has driven by its facility at 5829 County Road 41. Complainant believes Badger is still operating at that location under the same management. (Tr. 14, 26)

34. There is no building at 5928 County Road 41, which is located very close to 5829 County Road 41. (ALJ's Exh. 12)

OPINION AND DECISION

Disability Discrimination

It is an unlawful discriminatory practice for an employer to discharge an employee

because of the employee's disability. Human Rights Law § 296.1(a). Complainant has the initial burden to prove a prima facie case of discrimination. She must show that she is a member of a protected class, that she was qualified for her position, that she suffered an adverse employment action, and that the adverse action occurred under circumstances giving rise to an inference of discrimination. *Ferrante v. American Lung Association*, 90 N.Y.2d 623, 629, 665 N.Y.S.2d 25, 29 (1997). If Complainant makes out a prima facie case of discrimination, the burden shifts to Respondents to present a legitimate, non-discriminatory reason for their actions. If Respondents do so, Complainant must show that the reason presented was merely a pretext for discrimination. *Forrest v. Jewish Guild for the Blind*, 3 N.Y.3d 295, 305, 786 N.Y.S.2d 382, 390 (2004).

A disability is "a physical, mental or medical impairment resulting from anatomical, physiological, genetic or neurological conditions which prevents the exercise of a normal bodily function or is demonstrable by medically accepted clinical or laboratory diagnostic techniques," a record of such impairment, or the perception of such impairment. Human Rights Law § 292.21. This definition has been interpreted to include any medically diagnosable impairments and conditions which are merely "diagnosable medical anomalies." *State Div. of Human Rights v. Xerox Corp.*, 65 N.Y.2d 213, 219, 491 N.Y.S.2d 106, 109 (1985).

Complainant's schizophrenia is a disability under the Human Rights Law. Therefore, Complainant is a member of a protected class. Complainant was qualified for her position as an electrical inspector. Complainant suffered an adverse employment action when Badger terminated her employment. Because Badger terminated Complainant's employment approximately one week after Tiffany and Strong learned that she was taking medication for schizophrenia, Complainant's termination occurred under circumstances giving rise to an

inference of discrimination. Thus, Complainant has established a prima facie case of unlawful discrimination, the burden of which has been described as “de minimis.” *Schwaller v. Squire Sanders & Dempsey*, 249 A.D.2d 195, 671 N.Y.S.2d 759 (1st Dept. 1998).

Because Respondents did not appear at the hearing, they failed to meet their burden to present a legitimate, non-discriminatory reason for the termination of Complainant’s employment. Therefore, they did not rebut Complainant’s prima facie case of unlawful discrimination.

Damages

Complainant is entitled to damages in the form of back pay for Badger’s unlawful termination of her employment. Complainant earned an average of \$461.05 per week during her employment with Badger. Had she remained employed with Badger, she would have earned \$3,688.40 for the remaining eight weeks of 2011, \$23,974.60 in 2012, and \$17,980.95 through September 27, 2013, a total of \$45,643.95. Through September 27, 2013, Complainant earned \$13,755.62 from employment and received \$17,473.50 in UIB. Subtracting Complainant’s earnings and UIB from her lost wages yields a loss of \$14,414.83. Complainant is entitled to interest on this amount from October 19, 2012, a reasonable intermediate date. CPLR § 5001(b). Because Complainant did not present sufficient evidence to establish her earnings after September 27, 2013, she is not entitled to damages after that date.

Complainant is also entitled to recover compensatory damages for mental anguish caused by Badger’s unlawful conduct. In considering an award of such damages, 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. *State Div. of Human Rights v. Muia*, 176 A.D.2d 1142, 1144, 575 N.Y.S.2d 957, 960 (3d Dept. 1991). Because of the

“strong antidiscrimination policy” of the Human Rights Law, a complainant seeking an award for pain and suffering “need not produce the quantum and quality of evidence to prove compensatory damages he would have had to produce under an analogous provision.” *Batavia Lodge v. New York State Div. of Human Rights*, 35 N.Y.2d 143, 147, 359 N.Y.S.2d 25, 28 (1974). 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. State Div. of Human Rights (Nash)*, 78 N.Y.2d 207, 216, 573 N.Y.S.2d 49, 54 (1991). 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. New York State Div. of Human Rights*, 225 A.D.2d 856, 859, 638 N.Y.S.2d 827, 830 (3d Dept. 1996).

Complainant felt “degraded” and “awful” when she lost her job. She fell into a depression which lasted over a year. She also experienced stress, which was very debilitating because of her schizophrenia. As a result, she was not psychiatrically stable and had to postpone previously scheduled liver treatment. Accordingly, the Division finds that an award of \$10,000 to Complainant for mental anguish is consistent with similar cases and will effectuate the remedial purposes of the Human Rights Law. *See New York State Division of Human Rights v. Neighborhood Youth and Family Services*, 102 A.D.3d 491, 956 N.Y.S.2d 892 (1st Dept. 2013); *MTA Trading, Inc. v. Kirkland*, 84 A.D.3d 811, 814-15, 922 N.Y.S.2d 488, 491-92 (2nd Dept. 2011); *Woerhling v. New York State Div. of Human Rights*, 56 A.D.3d 1304, 1306, 867 N.Y.S.2d 641, 642-43 (4th Dept. 2008).

Civil Fine and Penalty

Human Rights Law § 297.4(c)(vi) authorizes 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.” Any such civil penalty “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.” Human Rights Law § 297.4(e). In determining the amount of a civil penalty, the Division should consider the goal of deterrence, the nature and circumstances of the violation, the degree of the respondent’s culpability, any relevant history of the respondent’s actions, the respondent’s financial resources, and other matters as justice may require. *Gostomski v. Sherwood Terrace Apartments*, DHR Case Nos. 10107538 and 10107540 (November 15, 2007), *aff’d*, *Sherwood Terrace Apartments v. New York State Div. of Human Rights*, 61 A.D.3d 1333, 877 N.Y.S.2d 595 (4th Dept. 2009).

A civil fine is appropriate in this matter. Badger terminated Complainant’s employment just one week after it learned that she had schizophrenia. There is no evidence that Complainant’s disability affected her job performance or had anything to do with her employment. Badger’s decision was deliberate, resulted in Complainant being out of work for seven months, and exacerbated her physical and mental condition. While the record contains no information showing that Badger has a history of discriminatory actions and no information about its financial resources, it is noted that Badger ignored repeated notices from the Division and failed to participate in this proceeding.

Considering these factors, a civil fine in the amount of \$10,000 may act as an inducement to comply with the Human Rights Law in the future, may deter Badger and others from future discriminatory action, and will present an example to the public that the Division vigorously enforces the Human Rights Law.

Liability of TCS

Complainant did not allege or prove that she had any employment relationship with TCS. Accordingly, TCS is only liable for Badger's unlawful discrimination if it is Badger's successor in interest.

Federal courts have developed a nine-factor test for successor liability in employment discrimination cases under Title VII of the federal Civil Rights Act of 1964. New York courts have utilized this test in determining whether to impose successor liability under the Human Rights Law. *MTA Trading, Inc.* at 814-15, 922 N.Y.S. 2d at 491-92. The factors to be considered are:

(1) whether the successor company had notice of the charge, (2) the ability of the predecessor to provide relief, (3) whether there has been a substantial continuity of business operations, (4) whether the new employer uses the same plant, (5) whether he uses the same or substantially the same work force, (6) whether he uses the same or substantially the same supervisory personnel, (7) whether the same jobs exist under substantially the same working conditions, (8) whether he uses the same machinery, equipment and methods of production and (9) whether he produces the same product

MTA Trading, Inc. at 815, 922 N.Y.S.2d at 492, quoting *Equal Employment Opportunity Comm. v. MacMillan Bloedel Containers, Inc.*, 503 F.2d 1086, 1094 (6th Cir. 1974).

Applying these factors, the record contains insufficient evidence to impose successor liability on TCS. The evidence indicates that TCS and Badger operate at the same address, but the nature of their connection is unclear. The record also contains no evidence about Badger's ability to provide relief to Complainant. In fact, Complainant testified that she believes Badger continues to operate the same business at the same location. Accordingly, the complaint against TCS must be dismissed.

ORDER

On the basis of the foregoing Findings of Fact, Opinion and Decision, and pursuant to the provisions of the Human Rights Law and the Division's Rules of Practice, it is hereby

ORDERED, that the complaint against Respondent TCS Electronics, Inc. be and the same hereby is dismissed; and it is further

ORDERED, that the complaint charging that Respondent Badger Technologies, Inc. terminated Complainant's employment because of disability is sustained; and it is further

ORDERED that Respondent Badger Technologies, Inc., and its agents, representatives, employees, successors, and assigns, shall cease and desist from discriminatory practices in employment; and it is further

ORDERED that Respondent Badger Technologies, Inc. shall take the following action to effectuate the purposes of the Human Rights Law and the findings and conclusions of this Order:

1. Within 60 days of the date of the Commissioner's Order, Respondent Badger Technologies, Inc. shall pay to Complainant the sum of \$14,414.83, as damages for back pay between November 5, 2011 and September 27, 2013. Interest shall accrue on the award at the rate of nine percent per year from October 19, 2012, a reasonable intermediate date, until the date payment is actually made by Respondent Badger Technologies, Inc.

2. Within 60 days of the date of the Commissioner's Order, Respondent Badger Technologies, Inc. shall pay to Complainant the additional sum of \$10,000.00, without any withholdings or deductions, as compensatory damages for the mental anguish and humiliation suffered by Complainant as a result of Respondent Badger Technologies, Inc.'s unlawful discrimination against her. Interest shall accrue on the award at the rate of nine percent per year

from the date of the Commissioner's Order until payment is actually made by Respondent Badger Technologies, Inc.

3. The aforesaid payments shall be made by Respondent Badger Technologies, Inc. in the form of certified checks made payable to the order of Complainant, Vickie DeBerger, and delivered by certified mail, return receipt requested, to Richard Van Coevering, Esq., Senior Attorney, New York State Division of Human Rights, Walter J. Mahoney State Office Building, 65 Court Street, Suite 506, Buffalo, New York 14202. Respondent shall furnish written proof to Caroline Downey, Esq., General Counsel, New York State Division of Human Rights, One Fordham Plaza, 4th Floor, Bronx, New York 10458, of its compliance with the directives contained within this order.

4. Within 60 days of the date of the Commissioner's Order, Respondent Badger Technologies, Inc. shall pay a civil fine and penalty to the State of New York in the amount of \$10,000.00. This payment shall be made 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, New York State Division of Human Rights, One Fordham Plaza, 4th Floor, Bronx, New York, 10458. Interest on this award shall accrue at a rate of nine percent per year from the date of the Commissioner's Order until payment is made;

5. Respondent Badger Technologies, Inc. shall cooperate with the representatives of the Division during any investigation into compliance with the directives contained within this Order.

DATED: April 3, 2014
Syracuse, New York

A handwritten signature in black ink, appearing to read 'Edward Luban', with a long horizontal flourish extending to the right.

Edward Luban
Administrative Law Judge