



ANDREW M. CUOMO
GOVERNOR

**NEW YORK STATE
DIVISION OF HUMAN RIGHTS**

**NEW YORK STATE DIVISION
OF HUMAN RIGHTS**

on the Complaint of

SHARON DESMOND,

Complainant,

v.

**NEW YORK STATE HIGHER EDUCATION
SERVICES CORP.,**

Respondent.

**NOTICE AND
FINAL ORDER**

Case No. 10151412

Federal Charge No. 16GB200292

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 January 11, 2013, by Christine Marbach Kellett, 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”) WITH THE FOLLOWING AMENDMENTS:

- The damages are adjusted, and hereby awarded, as follows:

- Respondent's discriminatory treatment exacerbated Complainant's physical pain and caused Complainant to feel depressed, become upset, become angry, experience anxiety and panic attacks, experience increased blood pressure and suffer undue stress. These symptoms continued for over one year and lasted up to the date of the hearing. As such, \$10,000 is a more appropriate award to compensate Complainant for the mental anguish she suffered. *See State of New York v. New York State Div. of Human Rights*, 284 A.D.2d 882, 727 N.Y.S.2d 499 (3rd Dept. 2001); *Georgeson & Co. v. State Div. of Human Rights*, 267 A.D.2d 126, 700 N.Y.S.2d 9 (1st Dept. 1999); *NYC Health & Hospitals Corp. v. State Div. of Human Rights*, 236 A.D.2d 310, 654 N.Y.S.2d 310 (1st Dept. 1997); *State Div. of Human Rights v. Demi Lass Ltd.*, 232 A.D.2d 335, 648 N.Y.S.2d 925 (1st Dept. 1996).
- The civil fine is reduced to \$15,000. Respondent initially accommodated Complainant's disability for approximately one year and, thereafter, did not discipline Complainant for taking available leave time in lieu of working the mandated shift. Given the nature of the violations and the goal of deterrence, a penalty of \$15,000 is appropriate in this matter. *See Noe v. Kirkland*, 101 A.D.3d 1756, 957 N.Y.S.2d 796 (4th Dept. 2012)
- Complainant alleged that she charged a total of 126.75 hours from her leave time due to Respondent's failure to reasonably accommodate her disability. However, the evidence submitted and testimony given was not sufficiently reliable to support an award. In addition, the record reflects

that the leave used was a combination of vacation time, sick time, personal days, floating holidays and deficit reduction leave. On this record, any determination related to leave time would be purely speculative.

Accordingly, no damages are awarded for the use or loss of Complainant's leave time. *See Hillman v. U.S. Postal Service*, 257 F.Supp.2d 1330 (D. Kan. 2003) ("Sick leave is permissible time off from work when an employee is ill, not something that accrues a dollar value if an employee is well. In the absence of proof that the employer's policy is to pay employees for their accrued, unused sick leave upon termination from employment, no sick leave payment is owed").

- Interest shall accrue on all awards at the rate of nine percent per annum from the date of the Final Order until payment is actually made by Respondent.

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: 6/28/13
Bronx, New York



GALEN D. KIRKLAND
COMMISSIONER



ANDREW M. CUOMO
GOVERNOR

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SHARON DESMOND,

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**NEW YORK STATE HIGHER EDUCATION
SERVICES CORP.,**

Respondent.

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

Case No. **10151412**

SUMMARY

Complainant, an individual with a disability, charged Respondent with discriminatory conduct in employment when it failed to provide her with her medically based reasonable accommodation. Respondent failed to demonstrate any undue hardship existed had it provided the requested accommodation. Complainant met her burden of proof and is entitled to damages. Complainant is awarded compensatory damages. Civil fines and penalties are assessed against Respondent for its violation of the Human Rights Law.

PROCEEDINGS IN THE CASE

On October 24, 2011, 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 Christine Marbach Kellett, an Administrative Law Judge (“ALJ”) of the Division. Public hearing sessions were held on November 15, 2012.

Complainant and Respondent appeared at the hearing. The Division was represented by Lawrence J. Zyra, Esq. Respondent was represented by Donna Fesel, Esq.¹

FINDINGS OF FACT

1. Respondent is a public service corporation charged with assisting students and their families pay for higher education, including avoiding default on student loans. (Tr. 161)
2. Complainant at all relevant times was employed as a Student Loan Control Representative I (SLCR I) in Respondent’s Aversions unit. (Tr. 20-21)
3. Complainant made roughly \$42,000 a year (\$22.04 an hour) in her position. (Tr. 65)
4. The aversions unit is charged with assisting students with outstanding student load avoid defaulting on the loans. (Tr. 21-22, 107, 142) This is often done through phone contacts (Tr. 21, 143)
5. The posting for the SLCR position advises candidates that evening and weekend hours would be required. (Tr. 161-62) Evening hours were viewed as prime contact time for reaching the intended target population. (Tr. 69, 110-111)
6. The normal work schedule for SLCR I employees includes one 12:30 p.m. -8:30 p.m. day per week and four days of 8a.m -4p.m. . (Tr. 23-24)

¹ Respondent’s Attorney Donna Fesel is identified in the transcript as Donna Thessel.

7. In July of 2010 Complainant was diagnosed with rheumatoid arthritis (RA). She suffered daily pain and increased fatigue from the RA. (Tr. 17-20, 71-72; ALJ Exh. 1) Complainant is a person with a disability as defined under the Human Rights Law.

8. Until August of 2010 Complainant worked the evening hours when required. (Tr. 40-41)

9. On August 20, 2010, Complainant requested a reasonable accommodation of a temporary work schedule of 8 a.m. to 4 p.m. daily. (Tr. 22-24, 27-28; Complainant's Exh. 1) Her request was supported by a note from her physician that indicated consistent work hours would be effective to "avoid hypertension, stress, anxiety and extreme fatigue" associated with the RA. (Complainant's Exh. 1) The note specified Complainant needed rest. (Complainant's Exh. 1)

10. Complainant's direct supervisor, Vallisa Pompey (Pompey), approved the request. (Tr. 108-109; Complainant's Exh. 1)

11. Pompey viewed the evening hours as not particularly productive. (117-119, 147) The advent of caller ID, no solicitation calls laws and the widespread use of cell phones with caller ID weakened the value of evening hours. (123-126, 145) Borrowers ignored phone calls. (Tr. 144) Pompey reported phones do not ring at night and "skip-tracing", a means of locating the borrower, is done primarily during the day. (Tr. 127, 153-154)

12. However, on September 17, 2010, Elgin Joseph Taylor (Taylor), Sr., Director of Affirmative Action Programs, advised Complainant that her reasonable request was granted with modifications: instead of the five days with a consistent schedule of 8-4; Respondent provided Complainant with a schedule of four days 8-4 and the fifth day with an "adjusted late night schedule of 11 a.m. -7 p.m.". (Tr. 28-30, 190, 193-94; Complainant's Exh. 2)

13. Respondent had determined that it would respond to any request for a modified schedule of no evenings by a SCLR with the same response: an offer of a schedule of four days 8-4 and the fifth day with an adjusted late night schedule of 11 a.m. -7 p.m. in order to provide uniformity in response. (Tr. 167-169, 197)

14. This modification ignored Complainant's physician's note, and ignored the oral conversations Taylor had had with Complainant's physician in which the physician stressed the needs for consist hours and rest. (Tr. 203-206)

15. Taylor also acknowledged that in the usual process the position of the first line supervisor, in this case, Pompey, was accorded great weight, but here in Complainant's case it was ignored. (Tr. 208)

16. Respondent argued that restrictions to overtime, and reductions in staffing created a hardship. (Tr. 164-165; ALJ Exh. 3) Respondent failed to produce any report by management staff regarding a shortage of personnel. (Tr. 184) Respondent failed to produce any evidence of loss of revenue from the loss of personnel. (Tr. 186) Respondent is mandated to contact borrowers by mail but is not mandated to have evening or weekend hours. (Tr. 141)

17. Respondent never told Complainant that it had insufficient coverage for the evening hours. (Tr. 37)

18. Pompey objected to management's response and informally permitted Complainant to modify her schedule to the 8-4 workday. (Tr. 114-116, 129) Between August of 2010 and June 22, 2011 Complainant was not required to work any evening hours. (Tr. 157)

19. Complainant renewed her reasonable accommodation request in March of 2011, with the same results: Pompey, still her immediate supervisor, approved the request, but

administration through Taylor again offered a modified schedule which continued to require limited evening hours. (Tr. 32-33; Complainant's Exhibits 3, 4, 6, and 8)

20. Complainant utilized an internal appeal of the modification which was denied and continued to be scheduled for a modified schedule with evening hours. (Tr. 33-34; Complainant's Exh. 5)

21. But by June 2011, Pompey no longer had the ability to permit Complainant to flex her schedule. As a result, Complainant began to charge her leave accruals on days she was expected to work evenings. (Tr. 34, 45-46) Between June 23, 2011 and July 19, 2012, complainant charged a total of 126.75 hours, were charged to accruals in order to avoid evening hours. (Tr. 35; 59-61; Complainant's Exh. 11). These charges were the result of the pain, fatigue and stress of her disability coupled with scheduled late hours. (Tr. 49)

22. In April of 2012 Respondent changed Complainant's hours by removing the evening hours but requiring her to work Saturdays. (Tr. 201) This was worse for Complainant due to her fatigue, pain and stress and she applied for FMLA to charge each Saturday, which was granted. (Tr 49-51) Complainant never worked Saturday. (Tr. 52) Her doctor repeatedly told Taylor Complainant could not work the sixth day a week Saturday hours would require. (Tr. 52, 203).

23. Complainant was angry about being denied her reasonable accommodation request. She knew of two other SCLR I's in the Aversions Unit during this time period who had been permitted to work a modified schedule with no evening or weekend hours after they personally spoke with Respondent's President Elsa Magee. (Tr. 53-54)

24. Respondent admitted that at least two individuals in the SCLR I title in Aversions were given a no evening and no weekend schedule. (Tr. 170-171, 178-181) Neither of these SCLR's went through the formal process for modifying their work schedule, either under the Civil

Service program or under the reasonable accommodation program. (Tr. 53-57, 170-171, 178-181).

25. Respondent's Assistant Director of Personnel admitted Complainant was not treated the same as other SCLR Is. (Tr. 181) She admitted management had a "disconnect" in understanding accommodations based on temporary need of any type and accommodations based upon medical needs. (Tr. 182)

26. Taylor admitted that it was inconsistent with the Respondent's anti-discrimination policies to deny Complainant her reasonable accommodation request for no evening hours while granting two others SCLRs in the same unit no evening hours without going through the channels. (Tr. 210-211) As he put it "...saying yes to one person and no to another is not a fair practice."

27. On July 19, 2012, Complainant retired after more than thirty two years of service. (Tr. 20, 52)

28. Complainant was angry, when her request was denied. (Tr. 66) She began to suffer from anxiety attacks and panic attacks. (Tr. 65-66) She has worked faithfully for thirty-two years and considered herself a good employee trying to do the best job she could do. (Tr. 66) She was depressed. (Tr. 66) She continues to be upset. (Tr. 67)

OPINION AND DECISION

A respondent is obligated to provide a reasonable accommodation for a complainant's known disability. N.Y. EXEC. L, art. 15 (Human Rights Law) § 296.3. Forms of reasonable accommodation include, but are not limited to: "making existing facilities more readily accessible to individuals with disabilities; acquisition or modification of equipment; job restructuring; modified work schedules; adjustments to work schedule for treatment or recovery;

reassignment to an available position.” 9 N.Y.C.R.R. § 466.11(a)(2). Furthermore, both the employee and the employer are obligated to engage in an interactive process, which includes the discussion and exchange of pertinent medical information, in order to arrive at a reasonable accommodation which will allow a disabled employee to perform the necessary job requirements. 9 N.Y.C.R.R. § 466.11(j) (4).

Complainant charged Respondent with illegal discrimination in employment when it twice refused her request for a modification of her work schedule due to her disabilities. The first application was in August of 2010; the second in March of 2011. Respondent’s response to both applications and its explanation for its actions was the same: it modified the requested work schedule to require minimal evening hours rather than no evening hours. It argued that the schedule requested by Complainant would pose an undue hardship due to loss of personnel. Respondent’s explanation is not supported by the record and is established to be a pretext for illegal discrimination. Complainant is a victim of illegal discrimination.

August 20, 2010 REASONABLE ACCOMMODATION REQUEST

The Human Rights Law provides that, “[a]ny complaint filed pursuant to this section must be so filed within one year after the alleged unlawful discriminatory practice.” N.Y. Exec. Law, art. 15 (Human Rights Law) § 297.5. This provision acts as a mandatory statute of limitations in these proceedings. *Queensborough Cmty. College v. State Human Rights App. Bd.*, 41 N.Y.2d 926, 394 N.Y.S.2d 625 (1977).

This complaint was filed October 24, 2011. Complainant’s first application for a reasonable accommodation was filed on August 20, 2010. Respondent responded to her request on September 17, 2010. This claim is barred by the statute of limitations.

However, it is pointed out that despite Respondent’s formal modifications, Complainant’s

supervisor informally granted the request made by Complainant and Complainant was not required to work any evening hours between the time of her application in August 2010 and June 2011.

March 2011 REASONABLE ACCOMMODATION REQUEST.

Complainant renewed her reasonable accommodation request for no evening hours in March of 2011. The testimony of Complainant's supervisor made clear the unit could accommodate the requested change in schedule. The unit had accommodated Complainant working a modified schedule informally since August of 2010.

More significantly, the Respondent's President granted to two similarly situated employees, who did not have disabilities and were assigned to the same Aversions Unit, the very modification requested by Complainant. Respondent failed to show any hardship in permitting Complainant to work the modified schedule she requested. It failed to produce any contractual reason for evening hours. It failed to demonstrate any statistical reason to deny Complainant's request. It violated the policies it had adopted in connection with a reasonable accommodation: an individualized analysis of the needs of the individual. Complainant was the victim of illegal discrimination and is entitled to damages.

Complainant is entitled to recover compensatory damages for mental anguish caused by Respondent's unlawful conduct. In considering an award of compensatory damages for mental anguish, the Division must be 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 as the victim of illegal discrimination is entitled to compensatory damages for the period June 23, 2011 and July 19, 2012 during which time her reasonable accommodation request was denied and she was scheduled to work evening hours. Complainant charged 126.75 hours to her leave accruals in order to avoid working the evening hours. Complainant is entitled to the monetary value of the 126.75 hours charged. Interest on this value shall accrue from a reasonable intermediary date of October 20, 2011. To the extent these leave hours, had they been included in her accruals, would have increased her final state pension, the pension should be adjusted accordingly.

Complainant described her mental anguish as one of feeling bad, depressed, anxious and angry. This is sufficient to establish mental anguish. *See Cosmos Forms, Ltd v. State Division of Human Rights*, 150 AD2d 442, 541 NYS 2d 50 (2nd Dept. 1989) This stress lasted from when her supervisor was unable to permit her an informal accommodation (June 23, 2011) until her retirement (March 12, 2012) and continues until today. Under the circumstances of this case, an award of \$5,000 is appropriate to compensate Complainant for the mental anguish she suffered as result of Respondent’s discriminatory actions. *See: Mohawk Valley Orthopedics, LLP v.*

Carcone, 66 AD 3d 1350 (4th Dept. 2009) (award of \$7500 supported by Complainant's testimony that she felt humiliation); *Niagara Falls v. NYS Division of Human Rights*, 94 AD3d 1442 (4th Dept. 2012) (\$4,000 supported by Complainant's testimony that he felt frustrated and angry.) Interest shall accrue on this award at the rate of nine percent per annum from the date of the Final Order until payment is actually made by Respondent.

The Human Rights Law provides that an order may 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". N.Y. EXEC. L. §297.4 (c) (vi)

In assessing civil fines and penalties, consideration should be given to the following factors: the goal of deterrence; the nature and circumstances of the violation; the degree of Respondent's culpability; any relevant history of Respondent's actions; respondent's financial resources and other matters as justice may require. *See Gostomski v. Sherwood Terr. Apts.*, SDHR Case Nos 10107538 and 10107540, November 2007, *aff'd Sherwood Terrace Apartments v. N.Y. State Div. of Human Rights (Gostomski)*, 61 AD 2d 1333, 877 NYS 2d 595 (4th Dept, 2009).

Under these factors and with consideration for the following specific facts established by the record (that other SCLR Is were permitted to work a modified schedule with no evening hours, that Complainant's supervisor approved her request, that Respondent's Affirmative Action Officer testified to the unfairness of Respondent's treatment of Complainant, that the Respondent's Assistant Director of Personnel admitted management had a "disconnect" in

understanding the accommodations process, and that Respondent failed to produce any evidence of hardship) a civil fine of \$25,000 is appropriate.²

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 Complainant's charge of illegal discriminatory conduct by the Respondent is sustained; and it is further

ORDERED that the Respondent, its agents, representative, 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 the Respondent, its agents, representative, employees, successors and assigns shall take the following action to effectuate the purposes of the Human Rights Law:

1. within sixty days of the date of the Commissioner's Final Order, Respondent shall pay to Complainant the sum of \$5,000 as compensatory damages for the mental anguish Complainant suffered as a result of Respondent's unlawful discrimination. Interest shall accrue on this award at the rate of nine percent per annum from the date of the Final Order until payment is actually made by Respondent.

2. within sixty days of the date of the Commissioner's Final Order, Respondent shall pay the monetary equivalent as determined by the State Comptroller for the 126.75 hours leave time Complainant had to charge to leave accruals as a result of Respondent's unlawful discrimination. Interest shall accrue on this award at the rate of nine percent per annum from the date of the Final Order until payment is actually made by Respondent. Adjustment to Complainant's

² I take note that a complaint against this same Respondent, *Polack v NYS Higher Education Services Corp*, Case No. 10148996, awaits final Commissioner Order.

pension to consider these additional accruals shall also be made if appropriate under state pension provisions.

3. Respondent shall make the monetary payments above ordered by certified check, made payable to Sharon Desmond and delivered by certified mail, return receipt requested to Complainant's home address. A copy of the certified check shall be mailed to Caroline Downey, General Counsel of the Division, at One Fordham Plaza, 4th Floor, Bronx, New York 10458.

4. within sixty days of the date of the Commissioner's Final Order, Respondent shall pay in civil fines and penalties to the State of New York the sum of \$25,000. Said payment shall be made by certified check made payable to the State of New York and delivered in accord with the State Comptroller rules. Proof of payment shall be provided to Caroline Downey, General Counsel of the Division, One Fordham Plaza, 4th Floor, Bronx, New York 10458

5. within sixty days of the date of the Commissioner's Final order, respondent's executives and management team shall undergo training in the principles and practices of disability discrimination and reasonable accommodation, and the prevention of disability discrimination in the workplace.

DATED: January 11, 2013
Bronx, New York


Christine Marbach Kellett
Administrative Law Judge