



**Division of
Human Rights**

**NEW YORK STATE
DIVISION OF HUMAN RIGHTS**

**NEW YORK STATE DIVISION
OF HUMAN RIGHTS**

on the Complaint of

CHUKWUEMEKA EZEOKOLI,

Complainant,

v.

**JANET ROTHWELL, ENERGETICA SYSTEMS
LTD.,**

Respondents.

**NOTICE AND
FINAL ORDER**

Case No. 10164407

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 October 21, 2016, by Robert J. Tuosto, 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: **NOV 28 2016**
Bronx, New York



HELEN DIANE FOSTER
COMMISSIONER



**Division of
Human Rights**

**NEW YORK STATE
DIVISION OF HUMAN RIGHTS**

**NEW YORK STATE DIVISION OF
HUMAN RIGHTS**

on the Complaint of

CHUKWUEMEKA EZEOKOLI,

Complainant,

v.

**JANET ROTHWELL, ENERGETICA
SYSTEMS LTD.,**

Respondents.

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

Case No. **10164407**

SUMMARY

Complainant alleged that he suffered unlawful discrimination on the basis of his disability when he was not hired by Respondents. Complainant, upon Respondents' default, has proven his case and is awarded damages for emotional distress; a civil fine payable to the State of New York is also assessed.

PROCEEDINGS IN THE CASE

On August 1, 2013, Complainant filed a verified complaint with the New York State Division of Human Rights ("Division"), charging Respondents 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 Respondents had engaged in unlawful discriminatory practices. The Division thereupon referred the case to public hearing.

On November 13, 2015, Robert A. Meisels, Esq., Senior Attorney, requested that the Division be granted an administrative convenience dismissal (“ACD”) in this case on the ground that there was neither a viable respondent nor a successor-in-interest.

On December 23, 2015, the undersigned granted the Division’s request for an ACD.

On February 4, 2016, Matthew Menes, Esq., Division Adjudication Counsel, directed a reopening of the record in this case after it had been submitted for an ACD due to Division counsel’s previous position that there was neither a viable respondent nor a successor-in-interest.

(Tr. 4) This aforementioned reopening was directed given that the above-captioned corporate Respondent was listed as “active” by the New York State Department of State, and that Respondent Jane Rothwell was also listed as the corporate Respondent’s Chief Executive Officer. (ALJ Exhs. 4, 5)

After due notice, the case came on for hearing before Robert J. Tuosto, an Administrative Law Judge (“ALJ”) of the Division. A public hearing session was held on March 23, 2016.

Complainant appeared at the hearing. The Division was represented by Luwick Francois, Esq., Senior Attorney. Neither Respondent appeared at the public hearing despite each having been served with letters informing them of the date, time and location of same. Copies of said letters were mailed to Respondents at the corporate address of Respondent Energetica Systems, Ltd. (“Energetica”) listed as 14 Wall Street, New York, New York 10005. (ALJ Exh. 3, 5).

FINDINGS OF FACT

1. Complainant has been diagnosed by a physician with a dermatological condition of the scalp known as folliculitis. (Tr. 12, 23)
2. Complainant has suffered from folliculitis for the past six or seven years. (Tr. 12, 23)
3. Complainant takes the prescription medication Doxycycline to treat his condition. (Tr. 12, 23)
4. Folliculitis is obvious to the naked eye insofar as it causes balding, bumps and discoloring. (Tr. 25)
5. In July, 2012, Complainant's folliculitis was "a bit heightened" and "in its worst state." (Tr. 25)
6. In late July, 2012, Complainant, who was seeking employment, received a telephone call from Respondent Rothwell concerning a full-time office assistant position with Respondent Energetica. (Tr. 13, 17, 20, 27)
7. Respondent Energetica is a technology company. (Tr. 13)
8. During the phone call Respondent Rothwell, Respondent Energetica's chief executive officer, invited Complainant to a job interview. (Tr. 10, 13-14)
9. During the interview, Complainant and Respondent Rothwell discussed his job history. Respondent Rothwell said that Complainant would receive a higher salary than he previously earned if employed with Respondent Energetica. (Tr. 15)
10. Complainant's scalp condition was obvious during the interview. (Tr. 25)
11. A few days later, Complainant received a second telephone call from Respondent Rothwell. (Tr. 15-16)

12. During the second phone call, Respondent Rothwell extended an offer of employment to Complainant and asked that he start work on the following Monday. (Tr. 16, 26)

13. Respondent Rothwell stated to Complainant during the second phone call that, as a condition of the offer of employment, he had to see a dermatologist for his scalp condition. (Tr. 16)

14. Complainant was “embarrassed,” “shocked” and “confused” upon hearing this. These feelings have persisted to the date of the public hearing. (Tr. 17-18, 27-28)

15. Respondent Rothwell requested that Complainant visit a dermatologist for his scalp condition because there were “chemicals in the office.” Respondent Rothwell did not identify these chemicals. (Tr. 17-18, 26-27)

16. Complainant did not see any chemicals in the office during his interview with Respondent Rothwell and inquired about this. (Tr. 27)

17. Upon Complainant’s inquiry about the absence of chemicals in the office, Respondent Rothwell replied that it did not matter. (Tr. 18, 27)

18. Complainant ended the telephone call due to Respondent Rothwell’s “dismissive” tone. (Tr. 18, 27)

19. From August 2012 to November 2015, Complainant was unemployed except for one week of full-time work and some part-time tutoring jobs. (Tr. 20-21)

20. Complainant could not calculate the amount of money earned from the part-time tutoring jobs. (Tr. 21)

21. During this time Complainant supported himself by relying on friends and family. (Tr. 20)

22. The full-time office assistant position with Respondent Energetica was to pay Complainant approximately \$13.00 per hour. (Tr. 22)

23. In November, 2015 Complainant found employment which paid a wage comparable to that which he was to receive from Respondent Energetica. (Tr. 22)

OPINION AND DECISION

Respondents had notice of the public hearing as letters from the Division noticing same were mailed to Respondents at Respondent Energetica's known corporate address via the U.S. Postal Service. None of the aforementioned letters was returned and are therefore presumed to have been delivered.

Although given various opportunities to participate in the public hearing process, Respondents failed to appear before the Division to defend against the complaint. Therefore, Respondents defaulted pursuant to 9 N.Y.C.R.R. §465.11(e).

The hearing proceeded on the evidence in support of the complaint pursuant to 9 N.Y.C.R.R. §465.12(b)(3).

The Human Rights Law makes it an unlawful discriminatory practice "for an employer...because of an individual's...disability...to refuse to hire or employ...such individual..." Human Rights Law § 296.1(a).

In order to prevail, Complainant must first make out a prima facie case of disability discrimination. In order to do so Complainant must show that he was suffering from a disability recognized by the Human Rights Law, and that the disability engendered the behavior for which he was unlawfully discriminated against. *Thide v. New York State Dept. of Transportation*, 27 A.D.3d 452, 811 N.Y.S.2d 418 (2006). Respondents then have the burden of rebutting any

inference of unlawful discrimination by articulating a legitimate, non-discriminatory reason for its actions. If they do so, the burden shifts to Complainant to show that the articulated reason was a pretext for unlawful discrimination. *Ferrante v. American Lung Association*, 90 N.Y.2d 623, 630, 665 N.Y.S.2d 25, 29 (1997).

Here, Complainant has established an un rebutted case of disability discrimination, the elements of which were easily met.

First, the record shows that Complainant suffers from a disability, as that term is used in the Human Rights Law, upon being diagnosed with folliculitis by a physician; Complainant also takes prescription medication to address this condition. Note that the statute defines the term disability as “a physical, mental or medical impairment . . . which . . . is demonstrable by medically accepted clinical or laboratory diagnostic techniques or . . . a condition regarded by others as such an impairment.” Human Rights Law § 292.21.

As to the second element, it was precisely this condition, or its perception by Respondent Rothwell, which prevented Complainant from being hired or employed.

Therefore, in the absence of a legal reason by Respondent for its employment decision, this claim has been proved.

The record showed that Complainant would have earned approximately \$520 per week as a full-time employee for 159 weeks (the time period between when Complainant would have received the job in question and November, 2015 when he received comparably paid employment, less the one week during this time when he worked full time). However, I conclude, based on the record, that Complainant did not mitigate his damages. *Rio Mar Restaurant v. New York State Division of Human Rights (Del Caprio)*, 470 A.D.2d 47, 704 N.Y.S.2d 230, (1st Dept. 2000). The record shows that, during this time period, Complainant

supported himself by relying on friends and family, and did not seek comparable employment other than for some part time tutoring jobs (the income from which he could not provide). As a result, I decline to award damages for back pay.

A complainant is entitled to recover compensatory damages for mental anguish caused by a respondent's unlawful conduct. 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. *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).

Here, the record shows that Complainant, as a result of Respondents' conduct, was made to feel "embarrassed," "shocked" and "confused." Further, these feelings continue to the present time. As a result, an award of \$5,000 for emotional distress is related to Respondents' wrongdoing and supported by substantial evidence. *Quality Care, Inc. v. Rosa*, 194 A.D.2d 610, 599 N.Y.S.2d 65 (2d Dept. 1993) (award could not exceed \$5,000 in absence of, among other

things, any medical treatment); *Club Swamp Annex v. White*, 167 A.D.2d 400, 561 N.Y.S.2d 609 (2d Dept. 1990) (\$5,000 award to party based solely on his testimony); *Port Washington Police Dist. v. State Div. of Human Rights*, 221 A.D.2d 639, 634 N.Y.S.2d 195 (2d Dept. 1995) (award of \$5,000 after “brief” discussion by complainant as to her mental anguish); *Wantagh Union Free School Dist. v. New York State Div. of Human Rights*, 122 A.D.2d 846, 505 N.Y.S.2d 713 (2d Dept. 1986) (\$5,000 award to complainant discriminated against not grossly excessive).

Human Rights Law § 297 (4)(e) requires 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.” The additional factors that determine the appropriate amount of a civil fine and penalty are 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 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).

First, the goal of deterrence warrants a penalty. Respondents’ actions, both in this case and in choosing to default, apparently have no fear of any response by law enforcement for their conduct. Additionally, the nature and circumstances of Respondents’ violation warrants a penalty. Here, in holding out the possibility of employment to Complainant but specifically conditioning same on his being treated by a dermatologist for his scalp condition, Respondents evinced a disregard for his rights. Finally, Respondents’ culpability warrants a penalty. As

stated, above, Respondents, due to the conduct of its Chief Executive Officer, Respondent Rothwell, acted intentionally to violate Complainant's rights.

It should be noted that the record does not furnish any evidence of Respondents' relevant history, financial resources, or other matters which might also be considered in assessing a penalty other than for the Division's position that the corporate respondent was still "active."
(Tr. 5)

Accordingly, a civil fine of \$5,000 is appropriate in this case. *See Housing Opportunities Made Equal, Inc. v. Mosovich*, (SDHR Case No. 10118849, February 5, 2009) (\$5,000 civil fine ordered in Division case).

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 Respondents, and their agents, representatives, employees, successors, and assigns, shall cease and desist from discriminatory practices in housing; and

IT IS FURTHER ORDERED, that Respondents shall take the following action to effectuate the purposes of the Human Rights Law, and the findings and conclusions of this Order:

1. Within sixty (60) days of the date of the Commissioner's Order, Respondents, jointly and severally, shall pay Complainant, Chukwuemeka Ezeokoli, an award for compensatory damages for mental pain and suffering in the amount of \$5,000. Respondents shall pay interest on said award at the rate of nine (9) percent per annum from the date of the Commissioner's

Order until payment is actually made by Respondents;

2. Within sixty (60) days of the date of the Commissioner's Order, Respondents, jointly and severally, shall pay a civil fine and penalty to the State of New York in the amount of \$5,000 for having violated the Human Rights Law. Payment of the civil fine and penalty 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 shall accrue on this award at the rate of nine (9) percent per annum, from the date of the Commissioner's Final Order until full payment is made.

3. The aforesaid payment to Complainant, Chukwuemeka Ezeokoli, shall be made by Respondents in the form of a certified check made payable to his order 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. Respondents shall furnish written proof to the Division of their compliance with the directives contained in this Order;

DATED: October 21, 2016
Bronx, New York



Robert J. Tuosto
Administrative Law Judge