



**Division of
Human Rights**

**NEW YORK STATE
DIVISION OF HUMAN RIGHTS**

**NEW YORK STATE DIVISION
OF HUMAN RIGHTS**

on the Complaint of

REGINALD FERGUSON,

Complainant,

v.

**FRANK MANAGEMENT, LLC, REVOLUTIONS
AT DESTINY, LLC,**

Respondents.

**NOTICE AND
FINAL ORDER**

Case No. 10167833

Federal Charge No. 16GB402280

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 24, 2016, 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, 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: **AUG 02 2016**
Bronx, New York


HELEN DIANE FOSTER
COMMISSIONER



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on the Complaint of

REGINALD FERGUSON,

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v.

**FRANK MANAGEMENT, LLC,
REVOLUTIONS AT DESTINY, LLC,**

Respondents.

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

Case No. **10167833**

SUMMARY

Complainant alleged that Respondents failed to accommodate his disability; that he worked in a racially charged environment; and that Respondents terminated his employment because of his race or color, because of his disability, and in retaliation for complaining about unlawful discrimination. Respondents did not answer the complaint or appear at the first three of four public hearing sessions, and a default was entered. The evidence does not support Complainant's allegations of failure to accommodate, hostile work environment, race or color discrimination, or disability discrimination. However, Complainant proved that Respondents retaliated against him, and he is awarded damages for lost wages and mental anguish. A civil fine and penalty is also assessed against Respondents.

PROCEEDINGS IN THE CASE

On April 11, 2014, Complainant filed a verified complaint with the New York State Division of Human Rights (“Division”), charging Revolution [*sic*] at Destiny LLC with unlawful discriminatory practices relating to employment in violation of N.Y. Exec. Law, art. 15 (“Human Rights Law”).

On May 8, 2014, the Division amended the caption to substitute Frank Management, LLC for Revolution at Destiny LLC as Respondent.

After investigation, the Division found that it had jurisdiction over the complaint and that probable cause existed to believe that Respondent Frank Management, LLC 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 Edward Luban, an Administrative Law Judge (“ALJ”) of the Division. A public hearing session was held on April 6, 2015.

Complainant appeared at the hearing. The Division was represented by Richard J. Van Coevering, Esq. Respondent Frank Management, LLC did not appear. The hearing was adjourned so the Division’s Calendar Unit could serve Respondent Frank Management, LLC with a notice of hearing that included a copy of the amendment to the complaint. (Tr. 6)

On June 29, 2015, the Calendar Unit served the parties with a notice that a hearing on the complaint was scheduled for July 6-7, 2015 at the Division’s Syracuse Regional Office. The notice included a copy of the amendment to the complaint. (ALJ’s Exh. 1)

On July 6, 2015, the public hearing session was held as scheduled. Complainant and Van Coevering appeared. Respondent Frank Management, LLC did not appear. The Division requested that the complaint be amended to add Revolutions at Destiny, LLC as a Respondent, on the grounds that Revolution at Destiny LLC had been improperly removed as Respondent.

The presiding ALJ granted this request, noting that the Division's Rules of Practice do not permit parties to be removed by amendment. The hearing was adjourned to serve Respondents with the amendment and the verified complaint. (Tr. 15-18)

On July 17, 2015, the Calendar Unit served the parties with the amendment. (ALJ's Exh. 5)

On September 15, 2015, the Calendar Unit served the parties with a notice that a hearing on the complaint was scheduled for September 28-29, 2015 at the Syracuse Regional Office. The notice included copies of the amendments and the verified complaint. (ALJ's Exh. 2)

None of the Division's notices have been returned. (Tr. 25) They are presumed to have been delivered.

On September 28, 2015, Complainant and Van Coevering appeared for the hearing as scheduled. Respondents did not appear. In accordance with Human Rights Law § 297.4(b) and the Division's Rules of Practice, 9 N.Y.C.R.R. §§ 465.11(e) and 465.12(b)(3), the presiding ALJ entered Respondents' default, and the hearing proceeded on the evidence in support of the complaint. (Tr. 26)

After the presiding ALJ reviewed the hearing record, pursuant to § 465.12(f)(13) of the Division's Rules of Practice, he directed that a further hearing session be held to take additional evidence related to Complainant's lost wages and mitigation of damages. (ALJ's Exh. 6)

Another public hearing session was held on January 12, 2016. Complainant and Van Coevering appeared. Dana Umstead appeared for Respondents. Umstead informed the presiding ALJ that he was neither an attorney nor a principal of either Respondent but was the general manager of Revolutions Destiny USA and had been directed to appear on behalf of Respondents by Respondent Frank Management, LLC. (Tr. 66, 68) The Division objected to Umstead

appearing for Respondents because he was not an attorney, an officer, or a director of either Respondent. (Tr. 69-70)

The presiding ALJ noted that Umstead had presented no indication that he had authority to represent Respondents, and he ruled that Umstead could not appear for Respondents. (Tr. 70) Umstead then requested that the hearing be adjourned so Respondents could obtain an attorney. The Division objected to this request. The presiding ALJ denied the request, noting that Respondents were in default because they failed to file answers and appear at the three previous hearings, had not offered any excuse for their failure to appear, and had not offered any excuse for their failure to appear that day ready to proceed. (Tr. 71-73)

FINDINGS OF FACT

1. Complainant is black. (Tr. 57)
2. Complainant has bipolar disorder, post-traumatic stress disorder, major depression, anxiety, and an inoperable hernia. (Tr. 34)
3. For at least five years, Complainant has received Supplemental Security Income (“SSI”) and Social Security Disability Insurance (“SSDI”) benefits for his physical and mental disabilities.¹ (Tr. 33-35, 52)
4. I take official notice that SSI and SSDI are federal programs that provide benefits to eligible individuals with disabilities.
5. Respondent Revolutions at Destiny, LLC operates a combination restaurant, bowling alley, and bar (“Revolutions”) in the Destiny USA shopping mall in Syracuse, New York. (Tr. 32, 57)

¹ SSDI was identified as “SSD” at the hearing. (Tr. 33-34)

6. In or around November 2013, "Bob" (last name unknown), Revolutions' kitchen manager, interviewed Complainant for a dishwasher position. (Tr. 29-31, 76)

7. Bob reported to Ronald Toper, district manager. (Tr. 30-31)

8. Complainant told Bob that he was on SSI and SSDI and that he could work limited hours on a trial basis. (Tr. 33)

9. Complainant also told Bob that he could not lift more than "about 60 pounds, 60, 70 pounds because of the hernia." Bob told Complainant that he would not be alone and that other employees would help him lift heavy things. (Tr. 35)

10. In or around November 2013, Bob hired Complainant as a dishwasher. (Tr. 30-32)

11. Respondent Frank Management, LLC paid Complainant for the work he performed at Revolutions. (Tr. 49-50; Complainant's Exh. 1)

12. "At times" during his employment, Complainant was required to lift more than 60 pounds. Complainant complained about this "a couple of times." He was told "they were gonna handle it." (Tr. 35-36)

13. Complainant did not present evidence that he was required to lift more than 70 pounds. He also did not present evidence showing when he was required to lift more than 60 pounds, what items he was required to lift, whether he requested assistance at the time, or to whom he complained.

14. Shondreace Bradwell worked with Complainant in the kitchen. Bradwell is black. (Tr. 37, 42, 57)

15. Bradwell and other employees Complainant did not identify, both black and white, used the word "nigger." (Tr. 39)

16. On one occasion, a white employee Complainant did not identify came in the back and said, "What's up my niggas?" Other black employees "got pissed off" at the white employee, but Complainant told him, "[D]on't worry about it . . . if anybody bothers you or say [*sic*] anything, come to me, I'll have your back" (Tr. 39)

17. "On a couple of occasions," Complainant observed Bob looking through the line cook window as black and white employees "started loudly cussing each other out, using profanity language" and words such as "white boy," "nigga," "punk ass," "bitch," and "fuckers." (Tr. 40)

18. Complainant told Bob, Toper, and Brad Tucker, another manager, that the word "nigger" was being used around him and that it made him "uncomfortable." (Tr. 38-39)

19. The managers told Complainant they would handle it, but nothing was done about his complaints. (Tr. 39, 41, 43)

20. One day, Complainant was wearing headphones while he was putting dishes away. Complainant heard someone yelling. When he turned around, Bradwell was several inches from his face screaming at him, "Punk ass bitch, what you doin', we need help we need some help on the line, you need to move these mother fuckin' dishes, get over here now" (Tr. 43-44)

21. Complainant felt threatened by Bradwell. He said, "No, you're not gonna put your hands on me. I swear on my son's grave, I swear on my son's life I will defend myself. You will not put your hands on me." (Tr. 44)

22. Complainant "flipped." In panic, he left the kitchen to find a manager. (Tr. 43-44)

23. Complainant found a manager in the dining room and told the manager, "Please come handle this fuckin' situation. I have Shondreace in the kitchen threatening me . . . he's threatened

to fight me.”² The manager ordered Complainant to return to the kitchen. Complainant followed the manager into the kitchen. (Tr. 44-45).

24. When Complainant returned to the kitchen, the manager fired him. (Tr. 45)

25. Complainant “argued up and down” that he did nothing wrong. Words were exchanged; Complainant, Bradwell, and the manager were yelling and screaming. Eventually, the manager sent Complainant and Bradwell home. (Tr. 46-47)

26. The manager told Complainant to come back another time to talk about his job. Complainant did so, and Toper told him that he could not let him return to work. (Tr. 47)

27. Complainant’s employment at Revolutions ended before Christmas in December 2013. (Tr. 31-32, 76)

28. The loss of his job “aggravated” and “frustrated” Complainant. It put him “back in a post-traumatic stress mode” and “into those aggravated, pissed off days where it just frustrated me and made me want to give up.” He became depressed and argued with his family. (Tr. 54-55)

29. Complainant worked approximately 20 hours per week at Revolutions, at a rate of \$8.00 per hour. Respondent Frank Management, LLC paid Complainant a total of \$800.40. (Tr. 50, 76-77; Complainant’s Exhs. 1, 2)

30. Complainant did not apply for unemployment insurance benefits (“UIB”) after he lost his job. He did not believe he had sufficient qualifying employment and did not believe he was eligible for UIB because he received SSI and SSDI. (Tr. 51-52)

31. In or around January or February 2014, Complainant began looking for other employment. (Tr. 50, 52-53, 77)

² It is not clear who this manager was. Complainant initially identified him as Toper. (Tr. 46) Later he said that Tucker was the manager he found in the dining room. (Tr. 58)

32. Complainant applied for work at restaurants including McDonald's, Denny's, Limp Lizard, "KFC," and Little Caesar's.³ He told prospective employers that he was receiving SSI and SSDI, which limited his potential hours and the type of work he could do. (Tr. 53-54, 78)

33. Complainant did not obtain employment until around June or July 2015, when he began working at Moe's restaurant.⁴ Moe's paid Complainant at a rate of approximately \$8.50 – \$9.00 per hour. (Tr. 53, 56, 77, 80)

34. In 2015, Complainant received \$6,108.00 in benefits from the Social Security Administration. (Complainant's Exh. 3)

OPINION AND DECISION

Race/Color and Disability Discrimination

It is an unlawful discriminatory practice for an employer to discharge an employee because of the employee's race, color, or disability. N.Y. Exec. Law, art. 15 ("Human Rights Law") § 296.1(a). Complainant has the initial burden to prove a prima facie case of discrimination. He must show that he is a member of a protected class, that he was qualified for his position, that he suffered an adverse employment action, and that the adverse action occurred under circumstances giving rise to an inference of discrimination. *Ferrante v. American Lung Assn.*, 90 N.Y.2d 623, 629, 665 N.Y.S.2d 25, 29 (1997). If Complainant makes such a showing, the burden shifts to Respondents to present a legitimate, non-discriminatory reason for their action. 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).

³ Limp Lizard is identified as "Wet Lizard" in the transcript. (Tr. 78)

⁴ Moe's is identified as "Mose" in the transcript of the January 12, 2016 hearing. (Tr. 77)

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 bipolar disorder, post-traumatic stress disorder, depression, anxiety, and hernia are disabilities under the Human Rights Law.

Complainant is a member of protected classes based on his race and his disabilities. Complainant was qualified for his position as a dishwasher. Complainant suffered an adverse employment action when Respondents terminated his employment. However, the termination of Complainant’s employment did not occur under circumstances giving rise to an inference of discrimination. Complainant did not show that Respondents’ managers acted with discriminatory animus or that Respondents exhibited any other indicia of race or disability discrimination. I note that Bradwell, the employee who was involved in the altercation with Complainant on his last day of work and was also sent home, is the same race as Complainant.

The ultimate burden of persuasion lies at all times with Complainant to show that Respondent intentionally discriminated against him. *Bailey v. New York Westchester Square Med. Ctr.*, 38 A.D.3d 119, 123, 829 N.Y.S.2d 30, 34 (1st Dept. 2007). Complainant cannot rely on supposition and conclusory allegations to satisfy this burden. *Kelderhouse v. St. Cabrini Home*. 259 A.D.2d 938, 939, 686 N.Y.S.2d 914, 915 (3d Dept. 1999). Accordingly, this claim must be dismissed.

Reasonable Accommodation

An employer must provide a reasonable accommodation for an employee's known disability. Human Rights Law § 296.3 (a). To establish a prima facie case that Respondents failed to provide a reasonable accommodation, Complainant must show that he was a person with a disability within the meaning of the Human Rights Law, that Respondents were aware of his disability, that with reasonable accommodation he could perform the essential functions of his position, and that Respondents refused to make such accommodation. *Abram v. New York State Div. of Human Rights*, 71 A.D.3d 1471, 1473, 896 N.Y.S.2d 764, 767 (4th Dept. 2010).

Complainant's hernia is a disability under the Human Rights Law. Complainant told Bob about his hernia and the related lifting restriction during his job interview. Bob hired Complainant and told him that other employees would be available to help if he had to lift heavy things. This shows that Complainant could perform the essential functions of his position with the accommodation Bob proposed.

However, Complainant did not establish that Respondents violated his lifting restriction. Complainant told Bob that he could not lift more than "about 60 pounds, 60, 70 pounds." At the public hearing, Complainant testified that "at times" he was required to lift more than 60 pounds. Requiring Complainant to lift more than 60 but less than 70 pounds did not violate his restriction of "60, 70 pounds." Moreover, Complainant did not establish that he requested assistance when he had to lift items he believed were too heavy or that Respondents refused to accommodate him.

Complainant failed to show that Respondents refused to accommodate his disability. Therefore, this claim must be dismissed.

Hostile Work Environment

Complainant alleged that Respondents subjected him to a "racially charged"

environment. Racial harassment that rises to the level of a hostile work environment is a form of race discrimination. To prevail on a claim of hostile work environment, Complainant must demonstrate that he was subjected to a work environment permeated with discriminatory intimidation, ridicule, and insult that was sufficiently severe or pervasive to alter the conditions of his employment and create an abusive working environment. Whether an environment is hostile or abusive can be determined only by looking at all of the circumstances, including the “frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee’s work performance.” *Harris v. Forklift Sys., Inc.* 510 U.S. 17, 23 (1993). The Division must examine the totality of the circumstances and the perception of both the victim and a reasonable person in making its determination. *Father Belle Community Ctr. v. N.Y. State Div. of Human Rights*, 221 A.D.2d 44, 50, 642 N.Y.S.2d 739, 744 (4th Dept. 1996), *lv. denied*, 89 N.Y.2d 809, 655 N.Y.S.2d 889 (1997).

Complainant testified that his co-workers, both black and white, used the word “nigger” around him. Complainant’s testimony about this subject was vague. Complainant described one occasion when a variant of the word was used: an unnamed white employee came in the kitchen and said, “What’s up my niggas?” Complainant told the employee, “[D]on’t worry about it . . . if anybody bothers you or say [*sic*] anything, come to me, I’ll have your back . . .” Complainant testified that other employees used the word “nigger,” but the only employee he identified was Bradwell who, like Complainant, is black. While any use of this word was offensive and inappropriate in the work environment, Complainant did not establish how often the word was used or the circumstances in which it was used. Absent such evidence, the Division cannot find that the use of the word was sufficiently severe or pervasive to create an abusive working

environment. *See Forrest*, 3 N.Y. 2d at 311, 786 N.Y.S.2d at 395.

Retaliation

It is an unlawful discriminatory practice to retaliate against a person who has opposed discriminatory practices. Human Rights Law § 296.7. To prove a prima facie case of retaliation, Complainant must establish that he engaged in activity protected by the Human Rights Law, that Respondents were aware he engaged in the protected activity, that he suffered an adverse employment action based on his activity, and that there was a causal connection between the protected activity and the adverse employment action. *Pace v. Ogden Servs. Corp.*, 257 A.D.2d 101, 104, 692 N.Y.S.2d 220, 223-24 (3d Dept. 1999). If Complainant meets this burden, Respondents must present legitimate, non-discriminatory reasons for their action. If Respondents do so, Complainant must show that the reasons Respondents have presented were merely a pretext for discrimination. *Id.*

Complainant engaged in protected activity when he complained to Bob and other managers that his co-workers used racially charged language around him. Respondents were aware of Complainant's complaints. Complainant suffered an adverse employment action when Respondents terminated his employment. Although Complainant did not identify the dates he complained or the date his employment was terminated, he was employed at Revolutions only from November to December 2013. Whenever he made his complaints, his termination date was sufficiently close in time to permit an inference of a causal connection between his complaints and the termination of his employment. *See Ji Sun Jennifer Kim v. Goldberg, Weprin, Finkel, Goldstein, LLP*, 120 A.D.3d 18, 25, 987 N.Y.S.2d 338, 343 (1st Dept. 2014). Accordingly, Complainant has established a prima facie case of unlawful retaliation.

Because Respondents did not appear at the public hearing session held on September 28,

2015, they failed to meet their burden to present a legitimate, non-discriminatory reason for the termination of Complainant's employment. Therefore, Respondents did not rebut Complainant's prima facie case.

Damages

Complainant is entitled to damages in the form of back pay for Respondents' unlawful termination of his employment. Complainant worked approximately 20 hours per week at a rate of \$8.00 per hour, for earnings of approximately \$160 per week. Complainant did not establish the date his employment with Respondents ended, but he testified that he did not start to look for other work until January or February 2014. Complainant had a duty to mitigate his damages "by making reasonable efforts to obtain comparable employment." *Matter of Goldberg v. New York State Div. of Human Rights*, 85 A.D.3d 1166, 1167, 927 N.Y.S.2d 123, 125 (2d Dept. 2011).

Therefore, Complainant is only entitled to lost wages from February 2014, when he started looking for other work, to June 2015, when he began working at Moe's, a period of 69 weeks. At \$160 per week, Complainant's lost wages total \$11,040.00. Complainant is entitled to interest on this amount from September 30, 2014, a reasonable intermediate date. CPLR § 5001(b).

Complainant did receive Social Security benefits in 2015. However, these benefits will not be offset against the award for back pay, because there is no evidence that they were compensation for Complainant's lost earnings. *See Exxon Shipping Co. v. New York State Div. of Human Rights*, 303 A.D.2d 241, 242, 755 N.Y.S.2d 608, 609 (1st Dept. 2003), *lv denied*, 100 N.Y.2d 505, 763 N.Y.S.2d 811 (2003).

Complainant is also entitled to recover compensatory damages for mental anguish caused by Respondents' 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).

The loss of his job “aggravated” and “frustrated” Complainant. It put him “back in a post-traumatic stress mode” and “into those aggravated, pissed off days where it just frustrated me and made me want to give up.” He became depressed and argued with family. Accordingly, the Division finds that an award of \$5,000.00 to Complainant for mental anguish is consistent with similar cases and will effectuate the remedial purposes of the Human Rights Law. *See Rite Aid of New York, Inc. v. New York State Div. of Human Rights*, 60 A.D.3d 1428, 1430, 875 N.Y.S.2d 708, 710 (4th Dept. 2009); *Matter of New York State Office of Mental Health v. New York State Div. of Human Rights*, 53 A.D.3d 887, 890, 861 N.Y.S.2d 223, 226 (3rd Dept. 2008); *Quality Care, Inc. v. Rosa*, 194 A.D.2d 610, 611, 599 N.Y.S.2d 65, 66 (2d Dept. 1993).

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. Respondents terminated Complainant’s employment shortly after he complained that co-workers used racially charged language around him. Respondents’ decision was deliberate and resulted in Complainant being out of work for more than one year. While the record contains no information showing that Respondents have a history of discriminatory actions and no information about their financial resources, it is noted that Respondents ignored repeated notices from the Division, failed to file answers to the complaint, failed to attend the first three public hearing sessions, and failed to offer any explanation for their failure to attend those hearing sessions or their failure to be ready to proceed at the fourth session.

Considering these factors, a civil fine in the amount of \$5,000.00 may act as an inducement to comply with the Human Rights Law in the future, may deter Respondents and others from future discriminatory action, and will present an example to the public that the Division vigorously enforces the Human Rights Law. *See County of Erie v. New York State Div. of Human Rights*, 121 A.D.3d 1564, 1566, 993 N.Y.S.2d 849, 851 (4th Dept. 2014).

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 employment; 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 60 days of the date of the Commissioner's Order, Respondents shall pay to Complainant the sum of \$11,040.00, as damages for back pay between February 2014 and June 2015. Interest shall accrue on the award at the rate of nine percent per year from September 30, 2014, a reasonable intermediate date, until the date payment is actually made by Respondents

2. Within 60 days of the date of the Commissioner's Order, Respondents shall pay to Complainant the additional sum of \$5,000.00, without any withholdings or deductions, as compensatory damages for the mental anguish and humiliation suffered by Complainant as a result of Respondents' unlawful discrimination against him. 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 Respondents.

3. The aforesaid payments shall be made by Respondents in the form of certified checks made payable to the order of Complainant, Reginald Ferguson, and delivered by certified mail, return receipt requested, to Richard J. 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. Respondents 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 their compliance with the directives contained within this order.

4. Within 60 days of the date of the Commissioner's Order, Respondents shall pay a civil fine and penalty to the State of New York in the amount of \$5,000.00. 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. Respondents shall cooperate with the representatives of the Division during any investigation into compliance with the directives contained within this Order.

DATED: March 24, 2016
Syracuse, New York


Edward Luban
Administrative Law Judge