



**Division of
Human Rights**

**NEW YORK STATE
DIVISION OF HUMAN RIGHTS**

**NEW YORK STATE DIVISION
OF HUMAN RIGHTS**

on the Complaint of

DAVID K. FINK,

Complainant,

v.

**JPK IMPORTS/ONEONTA, INC., D/B/A EMPIRE
TOYOTA SCION,**

Respondents.

**NOTICE AND
FINAL ORDER**

Case No. 10175131

Federal Charge No. 16GB502656

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 June 9, 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”) WITH THE FOLLOWING AMENDMENTS:

- Given the record, a \$60,000 civil fine and penalty is assessed in this matter. In

response to a Notice of Hearing, Respondent submitted a letter to the Division stating “Respondent has no intentions of attending the public hearing and participating in this circus.” *See* ALJ’s Ex. 3. Respondent later demanded that the Division’s prosecution attorney “cease and desist with the voicemail messages.” Respondent defaulted at the hearing, made no excuse for its default and did not request to cure it. Instead, in Objections to the Recommended Order, Respondent asserted that Complainant should have been required to reveal his disability during his employment application even though such a requirement is not lawful. *See* Human Rights Law § 296.1(d). These facts, and the record as a whole, evince a serious and wanton disregard for the law and warrant the imposition of a more substantial penalty to deter Respondent from engaging in future unlawful behavior. On this basis, and because Respondent violated the Human Rights Law by terminating Complainant’s employment because of disability, Respondent is directed to pay to the State of New York a civil fine and penalty in the amount of \$60,000. *See State Div. of Human Rights v. Golden Mine 2000, Inc.*, Div. Case No. 10169517 (June 29, 2016) (\$55,000 civil fine and penalty where “Respondent’s complete disregard for the Division’s investigation and inquiries throughout the process, including Respondent’s representative’s statement to the Division attorney that he ‘had no interest in speaking to the Division or participating in the proceedings’ evince a serious and wanton disregard for the law and warrant the imposition of a greater penalty to deter Respondent from engaging in future unlawful behavior”); *see also Jacobs v. State Div. of Human Rights*, 131 A.D.3d 883 (1st Dept. 2015), confirming *Staton v. Jacobs Re LLC*, Division Case no. 10150646 (July 17, 2013) (\$55,000 civil fine and penalty assessed against Respondent after default. “Respondents’ actions, both in this case and in choosing

to default, have made it clear that they do not fear any response by law enforcement to their conduct. This is perhaps best shown by Respondent Jacobs' handwritten missives to the Division which evince a blatant contempt for the seriousness of the allegations, as well as a lack of respect for the Division, as a law enforcement agency, to prosecute them"). Interest is to accrue on the civil fine and penalty at a rate of nine percent per annum from the date of this Order until payment is made.

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 26 2016**
Bronx, New York


HELEN DIANE FOSTER
COMMISSIONER



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DAVID K. FINK,

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v.

**JPK IMPORTS/ONEONTA, INC., D/B/A
EMPIRE TOYOTA SCION,**

Respondent.

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

Case No. **10175131**

SUMMARY

Complainant alleged that Respondent terminated his employment because of his disability. Respondent did not answer the complaint or appear at the hearing, and a default was entered. Complainant has proven his case and is awarded damages for lost wages and mental anguish. A civil fine and penalty is also assessed against Respondent.

PROCEEDINGS IN THE CASE

On May 27, 2015, Complainant filed a verified complaint with the New York State Division of Human Rights (“Division”), charging Empire Toyota Scion with unlawful discriminatory practices relating to employment in violation of N.Y. Exec. Law, art. 15 (“Human Rights Law”).

On October 22, 2015, the Division amended the complaint to add JPK Imports/Oneonta, Inc. as a respondent. (ALJ's Exh. 1)

After investigation, the Division found that it had jurisdiction over the complaint and that probable cause existed to believe that JPK Imports/Oneonta, Inc. and Empire Toyota Scion had engaged in unlawful discriminatory practices. The Division thereupon referred the case to public hearing.

By letter postmarked March 18, 2016, in response to a letter from the Division's Calendar Unit informing the parties of the upcoming public hearing, Respondent informed the Division that Complainant's job performance was not satisfactory and that it had "no intentions of attending the public hearing and participating in this circus." (ALJ's Exh. 3)

On April 15, 2016, in response to a letter from the presiding Administrative Law Judge ("ALJ"), Respondent faxed the Division a letter with the same content as the letter postmarked March 18, 2016, with a request to instruct the Division attorney "to cease and desist" from leaving voicemail messages about settling the case. (ALJ's Exh. 4)

After due notice, the case came on for hearing before Edward Luban, an ALJ of the Division. A public hearing session was held on April 27, 2016.

Complainant appeared at the hearing. The Division was represented by Alyssa Talanker, Esq. Respondent 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 Respondent's default, and the hearing proceeded on the evidence in support of the complaint.

At the hearing, the presiding ALJ amended the caption to reflect Respondent's correct name, JPK Imports/Oneonta, Inc., d/b/a Empire Toyota Scion. (Tr. 6)

The presiding ALJ also asked the Division to submit documentation of the unemployment compensation Complainant received in 2015 and the wages he received from his current employer. (Tr. 45) After the hearing, the Division submitted copies of a printout of Complainant's unemployment compensation payment history with corresponding deposit records from Citizens Bank, Complainant's Form W-2 for 2015 from Cook Enterprises, Inc., and Complainant's pay stub dated April 29, 2016. These documents have been received in evidence as Complainant's Exhibits 6, 7, and 8 respectively.

FINDINGS OF FACT

1. Complainant has worked in automobile and automobile parts sales in the Oneonta, New York area since 1984. (Tr. 31-32)
2. Respondent operates an automobile dealership in Oneonta. (Tr. 32, 44; ALJ's Exhs. 3, 4)
3. Geoffrey Harris is Respondent's owner.¹ (Tr. 12, 44; ALJ's Exhs. 3, 4)
4. Steve Martin is Respondent's service manager. (Tr. 31, 44)
5. Jerry Mertz is Respondent's parts manager. (Tr. 11)
6. From 1984 to 1997, Complainant was employed at Royal Chrysler, another dealership owned by Harris. (Tr. 11-12)
7. In March 2015, Mertz told Complainant that Respondent was looking for an assistant service manager. Mertz knew Complainant from his employment at Royal Chrysler. (Tr. 11-12)

¹ Harris is identified as Jeffrey Harris in the transcript. (Tr. 12)

8. After an interview, Martin hired Complainant as an assistant service manager, also known as assistant service writer. Complainant began work during the week beginning March 23, 2015. (Tr. 10, 12-13; Complainant's Exh. 3)

9. One Saturday, Complainant saw Harris in Respondent's front office. This was the first time Complainant had seen Harris since he began working for Respondent. Harris told Complainant that he was doing a very good job. (Tr. 32-33)

10. Respondent did not discipline Complainant or write him up for any deficiencies in his job performance. (Tr. 14, 19, 32)

11. Approximately six months before he started working for Respondent, Complainant began to experience numbness in his right hand and back. The numbness did not interfere with his job performance with his previous employer or with Respondent. (Tr. 13-14, 19)

12. On April 20, 2015, Complainant saw a chiropractor for the numbness. The chiropractor suggested that Complainant go home and rest for the remainder of the day. Complainant informed Martin, who said it was not a problem. (Tr. 14-16)

13. On April 21, 2015, Complainant saw Mohamed Egal, M.D., his primary care physician, about the numbness. Dr. Egal excused Complainant from work for the rest of the day and ordered a CAT scan.² (Tr. 17-18)

14. Complainant told Martin that Dr. Egal had excused him from work but that he would return to work the next day. (Tr. 18)

15. Dr. Egal referred Complainant to Mark Hornyak, M.D., a surgeon. Dr. Hornyak had Complainant undergo an MRI.³ The MRI showed that Complainant had several damaged vertebrae. (Tr. 21-23, 36-37)

² I take official notice that a CAT (computerized axial tomography) scan is a type of x-ray procedure.

16. On May 5, 2015, Dr. Egal excused Complainant from work through May 8, 2015. (Tr. 23; Complainant's Exh. 1)

17. On Monday, May 11, 2015, Complainant returned to work. He told Martin that he had a note from his doctor, but Martin said the note was not necessary. Complainant also told Martin that he might need surgery. (Tr. 24-25, 37-38)

18. At the end of the day, Martin told Complainant that Harris had told him to let Complainant go because of lack of work. Respondent terminated Complainant's employment. (Tr. 27, 44; ALJ's Exh. 1)

19. Complainant, Martin, and another assistant service manager had been busy that day. In Complainant's experience, May is usually a "very busy" month for automobile sales. (Tr. 27, 32)

20. On May 18, 2015, Respondent advertised in *The Daily Star*, a local newspaper, for three immediate openings, including an assistant service manager. (Tr. 28, 31; Complainant's Exh. 2)

21. When Respondent terminated Complainant's employment, he was "very surprised" and "upset." He had trouble sleeping. The termination of his employment caused tension with his girlfriend because he was not bringing home any money. (Tr. 27, 43)

22. On June 1, 2015, Dr. Hornyak performed anterior cervical fusion surgery on Complainant. Complainant was unable to work until June 10, 2015, when Dr. Hornyak cleared him to return to work full-time on light duty. (Tr. 38-39; Complainant's Exhs. 4, 5)

23. Respondent paid Complainant a salary of \$600.00 per week. Complainant earned an additional \$120.00 for the week ending April 5, 2015, when he worked an extra day. (Tr. 33-34, 44; Complainant's Exh. 3)

³ I take official notice that MRI (magnetic resonance imaging) is a medical imaging procedure.

24. Had Complainant remained employed with Respondent, he would have earned \$480.00 from May 12, 2015 to May 15, 2015, \$600.00 for the week of May 18-22, 2015, and \$600.00 for the week of May 25-29, 2015, a total of \$1,680.00. Complainant would have had no earnings from June 1, 2015 to June 10, 2015 because he was unable to work because of his surgery and recovery. Complainant would have earned \$240.00 from June 11, 2015 to June 12, 2015 and \$27,600.00 (46 weeks x \$600.00/week) from June 15, 2015 through April 27, 2016, the date of the public hearing.

25. At the time Respondent terminated Complainant's employment, he had 40 hours of vacation remaining. (Complainant's Exh. 3) Complainant did not establish that he was entitled to vacation pay for these unused hours. (Tr. 34)

26. Complainant received \$756.00 in unemployment compensation from May 24, 2015 to July 5, 2015. (Complainant's Exh. 6)

27. On June 26, 2015, Complainant began employment with Cook Enterprises, Inc. Complainant works 40 hours per week at the rate of \$13.00 per hour, for a weekly wage of \$520.00. (Tr. 41-42; Complainant's Exh. 8)

28. Complainant earned \$13,503.75 from Cook Enterprises in 2015 and \$8,632.00 (16.6 weeks x \$520.00/week) from January 1, 2016 through April 27, 2016, a total of \$22,135.75. (Complainant's Exhs. 7, 8)

OPINION AND DECISION

Disability Discrimination

It is an unlawful discriminatory practice for an employer to discharge an employee because of the employee's 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 Respondent to present a legitimate, non-discriminatory reason for its action. If Respondent does 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 experienced persistent numbness in his back and hand. The MRI showed that he had several damaged vertebrae, for which he had surgery. Therefore, Complainant had a disability under the Human Rights Law, and he is a member of a protected class. Complainant was qualified for his position as assistant service manager when Respondent hired him. Complainant suffered an adverse employment action when Respondent terminated his employment. Respondent terminated Complainant’s employment the day he returned to work from a medical absence and told Martin that he might need surgery for his back. Martin told Complainant that Respondent was letting him go because of lack of work, but Complainant was

busy that day at work. One week later, Respondent advertised an immediate opening for an assistant service manager. These circumstances give rise to an inference of unlawful discrimination.

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

Damages

Complainant is entitled to damages in the form of back pay for Respondent's unlawful termination of his employment. Had Complainant remained employed with Respondent, he would have earned \$29,520.00 from May 12, 2015 through April 27, 2016, the day of the public hearing (\$480.00 from May 12, 2015 to May 15, 2015, \$600.00 for the week of May 18-22, 2015, \$600.00 for the week of May 25-29, 2015, \$240.00 from June 11, 2015 to June 12, 2015, and \$27,600.00 (46 weeks x \$600.00/week) from June 15, 2015 through April 27, 2016). During this period, Complainant earned \$22,135.75 from other employment and received \$756.00 in unemployment compensation. Subtracting Complainant's earnings and unemployment compensation from his lost wages yields a loss of \$6,628.25. Complainant is entitled to interest on this amount from November 3, 2015, a reasonable intermediate date. CPLR § 5001(b).

Complainant is also entitled to recover compensatory damages for mental anguish caused by Respondent'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 was “very surprised” and “upset” when Respondent terminated his employment. He had trouble sleeping. The loss of his job caused tension with his girlfriend. In light of the nonspecific nature of Complainant’s mental distress and the relatively brief time he was unemployed, the Division finds that an award of \$2,500.00 for mental anguish is consistent with similar cases and will effectuate the remedial purposes of the Human Rights Law. *See Matter of 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)

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. Respondent terminated Complainant’s employment the day he returned from a medical absence and told Martin that he might need surgery. Respondent’s decision was deliberate and resulted in Complainant being out of work for more than six weeks. While the record contains no information showing that Respondent has a history of discriminatory actions and no information about its financial resources, I note that Respondent failed to answer the complaint and that its failure to attend the public hearing was deliberate.

Considering these factors, a civil fine in the amount of \$1,000.00 may act as an inducement to comply with the Human Rights Law in the future, may deter Respondent and others from future discriminatory action, and will present an example to the public that the Division vigorously enforces the Human Rights Law. *See Matter of Law Offices of Oliver Zhou, PLLC v. New York State Div. of Human Rights*, 128 A.D.3d 618, 619, 10 N.Y.S.3d 211 (1st Dept. 2015).

ORDER

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

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

ORDERED that Respondent 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 shall pay to Complainant the sum of \$6,628.25, as damages for back pay. Interest shall accrue on the award at the rate of nine percent per year from November 3, 2015, a reasonable intermediate date, until the date payment is actually made by Respondent.

2. Within 60 days of the date of the Commissioner's Order, Respondent shall pay to Complainant the additional sum of \$2,500.00, without any withholdings or deductions, as compensatory damages for the mental anguish and humiliation suffered by Complainant as a result of Respondent's unlawful discrimination against him. Interest shall accrue on the award at the rate of nine percent per year from the date of the Commissioner's Order until payment is actually made by Respondent.

3. The aforesaid payments shall be made by Respondent in the form of certified checks made payable to the order of Complainant, David K. Fink, and delivered by certified mail, return receipt requested, to Alyssa Talanker, Esq., Senior Attorney, New York State Division of Human Rights, Empire State Plaza, Agency Building 1, 2nd Floor, Albany, New York 12220. 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 shall pay a civil fine and penalty to the State of New York in the amount of \$1,000.00. 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 shall cooperate with the representatives of the Division during any investigation into compliance with the directives contained within this Order.

DATED: June 7, 2016
Syracuse, New York


Edward Luban
Administrative Law Judge