

**STATE OF NEW YORK: EXECUTIVE DEPARTMENT
STATE DIVISION OF HUMAN RIGHTS**

STATE DIVISION OF HUMAN RIGHTS
on the complaint of
NANCY L. FIX,

Complainant,

-against-

RITE AID OF NEW YORK, INC.,

Respondent.

NOTICE OF ORDER AFTER HEARING

Case Nos.
7-EO-97-7901904E
7-E-S-97-7901881E

PLEASE TAKE NOTICE that the within is a true copy of an Order issued herein by the Hon. Edward A. Friedland, Executive Deputy Commissioner of the State Division of Human Rights, after a hearing held before Administrative Law Judge Peter J. Gemellaro. 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, Bronx, New York 10458. The Order may be inspected by any member of the public during the regular office hours of the Division.

PLEASE ALSO TAKE NOTICE that any party to this proceeding may appeal this Order to the Supreme Court in the County wherein the unlawful discriminatory practice which 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 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 days after service of this Order. The Petition and Notice of Petition must also be served on all parties, including the Division of Human Rights.

PLEASE TAKE FURTHER NOTICE that a complainant who seeks state judicial review, and who receives an adverse decision therein, may lose his or her right to proceed subsequently in Federal

Court under Title VII, by virtue of Kremer v. Chemical Construction Corp., 456 U.S. 461, 102 S. Ct. 1883, 72 L.Ed.2d 262 (1982).

DATED: **MAR 16 2007**
BRONX, NEW YORK

STATE DIVISION OF HUMAN RIGHTS


EDWARD A. FRIEDLAND
Executive Deputy Commissioner

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**STATE OF NEW YORK
DIVISION OF HUMAN RIGHTS**

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PROCEEDINGS IN THE CASE

On March 10, 1997 and April 16, 1997, Complainant filed verified complaints with the New York State Division of Human Rights (Division) charging Respondent with discriminatory practices relating to employment in violation of the Human Rights Law of the State of New York.

After an investigation, the Division found that it had jurisdiction over the complaints and that probable cause existed to believe that Respondent had engaged in unlawful discrimination. The cases were referred to a public hearing.

After due notice, a public hearing was held on February 18 and 19, 2004, before Peter J. Gemellaro, an Administrative Law Judge (ALJ) with the Division.

Complainant and Respondent appeared at the hearing. Complainant was represented by the law firm of Godinho & Galeziowski, by John A. Galeziowski, Esq. Respondent was represented by the law firm of Kenney, Kanaley, Shelton, Nowak & Liptak, LLP, by Stephen F. Szymoniak, Esq.

Both parties submitted post-hearing briefs.

The Recommended Findings of Fact, Opinion, Decision and Order ("Recommended Order") in this case was issued on January 31, 2005.

Objections to the Recommended Order were filed with the Order Preparation Unit by Complainant's counsel dated February 18, 2005 and by Respondent's counsel dated February 22, 2005.

An Alternative Proposed Order (APO) in this case was issued on August 18, 2006.

Objections to the APO were filed with the Order Preparation Unit by Respondent's counsel dated September 7, 2006.

FINDINGS OF FACT

1. Complainant alleged that she was subjected to different terms, conditions and privileges of employment. Specifically, she alleged that she was subjected to a differential in pay based upon her sex. Complainant also alleged that she was constructively discharged in retaliation for filing her pay differential complaint. (ALJ Exhibit I).

2. Respondent denied that it engaged in unlawful discrimination or retaliation practices relating to employment and that it subjected Complainant to different terms, conditions and privileges of employment. (ALJ Exhibits IV, V).

3. Complainant was hired by Respondent in June of 1990 as a cashier. Prior to her employment at Rite-Aid, she was an Assistant Manger at Pennzoil from December 1989 to May 1990. Complainant worked as a cashier for Respondent for approximately one month before her promotion to a Key position which allowed her to open and close the store, make bank deposits and control money in the safe. Complainant worked in this position for two to three years at Respondent's store in North Tonawanda. (Tr. 17-20; Complainant's Exhibits 1, 3).

4. When Complainant was hired in 1990, she possessed an 11th grade education. She received her high school diploma in 1993. (Tr. 65-66).

5. On May 2, 1993, Complainant was promoted to Assistant Manager at Respondent's Grand Island store. As a result of this promotion, she was transferred from an hourly employee to a salaried employee. (Tr. 20; Complainant's Exhibits 3, 18).

6. On June 13, 1993, Complainant was promoted to Manager. Her salary increased from \$250 to \$275 per week. A month later, Complainant was transferred from Grand Island to the North Tonawanda store where she worked until February of 1997. (Tr. 20-23, 173; Complainant's Exhibits 3, 18).

7. In late February of 1997, Complainant was transferred to manage the Niagara Falls/Hyde Park store. Her salary was \$400 per week. (Tr. 24; Complainant's Exhibit 18).

8. While managing the Niagara Falls/Hyde Park store, Complainant's District Manager was Joe Stein. He had previously been her District Manager at the Tonawanda store. As District Manager, he was the Store Manager's immediate supervisor. The District Manager's immediate supervisor was the Marketing Manager, who was Jeff Hammond. (Tr. 34-35).

9. The previous Store Manager at the Niagara Falls/Hyde Park store was Gerald Bush, a male. He was hired in September of 1996 at a salary of \$575 per week. (Tr. 32, 37; Complainant's Exhibits 16, 19).

10. Complainant received bonuses, awards and commendations for her work performance. She was never disciplined. (Tr. 25-31; Complainant's Exhibits 4, 5, 7-A, 8-A, 10-13).

11. Complainant found a salary stub for Bush in a safe at the Niagara Falls/Hyde Park store which showed that he was paid more than she was. (Tr. 37, 71).

12. After Complainant found Bush's salary stub, she asked Stein for a raise. Stein referred her to Deborah Breed, who had been Respondent's Human Resources Manager since 1995. (Tr. 37-38, 134).

13. Breed was a District Manager for Respondent from 1986 to 1995. Part of a District Manager's duties was to determine salary raises for Store Managers. The criteria used to determine these raises included store maintenance, sales increases and theft prevention. (Tr. 130-131).

14. The criteria used by Respondent in deciding a starting salary for a newly hired Store Manager included prior work experience and education. (Tr. 132).

15. After finding Bush's pay stub, Complainant contacted Breed on February 27, 1997 asking for a \$200 a week raise. Her reason was that "...new hires were being hired in at approximately that much more than I was making to do the same job." Complainant also believed that she should be paid more because Bush was hired in 1996 and she had been with Rite-Aid since 1990. Breed did not believe Complainant deserved a \$200 per week raise and told Complainant that she would never get that amount. Breed further told Complainant that she was "misinformed and delusional" and threatened to fire Complainant for discussing her wages. (Tr. 38, 81).

16. As a result of her complaint of wage disparity, Stein gave Complainant a \$20 raise which increased her weekly pay from \$380 to \$400 effective March 2, 1997. Complainant filed her pay disparity complaint with the Division on March 10, 1997. (ALJ Exhibit I; Complainant's Exhibit 3; Tr. 38, 145-148).

17. Raises for Store Managers were based upon their last performance review, which is supposed to be conducted annually by the District Manager. When a District Manager failed to conduct a performance review, a raise could be based upon a fixed percentage, usually two or three percent, unless the District Manager disagreed. A Store Manager could also request a transfer to a higher volume store if he/she wanted a pay increase. Nothing in the record indicates whether any Manager in Stein's district ever received a pay increase as a result of a transfer to a higher volume store. (Tr. 138-139, 152-153, 182-183).

18. Through March of 1997, there was no written policy regarding the criteria Respondent used to hire Managers or to determine their salaries. The percentage and range for pay raises for Store Managers were verbally communicated by the Regional Director to the District Managers. (Tr. 154-156).

19. Breed interviewed and hired Bush in 1996. She considered factors such as his prior managerial experience with the McDonald's corporation and his education when she hired him. (Tr. 140-142, 184-185; Complainant's Exhibit 19).

20. Complainant had only one Manager's performance review, which was conducted by Susan Bucelata. (Tr. 151-153).

21. There were 25 Store Managers including Complainant who worked under District Manager Joseph Stein in 1997. Their genders, dates of hire, dates they became Manager, weekly starting salaries as Manager and weekly salaries in 1997, in order of seniority, are as follows:

	Gender	Date Hired	Date made Manager	Start salary as Manager	1997 salary	Comp. Ex.
James Claps	M	10/30/71	1/26/97	N/A*	637	16
Denise Claps	F	5/01/74	N/A	N/A	533	16
Michael Sarhal	M	11/24/75	5/7/95	710	749	16, 40
Renee Taczak	F	10/01/77	1/5/92	281	460	16, 24, 54
Robert Tavano	M	1/01/78	N/A	N/A	578	16
Howard Wurstner	M	9/04/84	12/8/96	611	661	16, 38
Susan Bucelata	F	5/09/88	N/A	N/A	610	16
Cindy Evans	F	8/01/88	5/28/95	375	420	16, 43, 54
Lorrie Alexander	F	11/08/88	7/28/96	350	425	16, 22, 54
Candace Klutts	F	1/29/90	12/8/91	270	400	16, 20, 54

Nancy Fix	F	6/11/90	6/30/93	275	400	3, 16, 18, 54
Rosemary Miller	F	11/28/90	6/30/91	275	415	16, 21, 54
Mark Lepage	M	4/20/92	12/20/93	335	450	16, 23, 54
Arthur Eberhart	M	3/22/93	10/24/93	385	538	16, 28, 54
John Welch	M	5/02/93	6/13/93	400	550	16, 30, 54
Kathleen Siergiej	F	5/17/93	6/27/93	335	430	16, 41, 54
Samuel Napolitano	M	11/01/93	12/19/93	450	656	16, 37, 54
James Leffler	M	1/03/94	2/13/94	425	525	16, 26, 54
John Michalski	M	1/24/94	7/31/94	420	550	16, 31, 54
Charles Ciesielski	M	9/19/94	12/30/94	625	711	16, 39, 54
Ira Karp	M	5/08/95	10/29/95	500	515	16, 25, 54
Ronald Swader	M	5/21/95	7/6/97	527	540	16, 29, 54
Robert Dutter	M	4/22/96	6/2/96	475	560	16, 32, 54
Gerald Bush	M	9/09/96	9/9/96	575	575	16, 19, 54
John Russell	M	6/09/97	7/20/97	575	575	16, 33, 54

*Data Not Available

22. Their years of prior supervisory/managerial experience and educational levels are as follows:

Mgr.	Experience	Education	Comp. Exhibit
James Claps	None	High School	36
Denise Claps	N/A*	N/A	—
Michael Sarhal	N/A	N/A	—
Renee Taczak	None	High School	24

Robert Tavano	None	College	34
Howard Wurstner	N/A	N/A	—
Susan Bucelata	None	College	35
Cindy Evans	4 yrs.	High School	43
Lorrie Alexander	N/A	N/A	—
Candace Klutts	None	High School	20
Nancy Fix	6 months	High School	1
Rosemary Miller	4 yrs.	College	21
Mark LePage	5 yrs.	College	23
Arthur Eberhart	6 yrs.	High School	28
John Welch	16 yrs.	High School	30
Kathleen Siergiej	17 yrs.	High School	42
Samuel Napolitano	7 yrs.	High School	37
James Leffler	4 yrs.	College	26
John Michalski	3 yrs.	College	31
Charles Ciesielski	3 yrs.	College	39
Ira Karp	9 yrs.	College	25
Ronald Swader	17 yrs.	College	29
Robert Dutter	11 yrs.	College	32
Gerald Bush	6 yrs.	College	19
John Russell	9 yrs.	High School	33

* Data Not Available

23. The starting salaries of those employees who were made Manager in 1993 and their 1997 salaries are as follows:

Name	1993 Salary	1997 Salary	Difference
Nancy Fix	275	400	(+125)
Mark LePage	335	450	(+115)
Arthur Eberhart	385	538	(+153)
John Welch	400	550	(+150)
Kathleen Siergiej	335	430	(+95)
Samuel Napolitano	450	656	(+206)

24. Of the 25 Managers who worked in Stein's district, sixteen were male and nine were female. Complainant had more seniority than the following twelve male Managers:

Name	Starting Salary as Mgr.	1997 Salary
Fix	275	400
Swader	527	540
LaPage	335	450
Karp	500	515
Leffler	425	525
Eberhart	385	538
Welch	400	550
Michalski	420	550
Dutter	475	560
Bush	575	575
Russell	575	575

27. The salary difference between Complainant and Eberhart during their tenures as

Manager for Respondent is as follows:

Dates	Eberhart	Fix	Weekly diff.	No. of weeks	Total
10/24/93 - 6/12/94	385	275	110	32	3520
6/13/94 - 8/21/94	385	271.54	113.46	10	1134.60
8/22/94 - 9/4/94	385	291.54	93.46	2	186.92
9/5/94 - 7/9/95	410	291.54	118.46	43	5093.78
7/1/95 - 8/20/95	450	291.54	158.46	5	792.30
8/21/95 - 9/3/95	450	300.28	149.72	2	299.44
9/4/95 - 7/7/96	450	356	94	44	4136
7/8/96 - 8/4/96	461.25	356	105.25	4	421
8/5/96 - 9/1/96	525	356	169	4	676
9/2/96 - 3/2/97	525	380	145	26	3770
3/3/97 - 3/25/97	525	400	125	3	375
Total					\$20,405.04

28. Breed could not explain what criteria were used in determining Complainant's salary.

Aside from Bush, Respondent could not explain the specific rationale for any Manager's salary in Stein's district. For example, Breed could not specifically explain how Rosemary Miller's prior work experience factored into her starting salary as a Store Manager. Respondent could not specifically explain how Eberhart's experience compared to Miller's in terms of its decision to hire him as Store Manager. Respondent could not specifically explain the reason for the salary

differential between Complainant and Eberhart. Respondent could not explain how Sam Napolitanos' salary was determined. (Tr. 167-170, 173, 175).

29. On March 14, 1997, at a previously scheduled sales meeting, Complainant alleged that she was being ignored by a District Manager, Randy Zwanick, when she was standing with Kathleen Siergiej, another Manager. (Tr. 39-40).

30. At the March 14, 1997 meeting, Complainant believed that Respondent's Marketing Manager, Jeff Hammond, had singled her out by approaching her and engaging in what she described as an "awkward conversation." She felt uncomfortable with his facial expression and body language. She also believed that he was staring at her. This was the first time Complainant met Hammond, who had only been employed by Respondent for a few months. One purpose of this meeting was for Hammond to meet other Managers. (Tr. 40, 104, 144-145).

31. Complainant also believed that Stein and Breed were staring and pointing at her in this meeting. (Tr. 41-42, 87).

32. Complainant's attendance at the March 14, 1997 meeting was mandatory, and the meeting had been planned prior to March 10, 1997. (Tr. 86, 90).

33. Kathleen Siergiej credibly testified that at the March 14, 1997 meeting, Stein, Zwanick, Breed and Hammond "ignored her [Complainant]. They treated her like she wasn't there." (Tr. 120).

34. Complainant did not know if Respondent received her complaint by March 14, 1997. Breed did not know when Respondent received the complaint. (Tr. 85-86, 144, 158-159).

35. None of Complainant's Managers ever discussed with her the pay disparity complaint she filed with the Division. (Tr. 85-86).

39. At the time of her termination, Complainant earned \$400 per week. At the same time, Eberhart earned \$525 per week. (Complainant's Exhibits 3, 28).

40. Complainant produced a contemporaneous work search record which documented over one-hundred attempts made by Complainant to find work between March of 1997 and March of 1998. Complainant collected \$10,100.00 in unemployment benefits. Complainant was hired in March of 1998 by National Action Financial Services (NAFS). It was not until the year 2002 that Complainant's actual earnings surpassed what she should have been making at the time of her constructive termination, \$27,300. (Complainant's Exhibits 14, 47; Tr. 53-64, 67).

DECISION AND OPINION

Complainant alleged that Respondent unlawfully discriminated against her by subjecting her to different terms, conditions and privileges of employment, specifically, a differential in pay based upon her sex. Complainant also alleged that she was constructively discharged in retaliation for filing her pay differential complaint. The Division finds that Complainant was discriminated against because of her sex and was constructively discharged.

SEX DISCRIMINATION

The Human Rights Law makes it an unlawful discriminatory practice for an employer to discriminate against an individual in the terms and conditions of her employment because of her sex. Human Rights Law §296.1(a)

In order to prove a claim of disparity in pay based upon sex, Complainant must prove that: (1) she is a member of a protected class; (2) she was paid less than non-members of her class for work involving substantially the same amount of skill, effort and responsibility, and (3) that she performed such work under substantially the same conditions as the non-members of her class. Classic Coach v. Mercado, 280 A.D.2d 164, 722 N.Y.S.2d 551 (2d Dept. 2001). A discriminatory

intent may be inferred from the very fact that an employer offers a sham excuse for its action. Morse v. Wyoming County Community Hosp. and Nursing Facility, 305 A.D.2d 1028, 758 N.Y.S.2d 749 (4th Dept. 2003).

Complainant met her prima facie burden of proof. Complainant asserted that Respondent assigned her to work as a Store Manager but did not compensate her at the same rate of pay as her male predecessor, Gerald Bush, or other similarly situated male Managers. It is undisputed that Complainant, a female, is a member of a protected class. Complainant also performed substantially the same work as Bush and the other male Managers but was paid less than all of those male Managers.

Once Complainant has proven a prima facie case, the burden shifts to the employer to show some legitimate, nondiscriminatory reason for the pay differential. If that is done, then the burden reverts to Complainant to prove that the employer's articulated reasons are pretext for unlawful discrimination. Ferrante v. American Lung Assoc., 90 N.Y.2d 623, 665 N.Y.S.2d 25 (1997).

Factors other than sex, such as an employee's educational background and relevant work experience, can be taken into account when employers decide to offer certain individuals higher salaries than others. However, an employer who attempts to justify a pay differential based on factors other than sex must prove that the gender neutral factor was adopted for a legitimate business reason. Kent v. Papert Cos., 309 A.D.2d 234, 764 N.Y.S.2d 675 (1st Dept. 2003).

Respondent's Human Resources Manager, Deborah Breed, testified in rebuttal to Complainant's prima facie case. Breed listed several factors which were considered in determining Bush's starting salary, including his college degree and his experience as a District Manager for McDonald's. Complainant did not have a college degree. Breed did not know how Complainant's salary was determined. Although Respondent explained that Bush was paid a higher starting salary

than Complainant based upon his college degree and outside managerial experience, it failed to explain how the salaries of the other Store Managers were determined and how their prior experience and education influenced their salaries. Further, Respondent did not explain why all the male Managers earned a higher starting salary than Complainant.

The Division finds that Respondent failed to articulate a legitimate nondiscriminatory reason for the pay disparity between Complainant and similarly situated male Managers other than Bush. Therefore, the Division finds that Respondents discriminated against Complainant by subjecting her to different terms, conditions and privileges of employment, specifically, a differential in pay, based upon her sex.

RETALIATION

Complainant alleged that she was constructively discharged due to retaliation in violation of the Human Rights Law. The Division finds that Respondent did retaliate against Complainant by constructively discharging her.

Complainant bears the burden of establishing a prima facie case of retaliation. Complainant must show that: (1) she engaged in a protected activity; (2) Respondent knew that she engaged in protected activity; (3) Complainant suffered an adverse employment action; and (4) there was a causal connection between the protected activity and adverse action. Pace v. Odgen Services Corp., 257 A.D.2d 101, 692 N.Y.S.2d 22 (3rd Dept. 1999). The Division finds that Complainant engaged in a protected activity on February 27, 1997, when she advised Respondent that she was being paid less than a similarly situated male Manager and when she filed a complaint with the Division on March 10, 1997. Thus, she has satisfied the first two elements. A causal connection can be inferred given the closeness in time of her initial protected activity and Respondent's notice thereof on February 27, 1997 and her adverse action of constructive termination on March 25, 1997.

The remaining element to be proven is whether Complainant in fact suffered an adverse action. In this case, Complainant alleges that the adverse action was her constructive discharge.

Constructive discharge occurs when an employer deliberately creates working conditions for an employee so difficult the employee feels compelled to resign. Civil Service Employees Ass'n v. N.Y.S. Public Employee Relations Board, 8 A.D.3d 796, 798 (3rd Dept. 2004); Fisher v. KPMG Peat Marwick, 195 A.D.2d 222, 225 (1st Dept 1994). The working conditions must be so difficult or unpleasant as to permit an inference that a reasonable person in the employee's position would have felt compelled to resign. Martinez v. State Univ. of N.Y., 294 A.D.2d 650, 741 N.Y.S.2d 602 (3rd Dept. 2002). Here, Complainant has shown sufficient facts which would indicate that her resignation was prompted by such difficult or unpleasant working conditions that a reasonable person would have concluded that he or she had no choice but to resign.

Complainant left her employment on March 25, 1997, the same day she was subjected to public humiliation, threats of disciplinary action and unreasonable demands to work straight through the night by Stein. Regarding the events of that day, Complainant credibly testified:

Well, after he yelled at me in the back room and everything, I said – he wouldn't let me say anything. It was clear that he had a problem with me. He asked me – actually, didn't ask me, he demanded I leave the room, get out of his sight. He told me to get the bank deposit and go to the bank. When I came back I thought about it when I was gone, and I came to the decision the working standards he was requesting of me were above and beyond the job; I didn't feel that was right. I didn't feel I could continue working for him.

Complainant never had a problem working with Stein in the past and thought they had a good working relationship. The record shows that Stein's actions created an abusive working condition and were aimed at bringing about Complainant's resignation. The record further shows that Stein's actions occurred less than one month after Complainant put Respondent on notice of her sex based pay disparity claim. The Division finds that based on the totality of the credible evidence, any

reasonable person would feel compelled to leave this employment. The Division finds that Complainant was constructively terminated and did not quit her employment voluntarily. Therefore, Complainant suffered an adverse employment action.

The overall record supports the charge of retaliatory discrimination. Complainant proved all the elements of a prima facie case. The Division finds that Complainant was constructively terminated by Respondent as a result of the retaliation to which she was subjected. Therefore, Complainant's claim for retaliation in the form of constructive discharge is sustained.

DAMAGES

As the victim of discrimination, Complainant is entitled to damages under the Human Rights Law including compensatory damages for lost wages and lost benefits. Complainant had more seniority than twelve male Managers. Of those twelve, Complainant had the same educational level as four of them. Of those four, Complainant's managerial experience and seniority was closest to that of Arthur Eberhart. Therefore, Complainant is entitled to back pay based on Eberhart's salary. The difference in salaries between what Complainant earned and what Eberhart earned during their tenures as Manager totals \$20,405 from October of 1993 until March of 1997. Therefore, Complainant is owed \$20,405 in back wages and is hereby awarded that amount. Respondent is also liable to Complainant for predetermination interest on this portion of the back pay award at a rate of nine percent per annum from March of 1999, a reasonable intermediate date, through the date of this Order. Aurrecchione v. New York State Div. of Human Rights, 98 N.Y.2d 21, 744 N.Y.S.2d 349 (2002). Furthermore, Respondent is liable to Complainant for interest on this portion of the back pay award at a rate of nine percent per annum from the date of this Order until payment is made.

Subsequent to her separation from employment, Complainant had a duty to mitigate her damages and produce proof of mitigation. Complainant produced sufficient evidence for the Division to determine that she made a good faith effort to secure subsequent employment. Complainant was hired in March of 1998 by National Action Financial Services (NAFS).

The parties stipulated to Complainant's subsequent unemployment benefits and earnings in Complainant's Exhibit 47. Complainant has met her burden to prove mitigation of damages. Respondent, therefore, is liable to Complainant for back pay in an amount equal to the difference between what Complainant should have earned (Eberhart's salary) working for Respondent for the years 1997 through 2001 and what Complainant actually received in salary and benefits for the same time period. Based on Eberhart's salary in March of 1997, Complainant would have earned approximately \$27,300 per year for five years for a total of \$136,500. During that same time period, Complainant's total income from salary and unemployment benefits equaled \$75,414. This amount must be deducted from Complainant's projected income, leaving a difference of \$61,086 as her post-termination back pay damages. Therefore, Complainant is owed \$61,086 in back wages and is hereby awarded that amount. Respondent is also liable to Complainant for predetermination interest on this portion of the back pay amount at a rate of nine percent per annum from November of 2001, a reasonable intermediate date, through the date of this Order. Aurecchione v. New York State Div. of Human Rights, 98 N.Y.2d 21, 744 N.Y.S.2d 349 (2002). Furthermore, Respondent is liable to Complainant for interest on this portion of the back pay award at a rate of nine percent per annum from the date of this Order until payment is made.

Complainant is therefore entitled to a total back pay award of \$81,491 plus interest and is hereby awarded that amount.

† Making Complainant whole entails compensating her for the emotional suffering that she endured because of Respondent's sex discrimination and retaliation culminating in her constructive discharge. Complainant suffered mental anguish as a result of Respondent's actions. Therefore, Complainant is entitled to compensatory damages for the emotional distress, pain and suffering that Respondent's actions caused her. Such compensation may be based solely on Complainant's testimony. Cosmos Forms, Ltd. v. State Div. of Human Rights, 150 A.D.2d 442, 541 N.Y.S.2d 50 (2d Dept. 1989); Wantagh Union Free School Dist. v. State Div. of Human Rights, 122 A.D.2d 846, 505 N.Y.S.2d 713 (2d Dept. 1986), appeal dismissed, 69 N.Y.2d 823 (1987).

In regard to her sex discrimination and constructive termination claims, an award for mental anguish damages is supported by Complainant's description of Respondent's conduct and Complainant's reaction to that conduct. She was paid less than similarly situated male employees for almost four years. Further, when Complainant protested and asked to be put on par with a male Manager, she was belittled and threatened with being fired for discussing her salary. Regarding her constructive termination, Complainant credibly testified, "It was so intense I just had to leave." She further credibly testified, "I didn't feel I could continue working for him." The Division credits Complainant's testimony of how her emotions were affected by Respondent's actions. Complainant was so affected by Respondent's actions that she was compelled to leave her employment.

Accordingly, an award of \$15,000.00 for mental anguish and humiliation is appropriate. It is consistent with awards in similar cases and will effectuate the remedial purposes of the Human Rights Law. City of New York v. State Div. of Human Rights, 283 A.D.2d 215, 728 N.Y.S.2d 367 (1st Dept. 2001); New York City Health & Hosps. Corp. v. State Div. of Human Rights, 236 A.D.2d 310, 654 N.Y.S.2d 310 (1st Dept. 1997); New York State Dept. of Correctional Servs. v. State Div. of Human Rights, 241 A.D.2d 811, 661 N.Y.S.2d 85 (3rd Dept. 1997). Complainant is

also entitled to interest on this award at a rate of 9% per annum from the date of this Order until payment is made.

ORDER

Based on the foregoing Findings of Fact, Decision and Opinion, and pursuant to the provisions of the Human Rights Law, it is

ORDERED that Respondent, its agents, representatives, employees, successors and assigns shall not discriminate in violation of the Human Rights Law and it is further

ORDERED that Respondent shall take the following affirmative actions to effect the purposes of the Human Rights Law:

1. Within sixty days of the date of this Order, Respondent shall pay to Complainant the sum of \$81,491 as damages for back pay. Interest shall accrue on \$20,405 of the award at the rate of nine percent per annum from March of 1999 until the date payment is actually made by Respondent. Interest shall accrue on \$61,086 of the award at the rate of nine percent per annum from November of 2001 until the date payment is actually made by Respondent.

2. Within sixty days of the date of this Order, Respondent shall pay to Complainant the sum of \$15,000.00 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 her. Interest shall accrue on the award at the rate of nine percent per annum, from the date of this Order until the date payment is actually made by Respondent.

3. The aforesaid payments by Respondent shall be in the form of two separate certified checks made payable to the order of Complainant Nancy Fix and delivered to her at her address of 54 Janice Street, Buffalo, New York 14207, by registered mail, return receipt requested. Respondent shall simultaneously furnish written proof of the aforesaid payment of the sums required by this

Order to Caroline Downey, Acting General Counsel, New York State Division of Human Rights,
One Fordham Plaza, 4th Floor, Bronx, New York 10458.

4. Respondent shall cooperate with the Division during any investigation into compliance
with the directives contained in this Order.

DATED: **MAR 16 2007**

BRONX, NEW YORK

STATE DIVISION OF HUMAN RIGHTS



EDWARD A. FRIEDLAND
Executive Deputy Commissioner