ANDREW M. CUOMO
GOVERNOR

NEW YORK STATE
DIVISION OF HUMAN RIGHTS

NEW YORK STATE DIVISION OF HUMAN RIGHTS
on the Complaint of

ERIN FULLER,

Complainant,

v.

ADVANCED RECOVERY, INC., MARK REA,

Respondents.

NOTICE AND FINAL ORDER

Case No. 10144572

Federal Charge No. 16GB100211

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 February 20, 2015, by Robert M. Vespoli, 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: APR 01 2015
Bronx, New York

HELEN DIANE FOSTER
COMMISSIONER

ANDREW M. CUOMO
GOVERNOR

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DIVISION OF HUMAN RIGHTS

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ADVANCED RECOVERY, INC., MARK REA,

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RECOMMENDED FINDINGS OF FACT, OPINION AND DECISION, AND ORDER

Case No. **10144572**

SUMMARY

Complainant alleged that Respondents subjected her to unlawful discrimination based on sex, disability and in retaliation for filing a complaint of discrimination. Because Complainant's claim of retaliation is time-barred, it must be dismissed. Complainant has established her claim of discrimination based on sex and disability, and she is awarded damages. A civil penalty is also awarded to the State of New York.

PROCEEDINGS IN THE CASE

On October 13, 2010, 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.

After due notice, the case came on for hearing before Migdalia Parés, an Administrative Law Judge ("ALJ") of the Division. Public hearing sessions were held on December 2, 2013, December 3, 2013, and February 24, 2014.

When the instant complaint was originally filed, Edward Kackos was named as a Respondent.

On December 2, 2013, Complainant and Kackos executed a Stipulation of Settlement whereby Complainant released her claims against him. (Tr. 107)

On January 29, 2014, the Division severed the complaint against Kackos from the instant complaint and assigned a new case name and case number as follows: *Erin Fuller v. Edward Kackos*, DHR Case No. 10166874.

On February 4, 2014, the Commissioner issued an Order after Stipulation of Settlement in DHR Case No. 10166874 and closed the case.

A public hearing proceeded in the instant complaint against Respondents Advanced Recovery, Inc. and Mark Rea. Complainant and Respondents appeared at the hearing. Complainant was represented by Stephen Bergstein, Esq. and Helen Ullrich, Esq. Respondents were represented by James J. Herkenham, Esq.

At the public hearing, Complainant moved to amend the instant complaint to include a claim of retaliation. Complainant alleged that Respondents retaliated against her by causing her to be criminally prosecuted in October 2011 because she altered an official New York State

prescription issued by a licensed physician. (Tr. 15, 161) Respondents opposed this motion, and ALJ Parés reserved decision. (Tr. 161-62)

Complainant and Respondents filed post-hearing briefs.

After the hearing and receipt of post-hearing briefs, the case was reassigned to Robert M. Vespoli, another ALJ of the Division, pursuant to the Division's Rules of Practice. 9 N.Y.C.R.R. § 465.12(d)(2).

FINDINGS OF FACT

1. On May 31, 1969, Complainant was born a male and was named Edward Charles Fuller, Jr. (Tr. 23)

2. Complainant identifies herself as a woman. (Tr. 23; Complainant's Exh. 6)

3. Respondent Mark Rea ("Rea") is the president and chief executive officer ("CEO") of Respondent Advanced Recovery, Inc. ("Advanced Recovery"). Advanced Recovery is a New Jersey corporation that is engaged in the business of recycling electronics. (Tr. 33; Respondents' Exh. 6)

4. At the public hearing, Rea submitted his own affidavit and testimony on direct examination in support of Respondents' case in chief. However, on cross-examination, Rea repeatedly invoked his Fifth Amendment privilege against self-incrimination and refused to answer questions put to him by counsel for Complainant. This inquiry included questions regarding the reasons for Rea's decision to terminate Complainant's employment. (Tr. 446-78; Respondents' Exh. 6)

5. In their Verified Answer, Respondents acknowledged that they employ more than fifteen people. (ALJ's Exhibits 1, 2)

6. At all relevant times, Respondents conducted business operations at facilities located in Port Jervis, New York, Newark, New Jersey, and Fairmont, North Carolina. (Tr. 35, 300; Respondents' Exhibits 1, 6)

7. On February 7, 2008, Respondents hired Complainant to work as a full-time mechanic. Edward Kackos, the plant manager at the Port Jervis facility during the relevant time period, hired Complainant. (Tr. 30-31, 35-36, 449; Complainant's Exh. 4; Respondents' Exhibits 1, 6)

8. Complainant has over twenty-five years of experience working as a mechanic. She began working in her father's auto repair business when she was twelve years of age. (Tr. 36)

9. Complainant generally worked a forty-hour week for Respondents. Initially, Respondents paid Complainant $12.00 per hour. (Tr. 39, 96-97; Complainant's Exh. 4)

10. Respondents subsequently increased Complainant's pay to $14.00 per hour. (Tr. 96-97)

11. Complainant worked for Respondents at the Port Jervis and Newark facilities. (Tr. 35)

12. At all relevant times, Kackos was Complainant's direct supervisor. Complainant also reported to Rea. If both Kackos and Rea were unavailable, Complainant reported to Advanced Recovery's then chief financial officer ("CFO"), Christopher Westby. (Tr. 59-60, 286, 396)

13. From the time Complainant was hired until sometime in late 2008, Respondents deducted withholding taxes from her paycheck. During this time period, Respondents issued an Internal Revenue Service ("IRS") Form W-2 Wage and Tax Statement ("W-2") to Complainant for her work. (Tr. 45; Complainant's Exh. 4)

14. In or about November 2008, Respondents began to pay Complainant "off the books" and did not deduct withholding taxes from her paycheck. For the tax years 2009 and 2010, Respondents did not provide Complainant with a W-2 or an IRS Form 1099 showing her yearly earnings. (Tr. 44-47; Complainant's Exh. 5)

15. In or about November 2008, Westby met with Complainant and approximately twenty other employees at the Port Jervis facility. Westby told Complainant and the other employees that Respondents were experiencing financial difficulties and that, going forward, Respondents would not deduct withholding taxes from their paychecks. (Tr. 45-47)

16. Westby acknowledged that in or about November 2008, Advanced Recovery was experiencing a "big downturn and we almost closed up." (Tr. 439)

17. Rea acknowledged that financial difficulties played a significant role in the reclassifying of employees as independent contractors. (Tr. 466-67)

18. Westby testified that, at some point prior to the time Respondents terminated Complainant's employment, Respondents reclassified Complainant's status with Respondents from an employee to a "consultant." Westby's testimony was sometimes evasive, contradictory and unworthy of belief. He was often unable to recall important facts about this reclassification process. (Tr. 313-19, 417-18, 420-21, 435-36)

19. The record does not establish that Respondents' level of control over Complainant's work product changed in any meaningful way after Respondents reclassified her as an independent contractor. Kackos continued to supervise Complainant, and he told Complainant when she must come to work and when she could leave. Kackos continued to assign job responsibilities to Complainant and prioritize her job duties. (Tr. 315-16) At all relevant times, Complainant was obligated to follow instructions from her supervisors regarding her conduct at work. (Tr. 60-61)

20. Respondents did not present time keeping records for any of its employees.

21. The record contains evidence of Respondents' payroll records beginning in the third quarter of 2009 and ending in the second quarter of 2011. In the third quarter of 2009,

Respondents list three employees: Rea, Westby, and Gustavo Garcia. The succeeding payroll records, continuing until the end of August 2010, show that Respondents employed four or more individuals. (Complainant's Exh. 12)

22. When Complainant began working for Respondents, she dressed in men's clothing. (Tr. 34)

23. During the relevant time period, Complainant was diagnosed with gender dysphoria, a medical diagnosis that describes a person who identifies with a gender different from the biological gender assigned at birth. (Tr. 13-14; Complainant's Exh. 6; Joint Exh. 1)

24. In or about October 2009, Complainant began treatment with Dr. Lisa O'Connor for her gender dysphoria. (Tr. 63; Complainant's Exh. 6)

25. By letter dated October 5, 2009, Dr. O'Connor stated that Complainant was her patient and that Complainant was "undergoing treatment for gender dysphoria, a recognized medical diagnosis as outlined in the DSM-IV." In her letter, Dr. O'Connor stated that Complainant's diagnosis requires that Complainant "appears dressed as a female, is to be allowed full access to the women's restroom, and is to be treated in all respects, as a female. Being treated as anything other than female could seriously undermine [Complainant's] mental and physical health." Dr. O'Connor also referred to Complainant as Erin and stated that Complainant's appearance and demeanor was not "for any illegal or immoral purpose." (Complainant's Exh. 6)

26. Shortly thereafter, Complainant provided Dr. O'Connor's October 5 letter to Rea. (Tr. 64; Complainant's Exh. 6) Nevertheless, Respondents did not refer to Complainant as Erin, and they continued to issue paychecks to her in the name of Edward Fuller, Jr. (Tr. 64-65; Complainant's Exh. 5)

27. Around this time, Complainant began painting her fingernails, disposing of her male clothing, and wearing "modest female attire" to work. (Tr. 25-26, 65)

28. Rea did not speak to Complainant about her work attire at that time. (Tr. 65)

29. On a warm day in February 2010, Complainant was wearing coveralls while working on the roof of the Newark facility. Underneath the coveralls, Complainant wore a tank top shirt and a bra. (Tr. 66-67)

30. When Complainant began to feel the heat of the day, she took down the top portion of her coveralls, revealing her tank top shirt and the straps of her bra. (Tr. 66-69, 71)

31. Rea observed this and became upset. Rea told Complainant that he did not like what she was wearing. Rea then instructed Complainant to go home and change her clothing and not to wear "that type of clothing again." (Tr. 67-68, 71)

32. Complainant, who lived far from the Newark facility, decided not to go home. Instead, Complainant "pulled the coveralls back up and endured the rest of the day." (Tr. 71-72)

33. At other times during her employment, Complainant observed that Respondents regularly allowed some of her male co-workers to wear tank top shirts at work. (Tr. 68, 72, 210-12)

34. Complainant's former wife, Laurie Fuller, observed several of Complainant's male co-workers wearing tank top shirts when she visited Complainant at Respondents' workplace. (Tr. 222)

35. On June 18, 2010, Complainant was admitted to Bon Secours Community Hospital due to depression. (Tr. 139-41; Complainant's Exh. 10; Joint Exh. 1)

36. At the hospital, Complainant was treated by Dr. Khin M. Myo. (Tr. 140-41; Complainant's Exh. 10; Joint Exh. 1)

37. On June 22, 2010, Complainant was discharged from the hospital. Dr. Myo provided Complainant with a note dated June 22, 2010, written on an official New York State prescription form, allowing Complainant to return to work. This note identified Complainant's dates of treatment and stated that "he may return to work on 6-28-10 without restriction." (Tr. 140-41; Complainant's Exh. 10; Joint Exh. 1)

38. In the note, Dr. Myo identified Complainant as a male by checking "M" in the box describing Complainant's sex. (Complainant's Exh. 10)

39. When Complainant received the note, she altered the note by checking "F" in the box describing her sex, and she added the letter "s" in front of the pronoun "he." After these alterations, the note read "*s*he may return to work on 6-28-10 without restriction." (emphasis added) (Tr. 141-42; Complainant's Exh. 10)

40. On June 28, 2010, Complainant returned to work and provided the altered doctor's note to Westby. Westby read the note and accepted it. (Tr. 142-43; Complainant's Exh. 10)

41. On occasion, Rea advanced money to Complainant so she could purchase heating oil for her home. Any monies that Respondents advanced to Complainant were subsequently deducted from her paycheck. (Tr. 110-14, 292, 457; Complainant's Exh. 9)

42. On or about July 13, 2010, Westby gave Complainant $110.00 in cash to purchase torch gas for Respondents. (Tr. 116-17, 119-21, 168-69, 291; Respondents' Exhibits 1, 6)

43. Complainant did not purchase torch gas with this money. Instead, Complainant used the money to purchase heating oil for her home. (Tr. 168-71)

44. Westby subsequently asked Complainant if she had purchased torch gas with the money. Complainant admitted to Westby that she had used the money to buy heating oil for her home. (Tr. 122-23, 378)

45. At the public hearing, Complainant acknowledged that she misappropriated this money from Respondents. (Tr. 172)

46. On or before July 22, 2010, Respondents were aware that Complainant had used the torch gas money to purchase heating oil for her home. Respondents recovered the torch gas money by deducting a "$110 petty cash advance" from Complainant's July 22, 2010, paycheck. However, Respondents did not terminate Complainant's employment at that time. (Tr. 378-80; Respondents' Exh. 1)

47. On August 3, 2010, Complainant received a court order changing her legal name to Erin Fuller. (Tr. 29-30, 76; Complainant's Exh. 3)

48. On the morning of August 4, 2010, Complainant presented this document to Westby in order to have her paychecks issued to her in her new name. (Tr. 29-30, 76-77) Westby subsequently showed this document to Rea. (Tr. 383)

49. Later that day, Rea called Complainant to his office for a meeting. Complainant went to Rea's office and met with Rea and Westby. At the meeting, Rea told Complainant, "[n]ow I have a problem with your condition. I have to let you go." (Tr. 77-84)

50. At that time, Complainant observed Westby gesturing to Rea to stop speaking. Rea then told Complainant that the poor economic climate was the reason behind Complainant's discharge and that Respondents would try to help Complainant obtain unemployment insurance benefits. (Tr. 79-82, 84, 86)

51. Complainant reasonably believed that Respondents had terminated her employment at that time. (Tr. 83-84)

52. At this meeting, Rea did not tell Complainant that Respondents terminated her employment for reasons that included poor work performance, stealing money from

Respondents, mishandling company money, or mishandling the purchase of a vehicle. (Tr. 87, 95-96, 134-35)

53. At the public hearing, Respondents produced an August 4, 2010, letter from Westby addressed to Complainant. The letter references Complainant's meeting with Rea that day "regarding the misappropriation of the $100 cash that was provided to you for the purchase of welding gas for Advance Recovery, but was used by you for fuel for your home, in addition to the multiple occasions of unaccounted for company funds and a substantial degradation of your work performance, we have no other alternative but to terminate you as of August 5, 2010." (Complainant's Exh. 8; Respondents' Exh. 1)

54. Notably, the August 4 termination letter does not include specific details regarding the alleged incidents of "unaccounted for company funds" or the "substantial degradation" of Complainant's work performance. Moreover, there is no credible evidence in the record corroborating these allegations, such as dates of occurrence, documentary evidence memorializing these transgressions, or documentary evidence of discipline taken against Complainant by Respondents. (Complainant's Exh. 8; Respondents' Exh. 1)

55. Respondents did not provide the August 4 termination letter to Complainant. Complainant did not see the August 4 termination letter until it was produced by Respondents during the Division's investigation of the instant complaint. (Tr. 94-95)

56. Rea acknowledged that the August 4 termination letter was created with the assistance of counsel because "we knew that this would lead to a discrimination case." Rea conceded that "in our letter we express only a money issue." (Tr. 461)

57. In his affidavit, Rea stated that he decided to terminate Complainant's employment "based solely upon his theft and misappropriation of company funds." (Respondents' Exh. 6)

58. I do not credit Rea's testimony that he terminated the employment of six employees in 2013 for the misappropriation of company funds. At the public hearing, Rea could not recall the names of any of these employees. (Tr. 461-62)

59. Westby provided contradictory testimony when he testified that Respondents terminated Complainant's employment because Respondents no longer needed her services. (Tr. 313)

60. On or about August 6, 2010, Complainant went to Respondents' Port Jervis facility to pick up her final paycheck. Complainant's final paycheck, in the amount of $410.00, is dated August 5, 2010, and was issued to her in the name of Edward Fuller, Jr. (Tr. 89-91; Complainant's Exh. 7)

61. When Complainant went to pick up her final paycheck, she spoke to Kackos. Kackos told Complainant that "he felt bad, but [Complainant's] job would be waiting for [her] as long as [she] c[a]me in wearing normal clothes." (Tr. 91-93)

62. On October 12, 2011, Detective John Barbarino of the Port Jervis Police Department arrested Complainant because she altered Dr. Myo's June 22, 2010, note authorizing her return to work. (Tr. 144-45; Complainant's Exh. 11)

63. Complainant was charged with a crime. Complainant ultimately pleaded guilty to the violation of Disorderly Conduct and paid a fine of $250.00. (Tr. 147-48; Complainant's Exh. 11)

64. After Respondents terminated Complainant's employment, Complainant immediately began looking for work. (Tr. 150-53) Laurie Fuller saw Complainant search for work online, and she allowed Complainant to use her car to look for employment. (Tr. 227)

65. Complainant did not apply for unemployment insurance benefits because Respondents paid her "off the books." (Tr. 80, 153; Joint Exh. 1)

66. Complainant acknowledged that she stopped looking for work after approximately six months. (Tr. 153)

67. After Respondents terminated Complainant's employment, Laurie Fuller noticed that Complainant was "very depressed," was withdrawn, and did not eat much anymore. (Tr. 225-26)

68. Jennifer Donato, Laurie Fuller's best friend, has known Complainant for twenty-five years. After Respondents terminated Complainant's employment, Donato noticed that Complainant was "stressed, she stopped eating, in and out of the hospital with depression, and that was not like her." Donato also observed that Complainant "felt worthless" and became "a shell of the person that [she] was." (Tr. 234-36)

69. Sometime in 2011, Complainant moved out of the family home because she could no longer make financial contributions to the household. Laurie Fuller remained in the family home with their son. (Tr. 154)

70. Complainant then moved a short distance away to live with her parents in Port Jervis, New York. (Tr. 154-55)

71. Complainant's parents allowed her to live in their home for "a few months." (Tr. 155)

72. However, Complainant's father became increasingly uncomfortable with Complainant's "condition." Therefore, in July 2011, Complainant began living outdoors in a tent on her parents' property. (Tr. 155-56)

73. Complainant felt that living in a tent was "degrading," "disappointing," and "depressing." (Tr. 157)

74. In or about October 2011, Complainant obtained emergency housing in Orange County, New York. (Tr. 157)

75. After Respondents terminated her employment, Complainant did not want to eat, had trouble sleeping, and felt that her depression had become worse. Complainant candidly described her feelings of betrayal, loss of dignity, and loss of self-worth. (Tr. 158-60)

76. Complainant's medical records reveal that she has a history of depression and suicidal ideation that predates her employment with Respondents. (Joint Exh. 1)

77. The record shows that Complainant experienced deepening depression, hospitalization, and suicidal tendencies that were related, in part, to the loss of her employment with Respondents. After Respondents terminated her employment, Complainant was admitted for inpatient psychiatric treatment on several occasions and received medications to treat her depression, anxiety, and inability to sleep. (Tr. 158-60; Joint Exh. 1)

78. Complainant's medical records show that her pending divorce, the inability of her family to deal with her sex change, her limited social support, and the fact that her wife wanted her out of the marital home also contributed to Complainant's mental anguish after Respondents terminated her employment. (Joint Exh. 1)

79. At the time of the public hearing, Complainant continued to reside in an emergency housing shelter in Port Jervis, New York. (Tr. 158)

OPINION AND DECISION

N.Y. Exec. Law, art. 15 ("Human Rights Law") § 292.5 states that "[t]he term 'employer' does not include any employer with fewer than four persons in his employ." The record shows that Respondents qualify as an employer as that term is defined in the Human Rights Law. In their Verified Answer, Respondents acknowledged that they employ more than fifteen people.

Respondents' position that Complainant worked for them as an independent contractor is

without merit. In order to determine whether an employer-employee relationship exists, four factors must be considered: (1) selection and engagement of the servant; (2) the payment of salary or wages; (3) the power of dismissal; and, (4) the power of control of the servant's conduct. The key factor is the power of control of the servant's conduct. *See State Div. of Human Rights (Emrich) v. GTE Corp.*, 109 A.D.2d 1082, 1083, 487 N.Y.S.2d 234, 235 (4th Dept. 1985).

On February 7, 2008, Respondents hired Complainant to work as a full-time mechanic. Until sometime in late 2008, Respondents deducted withholding taxes from Complainant's paycheck and issued a W-2 form to her for her work. Sometime thereafter, Respondents began to issue paychecks to Complainant without deducting payroll taxes, and they reclassified her as an independent contractor. The record shows that Respondents did this to Complainant, and other employees, to save money during difficult economic times.

Respondents set Complainant's wages at $12.00 per hour and subsequently decided to increase her wages to $14.00 per hour. Respondents clearly demonstrated that they retained the power of dismissal over Complainant when they terminated her employment on August 4, 2010.

Finally, the record shows that Respondents' level of control over Complainant's work product did not change in any meaningful way after Respondents reclassified her as an independent contractor. Kackos continued to supervise Complainant and direct her regarding her work hours. Kackos continued to assign job responsibilities to Complainant and prioritize her job duties. At all times, Complainant was obligated to follow instructions from her supervisors regarding her conduct at work.

Based on the circumstances of this case, it is reasonable to conclude that an employment relationship existed between Complainant and Respondents.

These findings, together with Respondents' payroll records, further show that Respondents employed four or more persons during the relevant time period.

At the public hearing, Complainant moved to amend the complaint to include a claim of retaliation. This is not a timely claim.

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

Complainant alleged that Respondents retaliated against her by causing her to be arrested on October 12, 2011, because she altered Dr. Myo's June 22, 2010, note authorizing her return to work. This claim is distinct from the claims raised in the instant complaint, and the record does not establish that Respondents had proper notice of this claim. Because this claim began to accrue on October 12, 2011, Complainant was obligated to file this claim with the Division no later than October 12, 2012. Therefore, Complainant's attempt to include this claim by amending the instant complaint at the public hearing, which began on December 2, 2013, is time-barred and must be dismissed.

In the instant complaint, Complainant alleged that Respondents discriminated against her because of her sex. Inasmuch as the instant complaint also includes a claim of discrimination based on disability (i.e., gender dysphoria), the pleadings are conformed to the proof. This finding is made consistent with that pleading and that proof. *See* 9 N.Y.C.R.R. § 465.12(f)(14).

It is unlawful for an employer to discriminate against an employee on the basis of sex or disability. Human Rights Law § 296.1(a). Complainant has the burden of establishing a prima

facie case by showing that she is a member of a protected group, that she was qualified for the position she held, that she suffered an adverse employment action, and that Respondents' actions occurred under circumstances giving rise to an inference of unlawful discrimination. Once a prima facie case is established, the burden of production shifts to Respondents to rebut the presumption of unlawful discrimination by clearly articulating legitimate, nondiscriminatory reasons for their employment decision. The burden then shifts to Complainant to show that Respondents' proffered explanations are a pretext for unlawful discrimination. *Ferrante v. Am. Lung Ass'n*, 90 N.Y.2d 623, 629-30, 665 N.Y.S.2d 25, 29 (1997).

Complainant has established a prima facie case of sex and disability discrimination. As a transgendered person (i.e., male to female), Complainant "states a claim pursuant to New York State's Human Rights Law on the ground that the word 'sex' in the statute covers transsexuals." *Buffong v. Castle on the Hudson*, 12 Misc.3d 1193(A), 824 N.Y.S.2d 752 (N.Y. Sup. Ct. Westchester Co. 2005) (citations omitted).

Complainant also has a disability as that term is defined in the Human Rights Law. A disability is defined in the Human Rights Law as "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 disability may also be a record of such impairment or the perception of such impairment. Human Rights Law § 292.21.

During the relevant time period, Complainant was diagnosed with gender dysphoria. This condition falls within the broad definition of disability recognized under the Human Rights Law. *See Valentine v. New York State Thruway Auth.*, DHR Case No. 10116524 (January 13, 2011). Complainant made Respondents aware of her gender dysphoria when she presented them

with Dr. O'Connor's letter dated October 5, 2009. Next, Complainant's extensive experience working as a mechanic establishes that she possessed the basic qualifications to work as a mechanic for Respondents.

The record also establishes that Complainant suffered an adverse employment action when Respondents terminated her employment. Finally, Complainant established the requisite causal nexus between her discharge and her protected classes. On August 4, 2010, Rea became aware that Complainant presented Westby with a court order changing her legal name to Erin Fuller. Later that day, Rea summoned Complainant to his office and terminated her employment stating, "[n]ow I have a problem with your condition. I have to let you go." Furthermore, when Complainant went to pick up her final paycheck, Kackos told her that "he felt bad, but [Complainant's] job would be waiting for [her] as long as [she] c[a]me in wearing normal clothes." Notably, Complainant's final paycheck was not issued to her in her new, legal name.

Therefore, Complainant has established a prima facie case of discrimination based on sex and disability.

The burden of production then shifts to Respondents to show that their actions were motivated by legitimate, nondiscriminatory reasons. Respondents have asserted that the primary reason for the termination of Complainant's employment was because she misappropriated the money Respondents gave her to purchase torch gas by using it to purchase heating oil for her home.

However, even though Complainant admittedly used the torch gas money for an unauthorized purpose, the record establishes that this reason is a pretext for unlawful discrimination. On or before July 22, 2010, Respondents were aware that Complainant had used the torch gas money to purchase heating oil for her home. Respondents recovered the torch gas

money by docking Complainant's July 22 paycheck. However, they did not terminate Complainant's employment at that time. Complainant continued to work for Respondents for another two weeks until she presented Respondents with the court order changing her legal name to Erin Fuller. On the very day that Complainant presented this document to Respondents, Rea terminated her employment and told her that he was terminating her employment because he had "a problem with [her] condition."

Notably, Rea did not deny making this statement when provided the opportunity to do so at the public hearing. Rea made the decision to terminate Complainant's employment. Therefore, Rea's testimony was essential for this tribunal to make a determination regarding the reasons for Complainant's discharge. At the public hearing, Rea submitted his own affidavit and testimony on direct examination regarding his version of the events in issue. However, on cross-examination, Rea conveniently chose to invoke his Fifth Amendment privilege against self-incrimination in response to virtually every question asked of him by opposing counsel. This inquiry included questions regarding the reasons for Rea's decision to terminate Complainant's employment.

The Division concludes that these circumstances warrant drawing an inference that any answers Rea provided in response to the questions put to him on cross-examination would have been adverse to him. *See Rauss v. Johnson*, 243 A.D.2d 849, 850, 674 N.Y.S.2d 135, 136 (3d Dept. 1997) ("It is beyond cavil that an inference may be drawn against a witness in a civil proceeding because of his or her failure to testify, even where a constitutional privilege is invoked.") The taking of this adverse inference applies to questions put to Rea by Complainant's counsel regarding the termination of Complainant's employment.

The alternative reasons presented in the August 4, 2010, termination letter cannot be

credited. In his affidavit, Rea stated that he decided to terminate Complainant's employment "based solely" upon Complainant's alleged misappropriation of company funds. The August 4 termination letter does not include specific details regarding the alleged incidents of "unaccounted for company funds" or the "substantial degradation" of Complainant's work performance. Moreover, there is no credible evidence in the record corroborating these allegations, such as dates of occurrence, documentary evidence memorializing these transgressions, or documentary evidence of discipline taken against Complainant by Respondents. This letter was not provided to Complainant at the time of her discharge and was clearly created in anticipation of litigation.

The drawing of an adverse inference against Rea, together with Complainant's prima facie case and a showing that Respondents' asserted justifications are false, are sufficient to sustain Complainant's claim of unlawful discrimination. Accordingly, the Division finds that Respondents unlawfully discriminated against Complainant based on her sex and disability by terminating her employment on August 4, 2010.

Rea, the president and CEO of Advanced Recovery, had the authority to hire and fire employees and was the perpetrator of the unlawful discrimination. Accordingly, Rea is individually liable along with Advanced Recovery. *Patrowich v. Chemical Bank*, 63 N.Y.2d 541, 544, 483 N.Y.S.2d 659, 661 (1984); *State Div. of Human Rights v. Koch*, 60 A.D.3d 777, 777-78, 875 N.Y.S.2d 180, 181 (2d Dept. 2009).

The Division is granted broad discretionary powers to redress an injury by way of an award of reasonable compensatory damages. *Imperial Diner, Inc. v. State Human Rights Appeal Bd.*, 52 N.Y.2d 72, 79, 436 N.Y.S.2d 231, 235 (1980). However, the award must bear a reasonable relationship to the wrongdoing, be supported by substantial evidence, and be

comparable to awards for similar injuries. *State of New York v. New York State Div. of Human Rights*, 284 A.D.2d 882, 884, 727 N.Y.S.2d 499, 501 (3d Dept. 2001).

Complainant is entitled to compensation for back pay. After Respondents terminated Complainant's employment, she immediately began looking for work. This was corroborated by Laurie Fuller. Complainant acknowledged that she stopped looking for work after approximately six months. Therefore, Complainant's lost wages are calculated for a period of six months. At the time of her discharge, Complainant worked a forty-hour week and earned $14.00 per hour. This amounts to $560.00 in weekly pay. During this six month period, Complainant would have earned $14,560.00 (i.e., $560.00 x 26 weeks). Complainant did not receive unemployment insurance benefits. Therefore, Complainant is entitled to $14,560.00 in back pay.

Complainant is also entitled to recover compensatory damages for mental anguish caused by Respondents' 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 No. 196 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*, 78 N.Y.2d 207, 216, 573 N.Y.S.2d 49, 54

(1991).

After Respondents terminated her employment, Complainant did not want to eat, had trouble sleeping, and felt that her depression had become worse. Complainant candidly described her feelings of betrayal, loss of dignity, and loss of self-worth. Complainant's testimony on this issue was largely corroborated by Laurie Fuller and Donato.

Complainant's medical records show that she has a history of depression and suicidal ideation that predates her employment with Respondents. However, the record shows that Complainant experienced deepening depression, hospitalization, and suicidal tendencies that were related, in part, to the loss of her employment with Respondents. Other factors also contributed to Complainant's mental anguish after Respondents terminated her employment. These factors include Complainant's pending divorce, the inability of Complainant's family to deal with her sex change, Complainant's limited social support, and the fact that Complainant's wife wanted her out of the marital home.

After Respondents terminated her employment, Complainant was admitted for inpatient psychiatric treatment on several occasions and received medications to treat her depression, anxiety, and inability to sleep. At the time of the public hearing, Complainant continued to reside in an emergency housing shelter in Port Jervis, New York.

Under the circumstances of this case, the Division finds that an award of $30,000.00 for mental anguish is consistent with similar cases and will effectuate the remedial purposes of the Human Rights Law. *See New York State Office of Mental Health v. New York State Div. of Human Rights*, 75 A.D.3d 1023, 906 N.Y.S.2d 181 (3d Dept. 2010) ($30,000.00 award appropriate where the respondent terminated the complainant's employment because of his disability causing him to feel "enormous mental anguish and humiliation" at the time of the

hearing over four years later, and his children had lost respect for him because he lost his job).

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 penalty are the goal of deterrence, the nature and circumstances of the violation, the degree of Respondents' culpability, any relevant history of Respondents' actions, Respondents' 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 penalty is appropriate in this matter. Respondents terminated Complainant's employment on the day that she handed them the court order changing her legal name to Erin Fuller. Respondents' decision to terminate Complainant's employment was direct and deliberate, and it resulted in humiliation to Complainant. Notably, Respondents have demonstrated no remorse for their conduct.

There is nothing in the record showing that Respondents were adjudged to have committed any previous, similar violations of the Human Rights Law or that they are incapable of paying a penalty.

To vindicate the public interest and deter future violations of the Human Rights Law, a civil penalty of $20,000.00 is appropriate in this 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 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 sixty (60) days of the date of the Commissioner's Order, Respondents shall pay Complainant an award of lost wages in the amount of $14,560.00. Interest shall accrue on the award at the rate of nine (9) percent per annum from November 4, 2010, a reasonable intermediate date, until the date payment is actually made by Respondents;

2. Within sixty (60) days of the date of the Commissioner's Order, Respondents shall pay Complainant an award of compensatory damages for mental anguish and humiliation in the amount of $30,000.00. Interest shall accrue on the 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;

3. Within sixty (60) days of the date of the Commissioner's Order, Respondents shall pay a civil penalty to the State of New York in the amount of $20,000.00 for having violated the Human Rights Law. Payment of the civil 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 of the Division, at 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 Order until payment is actually made by Respondents;

4. The aforesaid payments to Complainant shall be made by Respondents in the form of a certified check made payable to the order of Complainant, Erin Fuller, and delivered by certified mail, return receipt requested, to her attorneys, Stephen Bergstein, Esq. and Helen Ullrich, Esq., Bergstein & Ullrich, LLP, at 15 Railroad Avenue, Chester, New York 10918. Respondents shall furnish written proof to the New York State Division of Human Rights, Office of General Counsel, One Fordham Plaza, 4th Floor, Bronx, New York 10458, of their compliance with the directives contained within this Order;

5. Within sixty (60) days of the date of the Commissioner's Order, Respondents shall prominently post a copy of the Division's poster (available at the Division's website at www.dhr.ny.gov) in their place of business where employees are likely to view it. Respondents shall also promulgate policies and procedures for the prevention of unlawful discrimination and harassment in accordance with the Human Rights Law. Respondents shall provide proof of the aforementioned to the Division upon written demand.

6. Respondents shall cooperate with the representatives of the Division during any investigation into compliance with the directives contained within this Order.

DATED: February 20, 2015
Hauppauge, New York

Robert M. Vespoli
Administrative Law Judge