

**NEW YORK STATE
DIVISION OF HUMAN RIGHTS**

**NEW YORK STATE DIVISION
OF HUMAN RIGHTS**

on the Complaint of

YURI GUTKIN,

Complainant,

v.

T.D.A. TRADING CORP.,

Respondent.

**NOTICE AND
FINAL ORDER**

Case No. 10114508

PLEASE TAKE NOTICE that the attached is a true copy of the Alternative Proposed Order, issued on February 20, 2008, by Peter G. Buchenholz, Adjudication Counsel, after a hearing held before Thomas S. Protano, 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 Alternative Proposed Order, and all Objections received have been reviewed.

PLEASE BE ADVISED THAT, UPON REVIEW, THE ALTERNATIVE PROPOSED ORDER IS HEREBY ADOPTED AND ISSUED BY THE HONORABLE KUMIKI GIBSON, 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, this 17th day of March, 2008.

A handwritten signature in black ink, appearing to read 'Kumiki Gibson', written over a horizontal line.

KUMIKI GIBSON
COMMISSIONER

**NEW YORK STATE
DIVISION OF HUMAN RIGHTS**

**NEW YORK STATE DIVISION OF
HUMAN RIGHTS**

on the Complaint of

YURI GUTKIN,

Complainant,

v.

T.D.A. TRADING CORP.,

Respondent.

**ALTERNATIVE
PROPOSED ORDER**

Case No. **10114508**

Respondent discriminated against Complainant based on his age when it terminated his employment. The complaint is sustained, and Complainant is awarded \$1,800 for lost wages and \$10,000 in mental anguish damages.

PROCEEDINGS IN THE CASE

On September 12, 2005, Complainant filed a verified complaint with the New York State Division of Human Rights ("Division"), charging Respondent 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 Respondent had engaged in unlawful discriminatory practices. The Division referred the case to public hearing.

After due notice, the case came on for hearing before Thomas S. Protano, an Administrative Law Judge ("ALJ") of the Division. A public hearing was held on November 19, 2007.

Complainant appeared at the hearing. The Division was represented by Christopher R. Knauth, Esq. Respondent failed to appear and is in default. A Notice of Hearing was sent to

Respondent on September 20, 2007, via first class mail. The Notice was not returned to the Division by the United States Postal Service and is, therefore, presumed received.

On January 17, 2008, ALJ Protano issued a recommended Findings of Fact, Opinion and Decision and Order ("Recommended Order"). On January 31, 2008, Complainant, pro se, filed Objections to the Recommended Order with the Commissioner's Order Preparation Unit.

FINDINGS OF FACT

1. Complainant was born July 1, 1954. (Tr. 7)
2. He began working for Respondent in 1989. (Tr. 9)
3. From 1998 until March of 2005, Complainant worked as a delivery driver for Respondent earning \$300 per week. He was Respondent's oldest driver. (Complainant's Exhibit 4; Tr. 11-12, 18)
4. Complainant credibly testified that he was fired because of his age. (Tr. 25). Starting in 2004, Albilis told him one or twice per week, "you too [*sic*] slow and too old." (Tr. 25-26). According to Complainant's credible testimony, two individuals witnessed these comments and reported as much to the Division's investigator. (Tr. 26) On March 9, 2005, after being referred to as too old and too slow for two years on a weekly basis, Albilis terminated Complainant's employment. (Tr. 13-14)
5. After the termination, Complainant collected \$150 per week in Unemployment Insurance for six months. (Tr. 14, 22). Complainant diligently looked for other work. (Tr. 15)
6. Approximately three months after Complainant was fired, Albilis asked Complainant to return to work, but Complainant refused because he was afraid he would be fired again. (Tr. 18)

7. As a result of Respondent terminating Complainant's employment, he felt as if someone "put a knife in [his] back." He cried. He felt "very bad" and nervous. Complainant remained upset up to the date of the hearing. (Tr. 18-19)

OPINION AND DECISION

Complainant's claim that Respondent discriminated against him based on his age when it terminated his employment is sustained.

The Human Rights Law prohibits an employer from discriminating against its employees based on age. *See* Human Rights Law § 296.1.

Absent direct evidence, Complainant can prove his case utilizing the burden-shifting analysis. Complainant must first make out a prima facie case that he suffered an adverse employment action under circumstances giving rise to an inference of discrimination. If he does so, this creates a presumption of discrimination. Respondent must then articulate legitimate business reasons for its action. "If the trier of fact believes [Complainant's] evidence, and if [Respondent] is silent in the face of the presumption of discrimination, judgment must be entered for [Complainant] because no issue of fact remains in the case." *Ferrante v. American Lung Assoc.*, 90 N.Y.2d 623, 655 N.Y.S.2d 25 (1997) (citing *Texas Dept. of Community Affairs v Burdine*, 450 U.S. 248 (1981)).

In the instant case, Complainant has produced sufficient evidence to establish a prima facie case of discrimination. The Division credits Complainant's claim that the termination resulted from Albilis's dissatisfaction with Complainant because of his age. This is evidenced by his weekly complaints to Complainant that he was too old and slow.

Respondent failed to appear at the hearing despite due notice and it has not disputed any of Complainant's evidence. Because Complainant produced credible evidence of age

discrimination and Respondent failed to rebut it, the complaint is sustained.

Complainant is entitled to be compensated for the lost wages he suffered as a result of Respondent's discrimination. *See* Human Rights Law § 297.4(c). Complainant earned \$300 per week working for Respondent. He was out of work until January of 2006. (Tr. 17) Respondent, however, offered to re-employ Complainant three months after the termination, but Complainant declined reemployment. Thus, Complainant is entitled to lost wages for three months following the termination *See State Div. of Human Rights v. North Queensview Homes, Inc.*, 75 A.D.2d 819, 427 N.Y.S.2d 483 (2d Dept. 1980) (back pay awarded to date Complainant was offered and declined reemployment). Complainant would have earned \$3,600 had he remained employed by Respondent. He is entitled to \$3,600, less \$150 per week (or \$1,800 for twelve weeks) for the Unemployment Insurance he received. *See New York State Div. of Human Rights v. Marcus Garvey Nursing Home*, 249 A.D.2d 549, 672 N.Y.S.2d 130 (2d Dept. 1998). Thus, Complainant is entitled to total lost wages in the amount of \$1,800.

It is well-settled that an award of compensatory damages to a person aggrieved by an illegal discriminatory practice may include compensation for mental anguish and that an award may be based solely on the complainant's testimony. *See Cosmos Forms, Ltd. v. State Div. of Human Rights*, 150 A.D.2d 442, 541 N.Y.S.2d 50 (2d Dept. 1989). As a result of Respondent's discrimination, Complainant felt as if someone "put a knife in [his] back." He cried. He felt "very bad" and nervous. Complainant remained upset up to the date of the hearing. Accordingly, in consideration of the severity of the discriminatory behavior, the duration and extent of Complainant's suffering, \$10,000 will effectuate the purposes of the Human Rights Law. *See State Div. of Human Rights v. Stoute*, 826 N.Y.S.2d 122, 2006 N.Y. App. Div. LEXIS

14350 (2d Dept. 2006); *Matteo v. State Div. of Human Rights*, 306 A.D.2d 484; 761 N.Y.S.2d 517 (2d Dept. 2003).

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 cease and desist from discriminating in housing in violation of the Human Rights Law; it is further

ORDERED, that Respondent, its agents, representatives, employees, successors and assigns shall take the following affirmative actions to effectuate the purposes of the Human Rights Law:

1. Within sixty days of receipt of the Final Order of the Commissioner, Respondent shall pay to Complainant the sum of \$1,800 without any withholdings or deductions, for the lost wages he suffered as a result of Respondent's discriminatory actions. Interest on the lost wage award shall accrue at a rate of nine percent per annum from April 15, 2005, a reasonable intermediate date, until date payment is made.
2. Within sixty days of receipt of the Final Order of the Commissioner, Respondent shall pay to Complainant the sum of \$10,000 without any withholding or deductions, as compensatory damages for the anguish he suffered as a result of Respondents' discriminatory actions. Interest on the compensatory damage award shall accrue at a rate of nine percent per annum from the date of the Commissioner's Final Order until the date payment is made.
3. The payments for compensatory damages and lost wages shall be made in the form of two certified checks made payable to the order of Complainant, Yuri Gutkin, and delivered to

him at his address at 7150 Parsons Blvd., Apt. 2F, Fresh Meadows, New York 11365-4101, by certified mail, return receipt requested.

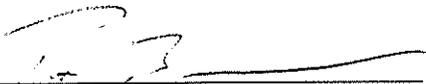
4. Within sixty days of the date of the Final Order, Respondent shall prominently post a copy of the Division's poster (available at the Division's website at www.dhr.state.ny.us under the homepage heading, "NYS Division of Human Rights Is...") in places on Respondent's premises where employees are likely to view it.

5. Respondents shall simultaneously 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 its compliance with the directives contained in this Order.

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

DATED: FEB 20 2000
Bronx, New York

STATE DIVISION OF HUMAN RIGHTS


PETER G. BUCHENHOLZ
Adjudication Counsel