Division of
Human Rights

NEW YORK STATE
DIVISION OF HUMAN RIGHTS

NEW YORK STATE DIVISION OF HUMAN RIGHTS
on the Complaint of

MAUREEN HAGEN,

Complainant,

v.

SELDEN FIRE DISTRICT,

Respondent.

NOTICE AND FINAL ORDER

Case No. 10167061

Federal Charge No. 16GB401690

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 July 17, 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: AUG 21 2015
Bronx, New York

HELEN DIANE FOSTER
COMMISSIONER

ANDREW M. CUOMO
GOVERNOR

NEW YORK STATE
DIVISION OF HUMAN RIGHTS

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on the Complaint of

MAUREEN HAGEN,

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SELDEN FIRE DISTRICT,

Respondent.

RECOMMENDED FINDINGS OF FACT, OPINION AND DECISION, AND ORDER

Case No. **10167061**

SUMMARY

Complainant alleged that Respondent unlawfully retaliated against her and discriminated against her because of her sex, disability, and sexual orientation. Complainant has failed to establish her claims of discrimination based on sex, sexual orientation, and disability. However, Complainant has established her claim of retaliation, and she is awarded damages. A civil penalty is also awarded to the State of New York.

PROCEEDINGS IN THE CASE

On February 7, 2014, 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 thereupon referred the case to public hearing.

After due notice, the case came on for hearing before Robert M. Vespoli, an Administrative Law Judge ("ALJ") of the Division. Public hearing sessions were held on February 18-19, 2015.

Complainant and Respondent appeared at the hearing. Complainant was represented by Mark A. Murray, Esq. Respondent was represented by Jed Kirsch, Esq.

In the instant complaint, Complainant alleged that Respondent unlawfully retaliated against her and discriminated against her because of her sex, disability, and sexual orientation. At the public hearing, Mr. Murray stated that Complainant would only pursue her claims of sex-based discrimination and retaliation. (Tr. 5-6; ALJ's Exh. 1)

The presiding ALJ granted Mr. Murray's application to submit additional documents into the record after the conclusion of the public hearing. (Tr. 402-20, 437-38) However, Mr. Murray did not submit any additional documents into the record.

Permission to file post-hearing briefs was granted. Complainant filed a timely post-hearing brief. Respondent did not file a post-hearing brief.

FINDINGS OF FACT

1. Complainant, who is female, has been a certified emergency medical technician ("EMT") since 1995. (Tr. 94, 98)

2. In 2003, Complainant began working for the Terryville Fire Department ("Terryville") as a paid paramedic. During her employment with Terryville, Complainant was also employed by the Ridge Fire District ("Ridge") as a paid paramedic. (Tr. 14-15)

3. In 2006, Complainant became a licensed paramedic in Suffolk County, New York. (Tr. 162)

4. Complainant has eight years of experience as an instructor for Suffolk County Emergency Medical Services ("Suffolk County EMS") teaching students EMT skills, including the proper administration of narcotics to patients. (Tr. 13, 30, 122)

5. From 2005 to 2011, Complainant worked as a full-time paramedic for Ridge. (Tr. 105)

6. During Complainant's tenure at Ridge, she filed a complaint against Ridge alleging unlawful discrimination based on sex. (Tr. 41, 170; ALJ's Exh. 1)

7. In 2011, Complainant's discrimination claims against Ridge were resolved. (Tr. 41-42; ALJ's Exh. 1)

8. In June 2008, Complainant interviewed with John Jay Egan, Respondent's fire district manager, for a paid, per diem paramedic position. (Tr. 16, 104, 110, 173, 220)

9. As the fire district manager, Egan is involved in all personnel issues, including the hiring and firing of Respondent's employees. (Tr. 173, 184)

10. During the interview, Complainant informed Egan about her then pending claim of unlawful discrimination against Ridge. Egan responded by saying that "what happens in Ridge is Ridge, and this is Selden." (Tr. 42-43, 108, 169-70, 220; ALJ's Exh. 1)

11. In or about June 2008, Respondent hired Complainant to work on a per diem basis as a paid paramedic first responder. (Tr. 16, 103-04, 220)

12. In or about July 2008, Matthew Gruber, Respondent's lead paramedic, became Complainant's direct supervisor. (Tr. 111, 202, 346, 380)

13. During the course of Complainant's employment with Respondent, she received eight incident reports, also known as "write-ups," complaining about her work performance. Seven of these write-ups occurred between September 2013 and January 2014. Respondent never disciplined or counseled Complainant regarding any of these write-ups. (Tr. 47-50)

14. Complainant did not become aware of these seven write-ups until March 14, 2014, when she reviewed her personnel file. (Tr. 49)

15. During the course of Complainant's employment with Respondent, she had an ongoing conflict with a coworker, Michael Ozer. Ozer was a volunteer paramedic for Respondent and a paid paramedic for Ridge. (Tr. 60, 93, 341)

16. On December 4, 2012, Ozer accused Complainant of not following proper protocols while treating a patient during an ambulance call. (Tr. 60-61, 295-300; Complainant's Exhibits 5, 8)

17. Respondent ultimately determined that Complainant had committed no wrongdoing. (Tr. 60-61, 84; Complainant's Exh. 8)

18. After Ozer accused Complainant of violating proper protocols, Complainant felt harassed by coworkers during ambulance calls because they were always "questioning" her about her competency on the job. Because of the constant questioning, Complainant felt as if she was "under a microscope" and that her job was "becoming more difficult." Among other general remarks, Complainant's coworkers continued to remind her that Ozer believed that she was "one of the worst paramedics." (Tr. 71, 89-90; ALJ's Exh. 1)

19. In or about January 2013, Complainant received a write-up from Gruber for failing to work a shift that she was scheduled to work. Complainant signed this write-up. (Tr. 19, 393)

20. On May 22, 2013, both Complainant and Ozer were present at a continuing education dinner hosted by Mather Memorial Hospital ("the Mather incident"). (Tr. 62-63, 67, 139) This dinner was not associated with any of the facilities or properties of Respondent. (Tr. 147, 228) At this event, Ozer cursed at Complainant, using derogatory terms such as "cunt" and "fuckin' bitch." (Tr. 63, 68-70; Complainant's Exhibits 3, 4)

21. On or about May 29, 2013, Complainant sent a letter to Respondent's commissioners, Respondent's chief, and Egan, describing the inappropriate remarks Ozer made to her during the Mather incident. (Tr. 64-65, 308; Complainant's Exh. 3) In this letter, Complainant also addressed the rumors Ozer had spread about her, including the rumors of Complainant being a "shitty paramedic" and the December 4, 2012, false allegation about Complainant's incorrect treatment of a patient. Complainant requested that Ozer be held accountable for the Mather incident and the rumors. (Complainant's Exh. 3)

22. Complainant subsequently sent a letter to Ozer, requesting that he leave her alone. Complainant sent a copy of this letter to Gruber and Respondent's commissioners. (Tr. 71, 148)

23. In or about August, 2013, Complainant met with Respondent's attorney and its commissioners; she asked them to intervene in the "escalating" problems she was having with Ozer at work. Complainant's reference to "escalating" problems with Ozer included the December 4, 2012, false allegation report, the general rumors Ozer had spread about her, and the Mather incident. Complainant referred to these incidents generally as "problem after problem." At this meeting, Complainant did not tell Respondent's attorney or its commissioners that she did not want "anything done with [Ozer]." (Tr. 77-80; Complainant's Exh. 4; ALJ's Exh. 1)

24. Respondent did not investigate or discipline Ozer as a result of the Mather incident. Respondent did not discipline Ozer because he attended the event as an employee of Ridge, and no witnesses provided evidence against him. (Tr. 70, 286, 288, 312)

25. In or about September 2013, Complainant became aware that Respondent was planning to hire full-time paramedics to replace the per diem paramedics. (Tr. 17, 48-49, 114) These full-time paramedic positions were open, competitive civil service positions that were scheduled to begin in February 2014. (Tr. 117, 210, 359, 405)

26. Around this time, Respondent planned to transition from a per diem paramedic staff to a full-time paramedic staff to encourage loyalty among its staff members and to prevent scheduling conflicts. Respondent notified its per diem paramedic staff that the full-time paramedic positions would start in February 2014, and that their per diem employment with Respondent would end at that time. (Tr. 31-32, 115, 118, 360, 394)

27. The New York State Department of Health ("NYS DOH") provided that any agency that was certified in advanced life support ("ALS") would be required to carry and administer controlled substances when treating patients. Respondent has been ALS certified since 2005. Therefore, Respondent sought to reduce its staff to a smaller number of full-time employees to create greater accountability in handling controlled substances. (Tr. 184-87)

28. Respondent wanted employees for the full-time paramedic position who had experience treating traumatic injuries, working with controlled substances in the context of provider care, and handling a large volume of calls in a larger system. (Tr. 199, 201, 363-64)

29. Gruber acknowledged that Complainant was very dependable in picking up shifts on short notice and that her skills were on par with the rest of Respondent's paramedics. (Tr. 395, 399)

30. Beginning in September 2013, Complainant received several write-ups and had another incident with Ozer. (Tr. 47, 72)

31. On September 5, 2013, one of Complainant's coworkers issued a write-up to her because he observed her failing to follow proper protocols when she treated a patient without the use of gloves. (Tr. 325-26; Complainant's Exh. 9) This incident was brought to the attention of Respondent's commissioners, but Respondent took no action against Complainant. (Tr. 327)

32. In September 2013, while Complainant was out of town, Ozer and Dan DeSoiza, a paid paramedic working for Respondent at that time, wrote on the back window of a paramedic vehicle used by Complainant ("the Tailgate incident"). Ozer and DeSoiza drew a common symbol used to represent the male sex under "M15" (i.e., Medic 15), referring to Complainant's paramedic number. Ozer and DeSoiza also wrote "M1," referring to Gruber's paramedic number, on the window along with the words "I love boys." (Tr. 72-73, 233, 235, 321; Complainant's Exhibits 1, 4) Egan viewed video surveillance of the incident and confirmed that it was Ozer and DeSoiza who wrote on the back window of the vehicle. (Tr. 233, 320-21)

33. On September 21, 2013, Complainant sent an e-mail to Respondent's commissioners complaining about the Tailgate incident. In the e-mail, Complainant expressed her embarrassment over this incident, and she stated that this incident "discredits [her] as a professional." Complainant also wrote that she had to "deal with [Ozer] calling [her] a fucking Bitch, and a Cunt." Complainant also complained to Egan and Gruber about the Tailgate incident. (Tr. 74-76; Complainant's Exh. 4)

34. As a result of the Tailgate incident, Respondent suspended DeSoiza indefinitely. (Tr. 234)

35. Respondent punished Ozer by issuing him a suspension and additional assignments to the duty roster. (Tr. 236-37; Respondent's Exh. 1)

36. In October or November 2013, Jake Parish, a volunteer working for Respondent, prepared a write-up regarding Complainant's conduct on the job and provided it to Gruber. (Tr. 378, 382) This write-up alleged that Complainant had violated Respondent's protocols when she administered medicine to a patient in respiratory distress. (Tr. 378-79, 389) Gruber forwarded the write-up to Respondent's medical director, Dr. Christopher Ang, who then forwarded it to Suffolk County EMS. Suffolk County EMS ultimately found the claim to be unsubstantiated. (Tr. 378, 390; ALJ's Exh. 1)

37. In November 2013, the Suffolk County Civil Service Commission created the civil service eligible list for the full-time paramedic position. Each candidate was assigned a score in five percent increments. The score for each individual reflected the candidate's life and work experience, combined with other selective criteria. (Tr. 187-90)

38. As a result, Respondent sent canvass letters to all eligible candidates from the list pursuant to Suffolk County Civil Service Rules. (Tr. 23, 193)

39. Complainant received a score of ninety-five. (Tr. 23, 44) Approximately thirty-five candidates on the list received the same score. (Tr. 193, 196-97, 362)

40. One candidate received a higher score than Complainant, but he was not interested in pursuing a full-time paramedic position with Respondent. (Tr. 188, 196-97)

41. Approximately eighteen candidates, including Complainant, responded to the initial canvass letters. Egan and Gruber interviewed all eighteen candidates. (Tr. 119, 197-98, 362)

42. In December 2013, Egan and Gruber interviewed Complainant for the full-time paramedic position. (Tr. 22, 196) Egan and Gruber told Complainant that four positions were to be filled. (Tr. 25)

43. Compared to the other candidates for the full-time paramedic position, Complainant had the most experience teaching EMS protocols and procedures. (Tr. 397) Complainant also had prior experience working in a larger system in New York City. (Tr. 122)

44. Respondent called seven candidates for a second interview. Three of the seven candidates worked for Respondent. These three individuals were Complainant, Steve Badaloto and Erin Lambert. Egan gave the recommendation for the final seven candidates. (Tr. 116, 205, 212, 366)

45. On December 30, 2013, Egan, Gruber, Dr. Ang, and Commissioner McConville interviewed Complainant. (Tr. 29, 123, 205-07) This interview was primarily conducted by Dr. Ang, who asked questions related to the administration of medications to patients. (Tr. 207)

46. Gruber, Egan, and Dr. Ang made hiring recommendations to Respondent's commissioners for the full-time paramedic positions. The ultimate hiring decisions for these positions were made by Respondent's commissioners. (Tr. 212, 370)

47. After the second round of interviews, Respondent made offers to three candidates for three full-time paramedic positions. (Tr. 208-09, 362, 370)

48. Complainant was not recommended for one of the full-time paramedic positions. Gruber could not recall the reason why Complainant was not recommended for a full-time paramedic position. (Tr. 399) At the public hearing, Respondent did not assert a legitimate, nondiscriminatory reason for failing to select Complainant for a full-time paramedic position.

49. Respondent made initial offers for the full-time paramedic position to Christopher Van Hauten, Greg Wayrich, and Lambert. Van Hauten, and Wayrich are male; Lambert is female. (Tr. 205, 210, 212, 370-71)

50. Lambert declined the offer for a full-time paramedic position. (Tr. 211, 370-71) Respondent then offered a full-time paramedic position to Ryan Reynolds, a male. Reynolds also declined the offer. (Tr. 28, 45, 370-72)

51. Respondent then offered a full-time paramedic position to Badaloto, a male. Badaloto accepted the position. (Tr. 27, 210-11, 372)

52. On or about January 15, 2014, Complainant received a letter from Egan, signed by Commissioner McConville, stating that she did not receive a full-time paramedic position. (Tr. 126, 223)

53. Around this time, Respondent decided to add a fourth full-time paramedic position. (Tr. 212, 375)

54. In mid to late January 2014, a second eligible list was established which contained the names of additional candidates. (Tr. 208) Complainant was on this list. (Tr. 213)

55. On January 30, 2014, Complainant's employment with Respondent as a per diem paid paramedic ended. (Tr. 134; ALJ's Exh. 1) Around that time, Respondent also terminated the employment of other per diem employees, both male and female, because of the transition to full-time paid paramedics. (Tr. 223)

56. Complainant earned approximately the same amount of money working for Respondent in 2012 and 2013. (Complainant's Exh. 10) There is nothing in the record corroborating Complainant's claim that Respondent reduced her work hours in retaliation for her complaints against Ozer. (Tr. 135-36, 168-69)

57. In February 2014, Respondent sent canvass letters to the additional candidates who were reachable on the second eligible list. (Tr. 213-14, 333-34)

58. As a result of the second canvass, Respondent interviewed four new candidates who appeared on the second eligible list. Two of these four candidates received a second interview. As a result, Respondent offered Amanda Kingdon, a female, a full-time paramedic position. In March 2014, Kingdon began working for Respondent as a full-time paramedic. (Tr. 213-15, 376)

59. At the end of March 2014, Wayrich resigned from his full-time paramedic position. Around this time, Respondent hired Louis Brand, a male, from the second eligible list, to fill Wayrich's position. (Tr. 215-16, 334, 373, 375)

60. By the end of March 2014, Badaloto, Van Hauten, Kingdon, and Brand were the individuals employed by Respondent for the four full-time paramedic positions. (Tr. 216, 376)

61. I do not credit Complainant's claim that she could not obtain future employment as a paramedic because of her complaints of unlawful discrimination against Ridge and Respondent. (Tr. 36-39, 132-34) This claim is conclusory, self-serving, and is not corroborated in the record.

62. Complainant testified that she first started seeing a psychologist in the middle of 2013 because of her ongoing conflict with Ozer, and she felt that she was "hitting a brick wall with [Respondent]." Complainant testified that she was prescribed Lexapro for depression in 2013 because she was feeling depressed and frustrated with what was going on at work. Complainant also testified that she continued to see a psychologist in 2014. (Tr. 91-93) Complainant did not offer testimony, prescription verification, or supporting documentation from a treating psychologist or medical doctor in support of her testimony on this issue.

63. Complainant also testified that, after her employment with Respondent ended, she felt frustrated, discouraged, and depressed because she no longer worked in a job that she loved. (Tr. 89-91)

OPINION AND DECISION

It is unlawful for an employer to discriminate against an individual on the basis of her disability, sex, or sexual orientation. N.Y. Exec. Law, art. 15 ("Human Rights Law") § 296.1(a).

Because Complainant did not present evidence at the public hearing to substantiate her claims of discrimination based on disability and sexual orientation, these claims are hereby dismissed.

Complainant has the burden of establishing a prima facie case of discrimination 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 Respondent's 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 Respondent to rebut the presumption of unlawful discrimination by clearly articulating legitimate, nondiscriminatory reasons for its employment decision. The burden then shifts to Complainant to show that Respondent's 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 failed to establish her prima facie case of discrimination based on sex. Complainant has satisfied the first three elements of her prima facie case. Complainant is a female, and she was qualified for the full-time paramedic position. Complainant suffered adverse employment actions when Respondent terminated her employment and did not select her

for the full-time paramedic position. However, Complainant has not shown that these adverse employment actions occurred under circumstances giving rise to an inference of unlawful sex-based discrimination.

Complainant has offered no direct or indirect evidence of sex-based discriminatory animus on the part of Respondent's decision makers. Ozer was a volunteer paramedic for Respondent. There is nothing in the record showing that Ozer had any authority to make decisions regarding the discharge or hiring of Respondent's employees. Complainant has not shown that any stray, discriminatory remarks made by Ozer had any nexus to Respondent's decisions to hire or fire its employees. *See Chiara v. Town of New Castle*, 126 A.D.3d 111, 124, 2 N.Y.S.3d 132, 142 (2d Dept. 2015).

At the time that Respondent terminated Complainant's employment, Respondent also terminated the employment of other per diem employees, both male and female, because of the transition to full-time paid paramedics. Although Respondent did not offer a full-time paramedic position to Complainant, Respondent did offer full-time paramedic positions to other female candidates. Respondent initially offered a full-time paramedic position to Lambert, but she declined the offer. Respondent ultimately hired Kingdon for one of the four full-time paramedic positions.

Accordingly, Complainant's claim of discrimination based on sex must be dismissed.

Complainant also did not show that she was subjected to a hostile work environment based on her sex. In order to sustain a claim of discrimination based on a hostile work environment, a complainant must demonstrate that he or she was subjected to conduct that produced a work environment permeated with unlawful discriminatory intimidation, ridicule and insult that is sufficiently severe or pervasive to alter the conditions of his or her employment and

create an abusive working environment. The Division must examine the totality of the circumstances and the perception of both the victim and a reasonable person in making its determination. *Father Belle Cmty. Ctr. v. New York State Div. of Human Rights*, 221 A.D.2d 44, 50-51, 642 N.Y.S.2d 739, 744 (4th Dept. 1996), *lv. denied*, 89 N.Y.2d 809, 655 N.Y.S.2d 889 (1997). Moreover, "isolated remarks or occasional episodes of harassment will not support a finding of a hostile or abusive work environment; in order to be actionable, the offensive conduct must be pervasive." *Id.* at 51, 642 N.Y.S.2d at 745 (citations omitted).

The record shows that there was an escalating history of personal animosity between Complainant and Ozer that began after Ozer falsely alleged that Complainant violated proper protocols in December 2012. The record contains only two incidents of offensive sex-based conduct directed at Complainant by Ozer: the Mather incident and the Tailgate incident. Complainant's other allegations of "continued harassment" by Ozer and coworkers were general in nature and thus too ambiguous to constitute a complaint of discrimination based on her sex or any other protected class. *See Gonzalez v. EVG, Inc.*, 123 A.D.3d 486, 487, 999 N.Y.S.2d 16, 17 (1st Dept. 2014). These other generalized incidents of harassment appear to have been motivated by workplace dynamics unrelated to Complainant's sex.

Under the circumstances of this case, the Mather incident and the Tailgate incident are isolated incidents of offensive sex-based conduct. These two incidents do not rise to the level of objective severity or pervasiveness required to sustain an actionable hostile work environment claim. *See Constantine v. Kay*, 6 Misc.3d 927, 930, 792 N.Y.S.2d 308, 312 (Sup. Ct. Kings Co. 2004) (four unwelcome sex-based comments made by a coworker over a six month period insufficient to create a hostile work environment).

Finally, Complainant alleged that Respondent subjected her to unlawful retaliation. It is unlawful for an employer to retaliate against an employee for having filed a complaint or opposed unlawful discriminatory practices. Human Rights Law § 296.7.

Complainant bears the burden of establishing a prima facie retaliation claim by showing that she engaged in protected activity, Respondent was aware that she participated in this activity, she suffered an adverse employment action, and there is a causal relationship between the protected activity and the adverse employment action. Once Complainant has met this burden, Respondent has the burden of coming forward with legitimate, nondiscriminatory reasons in support of its actions. Complainant then must show that the reasons presented are a pretext for unlawful retaliation. *Pace v. Ogden Servs. Corp.*, 257 A.D.2d 101, 104, 692 N.Y.S.2d 220, 223-24 (3d Dept. 1999). Complainant does not need to establish that Respondent violated Human Rights Law § 296.1(a) in order to maintain a successful retaliation claim. *Id.*

Complainant engaged in protected activity when she filed a complaint against Ridge alleging unlawful discrimination based on sex. Complainant also engaged in protected activity when she complained about the Mather incident and the Tailgate incident. During the Mather incident, Ozer called Complainant sex-based derogatory terms such as "cunt" and "fuckin' bitch." Complainant complained to Respondent that Ozer had directed sex-based derogatory remarks at her. During the Tailgate incident, Ozer and DeSoiza referred to Complainant in a drawing using a common symbol representing the male sex. Complainant complained to Respondent about the demeaning nature of the Tailgate incident, and she also stated that she had to "deal with [Ozer] calling [her] a fucking Bitch, and a Cunt." Under these circumstances, Complainant reasonably believed that she was complaining about conduct that was within the

"remedial scope" of the Human Rights Law. *See Modiano v. Elliman*, 262 A.D.2d 223, 223, 693 N.Y.S.2d 24, 25 (1st Dept. 1999).

Respondent was aware of these complaints. Complainant told Egan about the Ridge complaint, and she informed Respondent about the Mather incident and the Tailgate incident in written form. Complainant suffered adverse employment actions when Respondent terminated her employment and did not hire her for a full-time paramedic position.

Complainant has offered no direct evidence of retaliatory animus on the part of Respondent's decision makers. However, causation can be presumed in the absence of retaliatory animus if there is sufficient temporal proximity between the protected activity and the adverse employment action. *See Calhoun v. County of Herkimer*, 114 A.D.3d 1304, 1307, 980 N.Y.S.2d 664, 667 (4th Dept. 2014). There is no "bright line to define the outer limits beyond which a temporal relationship is too attenuated" to establish causation. *Gorman-Bakos v. Cornell Coop. Extension*, 252 F.3d 545, 554 (2d Cir. 2001) (reviewing cases that found temporal proximity to indicate a causal connection for time periods ranging from twelve days to eight months).

With regard to the Ridge complaint, Complainant cannot, as a matter of law, establish causation through temporal proximity. Complainant filed the Ridge complaint sometime before she interviewed with Egan in June 2008, more than five and one-half years before Respondent terminated Complainant's employment and hired the full-time paramedic staff. This temporal relationship is too remote to establish causation. *See Ponterio v. Kaye*, 25 A.D.3d 865, 869, 808 N.Y.S.2d 439, 443 (3d Dept. 2006), *lv. denied*, 6 N.Y.3d 714, 816 N.Y.S.2d 750 (2006) (five years too long to establish causal connection between complaint and denial of application).

On or about May 29, 2013, Complainant complained about the Mather incident. Complainant complained about the Tailgate incident on September 21, 2013, less than four months before Respondent notified Complainant that she did not receive a full-time paramedic position. During that time period, Complainant received an unusual amount of write-ups questioning her work performance, while Respondent was going through the interview and selection process for the transition to full-time paramedics. Under these circumstances, Complainant has established the requisite causal nexus to establish a prima facie case of retaliation.

The burden of production then shifts to Respondent to show that its actions were motivated by legitimate, nondiscriminatory reasons. When Respondent terminated Complainant's employment, it also terminated the employment of other per diem employees due to the transition to full-time paid paramedics. Respondent planned to move from a per diem staff to a full-time staff to encourage loyalty among its staff, to prevent scheduling conflicts, and to comply with NYS DOH recommendations. Complainant did not show that these reasons are a pretext for unlawful retaliation

However, Respondent did not show that its decision not to hire Complainant for a full-time paramedic position was motivated by legitimate, nondiscriminatory reasons. Complainant was well-qualified for the full-time paramedic position. Complainant had one of the highest scores on the civil service eligible list, she was loyal to Respondent in picking up shifts, she had previous experience handling a large volume of calls, and she had more experience than any other candidate teaching EMS protocols and procedures.

The ultimate hiring decisions for the full-time paramedic positions were made by Respondent's commissioners based upon the recommendations of Gruber, Egan, and Dr. Ang.

Although Gruber and Egan testified at the public hearing, they did not provide a reason why Complainant was not selected for one of the positions. Respondent did not produce evidence from Dr. Ang or any of its commissioners regarding the selection process.

Respondent did not meet its burden of coming forward with legitimate, nondiscriminatory reasons for not selecting Complainant for a full-time paramedic position. Therefore, there is no need to proceed with an analysis of pretext. *See Gaffney v. Dep't of Info. Tech. & Telecommc'ns*, 536 F. Supp. 2d 445, 474 (S.D.N.Y. 2008). Accordingly, Complainant's claim of unlawful retaliation must be sustained.

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).

The Division cannot order a candidate to be appointed from a civil service list, nor can it award back pay that would have accrued pursuant to such an appointment. *See City of New York v. New York State Div. of Human Rights*, 93 N.Y.2d 768, 698 N.Y.S.2d 594 (1999). Ultimately, the Division cannot direct relief from public employers that "would in effect deprive the appointing authority of the power of selection." *Close v. New York State Div. of Human Rights*, 43 A.D.3d 574, 575-76, 840 N.Y.S.2d 660, 661 (3d Dept. 2007), *lv. denied*, 10 N.Y.3d 702, 854 N.Y.S.2d 103 (2008) (citations omitted).

There is nothing in the record corroborating Complainant's self-serving claims that Respondent reduced her work hours in retaliation for her complaints against Ozer or that she could not obtain future employment as a paramedic because of her complaints of discrimination.

Accordingly, there will be no award for lost wages.

Complainant is entitled to recover compensatory damages for mental anguish caused by Respondent's 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).

In the instant case, Complainant testified that she felt depressed, discouraged, and frustrated because she no longer worked in a job that she loved. Complainant stated that she started seeing a psychologist in the middle of 2013, and she continued seeing a psychologist after Respondent declined to offer her a full-time paramedic position in January of 2014. Complainant also testified that she has been prescribed Lexapro, a medication for depression. However, Complainant offered no supporting documentation, prescription verification, or

testimony from a treating psychologist or medical doctor in support of her testimony on this issue. There is simply a dearth of evidence in the record establishing the severity, duration, consequences, or treatment of her mental condition.

Accordingly, the Division finds that an award of $5,000.00 for mental anguish is reasonably related to Respondent's wrongdoing and is comparable to awards for similar injuries. *See Niagara Falls v. New York State Div. of Human Rights*, 94 A.D.3d 1442, 943 N.Y.S.2d 321 (4th Dept. 2012) (reducing an $8,000.00 mental anguish award to a maximum of $4,000.00 where the award was supported solely by the complainant's testimony that he was frustrated and angry, but no evidence concerning the depth of the mental anguish experienced); *see also, Quality Care, Inc. v. Rosa*, 194 A.D.2d 610, 599 N.Y.S.2d 65 (2d Dept. 1993) (reducing a mental anguish award from $10,000.00 to an award not exceeding $5,000.00 where the award was based solely on the complainant's testimony that she was "shocked," and "devastated" by her discharge, and there was no evidence of medical treatment); *Cosmos Forms, Ltd. v. State Div. of Human Rights*, 150 A.D.2d 442, 541 N.Y.S.2d 50 (2d Dept. 1989) (reducing a $35,000.00 mental anguish award to $5,000.00 where the award was based solely on the complainant's own testimony that she was "[e]motionally and physically screwed up" without evidence of any medical treatment, the duration of her condition, or its severity).

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 Respondent's culpability, any relevant history of Respondent's actions, 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).

The record supports a finding that Respondent did not hire Complainant to a full-time paramedic position in retaliation for her opposition to discriminatory practices in the workplace. This was a deliberate act, and it caused Complainant to experience mental anguish. There is nothing in the record showing that Respondent was adjudged to have committed any previous, similar violations of the Human Rights Law or that it is incapable of paying a penalty.

To vindicate the public interest and deter future violations of the Human Rights Law, a civil penalty of $5,000.00 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 Respondent, and its agents, representatives, employees, successors, and assigns, shall cease and desist from unlawful discriminatory practices; 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 sixty (60) days of the date of the Commissioner's Order, Respondent shall pay Complainant an award of compensatory damages for mental anguish in the amount of $5,000.00. The aforesaid payment to Complainant shall be made by Respondent in the form of a certified check made payable to the order of Complainant, Maureen Hagen, and delivered by certified mail, return receipt requested, to her attorney, Mark A. Murray, Esq., 132 Clyde Street, Suite One, West Sayville, New York 11796. 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 Respondent;

2. Respondent shall furnish written proof of the aforesaid payment 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 within this Order;

3. Within sixty (60) days of the date of the Commissioner's Order, Respondent shall pay a civil penalty to the State of New York in the amount of $5,000.00 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 penalty at the rate of nine (9) percent per annum from the date of the Commissioner's Order until payment is actually made by Respondent;

4. Within sixty (60) days of the date of the Commissioner's Order, Respondent shall establish policies, procedures, and training regarding the prevention of unlawful discrimination. Respondent shall provide proof of the aforementioned to the Division upon written demand; and

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

DATED: July 17, 2015
Hauppauge, New York

Robert M. Vespoli

Robert M. Vespoli
Administrative Law Judge