

**NEW YORK STATE
DIVISION OF HUMAN RIGHTS**

**NEW YORK STATE DIVISION
OF HUMAN RIGHTS**

on the Complaint of

ROSE MARIE LEONE,

Complainant,

v.

VITALE HEAVY HAULING, INC.,

Respondent.

**NOTICE OF FINAL
ORDER AFTER HEARING**

Case No. 10106904

PLEASE TAKE NOTICE that the attached is a true copy of the Recommended Findings of Fact, Opinion and Decision, and Order ("Recommended Order"), issued on June 25, 2007, by Christine Marbach Kellett, 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 KUMIKI GIBSON, COMMISSIONER, AS THE FINAL ORDER OF THE NEW YORK STATE DIVISION OF HUMAN RIGHTS ("ORDER") WITH THE FOLLOWING AMENDMENT:

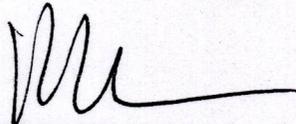
- The reasonable intermediate date from which interest shall accrue on the lost wages award of \$22,563.92 is November 2, 2005, not June 24, 2005, as stated in the Recommended Order.

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 20th day of July, 2007.



KUMIKI GIBSON
COMMISSIONER

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Christine Marbach Kellett
Administrative Law Judge

**NEW YORK STATE
DIVISION OF HUMAN RIGHTS**

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HUMAN RIGHTS**

on the Complaint of

ROSE MARIE LEONE,

Complainant,

v.

VITALE HEAVY HAULING, INC.,

Respondent.

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

Case No. 10106904

SUMMARY

Complainant charged Respondent with discrimination in employment based up sex (disparate treatment) and retaliation. Respondent claimed it did not have the hours to give to complainant. Complainant successfully established that Respondent's explanation was a pretext for illegal discrimination. Complainant also established that after she had complained about her hours compared to the male drivers, Respondent, in retaliation, ceased assigning any work to her. Complainant is entitled to damages.

PROCEEDINGS IN THE CASE

On July 22, 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 an unlawful discriminatory practice. The Division thereupon referred the case to public hearing.

After due notice, the case came on for hearing before Christine Marbach Kellett, an Administrative Law Judge ("ALJ") of the Division. Public hearing sessions were held on April 24-25, 2007.

Complainant appeared at the hearing. Matthew E. Bergeron, Esq. represented the Complainant. Norman J. Chirco, Esq. represented the Respondent. Paul R. Vitale, owner and operator of Vitale Heavy Hauling, Inc. attended the public hearing.

At the public hearing, Complainant declared her legal name to be Rose Marie Leone, not Rose Leone, and the complaint was amended on the record (Tr. 20-21).

Permission to file post-hearing briefs was granted. Both attorneys filed timely post-hearing briefs.

FINDINGS OF FACT

1. Complainant charged Respondent with discrimination based upon sex (disparate treatment) on violation of section 296 (1) (a) of the Human Rights Law and with retaliation in violation of section 296 (7) of the Human Rights Law (ALJ Exhibit 1).
2. Respondent denied the charges of disparate treatment and of retaliation (ALJ Exhibit 3).
3. Paul R. Vitale (Vitale) is owner and operator of Respondent Vitale Heavy Hauling Inc., a privately owned company specializing in heavy hauling and hauling cement (Tr. 26, 180, 273).
4. Respondent has approximately sixty employees (Tr. 300).
5. According to the policy book, described at the public hearing as an employee handbook, the standard work week for employees is full-time, forty hours per week (Joint Exhibit 2). Because cement hauling is dependent on demand and the weather, the standard work week in the employees' handbook is Monday through Saturday (Joint Exhibit 2).

6. In the winter of 2004-2005 Vitale learned of a proposed building project in the Syracuse area that might have resulted in higher demand for cement (Tr. 185-186, 324).
7. Anticipating this higher demand, Vitale mentioned to his employees in January 2005 that he might add a cement driver to meet the anticipated increase (Tr. 185).
8. When John Leone, a heavy hauler employed by Respondent heard that there was a possible job opportunity for a cement driver, he told his mother, the Complainant Rose Leone, about the opportunity (Tr. 23, 216).
9. Complainant Rose Leone is female, and has a commercial driver's license, class A (Tr. 21, 134).
10. This license qualifies Complainant to drive the large commercial trucks including tractor trailers, dump trucks, heavy haulers and cement trucks used in Respondent's business (Tr. 21-22, 28).
11. Complainant had owned a business for ten years doing long distance interstate heavy hauling (Tr. 22).
12. Complainant completed an application for a position with Respondent on January 12, 2005 (Tr. 23, 71-72, 218-220; Joint Exhibit 3).
13. On March 18, 2005, Vitale hired Complainant for the position of cement driver, joining two other males who were designated cement drivers (Tr. 24, 35, 73, 188).
14. Vitale cautioned Complainant that at first there might be less than full time hours, but that as the season progressed, she would have all the hours she could handle; and discussed with her the possibility of also driving the heavy hauler tractors (Tr. 24-25, 145, 188-189).
15. Vitale told Complainant to report to Don Brown, the assistant dispatcher primarily responsible for assignments for the three cement drivers. (Tr. 25-26, 36-37, 76, 318).

16. Complainant filled out all the paperwork for a position, including the health insurance forms on the assumption she was hired for full time work (77, 136, 138).

17. Vitale never told Complainant she was other than a full time employee, and in fact there were no part-time drivers (Tr. 77, 140-141, 144).

18. As directed, Complainant called in regularly to Brown regarding assignments, but it wasn't until April 20, 2005, that the dispatcher began assigning Complainant to cement runs (Tr. 36, 78-79).

19. The other two cement drivers started work at 6:30 a.m., Brown had Complainant call him and report in after 7:30; the other drivers had their work posted on the board for the next day but Brown told Complainant to check in with him rather than assume work on any day (Tr. 37, 88, 102-104).

20. During her four week period starting with April 20, 2005, Complainant was scheduled for a total of 129.50 hours, or approximately 32 hours a week (Joint Exhibit 1).

21. However, the two male drivers, both of whom had worked for Respondent in the previous year, were assigned 160 regular hours each and an additional 52 overtime hours for one and 42 overtime hours for the other, for an average of 57 hours a week (Joint Exhibit 1).

22. This pattern of assigning the two male drivers to large amounts of overtime continued throughout the spring and into the summer season as the male cement drivers are routinely assigned to over 55 hours a week while Complainant's hours are reduced to an average of 22 hours a week (Joint Exhibit 1).

23. In late May, Complainant went directly to Vitale to complain about the assignments and he seemed surprised she was not getting more work so he directed her back to Brown (Tr. 39-40).

24. When Complainant went back to Brown, he was angry she had gone over his head and he justified the assignments as the two men were coming back from winter layoffs and needed the income as the men headed households and expected the additional hours to support families, and the male drivers had threatened to quit if he assigned "their" hours to her (Tr. 40, 42, 94-96, 330-332).

25. Although the ALJ requested the Respondent to provide the time cards for the two male drivers for the period January through March 2005 (Tr. 176), these cards were not produced. Consequently there is no documentary support for the report by Respondent that the two male drivers were coming back from winter layoffs.

26. Vitale reported that he told the two male drivers when he hired them:

" I told them so much an hour plus the overtime. The regular hours are not way up high because I know there is overtime in it, so we cut their regular time down so they get their overtime and their overtime is what their gross pay is so they could have all the hours."

Tr. 194.

Later Vitale confirmed that his policy was to set the hourly rate of pay low, but provide plenty of overtime as an incentive (Tr. 290-292).

27. After Complainant complained to Vitale about the hours assigned to her, Brown went to Complainant's son, John Leone, and told him to speak with his mother and calm her down as the male drivers had to support their families (Tr. 225).

28. At the end of June 2005, the truck usually assigned to Complainant, was assigned to another driver to take to Chicago for a week (Tr. 54-55, 118-119).

29. Complainant worked only one day that work period, using a spare tractor (Tr.54).

30. On Saturday, June 25, 2005, the two male cement drivers and several heavy hauler drivers were assigned overtime to haul cement (Tr. 51).
31. At the public hearing Brown explained that he canvassed "the guys" to see who wanted Saturday work (Tr. 356).
32. Complainant was not given any hours for Saturday, June 25, 2005 (Tr. 51-54).
33. Complainant went a third time to Vitale who told her giving her hours would take food off the table of the male drivers (Tr. 42-43).
34. Vitale also spoke with Complainant's son telling him the male drivers had threatened to quit if he took hours away from them and gave the Complainant more time (Tr.225-226)
35. At the same time as Complainant was told there were no hours, the two other drivers were working in excess of 55 hours a week each (Tr. 91; Joint Exhibit 1).
36. Some of these hours were driving ash, not cement (Tr. 342; Joint Exhibit 1)
37. Complainant was never offered other runs besides cement although qualified to drive the vehicles (Tr. 26; Joint Exhibit 1).
38. After June 24, 2005, Brown told Complainant not to call back as he would call her if there were any hours (Tr. 92, 329).
39. Brown never called complainant after June 24, 2005 (Tr. 42, 334).
40. In early July 2005 Complainant sought advice from an attorney regarding her situation (Tr. 55-56).
41. The attorney sent Vitale a letter on Complainant's behalf (Tr. 56-57, 124; Complainant's Exhibit 1).

42. After receiving the letter from Complainant's attorney, Vitale spoke to John Leone and told him his mother would never get any work from him because she was causing trouble among the men (Tr. 59-60, 124).
43. As Respondent's cement driver, Complainant earned \$ 12.50 an hour, and worked more than forty hours only one week of the possible 14 weeks between March 18, 2005 and June 24, 2005 (Tr. 66-67; Joint Exhibit 1).
44. Working for Respondent Complainant earned \$4, 014.09 (Joint Exhibit 3).
45. By July 22, 2005 Vitale had hired a male cement driver, Bill Castle ("Castle") to replace Complainant (Tr. 169-170, 199).
46. In his first month of employ Castle worked 120 regular hours and 17.5 overtime hours, averaging 34.5 hours a week (Joint Exhibit 1).
47. Although Vitale claimed Castle was working both as a cement driver and as a heavy hauler, the time cards reflect Castle was hauling cement (Tr. 199-200, 276-277, 289).
48. By the end of the next month of Castle's employ he was averaging similar hours to the two other male cement drivers: in excess of 50 hours a week (Joint Exhibit 1).
49. By October Castle was working more hours than the other male cement drivers (Joint Exhibit 1).
50. Respondent's disparate treatment of Complainant was so obvious that other drivers from the heavy hauling side had spoken with her son and with Vitale about it (Tr. 143, 249-253).
51. Complainant was devastated, angry, embarrassed, and humiliated. She was depressed and sad. She felt she had taken a terrible blow to her self-confidence. At first she stayed in bed, unable to go out of her house for almost a month. Her electricity and cable were turned off when she could not make payments. (Tr.61-63, 67-69, 126-127)

52. By August, 2005, Complainant was actively seeking employment. Between July 24, 2005 and June 19, 2006, Complainant found temporary positions with Fed Ex at Christmas, employment at a business called PODS, and then a position at Marten's Farms (Tr. 64-65, 130). She earned a total of \$5921.99 in that time period. On June 16, 2006 Complainant began working for Verizon at \$18.50 an hour (Tr. 65). Complainant did not apply for unemployment benefits (Tr. 127).

OPINION AND DECISION

Complainant charged Respondent violated the Human Rights Law section 296 (a) (1) discrimination in employment on the basis of sex (disparate treatment) when it repeatedly assigned her fewer hours than similarly titled male employees. Respondent admitted it assigned the two males cement drivers longer hours, claiming it was to make up for winter hiatus. However, a male driver hired after Complainant was terminated, was quickly assigned the same hours as the experienced drivers. This established that Respondent's explanation was a pretext for illegal discrimination.

Complainant also charged Respondent with retaliation in violation of the Human Rights Law section 296 (7), when Respondent refused to call her or assign her any work after she complained of her treatment. Respondent's claim that it never terminated Complainant was shown to be a pretext. Respondent's dispatcher told Complainant to stop calling in and then failed to call Complainant.

Complainant is entitled to compensatory damages for lost wages and for emotional distress, pain and suffering for Respondent's unlawful discriminatory employment practices of disparate treatment and retaliation.

Discrimination (disparate treatment)

The Human Rights Law declares it to "be an unlawful discriminatory practice ... (f) or an employer... because of the ...sex.... of any individual, to ...discriminate against such individual in compensation or in terms, conditions or privileges of employment. NYS Executive Law section 296 (1)(a).

Disparate treatment exists when a person is treated differently than other coworkers because of her protected class. In order to establish a prima facie case of discrimination a complainant must show she was in a protected class, that she was qualified for the position, that she was treated differently than other employees not in her protected class, and that the conditions of her treatment give rise to an inference of discrimination, *Pace College v. Commission on Human Rights of the City of New York*, 38 N.Y.2d 28, 377 N.Y.S.2d 471, 339 N.E.2d 880 (1975).

Complainant established a prima facie case for discrimination based upon disparate treatment when she established that she was a female in a protected class by having a gender/sex, that she was qualified for the position by virtue of having a commercial driver's license, and that she was treated differently than others not in her protected class in that she received fewer hours than male cement drivers. The comments from Brown regarding the need to give the male drivers the additional hours due to the winter hiatus give rise to an inference of discrimination.

Respondent's explanations are shown to be a pretext in two ways. First, when its conduct regarding Complainant's assignments is compared to its conduct regarding the assignment of work hours to Complainant's successor, a male, there is a great difference in the treatment. The male replacement began immediately, rather than waiting a month after hire. In his first month the male replacement averaged forty hours a week. More significantly the male replacement quickly began receiving similar overtime hours to those of the other two male drivers. By the

second month of the male replacement's employ, the hours assigned began to even out.

Second, Respondent's claim that there were no hours is demonstrably untrue. Looking at the number of hours given the males drivers in April alone, it is only simple arithmetic to calculate that all three drivers could have been assigned forty hours a week, and there would still be still additional hours available for overtime.

Vitale, as owner, was fully aware of the scheduling being done by Brown. Although he had testified to an employment practice emphasizing overtime, he acquiesced to the complaints of the male drivers and condoned limiting Complainant to fewer hours with no overtime.

In his post hearing brief, Respondent's attorney claims Complainant did not give Respondent a chance. This is also without merit. Complainant was hired in March yet given no hours until April; then she was given significantly fewer hours than the male drivers. A careful review of the scheduled hours shows Complainant was assigned fewer hours, not more as the season progressed.

The record is clear that Complainant was treated differently because she was female.

Retaliation claim

The Human Rights Law makes it an unlawful discriminatory practice for an employer to retaliate against an employee because she opposed behavior she reasonable believed to be discriminatory. NYS Executive Law section 296.7.

In order to establish a prima facie case of retaliation, a complainant must establish that she engaged in a protected activity; that the employer was aware she had engaged in the protected activity, that she suffered an adverse employment action and that there is a causal connection between her engagement in the protected activity and the adverse action. Upon the demonstration of a prima facie case of retaliation, a burden of production shifts to the

Respondent to articulate a legitimate non-discriminatory reason for its actions. Upon the offer of such an explanation, the burden of proof requires the complainant to demonstrate that the reason offered is a pretext for unlawful discrimination. *Pace v. Ogden Services Corp.*, 257 A.D.2d 101, 692 N.Y.S.2d 220 (3rd Dept., 1999).

The record clearly established that Complainant was a victim of retaliation: after she complained to Brown and Vitale that she was receiving fewer hours than the male drivers, she was assigned to even fewer and ultimately no hours. Her complaint regarding the assignments constituted a protected activity as it complained of alleged discriminatory conduct. After she contacted Vitale in May, Brown the dispatcher got angry with her for bringing the matter up to Vitale. Brown then assigned her to fewer hours. After she complained in June, Vitale himself was angry and annoyed. The direct consequence of Complainant's complaints regarding her hours as compared to the male drivers was that Brown assigned her no hours. Complainant was terminated.

Respondent's argument, that it did not terminate Complainant, is not credible. John Leone's conversation with Vitale contained an admission that Complainant was terminated. Respondent's actions in telling Complainant not to call in and in never calling her in, effectuated termination. One ceases to be an employee if one ceases to be given work.

Damages

Complainant was damaged in several ways by Respondent's conduct. First, as Vitale stated, he set the rate of pay at a low amount for his cement drivers in order to get them to work the overtime. Complainant's pay was impacted by both fewer hours and the low rate assigned to regular hours. As Vitale testified, he set the rate low but compensated for that with many hours of overtime at time and half. Had Respondent treated Complainant as he treated his two male

drivers, Complainant would have worked a minimum of forty or more hours a week at \$12.50 an hour and received overtime. Forty hours a week at twelve dollars an hour is \$500 a week. Over the fourteen week period between March 18, 2005, when Complainant was told she was hired and June 24, 2005, after which she received no hours at all, Complainant earned only \$4,014.09. Had Complainant been assigned the minimum forty hours she would have earned \$7000.00. Complainant is entitled to the difference between what she should have made by being assigned forty hours as a full time driver and what she did make. The difference is \$7,000.00 minus \$4,014.09 or \$2,985.91.

There are 51 weeks in the time period from June 24, 2005 through June 16, 2006 when Complainant found comparable full time work at Verizon. Had Complainant been assigned the minimum forty hours per week working for Respondent Complainant would have earned \$25,500 excluding overtime. Instead, despite her efforts to mitigate damages, Complainant earned \$5921.99 at various temporary positions including Fed Ex, PODS and Marten's Farm. The difference is \$ 19578.01.

The total damages in back wages due to Complainant as a result of Respondent's discriminatory practices are \$2,985.91 plus \$19,578.01 or \$22,563.92. Complainant shall receive interest at the statutory rate on the back pay from June 24, 2005. Aurrecchione v. NYS Division of Human Rights, 98 N.Y.2d 21, 744 NYS 2d 349 (2002).

As a result of Respondent's conduct, Complainant felt angry, humiliated, depressed and embarrassed. She was unable to leave her house for almost a month. She avoided her family and friends. She exhausted her savings. Her electricity and cable were temporarily shut off. She felt as though she had "taken a hit" and her self-confidence was affected. She is only now beginning to feel better. Under these circumstances, in which Complainant was victimized in

two ways: first on the basis of her sex and second when she engaged in a protected activity to complain about unlawful treatment, an award of twenty-five thousand dollars (\$25,000) for emotional distress will effectuate the purposes of the Human Rights Law. *See: Gleason v. Callanan Industries, Inc.* 203 A.D.2d 750, 610 N.Y.S.2d 671 (3rd Dept. 1994) in which an award of \$54,000 for discrimination (sexual harassment and retaliation) for a three year employee; *R & B Autobody & Radiator, Inc. v. State Division of Human Rights*, 31 A.D.3rd 989, 990, 819 N.Y.S.2d 599, 600 (3rd Dep2t., 2006) in which an award of \$15,000 for discrimination (hostile work environment) over a six month period. Under the circumstances of this case, Complainant shall receive statutory interest on the award for pain and suffering from the date of the Commissioner's order. *See: Aurrecchione v. NYS Division of Human Rights*, 98 N.Y.2d 21, 744 NYS 2d 349 (2002).

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, representative, employees successors and assigns shall cease and desist from discriminatory practices in employment; and it is further

ORDERED that Respondent shall take the following action to effectuate the purposes of the Human Rights Law and the findings and conclusions of this Order:

1. Within sixty days of the date of the Commissioner's Order, Respondent shall pay to Complainant the sum of \$ 22,563.92 as compensatory damages for back pay. Interest shall accrue on the award as the rate of nine percent per annum from June 24, 2005 a reasonable intermediate date until the date payment is actually made by Respondent;

2. Within sixty days of the date of the Commissioner's order, Respondent shall pay to

Complainant the sum of \$25,000.00 without any withholdings or deductions, as compensatory damages for the mental anguish and humiliation suffered by Complainant as a result of Respondent's unlawful discrimination against him. Interest shall accrue on the award at the rate of nine per cent per annum from the date of the Commissioner's Order until payment is actually made by Respondent.

3. The aforesaid payments shall be made by Respondent in the form of a certified check made payable to the order of Complainant, Rose Marie Leone, and delivered by certified mail return receipt requested to the law offices of Complainant's attorney, Matthew Bergeron, Esq. Respondent shall furnish written proof to the New York State Division of Human Rights, Office of General Counsel, One Fordham Plaza, 4th Floor, Bronx, NY 10458 of its compliance with the directives contained in this Order; and

4. In addition to the foregoing remedies, within sixty (60) calendar days of the date of this Order, Respondent shall promulgate policies and procedures for the prevention and redress of discrimination in the workplace. These policies shall include a formalized complaint and reporting mechanism for employees in the event they encounter discriminatory and or harassing behavior and/or treatment, and the development and implementation of regular training programs for all supervisory staff and employees regarding discrimination and harassment in the workplace. A copy of these policies and procedures shall be prominently posted in the workplace and shall be made individually available to all supervisory staff and employees. The shall also be provided to Caroline Downey, Acting General counsel, New York State Division of Human Rights, One Fordham Plaza, 4th Floor, Bronx, New York 10458, within sixty-five (65) calendar days of the date of this order.

DATED: June 25, 2007
Albany, New York



Christine Marbach Kellett
Administrative Law Judge