ANDREW M. CUOMO
GOVERNOR

NEW YORK STATE
DIVISION OF HUMAN RIGHTS

NEW YORK STATE DIVISION OF HUMAN RIGHTS
on the Complaint of

EILEEN LIEB,

Complainant,

v.

ROCHESTER INSTITUTE OF TECHNOLOGY,

Respondent.

NOTICE AND FINAL ORDER

Case No. 10162020

Federal Charge No. 16GB303228

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 January 16, 2015, by Michael Groben, 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") WITH THE FOLLOWING AMENDMENTS:

- Respondent asserts that it offered Complainant a reduced merit raise because she was not present for a portion of the performance appraisal period. It denies that it was because

Complainant was out on a disability leave per se. However, Respondent offers no evidence that it maintained a policy or practice of prorating merit increases based on employee absences. It produced no evidence showing that it prorated the merit increases of any other employee who was out on leave due to some reason other than disability. The most it offered was Carcaci's vague testimony that there were a variety of reasons an employee might be out of work for a prolonged period. (Tr. 251; Respondent's October 6, 2014, post-hearing submission, pp 19-21; Respondent's February 20, 2015, Objections to the Recommended Order, p. 8). However, Carcaci did not testify further that those employees would have had their merit pay prorated. None of Respondent's witnesses testified to this vital fact. Indeed, Carcaci testified Respondent had updated its policies since Complainant's merit pay was prorated. According to Carcaci, Respondent's merit increases were now based on how much an employee was paid was in relation to the market rate and on performance. (Tr. 252-53) However, the documents Respondent submitted demonstrate that this was not a change in policy. Respondent maintained this same market-based policy at the time it prorated Complainant's merit pay. (*See* June 15, 2015, Respondent's letter, attachment designated RIT 001).

- Jacqueline Taylor was out on an extended disability leave and when she returned, her merit increase was not prorated. However, she is not similarly-situated to Complainant and, thus, this fact does not give insight into why Complainant was treated differently. As it stands, the ALJ credited Complainant's claim that she was told her merit pay was prorated because she was on disability leave. There is nothing in the record, including the additional evidence submitted in response to the Adjudication Counsel's request, that

warrants departing from the recommendation of the ALJ. Accordingly, the Recommended Order sustaining the complaint is hereby adopted.

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: OCT 15 2015
Bronx, New York

HELEN DIANE FOSTER
COMMISSIONER

ANDREW M. CUOMO
GOVERNOR

NEW YORK STATE
DIVISION OF HUMAN RIGHTS

NEW YORK STATE DIVISION OF HUMAN RIGHTS
on the Complaint of

EILEEN LIEB,

Complainant,

v.

ROCHESTER INSTITUTE OF TECHNOLOGY,

Respondent.

RECOMMENDED FINDINGS OF FACT, OPINION AND DECISION, AND ORDER

Case No. **10162020**

SUMMARY

Complainant alleges that Respondent unlawfully discriminated against her in employment due to disability when it denied her a pay raise, terminated her employment, and denied her a severance benefit. Respondent denies the allegations. The complaint is sustained, in part, and damages and a civil fine and penalty are awarded.

PROCEEDINGS IN THE CASE

On May 15, 2013, 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 Michael T. Groben, an Administrative Law Judge ("ALJ") of the Division. Public hearing sessions were held on August 6 and 7, 2014.

Complainant and Respondent appeared at the hearing. Complainant was represented by Kimberly A. Glennon, Esq. Respondent was represented by the Wolford Law Firm LLP, by Sarah Snyder Merkel, Esq., of counsel.

At the hearing, ALJ Groben denied Complainant's application to amend the complaint and present evidence that Respondent had discriminated against Complainant by failing to rehire her after her position was eliminated. ALJ Groben also denied Respondent's application to preclude testimony addressing alleged discrimination regarding Complainant's job termination and severance plan. (Tr. 14-28, 28-30)

Permission to file post-hearing briefs was granted, and both parties timely file proposed findings of fact and conclusions of law.

FINDINGS OF FACT

1. On November 2007, Complainant was hired as an operations coordinator for Respondent's Printing Applications Lab ("PAL"). (Tr. 8, 38-39, 245-46; Respondent's Exhibit 3)

2. PAL is an operation within Respondent's Center for Integrated Manufacturing Studies ("CIMS"), a department of Respondent's Golisano Institute for Sustainability ("GIS"). (Tr. 244-45)

3. PAL's functions included the operation and use of a "Goss press" (also known as a Heidelberg press), a large printing press used for research and testing of inks and paper for the commercial printing industry. (Tr. 62, 246-47, 262-64)

4. Complainant's duties as operations coordinator included processing accounts receivable and payable, and acting as a contact for customers who wanted to have tests run on the Goss press. (Tr. 39, 62)

5. Complainant worked 40 hours per week. Complainant was paid every two weeks. (Tr. 65, 124)

6. James Lieb is Complainant's husband. (Tr. 38, 166-67)

7. At all times relevant to the complaint, Complainant's daughter Elyse Lieb was a student at Respondent. Elyse started her junior year in September 2012. (Tr. 65, 93, 94, 142)

8. Barbara Giordano ("Giordano"), the operations manager of PAL, was Complainant's supervisor. (Tr. 39, 248, 262)

9. Bill Garno ("Garno"), the director of PAL, was Giordano's supervisor. (Tr. 39, 248; Complainant's Exhibit 12)

10. Katherine Carcaci ("Carcaci") is employed by Respondent as a manager of staff recruitment and a senior human resources representative. (Tr. 244, 254)

11. Carcaci's duties as a senior human resources representative include employee relations and employee compensation for employees working within CIMS and GIS, including PAL. (Tr. 49, 244-45)

12. Judy DeCourcey ("DeCourcey") is employed by Respondent as a senior benefits specialist. (Tr. 200)

13. DeCourcey's duties include overseeing the operations of most of Respondent's benefit plans, including its education benefits plans and severance plan. DeCourcey is responsible for making determinations as to the benefits available for a particular employee, subject to the approval of DeCourcey's supervisor, associate director for benefits Renée Brownstein. (Tr. 200-201, 228, 232)

Medical Leave

14. In November 2011, Complainant went on medical leave in order to have surgery on her knee. (Tr. 41)

15. At the time Complainant went on leave, she was paid at the rate of $17.54 per hour. (Tr. 10-11, 42; Complainant's Exhibit 5)

16. Complainant returned from medical leave in early February, 2012. She was only able to work one day before having to go on medical leave again, due to depression. (Tr. 41, 142-43, 167)

17. When Complainant went out on medical leave again, she informed Giordano that her doctor had diagnosed her with depression. (Tr. 41-42, 270-71)

18. Complainant was anxious and had difficulty sleeping. (Tr. 42)

Performance Appraisal and Pay Raise

19. Respondent's employees receive a written performance appraisal each year, followed by a merit pay raise. (Tr. 43)

20. An employee who is found to exceed Respondent's performance goals, as determined by the performance appraisal, will receive the maximum pay raise available for that employee. An employee who merely meets performance goals will get a lesser percentage, such as fifty percent, of the maximum pay raise. (Tr. 44)

21. Complainant usually met or exceeded her performance goals, and received the appropriate pay raise. (Tr. 40, 44)

22. In April 2012, Giordano began preparing yearly performance appraisals for employees under her supervision. (Tr. 265-66, 269)

23. Garno told Giordano that because Complainant had been out most of that year, it was not necessary for Giordano to prepare a performance appraisal for her. Giordano did not prepare a performance appraisal for Complainant at that time. (Tr. 266-67)

24. In early May of 2012, Complainant returned from her second medical leave. She initially worked part-time, and resumed full time work in or about the third week of May. (Tr. 43, 116, 270)

25. Complainant felt "very good", "eager to go back to work" and her depression was "very much under control." (Tr. 111)

26. By letter dated May 21, 2012, Respondent informed Complainant that her hourly pay rate for the next year would be $17.54, the same as her current rate of pay. (Tr. 45-46, 271; Complainant's Exhibit 6)

27. Complainant asked Giordano why she had not received a raise or a performance appraisal. Giordano inquired on Complainant's behalf. Garno told Giordano that he had determined not to give Complainant a performance appraisal or a raise because she had been out on disability during a portion of the review period. Giordano then related this to Complainant (Tr. 46-48)

28. Complainant contacted Carcaci to complain about not receiving a performance appraisal and pay raise. Carcaci contacted either Giordano or Garno, and advised that person to proceed with the performance appraisal. (Tr. 48-51, 247-48, 254-55)

29. Carcaci was aware that Complainant had been out of work because of disability during part of the performance appraisal review period. (Tr. 249-50, 254)

30. Carcaci advised Garno that any merit pay raise due Complainant after her performance appraisal could be "pro-rated" and reduced to reflect the time she had spent away from the workplace. (Tr. 248-52, 253, 259)

31. Carcaci testified credibly that, if faced with this question today, she would no longer recommend that Respondent reduce an employee's merit pay raise because of absence from work due to disability. (Tr. 252-54)

32. In May 2012, Giordano prepared a performance appraisal for Complainant to review. Complainant reviewed the appraisal and added information as appropriate. In early June 2012, she met with Giordano to discuss the appraisal. (Tr. 51-55, 115-16, 267-68; Complainant's Exhibit 10)

33. Complainant's performance was good; she received a combination of "exceeds" expectations and "meets" expectations ratings on her performance appraisal. Complainant testified credibly that her performance merited a full merit pay raise. (Tr. 52, 55-56; Complainant's Exhibit 10)[1]

34. Giordano informed Garno that Complainant's performance appraisal was completed. (Tr. 275-76)

35. The full merit pay raise available to Complainant was two point five percent of her hourly wage. Shortly after Complainant's meeting with Giordano, Garno advised Complainant that although her performance appraisal entitled to her to the full increase, she would receive only one half of that. (Tr. 55, 60, 118-20, 137)

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[1] Complainant and Giordano signed the performance appraisal in or about June 2012, backdating their signatures to May 14, 2012. (Tr. 54-55, 271-72, 274-76; Complainant's Exhibit 10)

36. Giordano advised Complainant that Garno had reduced her raise because she had been out on disability. (Tr. 120-21)

37. By letter dated May 21, 2012, Respondent informed Complainant that she had received a raise of her $17.54 pay rate to $17.80 per hour (an increase of $.26 per hour, or one point five percent), effective July 1, 2012. That increase in pay would be reflected in Complainant's July 20, 2012 wage statement. (Tr. 56-58, 118-19, 122-24, 273-74; Complainant's Exhibits 5 and 7)[2]

38. A raise of two point five percent of Complainant's $17.54 pay rate would have been an increase of $.44 per hour, to $17.98 per hour effective July 1, 2012. A raise of two point five percent would have paid Complainant $.18 more per hour than the one point five percent she actually received. (Tr. 122)

39. Complainant's anxiety increased as a result of Respondent's initial denial of her request for a performance appraisal, and because of Respondent's subsequent refusal to grant her the full merit pay raise. Complainant was "angry" and "confused" by Respondent's conduct. (Tr. 111, 115-16, 169-70)

40. When Complainant received the second letter regarding her pay raise, she complained to Carcaci and Sue Quinn (Respondent's disability specialist within the human resources department) that she should not have been penalized for her disability leave. Complainant was told there was nothing they could do. (Tr. 58-61, 255-556; Complainant's Exhibit 11)

Complainant's Position Is Eliminated

41. In 2012, Respondent made a business decision to reduce PAL operations by disposing of the Goss press, and terminating the employment of Complainant and the five other employees involved in that operation. (Tr. 63, 114-15, 128, 179-80, 246-47, 262-65)

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[2] Complainant received that second letter regarding her pay increase several weeks after the May 21, 2012 date on the letter. (Tr. 56-58; Complainant's Exhibit 7)

42. In April 2012, Garno informed Complainant of this decision and told her that her position would be eliminated sometime within the next six months to one year. (Tr. 61, 128, 247)

Severance Plan and Education Benefits Plan

43. Respondent maintains an education benefits plan for its employees. Pursuant to the plan, the dependents of an employee who has worked for Respondent for at least five years are eligible for a waiver of student tuition at Respondent. (Tr. 40, 201, 238-39; Respondent's Exhibit 1)

44. The tuition waiver for employees such as Complainant, whose date of hire is after January 1, 2006 and who have worked for Respondent for at least five years, is set forth in the education benefits plan. (Tr. 8, 38; Respondent's Exhibit 1 [pp. 3-4])

45. Respondent maintains a severance plan for its employees whose positions are eliminated because of restructuring or reorganization. These employees are eligible for a severance payment. (Tr. 206-07; Complainant's Exhibit 18)

46. The severance plan also permits the continuation of the tuition waiver benefit for the dependents of an employee who is eligible for said benefit. (Tr. 214, 239-40; Complainant's Exhibit 18 [p. 7])

47. Complainant submitted an application for the tuition waiver benefit, and was later informed by Respondent's student financial services office that a "credit" had been applied. (Tr. 81-82, 135; Respondent's Exhibit 4)

48. Complainant was confused by Respondent's severance policy, and concerned that her daughter might not be eligible to receive the tuition waiver benefit because Complainant's position was to be eliminated. (Tr. 73-74, 80-81; Complainant's Exhibit 18)

49. In June 2012, Complainant, Giordano and DeCourcey participated in a telephone conference call, during which they discussed the tuition waiver and severance policies in a general manner. DeCourcey opined that Complainant would be eligible for the tuition waiver benefit. Because Complainant did not inform DeCourcey of her hiring date, and did not yet know her termination date, they did not confirm whether or not Complainant would receive the tuition waiver benefit based on her years of service. (Tr. 74-75, 79-81, 85-86, 124-25, 240-41, 272-73; Complainant's Exhibit 21)

50. By letters dated August 23, 2012, and September 7, 2012, Garno informed Complainant that her position was being eliminated effective September 14, 2012, and that she was entitled to severance pay. (Tr. 61-63, 212-13; Complainant's Exhibits 13 and 14)

51. On September 5, 2012, in response to her inquiry to human resources, Complainant was notified by DeCourcey that she would not be eligible to receive the tuition waiver benefit under Respondent's severance plan because, as of the newly announced termination date of September 14, 2012, Complainant would not have completed five years of service. (Tr. 82-84, 126-28, 213-14, 237-38; Complainant's Exhibits 18, 19 and 21, Respondent's Exhibit 1)

52. After Complainant and her husband met with DeCourcey to discuss the issue, DeCourcey consulted with Respondent's legal counsel and reiterated her determination in an e-mail to Complainant. (Tr. 84-88, 191-92; Complainant's Exhibit 20)

53. Complainant filed an appeal of DeCourcey's determination. On October 25, 2012, the appeal was denied by Renee Brownstein. Complainant did not receive the tuition waiver benefit for her daughter. (Tr. 88-90, 129-30, 133, 214-15, 228-29; Complainant's Exhibit 17 [p.2], Complainant's Exhibit 23, Respondent's Exhibit 2)

54. Because the tuition waiver issue was not resolved until well into the school year, Complainant was unable to secure significant financial aid for her daughter, and Complainant and her husband were forced to pay approximately $20,000 of Elyse's tuition using a combination of student loans and cash payments. (Tr. 88, 147, 149-51, 172-75, 180-81, 183, 185, 194)

55. Complainant was unable to secure another job until April 28, 2013. (Tr. 71-72)

56. Complainant was frustrated and angry because of Respondent's conduct regarding the performance appraisal and merit raise, the elimination of her job, and the denial of Elyse's tuition waiver. Complainant's emotional reaction to these issues negatively affected her relationship with her family. (Tr. 65, 116-17, 144-45, 170-71, 176-77, 185, 187-90, 192-93)

57. Complainant continued, and increased, her medication for depression. Complainant is being treated by a psychiatrist. (Tr. 109-10)

Separation Benefits and Damages

58. Complainant's pay raise was effective July 1, 2012 and her last day of work was September 14, 2012. Between those dates, Complainant was paid at the rate of $17.80 per hour, instead of the full merit raise of $17.98 per hour, for a difference of $.18 per hour.

59. Earnings: The number of hours Complainant was compensated at the rate of $17.80 per hour after July 1, 2012, can be calculated by subtracting the "year to date" total from her earnings statement ending June 28, 2012 from that set forth in her final earnings statement ending November 29, 2012, and dividing that figure by 17.80. Multiplying the resulting figure by $.18 will produce Complainant's earnings shortfall between July 1, 2012 and September 14, 2012, in a particular earning category, such as wages. (Tr. 217-21; Respondent's Exhibit 7)

60. Complainant's final year to date wages of $9,936.42, minus $4,017.90 (earned before her raise) equals $5,918.52. This figure, divided by 17.80, equals 332.5 hours. The hours multiplied by $.18 equals $59.85, the wages Complainant failed to receive as a result of Respondent's decision not to give her a full merit pay raise. (Tr. 216-22; Respondent's Exhibit 7)

61. A similar calculation for Complainant's vacation pay is as follows: final year to date vacation pay of $1,139.62 minus $368.34 equals $771.28, divided by 17.80 equals 43.33 hours. Those hours multiplied by $.18 equal $7.80. (Tr. 222-24; Respondent's Exhibit 7)

62. The calculation for holiday pay is $354.96 minus $70.16 equals $284.80, divided by 17.80 equals 16 hours. Those hours, multiplied by $.18, equal $2.88. (Tr. 225-26; Respondent's Exhibit 7)

63. The calculation for sick pay is $890 minus $0, divided by 17.80 equals 50 hours. Those hours multiplied by $.18 equal nine dollars. (Respondent's Exhibit 7)

64. The calculation for the compensation category of "GLT Imp" is $12.30 minus $8.31 equals $3.99 divided by 17.80 equals .22 hours. That hourly figure multiplied by $.18 equals four cents. (Respondent's Exhibit 7)

65. Complainant also earned $12.30 in overtime pay. Time and a half overtime pay at $17.80 per hour is $26.70 ($17.80 divided by two equals $8.90; $17.80 plus $8.90 equals $26.70). Complainant's $12.30 represents approximately .46 hours of overtime. Overtime calculated at $17.98 per hour is $26.97 ($17.98 divided by two equals $8.99; $17.98 plus $8.99 equals $26.97). The overtime hour figure of .46 multiplied by $26.97 equals $12.41. Complainant's shortfall in overtime was $.11. (Tr. 226-27; Respondent's Exhibit 7)

66. Complainant's total lost earnings are $59.85 + $7.80 + $2.88 + $9 +$.04 + $.11, for a total of $79.68.

67. Severance pay: Complainant's years of service entitled her to 2 1/2 months of severance pay, which she received. (Tr. 121-22, 206-07, 210-211; Complainant's Exhibits 13 and 18)

68. The severance benefit for Respondent's hourly employees is calculated by determining the employee's "annualized pay" (calculated by multiplying the hourly pay rate by hours worked per week, multiplied by weeks worked per year). The annualized pay is divided by 12, to determine monthly pay. That figure is then multiplied by the months of severance pay available to the employee. (Tr. 207-08, 210; Complainant's Exhibit 18 [pp.4-5])

69. Complainant's annualized pay was derived by multiplying her hourly rate of $17.80 by 40 hours per week, multiplied by 52 weeks per year, for a total of $37,024. Her monthly pay was calculated at $3,085.33 multiplied by 2.5, for a total of $7,713.33. (Tr. 211-12; Complainant's Exhibit 13)

70. The same calculation using an hourly rate of $17.98 results in a total of $7,791.33, for a difference of $78. (Tr. 212)

71. After Complainant filed her Division complaint, she received a W-2 form and check for $210.26 from Respondent. Complainant believed that the check was intended to be a full "settlement" of her Division complaint, and she returned the check. (Tr. 95, 106-08, 117-18; Complainant's Exhibit 26)

OPINION AND DECISION

It is unlawful for an employer to discriminate against an employee because of disability. N.Y. Exec. Law § 296.1 (a). A complainant has the burden of establishing a prima facie case by showing that: (1) she is a member of a protected group; (2) she was qualified for the position held; (3) she suffered an adverse employment action; and (4) the respondent's actions occurred under circumstances giving rise to an inference of discrimination. Once a prima facie case is

established, the burden of production shifts to the respondent to clearly articulate legitimate, nondiscriminatory reasons for its action. If respondent does so, the complainant has the opportunity to rebut respondent's proof by demonstrating that the respondent's proffered reasons for its action were pretextual in nature. *Ferrante v. American Lung Ass'n*, 90 N.Y.2d 623, 630, N.Y.S.2d 25, 29 (1997).

A disability is defined under the Human Rights Law as "... a physical, mental or medical impairment resulting from anatomical, physiological or neurological conditions which prevents the exercise of a normal bodily function or is demonstrable by medically accepted clinical laboratory techniques..." Human Rights Law § 292.21. In order to meet this definition, an employee must only show that he suffers from some diagnosable impairment. *Nowak v. EGW Home Care, Inc.*, 82 F. Supp. 2d 101, 111 (W.D.N.Y. 2000) (citing *State Division of Human Rights v. Xerox Corp.*, 65 N.Y.2d 213, 218-19, 491 N.Y.S.2d 106, 109 (1985)).

In the instant case, Complainant suffered from a knee condition requiring surgery, and from subsequent depression. Complainant had a disability as that term is defined in the Human Rights Law, and is thus a member of a protected class. Complainant was qualified for her position of operations coordinator. Respondent initially refused to allow Complainant a performance appraisal and pay raise, and then gave her a reduced raise, all because she had been on leave for her surgery and depression. Respondent's actions deprived Complainant of wages and severance benefits. Complainant suffered an adverse job action under circumstances raising an inference of discrimination. Complainant has established a prima facie case of discrimination. Respondent failed to articulate legitimate, nondiscriminatory reasons for its actions. This claim is sustained, and damages are awarded.

Complainant also alleged that her position was eliminated, and that she was denied a

tuition waiver benefit for her daughter, because of unlawful discrimination. Complainant suffered adverse employment actions when her position was eliminated and when the tuition waiver benefit was denied. However, Complainant failed to establish that Respondent took these actions under circumstances permitting an inference of discrimination. Respondent eliminated Complainant's job, and those of other employees in her department, because of a business decision to close the Goss press operation. Because Complainant's position was eliminated before she met the five year employment requirement, she was denied the tuition waiver benefit pursuant to Respondent's severance and education benefit policies. These claims are dismissed.

Damages

As a result of Respondent's denial of a full merit pay increase, Complainant lost $79.68 in wages. She also lost $78 in severance payments, for a total of $157.68.

Complainant is also entitled to an award for mental anguish and humiliation. A complainant is entitled to recover compensatory damages for mental anguish caused by a respondent's unlawful conduct. In considering an award for 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 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 Authority v. State Div. of Human Rights (Nash), 78 N.Y.2d 207, 216, 573 N.Y.S.2d 49, 54 (1991). The severity, frequency and duration of the conduct may be considered in fashioning an appropriate award. *New York State Department of Correctional Services v. State Div. of Human Rights*, 225 A.D.2d 856, 859, 638 N.Y.S.2d 827, 830 (3d Dept. 1996).

Complainant suffered from depression sufficiently severe to require her to go on disability leave for approximately three months. Before she returned to work, Complainant was informed that her job would be eliminated. Upon her return, Complainant was anxious, "angry," and "confused" because of Respondent's initial denial of her request for a performance appraisal, and because of Respondent's subsequent refusal to grant her the full merit pay raise. Complainant and her husband were forced to pay for their daughter's tuition when they were denied the tuition waiver benefit. As set forth above, all of these circumstances contributed to Complainant's agitation and distress. However, the record evidence demonstrates that Complainant's concern about the performance appraisal could have lasted no longer than a few weeks before Respondent relented and granted her the appraisal. Her concern about the merit pay raise, although not so limited in duration, appears minimal in light of the damages she actually incurred, a matter of less than $158. There is little reliable proof as to the duration of Complainant's condition, its severity, or consequences as these relate to the Respondent's acts of discrimination. Therefore, an award of $3,500.00 for emotional distress is appropriate and would effectuate the purposes of the Human Rights Law. *Goffe v. Alterra Healthcare Corp.*, SDHR 10113568 (April 5, 2010) ($2,500 "nominal damages" for mental anguish based on inference that some damage was incurred by violation of the Human Rights Law); *Sevilla v. Gottlieb*, SDHR 10119299 (April 24, 2009) ($2,500 award based on Complainant's testimony that she "felt badly," "hurt" and "disrespected").

Civil Fines and Penalties

Pursuant to Human Rights Law § 297, the Division may assess civil fines and penalties. The factors that determine the appropriate amount of a civil fine and penalty are the goal of deterrence; the nature and circumstances of the violation; the degree of respondent's culpability; the relevant history of respondent's actions; respondent's financial resources; and other matters as justice may require.

In the instant case, there was no proof in the record regarding Respondent's financial resources. Respondent's senior human resources representative testified credibly that she would not recommend reducing an employee's pay raise because of disability if confronted with that situation today. Respondent ignored Complainant's repeated attempts to correct the error, and denied her the full merit pay raise. Under these circumstances, a civil fine of $5,000.00 will be appropriate to deter Respondent from future discriminatory behavior.

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 that Respondent, and its agents, representatives, employees, successors, and assigns, shall cease and desist from 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 60 days of the date of the Commissioner's Order, Respondent shall pay to Complainant the sum of $79.68 for lost wages. Interest shall accrue on the lost wage

amount at a rate of nine percent per annum from August 7, 2012, a reasonable intermediate date, until payment is made by Respondent.

2. Within 60 days of the date of the Commissioner's Order, Respondent shall pay to Complainant the sum of $78.00 for lost severance pay. Interest shall accrue on this sum at a rate of nine percent per annum from September 14, 2012, the date of Complainant's last day of work, until payment is made by Respondent.
3. Within 60 days of the date of the Commissioner's Order, Respondent shall pay to Complainant the sum of $3,500.00, 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. Interest shall accrue on the award at the rate of nine percent per annum from the date of the Commissioner's Order until payment is made by Respondent.
4. The aforesaid payments shall be made by Respondent in the form of three certified checks made payable to the order of Complainant, Eileen Lieb, and delivered by certified mail, return receipt requested, to her attorney, Kimberly A. Glennon, Esq., 160 Linden Oaks, Rochester, New York 14625.
5. Within 60 days of the date of the Commissioner's Order, Respondent shall pay the sum of $5,000.00 as a civil fine and penalty, by certified check made out to the "State of New York" and delivered by certified mail, return receipt requested, to the offices of Caroline Downey, Esq., General Counsel of the Division of Human Rights, at One Fordham Plaza, 4th floor, Bronx, New York, 10458. Interest shall accrue at the rate of nine percent per annum on any amount paid after 60 days from the date of said Final Order until payment is made.

6. Within 60 days of the date of the Commissioner's Order, Respondent shall develop and implement a training program in the prevention of unlawful discrimination in accordance with the Human Rights Law. Respondent shall provide this training to all supervisory and human resources personnel. A copy of the training program shall be provided to Caroline Downey, Esq., General Counsel of the Division, at One Fordham Plaza, 4th floor, Bronx, New York, 10458.
7. Respondent shall furnish written proof to the New York State Division of Human Rights, Compliance Unit, Att'n Barbara Buoncristiano, One Fordham Plaza, 4th floor, Bronx, New York 10458, of its compliance with the directives contained in this order.

DATED: January 9, 2015
Bronx, New York

Michael T. Groben
Administrative Law Judge