



ANDREW M. CUOMO
GOVERNOR

**NEW YORK STATE
DIVISION OF HUMAN RIGHTS**

**NEW YORK STATE DIVISION
OF HUMAN RIGHTS**

on the Complaint of

GARY MARCUS,

Complainant,

v.

ALL ISLAND AIRPORT SERVICE, INC.,

Respondent.

**NOTICE AND
FINAL ORDER**

Case No. 10135993

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 November 29, 2013, by Margaret A. Jackson, 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, ACTING COMMISSIONER, AS THE FINAL ORDER OF THE NEW YORK STATE DIVISION OF HUMAN RIGHTS (“ORDER”) WITH THE FOLLOWING AMENDMENTS:

- Findings of Fact 6 and 8 are not adopted.

- With the exception of the first two sentences, the analysis in the Opinion and Decision section of the Recommended Order is not adopted. It is an unlawful discriminatory practice for a place of public accommodation to refuse to make reasonable modifications to its policies, practices, or procedures, when such modifications are necessary to afford facilities, privileges, advantages or accommodations to individuals with disabilities, unless it can be demonstrated that making such modifications would fundamentally alter the nature of such facilities, privileges, advantages or accommodations. *See* Human Rights Law § 296.2(c)(i). Here, Respondent did not permit drivers to transport wheelchair-bound customers in sedan taxis, even in situations where the customers were able to transfer to the vehicle on their own. Instead, such customers were required to reserve and be transported by ambulette. Respondent failed to show that modifying or eliminating that practice would be an undue hardship or would fundamentally alter the nature of the public accommodation.
- Respondent's argument that it is not responsible for the conduct of the drivers is unavailing. Respondent is liable for the conduct because it encouraged, condoned, and approved it. *See Totem Taxi, Inc. v. NYS Human Rights Appeal Bd.*, 65 N.Y.2d 300 (1985). Whether the drivers were employees or independent contractors is immaterial. *See Dunn v. Wash. County Hosp.*, 429 F.3d 689 (7th Cir. 2005) (“Because liability is direct rather than derivative, it makes no difference whether the person whose acts are complained of is an employee, an independent contractor, or for that matter a customer. Ability to ‘control’ the actor plays no role.”). *See also Halpert v. Manhattan Apartments*, 580 F.3d 86

(2d Cir. 2009) (“If a company gives an individual authority to [act] on the company's behalf, then the company may be held liable if that individual improperly discriminates Significantly, however, the company’s potential liability does not depend on whether the individual . . . is an employee or an independent contractor.”)

- Considering the the nature and circumstances of the conduct and the degree of Complainant's suffering, a reduction of the mental anguish award to \$3,000 is warranted. *See Wal-Mart Stores East, L.P. v. NYS Div. of Human Rights*, 71 A.D.3d 1452 (4th Dept. 2010). *See also Swails v. Classic Fashion Resources, Inc., d/b/a Pittsford Pendleton Shop*, DHR Case No. 10115313 (February 6, 2008); *Keimel v. Manchester Newspapers d/b/a Free Press*, DHR Case No. 10102907 (May 1, 2007).
- The facts at issue in this case occurred in October 2008. At that time, civil fines and penalties were not available in public accommodation cases. The amendment to the Human Rights Law permitting civil fines and penalties in public accommodation cases did not go into effect until July 6, 2009. As such, no civil fines and penalties are awarded in this matter.

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: **FEB 13 2014**
Bronx, New York



HELEN DIANE FOSTER
ACTING COMMISSIONER



ANDREW M. CUOMO
GOVERNOR

**NEW YORK STATE
DIVISION OF HUMAN RIGHTS**

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on the Complaint of

GARY MARCUS,

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v.

ALL ISLAND AIRPORT SERVICE, INC.,

Respondent.

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

Case No. **10135993**

SUMMARY

Complainant was diagnosed with cerebral palsy, a neurological disease considered a disability under the Human Rights Law. As a result, he has limited mobility and ambulates only with the assistance of a wheelchair. Complainant alleges that Respondent unlawfully discriminated against him when it failed to provide him with a public accommodation consisting of taxi service to his destination. Respondent did not take reasonable steps to accommodate Complainant in accordance with the Human Rights Law. As a result, Respondent is liable to Complainant for compensatory damages in the form of mental anguish and to the State of New York for civil fines and penalties.

PROCEEDINGS IN THE CASE

On September 1, 2009, Complainant filed a verified complaint with the New York State Division of Human Rights (“Division”), charging Respondent with unlawful discriminatory practices relating to public accommodation 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 Margaret A. Jackson, an Administrative Law Judge (“ALJ”) of the Division. Public hearing sessions were held on September 12, 2012 and July 26, 2013.

On September 12, 2012,¹ Complainant appeared via telephone and Respondent appeared in person. The Division was represented by Bellew S. McManus, Esq. Respondent was represented by Cobert, Haber & Haber, by Eugene F. Haber, Esq. On July 26, 2013,² Complainant appeared via telephone. Respondent did not appear. However, Eugene F. Haber, Esq. appeared on Respondent’s behalf.

On or about June 12, 2013, Respondent’s counsel received a second notice of hearing and inquired about the need for a second hearing. The Division contacted Respondent’s counsel and notified him that a second hearing session was scheduled to obtain additional information about the alleged status of Respondent’s drivers as independent contractors. (T2. 5)

Despite notification about the purpose of the hearing, Blessinger did not appear on the July 26, 2013 hearing date. When questioned further, Respondent’s counsel alleged that Blessinger

¹ The hearing transcript of September 12, 2012 is designated as T1.

² The hearing transcript of July 26, 2013 is designated as T2.

was the only person with information about the status of Respondent's taxi drivers as employees or independent contractors. (T2. 5)

FINDINGS OF FACT

1. Complainant was diagnosed with cerebral palsy at three years of age. (T1. 9)
2. Complainant uses a wheel chair for mobility and performs all of his daily activities from the wheelchair. Complainant is unable to walk, but he is able to get in and out of the wheelchair in order to stand and rotate himself from one seated position to another. (T1. 9-10, 18)
3. Respondent owns and operates several taxis from various locations on Long Island, including Rockville Centre (RVC), New York. (T1. 38)
4. Respondent provides taxi service to passengers to various destinations. Respondent alleges that there are approximately fifteen taxis present at the RVC train station location daily. (T1. 39)
5. Respondent further alleges that the drivers of the taxis are not employees. However, all drivers must lease and use only sedan type cars or mini-vans which are licensed by Respondent and leased to drivers from Respondent. The cars are all marked with the location of the vehicles. In this case, all of the cars are identified with All Island Rockville Centre logos. (T1. 39, 44)
6. The drivers pick up the cars at Respondent's depot or at the train station. The drivers also report to work as directed by Respondent, and receive wages based on a fee structure that is determined by Respondent. The drivers are prohibited from searching for or picking up passengers while driving. The drivers are told which calls to take from the dispatcher, who is inside Respondent's dispatch office at the RVC station. (T.1 45; Respondent's Exhibit 1, Article XII § 297-38 (H))

7. Per RVC village guidelines, “No taxicab person shall refuse or neglect to convey, any orderly person, upon request, unless previously engaged to full capacity or unless the transportation of such person shall substantially delay or inconvenience passengers who have already engaged in his taxicab.” (Respondent’s Exhibit 1 Article XII § 297-38 (H))

8. The fee charged by the drivers is set by Respondent and the Village of Rockville Centre’s regulating authority. The driver does not keep the full amount of the fee charged to the passenger. As determined by Respondent, a percentage of each fare collected is given back to Respondent. (Respondent’s Exhibit 1)

9. A schedule of charges is recognized in the village guidelines for senior and disabled passengers. (Respondent’s Exhibit 1)

10. Respondent’s Vice President, Lawrence Blessinger, testified that per Respondent, passengers who cannot get into a taxi by themselves, are required to take another form of transportation. (T1. 47)

11. However, Complainant, who is able to stand and rotate himself from his wheelchair into a taxi cab’s seat, commuted using Respondent’s RVC taxi service for many years while attending classes at Hofstra University located in Uniondale, New York and to visit his doctors in RVC. (T1. 10, 18, 33)

12. Complainant relocated to Florida in 1999. In 2008, unaccompanied, he returned to New York for a doctor’s visit. He flew into John F. Kennedy International Airport. He then went to the Long Island Railroad station in Jamaica, New York and took the train to RVC where he attempted to take a taxi from Respondent’s dispatch office to a doctor’s office which was located seven to eight blocks from the station. (T1.10-11, 19)

13. After disembarking the train and proceeding to the street level via an elevator, Complainant called across the street to two taxi drivers standing in front of Respondent's cars outside the dispatcher's office and requested a taxi. The two taxi drivers walked across the street and one of the men told Complainant that he could not lift him into the cab. Complainant informed the man that he could get into the taxi without assistance. The man then told Complainant to call the doctor's office to get an ambulette to transport him to the doctor's office. (T1.12-13, 22)

14. The two drivers went into the dispatch office for approximately nine minutes. When they came out they told the Complainant that they were not going to lift his wheelchair into a regular taxi. They told the Complainant that they were going to call a mini-van to transport him. Complainant informed them that he could not lift himself into a mini-van because it was too high, but he could lift himself into the front seat of the taxi which he had always done. (T1. 14, 26)

15. With reservation, Complainant agreed to take the mini-van. However, he was unable to get into this higher vehicle. (T1. 14, 27)

16. One of the cab drivers pushed Complainant in his wheelchair the distance of three or four blocks across Sunrise Highway and abandoned the Complainant sitting on the sidewalk adjacent to Sunrise Highway to push himself to the doctor's office. (T1. 15, 27)

17. Complainant was late for his doctor's appointment as he traveled, pushing himself, through the streets along Sunrise Highway without assistance. Complainant, who also has a hiatal hernia, had a second doctor's appointment scheduled at another location. After being refused service by Respondent, Complainant left the first doctor's office and pushed himself an additional ten blocks to another doctor's office. (T1. 15)

18. Upon leaving the second doctor's office, Complainant took a wheelchair accessible bus to Roosevelt Field where his sister picked him up and drove him back to the airport. (T1. 15-16, 30)

19. Complainant was confused and frustrated following the incident. (T1.17)

OPINION AND DECISION

The Human Rights Law makes it an unlawful discriminatory practice for an owner or proprietor of a place of public accommodation directly or indirectly to refuse, withhold from, or deny to any person any of the accommodations, advantages, facilities or privileges thereof, because of that person's disability. See Human Rights Law § 296.2 (a).

A taxi cab company, such as Respondent, is a place of public accommodation. Respondent's position that its drivers are independent contractors is unsupported by the record.

The Human Rights Law defines an "employer" in Section 292.5, by making reference only to the number of persons in its employ. It does not offer a definition that would provide guidance into whether an employer-employee relationship exists. Courts have held, however, that four elements should be considered in determining if such a relationship exists: (1) selection and engagement of the servant; (2) the payment of salary or wages; (3) the power of dismissal; and, (4) the power of control over the servant's conduct. State Division of Human Rights (*Emrich v. GTE Corp.*, 109 A.D.2d 1082, 1083, 487 N.Y.S.2d 234, 235 (4th Dept. 1985)). The key element is the fourth element, in that an employer-employee relationship can be found based upon evidence that the employer exercised "control over the results produced or over the means used to achieve the results." *Scott v. Massachusetts Mutual Life Ins. Co.*, 86 N.Y.2d 429, 433,

633 N.Y.S.2d 754 (1995) (quoting *Matter of Ted is Back, Corp.*, 64 N.Y.2d 725, 726, 485 N.Y.S.2d 742 (1984)).

It is reasonable to conclude that Respondent's drivers at the RVC taxi location are employees. Respondent hires the drivers who report to the RVC train station which is the location designated by Respondent. The drivers then take passengers that are designated by the dispatch office. The fare charged by the Respondent is determined by Respondent and the Village of Rockville Centre. The fee split arrangement is then set by Respondent, thereby determining the wages of the driver. The driver is not permitted to pick up fares other than those given to him by the dispatcher. It is unlikely that the drivers report to work without a schedule that is set by Respondent. After reporting to work, the drivers must abide by the rules of conduct set by Respondent.

In the instant case, Respondent's drivers are prohibited, by regulation, from refusing to convey Complainant. Respondent need not recognize its drivers based on Complainant's description. The mere fact that they attempted to get Complainant into one of Respondent's cabs, called for an ambulette from the dispatch office, then pushed Complainant across to Sunrise Highway and abandoned him, is sufficient indication that they were working for Respondent. They did not provide transportation to Complainant. *See, Totem Taxi, Inc. v. New State Human Rights Appeal Bd.*, 65 N.Y.2d 300, 480 N.E.2d 1075 N.Y. (1985). Therefore, they failed to provide a public accommodation.

Complainant is entitled to an award of compensatory damages owing to the emotional distress he suffered as a result of Respondent's actions. "Mental 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 (Nash)*, 78 N.Y.2d

207, 216, 573 N.Y.S.2d 49, 54 (1991). “An award of damages for mental anguish will be upheld where...it is reasonably related to the wrongdoing, is supported by substantial evidence, and is comparable to awards for similar injuries.” *Kondracke v. Blue*, 277 A.D.2d 953, 716 N.Y.S. 2d 533 (4th Dep’t. 2000); *State Div. of Human Rights v. Muia*, 176 A.D.2d 1142, 1144, 575 N.Y.S.2d 957, 960 (3d Dept. 1991).

As a result of Respondents’ actions, Complainant has suffered emotionally. He has a hiatal hernia and depends on public transportation because he is unable to ambulate on his own. Complainant suffers emotional anguish resulting from his confusion, frustration and subsequent abandonment. Accordingly, an award of \$10,000 will effectuate the remedial purposes of the Human Rights Law and is consistent with similar cases. *MTA Trading, Inc. v. Kirkland*, 84 A.D.3d 811, 922 N.Y.S.2d 488 (2d Dept. 2011); *Bemis v. New York State Div. of Human Rights*, 26 A.D.3d 609 (3d Dep’t. 2006).

Because of Respondent’s actions, Respondents shall also be liable to the State of New York for civil fines and penalties. 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 fine and 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 Terr. Apts.*, SDHR Case Nos. 10107538 and 10107540, November 15, 2007, *aff’d*, *Sherwood Terrace Apartments v. N.Y. State Div. of Human Rights (Gostomski)*, 61 A.D.3d 1333, 877 N.Y.S.2d 595 (4th Dept.

2009), *119-121 East 97th Street Corp, et. al., v. New York City Commission on Human Rights, et. al.*, 220 A.D.2d 79; 642 N.Y.S.2d 638 (1st Dept.1996)

A civil fine is appropriate in this matter. Human Rights Law §297 (4)(c)(vi) directs the Division to assess civil fines and penalties, “in an amount not to exceed fifty thousand dollars, to be paid to the state by a respondent found to have committed an unlawful discriminatory act, or not to exceed one hundred thousand dollars to be paid to the state by a respondent found to have committed an unlawful discriminatory act which is found to be willful, wanton or malicious.” Statutory directives require a civil fine and penalty of greater than \$50,000.00 for cases in which a respondent’s actions were willful, wanton, and malicious.

The proof established that Respondent’s actions easily met the statutory thresholds of willful, wanton, and malicious. Respondent’s employees acted with deliberate indifference to Complainant’s disability and protected rights. The drivers acted in a manner considered outrageous in a civil society. Then, Respondent did not participate in the hearing process. Given the above, and the Division’s goal of deterrence, a civil fine of \$15,000.00 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 their agents, representatives, employees, successors, and assigns, shall cease and desist from discriminatory practices in providing a public accommodation; and it is further

ORDERED that Respondent shall take the following affirmative 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 Final Order, Respondent All Island Airport Service, Inc., shall establish policies regarding the prevention of unlawful discrimination. These policies shall include an official anti-discrimination policy. The policies shall also contain the development and implementation of a training program relating to the prevention of unlawful discrimination in accordance with the Human Rights Law. Training and a copy of the policies shall be provided to all employees and independent contractors, and the policies shall be posted prominently where they may be viewed by everyone in the workplace.

2. Within 60 days of the Commissioner's Final Order, Respondent, All Island Airport Service Inc., shall pay to Complainant, Gary Marcus, \$10,000 as compensatory damages due to his emotional distress. Payment shall be made in the form of a certified check made payable to Complainant, Gary Marcus, to his address at 281 Fort Augustine Circle in Ocoee, Florida 34761. A copy of the certified check shall be delivered by certified mail by return receipt requested to Caroline Downey, Esq., General Counsel of the Division, One Fordham Plaza, 4th Floor, Bronx, New York 10458. Interest on this award shall accrue at a rate of nine per cent per annum from the date of the Commissioner's Order until payment is made in accordance with Division practice and C.P.L.R. §5004.

3. Within sixty days of the date of the Commissioner's Final Order, Respondent shall pay to the State of New York the sum of \$15,000.00 as a civil fine and penalty for its violations of the Human Rights Law. The payment of the civil fine and penalty shall be made by Respondent All Island Airport Service, Inc., 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, if any, shall be paid at a rate determined by the Commissioner.

4. Respondent shall simultaneously furnish written proof of Respondent's compliance with all of the directives contained within this Order to Caroline Downey, Esq., General Counsel of the Division, at her office address at One Fordham Plaza, 4th Floor, Bronx, New York, 10458.

5. Respondent shall cooperate with the Division during any investigation into its compliance with the directives contained in this order.

DATED: November 29, 2013
Hempstead, New York

A handwritten signature in black ink that reads "Margaret A. Jackson". The signature is written in a cursive style with a large, sweeping flourish at the end of the name.

Margaret A. Jackson
Administrative Law Judge