



ANDREW M. CUOMO  
GOVERNOR

**NEW YORK STATE  
DIVISION OF HUMAN RIGHTS**

**NEW YORK STATE DIVISION  
OF HUMAN RIGHTS**

on the Complaint of

**CRYSTAL MARTINEZ,**

Complainant,

v.

**INTERNATIONAL FINANCIAL SERVICES  
GROUP, CARLOS ZAPATA,**

Respondents.

**NOTICE AND  
FINAL ORDER**

Case No. 10167153

Federal Charge No. 16GB401761

**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 April 16, 2015, by Thomas S. Protano, an Administrative Law Judge of the New York State Division of Human Rights (“Division”). An opportunity was given to all parties to object to the 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: **MAY 19 2015**  
Bronx, New York

  
HELEN DIANE FOSTER  
COMMISSIONER



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on the Complaint of

**CRYSTAL MARTINEZ,**

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v.

**INTERNATIONAL FINANCIAL SERVICES  
GROUP, CARLOS ZAPATA,**

Respondents.

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

Case No. **10167153**

**SUMMARY**

Complainant alleges that Respondents' terminated her employment because of her disability and harassed her because of her national origin. Although Complainant has failed to prove she was harassed because of her national origin, she has shown that her employment was terminated because of her disability. She is therefore entitled to recover damages from Respondents. In addition, civil fines and penalties are assessed against Respondent.

**PROCEEDINGS IN THE CASE**

On February 13, 2014, Complainant filed a verified complaint with the New York State Division of Human Rights ("Division"), charging Respondents 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 Respondents 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 Thomas S. Protano, an Administrative Law Judge (“ALJ”) of the Division. Public hearing sessions were held on December 1, 2014 and December 2, 2014.

Complainant and Respondents appeared at the hearing. Complainant was represented by William J. Sipser, Esq. Respondents were represented by Neil A. Margulies, Esq.

### **FINDINGS OF FACT**

1. Complainant is Puerto Rican. Complainant suffers from insomnia, anxiety and major depressive disorder. (Complainant’s Exhibits 5, 6; Tr. 29)
2. Complainant worked for Respondent International Financial Services Group (“IFSG”), a collection agency from March 17, 2008 to June 17, 2013. (Tr. 19)
3. Complainant was a bill collector. Her duties included collecting monies owed to Respondents’ clients. (Tr. 20)
4. Carlos Zapata (“Zapata”) is an employee of IFSG, which is owned by his son, Daniel. Carlos Zapata is the marketing director of sales. (Complainant’s Exhibit 16; Tr. 86, 156)
5. Complainant alleged in her complaint that Zapata made disparaging remarks about Puerto Ricans. Complainant stated that Zapata told her he was Italian and Puerto Rican. (ALJ’s Exhibit 2; Tr. 30)
6. Zapata states he is Puerto Rican and “101 percent Latino.” (Complainant’s Exhibit 16; Tr. 87)

7. In 2010, while at work, Complainant became ill and was forced to seek medical attention. (Tr. 21)

8. While Complainant was at the hospital seeking medical attention, Zapata called her repeatedly, threatening her and telling her she needed to be at work. (Tr. 22-23)

9. Zapata's calls became such a distraction that the doctor attending to Complainant took Complainant's phone and instructed Zapata to leave Complainant alone so he could treat her. (Tr. 21-22)

10. Complainant was considered an "excellent" collector, despite the fact that she had had some disagreements with her supervisors. Complainant had a problem with absences and had resigned and returned after a disagreement with Respondent's management. (Respondents' Exhibit 5; Tr. 100)

11. On May 13, 2013, Complainant had a panic attack while at work. (Tr. 33)

12. Complainant was taken by ambulance to Jacobi Hospital from her place of work. (Tr. 34)

13. Upon her return to work, Complainant notified Respondents of her medical conditions, which were anxiety, panic attacks and depression. (Tr. 37)

14. On or about June 3, 2013, Complainant asked for time off to attend a psychiatric appointment on June 17, 2013. Respondents did not approve the leave time. (Tr. 38)

15. While Complainant was seeing the psychiatrist, Zapata repeatedly called Complainant. After Complainant hung up on Zapata, Zapata sent Complainant a text message at 10:23 a.m., telling her she was fired. Complainant was supposed to start her day at 9:00 a.m. (Complainant's Exhibits 3, 4; Tr. 41)

16. Although Zapata asserts he only briefly spoke to Complainant and hung up, a doctor's report submitted by Complainant states that "[Complainant's] boss called her while she was in interview with me and harassed her by phone." (Complainant's Exhibit 4; Tr. 117-19)

17. Zapata also stated that he called Complainant after "she was terminated already." (Tr. 117)

18. Zapata said he terminated Complainant's employment because "she was a no show. She disappeared." (Tr. 118)

19. Zapata stated that he tried to reach Complainant "all day long," despite the fact that he had reached her and fired her, via text message, at 10:23 a.m. (Tr. 160)

20. Zapata also stated that Complainant was not dismissed by Respondent, but that Complainant resigned. (Tr. 128)

21. Zapata further stated that Complainant was dismissed, but he did not dismiss her. He asserts his son, Daniel, and Rebecca Rivera, office manager, terminated Complainant's employment. (Tr. 133, 159)

22. Rivera stated that Complainant was deemed to have resigned when she did not call in on June 17, 2013. (Tr. 272)

23. In May of 2013, Rivera questioned Complainant about her health. Rivera's notes indicate that Rivera pressed Complainant to discuss her condition. When Complainant indicated she was "not comfortable discussing her health issue," Rivera called the treatment center that had been treating Complainant. (Respondents' Exhibit 5; Tr. 268)

24. Rivera's notes describe Complainant as "weird" and "very different from normal." (Respondents' Exhibit 5)

25. After calling the treatment center, Rivera confronted Complainant with the fact that Complainant was seeing a social worker and asked Complainant why she was seeing a social worker. (Tr. 268)

26. At the time of her dismissal, Complainant was earning \$21.23 per hour. She worked 36.5 hours per week. (Respondents' Exhibit 5; Tr. 20)

27. Respondent contested Complainant's claim for unemployment insurance benefits ("UIB"), alleging that Complainant lost her job because of "misconduct." Complainant received benefits after a hearing. (Complainant's Exhibit 7)

28. Complainant received a total of \$9,179.00 in UIB when the benefits ran out, in January 2014. (Complainant's Exhibit 8)

29. Despite making diligent efforts to find suitable employment, Complainant has not been able to secure a new job. (Complainant's Exhibits 9, 10; Tr. 56-57)

30. After her employment was terminated, Complainant became more depressed than she had been previously. She continued to seek psychiatric treatment and took medication to alleviate her symptoms of depression and insomnia. Her symptoms persist to this day. (Tr. 59-61)

### **OPINION AND DECISION**

An employer may not fire or otherwise discriminate against an employee with a disability unless that disability precludes the employee from performing the essential duties of the job. N.Y. Exec. Law, art. 15 (Human Rights Law) §296.1(a); *see also, Miller v. Ravitch*, 60 N.Y.2d 527, 470 N.Y.S.2d 558 (1983). A "disability" is "... 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 or laboratory

techniques ... ." Human Rights Law § 292.21. In order to meet this definition, an employee must only show 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 Div. of Human Rights v. Xerox Corp.*, 65 N.Y.2d 213, 218-19, 491 N.Y.S.2d 106 (1985); *Reeves v. Johnson Controls World Servs., Inc.*, 140 F.3d 144, 154-56 (2d Cir. 1998)).

In order to prevail, Complainant must first make out a prima facie case of unlawful discrimination. To do so, a complainant must show that he suffered from a disability, and that the disability engendered the behavior for which he was discriminated. *McEniry v. Landi*, 84 N.Y.2d 554, 558, 620 N.Y.S.2d 328 (1994); *Thide v. New York State Dep't. of Transp.*, 27 A.D.3d 452, 811 N.Y.S.2d 418 (2d Dept. 2006). If a complainant can establish a prima facie case of discrimination or retaliation, the respondent must then articulate a legitimate, non-discriminatory business reason for its actions. If the respondent does so, then the complainant must show that the proffered reason is a pretext for discrimination. *Pace University v. N.Y. City Comm. on Human Rights*, 85 N.Y.2d 125, 128, 623 N.Y.S.2d 765 (1995); *Pace v. Ogden Svcs. Corp.*, 257 A.D.2d 101, 692 N.Y.S.2d 220 (3d Dept. 1999)

Complainant has established her prima facie case. She suffered from mental illnesses, including depression and anxiety; she was well qualified for the position she held for over five years; and her employment was terminated shortly after she was removed from her work place in an ambulance and informed her employers about her mental condition. From these circumstances, one can infer that unlawful discrimination, based upon disability, occurred.

The burden now shifts to Respondents to articulate a legitimate, non-discriminatory reason for the actions it took. Respondents have been unable to accomplish that. Zapata's testimony lacks any semblance of credibility. He alternately states that Complainant was not



fired, was fired by him and was fired by others. His assertions contradict Rivera's testimony and they contradict the position Respondents took when opposing Complainant's UIB. More significantly, Zapata contradicted himself repeatedly. In addition, he said he tried to reach Complainant "all day long" when Complainant's cell phone record shows that he sent the text message dismissing her at 10:23 a.m. Zapata and Rivera both indicate that Complainant could not be reached, yet Zapata admitted that he spoke to Complainant while she was with her doctor. Given the discrepancies, the vague and inconsistent assertions of Rivera and, especially, Zapata, and after viewing the demeanor and temperament of Zapata at hearing, it is clear that none of Respondents' stated reasons for terminating Complainant's employment can be credited. There remains only one explanation for the termination of Complainant's employment: Complainant was dismissed because she suffered from anxiety and depression and had an anxiety attack while working for Respondents. Complainant had attendance problems and problems getting along with her superiors before her anxiety attack, which Respondents did not consider serious enough to sever their relationship with her. It was only after the anxiety attack that her behavior became intolerable to Respondents. She has thus shown Respondents' stated reasons for terminating her employment to be pretextual. Thus, IFSG, as her employer, is liable for unlawfully discriminating against Complainant.

Zapata, unlike IFSG, is not an employer under the Human Rights Law. There is no evidence that he is anything more than an employee of IFSG, which was Complainant's employer as well. An employee cannot be sued as an employer under the Human Rights Law, even though he is a manager, without some ownership interest or some authority to do more than carry out decisions made by others. *Patrowich v. Chemical Bank*, 62 N.Y. 2d 541, 43 N.Y.S. 2d 659 (1984). Nothing in the record supports a conclusion that Zapata has the type of authority

that could classify him as an employer under the Human Rights Law. The Human Rights Law does state that it is unlawful discriminatory practice for any person “to aid, abet, incite, compel or coerce the doing of any of the acts forbidden under this article, or attempt to do so.” Human Rights Law § 296.6. Thus, as the individual who is responsible for firing Complainant, Zapata can be considered an aider and abettor under the Human Rights Law and liable for damages.

Complainant also states that she was discriminated against because of her national origin and that Zapata made repeated remarks about her Puerto Rican national origin. In order to prevail on a claim of harassment based upon her national origin, Complainant must demonstrate that she was subjected to a work environment permeated with discriminatory intimidation, ridicule and insult that is sufficiently severe or pervasive to alter the conditions of 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 Community Ctr. v. N.Y. State Div. of Human Rights*, 221 A.D.2d 44, 50, 642 N.Y.S.2d 739, 744 (4<sup>th</sup> Dept. 1996), *lv. denied*, 89 N.Y.2d 809, 655 N.Y.S.2d 889 (1997). Complainant has not shown that the alleged comments made by Zapata were severe or pervasive enough to rise to the level of unlawful harassment based upon national origin. She has given little information about the frequency or timing of the comments and, therefore, her claim of national origin discrimination must fail.

As a result of Respondents’ violation, Complainant is entitled to lost wages for the period of time she has been unemployed. *See* Human Rights Law § 297.4(c). Complainant has been out of work for 95 weeks. During that time, she would have earned \$73,615.03 had she remained employed by Respondents. During that period, she received \$9,179.00 in UIB, which must be deducted from her lost wages. Thus, Complainant is entitled to receive \$64,436.03 from

Respondents in back wages. No deductions or withholdings should be made from these back wages. *Bell v. NYS Division of Human Rights*, 36 A.D.3d 1129, 827 N.Y.S.2d 779 (3<sup>rd</sup> Dept., 2007). Complainant is entitled to pre-determination interest on the back wage award at a rate of nine percent per year, from May 15, 2014, a reasonable intermediate date. “An award of interest is often appropriate from the time which a party was deprived of the use of money since without the addition of interest, the aggrieved party is not made whole.” *Aurecchione v. New York State Division of Human Rights*, 98 N.Y.2d 21, 771 N.E.2d 231, 744 N.Y.S.2d 349 (2002). Under New York law, prejudgment interest is calculated on a simple interest basis. *Patane v. Romeo*, 235 A.D.2d 649, 651, 652 N.Y.S.2d 142, 144 (1st Dept. 1997); *Long Playing Sessions, Inc. v. Deluxe Laboratories, Inc.*, 129 A.D.2d 577, 601 N.Y.S.2d 186 (1st Dept. 1987).

As a result of the Respondents’ discriminatory actions, Complainant is entitled to recover damages from Respondents owing to her emotional distress. Complainant suffered depression and anxiety after losing her job. Although she suffered some anxiety prior to losing her job, the symptoms increased after her dismissal. Complainant was dismissed because of her mental afflictions and the Court has stated that “distress follows such bias and exclusion as night follows day.” Complainant is therefore entitled to \$10,000.00, which is reasonably related to the harm she suffered and will effectuate the purpose of the Human Rights Law. *Kowalewski v. New York State Division of Human Rights*, 26 A.D.3d 888, 809 N.Y.S. 2d 347 (4<sup>th</sup> Dept. 2006); *Bayport-Blue Point School District v. State Division of Human Rights*, 131 A.D. 2d 849, 517 N.Y.S. 2d 209 (2d Dept. 1987).

Pursuant to § 297 of the Human Rights Law, the Division may assess civil fines and penalties. In this case, a civil fine will be appropriate to deter Respondents from future discriminatory behavior. The IFSG is a small family business. Nevertheless, Zapata and Rivera

were aware of their actions when they terminated Complainant's employment. They took the actions willingly and in violation of the Human Rights Law. Both Rivera and Zapata are managers and Zapata, in particular, as the owner's father, maintains a level of authority over IFSG employees. Given the circumstances, considering the goal of deterrence, the nature and circumstances of the violation, the degree of Respondents' culpability, and Respondents' size and financial resources, \$20,000.00 is an appropriate civil fine and penalty. *See Noe v. Kirkland*, 101 A.D.3d 1756, 1758, 957 N.Y.S. 2d 797 (4th Dept. 2012) (\$20,000 civil fine and penalty confirmed); *Div. of Human Rights v. Stennett*, 98 A.D.3d 512, 514, 949 N.Y.S. 2d 459 (2d Dept. 2012) (\$25,000 civil fine and penalty confirmed).

## 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, Respondents and their agents, representatives, employees, successors, and assigns, shall cease and desist from discriminatory practices in employment; and it is further

ORDERED that Respondents 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 Commissioner's Final Order, Respondents shall pay to Complainant \$10,000.00 as compensatory damages due to her emotional distress. Payment shall be made in the form of a certified check made payable to Complainant and delivered to her attorney, William J. Sipser, Esq., at 120 Broadway, 18<sup>th</sup> Floor, New York, New York, 10271, by certified mail, return receipt requested. Interest on the award shall accrue from the date of the Commissioner's Final Order until the date payment is made at a rate of nine percent per year in accordance with Division practice and C.P.L.R. §5004.

2. Within 60 days of the Commissioner's Final Order, Respondents shall pay to Complainant \$64,436.03 as back wages. Payment shall be made in the form of a certified check made payable to Complainant and delivered to her attorney, William J. Sipser, Esq., at 120 Broadway, 18<sup>th</sup> Floor, New York, New York, 10271, by certified mail, return receipt requested. Interest on the award shall accrue from May 15, 2014 until the date payment is made at a rate of nine percent per year in accordance with Division practice and C.P.L.R. §5004.

3. Within 60 days of the date of the Commissioner's Final Order, Respondents shall pay to the State of New York the sum of \$20,000.00 as a civil fine and penalty for their violations of the Human Rights Law. The payment of the civil fine and 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.

4. Respondents shall simultaneously furnish written proof of their 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, 4<sup>th</sup> Floor, Bronx, New York, 10458.

5. Respondents shall cooperate with the Division during any investigation into their compliance with the directives contained in this Order.

DATED: April 16, 2015  
Bronx, New York



Thomas S. Protano  
Administrative Law Judge