

**NEW YORK STATE
DIVISION OF HUMAN RIGHTS**

**NEW YORK STATE DIVISION
OF HUMAN RIGHTS**

on the Complaint of

EDWARD J. RICE,

Complainant,

v.

**NEW YORK STATE, DEPARTMENT OF
CORRECTIONAL SERVICES,**

Respondent.

**and NEW YORK STATE, OFFICE OF THE STATE
COMPTROLLER, Necessary Party.**

**NOTICE AND
FINAL ORDER**

Case No. 10110576

PLEASE TAKE NOTICE that the attached is a true copy of the Alternative Proposed Order, issued on November 27, 2007, by Matthew A. Menes, Adjudication Counsel, after a hearing held before Lilliana Estrella-Castillo, 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 Alternative Proposed Order, and all objections received have been reviewed.

PLEASE BE ADVISED THAT, UPON REVIEW, THE ALTERNATIVE PROPOSED 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”). 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 24th day of December, 2007.

KUMIKI GIBSON
COMMISSIONER

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**ALTERNATIVE
PROPOSED ORDER**

Case No. **10110576**

SUMMARY

Respondent unlawfully discriminated against Complainant when Complainant was not allowed to return to work after he suffered a heart attack. Complainant's employment was then unlawfully terminated. Complainant is awarded \$73,620 for lost wages and \$10,000 for emotional distress damages.

PROCEEDINGS IN THE CASE

On March 14, 2006, Complainant filed a verified complaint with the New York State Division of Human Rights ("Division"), charging Respondent with unlawful discriminatory employment practices 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 Lilliana Estrella-Castillo, an Administrative Law Judge (“ALJ”) of the Division. Public hearing sessions were held June 12 and 13, 2007. The complaint was represented by Bellew McManus. Respondent was represented by Anthony J. Annucci, Deputy Commissioner and Counsel, by Benjamin H. Rondeau.

The complaint was amended to add New York State, Office of the State Comptroller, as a necessary party on June 12, 2007. (Tr. 139; ALJ’s Exhibit V) New York State, Office of the State Comptroller, by Pamela McMahan, Associate Counsel, waived service and appearance at the public hearing. (ALJ’s Exhibit VI)

On August 14, 2007, ALJ Estrella-Castillo issued a recommended Findings of Fact, Decision and Opinion, and Order (“Recommended Order”). No Objections to the Recommended Order were received by the Commissioner’s Order Preparation Unit.

FINDINGS OF FACT

1. Complainant became employed by Respondent as a Correction Officer in 1986. (Tr. 32; ALJ’s Exhibit I)

2. Complainant, as a Correction Officer, was responsible for the custody and security, as well as the safety and well-being, of criminal offenders in Respondent’s custody. (Respondent’s Exhibit M)

3. Complainant was in charge of a housing area with forty-two inmates. Complainant was the only officer in the housing area during his shift. (Tr. 52-54)

4. In 1993, Complainant suffered a heart attack, underwent angioplasty, and returned to work without incident or undue delay. (Tr. 33-34)

5. On March 16, 2004, Complainant suffered a second heart attack. (Tr. 34)

6. As a result of the second heart attack, Complainant had stents and a defibrillator implanted. (Tr. 34)

7. On May 10, 2004, Complainant was advised by Respondent that he would be placed on sick leave at “half-pay,” effective May 11, 2004, because he had exhausted his leave accruals and leave donations. (Respondent’s Exhibit A) Complainant received “half-pay” through September 2005. (Tr. 82-83)

8. By letter dated May 20, 2004, Complainant’s cardiologist, Dr. Ashok R. Patel, released Complainant to return to work on May 27, 2004, with no restrictions. (Tr. 41; Complainant’s Exhibit 1)

9. It is Respondent’s practice, based on Section 72 of the Civil Service Law, to have employees medically evaluated by Employee Health Services when an employee has been out of work for a period of time as a result of an illness or a disability to determine the employee’s ability to perform the essential functions of the position. (Tr. 192)

10. Based on Complainant’s absence, Respondent scheduled Complainant for a medical evaluation with Employee Health Services. (Tr. 44; Complainant’s Exhibit 2; Respondent’s Exhibit J)

11. As a result, on June 17, 2004, Complainant was medically evaluated by Dr. Joseph Doyle, on behalf of Respondent. (Tr. 46)

12. In the initial medical evaluation, Dr. Doyle, relying on Complainant’s description of his duties as a Correction Officer, recommended that “[i]nasmuch as his assignment is very unlikely to involve physical confrontation with prison inmates, it is felt that he can return to duty without restrictions in the near future.” (Respondent’s Exhibit K)

13. On July 28, 2004, Dr. Doyle was provided with a description of Complainant's duties, and was asked his written opinion regarding Complainant's ability to perform the essential duties of a Correction Officer, "including responding to emergencies and subduing combative inmates." (Respondent's Exhibits L, M)

14. Dr. Doyle revised his opinion, and on August 11, 2004, recommended to Respondent that Complainant should retire because Complainant was physically unable to discharge the full duties of a Correction Officer. (Respondent's Exhibit N)

15. On August 16, 2004, Complainant was advised that based on the examination performed by Dr. Doyle on June 17, 2004, Respondent determined that Complainant was unable to perform the essential functions of a Correction Officer, and was placed on involuntary leave of absence. (Complainant's Exhibit 3)

16. Complainant was then examined by his own doctor, Dr. Robert Svenson, M.D., on August 25, 2004, who concluded, "I do not see any reason why this patient cannot return to his job as a Corrections Officer . . . he certainly has enough cardiac reserve to perform his duties." (Respondent's Exhibit F)

17. Complainant appealed Respondent's decision to place him on involuntary leave of absence and requested a re-evaluation of his medical condition. (Respondent's Exhibit R)

18. Complainant underwent a second medical evaluation on January 11, 2005, and was found once again to be "unfit to perform the essential duties of a Correction Officer," even though Dr. Doyle found Complainant had "made a good functional recovery." (Respondent's Exhibits E, P)

19. On August 2, 2005, Complainant was given a “Return to Work” letter from Central New York Cardiology stating Complainant was able to return to work “100% Full Duty,” with “no restrictions.” (Complainant’s Exhibit 6)

20. On August 3, 2005, Respondent advised Complainant of its intent to terminate his employment because he had been continuously absent from work and unable to perform the duties of his position for over a year. (Tr. 194-95; Respondent’s Exhibit G)

21. Complainant once again appealed Respondent’s decision and underwent a third and final medical evaluation on August 23, 2005. Based on this examination, Dr. Doyle felt that Complainant remained “at unacceptable risk because of the presence of automatic defibrillator, which could be seriously damaged in the event of a violent physical altercation.” (Respondent’s Exhibit Q)

22. As a result, Complainant was terminated effective November 8, 2005. (Tr. 197; Respondent’s Exhibit I)

23. Complainant’s pay rate for the year 2004 was \$44,172. (Complainant’s Exhibit 5)

24. After Complainant’s employment was terminated by Respondent, he applied for and was awarded Social Security Disability in October 2006. (Tr. 83-84; Complainant’s Exhibit 9)

25. After Complainant was terminated, he felt degraded, had financial difficulties, was unable to pay some of his bills, had to sell his car, and often fought with his wife about money. (Tr. 88-90)

OPINION AND DECISION

Respondent unlawfully discriminated against Complainant when Complainant was not permitted to return to work after he suffered a heart attack. Complainant’s employment was then

unlawfully terminated. Complainant is awarded \$73,620 for lost wages and \$10,000 for emotional distress damages.

Human Rights Law § 296.1(a) prohibits an employer from discriminating against an employee because of that employee's disability. The statute defines the term disability as "a physical, mental or medical impairment . . . which . . . is demonstrable by medically accepted clinical or laboratory diagnostic techniques or . . . a condition regarded by others as such an impairment." Human Rights Law § 292.21.

There is no dispute that Complainant suffers from a disability as defined by the Human Rights Law. *See* Human Rights Law § 292.21. In fact, Respondent's sole reason for terminating Complainant's employment was their belief that Complainant's disability made him unfit to perform the essential duties of a Correction Officer.

Respondent examined Complainant on three occasions. In performing an individualized assessment, employers must demonstrate that the disability is such as would prevent Complainant from performing in a reasonable manner the activities involved in his occupation as a Correction Officer. *See Miller v. Ravitch*, 60 N.Y.2d 527, 470 N.Y.S.2d 558 (1983). However, employment "may not be denied based on speculation and mere possibilities, especially when such determination is premised solely on the fact of an applicant's inclusion in a class of persons with a particular disability." *Granelle v. City of New York*, 70 N.Y.2d 100, 517 N.Y.S.2d 715 (1987). An expectation that Complainant will be unfit to perform the duties of a Correction Officer some time in the future is similarly not sufficient. *See Id.* at 107.

Here, Complainant, on two occasions in 2004 and once in 2005, was cleared to return to work with no restrictions. He was declared to have made a good functional recovery and found to have enough cardiac reserve to perform his duties by at least three separate doctors.

Respondents did not introduce any evidence that indicates that at the time of his disqualification, or thereafter, Complainant was unable to perform the duties of a Correction Officer, or that his disability was an impediment. Instead, they speculated as to potential problems and hypothetical risks and presupposed assumed limitations.

As Respondents, in this case, failed to demonstrate that the disability would prevent Complainant from performing in a reasonable manner the activities involved in the job, they have violated the Human Rights Law.

In light of this violation, Complainant is entitled to an award of damages as compensation for lost wages. Complainant's pay rate for the year 2004 was \$44,172. Complainant was placed on sick leave at "half-pay" effective May 11, 2004. Complainant received "half-pay" until some point in September 2005. For that 16 month period, Complainant lost \$29,448. From October 2005 through October 2006, when Complainant started collecting Social Security Disability, Complainant lost \$44,172. Therefore, Complainant's total lost wages is \$73,620.

An award of compensatory damages to a person aggrieved by an illegal discriminatory practice may include compensation for mental anguish, which may be based solely on the complainant's testimony. *See Cosmos Forms, Ltd. v. State Div. of Human Rights*, 150 A.D.2d 442, 541 N.Y.S.2d 50 (2d Dept. 1989).

Here, Complainant credibly testified that as a result of the unlawful termination, he felt degraded, had financial difficulties, was unable to pay some of his bills, had to sell his car, and often fought with his wife about money. It is apparent that up to the date of the hearing, Complainant continued to feel anguish as a result of Respondent's discriminatory actions. Therefore, an award of \$10,000 to Complainant is justified in this case. *See State of New York v. New York State Div. of Human Rights*, 284 A.D.2d 882, 727 N.Y.S.2d 499 (3rd Dept. 2001);

Georgeson & Co. v. State Div. of Human Rights, 267 A.D.2d 126, 700 N.Y.S.2d 9 (1st Dept. 1999); *NYC Health & Hospitals Corp. v. State Div. of Human Rights*, 236 A.D.2d 310, 654 N.Y.S.2d 310 (1st Dept. 1997); *State Div. of Human Rights v. Demi Lass Ltd.*, 232 A.D.2d 335, 648 N.Y.S.2d 925 (1st Dept. 1996).

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, its agents, representatives, employees, successors, and assigns, shall cease and desist from discriminating against any employee in the terms and conditions of employment; and it is further

ORDERED, that Respondent, its agents, representatives, employees, successors and assigns shall take the following affirmative action to effectuate the purposes of the Human Rights Law:

1. Within sixty days of the date of this Final Order, Respondent shall pay to Complainant the sum of \$73,620 as compensatory damages for lost wages. Pre-judgment interest shall accrue on the award at the rate of nine percent per annum, from July 11, 2005, a reasonable intermediate date, until the date of this Final Order. Post-hearing interest shall accrue on this award at the rate of nine percent per annum, from the date of this Final Order until payment is actually made by Respondent.

2. Within sixty days of the date of this Final Order, Respondent shall pay to Complainant the sum of \$10,000 as compensatory damages for mental anguish and humiliation Complainant suffered as a result of Respondent's unlawful discrimination. Interest shall accrue on this award at the rate of nine percent per annum, from the date of this Final Order until payment is actually made by Respondent.

3. Payment shall be made by Respondent in the form of a certified check, made payable to the order of Edward Rice and delivered by certified mail, return receipt requested, to Caroline Downey, General Counsel of the Division, at One Fordham Plaza, 4th Floor, Bronx, New York 10458.

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

DATED: November 27, 2007
Bronx, New York

MATTHEW MENES
Adjudication Counsel