

**NEW YORK STATE
DIVISION OF HUMAN RIGHTS**

**NEW YORK STATE DIVISION
OF HUMAN RIGHTS**

on the Complaint of

CHARLES ROCHESTER,

Complainant,

v.

INS ELECTRICAL SERVICES, INC.,

Respondent.

**NOTICE AND
FINAL ORDER**

Case No. 10104905

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 December 12, 2008, by Robert J. Tuosto, 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 GALEN D. KIRKLAND, COMMISSIONER, AS THE FINAL ORDER OF THE NEW YORK STATE DIVISION OF HUMAN RIGHTS (“ORDER”) WITH THE FOLLOWING AMENDMENTS:

- It is noted that Respondent’s efforts to conciliate this matter are mentioned in the procedural history detailed in the Recommended Order. Those efforts, however, were not considered in reaching the determination that Respondent discriminated. Respondent is determined to be liable for unlawful discrimination because

Complainant's testimony is credible and un rebutted.

- Interest on the lost wage amount is awarded from a reasonable intermediate date, namely October 20, 2004, at a rate of nine percent per annum until payment is made.
- It is further noted that while the CPLR offers guidance in determining the rate of interest to be applied, it is merely persuasive authority and not mandatory on the Division.
- The Recommended Order is otherwise adopted and issued in its entirety as the Final 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: **FEB 02 2009**
Bronx, New York



GALEN D. KIRKLAND
COMMISSIONER

**NEW YORK STATE
DIVISION OF HUMAN RIGHTS**

**NEW YORK STATE DIVISION OF
HUMAN RIGHTS**

on the Complaint of

CHARLES ROCHESTER,

Complainant,

v.

INS ELECTRICAL SERVICES, INC.,

Respondent.

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

Case No. **10104905**

SUMMARY

Complainant alleged that he was laid off from an electrician job because of his race. Complainant, upon the default of Respondent, has proven his case and damages are hereby awarded.

PROCEEDINGS IN THE CASE

On April 5, 2005, Complainant filed a verified complaint with the New York State Division of Human Rights ("Division"), charging Respondent with unlawful discriminatory practices relating to employment in violation of N.Y. Exec. Law, art. 15 ("Human Rights Law").

After investigation, the Division found that it had jurisdiction over the complaint and that probable cause existed to believe that Respondent had engaged in unlawful discriminatory practices. The Division thereupon referred the case to public hearing.

On December 26, 2007 Respondent's owner, Christian Ingebrigtsen, appeared at the previously scheduled public hearing and stated that he represented Respondent, and agreed to a

settlement of this matter. However, subsequent to this time Ingebrigtsen and Respondent failed to pay the agreed-upon settlement amount, and this case was re-noticed for public hearing.

After due notice, the case came on for hearing before Robert J. Tuosto, an Administrative Law Judge ("ALJ") of the Division. A public hearing session was held on November 7, 2008.

Complainant appeared at the hearing. The Division was represented by Aaron Woskoff, Esq. Respondent, despite being served with notice, failed to appear at the public hearing. Respondent is therefore in default. The public hearing proceeded with the presentation of Complainant's case pursuant to the Division's Rules of Practice. 9 N.Y.C.R.R. §465.11 (e).

Permission to file post-hearing briefs was granted.

FINDINGS OF FACT

1. Complainant alleged that he was laid off from an electrician job because of his race. (ALJ Exh. 1)
2. Complainant is an African-American who has been a journeyman electrician for 32 years. (Tr. 11)
3. On or about July 30, 2004 Complainant's union sent him to a job requiring electrical services at Bay Shore High School, Bay Shore, New York. (Tr. 12)
4. Within a few hours of arriving, Complainant, along with the only other African-American worker at the job, were told by the job foreman that they were being laid off. There were approximately six other men on the job at the time; all were other than African-American and none were laid off. Both Complainant and the other African-American were replaced by Caucasian workers. (Tr. 13, 17, 19-20)

5. At about this time, Respondent's owner, Christian Ingebrigtsen, stated while in Complainant's presence, "I'm tired of this shit." or "I'm tired of this bullshit." Ingebrigtsen also stated, "I'm tired of these people being sent here." Complainant interpreted this as a reference to his race. Ingebrigtsen responded to Complainant's protest at being laid off by replying, "I can do whatever I want." (Tr. 14-15, 23, 24, 28)

6. Complainant was to be paid \$40 dollars per hour for 35 hours per week. Complainant noted that this job continued for almost one year and that, as a result, he believed he lost approximately \$48,000 of income. (Tr. 18, 25)

7. Complainant, as a union employee, was unable to solicit work but had to wait to be assigned a job from the union. After his lay off Complainant worked one week and then was out of work for approximately the next six to seven months. (Tr. 19, 24)

8. Complainant felt "degraded" by this entire experience. (Tr. 20)

9. On four separate occasions both Respondent and Ingebrigtsen had notice of public hearings which were scheduled in this matter, including the public hearing scheduled for November 7, 2008. (ALJ Exhs. 3, 4, 5, 6, 7)

OPINION AND DECISION

The Human Rights Law makes it an unlawful discriminatory practice for an employer, "...because of the...race...of any individual...to discharge from employment such individual..." Human Rights Law § 296.1(a).

In discrimination cases a complainant has the burden of proof and must initially establish a prima facie case of unlawful discrimination. Once a complainant establishes a prima facie case of unlawful discrimination, a respondent must articulate, via admissible evidence, that its action

was legitimate and nondiscriminatory. Should a respondent articulate a legitimate and nondiscriminatory reason for its action, a complainant must then show that the proffered reason is pretextual. *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502 (1993). The burden of proof always remains with a complainant and conclusory allegations of discrimination are insufficient to meet this burden. *Pace v. Ogden Services Corp.*, 257 A.D.2d 101, 692 N.Y.S.2d 220 (3d Dep't., 1999).

In order to establish a prima facie case of employment discrimination based on protected class membership, Complainant must show: 1) membership in a protected class; 2) that he was qualified for the position; 3) an adverse employment action; and 4) that the adverse employment action occurred under circumstances giving rise to an inference of discrimination. *Forrest v. Jewish Guild for the Blind*, 3 N.Y.3d 295, 786 N.Y.S.2d 382 (2004).

Complainant makes out a prima facie case. First, Complainant was clearly within a protected class. Second, Complainant was qualified for the position given his 32 years of journeyman electrician experience. Third, Complainant was laid off. Finally, Complainant's layoff inferred unlawful discrimination given that only he and the other African-American worker were laid off while the remaining workers outside of their protected class were not; both men were also later replaced by Caucasian workers.

Respondent, by its default, failed to appear and proffer a legitimate, nondiscriminatory reason for its actions. Thus, Complainant's case is un rebutted and has been proven.

Damages

The Human Rights Law provides various remedies to restore victims of unlawful discrimination to the economic position that they would have held had their employers not subjected them to unlawful conduct. See Human Rights Law § 297.4.c (i)-(iv); *Ford Motor Co.*

v. E.E.O.C., 458 U.S. 219 (1982). Awards of back pay compensate a complainant for any loss of earnings and benefits sustained from the date of the adverse employment action until the date of the verdict. *Iannone v. Frederic R. Harris, Inc.*, 941 F. Supp. 403 (S.D.N.Y. 1996). Besides back pay, “an award of...damages to a person aggrieved by an illegal discriminatory practice may include compensation for mental anguish.” *Cosmos Forms, Ltd. v. New York State Div. of Human Rights*, 150 A.D.2d 442, 541 N.Y.S.2d 50 (2d Dep’t. 1989). That award may be based solely on a complainant’s testimony. *Id.* Finally, an award of pre-determination interest of nine percent per annum, accruing from a reasonable intermediate date, complements the back pay award and is appropriate. *Aurecchione v. New York State Division of Human Rights*, 98 N.Y.2d 21, 744 N.Y.S.2d 349 (2002).

Complainant’s damages were arrived at by taking the average number of weeks of lost work given the figure of between six and seven months he was subsequently unemployed (26), less the one week in which Complainant worked, and multiplying 25 weeks by a salary of \$1600 dollars per week. Therefore, the record shows that Complainant’s total lost wages amount to \$40,000. *Ante*, at ¶6. Additionally, Complainant suffered emotional distress damages as a result of his layoff which he credibly described as making him feel “degraded”. Therefore, he is awarded \$5,000 as an amount which is reasonably related to Respondent’s discriminatory conduct, and consistent with case law in this regard. *Quality Care, Inc. v. Rosa*, 194 A.D.2d 610, 599 N.Y.S.2d 65 (2d Dep’t 1993)(award could not exceed \$5,000 in absence of, among other things, any medical treatment); *Club Swamp Annex v. White*, 167 A.D.2d 400, 561 N.Y.S.2d 609 (2d Dep’t. 1990)(\$5,000 award to waiter based solely on his testimony); *Port Washington Police Dist. v. State Div. of Human Rights*, 221 A.D.2d 639, 634 N.Y.S.2d 195 (award of \$5,000 after “brief” discussion by complainant as to her mental anguish).

ORDER

On the basis of the foregoing Findings of Fact, Opinion and Decision, and pursuant to the provisions of the Human Rights Law and the Division's Rules of Practice, it is hereby

ORDERED, that Respondent, and its agents, representatives, employees, successors, and assigns, shall cease and desist from discriminatory practices in employment; and

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

1. Within sixty (60) days of the date of the Commissioner's Order, Respondent shall pay Complainant, Charles Rochester, an award of lost wages in the amount of \$40,000. Respondent shall pay prejudgment interest on said award at the rate of nine (9) per cent per annum from a reasonable intermediate date, namely, October 30, 2006, in accordance with C.P.L.R. § 5004;

2. Within sixty (60) days of the date of the Commissioner's Order, Respondent shall pay Complainant, Charles Rochester, as an award of compensatory damages for mental pain and suffering the amount of \$5,000. Respondent shall pay interest on said award at the rate of nine (9) percent per annum from the date of the Commissioner's Order, in accordance with C.P.L.R. § 5002;

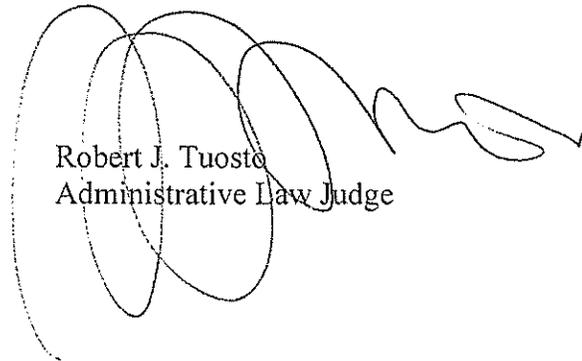
3. Respondent shall pay post-judgment interest in accordance with C.P.L.R. § 5002;

4. The aforesaid payments shall be made by Respondent in the form of a certified check made payable to the order of Complainant, Charles Rochester, and delivered by certified mail, return receipt requested, to the N.Y.S. Division of Human Rights, Office of General Counsel, One Fordham Plaza, 4th Fl., Bronx, N.Y. 10458. Respondent shall furnish written proof to the N.Y.S. Division of Human Rights, Office of General Counsel, One Fordham Plaza, 4th Fl., Bronx, New York 10458, of its compliance with the directives contained in this Order;

5. Respondent shall establish in its workplace both anti-discrimination training and procedures. Respondent shall provide proof of the aforementioned to the Division upon written demand.

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

DATED: January 9, 2009
Bronx, New York



Robert J. Tuosto
Administrative Law Judge