Division of
Human Rights

NEW YORK STATE
DIVISION OF HUMAN RIGHTS

NEW YORK STATE DIVISION OF HUMAN RIGHTS on the Complaint of **VALERIE A. SUTHERLAND,** Complainant, v. **CRUIZER'S SALES & SERVICE, INC., KEVIN SIMS,** Respondents.	**NOTICE AND FINAL ORDER** Case No. 10175546

Federal Charge No. 16GB502932

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 May 19, 2016, by Edward Luban, 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: JUN 29 2016
Bronx, New York

HELEN DIANE FOSTER
COMMISSIONER

Division of
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NEW YORK STATE DIVISION OF HUMAN RIGHTS on the Complaint of **VALERIE A. SUTHERLAND,** Complainant, v. **CRUIZER'S SALES & SERVICE, INC., KEVIN SIMS,** Respondents.	**RECOMMENDED FINDINGS OF FACT, OPINION AND DECISION, AND ORDER** Case No. **10175546**

SUMMARY

Complainant alleged that Respondents discriminated against her on the basis of disability by not allowing her to return to her job after a medical leave of absence. Respondents did not answer the complaint or appear at the hearing, and a default was entered. Complainant has proven her case and is awarded damages for lost wages and mental anguish. A civil fine and penalty is also assessed against Respondents.

PROCEEDINGS IN THE CASE

On June 4, 2015, Complainant filed a verified complaint with the New York State Division of Human Rights ("Division"), charging Cruizers Sales & Service with unlawful

discriminatory practices relating to employment in violation of N.Y. Exec. Law, art. 15 ("Human Rights Law").

On August 3, 2015, the Division amended the complaint to correct the spelling of Complainant's last name.

On August 14, 2015, the Division amended the complaint to reflect Respondent's correct name, Cruizer's Sales & Service, Inc., and to add Kevin Sims as a respondent.

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 Edward Luban, an Administrative Law Judge ("ALJ") of the Division. A public hearing session was held on March 30, 2016.

Complainant appeared at the hearing. The Division was represented by Neil L. Zions, Esq. Respondents did not appear.

In accordance with Human Rights Law § 297.4(b) and the Division's Rules of Practice, 9 N.Y.C.R.R. § 465.12(b)(3), the presiding ALJ entered Respondents' default, and the hearing proceeded on the evidence in support of the complaint.

At the hearing, the presiding ALJ asked the Division to submit documentation of the unemployment compensation Complainant received. (Tr. 53-53) After the hearing, the Division submitted Complainant's Form 1099-G for 2015 from the New York State Department of Labor. This document has been received in evidence as Complainant's Exhibit 7.

FINDINGS OF FACT

1. Respondent Cruizer's Sales & Service, Inc. ("Respondent Cruizer's") operates an automotive and motorcycle repair and sales business. Respondent Kevin Sims is the owner of Respondent Cruizer's. (Tr. 9)

2. Respondent Sims is Complainant's nephew by marriage. (Tr. 8)

3. Complainant is also known by her previous married name, Valerie Volcko.[1] (Tr. 17)

4. In January 2012, Complainant began employment as the manager of Respondent Cruizer's. Complainant was also the lead service writer. (Tr. 9)

5. Complainant reported directly to Respondent Sims. (Tr. 9-10)

6. On December 5, 2014, Complainant had surgery for an injury to her left hip. Complainant was out of work for two weeks. (Tr. 10-11)

7. Respondent Sims handled Complainant's responsibilities while she was out of work. (Tr. 11)

8. After Complainant returned to work, she continued to be in pain. Complainant was unable to heal properly. (Tr. 12-13)

9. On January 26, 2015, Michael Clarke, M.D., Complainant's orthopedist, took her out of work "until further notice." (Tr. 12; Complainant's Exh. 1)

10. Complainant called Respondent Sims when she left Dr. Clarke's office that day. Complainant told Respondent Sims that Dr. Clarke had taken her out of work. Complainant offered to bring Dr. Clarke's note releasing her from work to Respondent Sims, but Respondent Sims said he trusted Complainant and did not need the note. (Tr. 13-15, 19, 43)

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[1] Volcko is spelled "Volko" in the transcript. (Tr. 17)

11. Complainant told Respondent Sims that she did not know how long she would be out but that she would return to work when she was medically able to do so. (Tr. 45-46)

12. Respondent Sims gave Complainant permission to take a leave from work. He said that he could handle Complainant's duties because the shop was not extremely busy, and he asked Complainant to keep in touch with him. (Tr. 15-16, 19, 51)

13. In or around early February 2015, Complainant told Respondent Sims that she was scheduled to have hip replacement surgery on March 11, 2015. Complainant said that she would be out of work until her surgery and for at least eight weeks thereafter, and that she would return to work as soon as Dr. Clarke released her. (Tr. 20, 46-47)

14. Respondent Sims told Complainant that he would need someone to help out while she was out. Complainant said that she understood. (Tr. 18, 20-21, 44, 46)

15. After this conversation, Respondent Sims hired someone for the service writing component of Complainant's job. (Tr. 44)

16. During February and March 2015, Complainant communicated with Respondent Sims by telephone and text message approximately every other day. These communications covered both personal and business matters, including business expansion. They were the kind of conversations that Complainant and Respondent Sims would have had if she had been at work. (Tr. 48-49)

17. On March 11, 2015, Complainant had hip replacement surgery. (Tr. 21)

18. Complainant and Respondent Sims continued to communicate regularly about business matters "well after" her surgery. (Tr. 25, 49)

19. Respondent Sims did not tell Complainant that her position had been filled or that he had hired a permanent replacement for her. Respondent Sims never indicated that he did not expect Complainant to return to work. (Tr. 21, 26, 50)

20. During this time, several other employees of Respondents called and sent text messages to Complainant asking how she was doing and when she was coming back to work. (Tr. 27)

21. On May 14, 2015, Dr. Clarke released Complainant to return to work on full duty. (Tr. 24; Complainant's Exh. 2)

22. Complainant was excited that she could return to work. Complainant called Respondent Sims immediately and said that she had received full clearance and was ready to return to work. (Tr. 24, 50)

23. Respondent Sims told Complainant, "I don't have a position here for you." Complainant asked Respondent Sims what he meant. Respondent Sims said that she should have understood that he needed someone to help because she was not there. Complainant said, "I did understand that, but at no point did you ever tell me that it would be permanent." Respondent Sims replied, "It's not permanent. I may bring you back in a couple years." (Tr. 24-25)

24. Complainant felt "devastated," "very hurt," and "betrayed" by Respondent Sims' decision. Complainant felt that everything she had contributed to Respondents' business meant nothing. (Tr. 24, 26-27, 38)

25. Complainant continued to feel "hurt" and "depressed" as she looked for full-time employment. She distanced herself from her family, Respondent Sims' family, and friends. Complainant began to abuse alcohol. (Tr. 38-40)

26. On September 30, 2015, Complainant had herself admitted to Tully Hill, a chemical dependency rehabilitation facility in Tully, New York. Complainant spent two weeks in Tully Hill. (Tr. 39, 42, 52)

27. Complainant worked 40 hours per week for Respondents at the rate of $11.50 per hour, for a weekly wage of $460.00. (Tr. 28, 42)

28. During her employment with Respondents, Complainant also worked part-time catering weddings for Carnegie's Cafe. Complainant continued this part-time employment after she left Respondent Cruizer's, but she did not receive additional hours to make up for the employment she lost with Respondents. (Tr. 32, 33, 35)

29. Complainant received $4,717.00 in unemployment compensation after she lost her job with Respondents. (Tr. 29; Complainant's Exh. 7)

30. During the summer of 2015, Complainant earned $476.40 from employment with Spectrum Retirement of New York LLC. (Tr. 34-35; Complainant's Exh. 5)

31. From November 2015 through the beginning of February 2016, Complainant was employed part-time with Lessings Food Service Management ("Lessings"). Complainant earned $1,372.50 from Lessings in 2015 and approximately $500.00 to $600.00 in 2016. (Tr. 30, 32; Complainant's Exh. 4)

32. On February 15, 2016, Complainant began full-time employment with Seven O's RV Sales at a base rate of $12.00 per hour. (Tr. 35-36; Complainant's Exh. 6)

OPINION AND DECISION

Disability Discrimination

It is an unlawful discriminatory practice for an employer to discharge an employee

because of the employee's disability. N.Y. Exec. Law, art. 15 ("Human Rights Law") § 296.1(a). Complainant has the initial burden to prove a prima facie case of discrimination. She must show that she is a member of a protected class, that she was qualified for her position, that she suffered an adverse employment action, and that the adverse action occurred under circumstances giving rise to an inference of discrimination. *Ferrante v. American Lung Association,* 90 N.Y.2d 623, 629, 665 N.Y.S.2d 25, 29 (1997). If Complainant makes out a prima facie case of discrimination, the burden shifts to Respondents to present a legitimate, non-discriminatory reason for their actions. If Respondents do so, Complainant must show that the reason presented was merely a pretext for discrimination. *Forrest v. Jewish Guild for the Blind*, 3 N.Y.3d 295, 305, 786 N.Y.S.2d 382, 390 (2004).

A disability is "a physical, mental or medical impairment resulting from anatomical, physiological, genetic or neurological conditions which prevents the exercise of a normal bodily function or is demonstrable by medically accepted clinical or laboratory diagnostic techniques," a record of such impairment, or the perception of such impairment. Human Rights Law § 292.21. This definition has been interpreted to include any medically diagnosable impairments and conditions which are merely "diagnosable medical anomalies." *State Div. of Human Rights v. Xerox Corp.*, 65 N.Y.2d 213, 219, 491 N.Y.S.2d 106, 109 (1985).

Complainant's hip injury is a disability under the Human Rights Law. Therefore, Complainant is a member of a protected class. Complainant was qualified for her position as manager. Complainant suffered an adverse employment action under circumstances giving rise to an inference of discrimination when Respondent Sims did not allow her to return to work after her medical leave. Complainant called Respondent Sims the day Dr. Clarke cleared her to return to work, but Respondent Sims said that he no longer had a position for her.

Because Respondents did not appear at the hearing, they failed to meet their burden to present a legitimate, non-discriminatory reason for the termination of Complainant's employment. Therefore, Respondents did not rebut Complainant's prima facie case of unlawful discrimination.

Damages

Complainant is entitled to damages in the form of back pay for Respondents' unlawful termination of her employment. Complainant earned $460.00 per week working for Respondents. Had Complainant remained employed with Respondents, she would have earned $17,940.00 for the 39 weeks from May 15, 2015, when she could have returned to work, through February 12, 2016. Complainant's economic losses ended on February 15, 2016, when she began full-time employment at a higher pay rate than she received from Respondents. During this period, Complainant earned $2,448.50 from employment and received $4,717.00 in unemployment compensation. Subtracting Complainant's earnings and unemployment compensation from her lost wages yields a loss of $10,774.50. Complainant is entitled to interest on this amount from September 29, 2015, a reasonable intermediate date. CPLR § 5001(b).

Complainant is also entitled to recover compensatory damages for mental anguish caused by Respondents' unlawful conduct. In considering an award of such damages, 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 [s]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 Auth. 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 Dep't of Corr. Servs. v. New York State Div. of Human Rights*, 225 A.D.2d 856, 859, 638 N.Y.S.2d 827, 830 (3d Dept. 1996).

Complainant felt "devastated," "very hurt," and "betrayed" by Respondents' refusal to allow her to return to work. She became "depressed" and began to abuse alcohol. Eventually, she was admitted to an alcohol rehabilitation facility. However, Complainant did not present medical evidence that her alcohol abuse and treatment were related to the loss of her employment with Respondents. In these circumstances, an award of $5,000.00 to Complainant for mental anguish is consistent with similar cases and will effectuate the remedial purposes of the Human Rights Law. *See Matter of KT's Junction v. New York State Div. of Human Rights*, 74 A.D.3d 1910, 1911, 903 N.Y.S.2d 645, 647 (4th Dept. 2010); *Rite Aid of New York, Inc. v. New York State Div. of Human Rights*, 60 A.D.3d 1428, 1430, 875 N.Y.S.2d 708, 710 (4th Dept. 2009).

Civil Fine and Penalty

Human Rights Law § 297.4(c)(vi) authorizes 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." Any such civil penalty "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." Human Rights Law § 297.4(e). In determining the amount of a civil penalty, the Division should consider the goal of deterrence, the nature and circumstances of the violation, the degree of the respondent's culpability, any relevant history of the respondent's actions, the respondent's financial resources, and other matters as justice may require. *Gostomski v. Sherwood Terrace Apartments*, DHR Case Nos. 10107538 and 10107540 (November 15, 2007), *aff'd*, *Sherwood Terrace Apartments v. New York State Div. of Human Rights*, 61 A.D.3d 1333, 877 N.Y.S.2d 595 (4th Dept. 2009).

A civil fine is appropriate in this matter. Respondents terminated Complainant's employment after she was cleared to return to work after her medical leave. Respondents' decision was deliberate and resulted in Complainant being without full-time employment for nine months. While the record contains no information showing that Respondents have a history of discriminatory actions and no information about their financial resources, it is noted that Respondents ignored repeated notices from the Division, failed to answer the complaint, and failed to appear at the public hearing.

Considering these factors, a civil fine in the amount of $5,000.00 may act as an inducement to comply with the Human Rights Law in the future, may deter Respondents and others from future discriminatory action, and will present an example to the public that the Division vigorously enforces the Human Rights Law. *See County of Erie v. New York State Div. of Human Rights*, 121 A.D.3d 1564, 1566, 993 N.Y.S.2d 849, 851 (4th Dept. 2014).

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 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, Respondents shall pay to Complainant the sum of $10,774.50 as damages for back pay. Interest shall accrue on the award at the rate of nine percent per year from September 29, 2015, a reasonable intermediate date, until the date payment is actually made by Respondents.

2. Within 60 days of the date of the Commissioner's Order, Respondents shall pay to Complainant the additional sum of $5,000.00, without any withholdings or deductions, as compensatory damages for the mental anguish and humiliation suffered by Complainant as a result of Respondents' unlawful discrimination against her. Interest shall accrue on the award at the rate of nine percent per year from the date of the Commissioner's Order until payment is actually made by Respondents.

3. The aforesaid payments shall be made by Respondents in the form of certified checks made payable to the order of Complainant, Valerie A. Sutherland, and delivered by certified mail, return receipt requested, to Neil L. Zions, Esq., Senior Attorney, New York State Division of Human Rights, Walter J. Mahoney State Office Building, 65 Court Street, Suite 506, Buffalo, New York 14202. Respondents shall furnish written proof to Caroline Downey, Esq., General

Counsel, New York State Division of Human Rights, One Fordham Plaza, 4th Floor, Bronx, New York 10458, of their compliance with the directives contained within this order.

4. Within 60 days of the date of the Commissioner's Order, Respondents shall pay a civil fine and penalty to the State of New York in the amount of $5,000.00. This payment 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, New York State Division of Human Rights, One Fordham Plaza, 4th Floor, Bronx, New York, 10458. Interest on this award shall accrue at a rate of nine percent per year from the date of the Commissioner's Order until payment is made;

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

DATED: May 19, 2016
Syracuse, New York

Edward Luban
Administrative Law Judge