Division of
Human Rights

NEW YORK STATE
DIVISION OF HUMAN RIGHTS

NEW YORK STATE DIVISION OF HUMAN RIGHTS on the Complaint of **JAKUB R. ZAIC,** Complainant, v. **NEW YORK STATE, UNIFIED COURT SYSTEM, OFFICE OF COURT ADMINISTRATION,** Respondent.	**NOTICE AND FINAL ORDER** Case No. 10174105

Federal Charge No. 16GB501952

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 September 22, 2017, by 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 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: NOV 15 2017
Bronx, New York

HELEN DIANE FOSTER
COMMISSIONER

Division of
Human Rights

NEW YORK STATE
DIVISION OF HUMAN RIGHTS

NEW YORK STATE DIVISION OF HUMAN RIGHTS on the Complaint of **JAKUB R. ZAIC,** Complainant, v. **NEW YORK STATE, UNIFIED COURT SYSTEM, OFFICE OF COURT ADMINISTRATION,** Respondent.	**RECOMMENDED FINDINGS OF FACT, OPINION AND DECISION, AND ORDER** Case No. **10174105**

SUMMARY

Respondent's blanket policy of disqualifying candidates, such as Complainant, diagnosed with hearing loss above Respondent's hearing standards from the position of court officer-trainee and Respondent's ban on hearing aids as a reasonable accommodation for court officer-trainees, are unlawfully discriminatory. Accordingly, Complainant is awarded $5,000 for mental anguish, and Respondent is assessed a civil fine and penalty in the amount of $30,000.

PROCEEDINGS IN THE CASE

On March 11, 2015, 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.

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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 Feburary 29, 2016.

Complainant and Respondent appeared at the hearing. The Division was represented by Bellew S. McManus, Esq., Senior Attorney. Respondent was represented by Pedro Morales, Esq., Assistant Deputy Counsel, New York State Office of Court Administration.

At the public hearing, Complaininat withdrew his claims dealing with national origin and age discrimination. (Tr. 35-36)

ALJ Tuosto was on leave from the Division. Pursuant to the Division's Rules of Practice (9 NYCRR §465.12 (d) (2)), the complaint was reassigned to Lilliana Estrella-Castillo, another ALJ of the Division, to draft the Recommended Findings of Fact, Opinion and Decision, and Order.

During the hearing, ALJ Tuosto identified and marked a document as ALJ Exhibit 2 in evidence, as "the PC determination." (Tr. 13) Similarly, ALJ Tuosto identified and marked as ALJ Exhibit 4 in evidence, the "Notice of Hearing." (Tr. 14) The record is hereby supplemented with the correct copies of the following documents: (1) a copy of the Determination after Investigation, dated September 1, 2015, signed by William LaMot, Regional Director, as ALJ

Exhibit 5 in evidence and; (2) a copy of the Notice of Hearing with a copy of the complaint, as well as the executed affidavit of service, as ALJ Exhibit 6 in evidence.

On August 12, 2016, ALJ Estrella-Castillo served the parties with a Recommended Findings of Fact, Opinion and Decision, and Order. (ALJ Exhibit 7) On November 7, 2016, the Commissioner, by Matthew Menes, Adjudication Counsel, on her own motion, reopened the hearing record and returned the case to the ALJ for the limited purpose of allowing the parties an opportunity to complete the record regarding Complainant's emotional distress, if any. (ALJ Exhibit 8)

On March 3, 2017, Complainant and Respondent appeared at the hearing. The Division was represented by Bellew S. McManus, Esq., Senior Attorney. Respondent was represented by Pedro Morales, Esq., Assistant Deputy Counsel, New York State Office of Court Administration.

At the conclusion of the hearing, Respondent's counsel submitted a timely letter brief in support of Respondent's position.

FINDINGS OF FACT

1. Complainant has been a certified court interpreter since 1996. Complainant performs both simultaneous and consecutive interpretation from English to Polish and from Polish to English. (Tr. 14-15)

2. Complainant's vocation requires him to interpret while more than one conversation is going on and on occasion interpret overlapping conversations in the context of court proceedings. (Tr. 14-15)

3. Respondent is the state agency that oversees the state courts within New York State, and its Office of Court Administration is its administrative arm which handles support for the courts, including, the screening and selection of court officers. (Tr. 62-63, 141)

4. Complainant works on a per diem basis within Respondent's facilities and other courts in New York State. (Tr. 14-15)

5. Before Respondent added Complainant to its registry of per diem interpreters, Respondent tested Complainant in both English and Polish proficiency. A segment of Respondent's test required Complainant to use headphones to measure his ability to identify words. This test was not administered to measure Complainant's hearing capabilities. (Tr. 42-43)

6. Respondent found Complainant's performance on the test satisfactory and placed him on its per diem registry of certified court interpreters. (Tr. 42-43)

7. Complainant has never received any complaints about his auditory acuity from Respondent or others for whom Complainant has worked. (Tr. 34-35)

8. On October 24, 2009, Complainant took the written portion of the court officer-trainee examination. (Joint Exh. 1)

9. The duties and responsibilities of court officers include maintaining order and providing security in courtrooms, court buildings and grounds. Court officers are peace officers who are required to wear uniforms and may be authorized to carry firearms, execute warrants, make arrests, and perform other related duties. (Respondent's Exhs 1, 2; Tr. 63)

10. Complainant obtained a satisfactory score on the October 24, 2009, written court officer examination, and was added to the list of job candidates eligible for appointment to the court officer-trainee position on July 29, 2010. (Joint Exh. 1)

11. On March 7, 2014, Respondent offered Complainant a conditional appointment to the court officer-trainee position in New York City, subject to successful completion of a medical examination, physical ability examination, psychological examination and background investigation. (Joint Exh. 1)

12. On May 21, 2014, Dr. Scott Kerstetter, a practitioner at Affiliated Physicians medically disqualified Complainant for the court officer-trainee position due to hearing loss in his right ear. (Complainant's Exhs. 1, 2; Tr. 16-17, 21, 36-37, 92, 128, 142)

13. Affiliated Physicians has a contract with Respondent to conduct medical examinations for Respondent. (Tr. 76)

14. Dr. Kerstetter is not an audiologist. He is a doctor of osteopathy. (Tr. 128)

15. Dr. Kerstetter did not perform Complainant's hearing test; it was performed by a medical assistant. (Tr. 23, 128)

16. Respondent's court officer-trainee examination announcement contains a summary of medical standards for the position of court officer-trainee. That standard states, in pertinent part, "[e]ach candidate must be able to pass an audiometric test of hearing acuity without the use of a hearing aid. Bilateral testing is conducted in the frequency ranges of 500, 1000, 2000, 3000, 4000, and 6000 Hz. A candidate is qualified if the uncorrected bilateral hearing loss is less than or equal to 25 dB for the average of the following frequencies: 500, 1000, 2000, 3000 Hz; and, no greater than a 45dB loss at 4000 and 6000 Hz in either ear." (Respondent's Exh. 2 at 21)

17. Respondent's medical standard was last updated in 1990. (Respondent's Exhs. 7, 8; Tr. 144-47, 149, 152, 161)

18. Complainant's hearing loss in his right ear is greater than the allowable average under Respondent's medical standard. As a result, Respondent automatically medically disqualified

Complainant from the position of court officer-trainee. (Tr. 71-74, 102, 106-07, 114-17, 129, 141-43, 148, 152-56)

19. Respondent allows disqualified candidates to seek recourse testing, at the applicant's own expense, if they disagree with Respondent's medical disqualification. (Tr. 74)

20. At the public hearing, Respondent did not offer an explanation for why disqualified candidates are given an opportunity to seek recourse testing. (Tr. 162-63)

21. Respondent does not allow court officer-trainees or court officers to use hearing aids. (Respondent's Exh. 2 at 21; Tr. 95)

22. Respondent justified its ban on hearing aids on the grounds that hearing aids could fall out of the ear during a physical scuffle with an inmate or spectator, that the court officers might not wear them, and that hearing aids would have to have functioning batteries at all times. (Tr. 95, 131, 143)

23. In support of its justification to deny hearing impaired court officer-trainees a reasonable accommodation in the form of allowing hearing aids, Respondent submitted a chart which showed that between 2000 and 2015, Respondent recorded the filing of 54,710 "unusual occurrence cards" throughout the state of New York. (Respondent's Exh. 12)

24. Respondent offered no testimony as to the methods used to categorize these incidents and whether or not any of them are duplicative designations, such as "report of a crime" and "theft." The majority of these incidents were categorized as "other" and account for 30,234 of the 54,710 unusual occurrences. (Respondent's Exh. 12; Tr. 176-177)

25. The medical disqualification notice Complainant received from Affiliated Physicians informed Complainant that he could have recourse testing performed at one of the locations

listed on the notice or a New York State licensed audiologist of his choosing. (Complainant's Exh. 1)

26. In relevant part, the medical disqualification notice also explained the protocol to be used in recourse testing and the hearing standard. (Complainant's Exh. 1)

27. This protocol, which is provided to the medically disqualified candidates, is not the same protocol used by Respondent to determine whether or not applicants for the court officer-trainee position meet Respondent's medical standard. (Respondent's Exh. 2 at 21; Tr. 71-74, 102-03, 106-07, 114-17, 129, 141-43, 148, 152-56, 164-65, 172)

28. On June 4, 2014, Complainant took his medical disqualification notice to a New York State licensed audiologist, Audiological Diagnostics PC. He provided the practice with the medical disqualification notice he received from Affiliated Physicians indicating what protocol was to be used for testing and what standards were acceptable. Complainant instructed Audiological Diagnostics to follow the protocol described in the medical disqualification notice he received from Affiliated Physicians. (Complainant's Exh. 1, Tr. 39-40)

29. Complainant was then examined by a New York State licensed audiologist, Dr. Dassan Ali. (Complainant's Exh. 3; Tr. 128)

30. Dr. Ali provided Complainant with a form indicating the results from the recourse testing he performed pursuant to the protocol outlined in the medical disqualification notice. (Complainant's Exh. 3; Tr. 27)

31. Dr. Ali concluded that Complainant's hearing loss was above the minimum standards required by Respondent. Dr. Ali recommended that Complainant follow up with his primary care physician for asymmetrical hearing loss, undergo further testing to rule out retrocochlear,

and that Complainant be evaluated for a hearing aid after he receives medical clearance. (Complainant's Exh. 3)

32. Complainant provided Respondent with the results of his recourse testing. (ALJ's Exh.1; Tr. 54, 86)

33. Dr. Avram Nemetz is an internal medicine clinician and medical director associated with Affiliated Physicians. (Tr. 112-19)

34. Dr. Nemetz, who is not an audiologist and who did not examine Complainant, reviewed the results of Complainant's initial hearing test performed by Affiliated Physicians, along with the recourse testing done by Dr. Ali. (Tr. 112-119, 124)

35. Dr. Nemetz concluded that based on both results, Complainant did not meet Respondent's hearing medical standard. (Tr. 113-119)

36. Dr. Nemetz agreed with the recommendations made by Dr. Ali, but automatically disqualified Complainant because Respondent's medical standard does not allow hearing aids. (Tr. 122-25)

37. On July 1, 2014, based on the medical review done by Dr. Nemetz, Respondent once again medically disqualified Complainant from the court officer-trainee position. (ALJ's Exh. 1; Tr. 91)

38. On July 23, 2014, Complainant appealed the medical disqualification by writing to Respondent's Deputy Director for Court Officer Staffing and Security Services, Gregory Salerno. (ALJ's Exh. 1)

39. On December 2, 2014, Salerno sent Complainant a letter indicating that Respondent had reviewed Complainant's initial test results from Affiliated Physicians and the recourse testing results from Audiological Diagnostics and confirmed that Complainant did not qualify for the

court officer-trainee position due to his hearing loss in the right ear. The letter also indicated that Complainant could have additional recourse testing performed at his own expense and if he passed, Respondent would review his disqualification. (ALJ's Exh. 1)

40. The list of job candidates eligible for appointment to the court officer-trainee position dated July 29, 2010, expired July 2015. (Tr. 98; Complainant's Exhibit 5)

41. Complainant continues to perform interpreter services for Respondent on a per diem basis. (Tr. 30, 210)

42. As a result of the medical disqualification, Complainant has suffered emotional distress, which remain unabated as of the date of the public hearing, March 3, 2017. (Tr. 200-203, 211)

43. Upon learning of his medical disqualification, Complainant experienced surprise, anger, disappointment, frustration and stress. (Tr. 200-03, 208-09) Complainant also suffered stomach problems, which he attributed to the stress of being medically disqualified by Respondent. (Tr. 203-04)

OPINION AND DECISION

N.Y. Exec. Law, art. 15 ("Human Rights Law") prohibits an employer from refusing to hire or employ an individual because of that individual's disability. Human Rights Law §296.1(a).

To establish a prima facie case of unlawful disability discrimination under the Human Rights Law, a complainant must show that (1) he was disabled within the meaning of the Human Rights Law; (2) he was otherwise qualified to perform the essential functions of the job with or without a reasonable accommodation; (3) he suffered an adverse employment action; and (4) he suffered the adverse employment action because of his disability. *See Pace College v.*

Commission on Human Rights of the City of New York, 38 N.Y.2d 28, 39-40, 377 N.Y.S.2d 471 (1975). Once a prima facie case is established, the burden of production shifts to the respondent to rebut the presumption of unlawful discrimination by clearly articulating legitimate, nondiscriminatory reasons for its employment decision. The ultimate burden rests with the complainant to show that the respondent's proffered explanations are a pretext for unlawful discrimination. *See Ferrante v. American Lung Ass'n,* 90 N.Y.2d 623, 629-30, 665 N.Y.S.2d 25, 29 (1997).

The Human Rights Law 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. This definition is "limited to disabilities which, upon the provision of reasonable accommodations, do not prevent the complainant from performing in a reasonable manner the activities involved in the job or occupation sought or held." *Id.* In certain circumstances, the law requires reasonable accommodations to be made should the employee or applicant need such accommodation in order to satisfactorily perform the job. Satisfactory performance is defined as "minimum acceptable performance of the essential functions of the job as established by the employer." 9 N.Y.C.R.R. 466.11(f) (2).

Complainant made out a prima facie case of unlawful discrimination based on disability. Complainant's hearing loss constitutes a disability under the Human Rights Law. Complainant's condition need only be medically diagnosable and not necessarily pose a physical hindrance to be considered a disability under the Human Rights Law. *See State Div. of Human Rights on Complaint of McDermott v. Xerox Corp.*, 65 N.Y.2d 213, 219, 480 N.E.2d 695, 698 (1985). Complainant is disabled under the Human Rights Law because Complainant can perform the essential functions of

the court officer-trainee position with the accommodation of a hearing aid. Complainant satisfied the other two prongs of the prima facie test because he suffered an adverse employment action when Respondent automatically disqualified him from the court officer-trainee position because of his hearing loss.

Respondent argued that it disqualified Complainant from the court officer-trainee position because of his inability to meet Respondent's medical requirements for the job, not because of a disability. *See* Resp't Br. 9-10. Respondent alternatively argued that its standard for hearing acuity is a bona fide occupational qualification exempted under Human Rights Law § 296.1 (d). *See* Resp't Br. 10-12. Lastly, Respondent argued that it is not required to make a reasonable accommodation for Complainant because doing so would pose an undue burden on Respondent and pose a direct threat to the safety of the public or other employees. *See id.* at 13-15 (citing 9 N.Y.C.R.R. § 466.11(g)(2)(i); 9 N.Y.C.R.R. § 466.11 (b)(2)).

Because Respondent has a blanket policy which disqualifies all applicants with hearing loss above Respondent's hearing standards from being considered for employment as a court officer-trainee, and because Respondent does not individually assess the ability of those applicants with hearing loss to perform the essential functions of the job, Respondent's policy violates the Human Rights Law. *See Matter of State Div. of Human Rights [Granelle]*, 70 N.Y.2d 100, 106, 517 N.Y.S.2d 715, 718 (1987).

Respondent also failed to show that uncorrected hearing at its prescribed hearing standard is a bona fide occupational qualification. Certainly, there is the possibility that applicants with severe hearing loss could not perform this job, but Respondent has not adequately shown that this is true of all or nearly all applicants in the protected class of hearing impaired people, as is required. *See New York State Div. of Human Rights v. New York-Pennsylvania Prof'l Baseball*

League, 36 A.D.2d 364, 367, 320 N.Y.S.2d 788, 791 (1971), *aff'd* 29 N.Y.2d 921, 279 N.E.2d 856 (1972) (citing *Weeks v. S. Bell Tel. & Tel. Co.*, 408 F.2d 228, 235 (5th Cir. 1969)). Further, by establishing a standard requiring "uncorrected hearing," Respondent is categorically denying applicants a potentially effective reasonable accommodation.

The Human Rights Law defines reasonable accommodations as "actions taken which permit an employee, prospective employee or member with a disability… to perform in a reasonable manner the activities involved in the job…" *See* Human Rights Law § 292.21 (e).

Whether or not a given accommodation is considered "reasonable" depends on balancing several factors, including the efficacy of the accommodation, convenience and hardship caused by the accommodation, even to other coworkers. *See* 9 N.Y.C.R.R. § 466.11 (b)(1)(i-iii). Additionally, accommodations otherwise deemed "reasonable" that pose an undue hardship to the employer will not be required by law. *See* 9 N.Y.C.R.R. § 466.11 (b)(2). Examples of relevant factors in determining whether an undue hardship exists are: overall size of businesses, including budget, employees and facilities; the type of business the employer is involved in; the nature and cost of the accommodation being requested, including the other resources available to the employer to help pay for the cost of such an accommodation. *See id.* at i-iii.

Respondent argues that making a reasonable accommodation, in this case, allowing Complainant to use a hearing aid, would pose an undue burden on Respondent. *See* Resp't Br. 10-12. However, Respondent did not offer any financial information or any other relevant facts to demonstrate that allowing Complainant to wear a hearing aid would pose an undue burden on Respondent logistically or would otherwise not be feasible. Rather, the crux of Respondent's argument against making a reasonable accommodation revolves around the direct threat exception.

The Human Rights Law does not require an employer to reasonably accommodate an employee's disability where the disability or the accommodation itself poses a direct threat. *See* 9 N.Y.C.R.R. § 466.11(g)(2). "Direct threat means a significant risk of substantial harm to the health or safety of the employee or others that cannot be eliminated or reduced by reasonable accommodation." 9 N.Y.C.R.R. § 466.11(g)(2)(i). "In determining whether a direct threat exists, the employer must make an individualized assessment, based on reasonable judgment that relies on current medical knowledge or on the best available objective information, to ascertain: the nature, duration, and severity of the risk; the probability that the potential injury will actually occur; and whether reasonable accommodations, such as modification of policies, practices, or procedures, will mitigate the risk." 9 N.Y.C.R.R. § 466.11(g)(2)(ii). Additionally, "Heightened consideration of direct threat is to be encouraged in bona fide safety sensitive jobs." *See id.* at (iii). The record supports the conclusion that the court officer-trainee position is a safety sensitive position.

As discussed previously, Respondent's ban on hearing aids is largely rationalized based on the fact that the job requires the ability to hear and the speculation that hearing aids might become dislodged, malfunction or be used improperly. There is no evidence that this happened in the past or that Complainant has personally ever had an issue with wearing or using a hearing aid as directed or with medical compliance generally.

The only factual evidence that Respondent offered to substantiate the proposition that allowing the use of hearing aids is dangerous is a chart titled "Unusual Occurrence Card breakdown." The chart shows the number of "unusual occurrence cards" filled out by court officers during a 15 year time period gathered from the entire state of New York under various categories. The vast majority, 30,234 of the total 54,710 occurrences are categorized under the designation

"other." There is no testimony or other information in the record indicating the methodology used in categorizing these events or whether categorization is potentially duplicative in some cases. What the chart does indicate is that an average of 3,647 unusual occurrence cards were filled out per year between 2000 and 2015, throughout the various courts within the state of New York under Respondent's umbrella. The chart does not indicate how many, if any, of these occurrences involved a physical scuffle of the type in which Respondent fears a hearing aid could hypothetically become dislodged.

At first glance, the total number of "unusual occurrences" listed in Respondent's chart seems to demonstrate the high possibility of dangerous scenarios occurring in the presence of court officers. However, upon closer inspection it becomes clear that once spread over time and across the number of court houses falling under Respondent's responsibility, the numbers are less dire. Most importantly, nothing about these incidents or the quantity thereof adequately shows that allowing court officers to use hearing aids would pose a direct threat to the health or safety of Complainant or others.

In addition to the "unusual occurrence" chart, Respondent cites to the decision of the United States Court of Appeals in *Fraterrigo v. Akal Sec., Inc.* 2010 WL1660407 to support the proposition that allowing Complainant to use a hearing aid would pose a substantial safety risk. The Court held that Akal Security, who contracts court marshals for New York's federal courts, could categorically disqualify individuals who could not pass defendant's hearing test unassisted by a hearing aid. Fraterrigo claimed that the policy was discriminatory and violated the Americans with Disabilities Act ("ADA'), 41 U.S.C. section 12113(a) in addition to the Human Rights Law § 290. The Second Circuit affirmed the grant of summary judgment for the defendant based only on its analysis of the ADA, not the Human Rights Law. Similarly, Respondent cites *Godfrey v. New York City Transit*

Auth., No. 02CV2101LU, 2009 WL 3075207, at *1 (E.D.N.Y. Sept. 23, 2009) where plaintiff's application for employment to be a revenue collecting agent was put on hold for his failure to meet a hearing acuity standard. Godfrey also brought both ADA claims and Human Rights Law claims. Again, the Court declined to adjudicate the Human Rights Law claims, stating "Without federal claims, the court declines to exercise supplemental jurisdiction over plaintiffs claim under the New York Human Rights Law." *See id.* at *1.

Lastly, Respondent cites to *Allmond v. Akal Sec., Inc.*, 558 F.3d 1312 (11th Cir. 2009), where a court officer was fired after failing a hearing test and not permitted to use a hearing aid. In that case, defendant argued that the hearing aid ban was a business necessity for many of the same reasons Respondent puts forth here, such as the speculation that a hearing aid could become dislodged or malfunction. *See id.* at 1316. In order to show this the Court indicated that defendant would have to show that the ban was a "pertinent qualification standard…job related and consistent with business necessity." *See id.* at 1316. The Court further qualified defendant's burden of proof stating that "Although the burden of proof is quite high, it is significantly lowered when, like here… 'Economic and human risk involved in hiring an unqualified applicant are great.'" *See id.* (quoting *Hamer v. City of Atlanta*, 872 F.2d 1521, 1535 (11th Cir.1989)). While the 11th Circuit's interpretation of "business necessity" is very broad, like the previous cases cited by Respondent, it does not adjudicate the Human Rights Law claims. Those claims were not even raised, as New York is not within the jurisdiction of the 11th Circuit. To the extent that these cases may be persuasive by analogizing the ADA to the Human Rights Law, such guidance is superfluous when New York State Courts adjudicating the Human Rights Law offer controlling precedent and relevant analysis.

The New York Court of Appeals determined that a police officer applicant automatically disqualified for having spondylolisthesis pursuant to regulations promulgated by the New York City Department of Personnel was discriminated against under the Human Rights Law. *See Matter of State Div. of Human Rights on Complaint of Granelle*, 70 N.Y.2d 100, 510 N.E.2d 799 (1987). The Court noted that Granelle was already employed doing physically intensive manual labor without incident. Similarly, Complainant's current vocation as a court interpreter is completely contingent on his ability to hear and understand speech in a court setting, the same task for which he is being disqualified for the court officer-trainee position. Though Granelle's condition was asymptomatic, respondent's expert testified to the "great likelihood of low back disability developing in the future [for Plaintiff]." *Id.* at 104. The Division determined that respondent failed to establish a relationship between Granelle's medical condition and his ability to perform the duties of his prospective job. The Court of Appeals affirmed the Division's final order and explained the need for an individualized assessment, "the employer must demonstrate that the disability is such as would 'prevent the complainant from performing in a reasonable manner the activities involved in the job or occupation sought', failing which, the disability may not be the basis for rejecting the applicant." *Id.* (citing *Matter of Westinghouse Elec. Corp. v State Div. of Human Rights*, 49 N.Y.2d 234, 238). Summarily, pursuant to enacted regulations and state case law, an individualized assessment is required. *See* 9 N.Y.C.R.R. §466.11(g)(2)(ii); *see also Bayport-Blue Point School Dist. v. State Div. of Human Rights*, 131 A.D.2d 849, 517 N.Y.S.2d 209 (2d Dept. 1987); *Sitler v. State Div. of Human Rights*, 133 A.D.2d 938, 520 N.Y.S.2d 653 (3d Dept. 1987); *Giannavola v. Leroy Cent. Sch. Dist.*, 107 A.D.2d 153, 485 N.Y.S.2d 907 (4th Dept. 1985).

Respondent has not shown that an individualized assessment determined that Complainant's hearing loss, accommodated or otherwise, poses a direct threat or undue burden to Respondent.

Respondent has failed to show that allowing a hearing aid in Complainant's particular case would pose a direct threat. Lastly, in *Fraterrigo,* which Respondent cites to support the proposition that such a direct threat exists, the fact that the employer subsequently changed its hearing aid ban for court officers before the case made it to the Second Circuit, demonstrates the feasibility, rather than the burden, of making this reasonable accommodation.

The Division may order a respondent to reinstate a complainant from a specific existing list from which they were discriminatorily removed, and consider that complainant as a candidate for the position, if the list still exists. Here, at the time of the public hearing, the eligibility list for the court officer-trainee position on which Complainant's name appeared had expired. The Division cannot order Respondent to reinstate Complainant to an expired list or to create a "special list" to grant him an opportunity to be considered. *See City of New York v. New York State Div. of Human Rights,* 93 N.Y.2d 768, 698 N.Y.S.2d 594 (1999).

Complainant is also entitled to an award for mental anguish and humiliation. A complainant is entitled to recover compensatory damages for mental anguish caused by a respondent's unlawful conduct. In considering an award for compensatory damages for mental anguish, 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 (3rd 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 she 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 Authority 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 Department of Correctional Services v. State Div. of Human Rights*, 225 A.D.2d 856, 859, 638 N.Y.S.2d 827, 830 (3rd Dept. 1996).

As a result of Respondent's unlawful discrimination, Complainant testified that he experienced surprise, anger, disappointment, frustration and stress. Complainant credibly testified that those feelings continue unabated, and because of the stress he continues to experience, he also suffers from stomach problems.

An award of $5,000 for emotional distress is appropriate and would effectuate the purposes of the Human Rights Law. *Palmblad v. Gibson*, 63 A.D.3d 844, 881 N.Y.S.2d 139 (2nd Dept. 2009).

In addition to awards for mental anguish, the Division is authorized to assess and issue fines and penalties not exceeding fifty thousand dollars to be paid by respondents to the State of New York when the Division has found that respondents have engaged in unlawful discrimination. Human Rights Law §297.4 (c)(vi). When determining the amount of fines and penalties to be assessed against respondents, the Division has factored into its analysis the goal of deterrence, respondents' culpability and financial resources.

In this case, Respondent has had a blanket policy of excluding hearing impaired individuals from the court officer-trainee position since at least 1990. Respondent also failed to show that its hearing aid ban was justified by anything beyond speculation about potential risks. This policy is discriminatory on its face.

In the interest of deterring Respondent from further engaging in discriminatory practices, and taking into consideration Respondent's financial resources and culpability, a $30,000 civil fine and penalty is appropriate. *See Noe v. Kirkland*, 101 A.D.3d 1756, 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, 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 Respondent, its agents, representatives, employees, successors, and assigns, shall cease and desist from discriminating against any individual in the terms and conditions of employment, including but not limited to, subjecting them to discriminatory policies and blanket exclusions from the court officer-trainee job title based on hearing loss or the use of hearing aids; and it is further

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

1. Within sixty days of the date of the Final Order, Respondent shall pay to the State of New York the sum of $30,000 as a civil fine and penalty. The 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 of the Division, at One Fordham Plaza, 4th Floor, Bronx, New York 10458. Interest shall accrue on this award at the rate of nine percent per annum, from the date of the Final Order until payment

is actually made by Respondent. *See New York City Transit Auth. v. State Div. of Human Rights*, 160 A.D.2d 874, 875 (2d Dept. 1990), appeal denied, 560 N.Y.S.2d 880 (2d Dept. 1990).

2. Within sixty days of the date of the Final Order, Respondent shall pay to Complainant, Jakub Zaic, the sum of $5,000 without any withholdings or deductions, as compensatory damages for mental anguish suffered by Complainant as a result of Respondent's unlawful discrimination against him. Interest shall accrue on the award at the rate of nine percent per annum from the date of the Commissioner's Order until the date payment is actually made by Respondent.

3. The aforesaid payment shall be made by Respondent in the form of a certified check made payable to the order of Complainant, Jakub Zaic, and delivered by certified mail, return receipt requested, to Bellew McManus, Esq., Senior Attorney at New York State Division of Human Rights, One Fordham Plaza, 4th Floor, Bronx, NY 10458.

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

DATED: September 22, 2017
Bronx, New York

Lilliana Estrella-Castillo
Chief Administrative Law Judge