NEW YORK STATE
DIVISION OF HUMAN RIGHTS

NEW YORK STATE DIVISION OF HUMAN RIGHTS
on the Complaint of

SHARON HOOPER,

Complainant,

v.

BARIAN SHIPPING CO., INC. AND HARBOR AIR EXPRESS, INC. AND ELLEN B. ADLER, INDIVIDUALLY,

Respondents.

ALTERNATIVE PROPOSED ORDER

Case No. **3548803**

SUMMARY

Respondents unlawfully discriminated against Complainant when, after she was diagnosed with fibroid uterine tumors and had an emergency hysterectomy, they terminated her employment. Complainant is awarded damages for lost wages and for the emotional distress she suffered.

PROCEEDINGS IN THE CASE

On August 8, 2003, 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 public hearing before David W. Bowden, an Administrative Law Judge ("ALJ") of the Division.

On May 23, 2007, a public hearing session was held by ALJ Bowden ("Hooper I").

Complainant appeared at the public hearing. Complainant was represented by Louis Pechman, Esq., of the law firm Berke-Weiss & Pechman, L.L.P. Respondents Barian and Harbor were not represented although, according to ALJ Bowden's subsequent recommended Findings of Fact, Decision and Opinion, and Order ("Recommended Order"), " . . . they put in a brief appearance before the record was opened."

On September 18, 2007, ALJ Bowden issued a Recommended Order dismissing the complaint.

On October 15, 2007, Division Adjudication Counsel Matthew Menes, Esq., remanded this matter to ALJ Bowden for the purpose of amending the caption to add Adler, and to reopen the proceedings to allow Adler to defend against the complaint.

On February 29, 2008, ALJ Bowden left state service and this case was reassigned to ALJ Robert J. Tuosto.

On May 19, 2008, a second public hearing session was held by ALJ Tuosto ("Hooper II").

Complainant and Adler appeared at the public hearing. Complainant was, once again, represented by Louis Pechman, Esq. Adler was represented by Gerard J. McCreight, Esq., of the law firm Bracken & Margolin.

On June 30, 2008, ALJ Tuosto issued a Recommended Order dismissing the complaint. Complainant filed objections to the Recommended Order which were received by the Commissioner's Order Preparation Unit on July 22, 2008.

FINDINGS OF FACT

1. On November 22, 1992, Complainant was hired by Respondents as a clerk. (Tr. 12-13 Hooper I) On February 1, 1998, Complainant was promoted to bookkeeper. Her duties included administering accounts receivable, accounts payable, bank reconciliations, maintaining the general ledger, depositing checks, wire transferring monies, paying the bills in a timely manner and paying U.S. Customs taxes on imported merchandise. (Tr. 15-16 Hooper I)

2. Complainant worked thirty-four hours per week at a salary of twelve dollars per hour. (Tr. 17 Hooper I)

3. On November 26, 2002, Complainant was diagnosed with fibroid uterine tumors. (Tr. 19 Hooper I) Complainant was in pain and was unable to work at that time. (Tr. 20 Hooper I)

4. On November 29, 2002, Complainant had an emergency hysterectomy. (Tr. 21 Hooper I)

5. On December 3, 2002, Complainant was discharged from the hospital. (Tr. 21 Hooper I)

6. On that same day, Complainant informed Respondents of her release from the hospital and that, per her doctor's orders, she would need to be out of work for eight weeks. Respondents desired her immediate return to work claiming "everything was in disarray." (Tr. 22-23 Hooper I)

7. On December 29, 2002, Adler asked Complainant to return to work on January 3, 2003. Complainant said that she could not do so. (Tr. 22 Hooper I)

8. On January 10, 2003, Complainant left a message with Adler indicating that her doctor told her to wait until the end of January before returning to work. (Tr. 24 Hooper I)

9. On January 15, 2003, Complainant again called Adler, informing her that, per her doctor's directives, she could not return to work before the end of the month. (Tr. 25-26 Hooper I)

10. On January 20, 2003, Complainant called again, saying she would return to work on February 2, 2003. (Tr. 27 Hooper I)

11. On January 29, 2003, Adler terminated Complainant's employment and gave her duties to an employee hired approximately one week prior. (Tr. 106-08 Hooper II)

12. At all relevant times, Adler, Vice President of Respondents Barian and Harbor, was Complainant's supervisor and co-owned Respondents Barian and Harbor with her husband John A. Barrie. Adler was in the office every day, often for more than twelve hours per day. (ALJ's Exhibits 1, 2; Tr. 43-50 Hooper I)

13. Adler used Barian and Harbor business funds to pay for her personal expenses, including checks for home improvements, contractors, school taxes, utility bills, water bills and restaurant, spa and supermarket expenses. (ALJ's Exhibits 1, 2; Tr. 43-50 Hooper I)

14. After her employment was terminated, Complainant received $205 per week in unemployment from February through November 2003. (Complainant's Exhibit 2; Tr. 62-65 Hooper I)

15. In 2004 and 2005, Complainant made diligent and reasonable attempts to find full-time employment but was unsuccessful. (Tr. 64-69 Hooper I)

16. In 2004, Complainant earned a total of $2,000 from a baby-sitting job and in 2005, she earned a total of $750 from a bookkeeping assignment. (Tr. 64-69 Hooper I)

17. In June 2005, Respondents Barian and Harbor both ceased doing business. (Tr. 69 Hooper I)

18. As a result of Complainant's employment being terminated, she suffered financial difficulties. In addition, she had trouble sleeping, for which she was prescribed Ambien, lost

weight, felt increased stress and suffered increased blood pressure, for which Complainant was prescribed Hydrochlorozide. (Tr. 31-43 Hooper I)

OPINION AND DECISION

Respondents unlawfully discriminated against Complainant when, after she was diagnosed with fibroid uterine tumors and had an emergency hysterectomy, they terminated her employment. Complainant is awarded damages for lost wages and for the emotional distress she suffered.

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 suffered from a disability as defined by the Human Rights Law. *See* Human Rights Law § 292.21. Complainant was diagnosed with fibroid uterine tumors. At that time, Complainant was in pain, and thus unable to work. Complainant was later admitted to the hospital and had an emergency hysterectomy. When discharged from the hospital, Complainant's doctor informed her she would need to be out of work for eight weeks. Complainant informed Respondents and requested an accommodation.

Employers "have the duty to reasonably accommodate known disabilities, where the need for the accommodation is known." 9 N.Y.C.R.R. § 466.11(j)(3). An adjustment to a work schedule to allow for treatment and recovery is recognized under the law as a reasonable accommodation for employees with disabilities. *See* 9 N.Y.C.R.R. § 466.11(a)(2). Extended

leaves of absences may also, in certain instances, be held to be a reasonable accommodation required by law. *See Rogers v. New York Univ.*, 250 F.Supp.2d 310 (S.D.N.Y. 2002); *Durrant v. Chemical/Chase Bank/Manhattan Bank*, 81 F.Supp.2d 518 (S.D.N.Y. 2000); *Powers v. Polygram Holding, Inc.*, 40 F.Supp.2d 195 (S.D.N.Y 1999).

However, accommodations that pose an undue hardship on the employer will not be required. Undue hardship means significant difficulty or expense to the employer. 9 N.Y.C.R.R. § 466.11(b)(2).

Here, Respondents have provided no evidence that allowing Complainant to remain on leave for the requested time period would have been significantly difficult or costly. Respondents did not replace Complainant on a temporary basis or take any other steps to mitigate her absence for the majority of her medical leave. In fact, Respondents planned to allow Complainant to return to work up until approximately one week prior to her anticipated return when they replaced her.

Complainant had a disability that required a reasonable accommodation, of which Respondents were aware. Complainant requested two months leave to recover from surgery. Respondents refused to provide the full necessary leave. Instead, they chose to terminate Complainant's employment days before she was eligible to return to work. Respondents failed to show that Complainant's request, under these circumstances, was an undue hardship. This refusal and termination constitute a violation of the Human Rights Law.

Owners, and high-ranking corporate officers with the ability to do more than carry out personnel decisions made by others, can be held personally liable for violations of the Human Rights Law. *See Patrowich v. Chemical Bank,* 63 N.Y.2d 541, 483 N.Y.S.2d 659 (1984); *Pepler v. Coyne*, 33 A.D.3d 434, 822 N.Y.S.2d 516 (1st Dept. 2006). Here, Adler was Respondents' co-

owner and Vice President, evidenced by her co-mingling of company and personal funds and use of company funds to pay for her personal expenses. She had the authority to hire and fire employees and supervised every aspect of Respondents' business on a daily basis. Ultimately, Adler independently made the discriminatory decision to terminate Complainant's employment. As such, Adler can be held personally liable.

Complainant is entitled to an award of damages as compensation for lost wages. Complainant worked thirty-four hours per week at a salary of twelve dollars per hour for a weekly salary of $408 or approximately $1,632 per month. Complainant's employment was terminated at the end of January 2003 and Respondents went out of business in June 2005. During this time, Complainant looked for comparable work and made diligent and reasonable attempts to mitigate her damages. Therefore, the period of time for which damages can be awarded is twenty-nine months. For that twenty-nine-month period, Complainant lost $47,328. However, Complainant mitigated her damages by collecting unemployment of $205 per week for forty weeks totaling $8,200 and working two other jobs totaling $2,750. Therefore, Complainant's total lost wages is $36,378.

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, she suffered financial difficulties, had trouble sleeping, for which she was prescribed Ambien, lost weight, felt increased stress and suffered increased blood pressure, for which Complainant was prescribed Hydrochlorozide. 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 $15,000 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 (3d 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 & Hosps. 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 Respondents, their 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 Respondents, their 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, Respondents shall pay to Complainant the sum of $36,378 as compensatory damages for lost wages. Pre-judgment interest shall accrue on the award at the rate of nine percent per annum, from April 15, 2004, 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 Respondents.

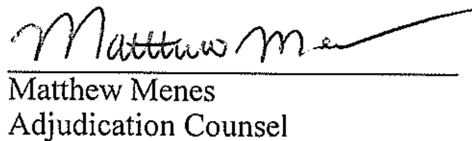
2. Within sixty days of the date of this Final Order, Respondents shall pay to Complainant the sum of $15,000 as compensatory damages for mental anguish and humiliation

Complainant suffered as a result of Respondents' 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 Respondents.

3. Payment shall be made by Respondents in the form of a certified check, made payable to the order of Sharon Hooper and delivered by certified mail, return receipt requested, to Louis Pechman, Esq., at Berke-Weiss & Pechman, LLP, 488 Madison Avenue, New York, New York 10022.

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

DATED: April 21, 2009
Bronx, New York



Matthew Menes
Adjudication Counsel