DAVID A. PATERSON
GOVERNOR

NEW YORK STATE
DIVISION OF HUMAN RIGHTS

NEW YORK STATE DIVISION OF HUMAN RIGHTS on the Complaint of **JAMES M. HAZEN, ESQ.,** Complainant, v. **HILL, BETTS & NASH, LLP,** Respondent.	**NOTICE AND FINAL ORDER** Case No. 10114676

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 25, 2008, by Thomas J. Marlow, 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 AMENDMENT:

- A complainant's decision to start his own business "from which he might reasonably expect to derive some financial benefit [is] consonant with his obligation

to mitigate damages." *Cornell v. T.V. Corp.*, 17 N.Y.2d 69, 75 (1966); *see also*, *Rocco v. Goldberg, et al.*, DHR Case No. 10112394 (Jan 25, 2010). In the instant matter, the credible evidence demonstrates that on or around March 15, 2006, within two weeks after Respondent unlawfully terminated his employment, Complainant started his own law practice. (Complainant's Exhibits 18, 21, 22, 23; Tr. 688-90, 692, 697). Respondent has not proven that Complainant failed to make diligent efforts to mitigate his damages during this period. *See State Div. of Human Rights v. North Queensview Homes, Inc.*, 75 A.D.2d 819 (2d Dept. 1980) (*citing Cornell v. T.V. Corp.*, 17 N.Y.2d at 74 and *Walter Motor Truck Co. v. New York State Div. of Human Rights v. Wackenhut Corp.*, 248 A.D.2d 926 (4th Dept. 1998)).

- Accordingly, in addition to the damages directed in the Recommended Order, Complainant is entitled to compensation for lost wages from the date of the termination through December 31, 2009. No damages are awarded beyond this date as no proof was submitted and an award would be speculative. In 2006, Complainant earned $28,920 from Respondent. (Complainant's Exhibit 20) In 2007, Complainant earned $31,105 from his practice. In 2008, he earned $21,593 and in 2009, $62,904, also from his practice. (*See* Complainant's May 13 and June 4, 2010, supplemental letters; Complainant's Exhibit 23) Complainant's total earnings for the relevant period equal $144,522. Had Complainant remained employed by Respondent, assuming he would have received no raises or additional bonuses, from March 6, 2006, through December 31, 2009, he would have earned $692,683. (Complainant's Exhibit 19; Tr. 675-82)

- Accordingly, Complainant is entitled to $548,161, plus nine percent interest to

accrue from January 6, 2008, a reasonable intermediate date, until the date payment is made.

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: OCT 27 2010
Bronx, New York

Galen D. Kirkland
GALEN D. KIRKLAND
COMMISSIONER

NEW YORK STATE
DIVISION OF HUMAN RIGHTS

NEW YORK STATE DIVISION OF HUMAN RIGHTS
on the Complaint of

JAMES M. HAZEN, ESQ.,
Complainant,

v.

HILL, BETTS & NASH, LLP,
Respondent.

RECOMMENDED FINDINGS OF FACT, OPINION AND DECISION, AND ORDER

Case No. **10114676**

SUMMARY

Complainant alleged that Respondent discriminated against him because of his disability and because he opposed unlawful discrimination. The evidence supports a finding of discrimination. Complainant is entitled to relief in the form of compensatory damages for mental anguish in the amount of $50,000.00. Complainant is not entitled to relief in the form of compensatory damages for lost wages or benefits.

PROCEEDINGS IN THE CASE

On November 7, 2006, 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.

After due notice, the case came on for hearing before Thomas J. Marlow, an Administrative Law Judge ("ALJ") of the Division. Public hearing sessions were held on December 26 and 27, 2007 and January 28 and 29, 2008.

Complainant and Respondent appeared at the hearing. Complainant was represented by William H. Roth, Esq. Respondent was represented by Diane Windholz, Esq., and Richard Greenberg, Esq., of Jackson Lewis, LLP.

Complainant and Respondent filed proposed findings of fact and conclusions of law after the conclusion of the public hearing.

FINDINGS OF FACT

1. Complainant was born in 1948. After graduating from Columbia University School of Law in 1973, he began his career in the personal injury aspect of maritime law. (Tr. 441-46, 682)

2. In 1989, after having worked with several law firms, Complainant began his employment with Respondent in New Jersey. In 1997, Complainant transferred to Respondent's New York City office. (Tr. 442-50)

3. Complainant alleges that, from September of 2005 through January of 2006, he suffered from Bipolar Disorder ("BPD") and, because of this disability, he acted inappropriately. (ALJ's Exhibit 1; Tr. 460-61, 481-82, 493-94, 795-97) Complainant further alleges that, after working for Respondent for approximately 17 years, and after requesting a reasonable accommodation for his disability, Respondent failed to engage in a meaningful interactive process regarding accommodation and terminated his employment because of his disability. (ALJ's Exhibit 1)

4. Respondent denies these accusations. (ALJ's Exhibit 5)

5. While working in the New York City office, Respondent gave Complainant an American Express credit card ("credit card") issued in his name but paid by Respondent. (Tr. 534)

6. Respondent permitted attorneys who were given credit cards to make personal charges unrelated to work with the understanding that the attorneys would reimburse Respondent. (Tr. 535-36, 736-37) For example, in February of 2006, William Clair ("Clair"), an attorney employed by Respondent, described by O'Neill as someone who "lives above his means," owed Respondent over $25,000.00 for personal expenses placed on his credit card. (Tr. 571-72, 589-95, 1494-95) Clair paid this money back over time, completing the payment sometime in 2007. (Tr. 603)

7. When Respondent received monthly credit card statements, Margaret Rochester ("Rochester"), who was the accounts payable clerk, would send each attorney a copy of his charges and, thereafter, the attorney would return to Rochester an accounting of all charges incurred. It was not Respondent's practice to return the statement to the attorney for further review. (Tr. 1038-44)

8. On or after August 30, 2005, Respondent assigned Complainant and Martin Dome ("Dome"), an attorney who formerly worked for Respondent, to work on the largest case ("the case") Respondent had in 10 to 15 years. The case had the potential of damages in the hundreds of millions of dollars. (Tr. 456-60, 1143) Both Mark Jaffe ("Jaffe") and Gregory O'Neill ("O'Neill"), the two equity partners of Respondent, consider Complainant a brilliant trial lawyer. (Tr. 1284-1384)

9. In or around September of 2005, Complainant was allowed to rent a hotel room "in connection with the work he was supposed to perform" regarding the case, but it was expected

by Respondent that no more than a few nights at a hotel would be needed. (Respondent's Exhibit 30) Before September of 2005, Complainant, on occasion, had rented hotel rooms while working on a case for Respondent. (Tr. 493)

10. From September of 2005 through January of 2006, Complainant charged approximately 50 hotel room rentals, car service, alcohol, adult movies, and phone calls to escort services to his credit card. (Respondent's Exhibit 28 and 30)

11. According to Respondent's calculations, Complainant is personally responsible for $21,117.77 for charges to his credit card from late September of 2005 through January of 2006. (Respondent's Exhibits 28 and 30) Only $200.00 of these expenses was charged to a client by Respondent and a credit for that amount was issued to the client. (Tr. 1229-30)

12. Complainant made these charges when he was suffering from the disability of BPD. (Tr. 261-73, 287-88, 298-300, 311-12, 349, 396, 460-61, 481-82, 493-94, 795-97)

13. Shortly after September 5, 2005, Complainant experienced an inability to sleep, as well as instances when he had to sleep in the afternoon. Complainant also experienced instances of increased productivity as well as lack of productivity. (Tr. 481-82) While working on the case, Complainant, although able to produce good work, experienced unusual shifts in energy, at times feeling too hyper to focus on his work. (Tr. 460-61) Complainant experienced mood swings and depression. As a result, Complainant became afraid because he didn't know what was wrong with him. (Tr. 795-97) From the end of September of 2005 through early January of 2006, Complainant was "very disruptive" in the office and was having "deportment problems" and "absenteeism problems." (Tr. 1148) Complainant's "remarks to different people" and his "making inappropriate noise" caused concern for Jaffe. (Tr. 1149)

14. In September of 2005, Complainant, finding that he could produce legal work of high quality but not be socially acceptable in an office environment, started renting and staying in hotel rooms. Complainant used the firm credit card to rent the hotel rooms. (Tr. 493-94, 796-97) Complainant did not tell Respondent that he was staying in hotels. (Tr. 796-97)

15. Complainant received the American Express statements for his credit card usage for late September, October, and November in December of 2005. However, Complainant did not provide Rochester with an accounting for these statements. (Tr. 535, 537)

16. On December 21, 2005, Complainant left a note for Mr. O'Neill saying that he had health issues to deal with that were causing "personality changes" and that he had to stay home and rest. Complainant hoped to "be on track by New Year's." (Complainant's Exhibit 9)

17. On January 2, 2006, Complainant sent an e-mail to Jaffe telling him he had been "on the verge of collapse," talking of the stress of work, and being under orders from both his internist and therapist to "decompress." (Complainant's Exhibit 10)

18. Jaffe never responded to this e-mail and did not discuss it with Complainant when he saw him later that week. (Tr. 520-22)

19. On January 11, after learning that Complainant had not submitted an accounting of his credit card usage since late September of 2005, Jaffe sent an e-mail to Complainant telling him to produce an accounting by the next day. (Complainant's Exhibit 13, Tr. 1128) On January 12, Pauline Blake ("Blake"), the Controller in charge of financial operations for Respondent, sent an e-mail to Complainant asking him to provide an accounting by the next day. (Complainant's Exhibit 12)

20. On January 13, Complainant had lunch with Philip Russotti ("Russotti"), who was an attorney and friend. (Tr. 74-75) When Russotti last saw Complainant in December of 2005 and

in January, his behavior did not seem so unusual. However, on January 13, Russotti thought there was something seriously wrong with Complainant as he was talking quickly, his speech was disjointed, and he didn't seem in control of his emotions. (Tr. 79-81, 136-38, 140, 142) Russotti told Complainant that he should see a psychiatrist. (Tr. 82)

21. During this conversation, Complainant told Russotti that he was having problems at work and needed to get paperwork related to his billing so he could pay for the personal expenses; Complainant asked Russotti to speak with Respondent on his behalf. (Tr. 81-83, 542-43, 550-55)

22. On January 13, Russotti called O'Neill and told him that Complainant was in a terrible state, that Complainant was going to a psychiatrist, and that he would advise him of the result of the psychiatric evaluation. (Tr. 86-87)

23. On January 16, Complainant met with John J. Verdon, Jr., M.D., a Board certified psychiatrist with approximately 40 years experience in psychiatry ("Dr. Verdon"). (Tr. 255-57, 307-09). On January 17, Russotti advised O'Neill of this meeting, that Complainant was taking medication, that the psychiatrist would do an evaluation, and that the psychiatrist would provide details about Complainant's psychiatric condition. (Tr. 92-93) Dr. Verdon prescribed Complainant an antipsychotic drug, Olanzapine (brand name Zyprexa), and a drug for the prevention of the recurrence of manic illness, Gabapentin (brand name Neurotin). (Tr. 274-76)

24. On January 19, Blake had Complainant's usage of the credit card for December reflected as an asset of Respondent due from Complainant. (Complainant's Exhibit 29; Tr. 1092-99) Eventually, Respondent considered Complainant's credit card charges from late September of 2005 through late January of 2006 as unaccounted for charges, owed to Respondent by Complainant. (Tr. 1236)

25. On January 21, Russotti attempted to help Complainant reconcile his expense records. He was unable to do so because Complainant didn't have all of the necessary paperwork. (Tr. 100-01, 106)

26. On January 23, Complainant sent Respondent, by facsimile, a preliminary attempt to reconcile his outstanding credit card usage ("January 23 facsimile"), with case numbers attributed to certain expenses, which he characterizes as the "diary of a madman." (Respondent's Exhibit 1; Tr. 106-07, 757-58) He sent the January 23 facsimile with a cover sheet that said, "There follows annotated Amx charges. I am working on collecting receipts and reconciliation on form. I have still not received personal papers from office which contain some receipts. Please tabulate subtotals." (Respondent's Exhibit 1)

27. Complainant credibly testified that, at the time he sent the January 23 facsimile, he "was crazy" and was "trying to make amends" as best he could. (Tr. 757-58) Complainant also credibly testified that, at or around January 23, he told Rochester that he didn't want to identify any of the hotel charges to anything until he saw his receipts. (Tr. 889-90)

28. Blake had no idea what Complainant's cover sheet meant and had never seen anything like it. However, Blake made no attempt to contact Complainant to find out what it meant and was not aware that anyone from accounting had attempted to contact Complainant to find out what the cover sheet meant. (Tr. 1122)

29. According to O'Neill and Blake, Complainant's credit card usage during this time period was a complete aberration from his previous usage. (Tr. 1123, 1508)

30. On January 23, O'Neill sent a letter to Complainant acknowledging Complainant's claims of illness and informing him that he must submit medical documentation by February 1,

so that Blake could forward it to Respondent's medical consultant for coverage assessment. (Respondent's Exhibit 4; Tr. 1065-66)

31. By January 25, Dr. Verdon determined that Complainant was having a positive response under his treatment plan, which included medication and therapy sessions. Dr. Verdon further determined that Complainant could return to work in some capacity in a few weeks. (Tr. 273-76, 289-92)

32. On January 25, after seeing the January 23 facsimile, Russotti sent a letter to O'Neill asking that the bookkeeper complete her calculations and forward them to Complainant so that Complainant could do a final accounting. Russotti also informed O'Neill that Complainant would be able to return to work soon, and assuring him that Dr. Verdon would have all of the medical information shortly after February 1. (Complainant's Exhibit 2, Tr. 109-10)

33. On January 26, Complainant sent documentation to O'Neill regarding some of his medical treatment since October and some of the medication he had taken since September. (Respondent's Exhibit 3) O'Neill never showed Blake this documentation (Complainant's Exhibit 3; Tr. 1068)

34. On January 27, at approximately 1:39am, Jaffe sent an e-mail to O'Neill regarding Complainant in which he says the following: ". . . it is time to close the door on this fellow. . .," ". . . instead of trying to wean our way off this guy, we need to face facts and he has to go," and "I do not want him back here; I do not want to see him again; and neither does anyone else." (Complainant's Exhibit 26)

35. On January 27, at approximately 1:57am, Jaffe sent another e-mail to O'Neill in which he expressed his concern if Complainant was around the office when there were "potential sources of business" there. (Complainant's Exhibit 27) Jaffe indicated that he thought that

would ". . . risk bringing all his "crap" into that atmosphere." (Complainant's Exhibit 27) Jaffe made a suggestion to O'Neill, "If you don't wish to turn him loose, then let's give him a leave of absence for six months at pay and then deal with his situation after the trial." (Complainant's Exhibit 27) Jaffe knew that, if Complainant "had medical problems," a leave of absence would have allowed Complainant an opportunity to have "worked them out." (Tr. 1150-51) In Jaffe's opinion, however, if Complainant "has mental problems, etcetera, that's his to deal with. It's not our responsibility." (Tr. 1283-84) By late January of 2006, Jaffe considered Complainant presence ". . . a risk that the firm really couldn't tolerate." (Tr. 1149)

36. On January 27, Russotti sent Dr. Verdon's letter of January 25 to O'Neill in which the doctor indicated that Complainant had experienced a severe mood disorder going back at least until November of 2005, had responded well to treatment, and should be able to resume his work as an attorney within a few weeks while continuing psychiatric care. (Complainant's Exhibit 3) According to Dr. Verdon's expert testimony, BPD is a severe mood disorder. (Tr. 286-87)

37. When O'Neill received Dr. Verdon's letter, he considered it, ". . . the beginning, the first step. (He) said to (himself) the next thing is going to be a denial of all personal moral responsibility for what's in the American Express cards. That's what's coming." (Tr. 1433)

38. O'Neill never asked Blake to get any medical information from Dr. Verdon concerning his psychiatric care of Complainant. (Complainant's Exhibit 3; Tr. 1068) Blake was never asked to forward Dr. Verdon's letter of January 25 to Respondent's medical consultant. (Tr. 1068) According to Blake, Respondent never asked her "to determine what condition Mr. Hazen had and what was required under our medical coverage." (Tr. 1066-67)

39. On January 28, Russotti recommended to Complainant that he offer to pay the December and January expenses to show his good faith. (Tr. 117-20, 237-38) On January 31,

Russotti sent a letter to O'Neil again requesting the preliminary tabulation regarding Complainant's expense account and making an offer, on Complainant's behalf, to assume responsibility for and pay the expenses incurred in December and January. Russotti stated that these expenses were "more properly related to his emotional illness at that time," informed O'Neill that Complainant would be further evaluated by his psychiatrist during that week, and that he would advise O'Neill of the results of that evaluation. (Complainant's Exhibit 4)

40. On February 3, Russotti spoke to counsel for Respondent and was informed that Respondent was terminating the employment of Complainant, effective March 6, 2008. (Complainant's Exhibit 18; Tr. 124-25) This decision was made after Respondent started its own investigation into Complainant's credit card usage and after it received Russotti's letter of January 31. (Tr. 1140-42, 1161-64) Complainant was terminated, according to O'Neill, ". . . because he attempted to charge hotel stays, restaurants and limousines to clients." (Tr. 1407-08)

41. Dr. Verdon's expert testimony was credible. In Dr. Verdon's expert opinion, in January of 2006, Complainant was very sick, actively psychotic, in a manic phase with mood fluctuation; his diagnosis was manic depressive disease, also known as BPD, manic phase. (Tr. 263, 267-68, 273, 367) Further, in Dr. Verdon's expert opinion, Complainant should not have been working at that time. (Tr. 272-73) Dr. Verdon also testified that someone suffering from BPD can be grandiose in thinking, impaired in judgment, impulsive in action, tending to do things in excess, and sexually acting out inappropriately. (Tr. 269-71, 349) Depression is a normal process of BPD. (Tr. 396) In Dr. Verdon's expert opinion, Complainant demonstrated dramatic symptoms when he saw him. (Tr. 269-71, 349) From the history Dr. Verdon received from Complainant and his wife, a practicing nurse whom Dr. Verdon found to be reliable, he opined that

Complainant was suffering from BPD at least since November of 2005. (Tr. 261, 265, 287-88, 311-12)

42. In Dr. Verdon's expert opinion, whatever was going on in Complainant's life, at least as far back as November of 2005, was ". . . caused by or at least significantly contaminated by his roaring mania." (Tr. 298-300)

43. Complainant testified credibly that he was experiencing mood swings and exhibiting bizarre behavior in September, October, November, and December of 2005 and January of 2006. (Tr. 460-61, 481-82, 493-94, 795-97)

44. In February of 2006, Complainant retained an attorney to represent him with regard to his employment termination. (Tr. 699) In or around April of 2006, this attorney sent a letter to Respondent with regard to the allegation of unlawful discriminatory employment termination. (Tr. 699-700) In or about July of 2006, Complainant's attorney met with Respondent's attorney to discuss Complainant's allegation. (Tr. 700)

45. By letter dated August 30, 2006, after consulting with an attorney who specializes in ethics, Respondent contacted the Departmental Disciplinary Committee, for the First Judicial Department, New York, New York ("DDC"). The DDC handles complaints concerning attorney professional misconduct. Respondent reported that Complainant had tried to assign personal expenses to Respondent's clients. (Complainant's Exhibit 24)

46. Complainant alleges that Respondent made this complaint to the DDC to retaliate against him because he opposed unlawful discrimination. (ALJ's Exhibit 1)

47. Respondent denies this accusation. (ALJ's Exhibit 5)

48. Jaffe testified that there were several reasons for the delay in reporting what they considered to be the professional misconduct of Complainant, including busy work schedules,

family health problems, the unpleasantness of the task, and the desire to confer with an ethics counsel. (Tr. 1175-78)

49. In February of 2006, Complainant visited a law firm and thereafter had discussions regarding possible employment, but the discussions were unsuccessful. (Tr. 685-86) In March of 2006, Complainant attended a job fair at the New Jersey State Bar Association. (Tr. 686-87) Complainant thought it "unrealistic" to expect to be hired since he was a "57 year old mental patient who got fired." (Tr. 686) Thereafter, Complainant developed a kind of "Of Counsel" relationship with an attorney he knew and set up his own office. (Tr. 687-88) Complainant had a loss from business in 2006 and expected a profit from business of approximately $23,000.00 in 2007. (Complainant's Exhibits 22 and 23; Tr. 690-91)

50. Complainant was "extremely overwrought and upset" by the termination of his employment. (Tr. 673-74)

51. Respondent's reporting to the DDC caused Complainant anxiety and stress. (Tr. 704-05, 988-90)

OPINION AND DECISION

The Human Rights Law makes it an unlawful discriminatory practice for an employer to discriminate against an individual in the terms, conditions, or privileges of employment because of that individual's disability. *See* Human Rights Law § 296.1(a)

Complainant raised an issue of discrimination in the terms, conditions, and privileges of employment because of disability. Complainant has the burden to establish by a preponderance of the evidence that such discrimination occurred. To meet his burden to establish that discrimination occurred, Complainant must initially show by a preponderance of the evidence

that he suffered from a disability, that his employment, for which he was qualified, was terminated, and that the termination occurred under circumstances giving rise to an inference of discrimination. *See Mittl v. New York State Div. of Human Rights*, 100 N.Y.2d 326, 763 N.Y.S.2d 518 (2003). Because Complainant has BPD he clearly has shown that he suffered from a disability. *See State Div. of Human Rights v. Xerox Corp.*, 65 N.Y. 2d 213, 491 N.Y.S.2d 106 (1985) The credible evidence establishes that Complainant is a member of a protected class and that he had been performing capably for approximately 17 years as an attorney for Respondent. While suffering from BPD, Complainant used his credit card in a way that was a complete aberration from his previous usage. Respondent was informed that Complainant was seeing a psychiatrist and wanted to reconcile his credit card usage which had charges that he claimed were caused by his illness. In Jaffe's opinion, however, Respondent had no responsibility with regard to Complainant's mental problems. Jaffe also thought that, with potential sources of business around the office, Complainant's presence was a risk Respondent couldn't tolerate, so the employment of Complainant was terminated. Clearly, his employment was terminated under circumstances inferring discrimination because of disability. Complainant has established a prima facie case, the burden of which has been described as "de minimis." *Schwaller v. Squire Sanders & Dempsey*, 249 A.D.2d 195, 671 N.Y.S.2d 759 (1st Dept. 1998) Because Complainant has established a prima facie case of discrimination, the burden shifts to Respondent to establish that the termination of employment was motivated by a legitimate nondiscriminatory reason. *See Mittl*, 100 N.Y.2d at 330.

Respondent has rebutted the inference of discrimination by raising a genuine issue of fact through the presentation of evidence that it terminated the employment of Complainant for a legitimate nondiscriminatory reason, namely, he attempted to charge personal expenses to

clients. The evidence established that, according to Respondent's calculations, Complainant is personally responsible for $21,117.77 for charges to his credit card from late September of 2005 through January of 2006, which included charges for hotel rooms, car service, alcohol, adult movies, and phone calls to escort services. The evidence further shows that it was Respondent's practice to have the American Express statements sent to its attorneys, to have the attorneys identify the charges by category, noting, where appropriate, the client that should be charged, and to have the attorney return the statement with its notations. It was not Respondent's practice to then return the statement to the attorney for further review. Respondent introduced into evidence expense records submitted by Complainant that, according to Respondent, show that Complainant was attempting to bill clients for his personal expenses.

With the absence of the inference of discrimination, Complainant has the burden to prove that the legitimate reason proffered by Respondent was merely a pretext for unlawful discrimination. *Id.* at 330. A further review of the record, however, shows that Complainant has successfully established that the legitimate reason proffered by Respondent was a pretext for unlawful discrimination. The evidence establishes that Complainant, an attorney for Respondent for approximately 17 years, with credit card privileges for approximately eight years, had only been questioned once before regarding a charge to his card. Nothing ever happened with regard to that charge. For eight years Complainant had been using the credit card with the knowledge that he was allowed to put personal charges on the card as long as he accounted for his personal usage and paid Respondent for this usage. In fact, one attorney working for Respondent, and known to O'Neill as someone who "lives above his means," once owed Respondent over $25,000.00 for personal expenses that he placed on his credit card. This attorney was allowed to pay the money back over time.

According to Respondent, the January 23 facsimile, with case numbers attributed to certain expenses, shows that Complainant was trying to bill clients for his personal expenses. However, I credit the testimony of Complainant and Russotti that this was sent as a preliminary accounting, and that Complainant told Rochester that he didn't want to identify any of the hotel charges to anything until he saw his receipts. Most telling is the first page of the document in which Complainant indicates that he is working on a reconciliation, collecting receipts and requesting tabulations of subtotals. Complainant best described what he sent to Respondent as the "diary of a madman." Blake did not understand what Complainant was saying on the first page and, in fact, had never seen anything like it; however she made no attempt to contact Complainant to find out what it meant. Also, she was not aware that anyone from accounting had attempted to contact Complainant to ascertain what the first page meant. This cover page should have stopped everyone from further action until an explanation was received.

The credible evidence shows that Complainant was suffering from BPD, not only at the time he submitted his preliminary accounting, but also at the time he incurred the expenses. The only expert testimony presented was the credible testimony of Dr. Verdon. Dr. Verdon's credible expert testimony revealed that it was common for someone with BPD to act impulsively, experience grandiose thinking, exhibit impaired judgment, and do thing in excess. This is an apt description of Complainant's behavior from the end of September of 2005 through January of 2006. This expert testimony explains everything Complainant experienced shortly after September 5, 2005, including why he was occasionally able to produce good work, why he experienced unusual shifts in energy, and why he could not trust himself to act in a socially acceptable manner in an office environment

I do not credit the testimony of Jaffe and O'Neill that the reason for the termination of Complainant's employment was his attempt to bill clients for his personal expenses. The circumstances of the January 23 facsimile clearly caused everyone to focus their attention on Complainant's behavior in the months leading up to this submission. According to both Blake and O'Neill, this credit card usage by Complainant was a complete aberration from the way he had ever used it before. Jaffe saw that Complainant had been exhibiting disruptive behavior during this time, had deportment problems, was making inappropriate noise and remarks, and had been excessively absent. Jaffe's e-mail of January 27, at approximately 1:57am, shows that he saw the propriety of giving Complainant a leave of absence after receiving information about Complainant's condition and his efforts to recover, including seeing a psychiatrist. However, the record is clear that Jaffe realized other factors to consider in deciding how to respond to Complainant's condition.

At the time Respondent was considering Complainant's condition, it was handling the largest case it had ever had in 10 to 15 years, with a potential for realizing damages in the hundreds of millions of dollars. Jaffe knew that there would be "potential sources of business" in the office as they continued to work on this case. He indicated his concern about the risk of having Complainant around, about how his presence would "risk bringing all his crap into that atmosphere." Jaffe stated that Complainant's presence was "a risk that the firm couldn't tolerate." He concluded that, if Complainant "has mental problems" they were "his to deal with." In Jaffe's opinion, "It's not our responsibility." I disagree. Complainant has successfully established, by a preponderance of the evidence, that the legitimate reason proffered by Respondent was a pretext for discrimination. Respondent was on notice of Complainant's mental health problems and terminated his employment in violation of the Human Rights Law.

Complainant also raised an issue of discrimination in that Respondent refused to provide a reasonable accommodation for his disability. The Human Rights Law also makes it an unlawful discriminatory practice for an employer to refuse to provide a reasonable accommodation to an employee's disability. *See* Human Rights Law § 296.3(a). The credible evidence establishes that both Russotti and Complainant made Respondent aware of Complainant's disability and the need for a reasonable amount of time for recovery as a reasonable accommodation. Respondent had the responsibility to consider Complainant's request for a reasonable amount of time for recovery. *See* 9 N.Y.C.R.R. § 466.11(i)(1). Respondent also had the duty to request from Complainant any documentation that it needed to consider his request. *See* 9 N.Y.C.R.R. § 466.11(j)(4). O'Neill did make a request for documentation in his letter of January 23 in which he told Complainant to send the documentation to Blake who was responsible for forwarding it to Respondent's medical consultant for coverage assessment. However, the proof establishes that Respondent did not take meaningful action with regard to the information and documentation it received. Although Blake forwarded information about Complainant to Respondent's medical consultant, she was never asked to ascertain what the consultant required to make a determination. Further, O'Neill never asked Blake to get any medical information from Dr. Verdon concerning Complainant's psychiatric care and never asked her to forward Dr. Verdon's letter of January 25 to Respondent's medical consultant. O'Neill didn't even show Blake the letter Complainant had sent to him dated January 26 regarding his treatment and medication.

While they should have been considering Complainant's request for accommodation, Jaffe was busy telling O'Neill that "it is time to close the door on this fellow." Jaffe thought that "instead of trying to wean our way off this guy, we need to face facts and he has to go." Jaffe

made his position on accommodation clear, "I do not want him back here; I do not want to see him again; and neither does anyone else." Therefore, Complainant has met his burden of showing that Respondent failed to provide a reasonable accommodation for his disability.

Complainant also raised an issue of discrimination in that Respondent retaliated against him because he opposed unlawful discrimination. The Human Rights Law further makes it an unlawful discriminatory practice for any employer to retaliate against any person because he opposed unlawful discrimination. *See* Human Rights Law § 296.7. Complainant has the burden to establish by a preponderance of the evidence that such retaliation occurred. To meet his burden to establish that discrimination occurred, Complainant must initially show by a preponderance of the evidence that he has engaged in protected activity, that his former employer was aware that he engaged in the protected activity, that he suffered an adverse employment action based on his activity, and that there is a causal connection between the protected activity and the adverse action. *See Forrest v. Jewish Guild for the Blind*, 3 N.Y.3d 295, 786 N.Y.S.2d 382 (2004). A claim of retaliation can be based on the actions of a former employer. *See Yanai v. Columbia University,* 2006 N.Y. Misc. LEXIS 2407; *Landwehr v. Grey Advertising, Inc.*, 211 A.D.2d 583, 622 N.Y.S.2d 17 (1st Dept. 1995); *Gonzalez v. City of New York,* 354 F.Supp.2d 327 (SDNY 2005). The credible evidence establishes that Complainant retained an attorney with regard to what he considered to be Respondent's unlawful discriminatory termination of his employment. In or about July of 2006, Complainant's attorney met with Respondent's attorney to discuss Complainant's opposition to this termination. Although Respondent had terminated Complainant, effective March 6, 2008, alleging professional misconduct, it reported to the DDC, by letter dated August 30, 2006, nearly six months after the termination, that Complainant had tried to assign his expenses to its clients.

Complainant experienced this adverse employment action of a complaint to the DDC that could end his career as an attorney shortly after making Respondent aware of his opposition to what he considered an unlawful discriminatory termination of his employment. The causal connection between Complainant's opposition to unlawful discrimination and his experience of an adverse employment action after Respondent learned of his opposition is clear. The fact that a complaint to the DDC is an adverse employment action is obvious. Therefore, Complainant has established a prima facie case.

Respondent has, again, rebutted the inference of discrimination by raising a genuine issue of fact by presenting evidence that it made the report to the DDC after consulting with an attorney who specializes in ethics. Again, with the absence of the inference of discrimination, Complainant has the burden to prove that the legitimate reason proffered by Respondent was merely a pretext for unlawful discrimination. *See Pace v. Ogden Servs. Corp.*, 257 A.D.2d 101, 692 N.Y.S.2d 220 (3d Dept. 1999). Complainant has, however, successfully established that the legitimate reason proffered by Respondent was a pretext for unlawful discrimination. The evidence establishes that Respondent claims to have determined in February of 2006 that Complainant had attempted to assign some of his own credit card expenses to clients and, therefore, terminated his employment, effective March 6, 2008. When Respondent terminated the employment of Complainant, it did not report the allegations of professional misconduct to the DDC. In fact, it was approximately six months after Respondent terminated Complainant's employment, allegedly for professional misconduct, after Respondent received the letter raising issues of unlawful discrimination regarding the termination of employment, and after the meeting of attorneys that Respondent reported to the DDC that Complainant had tried to assign his expenses to their clients. Jaffe testified that there were several reasons for the delay in

reporting what they considered to be the professional misconduct of Complainant, including busy work schedules, family health problems, the unpleasantness of the task, and the desire to confer with an ethics counsel. Respondent had every right to confer with an ethics counsel and in no way is that conference held against them. However, I do not credit the testimony of Jaffe or O'Neill with regard to their motivations for reporting their allegations against Complainant to DDC. I find, based on the evidence, that Respondent's motivations were retaliatory in nature. Therefore, Complainant has met his burden of showing that Respondent retaliated against him because he opposed unlawful discrimination.

Complainant is entitled to recover compensatory damages cause by the unlawful discriminatory conduct of Respondent. *See* Human Rights Law § 297.4(c)(iii). When income and benefits are at issue, however, Complainant has a duty to exercise diligence to mitigate his damages by making reasonable efforts to obtain comparable employment. *See Rio Mar Rest. v. New York State Div. of Human Rights*, 270 A.D.2d 47, 704 N.Y.S.2d 230 (1st Dept. 2000) The evidence establishes that, in February of 2006, Complainant visited a law firm and thereafter had discussions regarding possible employment, but the discussions were unsuccessful. Then, in March of 2006, Complainant attended a job fair at the New Jersey State Bar Association. Thereafter, claiming it "unrealistic" to expect to be hired, Complainant developed a kind of "Of Counsel" relationship with an attorney he knew and set up his own office.

I find that Complainant has not exercised due diligence in making a reasonable effort to obtain comparable employment to fulfill his responsibility to mitigate his damages. It is true that he would have approached any employment opportunity as a man in his late fifties with a history of mental illness who was terminated from his last legal position. After August 30 he was also someone who had a complaint reported to the DDC regarding passing off personal expenses to

clients. Finding comparable employment under those circumstances presented quite a challenge. As Respondents were faced with the challenge of properly treating an employee with a disability, so, too, Complainant was faced with the challenge of mitigation, a challenge that had to be met with diligence and reasonable effort. The record establishes that Complainant was the victim of unlawful discrimination; he should not have assumed that he could not convince an employer of this fact as well as his worthiness for employment. Both Jaffe and O'Neill have praised him as a brilliant trial lawyer. His credentials are superb and his experience is impressive. Complainant has over 30 years of experience as a personal injury lawyer, known for his skill at finding solutions to complex issues. The evidence shows that he did not approach mitigation in a diligent or reasonable fashion that was worthy of him. Respondent would be responsible for lost salary and benefits only if such efforts proved fruitless.

An award for mental anguish, however, is appropriate. It is well-settled that an award of compensatory damages to a person aggrieved by an illegal discriminatory act may include compensation for mental anguish and humiliation, which may be based solely on the complainant's testimony. *See Marcus Garvey Nursing Home, Inc. v. New York State Div. of Human Rights,* 209 A.D.2d 619, 619 N.Y.S.2d 106 (2d Dept. 1994). Complainant testified credibly that Respondent's discriminatory behavior caused significant mental anguish, and, in particular, that he was extremely overwrought and upset by the termination of his employment. Not only has the mental anguish from this act stayed with him, but also the anxiety and stress caused by Respondent's reporting to the DDC. The contributory nature of BPD must be considered in evaluating Complainant's mental anguish, but it cannot be denied that the actions of Respondent in terminating his employment and then in retaliating against his opposition to unlawful discrimination caused significant mental anguish that continued to the time of his

testimony. Therefore, considering the duration and severity of his mental anguish, the contributory nature of his BPD, and the fact that Respondent not once but twice unlawfully precipitated mental anguish, an award of $50,000 to Complainant is reasonably related to the wrongdoing, supported by the evidence, comparable with other awards for similar injuries, and, therefore, justified in this case. *See Boutique Industries, Inc. v. New York State Div. of Human Rights*, 228 A.D.2d 171, 643 N.Y.S.2d 986 (1st Dept. 1996); *Gleason v. Callanan Indus. Inc.*, 203 A.D.2d 750, 610 N.Y.S.2d 671 (3d Dept. 1994); *Greenville Bd. of Fire Comm'rs v. New York State Div. of Human Rights*, 277 A.D.2d 314, 716 N.Y.S.2d 685 (2d Dept. 2000).

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 the complaint with regard to the terms, conditions, and privileges of employment be and hereby is sustained; and it is further

ORDERED, that the complaint with regard to the refusal to provide a reasonable accommodation for a disability be and hereby is sustained; and it is further

ORDERED, that the complaint with regard to retaliation for opposing unlawful discrimination be and hereby is sustained; and it is further

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 from the date of the Final Order in this matter, Respondent shall pay to Complainant the sum of $50,000.00, without any withholdings or deductions, as compensatory damages for the mental anguish suffered by Complainant as a result of the unlawful acts of discrimination for which the Respondent is liable. Respondent shall also pay interest to Complainant on this award, at a rate of nine percent per annum, from the date of the Commissioner's Order until the date payment is made.

2. The aforesaid payment shall be in the form of a certified check made payable to the order of Complainant and delivered to Complainant's attorney, Law Offices of William H. Roth, One River Place, Suite 3608, New York, NY 10036, by certified mail, return receipt requested.

3. When Respondent mails said certified check to Complainant's attorney, Respondent shall simultaneously furnish written proof of said payment to Barbara Buoncristiano, Director of Compliance, New York State Division of Human Rights, One Fordham Plaza, 4th Floor, Bronx, New York 10458.

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

DATED: September 25, 2008
Bronx, New York

Thomas J. Marlow
Administrative Law Judge