Division of Human Rights

NEW YORK STATE
DIVISION OF HUMAN RIGHTS

NEW YORK STATE DIVISION OF HUMAN RIGHTS
on the Complaint of

KEVIN C. BENJAMIN,

Complainant,

v.

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.,

Respondent.

NOTICE AND FINAL ORDER

Case No. 10157991

Federal Charge No. 16GB300206

PLEASE TAKE NOTICE that the attached is a true copy of the Alternative Proposed Order, issued on March 18, 2016, by Peter G. Buchenholz, Adjudication Counsel, after a hearing held before Margaret A. Jackson, 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 Alternative Proposed Order, and all Objections received have been reviewed.

PLEASE BE ADVISED THAT, UPON REVIEW, THE ALTERNATIVE PROPOSED 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") WITH THE FOLLOWING AMENDMENTS:

- Because ALJ's Exhibit 5 was not admitted into evidence, any references to it are not hereby adopted.

- Because Respondent is self-insured, the $12,240 in Workers' Compensation benefits Complainant received is offset from his lost wage award (see below).
- Complainant's objection that $3,212.10 was incorrectly calculated as mitigation and improperly offset from the lost wage award is supported by the record. *See* Complainant's June 30, 2015, Objections to the Recommended Order, Exhibit A. The amount he earned from Buzzi Unicem/Hercules Cement was $2,225.70 and was accounted for in the mitigation calculation. Accordingly, the lost wage award is increased by $3,212.10 (see below).
- Respondent objects to the consideration of wage information submitted in Complainant's June 30, 2015, Objections to the Recommended Order. Respondent has provided no information to rebut the findings based in those records. Furthermore, it is noted, Respondent takes no issue with the Unemployment Insurance offset based on the information provided in those same Objections. Accordingly, Respondent's objection is unavailing.
- Respondent objects to the lost wage calculation arguing that Complainant's 2011 overtime is unrepresentative of the overtime he generally worked because the 2011 outage, which occurs only every six years, resulted in more overtime hours. Respondent states that, "[i]n the four preceding years, 2007-2010, when there was not an outage at the station, Respondent's records show that Complainant averaged 7.5 hours of overtime per week." However, Respondent failed to produce these records and failed to point to any evidence in the record to support this claim.

The record does contain Complainant's 2009 W2 from Respondent and his 2010 and 2011 tax returns. It also contains a 2011 Employer's Statement of Wage Earnings ("Wage Statement") prepared by Respondent in response to Complainant's Workers' Compensation claim which shows Complainant's weekly wages during the fifty-two weeks prior to the

outage. *See* Joint Ex. 34; Complainant's Exhibit 7. Overtime can be deduced by subtracting from Complainant's wages the amount he would have earned for a regular forty-hour workweek at the appropriate pay rate and then dividing the remainder by time-and-a-half.

Complainant's wage statements show that he earned $97,667.20 in 2009. *See* Complainant's Exhibit 7. His pay rate from January to June was $37.80 per hour and $56.70 at time-and-a-half for overtime work. From June to December his pay rate was $39.12 and $58.68 for overtime. *See* Joint Exhibit, p. 85. Thus, from January to June, he would have earned $39,312 for a regular forty-hour workweek ($37.80 x 40hrs x 26 wks) and $40,684.80 from June through December ($39.12 x 40hrs x 26 wks). Thus, he earned $17,670.40 for overtime work ($97,667.20 - $39,312 - $40,684.80). Since Complainant's pay rate changed from the first half of the year to the second, dividing his overtime earnings in half and further subdividing that figure by the appropriate overtime rate will yield the approximate number of hours he worked for each half of the year. Thus, for the first half of 2009, he worked approximately 155.82 hours of overtime ($17,670.40 ÷ 2 = $8,835.20 ÷ 56.70 at time-and-a-half) and 150.57 hours for the second half ($8,835.20 ÷ 58.68).

In 2010 Complainant earned $106,816. *See* Complainant's Exhibit 7. From January to June his pay rate was $39.12 and $58.68 for overtime and from June to December, $40.49 and $60.735. *See* Joint Exhibit 1, p. 85. Thus, he earned $24,021.60 in overtime wages ($106,816 - [($39.12 x 40 x 26) + ($40.49 x 40 x 26)]). Therefore, he worked approximately 204.68 hours of overtime during the first half of 2010 ($24,021.60 ÷ 2 ÷ $58.68) and 197.76 hours during the second half ($24,021 ÷ 2 ÷ $60.735).

According to the Wage Statement, Complaint worked 398.65 overtime hours during the first thirty-five weeks of 2011 preceding the outage.

Thus, during the 139 weeks preceding the outage – the only period for which there are records – Complainant worked 1,107.48 hours of overtime for an average of 7.97 hours per week (1,107.48 hrs ÷ 139 wks).

Accordingly, Complainant's lost wages are calculated as follows:

Complainant's employment was terminated as of December 27, 2011. From January through July of 2012, his pay rate was $41.91. *See* Joint Exhibit 1, p. 85. Had Complainant's employment not been terminated, through July 2012, he would have earned $50,292 ($41.91 x 40hrs x 30wks), plus, assuming Complainant continued to work 7.97 hours per week in overtime, an additional $15,031.02 in overtime ($62.865 x 7.97hrs x 30wks) for a total of $65,323.02.

From July 2012, through June of 2013, Complainant's pay rate would have been $42.75. *See* Joint Exhibit 2, p. 90. During that forty-eight week period, Complainant would have earned $82,080 in base pay and $24,531.66 in overtime ($64.125 x 7.97hrs x 48wks) for a total of $106,611.66.

From June 2013 through June 2014, Complainant's pay rate would have been $43.82. Thus, Complainant would have earned $118,386.74 ($91,145.60 base, plus $27,241.14 overtime).

From June 2014 through May 2015, the date of the Recommended Order, Complainant's pay rate would have been $45.13. See Joint Exhibit 2, p. 90. Thus, Complainant would have earned $114,547 during that forty-eight week period ($88,649.60 + $25,897.40).

Thus, had Complainant remained employed by Respondent from the date of his last paycheck, December 24, 2011, through May 21, 2015, the date of the Recommended Order, Complainant would have earned $404,868.42.

	Jan 2012 - Jul 2012 (30-weeks) at $41.91 per hr	Jul 2012 - Jun 2013 (48-weeks) at $42.75 per hr	Jun 2013 - Jun 2014 (52-weeks) at $43.82	Jun 2014 - May 2015 (48-weeks) at $45.13
40-hr week:	$50,292	$82,080	$91,145.60	$88,649.60
7.97 hrs of o/t (at time-and-a-half):	$15,031.02	$24,531.66	$27,241.14	$25,897.40
Total lost wage:	$65,323.02	$106,611.66	$118,386.74	$114,547
			Grand Total:	**$404,868.42**

Subtracting Complainant's $41,064.51 (this figure includes the $3,212.10 adjustment discussed above) in post-termination income, the $25,998 he received from Unemployment Insurance and the $12,240 he received in Workers' Compensation, leaves Complainant with total lost wages in the amount of $325,565.91. Subtracting the $68,747.89 pension amount accounted for in the Alternative Proposed Order, Respondent is directed to pay Complainant $256,818.02 in lost wages, plus interest as directed in the Alternative Proposed Order.

- In addition to the directives contained in the APO, Respondent is directed to immediately cease and desist from employing a policy that results in the termination of the employment of disabled employees absent the required individualized assessment. Within 120 days of the date of this Order, Respondent is to provide training to its supervisors and employees related to its obligations under the Human Rights Law to perform an individualized assessment and the policies it puts in place in compliance with this Order. Within sixty days of the date of this Order, Respondent shall provide the Division's General Counsel proof of its efforts and intent to provide such training. The remainder of the APO is hereby adopted.

- Respondent's assertions that the Administrative Law Judge who conducted the hearing was biased are not supported by the record. Respondent asserts that the ALJ unfairly limited the amount of time Respondent had to present its case, but fails to indicate any witness it was foreclosed from presenting or evidence it was precluded from introducing. *See* Respondent's

May 5, 2016, Objections to the APO at p. 5. Respondent asserts that the ALJ overruled a vast majority of Respondent's properly founded objections. *See Id.* at 6. A review of the record does not support this.

- Respondent asserts that the finding that Electrical Technicians worked in partnered teams with one functioning as the permit holder and the other as the helper has "absolutely no basis in the record." *Id.* at 11. However, Anatole Larokko, the union shop steward, testified "the work permit holder is now assigned to carrying out the job and anybody else is the helper." (emphasis added) Tr. 199.

- Respondent's assertion that this Order is prohibited by 29 U.S.C. 1144 ("ERISA") to the extent that the Order requires repayment of Complainant's pension lump-sum payout is without merit. "What ERISA protects is an employee's rights under a benefits plan, and thus preemption will extend to claims regarding the administration of such a plan, or to claims of denial of rights under a plan, whether or not the denial of benefits is said to have been occasioned by discriminatory animus. It does not follow, however, that state law governing other forms of misconduct, such as discriminatory hiring or firing, will be preempted merely because they have an incidental effect on the payment of employee benefits. Indeed, ERISA does not even preempt claims for benefits as such, but rather is limited to claims concerning the administration of a plan" *Algie v. MCI Int'l, Inc.,* 1993 WL 17158 (S.D.N.Y. 1993) (citing *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85 (1983) and *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1 (1987); *see also Exxon Shipping Co. v. State Div. of Human Rights,* 303 A.D.2d 241 (1st Dept. 2003) (Confirming Division Order directing Exxon to make retroactive contributions to employee's pension plan).

- Respondent's argument that requiring it to repay to the pension plan the amount Complainant withdrew as a lump-sum payout results in a double benefit for Complainant is without basis because the money was subtracted from the lost wage award.

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: SEP 06 2016
Bronx, New York

HELEN DIANE FOSTER
COMMISSIONER

Division of
Human Rights

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ALTERNATIVE PROPOSED ORDER

Case No. **10157991**

SUMMARY

Respondent unlawfully discriminated against Complainant because of his disability. Because there is insufficient evidence of retaliation, that charge is dismissed. Respondent is liable to Complainant for lost wages and emotional distress. Respondent is also assessed a civil fine and penalty.

PROCEEDINGS IN THE CASE

On October 9, 2012, 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 determined 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 Migdalia Pares, an Administrative Law Judge ("ALJ") of the Division. In 2013, Public hearing sessions were held on November 20 and 21 and in 2014 on February 26, 27, June 11 and 12.

On June 11, 2014, Complainant, on the record, withdrew his claims based on age, race, color and military status. (Tr. 714-15)

Complainant and Respondent appeared at the hearing. Complainant was represented by Eric Dinnocenzo, Esq. Respondent was represented by Lynelle J. Slivinski, Esq. and Richard A. Levin, Esq.

Both parties filed timely post-hearing proposed findings of fact and conclusions of law.

On November 20, 2014, the case was reassigned to ALJ Margaret A. Jackson.

On May 21, 2015, ALJ Jackson issued a recommended Findings of Fact, Opinion and Decision, and Order ("Recommended Order"). Thereafter, both Complainant and Respondent filed Objections to the Recommended Order with the Commissioner's Order Preparation Unit.

FINDINGS OF FACT

1. Respondent is a corporation that generates, transmits and distributes electricity, natural gas and steam in New York City and parts of Westchester County. It employs approximately 14,000 employees. (Tr. 35, 848)

2. Respondent hired Complainant as an Electrical Technician in its Instrument and Control Group ("Tech" or "Technician") in 2003. (Tr. 364-65; Joint Ex. 32)

3. There were fourteen Techs in Complainant's group during the relevant period. Techs worked in a "partner" or "buddy" system and assisted one another when they went into the field to perform their duties. Each buddy pair was assigned prior to a job with one designated the lead technician and the other the helper. The lead received a permit for the work. The pair then

discussed how best to divide responsibilities. Whenever there was a lead, there was a helper. (Tr. 165, 169, 198-200, 245, 379, 386, 404-05, 428-29, 1104)

4. Electrical Technicians calibrated, maintained and repaired various devices that control steam- and electricity-generating equipment at Respondent's East River power plant. The job entailed walking, climbing, standing and lifting materials up to fifty pounds. A large percentage of the work involved calibrating equipment. The tools required included screwdrivers and wrenches. (Tr. 197, 378, 385-88, 390, 850-51, 888; Joint Ex. 40)

5. Electrical Technicians could accomplish most of the work using one hand. For instance, using screwdrivers and wrenches only required one hand. Heavy equipment was lifted with a partner. Each partner would grab a handle on either side of the equipment. Wire was also installed with a partner. One partner would have to use two hands to pull the wire, but the partner who fed the wire into a conduit, could do so with one hand. Equipment that was heavier than fifty pounds was, on occasion, retrieved from storage and carried a few feet onto a wheeled cart to be rolled into the field and then only lifted again when it was put away. This too was done with a partner. On infrequent occasions, an Electrical Technician might have to use two hands when using a pair of Channellock wrenches. (Tr. 158-60, 165-167, 197, 236-37, 279, 381-82, 385, 390-92, 791-92, 830-31, 1106)

6. The Electrical Technicians worked collaboratively. If a Tech had physical limitations, he could obtain help from his partner or one of the other Technicians. For instance, one of the Techs was older, and though he was permitted and able to perform heavy lifting, his colleagues did the lifting for him merely because they respected his over forty years of experience. Another Tech could not pull wire or do heavy lifting because of a medical condition. Though he wanted to do the work, the other Technicians would not let him. They volunteered to do the work for

him. When asked if that caused a hardship in the department, the shop steward testified that it did not "[b]ecause it didn't take long to move the equipment to wherever it's got to go. And because we were aware of his situation we were always willing to give him a hand." (Tr. 169-72, 177, 243-44, 430-34, 1106)

7. Approximately every six years, the East River station goes through a scheduled outage when the generating equipment is taken out of service and maintenance is performed. In 2011, the station conducted an outage from September through December. (Tr. 207, 888-89)

8. On September 4, 2011, Complainant, who is right-hand dominant, overextended his left elbow when he was using two Channellock wrenches to open a conduit. Complainant's elbow felt bruised, but he took painkillers and continued working. (Tr. 392-94, 396-98)

9. On September 13, Complainant reported numbness and weakness in his arm to one of his supervisors who sent him to Respondent's Occupational Health Department ("OHD)" for examination. (Tr. 399, 761)

10. OHD physicians assess the ability of injured or ill employees to work and the extent to which restrictions, if any, should be imposed. They do not treat employees. (Tr. 916)

11. An OHD doctor diagnosed Complainant with lateral epicondylitis, commonly known as tennis elbow. Tennis elbow is an inflammation of the lateral tendon along the bone on the lateral side of the elbow, usually at the insertion point. (Tr. 967-68, 990, 1003; Joint Ex. 7)

12. The OHD doctor indicated that Complainant had equal strength in both arms and experienced discomfort with left extension. Complainant took Tramadol, a pain reliever, to "good effect." During the examination, the doctor noted that forceful movements of Complainant's upper left extremity resulted in moderate-to-severe wrist pain, but that it was fully relieved with Tramadol. (Tr. 988-90; Joint Ex. 7)

13. There is no evidence that Complainant ever requested an accommodation or to work lighter duties. Nonetheless, OHD placed Complainant under several temporary work restrictions initially lasting six days. He was limited to only occasional pushing, pulling or lifting up to 20-45 pounds; no reaching overhead; no work requiring repetitive hand or finger motion; and, no use of hand tools requiring a twisting motion. These restrictions applied, without explanation, to both his left and right hands. He was also directed to specifically limit the use of his left arm or hand. (Joint Exs. 7, 13)

14. When OHD imposes work restrictions, it does not make a determination as to whether an employee can perform the functions of his position. That determination is made by the manager of the department where the employee works. There is no evidence as to what OHD understood to be the functions of Complainant's job. The manager did not consult with the OHD staff and, in Complainant's case, did not consult with Complainant about what he was able and unable to do or how much of his job required him to perform the restricted activities. (Tr. 47-48, 73-74, 89-93, 929-30, 957, 1105, 1109)

15. Patricia Whelton, Respondent's Human Resources Manager of Employee and Labor Relations, acknowledged that Respondent viewed the medical restrictions and the job duties formulaically and did not look at how they specifically applied to Complainant. (Tr. 33, 83-86)

16. Complainant reported directly to any of several Technical Supervisors. Those supervisors reported to Christopher Brownlee who was the Technical Manager of the plant. (Tr. 48-49, 567-68, 847-850, 854-55, 880, 954, 1093, 1102)

17. On September 13, 2011, Brownlee received an e-mail advising of the restrictions. He was not told of the underlying condition that resulted in the restrictions. OHD personnel never

met with Human Resources or Complainant's supervisors to discuss his condition. (Tr. 882, 955-57, 1003-04, 1018-19; Joint Ex. 13)

18. At some point, Complainant's co-workers were informed that he was under restrictions and that if he could not perform a task, they should assist him. His day-to-day work did not change. Between September and December, there was only one occasion during which another worker actually had to perform a task for Complainant. Complainant was unable to use a sheet metal punch which required two hands and great strength. The sheet metal punch was used infrequently. Complainant found it difficult to use before his injury and, consequently, his partner would assist. There is no evidence that being able to use the sheet metal punch was an essential function of the Electrical Technician's job. (Tr. 178, 404-07, 409-10, 422-23, 882)

19. Both before and after the injury, Complainant primarily relied on his right hand to work. Though he was restricted by OHD from twisting and repetitive hand motions, he was able to twist screwdrivers and wrenches using his right hand. There were several ladders in the facility and climbing was required. Though he was restricted from reaching overhead, Complainant was able to reach overhead with his right arm. Though he was restricted from lifting more than occasionally, he was able to lift with his right hand, bearing the weight of heavier equipment in his right hand. If he used his left hand, it was merely to guide the work he was doing with his right hand. (Tr. 158-60, 165, 197, 236-37, 381-82, 385, 391, 406, 422-24, 428, 829-30, 1106)

20. Complainant was scheduled to return to OHD on September 19, 2011. After the September 19 visit, the doctor noted that Complainant experienced pain with certain movements, but that his pain was improving. The restrictions were continued and Complainant was scheduled to return on September 21. (Tr. 1009; Joint Ex. 7, p. 2)

21. Thereafter, Complainant was seen by OHD physicians on eight more occasions. The physicians noted varying degrees of pain or tenderness. On some visits, with certain movements, Complainant reported his pain as severe, on others as moderate-to-severe and on others as mild-to-moderate. Also, on some visits, when his arm was at rest, he reported the pain as mild and constant and at other visits he reported no pain. After each visit, the restrictions were maintained. (Joint Ex. 7)

22. Complainant continued performing his work with the OHD restrictions. He worked his regular hours, took no time off and also worked overtime. Complainant took pain medication as needed. (Tr. 481-82, 827, 1101)

23. Complainant did not work the midnight shift during the outage because the midnight shift was voluntary and Complainant was prohibited from volunteering as a result of the medical restrictions. (Tr. 1106-07)

24. On July 14 and October 11, 2011, Complainant was counseled for being discourteous to a supervisor. Complainant referred to a supervisor as racist. Complainant then threated to file an Equal Opportunity complaint against the supervisor, though he never did. (Tr. 558-64; Joint Ex. 11)

25. On October 17, 2011, Complainant received a one-day suspension for being discourteous and disloyal. (Joint Ex. 11)

26. On December 9, 2011, Complainant visited Dr. Eugene Bulkin, a private physiatrist, who diagnosed Complainant with tennis elbow. He recommended only three limitations for Complainant. Complainant was never to push or pull with his left arm; he was only occasionally to lift 36- to 50-pound objects; and, he could lift 26- to 35-pound objects no more than 3 to 6 hours per day. Dr. Bulkin did not restrict Complainant from reaching overhead, repetitive hand

or finger motions or the use of hand tools requiring a twisting motion. Dr. Bulkin provided Complainant an arm brace to minimize his arm movements. However, Complainant did not wear the brace at work. (Tr. 480-82, 773, 1034; Joint Ex. 30)

27. Respondent's personnel policy stated that OHD "will review temporary medical restrictions in effect for a three (3) month period and will either rescind them or designate them as permanent restrictions." (Tr. 1141; Joint Ex. 3, pp. 9-10)

28. Dr. Michelle Alexander, Respondent's OHD Medical Director, acknowledged that three months was an arbitrary point, though she asserted that "most medical conditions will improve in a three-month [time frame]." Those that do not, she considered serious. (Tr. 915, 1066)

29. After Complainant's December 12 OHD visit, during which he reported moderate-to-severe pain with some movements but otherwise reported improved left lateral elbow pain, the temporary restrictions were re-designated to permanent. (Tr. 1011; Joint Exs. 7, 20, 21)

30. Even though Complainant's restrictions became permanent, Complainant was given a follow-up appointment by OHD for January 4, 2012, to ascertain whether his condition was likely to continue improving or worsen. (Joint Ex. 7)

31. Dr. Alexander acknowledged that OHD continued to schedule Complainant for appointments because it anticipated that his condition would improve. (Tr. 1013-17, 1025)

32. Whether a disability was designated as temporary or permanent by Respondent was important because Respondent had a policy, known as "C-6," whereby an employee who could not perform his or her regular duties, with or without an accommodation, because of a permanent medical restriction, would be reassigned to another available position where he or she could perform the essential functions with or without an accommodation. In order to qualify, the

employee must not have had a disciplinary record with a suspension or higher. Because Complainant had been suspended, he did not qualify. (Tr. 47, 94; Joint Ex. 3)

33. Respondent's managers determined whether an accommodation should be granted. On December 12, 2011, Respondent's Human Resources Department notified Brownlee that Complainant was placed on permanent restriction. Brownlee was asked via e-mail whether Complainant could be placed on C-6 or accommodated. (Tr. 1005, 1141-42; Joint Ex. 21)

34. Brownlee did not, at that point, meet with or speak to Complainant. Brownlee did not directly supervise Complainant. He did not go into the field and did not observe his work on a day-to-day basis. Brownlee did not speak with any of the Technicians who partnered with Complainant about his ability to do his work. Brownlee did not review any of Complainant's medical documentation or discuss his abilities with anyone in OHD or Human Resources. On December 13, he notified Human Resources via e-mail that:

> Reasonable accommodation for the temporary restrictions was made by placing the employee on select non-essential tasks since 9/13/11. These tasks were limited in physical nature based on the restrictions, distributing the labor burden onto other technicians in the department. Due to the temporary restrictions, work evolutions involving the referenced restrictions as part of the job required additional staffing for the department to ensure the tasks were appropriately supported from a manpower perspective. The physical nature of the electrical technician job requires the ability to reach overhead, the use of hand tools imparting a twisting motion, repetitive hand or finger motion and occasional lifting of 20-45 pounds. These restrictions limit the ability to perform essential functions as an electrical technician, and as such, reasonable accommodation of these permanent restrictions cannot be made within the department.

(Tr. 192, 957, 1102-03, 1109-10, 1118; Joint Ex. 21)

35. Brownlee determined that Complainant could not be accommodated on a permanent basis. At no point did anyone consult with Complainant or assess his ability to do his work with or without accommodations. (Tr. 493, 605-06, 896)

36. Brownlee interpreted the OHD restrictions as applicable to both Complainant's left and right side and he did not consider whether Complainant could perform the restricted functions with his dominant, uninjured right hand. He acknowledged that in many cases, the tools requiring twisting motion could be used with the dominant hand. (Tr. 1110-12)

37. Brownlee testified that as a result of the restrictions, Complainant was unable to climb to access the main combustion turbine or the generator. He could not perform high voltage electrical system testing because his arm brace would interfere with personal protective equipment requirements. He could not perform the mechanical restoration or removal of turbine equipment. He could not work to support restoration of the wiring harness system. He could not assist with reassembly of the hydraulic systems, the pneumatic systems or "anything that required physical lifting or mechanical tightening, fastening, anything of that nature that required two hands . . ." (Tr. 892-93)

38. Brownlee's testimony is not credible and is contradicted by the record. Complainant could climb using his right hand. He did not wear his arm brace at work. He could utilize tools required to service the turbine equipment with his right hand and he could feed the wire with one hand while his partner pulled the wire. (Tr. 158-60, 165-67, 171-72, 197, 236-36, 381-82, 385, 391, 406, 422-24, 481-82, 829-30, 1106, 1123)

39. Brownlee testified that Complainant could not work the midnight shift because of his restrictions. He asserted that this was an essential function of the position, but he later admitted that the shift-work was voluntary and that not all Electrical Technicians volunteered. (Tr. 1107)

40. Brownlee testified that Complainant was relegated to the helper position during the relevant time and that this temporary assignment could not be made permanent. On at least one occasion during the period he was restricted, Complainant was made the lead technician.

Furthermore, Brownlee encouraged Electrical Technicians to work collaboratively. He testified, "I encourage it, but it's something that they also bring to the job when necessary." In any event, when out in the field, Techs worked in pairs where one Tech was always the lead and the other always the helper. (Tr. 165, 199-200, 273-74, 386, 445, 889, 1106; Joint Ex. 21)

41. Though Brownlee wrote in his e-mail that additional staff was required as a result of Complainant's restrictions, he admitted that no additional staff was hired. The union shop steward also credibly testified that no additional staff was required as a result of Complainant's restrictions. (Tr. 210, 1117)

42. After Human Resources received Brownlee's e-mail, no one evaluated whether Complainant could perform tasks with his right arm as opposed to his left. No one from Human Resources met with or spoke to Complainant about his ability to perform the functions of his position. (Tr. 83, 90-91)

43. Though Respondent's policy provided that Respondent's Human Resources Department was to make an individualized determination of Complainant's ability to perform his work and to make such a determination "with the advice and counsel of Occupational Health where necessary," no such individualized determination was made. No one requested or received advice or counsel from OHD. (Tr. 47-48, 65-67, 83-86, 88-95, 1003-04, 1018-19, 1025, 1109; Joint Ex. 3, p. 2)

44. During a deposition related to a Workers' Compensation Board hearing, Dr. Darren Friedman, a private orthopedist who treated Complainant after Respondent terminated his employment, testified that in terms of physical restrictions, Complainant could let his pain be his guide. He recommended Complainant avoid heavy lifting with his left arm, but added that if it did not hurt, he could do it. He noted that the pain could be worse on some days and better on

others. This is consistent with OHD's reports of Complainant's tenderness waxing and waning during the several visits he made from September through December of 2011. (Joint Ex. 25, pp. 8-10)

45. Dr. Debra Parisi, an orthopedic surgeon who treated Complainant from January 18 through September 5, 2012, also testified for a Workers' Compensation Board deposition that tennis elbow symptoms can wax and wane. She agreed that Complainant could work using his pain as a guide as to whether he could perform a task. She noted, "this isn't the type of injury where it tends to get significantly worse with working. Again, I do think he could work with certain limitations where if he starts having pain he would have to stop." (Joint Ex. 26, pp. 26, 30-31)

46. Dr. Alexander acknowledged that patients are capable of working with epicondylitis and they can compensate with their other arm. She agreed that the pain could wax and wane. (Tr. 990-93, 1012)

47. On December 19, 2011, the first time anyone from Human Resources met with Complainant, it was to advise him that, because he had permanent restrictions that could not be accommodated, he could not perform the essential functions of the job, and because he did not qualify for the C-6 program, his employment was terminated effective December 27, 2011. (Tr. 94-95, 221-22, 483)

48. At that meeting, Complainant advised Respondent that he was under a doctor's care, that he was performing effectively and that he could submit documentation from his doctor that he could perform the work. He explained that Dr. Bulkin had placed him on fewer restrictions than Respondent's doctors. (Tr. 225, 259, 488; Complainant's Ex. 6)

49. Indeed, on December 22, 2011, after Complainant informed him about the pending termination, Dr. Bulkin completed Respondent's medical form indicating that Complainant had no medical restrictions or limitations and that he was "okay for regular duty." The form was sent via facsimile to Respondent. (Tr. 591-93; Joint Ex. 30)

50. Complainant also personally delivered Dr. Bulkin's report to OHD and attempted to schedule an appointment but Respondent did not allow him to schedule an appointment. (Tr. 594-97)

51. OHD never followed up with Dr. Bulkin to discuss Complainant's condition or the doctor's lifting of the restrictions. (Tr. 1041)

52. When Complainant was informed that his employment was being terminated, he was shocked and dumbfounded. He described it as a gross betrayal. (Tr. 486-87, 490, 692)

53. The union shop steward was present at the termination meeting. He described Complainant as having a total breakdown. Complainant was crying. It was the most humbled he had ever seen Complainant. (Tr. 226-27)

54. As a result of the termination, Complainant suffered low energy, nightmares and had difficulty sleeping. He described how he had made his living troubleshooting problems and now that he was unable to troubleshoot the problems in his own life, he felt devastated, despondent and depressed. He felt angry. He had suicidal thoughts and felt like driving his car into something. (Tr. 646-47, 691-94)

55. His relationship with his fiancé became strained because he was no longer able to support her financially. He "felt like someone died . . . like there was a death because I . . . I couldn't do anything to help her. You know I couldn't help her because I didn't have any income." (Tr. 672-74)

56. Complainant's social life deteriorated. He became anxious and stopped feeling safe. He grew concerned that he might end up on drugs or alcohol-dependent and consequently started seeing a psychologist on a regular basis in September of 2012. He continued to see the psychologist through the time of the hearing. (Tr. 675-79, 687-89)

57. The psychologist diagnosed Complainant with post-traumatic stress disorder ("PTSD"), depression and anxiety and attributed it to Respondent's treatment of Complainant. Complainant acknowledged that he suffered from anxiety issues dating back to his childhood. (Tr. 562; Joint Ex. 37)

58. The psychologist indicated that Complainant's "symptoms include depression, nightmares, anxiety [and] anger when dealing with the legal and administrative issues surrounding his injury. . . ." Though the psychologist indicated that Complainant's psychotherapy had diminished his symptoms to some extent, it was evident at the hearing that Complainant continued to suffer. He started crying at one point while testifying. The psychologist's report concluded that "losing his life as he knew it [was] causal in his continued post-traumatic stress." (Tr. 561; Joint Ex. 37)

59. Complainant had difficulty paying his bills. In November of 2012, Complainant was evicted from his home and he became homeless. (Complainant's Ex. 4)

60. Right after Thanksgiving, Complainant moved into a veteran's homeless shelter where he lived in an approximately 100-square-foot room. (Tr. 642, 679-81)

61. He had to take a lump-sum payout from his pension in the amount of $68,747.89 in order to make ends meet. (Tr. 648; Joint Ex. 36)

62. In 2011, Complainant earned $126,157.97 from his Electrical Technician job. He was at the maximum pay rate for his title which, according to the union contract, was $41.91 per hour. (Tr. 607, 632; Joint Exs. 1, p. 85, 34)

63. The subsequent union contract increased the maximum pay rate each June by the following: 2 percent in 2012 to $42.75; 2.5 percent in 2013 to $43.82; 3 percent in 2014 to $45.13; and, 3 percent in 2015 to $46.48. Accordingly, had Complainant remained employed and worked the same hours each subsequent year, he would have earned each year approximately $128,681.13, $131,898.16, $135,855.11 and $139,930.76, respectively. (Joint Ex. 2, p. 90)

64. In January 2012, Complainant filed a Workers' Compensation claim, which was contested by Respondent. Eventually, Complainant received $12,240 in Workers' Compensation benefits. (Tr. 608, 620-23, 627; Joint Ex. 41)

65. Complainant also received $24,300 in Unemployment Insurance benefits between January 1, 2012, and March 5, 2013. (Joint Ex. 6)

66. After the termination, he looked for work every week. He listed his resume with several job banks, including the National Labor Exchange and the New York State Department of Labor job bank. He applied for two to five jobs per week. (Tr. 635-38, 640, 689; Complainant's Ex. 8)

67. He went on three interviews and eventually was hired on March 4, 2013, at the Center of Educational Advancement ("CEA") where he worked until June 24, 2014. He worked 37.5 hours per week and earned $8 per hour until April 8, 2013, when his hourly pay was increased to $8.25. On September 9, 2013, it was increased again to $9.50. His total 2013 wages at CEA were $22,912.61 (5 weeks at $300 per week + 22 weeks at $309.38 + 41 weeks at 356.25 per

week). (Tr. 640, 666-69; ALJ's Ex. 5; Complainant's Ex. 3) Complainant's 2014 CEA wages are listed below.

68. Complainant testified that since he started working again he got in better shape and "I feel better every day going to work. . . ." (Tr. 685)

69. Complainant worked at McDonald's as a cashier from May 21, 2014, through October 31, 2014. He worked 20 hours per week at a rate of $8.25 per hour. (Tr. 705-09; ALJ's Ex. 5)

70. Complainant supplemented the record after the issuance of the Recommended Order with evidence of his subsequent earnings as follows: an additional $7,146.24 in 2014 from CEA, $4,155.96 from McDonald's, $1,698 in New Jersey Unemployment Insurance, $2,225.70 from Hercules Cement Company, and $3,212.10 from Buzzi Unicem USA. (Complainant's June 30, 2015, Objection to the Recommended Order, Ex. A)

71. Complainant also received $4,624 from Vocational Rehabilitation Services from March 2015 through May 2015. (Complainant's June 30, 2015, Objection to the Recommended Order, Ex. A).

72. Accordingly, Complainant's total post-termination earnings, not including Unemployment Insurance, through May 21, 2015, the date of the Recommended Order, were $44,276.61.

OPINION AND DECISION

Human Rights Law § 296.1(a) prohibits an employer from discriminating against an employee based on his disability.

"A complainant states a prima facie case of discrimination if the individual suffers from a disability and the disability caused the behavior for which the individual was terminated. Once a prima facie case is established, the burden of proof shifts to the employer to demonstrate that the

disability prevented the employee from performing the duties of the job in a reasonable manner or that the employee's termination was motivated by a legitimate nondiscriminatory reason." (citations omitted) *McEniry v. Landi*, 84 N.Y.2d 554, 558, 620 N.Y.S.2d 328, 330 (1994).

In the instant matter, Respondent terminated Complainant's employment because it claimed Complainant's disability prevented him from performing the duties of his job in a reasonable manner. Thus, Complainant's disability was causally related to the termination. Accordingly, Complainant has established a prima facie case.

Respondent fails to meet its burden of proof to demonstrate that Complainant's disability prevented him from performing the duties of the job in a reasonable manner or that the termination was motivated by a legitimate nondiscriminatory reason. Because of Complainant's tennis elbow, he sometimes had difficulty performing tasks with his left arm. However, he credibly testified that he was able to perform his work utilizing his dominant right hand and arm. He was able to carry the equipment in his right hand. Since the larger equipment had handles and was carried by two workers, he was able to lift the larger equipment onto and off of the carts by carrying it in his right hand, only using his left hand to guide it. He could climb a ladder by reaching up with just his right arm. Likewise, as he did before his injury, when using wrenches and screwdrivers, he used his right hand, sometimes using his left hand merely to guide the tool. If Complainant had to pull wire, his partner did the pulling and he did the feeding, which he could do with his right hand. Complainant did acknowledge that on one occasion he was unable to use a sheet metal punch which required both hands and a great deal of strength, but he also explained that even prior to his injury he had difficulty using this tool and his partner was able to help.

Complainant not only worked his regular hours but also worked overtime. The evidence shows that consistent with medical expectations, the symptoms of his tennis elbow waxed and waned. When the discomfort increased, Complainant took pain medication which reduced the pain. There is no credible evidence that his work was unsatisfactory or that he was unable to perform his job in a reasonable manner as a result of the injury.

The Human Rights Law requires an employer to perform an individualized assessment of an employee's ability to perform his work. *See Brentwood Union Free Sch. Dist. v. Kirkland*, 126 A.D.3d 898, 899, 5 N.Y.S.3d 519, 520 (2d Dept. 2015) (citing *Antonsen v. Ward*, 77 N.Y.2d 506, 569 N.Y.S.2d 328 (1991); *Miller v. Ravitch*, 60 N.Y.2d 527, 470 N.Y.S.2d 558 (1983); and, *Daubman v. Nassau County Civil Serv. Comm'n,* 195 A.D.2d 602, 601 N.Y.S.2d 14 (2d Dept. 1993)). Had Respondent performed an individualized assessment, it would have discovered that Complainant could perform and was performing the work with his uninjured, dominant hand. Respondent failed to demonstrate that the medical restrictions imposed on Complainant were related to his injury and further failed to show that Respondent's managers did any meaningful assessment of whether Complainant could actually reasonably perform the requirements of his position. This is most starkly illustrated by the fact that Respondent's OHD imposed restrictions on Complainant without limiting those restrictions to his left, injured side. Indeed, Brownlee admitted that he understood the limitations to apply to both hands and that he did not consider whether Complainant could perform the work with his uninjured, dominant hand. After a period of three months on temporary restricted duty, Respondent re-designated Complainant as permanently restricted and terminated his employment. This re-designation, however, was not based on any change in Complainant's condition or prognosis. It was made despite the fact that his symptoms waxed and waned and regardless of the fact that OHD expected his symptoms to

improve. It was an admittedly arbitrary point in time imposed by operation of a formulaic disability policy.

OHD imposed the restrictions in the first place without consulting Complainant's supervisors and no evidence was presented as to what functions OHD understood to be involved in Complainant's work. After Respondent re-designated the restrictions as permanent, Respondent's Human Resources manager admitted that she reviewed the restrictions against her understanding of the job functions and not how they specifically applied to Complainant. In short, an individualized determination, as required by law, was not made in this case.

Brownlee asserted that Complainant could not do "anything that required physical lifting or mechanical tightening, fastening, anything of that nature that required two hands." However, Brownlee's testimony is not credible. Brownlee did not directly supervise Complainant, did not go out in the field with him and observe his work or speak with his partners about his abilities and limitations. His assertion that Complainant's arm brace would interfere with personal protective equipment requirements is belied by the fact that Complainant did not wear his brace at work. His claim that Complainant could not perform work that involved climbing to access the main combustion turbine or the generator is contradicted by the fact that Complainant could climb by reaching up with his right arm. As already stated, Brownlee never considered whether Complainant could perform the job tasks relying on his right hand. Though Brownlee testified that working the midnight shift was an essential function, he later admitted that the work was voluntary and not all Techs volunteered for it. Brownlee claimed that additional staffing was required in the department because of Complainant's restrictions, however, the credible evidence shows otherwise. Brownlee asserted that Complainant was relegated to a secondary helper position, however, whenever Electrical Technicians went in to the field, they did so in pairs and

one was always the helper. Furthermore, whether an individual was performing work as a lead or a helper, each member pitched in to perform the necessary work. Thus, the burden of the work was shared.

Complainant did not request work restrictions. He did not seek an accommodation for his injury. He never asked to work light duty. Respondent's case rests on proving that Complainant could not reasonably perform the functions of his position. The evidence shows that Complainant was reasonably performing the functions of his position. If Complainant did not perform a function, it was because Respondent had restricted him, not because he was physically unable. Respondent argues that to the extent Complainant "may have been performing certain work that was proscribed by the restrictions imposed on him, without the knowledge of management, that work should be disregarded. He should not be permitted to gain the benefit of doing work he was not permitted to do." (Respondent's July 1, 2015, Objections to the Recommended Order, n. 4). Respondent is essentially arguing that the Division should disregard the proof because the work was in violation of the unsolicited restrictions. The Human Rights Law "bars discrimination against an impaired individual who is reasonably able to do what the position requires. Unless it is shown that the employee's physical condition precludes him from performing to that extent, the disability is irrelevant to the job and can form no basis for denying him the position." *Miller v. Ravitch*, 60 N.Y.2d at 532; *see also, State Dep't of Corr. Services v. State Div. of Human Rights*, 57 A.D.3d 1057, 1059, 868 N.Y.S.2d 387, 389 (3d Dept. 2008) (speculative and hypothetical risks of ability to function in job are insufficient to support disqualification from employment).

This record demonstrates that Complainant was performing his work in a reasonable manner and, therefore, that Respondent discriminated against him when it terminated his employment due to his disability.

In regard to the C-6 program, Complainant's allegations of disparate treatment are misguided. By the terms of the program, it applies only to employees who cannot perform the essential functions of their positions with or without a reasonable accommodation. An employee covered by C-6 who has been disciplined is not similarly-situated to a non-covered, but disciplined employee because the non-covered employee is able to perform the essential functions of his or her position. Accordingly, Complainant has failed to demonstrate that Respondent's C-6 program is unlawful and this part of his claim is dismissed.

Complainant's retaliation claim is likewise dismissed. Human Rights Law §§ 296.1(e) and 296.7 make it an unlawful discriminatory practice for an employer to discriminate against a person because he has opposed any practices forbidden under the Human Rights Law.

Even if Complainant established a prima facie case by showing that he received a one-day suspension after threatening to file an internal EEO complaint, Respondent has presented nondiscriminatory reasons for its action. It suspended Complainant for being discourteous to a supervisor. Complainant has failed to demonstrate this was a pretext. Accordingly, this claim must be dismissed.

In light of Respondent's violation of the Human Rights Law in relation to the unlawful termination, Complainant is entitled to an award of damages as compensation for lost wages. *See* Human Rights Law § 297.4(c). A complainant has a duty to exercise diligence to mitigate his damages. *See Rio Mar Rest. v. State Div. of Human Rights*, 270 A.D.2d 47, 48, 704 N.Y.S.2d 230, 231 (1st Dept. 2000) (citing *State Div. of Human Rights v. North Queensview Homes*, 75

A.D.2d 819, 427 N.Y.S.2d 483 (2d Dept. 1980)). Complainant credibly testified that he actively sought employment after Respondent terminated his employment. He listed his resume with several job banks, including the National Labor Exchange and the New York State Department of Labor job bank. He applied for two to five jobs per week, went on three interviews and eventually was hired at the Center of Educational Advancement and then at McDonald's. He did work for Hercules Cement Company, Buzzi Unicem USA and Vocational Rehabilitation Services. Complainant demonstrated that he made diligent efforts to mitigate his damages and Respondent failed to prove otherwise. *See Walter Truck Co. v. State Human Rights Appeal Bd.*, 72 A.D.2d 635, 421 N.Y.S.2d 131 (3d Dept. 1979) (burden on Respondent to prove Complainant's lack of diligent efforts to mitigate damages); *see also, State Div. of Human Rights v. Wackenhut Corp.*, 248 A.D.2d 926, 670 N.Y.S.2d 134 (4th Dept. 1998), *appeal denied*, 92 N.Y.2d 812 (1998) (same). Had he remained employed by Respondent from the date of his last paycheck, December 24, 2011, through May 21, 2015, the date of the Recommended Order, Complainant would have earned $441,225.20 ($63,078.99 from the date of his last paycheck through June 2012 [or half of his annual salary at the time], $128,681.13 through June of 2013, $131,898.16 through June of 2014, approximately $117,566.92 [calculated at 45 weeks]). Subtracting Complainant's $44,276.61 post-termination income from $441,225.20, leaves $396,948.59 in back pay owed. The lost wage award must further be reduced by the $25,998 Complainant received in Unemployment Insurance. *See State Div. of Human Rights v. Marcus Garvey Nursing Home,* 249 A.D.2d 549, 550 (2d Dept. 1998); *see also, Allender v. Mercado*, 233 A.D.2d 15 (1st Dept. 1996), *appeal dismissed and leave to appeal denied,* 89 N.Y.2d 1055 (1997). Thus, Complainant is entitled to a total back pay award in the amount of $370,950.59. The Division declines to offset the award by the Workers' Compensation Board benefit

Complainant received. *See Rensselaer County Sheriff's Dept. v. State Div. of Human Rights*, 131 A.D.3d 777, 781-82 (3d Dept. 2015). Because Respondent is being directed to restore Complainant's pension benefit (see below), the lost wage award is further offset by the $68,747.89 Complainant received as a lump-sum pension payment. Accordingly, Complainant's lost wage award is $302,202.70. It is noted that this is a low estimate in consideration of the fact that typically during Respondent's outage, employees work midnight shifts in addition to regular overtime and that Complainant's 2011 salary did not include midnight shift hours because he was prohibited from the shift as a result of the restrictions Respondent imposed on him.

Pursuant to Human Rights Law § 297.4(c)(ii), Respondent is directed to reinstate Complainant to his former position as an Electrical Technician in the Instrumentation and Control Group at Respondent's East River Station. The record reveals that at the time of the hearing, Respondent had two such openings. (Tr. 1122) Respondent has indicated that it is not averse to reinstating Complainant and Complainant desires to have his job back. (*See* Complainant's June 30, 2015, Objections to the Recommended Order, pp. 1-2; Respondent's July 1, 2015, Objections to the Recommended Order, p. 3, n. 1)

In addition to the back wages ordered herein, Respondent is to continue to pay Complainant lost wages from May 21, 2015, until Complainant commences re-employment or refuses such offer of reinstatement. The pay rate shall be calculated at the maximum rate for Electrical Technicians established in the collective bargaining agreement between Respondent and the Utility Workers Union of America AFL-CIO, Local 1-2 (which for 2015 was $46.48, *see* Joint Ex. 2, p. 90), multiplied by 58 hours per week for each intervening week (this figure is calculated by dividing the annual salary Complainant received as detailed in finding of fact 62,

by the maximum pay rate for that year and then dividing that number by fifty-two to determine the hours per week. The figure is rounded up to 58 to account of the fact that overtime is not included in the calculations).

Respondent has indicated that it has already tendered an offer of reinstatement to Complainant, however, Complainant disputes that the offer was to the same position. Accordingly, the continuing lost wage award shall not be cut off until Respondent makes the reinstatement offer directed herein and Complainant commences re-employment or refuses such offer. No deductions or withholdings should be made from these lost wage awards. *See Bell v. State Div. of Human Rights*, 36 A.D.3d 1129, 1132, 827 N.Y.S.2d 779, 781 (3d Dept. 2007).

Additionally, Complainant is entitled to interest on the lost wage award at a rate of nine percent per annum from September 10, 2013, a reasonable intermediate date, until the date payment is made. Complainant is also entitled to interest on the lost wage award calculated from May 21, 2015, until Complainant is reinstated or refuses reinstatement, at a rate of nine percent per annum from May 21, 2015, until the date payment is made. *See Aurecchione v. State Div. of Human Rights*, 98 N.Y.2d 21, 27, 744 N.Y.S.2d 349, 352 (2002).

Respondent shall restore Complainant's seniority status, all fringe benefits and pension rights retroactively to December 27, 2011, as if his employment had not been terminated. Respondent is directed to return the $68,747.89 offset made to the lost wage award to the pension fund provider. If Complainant accepts reinstatement, Respondent shall restore Complainant's pension benefit to where it would be if Complainant had never separated from service. In the event Complainant declines reinstatement, Respondent shall pay to Complainant the total lump-sum value of his pension benefit as of the date Complainant declines re-employment. *See, e.g., Merkel v. Scovill, Inc.*, 570 F.Supp. 141, 145 (S.D. Ohio 1983).

Complainant shall have thirty days from the date of Respondent's reinstatement offer to accept or reject the offer.

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). In determining the amount of damages to be awarded, the following factors are taken into consideration: the relationship of the award to the respondent's wrongdoing; whether the award is supported by the evidence; the duration, consequence and magnitude of complainant's mental anguish, including physical manifestations or psychiatric treatment; and consideration of comparable awards for similar injuries. *See New York City Transit Auth. v. State Div. of Human Rights*, 78 N.Y.2d 207, 216, 573 N.Y.S.2d 49, 54 (1991); *Father Belle Cmty. Ctr. v. State Div. of Human Rights,* 221 A.D.2d 44, 57, 642 N.Y.S.2d 739, 748-49 (4th Dept. 1996); *Bronx County Med. Group, P.C. v. Lassen*, 233 A.D.2d 234, 235, 650 N.Y.S.2d 113, 114 (1st Dept. 1996). Complainant suffered enormously as a result of Respondent's discriminatory conduct. He lost his job, his fiancé, his apartment, and ended up in a homeless shelter. He considered suicide. He felt betrayed, suffered low energy, nightmares and difficulty sleeping. For several years, he was in regular treatment with a psychologist who diagnosed him with depression, anxiety and post-traumatic stress disorder. Though Complainant suffered from anxiety stemming from his childhood, Complainant's psychologist made clear that Respondent's unlawful conduct precipitated this dramatic downturn in Complainant's life. The psychologist diagnosed Complainant as suffering from PTSD and attributed it to Complainant having lost the life he knew. In fashioning an award for mental anguish, the Division is mindful that Complainant testified that once he found work again, he began to feel better each day and

that his psychologist indicated that Complainant's psychotherapy had also been effective in diminishing his symptoms "to some extent." However, it was evident at the hearing that Complainant continued to suffer, some two-and-a-half years later. Thus, the record makes clear that Complainant's suffering continued and was further exacerbated by having to pursue this claim.

With consideration of the fact that there were causal factors other than Respondent's discrimination which contributed to Complainant's suffering, but also recognizing that Complainant likely would not have lost his fiancé, his apartment and certainly his livelihood had Respondent not discriminated, a mental anguish award in the amount of $50,000 is justified by the duration, consequence and magnitude of complainant's mental anguish and is commensurate with awards for similar injuries. *See Marcus Garvey Nursing Home, Inc. v. State Div. of Human Rights,* 209 A.D.2d at 620 (Court reduced award to $75,000 for a complainant who felt lonely, depressed, agitated and generally tearful for a period of 9.5 months. No evidence as to the severity or consequences of his condition); *State Office of Mental Health v. State Div. of Human Rights*, 75 A.D.3d 1023, 906 N.Y.S.2d 181 (3d Dept. 2010) ($30,000.00 for a complainant who felt "enormous mental anguish and humiliation" at the time of the hearing over four years later, and whose children lost respect for him because he lost his job due to disability discrimination); *Ifrah v Cmty. Health Ctr., Inc.*, Division Case No. 10105630 (May 29, 2009) ($50,000 for a complainant who suffered chronic anxiety, depression, PTSD, had difficulty sleeping and concentrating, received counseling for approximately two months, was prescribed anti-depressant medication. Award made with consideration that factors apart from discrimination contributed to the complainant's suffering. Respondent's conduct, however, exacerbated the suffering); *Miranto v North Tonawanda,* Division Case No. 10104366 (January 14, 2008)

($50,000 for a complainant who was devastated and suffered from depression for several months); *La Penna v Sanders, Sanders, Block, Woycik, Viener & Grossman, P. C.*, Division Case No. 10103418 (April 11, 2008) ($50,000 for Complainant who felt depressed, upset and angry. Was prescribed Fluoxetine by primary care physician and continued to take it through public hearing, but did not seek counseling).

Pursuant to Human Rights Law § 297, the Division may assess civil fines and penalties. In determining the amount of a civil penalty, the Division considers the goal of deterrence, the nature and circumstances of the violation, the degree of the respondent's culpability, any relevant history of the respondent's actions, the respondent's financial resources, and other matters as justice may require. *See Gostomski v. Sherwood Terrace Apartments*, DHR Case Nos. 10107538 and 10107540 (November 15, 2007), *aff'd, Sherwood Terrace Apartments v. State Div. of Human Rights*, 61 A.D.3d 1333, 877 N.Y.S.2d 595 (4th Dept. 2009).

Civil fines and penalties may be assessed up $50,000 against a respondent found to have committed an unlawful discriminatory act. If the act is willful, wanton or malicious, the fines may be as high as $100,000. Human Rights Law § 297.4(c)(vi). In the instant matter, Respondent's actions are not deemed to be willful, wanton or malicious. Respondent's actions did cause Complainant grievous harm and it has failed to take any responsibility. Though the evidence does not specify Respondent's budget or the value of its assets, the record does make clear that Respondent is a very large corporation that employs approximately 14,000 employees and provides energy to millions of New Yorkers. Considering the goal of deterrence and Respondent's size and resources, the maximum civil fine and penalty in the amount of $50,000 is appropriate.

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 claims related to retaliation and the C-6 program are dismissed; 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 of the date of the Commissioner's Final Order, Respondent shall pay to Complainant the sum of $50,000 as compensatory damages for mental anguish and humiliation Complainant suffered as a result of Respondent's unlawful discrimination. Interest shall accrue on this award at the rate of nine percent per annum, from the date of the Commissioner's Final Order until payment is actually made by Respondent.

2. Within sixty days of the date of the Commissioner's Final Order, Respondent shall pay to Complainant a lost wage award in the amount of $302,202.70 for the period between December 24, 2011, and May 21, 2015. Interest shall accrue on this amount at a rate of nine percent per annum from September 10, 2013, a reasonable intermediate date, until the date payment is made by Respondent.

3. Within sixty days of the date of the Commissioner's Final Order, Respondent shall pay to Complainant lost wages for the period between May 21, 2015, until Complainant commences working again pursuant to the directives herein or until Complainant declines reinstatement. The amount shall be calculated at the maximum rate for Electrical Technicians established in the collective bargaining agreement between Respondent and the Utility Workers Union of America AFL-CIO, Local 1-2 (which for 2015 was $46.48), multiplied by 58 hours per week for each intervening week. Interest shall accrue on this amount at a rate of nine percent per annum from May 21, 2015, until the date final payment is made by Respondent.

4. Within sixty days of the date of the Commissioner's Final Order, Respondent shall reinstate Complainant to his former position as an Electrical Technician in the Instrumentation and Control Group at Respondent's East River Station. Respondent shall also restore Complainant's seniority status, all fringe benefits and pension rights retroactively as if his employment had never been terminated. Complainant shall have thirty days from the date of the offer to accept or decline.

5. If Complainant accepts reinstatement, Respondent shall restore Complainant's pension benefit to where it would be if Complainant had never separated from employment. If Complainant declines reinstatement, Respondent shall pay to Complainant the total lump-sum value of his pension benefit as of the date Complainant declines reinstatement. Payment shall be made within sixty days of Complainant's decision. Interest shall accrue on this amount from the date Complainant declines reinstatement until the date payment is made at a rate of nine percent per annum.

6. Payments shall be made in the form of certified checks, made payable to the order of Kevin C. Benjamin and delivered by certified mail, return receipt requested, to Complainant's attorney Eric Dinnocenzo, Esq., 469 Seventh Avenue, Suite 1215, New York, NY 10018. Copies of the certified checks shall be provided to Caroline Downey, General Counsel of the Division, One Fordham Plaza, 4th Floor, Bronx, NY 10458.

7. Within sixty days of the date of the Commissioner's Final Order, Respondent shall pay to its pension provider $68,747.89. Proof of payment shall be provided to Caroline Downey, General Counsel of the Division, One Fordham Plaza, 4th Floor, Bronx, NY 10458.

8. Within sixty days of the date of the Commissioner's Final Order, Respondent shall pay to the State of New York $50,000 as a civil fine and penalty for its violation of the Human Rights Law. Payment shall be made in the form of a certified check payable to the order of the State of New York and delivered by certified mail, return receipt requested, to Caroline Downey, General Counsel of the Division, One Fordham Plaza, 4th Floor, Bronx, NY 10458.

9. Respondent shall cooperate with representatives of the Division during any investigation into compliance with the directives herein contained.

DATED: March 18, 2016
Bronx, New York

Peter G. Buchenholz
Adjudication Counsel