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DIVISION OF HUMAN RIGHTS
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ANDREW M. CUOMO
GOVERNOR

HELEN DIANE FOSTER
COMMISSIONER

May 21, 2015

Re: Kevin C. Benjamin v. Consolidated Edison Company of New York, Inc.
Case No. 10157991

To the Parties Listed Below:

Enclosed please find a copy of my proposed Recommended Findings of Fact, Opinion and Decision, and Order. Please be advised that you have twenty-one (21) days from the date of this letter to file Objections.

Your Objections may be in letter form, should not reargue material in the Record, and should be as concise as possible. Objections provide the parties with an opportunity to be heard on the issues in the case before the issuance of a final Order of the Commissioner. *See* Rules of Practice of the Division of Human Rights, 9 NYCRR § 465.17(c).

Please address your Objections to Peter G. Buchenholz, Adjudication Counsel, at the address below. Mail copies to all parties and their attorneys, including all of the following where applicable: complainant(s), complainant counsel, respondent(s), respondent counsel, and Division counsel, at the addresses in the list below. A copy must also be mailed to Robert Goldstein, Director of Prosecutions, Division of Human Rights, who is also listed below. Any documents not copied to the aforementioned individuals may not be considered. The Objections must be filed by **June 11, 2015**, at the following address.

NYS Division of Human Rights
Order Preparation Unit
Attn: Peter G. Buchenholz, Adjudication Counsel
One Fordham Plaza, 4th Floor
Bronx, New York 10458

No extensions of time to file Objections will be granted, except for good cause shown, by written request to the Order Preparation Unit. If the Objections are not received by the Order Preparation Unit by the deadline noted above, the Division will assume that you do not object to the proposed Order and will proceed to issue the final Order under that assumption.

Please contact Peter G. Buchenholz, Adjudication Counsel, at (718) 741-8342 if you have any questions regarding the filing of Objections.

Very truly yours,

Margaret A. Jackson

Margaret A. Jackson
Administrative Law Judge

TO:

Complainant
Kevin C. Benjamin
c/o Hope for Veterans Program (HVP)Community Hope, Inc.
151 Knollcroft Road, Bldg. 53
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Margaret A. Jackson, Administrative Law Judge
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Caroline J. Downey, General Counsel
Elaine A. Smith, Associate Attorney, Legal Advisory
Peter G. Buchenholz, Adjudication Counsel
Matthew Menes, Adjudication Counsel

ANDREW M. CUOMO
GOVERNOR

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.

RECOMMENDED FINDINGS OF FACT, OPINION AND DECISION, AND ORDER

Case No. **10157991**

SUMMARY

Complainant alleged that he was unlawfully discriminated against based on his disability and that he was retaliated against when Respondent terminated his employment. A review of the testimony and documentary evidence demonstrate that Complainant established a violation of the Human Rights Law. Therefore, Respondent is liable to Complainant for lost wages and emotional damages. Respondent is also liable to the State of New York for civil fines and penalties.

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

On June 11, 2014, Complainant amended his complaint on the record by withdrawing 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., Senior Attorney and Richard A. Levin, Esq.

Permission to file post-hearing Findings of Fact and Conclusions of Law was granted. Both parties filed timely Findings of Fact and Conclusions of Law.

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

FINDINGS OF FACT

1. Respondent is a New York corporation engaged in the generation, transmission and distribution of electricity, natural gas and steam in New York City and parts of Westchester County. (Tr. 848)

2. In May 2003, Complainant began working with Respondent as an electrical technician in the Instrumentation and Control (I & C) group at Respondent's East River station, which is a steam and electricity generating plant. (Tr. 364-365, 378; Joint Exhibit 32)

3. Complainant earned $2,426.00 per week as an electrical technician. (Joint Exhibit 41)

4. The essential functions of Complainant's job involved calibration of equipment, troubleshooting, maintaining and repairing various devices that control steam and electricity generating equipment at the station as well as testing the pressure, flow and temperature of various devices. The job also entailed walking/climbing/standing and lifting materials up to fifty pounds. (Tr. 378, 385, 390, 850-51, 888)

5. Electrical technicians work in a partner or "buddy" system and assist one another in the workplace. When equipment is lifted, each person uses one hand on either side of the equipment. (Tr. 165, 197, 391, 1106)

6. Approximately every six years, the East River station goes through an "outage" when the generating equipment is sequentially taken out of service and major maintenance is performed on the equipment. (Tr. 888-89)

7. The East River Station conducted an outage that lasted from September through December of 2011. (Tr. 888)

8. On September 4, 2011, Complainant, who is right-hand dominant, was using two channel lock wrenches while trying to open a conduit, when his left elbow overextended. (Tr. 394, 396)

9. Complainant's elbow felt bruised, but he took painkillers and continued working. (Tr. 396-98)

10. On September 13, 2011, Complainant reported numbness and weakness in his arm to one of his supervisors, Richard Laurich, and went to Respondent's Occupational Health Department (OHD) for examination. (Tr. 399, 761)

11. The OHD consists of physicians and other health care professionals who do not treat employees who are injured or ill, but who assess the ability of such employees to work, and the extent to which restrictions should be imposed on the work said employees may perform. (Tr. 916)

12. When Complainant was examined in the OHD, he was told that it appeared that he had lateral epicondylitis, commonly known as tennis elbow. (Tr. 967, 990, 1003; Joint Exhibit 7)

13. The OHD placed temporary restrictions on the work Complainant could perform as follows: limiting the use of his left arm or hand for six days; 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 twisting motion. (Joint Exhibits 13 and 27)

14. Complainant continued performing the essential functions of his job as an electrical technician while working with a partner to complete the tasks assigned. (Tr. 428)

15. Complainant was scheduled to be seen again by OHD on September 19, 2011; September 21, 2011, and every two weeks thereafter through November 21, 2011. (Joint Exhibits 7, 14, 15, 16, 17, 18 and 19)

16. On November 21, 2011, the OHD physician noted that Complainant's left and right arm had equal strength. However, the temporary restrictions were continued until his next visit which was scheduled for December 12, 2011. (Tr. 988-99; Joint Exhibits 7 and 19)

17. Complainant continued performing essential tasks, with the OHD restrictions, while working his regular hours, taking no time off and working overtime. (Tr. 827, 1101)

18. Overtime work is assigned to complete essential tasks. (Tr. 471-72)

19. Complainant did not work the midnight shift during the outage because the midnight shift was voluntary, and Complainant was excluded from volunteering because of his medical condition. (Tr. 1106-107)

20. Complainant's injury did not cause Respondent to request additional staffing to complete work during the outage. (Tr. 210)

21. Respondent has a policy that is referred to as the C-6 program. This policy is implemented if an employee has a temporary medical restriction. After three months the temporary restriction must either be removed or deemed permanent. (Tr. 41-42, 44; Joint Exhibit 3)

22. The C-6 program further provides that if an employee is on temporary restriction (disabled) for three months and has a "suspension or higher" in terms of prior discipline within the 12 months preceding entry into the C6 program, he or she would be automatically terminated from employment. (Tr. 46-47, 54)

23. However, an employee who has a prior discipline but is not on medical restriction is not automatically terminated. (Tr. 47)

24. In addition, the C-6 program provides than if the employee cannot be placed in another position within 6 months and he or she cannot perform the essential duties of his or her job, he or she is automatically terminated. (Tr. 50)

25. Pursuant to the C-6 program, an employee with a permanent restriction, whose record is satisfactory, will be assigned to a work function that the employee is capable of performing. Where practicable, Respondent will provide basic training to the employee. (Joint Exhibit 1)

26. Complainant was placed in the C-6 program. (Exhibit 29)

27. On October 4, 2011, Complainant was accused of leaving the transmitter off of one of the large generators out of service. (Tr. 248, 864; Joint Exhibit 10)

28. On October 17, 2011 a counseling session was held with Complainant and his supervisor, Robert J. Mowrer. Mowrer asked Complainant three times whether he understood that if he left a piece of equipment out of service he would be given a verbal warning. (Tr. 266)

29. Complainant insisted that he did not leave the transmitter out of service. (Tr. 269-70)

30. Complainant's partner would have equal responsibility on the job. There was no investigation about who left the equipment out of service, and Complainant's partner did not receive a warning about the incident. (Tr. 275, 342-43, 866)

31. On October 17, 2011, Complainant received a verbal warning and a one day suspension for being "discourteous and disloyal" because he called Mowrer a racist at the end of the counseling session. (Joint Exhibit 11)

32. Complainant threatened to file an internal corporate Equal Employment Opportunity (EEO) complaint. However, he did not file an internal or external EEO complaint. (Tr. 563-564)

33. After his suspension, Complainant filed a grievance. The outcome of the grievance was not addressed at the hearing. (Tr. 259)

34. On December 9, 2011, Complainant visited a private physiatrist, Dr. Eugene Bulkin, who placed restrictions on Complainant's activities, limiting frequent lifting with his left arm to 26-35 pounds and occasional lifting 36-50 pounds and only pushing and pulling light weights. (Joint Exhibit 30)

35. On December 12, 2011, Complainant was seen again by OHD. The OHD physician noted that Complainant's left lateral pain had improved. However, the physicians changed all of the temporary restrictions to permanent restrictions. (Tr. 1011; Joint Exhibit 7, 20, and 21)

36. 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 Exhibit 7)

37. Respondent's supervisors and managers determine whether an accommodation should be granted. (Tr. 1005)

38. Christopher Brownlee was the technical manager at the East River station. (Tr. 567, 847-850)

39. On December 12, 2011, Terry Dussek, Senior Human Resource Specialist, notified Brownlee that Complainant was placed on permanent restriction, and asked via e-mail whether Complainant could be "placed on C-6 or accommodated." (Joint Exhibit 21)

40. On December 13, 2011, Brownlee did not review any of Complainant's medical documentation, but notified Dussek via e-mail that Complainant had been "placed on select non-essential tasks since September 13, 2011 and the restrictions that were placed on Complainant by OHD limit his ability to perform essential functions as an electrical technician, and as such, a reasonable accommodation of these permanent restrictions cannot be made within the department." (Joint Exhibit 21)

41. Dussek shared the correspondence with Respondent's Human Resource manager, Patricia Whelton, who did not evaluate whether Complainant could perform tasks with his right as opposed to his left arm. (Tr. 90-91)

42. However, the medical director of OHD, Dr. Michelle Denise Alexander, testified that patients are capable of working with epicondylitis and they can compensate with their other arm. (Tr. 993, Joint Exibit 26)

43. Another electrical technician, Eddie Baymack, who worked in the I & C department did not move the 60 pound test equipment or pull wires. He was accommodated by doing other work because there was flexibility in the department in terms of job assignments. (Tr. 175-76)

44. On December 19, 2011, Complainant was advised by Whelton, 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 immediately terminated. (Tr. 95, 483)

45. 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 do the work. (Tr. 225, 259; Complainant's Exhibit 6)

46. Complainant filed a grievance concerning his termination. The result of that grievance was not indicated at the hearing. (Tr. 259)

47. Complainant was not allowed to schedule a follow up appointment with OHD, and his January 4, 2012 medical exam was cancelled by Respondent. (Tr. 595-97, 599, 1042-44)

48. On December 22, 2011, Complainant's physiatrist 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 fax to Respondent. (Tr. 591-93; Joint Exhibit 30)

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

50. Complainant became "despondent," he had low energy and suffered with nightmares and sleeping problems. (Tr. 646, 691)

51. On November 2012, Complainant was evicted from his apartment, and he became homeless. (Complainant's Exhibit 4)

52. In January 2012, Complainant filed a Workers Compensation claim, which was contested by Respondent. Eventually, Complainant received $13,320 in Workers Compensation benefits from December 20, 2011 and January 18 to June 18, 2012. (Tr. 620; Joint Exhibit 41)

53. In January 2013, Complainant entered a Veteran's shelter where, among other things, he was diagnosed with a major depressive disorder. (Joint Exhibit 28)

54. In July 2013, Complainant's psychologist, Emanual Schapiro PhD, who had treated him since September 2012, diagnosed Complainant with post-traumatic stress disorder, depression and anxiety partially stemming from "Respondent's reaction to his job related injury" coupled with a feeling of "betrayal by his immediate supervisors and the resultant financial distress which caused his posttraumatic stress." (Joint Exhibit 37)

55. Complainant's personal relationships were damaged as evidenced by his broken engagement to his fiancée. (Tr. 672)

56. Complainant continues to have nightmares and exhibits anger when dealing with the legal and administrative issues surrounding his injury. He also has diminished social contact, diminished interest in activities and personal relationships, irritability, outbursts of anger and difficulty concentrating. (Joint Exhibit 37)

57. Complainant received unspecified unemployment benefits. (Tr. 640)

58. On March 4, 2013, Complainant accepted employment at the Center of Educational Advancement working 37.5 hours per week. Complainant was earning $8 per hour, increasing to $8.25 per hour on April 8, 2013 and to $9.50 per hour on September 9, 2013. Complainant continued working in that position until June 24, 2014. Complainant began working as a cashier

at McDonald's on May 21, 2014 working 20 hours per week at a rate of $8.25 per hour. (Complainant's Exhibit 3)

59. Complainant's post-employment termination earnings, exclusive of unemployment insurance benefits, total $25,387.50. (Complainant's Exhibit 3; ALJ Exhibit 5)

OPINION AND DECISION

N.Y. Executive Law, art. 15 ("The Human Rights Law") § 296.1(a) makes it an unlawful discriminatory practice for an employer to discriminate against an individual in compensation or in terms, conditions or privileges of employment because of that person's disability.

An employer may not discriminate against an employee with a disability which, with or without reasonable accommodations, does not prevent the employee from performing the duties of the job in a reasonable manner. 9 N.Y.C.R.R. § 466.11(c)(1); *Miller v. Ravitch*, 60 N.Y.2d 527, 470 N.Y.S.2d 558 (1983). A "disability" is "... a physical, mental or medical impairment resulting from anatomical, physiological or neurological conditions which prevents the exercise of a normal bodily function or is demonstrable by medically accepted clinical or laboratory techniques ... ." Human Rights Law § 292.21. In order to meet this definition, an employee must only show that he suffers from some diagnosable impairment. *See State Division of Human Rights v. Xerox Corp.*, 65 N.Y.2d 213, 491 N.Y.S.2d 106 (1985). A disability may also be a record of such impairment or the perception of such impairment. Human Rights Law § 292.21.

In order to make out a prima facie case on the basis of disability discrimination based upon an employer's failure to provide a reasonable accommodation, a complainant must show that: 1) the employee was an individual who had a "disability" within the meaning of the Human Rights Law; 2) the employer had notice of the disability; 3) with reasonable accommodation the

employee could perform the essential functions of the position; and 4) the employer refused to make such accommodation. *Abram v. New York State Div. of Human Rights*, 71 A.D.3d 1471, 1473, 896 N.Y.S.2d 764, 767 (4th Dept. 2010).

Should a complainant make out a prima facie case, the burden shifts to respondent to show that the provision of a reasonable accommodation constitutes an undue hardship. Human Rights Law § 296.3(b); *Parker v. Columbia Pictures Indus.*, 204 F.3d 326, 332 (2d Cir. 2000).

In addition, both the employee and the employer are obligated to engage in a good faith, interactive process that assesses the needs of the disabled individual and the reasonableness of the accommodation requested. The interactive process continues until, if possible, an accommodation reasonable to the employee and employer is reached. An employer cannot implement fixed or static leave policies in which employees are ineligible for accommodations or are automatically terminated after the passage of a set time period. *Phillips v. City of New York,* 66 A.D.3d 170, 884 N.Y.S.2d 369 (1 st Dept. 2009); 9 N.Y.C.R.R. § 466.11(j) (4).

I find that Complainant has a disability, epicondylitis, as defined by the Human Rights Law, and that Respondent had notice of the disability when he notified his supervisor about the injury and went to the OHD for an examination.

Complainant's disability was not reasonably accommodated by Respondent. Respondent determined that Complainant could not perform the essential duties of an electrical technician particularly alleging that he was performing non-essential tasks after his injury. There is no evidence in the record that Complainant was performing non-essential tasks after his injury. To the contrary, Complainant worked overtime and performed all of the tasks that he was assigned. Brownlee notified Dussek via e-mail that there was no accommodation available in the I & C group. The record indicates that Eddie Baymack, who also worked in the I & C group, was

accommodated. Complainant could have been reasonably accommodated as well, without an undue hardship to Respondent.

More importantly, Respondent's C-6 program is unlawful because it imposes a time period of 3 months in which medical restrictions go from temporary to permanent while excluding a class of employees who are disabled with a disciplinary history. It also limits employees to a six month period for a possible accommodation unless that employee receives a discipline, then that employee is automatically terminated.

Further, Respondent refused to engage in an interactive process. Respondent asked Complainant to provide medical documentation from his treating physician. However, without assessing the needs of Complainant or his medical documentation, Respondent coupled Complainant's suspension, with the C-6 program criteria and concluded that Complainant should be terminated because Brownlee advised Dussak that he could not be accommodated. Respondent did not allow Complainant an opportunity to produce medical documentation from his treating physician or engage in an interactive process which could have led to the discovery of a reasonable accommodation. *See, Jacobsen v. New York City Health and Hospitals Corp.*, 22 N.Y.3d 824, 11 N.E.3d 159, (2014)(where the application for summary judgment was not granted and the parties were directed to engage in an interactive process). On the basis of the foregoing, Complainant has established a prima facie case of discrimination based on disability.

Damages

Compensatory Damages

Complainant is also entitled to recover compensatory damages for mental anguish caused by Respondent's unlawful conduct. The Division is granted broad discretionary powers to redress an injury by way of an award of reasonable compensatory damages. *Imperial Diner, Inc.*

v. State Human Rights Appeal Bd., 52 N.Y.2d 72, 79, 436 N.Y.S.2d 231, 235 (1980). However, the award must bear a reasonable relationship to the wrongdoing, be supported by substantial evidence, and be comparable to awards for similar injuries. *State of New York v. New York State Div. of Human Rights*, 284 A.D.2d 882, 884, 727 N.Y.S.2d 499, 501 (3d Dept. 2001).

Because of the "strong antidiscrimination policy" of the Human Rights Law, a complainant seeking an award for pain and suffering "need not produce the quantum and quality of evidence to prove compensatory damages he would have had to produce under an analogous provision." *Batavia Lodge No. 196 v. New York State Div. of Human Rights*, 35 N.Y.2d 143, 147, 359 N.Y.S.2d 25, 28 (1974). Indeed, "[m]ental injury may be proved by the complainant's own testimony, corroborated by reference to the circumstances of the alleged misconduct." *New York City Transit Auth. v. State Div. of Human Rights*, 78 N.Y.2d 207, 216, 573 N.Y.S.2d 49, 54 (1991).

After Respondent terminated his employment in 2011, Complainant lost his home and his relationship with his fiancée. He began to have nightmares and trouble sleeping. He was treated by a psychologist and was diagnosed with major depressive disorder, recurrent general anxiety disorder and high blood pressure due to his limited fixed income earned working at McDonalds and similar establishments. Complainant's medical records support this finding.

Under the circumstances of this case, an award of $75,000.00 for mental anguish is consistent with similar cases and will effectuate the remedial purposes of the Human Rights Law. *See, Marcus Garvey Nursing Home, Inc. v. New York State Division of Human Rights,* 209 A.D.2d 619, 620, 619 N.Y.S.2d 106, 108 (2nd Dept. (award of $75,000 granted where no evidence as to the severity or consequences of his condition ["depression"]); *Cross v. New York City Transit Author.*, 417 F.3d 241, 258 (2nd Cir. 2005) ($50, 000 for emotional distress upheld

where unaccompanied by any evidence of medical treatment, other concrete evidence of duration, extent and consequences); *Meachum v. Knolls Atomic Power Laboratory*, 381 F.3d 56 (2d Cir. 20014), (rev'd on other grounds, 544 U.S. 957 (2005) award of $125,000 under New York State Human Rights Law confirmed where "no proof other than testimony establishing shock, nightmares, sleeplessness, humiliation and other subjective distress").

Pursuant the Human Rights Law § 296.7, "It shall be an unlawful discriminatory practice...for any person engaged in any activity to which this section applies to retaliate or discriminate against any person because he has opposed any practices forbidden under this article or because he...has filed a complaint, testified or assisted in any proceeding under this article."

In order to make out a prima facie case of retaliation, a complainant must show: 1) he engaged in protected activity; 2) the respondent was aware that he engaged in protected activity; 3) there was an adverse employment action; and 4) a causal connection between the protected activity and the adverse employment action. *Pace,* 257 A.D.2d at 103.

Complainant alleges that Respondent retaliated against him by terminating his employment after he threatened to file an internal corporate EEO complaint. Complainant did not file an internal or external EEO complaint. Likewise, Complainant filed a grievance and a workers compensation claim in July 2012, after his termination. Therefore, there is no evidence to support a finding that Complainant engaged in protected activity that Respondent used as the basis for his termination. Therefore, Complainant cannot establish a prima facie case of retaliation and his claim of retaliation is dismissed.

Civil Fines and Penalties

Pursuant to § 297 of the Human Rights Law, the Division may assess civil fines and

penalties. In this case, a civil fine will be appropriate to deter Respondents from future discriminatory behavior.

Given the circumstances, considering the goal of deterrence, the nature and circumstances of the violation, the degree of Respondents' culpability, and Respondents' size and financial resources, $25,000 is an appropriate civil fine and penalty. *See Noe v. Kirkland,* 101 A.D.3d 1756, 1758, 957 N.Y.S. 2d 797 (4th Dept. 2012) ($20,000 civil fine and penalty confirmed); *Div. of Human Rights v. Stennett*, 98 A.D.3d 512, 514, 949 N.Y.S. 2d 459 (2d Dept. 2012) ($25,000 civil fine and penalty confirmed).

Reinstatement

As a result of Respondent's discrimination, Complainant suffered losses and is entitled to be made whole. Complainant is entitled to reinstatement and an award of back pay, less any wages earned. *See, Cottongim v. Onandaga County v. Onondaga County Sheriff's Dept.*, 71 N.Y.2d 623, 528 N.Y.S.2d 802, (1988) wherein it is confirmed that the Commissioner has discretion to order reinstatement. *See also, Mize v. State Division of Human Rights*, 33 N.Y.2d 53, (1973); *New York Gaslight Club, Inc. v. New York State Human Rights Appeal Board*, 59 A.D.2d 852 (1 st Dept. 1977).

Complainant is entitled to reinstatement. Complainant seeks reinstatement to the permanent position of electrical technician. This is the position that he held when his employment was terminated. A review of the record reveals that Respondent continued to hire applicants as electrical technicians through June 2014. (Joint Exhibit 40) Complainant did not testify about any issues that would prevent his reinstatement as an electrical technician. Complainant's left arm epicondylitis resolved. There is no evidence that reinstatement would be undesirable or unreasonable. *See, Shea v. Icelandair*, 925 F.Supp. 1014, 1030 (S.D.N.Y.

1996), (wherein the court suggested the following guideline when considering reinstatement: (a) the availability of the prior position; (b) the complainant's health; and (c) post-verdict hostility).

Back Wages

Based on the foregoing, Complainant is entitled to compensation for back pay. After Respondent terminated Complainant's employment, he immediately began looking for work. Complainant continued looking for comparable work through June 2014, the last date of the public hearing. Therefore, Complainant's lost wages are calculated from his date of employment termination, December 22, 2011, through the date of hearing, June 14, 2014. Complainant's annual salary in the year prior to discharge from employment was $125,201. Complainant's lost total wages for this period of time equals $293,002.50. Complainant also received an unspecified sum as unemployment insurance benefits.

Complainant's total lost wages should be reduced by the earnings he received in post termination employment ($25,387.50), workers compensation benefits totaling ($13, 320) and unemployment benefits received.

Therefore, Complainant is entitled to $234,295 as back wages minus any unemployment benefits he received. Complainant will furnish the Division with confirmation of the amount of unemployment benefits received within sixty days of the Commissioner's final order.

ORDER

On the basis of the foregoing Findings of Fact, Opinion and Decision, and pursuant to the provisions of the Human Rights Law and the Division's Rules of Practice, it is hereby

ORDERED that Respondent its agents, representatives, employees, successors, and assigns, shall cease and desist from discriminating against any 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. Respondent is immediately enjoined from implementing and enforcing its C-6 procedure unless and until it is modified such that it is not discriminatory toward employees with a disability;

2. Within sixty days of receipt of the Final Order of the Commissioner, Respondent shall offer to Complainant employment as an electrical technician, without loss of seniority, and all other employment benefits which would have accrued in the absence of unlawful discrimination.

3. If Respondent fails to offer Complainant reinstatement within 60 days of the Final Order of the Commissioner, Complainant shall be entitled to an award of front pay calculated at the rate of One Hundred Twenty-five Thousand Two Hundred and One Dollars ($125,201) per year, minus any salary actually earned by Complainant, until he is actually reinstated.

4. If Complainant declines reinstatement, he is still entitled to the back pay award, but all front pay damages will be cut off.

5. Within sixty days of the date of the Commissioner's Final Order, Respondent shall pay to Complainant, Kevin C. Benjamin, the sum of $234,295 as damages for back pay less any amount

received by Complainant as unemployment insurance benefits. Interest shall accrue on this award at the rate of nine percent per annum from reasonable intermediate date, March 2012, for the period December 22, 2011, through June 2014, until the date payment is actually made by Respondent.

6. Within sixty days of the date of the Commissioner's Final Order, Respondent shall pay to Complainant, Kevin C. Benjamin, the sum of $75,000 as compensatory damages for mental anguish and humiliation Complainant suffered as a result of unlawful discrimination against him. 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.

7. The payment shall be made by Respondent to Complainant, Kevin C. Benjamin, in the form of a certified check, made payable to the order of Kevin C. Benjamin, and delivered by certified mail, return receipt requested, to Complainant's attorney, Eric Dinnocenzo, Esq., at 641 Lexington Avenue, 14th Floor, New York, New York 10022. A copy of the certified check shall be provided to Caroline Downey, Esq., General Counsel of the Division, One Fordham Plaza, 4th Floor, Bronx, New York 10458.

8. Within sixty days of the date of the Commissioner's Final Order, Respondent shall pay to the State of New York the sum of $25,000 as a civil fine and penalty for its violation of the Human Rights Law. 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.

9. The payment of the civil fine and penalty shall be made by Respondent in the form of a certified check, made payable to the order of the State of New York and delivered by certified mail, return receipt requested, to Caroline Downey, Esq., General Counsel of the Division, One Fordham Plaza, 4th Floor, Bronx, New York 10458.

10. Within sixty days of the Final Order, Respondent shall provide a training session to its managers in the proper review of its C-6 program and the application of reasonable accommodation requests in accordance with the Human Rights Law. Proof of the training session shall be provided to Caroline Downey, Esq., General Counsel of the New York State Division of Human Rights, One Fordham Plaza, 4th Floor, Bronx, New York 10458.

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

DATED: May 18, 2015
Hempstead, New York

Margaret A. Jackson
Administrative Law Judge