THE CITY OF NEW YORK
DEPARTMENT OF CONSUMER AND WORKER PROTECTION

NYC DEPARTMENT OF CONSUMER AND WORKER PROTECTION,

Petitioner,

-against-

KC BEAUTY CORP. d/b/a BLOOM SPA, KEI CHAN "ANDY" KIM, and JIN "JULIE" CHOI,

Respondents.

OATH Index No. 271/22

Final Agency Decision

On November 3, 2023, following a 3-day trial at which Respondents failed to appear, Administrative Law Judge Kara J. Miller of the Office of Administrative Trials and Hearings issued a Report and Recommendation ("OATH R&R") in the above-captioned matter. OATH found that Petitioner established most of the Earned Sick and Safe Time Act charges alleged in its petition and recommended that Respondents be ordered to pay civil penalties of $16,200 and employee relief of $8,355, in total.

The Department of Consumer and Worker Protection ("Department") now issues this Final Agency Decision pursuant to section 2203(h)(l) of the New York City Charter and section 6-02 of title 6 of the Rules of the City of New York. The Department received a written request from Petitioner to adopt the OATH R&R.

Following review of the record, the Department adopts the OATH R&R without modification. Respondents are ordered to pay $16,200 in civil penalties to the Department, $4,355 to employee Digna Barahona, $1,500 to Worker 1 and $2,500 to Worker 2.

Date: 02/06/2024

Vilda Vera Mayuga
Commissioner
Department of Consumer and Worker Protection

OFFICE OF ADMINISTRATIVE TRIALS AND HEARINGS

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ASIM REHMAN
COMMISSIONER AND
CHIEF ADMINISTRATIVE LAW JUDGE

KARA J. MILLER
ADMINISTRATIVE LAW JUDGE
212-933-3014

November 3, 2023

Hon. Vilda Vera Mayuga
Commissioner
NYC Department of Consumer and Worker Protection
42 Broadway, 8th Floor
New York, New York 10004

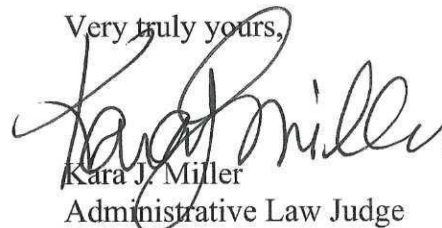
Re: *Dep't of Consumer and Worker Protection v. KC Beaty Corp.*,
OATH Index No. 271/22

Dear Commissioner Mayuga:

Enclosed for your review and decision is my Report and Recommendation. A copy of the report has been sent to respondents, who has a right to comment on it before you take final action. Your office should promptly inform respondents of the date by which comments should be submitted.

Please have your office send a copy of your final decision to the Office of Administrative Trials and Hearings by email to lawclerks@oath.nyc.gov so that we may complete our files.

Very truly yours,



Kara J. Miller
Administrative Law Judge

KJM: nz

Encl.

c: Margot Finkel, Esq.
Olivia Wade, Esq.
KC Beauty Corp.

Dep't of Consumer and Worker Protection v. KC Beauty Corp.

OATH Index No. 271/22 (Nov. 3, 2023)

Respondents violated the Earned Sick and Safe Time Act by failing to provide information requested as part of the investigation; failing to maintain a lawful written paid safe and sick leave policy; failing to distribute Notices of Employee Rights; failing to provide employees with paid sick leave; and retaliating against an employee for exercising her sick leave rights. ALJ recommends that respondents pay $16,200 in fines to petitioner, $4,355 in relief to the named complainant, and $1,500 in relief to Worker 1 and $2,500 to Worker 2.

NEW YORK CITY OFFICE OF ADMINISTRATIVE TRIALS AND HEARINGS

In the Matter of
DEPARTMENT OF CONSUMER AND WORKER PROTECTION
Petitioner
-against-
KC BEAUTY CORP. d/b/a BLOOM SPA, KEI CHAN "ANDY" KIM, and JIN "JULIE" CHOI
Respondents

REPORT AND RECOMMENDATION

KARA J. MILLER, *Administrative Law Judge*

Petitioner, the New York City Department of Consumer and Worker Protection ("Department"), brought this proceeding under sections 2203(e), (f), and (h) of the New York City Charter and sections 20-924(a), (c) of the Administrative Code. *See also* 6 RCNY § 6-01(a) (Lexis 2023). Petitioner alleges that respondents, KC Beauty Corp. d/b/a Bloom Spa, Kei Chan "Andy" Kim, and Jin "Julie" Choi ("respondents"), violated the Earned Safe and Sick Time Act ("ESSTA") and rules promulgated thereunder, 6 RCNY § 7-201 *et seq.*, by: failing to provide information requested by the Department; failing to maintain a lawful written paid safe and sick time policy; failing to distribute Notices of Employee Rights; failing to pay for authorized use of sick leave; failing to provide for the accruals of paid sick leave; failing to pay the named complainant for two days of sick leave; failing to allow the named complainant to use sick leave;

requiring the named complainant to find a replacement worker when she was unable to work, and retaliation (ALJ Ex. 1).

A three-day trial on the charges was held remotely via videoconference. On each day of the trial, petitioner's counsel appeared at the scheduled time. Respondents failed to appear.

Petitioner demonstrated that KC Beauty Corp. does business as Bloom Spa, a hair and nail salon, owned and operated by Mr. Kim and Ms. Choi. Upon respondents' failure to appear, proper proof of service of the charges and the notices of trial were submitted (ALJ Exs. 12, 13, 15). Petitioner established that it served respondents by first class mail, and certified mail return receipt requested to Bloom Spa's address and KC Beauty Corp.'s corporate address, which was obtained from the New York Department of State – Division of Corporations. Petitioner obtained confirmations from the United States Postal Service that the charges and the notices of trial were delivered to respondents. In addition, a Department employee sent emails in English and Korean to Korean-speaking respondents Mr. Kim and Ms. Choi, at email addresses they had provided to the Department, reminding them of the remote trial and continued trial dates (Pet. Exs. 12D, 13M, 15Q). Petitioner's evidence established the jurisdictional prerequisite for finding respondents in default and the matter proceeded in their absence.

During trial, petitioner presented the testimony of the named complainant, Digna Barahona, and Investigators Jessica An and Daisy Flores from the Department's Office of Labor Policy and Standards ("OLPS"). Petitioner also presented documentary evidence. For the reasons below, I recommend that the petition be granted and that respondents be ordered to pay a total of $16,200 in civil penalties and fines to the Department and $4,355 in relief to the named complainant, $1,500 to Worker 1, and $2,500 to Worker 2. Petitioner failed to meet its burden with respect to claims for civil penalties and relief on behalf of an anonymous complainant and other employees who may have worked at Bloom Spa.

ANALYSIS

Under ESSTA, an employer in New York City with five or more employees must provide qualifying employees with paid safe and sick time, refrain from retaliating against any employee for exercising their right to request and use safe/sick time, maintain and distribute to all employees written notice of their rights under the law, and retain records for three years demonstrating compliance with the law. Admin. Code §§ 20-913(a)(1), 20-918, 20-919(a), 20-

920 (Lexis 2023); 6 RCNY § 7-211(c). Employers with 99 or fewer employees shall provide a minimum of one hour of safe/sick time for every 30 hours worked by an employee up to 40 hours in one calendar year. Admin. Code § 20-913(b).

Petitioner charged respondents with failing to provide information and records related to its paid safe and sick time practices; failing to maintain a written paid safe and sick time policy; failing to distribute Notices of Employee Rights under ESSTA; failing to provide for the accrual and use of paid sick time; failing to pay for sick time; and retaliation (ALJ Exs. 1, 2).

The Department received complaints from two people working at Bloom Spa, alleging that they were not paid for sick time and were reluctant to use sick time because their employer would be upset (Tr. 21). The case was assigned to Jessica An, an investigator in OLPS, in January 2020 (Tr. 20). Ms. Barahona is the named complainant. The other complainant wants to remain anonymous (Tr. 23). Investigator An testified that the Department is obligated to investigate every complaint it receives that occurs within its jurisdiction (Tr. 29).

Upon receiving a complaint, the investigator reviews the allegations and interviews the complaining employee to obtain additional details related to the complaint and may request documents from the employee. The investigator then creates a Notice of Investigation ("NOI") to notify the employer about the allegations. The NOI also includes requests for certain documents and asks the employer to respond to the allegations. After receiving documents from the employer, the investigator can assess the practices of the employer and discuss the business' compliance with ESSTA (Tr. 17).

Investigator An interviewed the complainants and conducted several internet searches to confirm who their employers were (Tr. 20). The two complainants worked as manicurists at Bloom Spa. Ms. Barahona and the anonymous complainant informed Investigator An that the number of employees at Bloom Spa had fluctuated over the years. In 2016, when the anonymous complainant started working at Bloom Spa, there were as many as 15 employees. At the time the complaint was filed there were approximately ten employees and after the pandemic there were about eight employees (Tr. 23).

The anonymous complainant told Investigator An that she was never paid for sick time and did not receive a Notice of Employee Rights or a safe and sick leave policy (Tr. 24). Investigator An initially contacted Bloom Spa by telephone and then followed up by email. The complainants identified respondent Choi as the manager of Bloom Spa, which Investigator An

was able to verify by calling the spa and speaking to Ms. Choi (Tr. 24). Investigator An explained to Ms. Choi that Bloom Spa was under investigation regarding potential ESSTA violations and that respondents were going to receive a NOI, which would require them to answer questions and submit documentation (Tr. 24).

Investigator An prepared and sent the NOI to respondents on February 11, 2020, by certified return receipt and first class mail. The NOI indicated that the Department had received a complaint against Bloom Spa and as a result was investigating its compliance with ESSTA (Pet. Ex. 1; Tr. 26-28). The NOI included five requests for documents:

1. A list of all persons or entities that have control over operations or management at the business, including contact information;
2. Records showing the distribution method and date that every employee received the written notice of employees' rights to safe and sick time since the law was implemented on April 1, 2014;
3. All employer leave policies, including its safe and sick leave policy, in effect at any time between April 1, 2014, and the present, including disciplinary policies relating to absenteeism, lateness, attendance, and leaves of absence;
4. Payroll information for all employees in New York City for each pay period between February 1, 2017, and January 31, 2020, including each employee's start and end dates, hours worked during each pay period, safe and sick leave balance for each pay period, the number of paid and unpaid hours each employee took off from work, and the amount each employee was paid for each instance of paid time off from work;
5. A list of the names, phone numbers, and e-mail addresses of all employees employed for any amount of time and performing work in New York City from February 1, 2017, and January 31, 2020.

(Pet. Ex. 1).

The NOI also contained an "Employer Response Form" for the respondents to respond to the employees' allegations that Bloom Spa failed to provide a Notice of Employee Rights, restricted use of sick leave, and did not pay employees for sick leave (Pet. Ex. 1; Tr. 29-30).

The NOI stated that the Department "**must <u>receive</u> all requested documents and information within 30 days of the date of this letter. Please send your response to OLPS Investigator Jessica An by e-mail**" (emphasis in original) and provided Investigator An's email address. Directly below this statement was a box containing the following warning:

COOPERATION WITH THE DCA INVESTIGATION [1]
If you do not cooperate with this investigation or do not provide all of the information and documents requested, a notice of violation may be issued and action may be taken against you in the Office of Administrative Trials and Hearings (OATH), subjecting you to fines in addition to any civil penalties and relief resulting from violations of Law.

(Pet. Ex. 1).

Investigator An testified that she included the allegation that Bloom Spa restricted the use of sick time based on the claims that the spa would intimidate its employees from using or requesting sick time. In addition, the failure to pay employees for sick time also discouraged employees from exercising their rights to use sick time (Tr. 30).

Bloom Spa responded to petitioner's request for information by supplying only the employer contact information form via email from Ms. Choi on February 17, 2020 (Pet. Exs. 2, 3; Tr. 31-32, 37-38). The contact information form states that Kim Kei "Andy" Chan is the owner of Bloom Spa, which Investigator An confirmed by an internet search. The form also indicates that Jin Choi is the manager and contact person for the spa (Pet. Exs. 2, 3; Tr. 35-37). None of the other requested documents were provided to the Department (Tr. 37-38).

On March 13, 2020, Investigator An sent two emails[2] to Ms. Choi, asking her to provide the documents and information requested in the February NOI by March 27, 2020. Investigator An sent another email to Ms. Choi on March 30, 2020, stating that it was the Department's final attempt to obtain the requested information. The email also warned that if Bloom Spa failed to provide the documents by April 6, 2020, the case would be forwarded to the litigation team for prosecution. Investigator An never received a response from respondents (Pet. Ex. 4; Tr. 39-40).

Investigator An attempted to contact Ms. Choi by telephone. A person who sounded like Ms. Choi based on their earlier conversation, answered the telephone but did not identify herself. She told Investigator An to call back. Investigator An called back but never received a response to her telephone call (Tr. 40-41). Investigator An also attempted to call Mr. Kim, the owner of the business, but his telephone number was out of service (Tr. 41).

[1] The Department was formerly known as the Department of Consumer Affairs ("DCA").
[2] The second email was sent to correct the due date of the documents from February 27, 2020 to March 27, 2020.

On August 12, 2020, Investigator An forwarded a Notice of Findings to Ms. Choi, Mr. Kim, and Bloom Spa via Ms. Choi's email address (Pet. Ex. 5; Tr. 41, 43). The Notice of Findings states the ESSTA violations that the Department found against respondents based on the sick leave complaints it received from two employees and respondents' failure to provide any mitigating documentation (Tr. 41-43).

Digna Barahona testified, with the assistance of a Spanish translator, that she worked as a manicurist at Bloom Spa between April 2015 and February 2022 (Tr. 59). She was hired by Ms. Choi, who she identified as "the boss" (Tr. 60). Ms. Barahona worked five days a week from 10:00 a.m. to 8:00 p.m. Ms. Choi distributed the paychecks weekly (Tr. 61). Two of Ms. Barahona's paychecks from January 2018 and February 2019 demonstrated that she earned $367.20 per five-day work week (Pet. Ex. 6; Tr. 63). These checks do not show hours worked or the hourly rate of pay (Pet. Ex. 6).

Ms. Barahona testified that she was given a lunch hour, but the time was deducted from her check. Ms. Barahona testified that she often did not have one hour for lunch. She maintained that Ms. Choi would frequently approach her during lunch and tell her to go back to work before the hour was over (Tr. 61).

Ms. Barahona's hours were reduced from five days to three days per week because of the Covid pandemic (Tr. 63). Two of Ms. Barahona's paychecks from December 2021 and January 2022, demonstrated that she earned $299.90 per three-day work week (Pet. Ex. 7; Tr. 64-65). These checks do not show hours worked, the hourly rate of pay, and whether the wages are gross or net amounts (Pet. Ex. 7).

Ms. Barahona testified that she was told by co-workers and Ms. Choi that Mr. Kim was the owner of Bloom Spa. Her co-workers subsequently told her that Ms. Choi was also an owner of the spa. Mr. Kim worked at Bloom Spa cutting hair and Ms. Choi would create the work schedules and tell the workers what their duties were (Tr. 65). In addition, Ms. Choi was responsible for hiring and firing employees, tracking the employees' time, and setting their wage rate (Tr. 66). If Ms. Choi was not present in the salon on paydays, Mr. Kim would distribute the paychecks (Tr. 66).

Ms. Barahona testified that she never received a written employee manual from either Ms. Choi or Mr. Kim. In addition, the City's paid safe and sick time policy was not posted in the salon (Pet. Ex. 8; Tr. 67). Neither Ms. Choi nor Mr. Kim informed Ms. Barahona of her right to

paid sick time. Ms. Barahona was told by one of her co-workers that if she is sick, their employers require them to make up the day by working on another day (Tr. 69). According to Ms. Barahona, when one of her co-workers told Ms. Choi that employees were entitled to paid sick leave, Ms. Choi told the co-worker that their Christmas bonus would compensate them for sick leave (Tr. 70).

Ms. Barahona is the mother of three young children and if one of them was sick and she could not report to work, Ms. Barahona would send a text message to Ms. Choi (Tr. 70). On October 3, 2021, Ms. Barahona sent a text to Ms. Choi at 4:19 a.m. stating that she had been in the hospital since 2:00 a.m. because her son had experienced a seizure. She informed Ms. Choi that she was not going to be able to work that day. Ms. Choi sent a text at 6:54 a.m. giving Ms. Barahona permission to take the day off. She was never paid for the day. (Pet. Ex. 9; Tr. 71-72, 74).

Ms. Barahona informed Ms. Choi on April 28, 2021, that she had a six-month follow-up appointment with her doctor on October 27, 2021, at 8:30 a.m. Even though she provided advanced notification, Ms. Choi still scheduled Ms. Barahona to work on October 27. Ms. Choi told Ms. Barahona that if she needed to take sick leave, that she was responsible for finding someone to cover her shift and swap days (Tr. 70). Unfortunately, none of her co-workers were able to swap days. Ms. Barahona went to a scheduled follow-up appointment with her doctor on October 27, 2021. She was never paid for the day (Pet. Ex. 10; Tr. 75-76).

Ms. Barahona testified that on December 29, 2021, she had taken her son, who had Covid, to the doctor because he was susceptible to seizures. She sent a text to Ms. Choi to let her know that she would be 30 minutes late and explained why. Ms. Choi responded by text, stating that it would be the second time Ms. Barahona would be late. She told Ms. Barahona that she always has an excuse and what is she supposed to think about this. Ms. Choi told Ms. Barahona that she needed to think "cautiously" about this situation and that she needed to come to work on time. Ms. Choi ended the text by stating, "Don't make me [be] mean to you" (Pet. Ex. 11). Ms. Barahona interpreted Ms. Choi's text to mean that she did not believe that Ms. Barahona's son was sick and that she was "making up a story" (Tr. 78). Ms. Barahona was so concerned that she may lose her job because Ms. Choi was angry that she left her son at the doctor's office and went to work (Tr. 77-78).

Before she testified, Ms. Barahona provided a handwritten list in Spanish[3] of the employees who worked at Bloom Spa. At the top of the piece of paper it says "April 2015" (Pet. Ex. 14; Tr. 79). She testified that she wrote down the name of everybody who worked at Bloom Spa on the left side of the page and next to each name were the dates that the employees worked at the spa. Some of the employees started before Ms. Barahona started working at Bloom Spa. For several of the names, Ms. Barahona did not know exactly when the person started or stopped working at the spa. Instead, she approximated the amount of time that they worked at Bloom Spa (Tr. 82-83).

Ms. Barahona testified that she no longer works at Bloom Spa. She explained that she had been scheduled to work every Sunday and her children asked her to stay home on Sundays to rest. When she spoke to Ms. Choi about switching her workdays, Ms. Choi told her that if she did not work on Sundays, her schedule would be reduced to one day a week. The only day she would be permitted to work would be Wednesdays (Tr. 84).

Daisy Flores, an investigator in OLPS, testified that this case was reassigned to her in October 2022, after Investigator An left the Department (Tr. 96-97). Investigator Flores started working on this case after it had already been transferred to the litigation team. At their behest, Investigator Flores contacted additional workers at Bloom Spa. She spoke with two employees, who wished to remain anonymous (Tr. 98).

Investigator Flores testified that Workers 1 and 2 did not file a complaint (Tr. 100). Investigator Flores interviewed Workers 1 and 2 after this trial began because she obtained their names from the list of workers provided by Ms. Barahona during the trial (Tr. 101). Investigator Flores testified that Worker 1 worked at Bloom Spa between 2012 and 2019 (Tr. 99). Worker 1 told Investigator Flores that Ms. Choi would yell at the employees if they called in sick. This led Worker 1 to feel that she could not take sick time, so she would come to work sick and hire a babysitter when her children were sick. Worker 1 corroborated that employees at the spa were not provided with information regarding their rights to paid sick leave (Tr. 101).

Investigator Flores also interviewed Worker 2, who worked at Bloom Spa for a decade between 2012 and 2022 (Tr. 99). Worker 2 told Investigator Flores that the employees were not

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[3] Petitioner provided a certified English translation of the list during trial.

informed of their right to paid sick leave (Tr. 102). According to Investigator Flores, Worker 2 was not paid for sick leave either (Tr. 102).

Investigator Flores testified that in a typical investigation, the Department determines the number of employees from the employer's response to the NOI. The employer is asked to provide a list of employees and their contact information. When the employer does not provide the information, the investigator will ask the complainant about their co-workers (Tr. 102). Here, respondents did not respond to the notice of investigation. Consequently, Investigator Flores asked Ms. Barahona to provide the information. Investigator Flores confirmed that Workers 1 and 2 are on Ms. Barahona's list of Bloom Spa employees (Tr. 103-04). In addition, the name of the anonymous complainant is also included on the list (Tr. 104).

Joint Employers

The test for determining whether an entity or person is an employer under the New York Labor Law is the same as that used for analyzing employer status under the Fair Labor Standards Act. That test is known as the "economic reality test." To show employer status under the economic reality test, the relevant factors include "whether the alleged employer (1) had the power to hire and fire the employees, (2) supervised and controlled employee work schedules or conditions of employment, (3) determined the rate and method of payment, and (4) maintained employment records." *Herman v. RSR Security Services. Ltd.*, 172 F.3d 132, 139 (2d Cir. 1999) (internal citations omitted). Therefore, "[a]n individual may be held liable as an employer 'if he or she had the power to control the employees in question.'" *Java v. El Aguila Bar Restaurant. Corp.*, 2018 U.S. Dist. Lexis 69790 at *21 (S.D.N.Y. Apr. 25, 2018) (internal citations omitted); *see also Moon v. Kwon*, 248 F. Supp. 2d 201, 236 (S.D.N.Y. 2002); *Dep't of Consumer Affairs v. Brewer, Attorneys & Counselors*, OATH Index No. 514/19, mem. dec. at 11 (July 9, 2019); *Dep't of Consumer Affairs v. PCC Cleaning Services, Inc.,* OATH Index No. 0088/18 mem. dec. at 17 (June 26, 2018).

Workers may have more than one employer. Joint employers are defined as "each of two or more employers who has some control over the work or working conditions of an employee or employees." 6 RCNY § 7-101(b). There is no dispute that KC Beauty doing business as Bloom Spa, and Mr. Kim, and Ms. Choi qualify as joint employers. The employees of Bloom Spa were paid wages by paychecks from "K.C. BEAUTY CORP BLOOM SPA" (Pet. Exs. 6, 7).

Moreover, the only document that respondents provided to the Department indicates that Mr. Kim is the owner and Ms. Choi is the manager of Bloom Spa (Pet. Ex. 2). Ms. Barahona testified that Mr. Kim "was responsible for everything" when Ms. Choi was not there (Tr. 66). Although respondents identified Ms. Choi as the manager, Ms. Barahona credibly testified that she was "the boss" and that Ms. Barahona's co-workers told her that both she and Mr. Kim owned the business (Tr. 65). Moreover, Ms. Choi was responsible for hiring and firing employees, tracking the employees' time, and setting the employees' wage rate (Tr. 60, 66). Furthermore, both Mr. Kim and Ms. Choi are co-owners of the corporate respondent KC Beauty (Tr. 65). *See Dep't of Consumer & Worker Protection v. Reteg Elec. Inc.*, OATH Index No. 1186/20 at 8 (Mar. 29, 2021), *adopted*, Comm'r Dec. (Sept. 15, 2021) (an owner of a corporate respondent qualifies as an employer). As joint employers, respondents "are individually and jointly liable for violations of all applicable OLPS laws and rules." 6 RCNY §7-105(a).

It is also undisputed that respondents were employers required to comply with ESSTA as petitioner established that the number of Bloom Spa employees fluctuated between eight and 15 employees between 2017 and 2021. *See* NYC Admin. Code § 20-913(a)(1) ("All employers that employ five or more employees . . . shall provide paid safe/sick time to their employees in accordance with the provisions of this chapter.") Furthermore, there is no dispute that Ms. Barahona was a covered employee under the law. She testified that when she started working at Bloom Spa in 2015, she worked from 10:00 a.m. to 8:00 p.m. five days a week. In 2020, because of the Covid pandemic, her schedule was reduced from five days to three days a week (Tr. 61, 65).

Failure to Provide Information Requested by the Department (Count 1)

Respondents were charged with failing to provide information requested by the Department. ESSTA requires employers to make and retain records documenting compliance with the law and to allow the Department to access such records with appropriate notice. Admin. Code § 20-920; 6 RCNY § 7-212(c). "Appropriate notice" is defined as 30 days written notice. 6 RCNY § 7-212(d).

On February 11, 2020, the Department requested in writing five categories of documents (Pet. Ex. 1). Bloom Spa's email response on February 17, 2020, was limited to providing the

employer contact information form (Pet. Ex. 2). At the time of trial, respondents had still failed to provide the Department with any of the other requested documents and information.

Petitioner established that respondents failed to provide the requested documents at any time.

Failure to Maintain a Lawful Written Paid Safe and Sick Time Policy (Counts 2 – 5)

Respondents were charged with failing to maintain a written paid safe and sick leave policy which meets or exceeds the requirements of the law. 6 RCNY § 7-211(a). The written safe and sick leave policy must inform employees of the method of calculating safe/sick time; policies regarding use of safe/sick time; and policies regarding carry-over of unused safe/sick time at the end of the calendar year. 6 RCNY § 7-211(c)(1)-(3). Respondents are required to maintain records of any policies required by ESSTA for three years. 6 RCNY § 7-212(a).

The NOI sent to respondents included a request for all employer leave policies, including its safe and sick leave policy (Pet. Ex. 1). Respondents failed to provide these documents to the Department, despite multiple warnings that failure to produce documents may lead to additional penalties and result in an adverse inference at OATH.

"An employer's failure to maintain, retain, or produce a record that is required to be maintained under the OLPS laws and rules that is relevant to a material fact alleged by the Office in a notice of violation . . . creates a reasonable inference that such fact is true, unless a rebuttable presumption or other adverse inference is provided by applicable law." 6 RCNY § 7-111(a). Since respondents defaulted, they failed to provide documents to rebut this presumption. As such, it is reasonable to infer that respondents did not maintain a written safe and sick time policy. *Id.*

Moreover, Ms. Barahona credibly testified that respondents did not provide written employment policies or handbooks to her (Tr. 68). Ms. Barahona's testimony regarding respondents' failure to provide a lawful written paid safe and sick time policy was corroborated by Investigator An's testimony regarding her interview of the anonymous complainant (Tr. 24) and Investigator Flores' testimony regarding her interviews of Workers 1 and 2 (Tr. 101).

Petitioner established that respondents failed to provide employees with a written safe and sick leave policy.

Failure to Distribute Notices of Employee Rights (Count 6)

Respondents were charged with failing to distribute Notices of Employee Rights to their employees. Section 20-919(a) of the Administrative Code provides that at the commencement of employment, "[a]n employer shall provide an employee with written notice of such employee's right to safe/sick time pursuant to this chapter . . . . Such notice shall be in English and the primary language spoken by that employee, provided that the department has made available a translation of such notice in such language . . . . Such notice shall also be conspicuously posted at an employer's place of business in an area accessible to employees." Admin. Code § 20-919(a)(1).

Ms. Barahona was shown the Department's Spanish language version of the Notice of Employee Rights (Pet. Ex. 8). Ms. Barahona credibly testified that she had never been provided with this document by Mr. Kim or Ms. Choi during her employment at Bloom Spa (Tr. 67, 69). Investigators An and Flores testified that the anonymous complainant and Workers 1 and 2, informed them that Bloom Spa never provided them with information regarding their rights under ESSTA, corroborating Ms. Barahona's testimony.

Respondents' failure to provide records that they distributed the Notice of Employee Rights to their employees creates a rebuttable presumption. Respondents, however, defaulted and failed to rebut this presumption. As such, it is reasonable to infer that respondents did not maintain a written safe and sick time policy. 6 RCNY § 7-111(a). *See Dep't of Consumer Affairs v. Citi Health Home Care Services, Inc.*, OATH Index No. 144/18, mem. dec. at 5 (July 31, 2018) ("[A]n employer's failure to produce records showing that it provided the Notice of Rights to its employees at the commencement of employment, or within 30 days of April 1, 2014, the effective date of the law, creates a reasonable inference that it failed to do so."). Petitioner established that respondents failed to distribute the Notice of Employee Rights.

Failure to Provide for Accrual and Use of Paid Safe and Sick Time (Counts 7, 8, and 10)

Respondents were charged with failing to provide for the accrual and use of sick leave from 2017 to present. ESSTA requires all employers to provide a minimum of one hour of paid sick time, at an employee's regular rate of pay, for every 30 hours worked by an employee and such time begins to accrue at the commencement of employment. Admin. Code §§ 20-913(a), (b), (d); 6 RCNY § 7-208(a). Employers must compensate an employee for use of safe/sick time

at a rate of at least the applicable minimum wage. Admin. Code § 20-913(a)(1); 6 RCNY § 7-208(h).

Since January 1, 2017, respondents were required to allow eligible employees to use paid sick time as it's accrued. Admin. Code § 20-913(d). Effective, September 30, 2020, an employer must note, on a pay statement or other form of written documentation provided to the employee each pay period, the amount of sick time accrued and used during a pay period and an employee's total balance of accrued sick time. Admin. Code § 20-919(c).

Ms. Barahona testified that respondents never informed her about any sick leave policies, including the accrual of paid sick time (Tr. 68-69). She provided four paychecks from respondents from 2021 and 2022 (Pet. Ex. 7). None of the paychecks displayed information regarding Mr. Barahona's balance of accrued sick time.

Although there is no testimony regarding whether respondents failed to provide other workers with accruals of their paid sick leave, respondents were directed in the NOI to provide all payroll information, including each employee's sick leave balance each pay period, and use of paid time off, and respondents failed to do so. Petitioner's rules permit a reasonable inference to be made that the facts alleged are true because respondents failed to produce their records as required. 6 RCNY § 7-111(a).

Petitioner established that respondents failed to provide information to employees regarding the accrual and use of paid sick time.

Failure to Pay Complainant Sick Time (Count 9)

Respondents were charged with failing to pay Ms. Barahona for her use of sick time on October 3 and 27, 2021, in violation of Administrative Code section 20-913(a)(1).

Under ESSTA, employees have a right to use paid sick time to treat, receive medical diagnosis, or receive preventative medical care for their own illness, injury or health condition or that of a family member. Admin. Code § 20-914(a)(1). The definition of an employee's family member includes an employee's child. Admin. Code § 20-912.

Ms. Barahona used sick leave on October 3, 2021, to care for and seek medical attention for her son, who was having seizures. Ms. Barahona testified that she notified Ms. Choi by text explaining the situation and informing her that she would not be able to work that day (Pet. Ex. 9). Ms. Barahona also utilized sick leave on October 27, 2021, for a scheduled doctor's

appointment. Ms. Barahona testified that she notified Ms. Choi about the doctor's appointment as soon as it was scheduled (Pet. Ex. 10; Tr. 75-76).

Ms. Barahona credibly testified that she was never paid for these two days of sick leave. Ms. Barahona's testimony was corroborated by the anonymous complainant, and Workers 1 and 2, who also maintained that they were never paid for sick days (Tr. 24, 101-02). Respondents failed to appear at trial to present any evidence to contest this claim.

Petitioner established that respondents failed to pay Ms. Barahona for two sick days.

Retaliation and Requiring Complainant to Find a Replacement Worker (Counts 11 and 12)

Respondents were charged with taking an adverse action against employees that penalizes or is reasonably likely to deter the employee from exercising or attempting to exercise their rights under ESSTA. Admin. Code § 20-918(b). Adverse actions include, but are not limited to, threats, intimidation, and discipline. Admin. Code § 20-918(c).

A retaliation violation is established "when it is shown that a protected activity was a motivating factor for an adverse action, whether or not other factors motivated the adverse action." Admin. Code § 20-918(g); *see also* 6 RCNY § 7-108(e). The Department "may establish a causal connection between the exercise, attempted exercise, or anticipated exercise of rights protected by [ESSTA] and an employer's adverse action against an employee . . . by indirect or direct evidence." 6 RCNY § 7-108(d).

Ms. Barahona and the anonymous complainant maintained that respondents would become angry when they attempted to take time off from work when they were sick (Tr. 30, 101). Ms. Barahona credibly testified that Ms. Choi chastised her when she requested to use sick leave on December 29, 2021, which was corroborated by intimidating text messages sent by Ms. Choi to Ms. Barahona (Pet. Ex. 11; Tr. 76-77). This evidence was also supported by Worker 1, who told Investigator Flores that Ms. Choi would yell at her if she called out sick (Tr. 101). Consequently, she was reluctant to take sick time and would pay for childcare if her child was ill and would come into work sick, instead of taking time off (Tr. 101).

Respondents are also charged with wrongfully requiring employees to search for or find a replacement worker to cover the hours during which the employee is using sick time. Admin. Code § 20-915. Ms. Barahona maintained that respondents required her to search for a replacement worker when she requested to use sick time on October 27, 2021 (Tr. 70).

Respondents failed to appear to refute the charges. Ms. Barahona's credible testimony of being subjected to retaliation by Ms. Choi for asking for sick time and being required to find a replacement worker to swap shifts, established that respondents violated sections 20-915 and 20-918 of ESSTA.

FINDINGS AND CONCLUSIONS

1. Respondents were properly served with the Notices of Trial and Paid Safe and Sick Leave Petition.

2. Respondents are joint employers and are individually and jointly liable for ESSTA violations pursuant to sections 7-101(b) and 7-105(a) of the Department's rules.

3. Respondents failed to provide information requested by the Department in violation of section 20-920 of the Administrative Code and section 7-212(c) of the Department's rules.

4. Respondents failed to maintain a lawful written paid safe and sick time policy in violation of section 7-211(a) and 7-211(c)(1)-(3) of the Department's rules.

5. Respondents failed to distribute Notices of Employee Rights in violation of section 20-919(a) of the Administrative Code.

6. Respondents failed to provide for the accrual of paid safe and sick time in violation of section 20-913(b) of the Administrative Code.

7. Respondents failed to allow eligible employees to use paid safe and sick time, in violation of section 20-913(d) of the Administrative Code.

8. Respondents failed to pay Ms. Barahona for sick time on two occasions in violation of section 20-913(a)(1) of the Administrative Code.

9. Respondents required Ms. Barahona to search for or find a replacement worker to cover her hours while she took sick leave in violation of section 20-915 of the Administrative Code.

10. Respondents retaliated against Ms. Barahona for her use of sick leave in violation of section 20-918 of the Administrative Code

RECOMMENDATION

Petitioner seeks both civil penalties and employee relief for most of the proven violations. However, some of petitioner's requests for penalties and relief are duplicative in nature and thus should be treated as a single charge for purposes of penalty. *See Dep't of Consumer and Worker Protection v. Champion Security Services,* OATH Index No. 2293/21 at 66-67 (Oct. 23, 2023), *citing Dep't of Consumer Affairs v. Major World*, OATH Index No. 1897/17, mem. dec. at 48 (Jan. 24, 2019), *aff'd sub nom. Major World Chevrolet, L.L.C. v. Salas*, 216 A.D.3d 427 (1st Dep't 2023) (charges which alleged separate violations of the Administrative Code and rules were found duplicative "[s]ince the same language in the bill of sale and the same rationale form the basis for finding violations"); *see also Sitar v. Sitar,* 50 A.D. 3d 667, 670 (2d Dep't 2008) (causes of action alleging fraud, fraudulent misrepresentation, and negligent misrepresentation were all dismissed because they arose "from the same facts as the cause of action alleging legal malpractice" and did "not allege distinct damages"); *Savello v. Frank*, 48 A.D.2d 699, 699 (2d Dep't 1975) (in a disciplinary case, holding, "[a]lthough two different departmental rules were cited, they cover the identical conduct and, under the facts of this case, were merely duplicative. Petitioner should not receive two punishments for the one offense").

This tribunal has concluded in ESSTA cases that a separate penalty was not appropriate when the charges arose "from the same conduct." *Citi Health Home Care Services, Inc.,* OATH 144/18 at 8. *See also PCC Cleaning Services, Inc.,* OATH 0088/18 at 15 (finding the charge that an employer had a policy of not permitting the use of sick time in violation of section 20-913(d) of Administrative Code was duplicative as to one employee because employer had already been found liable under section 20-913(a)(1) of the Administrative Code for failing to provide her with paid sick leave for a particular absence from work); *see generally Dep't of Buildings v. Inglese*, OATH Index No. 2575/10 at 1 n. 1 (Dec. 1, 2010) (duplicative charge alleging same misconduct violating a different rule dismissed); *Taxi & Limousine Comm'n v. Linder*, OATH Index No. 1176/00 at 4 (Mar. 30, 2000), *modified on penalty*, Comm'n Dec. (May 10, 2001) (duplicative charge alleging the same misconduct as different rule violation dismissed).

A distinction may be drawn, however, when the conduct underlying each charge is separate and distinct even if the conduct was alleged to have violated the same rule or provision of the Administrative Code. In those instances, separate penalties would be appropriate. *See Champion Security Services,* OATH 2293/21 at 77 (finding that since failing to permit

employees to use sick leave is related to but not duplicative of the violation involving respondents' failure to provide employees with sick time accruals, separate penalties are warranted).

Recommended penalties are set forth below.

Civil Penalties and Monetary Relief Based on List of Employees (Petitioner's Exhibit 14)

The Department seeks civil penalties and monetary relief for employees who are included on the handwritten list provided by Ms. Barahona during trial. The top of the document contains a notation, "April 2015" and under that, it says, "Before I started working they were already at the job:" and lists the first names of 14 individuals and a notation next to almost all the names (Pet. Ex. 14).

The testing of the reliability of this document was deficient. For instance, Ms. Barahona was not asked whether the list was based on her recollection only, and how she knew which employees continued to work there after the end of her employment. Moreover, this document on its face is unclear. For instance, next to the name Susan, it says, "five months later she left"; next to Karol and Maria, it says "worked only three months"; and next to the second Rosa and Linda, it says "began working in 2021" (Pet. Ex. 14). In addition, the list includes the name James, but it is blank next to his name and does not state dates of employment (Pet. Ex. 14). When asked about James' employment at Bloom Spa, Ms. Barahona stated, "Yeah, he was working before I started working there" (Tr. 82).

Ms. Barahona's testimony about the other employees on the list was vague, confusing, and did little to clarify the list. The list states next to Sara, "In 2019 she left." Ms. Barahona testified that Sara started working at Bloom Spa in 2019 and left later that year, but she could not recall dates (Pet. Ex. 14; Tr. 81). Next to the second Rosa, it states "Began working in 2021" but Ms. Barahona did not know whether Rosa still worked at Bloom Spa (Pet. Ex. 14; Tr. 82). Ms. Barahona's list includes fourteen employees, other than herself who worked at Bloom Spa (Pet. Ex. 14). Petitioner's closing brief includes two charts based on Ms. Barahona's list. One chart lists 13 employees, including Ms. Barahona, who were not provided with information regarding sick leave accruals (Pet. Closing Br. at 11). The other chart lists 11 employees, including Ms. Barahona, who were not permitted to take paid sick leave (Pet. Closing Br. at 12). Both charts, inexplicably include James and state that he was employed from 2017 through 2021.

In addition to not including reliable start and end dates, the list did not include any information regarding the schedules of the workers listed. It does not shed light on how many days a week they worked nor the number of hours each day. The best evidence regarding the number of workers and their schedules would have been payroll records and work schedules provided by respondents. Respondents, however, did not provide this information even though petitioner requested it in its notice of investigation.

Respondents' failure to provide the requested information during petitioner's investigation or to appear at trial does not, however, relieve petitioner of its burden of proving the charges by a preponderance of the credible evidence. *See Dep't of Sanitation v. Anonymous*, OATH Index No. 730/23 at 5-6 (Feb. 24, 2023), *adopted in part, rejected in part,* Comm'r Dec. (May 20, 2023). Petitioner still bears the burden of proof in a default trial. Ms. Barahona memory of who worked at Bloom Spa seven years ago, is understandably hazy. The incomplete list, even coupled with Ms. Barahona's testimony, is insufficient to be considered reliable evidence. *See Health & Hospitals Corp. (Harlem Hospital) v. Baptiste*, OATH Index No. 937/20 at 3 (Dec. 24, 2019), *adopted*, CEO Dec. (Jan. 17, 2020) ("One occurrence of lateness, where the actual time of lateness is unknown, is insufficient to establish a charge of excessive lateness.").

Although petitioner otherwise provided credible evidence regarding Ms. Barahona, the anonymous complainant, and Workers 1 and 2, it failed to meet its burden with respect to other employees who may have worked at Bloom Spa and were included in the handwritten list. Consequently, the recommended civil penalties and monetary relief are limited to these four employees.

Civil Penalties

Count 1

Petitioner established that respondents never provided records in response to the Department's request and in advance of trial. Under Count 1, the petition breaks down respondents' failure to provide records into two violations with separate penalties of $500 each based on section 2203(h)(1) of the Charter and Rule 7-109(f).

Rule 7-109(f), states, "An employer who fails to timely and fully respond to the request for information or records . . . on or before the first scheduled appearance date is subject to a

penalty of five hundred dollars . . . ." In contrast, section 2203(h)(1) of the Charter is a general provision that authorizes the Department "to impose civil penalties for, and to order restitution or other forms of equitable relief, for and payment of monetary damages, to a consumer or worker in connection with the violation of any laws or rules the enforcement of which is within the jurisdiction of the department" Charter § 2203(h)(1) (Lexis 2023). The Charter further provides that imposed penalties "shall not exceed five hundred dollars for each violation" and shall be in addition to any other remedies or penalties provided for under any other law, including, but not limited to, civil or criminal actions.

Even though petitioner charged respondent under two sections of law and requested two penalties, the charges arise from the same conduct of not providing information or records. Accordingly, it is appropriate to impose only one civil penalty of $500.

Counts 2, 3, 4, and 5

Petitioner established that respondents failed to maintain a written paid safe and sick time policy in violation of Rules 7-211(a) and (c)(1-3). Petitioner, however, charged respondents with four separate violations: the general violation of failing to maintain a policy pursuant to 7-211(a); failing to maintain a policy that includes the method of calculating sick time in violation of Rule 7-211(c)(1); failing to maintain a policy that informs employees of any limitations in using sick and safe time in violation of Rule 7-211(c)(2); and failing to maintain a policy that includes information regarding carry-over of unused safe and sick time in violation of Rule 7-211(c)(3). Petitioner requested a $500 civil penalty for each of the violations charged, for a total of $2,000.

Asking for four separate penalties for the failure to maintain a sick leave policy is unwarranted. Petitioner's characterization of the charges in its closing brief is telling as it included the four charges under one heading "Respondents Failed to Maintain a Safe and Sick Leave Policy" (Pet. Closing Br. at 6). "Respondent's concurrent failure to maintain a sick leave policy that met all of the requirements of ESSTA was duplicative of that charge, as the underlying conduct was the same." *Champion Security Services*, OATH 2293/21 at 69. Consequently, only one civil penalty of $500 is appropriate.

Count 6

Petitioner established that respondents failed to distribute a paid safe and sick leave Notice of Employee Rights to its employees. Pursuant to section 20-919(d) of the Administrative Code, respondents are subject to payment of a civil penalty to the Department of $50 for each employee who was not provided with notice of their rights. Admin. Code § 20-919(d).

Petitioner used Ms. Barahona's list of employees (Pet. Ex. 14) in calculating a requested penalty. Petitioner maintained that 13 employees worked at KC Beauty from 2017 through 2021. Although petitioner asserts that respondents are liable for a civil penalty of $650 for this charge, it limited its request to $500. The testimony from Ms. Barahona and the investigators, however, reflected that the number of employees between 2017 and 2021 fluctuated between eight and 15 employees. As discussed previously, I found Ms. Barahona's list to be unreliable. As such, it may not be used to calculate a civil penalty against respondents.

The evidence presented demonstrated that Ms. Barahona, the anonymous complainant, and Workers 1 and 2 were not provided with a paid safe and sick leave notice of employee rights. Since the preponderance of the credible evidence established that there were four employees who did not receive this notice, a penalty of $50 for each employee, for a total of $200, is appropriate.

Counts 7, 8, and 10

Petitioner established a "workplace-wide" failure by respondents to provide for the accrual of sick leave (count 7) and to allow eligible employees to use paid sick leave (count 8). Petitioner further established that respondents failed to allow Ms. Barahona to use paid sick leave on December 29, 2021 (count 10).

Employers must note in writing each pay period the amount of accrued and used sick time during the pay period and the total balance of accrued sick leave. Admin. Code § 20-919(c). Respondents are subject to penalties in the amount of $500 per year for each employee who was not provided with accrued paid sick time for 2017, 2018, 2019, 2020, and 2021. Admin. Code § 20-924(e); 6 RCNY §§ 7-109(h) and 7-213(a).

Respondents are also subject to a civil penalty of $500 per eligible employee per year for 2017, 2018, 2019, 2020 and 2021, for their practice of constructively denying employees their

right to paid sick time. Petitioner's contention that relief of $500 should be imposed for each year that respondent failed to permit employees to use paid sick leave is rational because an employer's sick time obligations under ESSTA are calculated on an annual basis. *See Dep't of Consumer and Worker Protection v. Mr. Coco 162 Inc.*, OATH Index No. 1672/20 at 11 (Jan. 28, 2022), *adopted in part, modified in part*, Comm'r Dec. (Nov. 3, 2022) (recommending employee relief on an annual basis for the employer's failure to pay sick leave).

With respect to Ms. Barahona, she credibly testified that she was never provided accrued sick leave. In addition, she submitted four paychecks to demonstrate that respondents failed to provide in writing each pay period the amount of sick leave accrued for the pay period or the total balance of accrued sick leave. Since Ms. Barahona worked at Bloom Spa between 2017 and 2021, a civil penalty of $500 per year of her employment should be imposed, for a total civil penalty of $2,500 for failing to provide accrued sick leave. In addition, a civil penalty of $2,500 should be imposed for denying Ms. Barahona the right to paid sick leave between 2017 and 2021.

Petitioner collectively charged respondents for a work-place wide failure to allow employees to use paid sick leave and individually charged respondents for failing to allow Ms. Barahona to use paid sick leave. These charges are duplicative and should be treated as a single charge for purposes of penalty with respect to Ms. Barahona, as previously calculated. *PCC Cleaning Services., Inc.*, OATH 0088/18 at 15.

Although Ms. Barahona's list of employees was unreliable, petitioner established that the anonymous complainant, Workers 1 and 2, and Ms. Barahona, were not allowed to use paid sick leave. There is no testimony or evidence, however, regarding how many years the anonymous complainant worked at Bloom Spa. Unlike Workers 1 and 2, there is no evidence that the Department's investigator interviewed the anonymous complainant to determine the length of her employment. Even if I had credited Ms. Barahona's list of employees, because she remained anonymous, it would not be possible to determine who she is on this list. It would be inappropriate to make a supposition with respect to the length of the anonymous complainant's employment.

Investigator Flores provided credible testimony that while conducting her interviews she learned that Worker 1 was employed at Bloom Spa between 2012 and 2019 and Worker 2 was employed between 2012 and 2022. Since Worker 1 was employed between 2017 and 2019, a

civil penalty of $500 per year, for a total of $1,500 should be imposed for respondents' failure to provide Worker 1 with information relating to leave accruals. Similarly, a civil penalty of $500 per year of Worker 2's employment between 2017 and 2021, should be imposed, for a total of $2,500.

Civil penalties should also be imposed for the "workplace-wide" failure to allow employees to use paid sick leave. Ms. Barahona and Investigators An and Flores credibly testified that Bloom Spa failed to allow employees to use paid sick leave. Worker 1 was working at Bloom Spa between 2017 and 2019, and Worker 2 was working between 2017 and 2021. Civil penalties of $1,500 should be imposed on behalf of Worker 1 and $2,500 imposed on behalf of Worker 2.

Finally, with respect to the anonymous complainant, although there was credible testimony that she was not allowed to use paid sick leave and started working at Bloom Spa in 2016, petitioner's failure to establish dates of employment during the relevant period between 2017 and 2021, prevents a civil penalty from being imposed.

Count 9

Petitioner established that Ms. Barahona was not paid for sick leave on October 3 and October 27, 2021. Respondents are subject to a civil penalty in the amount of $500 for each instance of sick time used by Ms. Barahona for which respondents failed to provide compensation. Admin. Code § 20-924(e). A civil penalty of $1,000 should be imposed against respondents for failing to pay Ms. Barahona for two days of sick leave.

Counts 11 and 12

Petitioner established that respondents required Ms. Barahona to find a replacement worker when she requested to use sick leave on October 27, 2021 (count 11) and retaliated against Ms. Barahona for attempting to exercise her right to use sick time on December 29, 2021 (count 12). Civil penalties in the amount of $500 each for requiring Ms. Barahona to find a replacement worker and subjecting Ms. Barahona to retaliation for using or attempting to use sick leave, for a total of $1,000, should be imposed against respondents. Admin. Code §§ 20-924(d)(ii) and (d)(iii).

Summary of Civil Penalties

A total of $16,200 in civil penalties should be assessed against respondents. The total amount is broken down as follows: $500 for failing to provide documents and records as requested (count 1); $500 for failing to maintain a written paid sick time policy (counts 2-5); $200 for failing to distribute a paid sick leave notice of employee rights to four employees (count 6); $2,500 for failing to provide Ms. Barahona with her accrual of sick leave between 2017 and 2021 (count 7); $1,500 for failing to provide Worker 1 with her accrual of sick leave between 2017 and 2019 (count 7); $2,500 for failing to provide Worker 2 with her accrual of sick leave between 2017 and 2021 (count 7); $2,500 for denying Ms. Barahona the right to paid sick leave between 2017 and 2021 (counts 8 and 10); $1,500 for denying Worker 1 the right to use paid sick leave between 2017 and 2019 (count 8); $2,500 for denying Worker 2 the right to use paid sick leave between 2017 and 2021 (count 8); $1,000 for failing to pay Ms. Barahona for two days of sick leave (count 9); $500 for requiring Ms. Barahona to find a replacement worker on one occasion (count 11); and $500 for retaliating against Ms. Barahona for attempting to use sick leave on one occasion (count 12).

Requested Monetary Relief for Ms. Barahona

Petitioner seeks monetary relief to be paid to Ms. Barahona for various violations of ESSTA.

Counts 8 and 10

Pursuant to Administrative Code section 20-924(d), respondents are liable for civil relief for failing to allow Ms. Barahona to use paid sick leave between 2017 and 2021, at $500 per year for a total amount of $2,500. Because counts eight and ten are duplicative, separate civil relief for each count is inappropriate.

Count 9

Respondents failed to pay Ms. Barahona for two days of sick leave in October 2021. Pursuant to Administrative Code section 20-924(d)(i), respondents are liable for payment of civil relief to Ms. Barahona in the amount of the greater of three times the wages or $250 for each instance she was not paid for sick time. An employer must compensate an employee for the use

of safe and sick time at a rate of at least the applicable minimum wage, which is $15 per hour. Admin. Code § 20-913(a)(1); 6 RCNY § 7-208(h). Respondents should, therefore, pay $855 to Ms. Barahona, which is calculated as three times the wages she should have been paid for 9.5 hours of sick leave per day on October 3 and 27, 2021 ($15/hour x 9.5 hours = 142.50 wages/day x 3 = 427.50/day x 2 days = $855.00).

Counts 11 and 12

Respondents are liable for $500 in civil relief for requiring Ms. Barahona to find a replacement worker when she requested leave on October 27, 2021 (count 11) and $500 for retaliating against her for attempting to exercise her right to uses sick time on December 29, 2021 (Count 12) under section 20-924(e) of the Administrative Code.

Summary of Monetary Relief for Ms. Barahona

Respondents are liable for a total of $4,355 in civil relief to Ms. Barahona, broken down as follows: $2,500 for denying Ms. Barahona the right to paid sick leave between 2017 and 2021 (counts 8 and 10); $855 for failing to pay Ms. Barahona for two days of sick leave (count 9); $500 for requiring Ms. Barahona find a replacement worker on one occasion (count 11); and $500 for retaliating against Ms. Barahona for attempting to use sick leave on one occasion (count 12).

Requested Monetary Relief for Workers 1 and 2

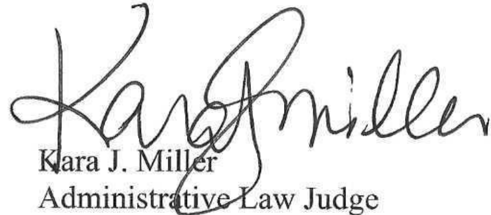
Pursuant to Administrative Code section 20-924(d), respondents are liable for damages for failing to allow Worker 1 to use paid sick leave between 2017 and 2019 and for failing to allow Worker 2 to use paid sick leave between 2017 and 2021 (count 8). Damages are calculated at $500 per year, for total damages of $1,500 due to Worker 1 and $2,500 due to Worker 2.

Requested Monetary Relief for the Anonymous Complainant

Although Investigator An testified that the anonymous complainant started working at Bloom Spa in 2016, petitioner failed to provide any evidence regarding when and how long the anonymous complainant worked during the relevant period between 2017 and 2021. This

precludes her from receiving civil relief for respondents' failure to allow all eligible employees to use paid sick leave.

In sum, respondents should be directed to pay a civil penalty of $16,200 to the Department and monetary relief of $4,355 to Ms. Barahona, $1,500 to Worker 1, and $2,500 to Worker 2.



Kara J. Miller
Administrative Law Judge

November 3, 2023

SUBMITTED TO:

VILDA VERA MAYUGA
Commissioner

APPEARANCES:

MARGOT FINKEL, ESQ.
OLIVIA WADE, ESQ.
Attorneys for Petitioner

No appearance by or for Respondents