CITY OF NEW YORK
COMMISSION ON HUMAN RIGHTS

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In the Matter of

COMMISSION ON HUMAN RIGHTS
ex rel. LISERNY FERNANDEZ,

Complaint No. M-E-SO-15-1031316;
M-E-SO-17-05626

Petitioner,

-against-

OATH Index No. 1245/19

GIL'S COLLISION SERVICES INC.
d/b/a D & R COLLISION CORP.
and GILBERT VELEZ, JR.,

Respondents.

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DECISION AND ORDER

On December 18, 2014, the Law Enforcement Bureau of the New York City Commission on Human Rights ("the Bureau") filed a complaint ("Complaint") alleging gender-based employment discrimination and retaliation against Gil's Collision Services Inc., d/b/a D & R Collision Corp. ("Gil's Collision"),[1] and Gilbert Velez, Jr. ("Velez") (collectively "Respondents") on behalf of Complainant Liserny Fernandez ("Complainant" or "Fernandez"). The Bureau alleges that Respondents continuously sexually harassed Complainant and retaliated against her for opposing the harassment (Petitioner's Exhibit ("Pet. Ex.") 1), in violation of the New York City Human Rights Law, Title 8, Chapter 1 of the New York City Administrative Code ("NYCHRL" or "Law"). Trial was held before the Honorable John B. Spooner, Administrative Law Judge of the New York City Office of Administrative Trials and Hearings ("OATH") on December 4, 2019 and February 4, 2020.

Presently before the Office of the Chair of the New York City Commission on Human Rights ("the Commission") are the April 30, 2020 findings and recommendations, *Comm'n on Human Rights ex rel. Fernandez v. Gil's Collision Services Inc.*, Report and Recommendation, 2020 WL 13470375 (April 30, 2020) ("Report and Recommendation" or "R & R") of Judge Spooner for Decision and Order. For the reasons set forth herein, the Commission adopts the Report and Recommendation's findings on liability in their entirety and the recommendations regarding damages and penalties in part. Specifically, the Commission adopts the findings that Respondents created a hostile work environment and discriminated against Ms. Fernandez in violation of N.Y.C. Admin Code § 8-107(1)(a), and that Respondents retaliated against Ms. Fernandez for objecting to the discrimination, including by constructively discharging her from employment in violation of NYC Admin. Code § 8-107(7). The Commission also adopts the

[1] The Complaint was amended to include D & R Collision Corp., an alternative name for Gil's Collision, on April 24, 2015. (Pet. Ex. 2.)

Report and Recommendation's payment proposal of $24,550 in back pay plus interest and injunctive relief including trainings and policy implementation. As a result, Respondents are ordered to pay Complainant $24,550 in back pay plus pre-determination interest of $9,540.62, institute a written anti-discrimination policy in all of their workplaces, train employees on the NYCHRL, and complete, along with their employees, an anti-sexual harassment training offered by the New York City Commission on Human Rights. The Commission declines to adopt the Report and Recommendation's proposed emotional distress damages and civil penalties. Respondents are ordered by the Commission to pay Complainant $275,000 in emotional distress damages and pay a $250,000 civil penalty.

I. BACKGROUND

The New York City Human Rights Commission's Law Enforcement Bureau filed a complaint on behalf of Liserny Fernandez on December 18, 2014. On June 20, 2015, Respondents filed an answer with the Commission in which they denied the allegations in the Complaint and further asserted that they were not covered by the NYCHRL because they had fewer than four employees.[2] (Pet. Ex. 3.) On July 29, 2015, Respondents submitted a position statement to the Bureau again asserting they are not employers and requesting dismissal of Complainant's claims. (Pet. Ex. 4.) On September 15, 2015, Complainant filed a rebuttal statement and requested that the Bureau find in her favor. (Pet. Ex. 5.) A Commission investigation followed.

On October 29, 2018, following an investigation, the Bureau issued a probable cause determination pursuant to Section 8-116 of the NYCHRL. (Pet. Ex. 8, Ex. H.) On December 17, 2018, the Bureau referred the matter to OATH for trial and Report and Recommendation. (Pet. Ex. 6.) The trial was initially scheduled for September 24, 25, and 26, 2019.

In the months leading up to the trial, Respondents' dilatory behavior and refusal to meaningfully participate caused inordinate delay in discovery. Respondents failed to provide the vast majority of documentation requested by the Bureau. (R & R at 2, 18; Pet. Ex. 8). Respondent Velez refused to be deposed and stated that many of Respondents' records were destroyed or lost in a flood in 2016. (Pet. Ex. 8, Ex. U; R & R at 2.) In addition, Respondents claimed in discovery that they would submit a verified statement as to Respondents' net worth, but never did so, and then failed to follow a court order directing production of a verified statement of assets and liabilities. (Pet. Ex. 8, Ex. U; R & R at 2-4.; *Comm'n on Human Rights ex rel. Fernandez v. Gil's Collision Services Inc.*, OATH Index No. 1245/19, Mem. Dec., at 3 (Nov. 27, 2019)).

Difficulty scheduling the deposition resulted in adjournment of the original trial dates. Trial commenced on December 4, 2019. The Bureau completed its direct examination of Ms. Fernandez that day. (Trial Transcript ("Tr.") at 59-235.) Respondent Velez expressed his intent to conduct a cross-examination the following day and agreed to appear in court the following morning. (Tr. 235:10-25, 236:1-7.) On December 5, 2019, Respondent Velez did appear, but he sought an adjournment of that day's proceeding and the December 6 trial date, citing medical issues. Respondent Velez claimed that he required a six-month adjournment. (R & R at 4 (citing (Tr. 248-51).) Judge Spooner granted a six-week adjournment on the condition that Respondent Velez provide medical documentation by the following day, along with a witness list. (*Id.*)

[2] At the time of the violations discussed herein, the prohibitions on gender-based harassment contained in N.Y.C. Admin. Code 8-107 applied to employers with four or more employees. Since May 9, 2018, the NYCHRL has covered employers with any number of employees for gender-based harassment claims. (Local Law No. 98 of 2018.)

Respondent Velez submitted a doctor's note, and trial was set for February 4, 2020. (*Id.* at 4-5.) Judge Spooner told Respondent Velez that the February 4, 2020 trial date would not be adjourned unless the Respondent could provide additional medical documentation demonstrating that he was unable to travel and participate in the trial. (*Id.* at 5.)

On January 30, 2020, five days before the trial, Respondent Velez sent an e-mail to Judge Spooner and the Bureau stating that he would not be appearing for the February 4, 2020 trial date and was seeing a doctor on that date. (Pet. Closing, Ex. F.) Respondent Velez indicated that he would provide medical documentation for the appointment, but he did not provide adequate documentation in advance of the trial. (Pet. Closing, Ex. F; Tr. 280-82.) The trial proceeded on February 4, 2020. Respondents did not appear. (Tr. 280:15.) Ms. Francesca Abreu, the Bureau's witness and mother of Complainant, testified. (*Id.* at 296-310.) Several documents were admitted into evidence. (*Id.* at 286-91). Both parties were notified via email that the trial was concluded and that the deadline for closing statements was February 25, 2020. (Tr. 313:8-14.) The Bureau submitted its closing statement on February 25, 2020. (R & R at 5.) Respondents did not submit a closing statement. (*Id.*)

On April 30, 2020, Judge Spooner issued his Report and Recommendation, recommending that the Commission on Human Rights hold that (1) Respondents created a hostile work environment and discriminated against Ms. Fernandez in violation of Section 8-107(1)(a) of the New York City Human Rights Law, and (2) Respondents retaliated against Ms. Fernandez for objecting to the discrimination by constructively discharging her from her employment in violation of Section 8-107(7) of the New York City Human Rights Law. (R & R at 2.) Judge Spooner recommended an award to Complainant of $24,550 in back pay plus interest, $150,000 in emotional distress damages, and a $75,000 civil penalty. (*Id.*) Additionally, Judge Spooner recommended that Respondents institute a written anti-discrimination policy and train their employees on the NYCHRL. (*Id*.)

Pursuant to 47 RCNY § 1-66, the Bureau submitted written comments to the Commission on November 15, 2021 ("Bureau Comments"). The Bureau Comments called for the adoption of Judge Spooner's recommendation with respect to liability, the award of back pay, and the requirement that Respondents institute a written anti-discrimination policy and train their staff on the NYCHRL. The Bureau also argued for an increase in Complainant's emotional distress damages to $275,000 and an increase in civil penalties to $250,000. (Bureau Comments at 6). Complainant, by counsel, submitted written comments on November 15, 2021, urging the Commission to adopt Judge Spooner's recommendations in their entirety with regard to liability and seeking an increase in the emotional distress damages award to at least $275,000. Respondents did not submit written comments.

II. STANDARD OF REVIEW

In reviewing a report and recommendation, the Commission may accept, reject, or modify, in whole or in part, the findings or recommendations made by the administrative law judge. Though the findings of an administrative law judge inform the Commission's assessment of evidence, the Commission ultimately determines the credibility of witnesses, the weight of the evidence, and other findings of fact. *Comm'n on Human Rights ex rel. Desir v. Empire State Realty Mgmt.*, *LLC*, OATH Index No. 1253/19, Comm'n Dec. & Order, 2020 WL 1234455, at *3 (March 2, 2020); *Comm'n on Human Rights ex rel. Cardenas v. Automatic Meter Reading Corp.*, OATH Index No. 1240/13, Comm'n Dec. & Order, 2015 WL 7260567, at *2 (Oct. 28, 2015), *aff'd,*

Automatic Meter Reading Corp. v. N.Y.C. Comm'n on Human Rights, No. 162211/2015, 2019 WL 1129210 (Sup. Ct. NY. Cty. Feb. 28, 2019); *Comm'n on Human Rights ex rel. Martinez v. Joseph "J.P." Musso Home Improvement*, OATH Index No. 2167/14, Comm'n Dec. & Order, 2017 WL 4510797, at *2 (Sep. 29, 2017).

The Commission also interprets the NYCHRL and ensures the NYCHRL is applied to the facts correctly. *Desir*, 2020 WL 1234455, at *3; *Martinez*, 2017 WL 4510797, at *2; *Cardenas*, 2015 WL 7260567, at *2. The Commission reviews an administrative law judge's report and recommendation and the parties' comments and objections *de novo* as to findings of fact and conclusions of law. *Desir*, 2020 WL 1234455, at *3; *Comm'n on Human Rights ex rel. Ondaan v. Lysius*, OATH Index No. 2801/18, Comm'n Dec. & Order, 2020 WL 7212457, at *2 (November 24, 2020); *Cardenas*, 2015 WL 7260567, at *2; *Comm'n on Human Rights ex rel. Gibson v. N.Y.C. Fried Chicken Corp.*, OATH Index No. 279/17, Comm'n Dec. & Order, 2018 WL 4901030, at *2 (Sep. 28, 2018); *Martinez*, 2017 WL 4510797, at *3.

III. THE EVIDENTIARY RECORD

Knowledge of the facts as described in the Report and Recommendation is assumed for purposes of this Decision and Order. The facts are derived from the testimony of the Bureau's witnesses, as well as documentary and recorded evidence submitted by the Bureau. During the trial, Respondents neither proffered evidence in response to the Bureau's charges nor cross-examined either of the Bureau's witnesses. As Judge Spooner observed at trial, "[e]ssentially, there's no proof in the record to contradict any of the proof that [the Bureau] offered." (Tr. 293:6-8.) As a result, the Bureau's trial evidence was uncontested. The majority of Respondents' participation was comprised of efforts to delay proceedings. The most pertinent facts are outlined herein.

A. Employment Background

Ms. Fernandez began working as a receptionist and office assistant for Respondent Gil's Collision, a towing and auto body shop, and Respondent Velez, who operated Gil's Collision, in January 2014 at 646 Liberty Avenue, Brooklyn, NY ("646 Liberty Ave"). (Tr. 59-80.) The duration of her employment was approximately nine months. (Tr. 89:23-25, 90:1-5.) Ms. Fernandez worked 40 hours per week and was paid $8 per hour. (Tr. 67:4-11, 223:13-20.) Respondent Velez hired Ms. Fernandez, directed her work, provided her pay, and kept track of her hours. (Tr. 61, 65-67).

During her employment, Ms. Fernandez became aware that Respondent Velez's business enterprise included four connected companies — Gil's Collision, Gil's Towing, Gil's Autobody, and Gil's Transportation (together, "the Gil Entities") (Tr. 65, 78-82.). While employed, she worked for all of the Gil Entities. (Tr. at 65). In a sworn interrogatory response, Respondent Velez attested that he had an "ownership interest, management position, or corporate officer position between January 1, 2013 and December 31, 2015" at each company. (Pet. Ex. 8, Ex. M). The Gil Entities were operated and managed by Respondent Velez, shared the same telephone number, and all primarily operated out of 646 Liberty Ave.[3] (Tr. 59, 65, 69:25, 78-82, 181:2-21; Pet. Exs. 8, Ex. M; 23, 24.) In addition, Velez self-identified that he was the sole owner and/or president of each of the Gil Entities at various points in time between 2007 and 2020 in Certificates of

[3] Respondent Velez also utilized a parking lot at 362 Shepherd Avenue to store vehicles associated with his businesses. (Tr. 60, 174; Pet. Ex. 24.).

Amendments of Certificates of Incorporation, renewal license applications, and an authorization letter. (Pet. Exs. 26-31, 38-42). That Velez managed and owned all of the Gil Entities during Ms. Fernandez's employment was uncontested at trial. Many of the car towings by the Gil Entities were through the City Damage Assessment and Restoration Program (DARP), in which the NYPD calls towing companies on an approved list to request services, contacting the companies on the list serially. (Tr. 59-61, 78-80). Ms. Fernandez observed that Respondent Velez used the four different company names and tax identification numbers in order to obtain as many DARP tows as possible. (Tr. 78.). Ms. Fernandez was instructed to answer each call with "Gil's, how can I help you?" since the business did not know which company NYPD was intending to contact from the DARP list. (Tr. 80.) Respondent Velez did this so that he would receive more compensation, as each of his four separately named companies would receive calls from the NYPD for towing jobs, and "the more times he's on that list the more jobs he gets." (Tr. 78-80.)

During trial, Ms. Fernandez identified at least eight employees that were in the employ of Velez and his related companies in January 2014 – the time when her employment began. These employees included Ms. Fernandez, Mr. Velez,[4] a receptionist named Michelle, a repairman named William Camacho, a relative of Respondent Velez's named George, and three drivers named Jason Davila, Darren Bennet,[5] and Rashad Carmichael. (Tr. 60-63, 73, 77, 84-87.) The record also includes a photograph taken at 646 Liberty Ave. showing that some of them were employed during the time that Ms. Fernandez worked for Respondents. (Tr. 164-65; Pet. Ex. 14.)

As detailed below, Respondent Velez made unwanted sexualized comments to Ms. Fernandez on a regular basis throughout her employment. These comments escalated into physical transgressions. Ms. Fernandez attempted to disengage with Velez, and tell him his behavior was inappropriate. Fernandez's efforts to end the unwanted behavior were met with derision. Ultimately Respondent Velez ended her employment.

B. Respondents' Unwelcome Sexual Comments

1. Comments to Complainant

Less than two weeks after she started working for Respondents, Respondent Velez began making lewd comments to Ms. Fernandez. (Tr. 87-88.) This behavior commenced with Respondent Velez telling Ms. Fernandez that she was "so fucking beautiful" while they were in the reception area. (*Id.*) He said this in a sexual tone, while laughing. (*Id.* at 88:2.) Ms. Fernandez did not respond and "[i]gnored him, upset, and . . . walked away." (*Id.* at 88:23-24.) Afterwards, she told Respondent Velez that his statement was inappropriate and that it made her uncomfortable. (*Id.* at. 89:3-7.)

Respondent Velez made unwelcome sexual comments about Ms. Fernandez's body "frequently." (*Id.* at. 89:10.) This happened "[m]ost of the times [she] was in the office." (*Id.* at. 89:10-12.)) For example, Respondent Velez told Ms. Fernandez that she had "big fucking titties" "*almost every day*" that they interacted over the course of her nine-month employment. (*Id.* at 89:13-25,90:1) (emphasis added). Ms. Fernandez was alone in the office with Mr. Velez approximately three hours per workday, and she worked five days per week, totaling about fifteen

[4] Respondent Velez admitted that he was on salary as an employee in Respondents' Position Statement. (Pet. Ex. 4. Ex. A.)

[5] Respondent Velez admitted to employing Darren Bennet, Jason Davila, and William Camacho in Response to the Bureau's interrogatories. (Pet. Ex. 8, Ex. M.)

hours each week. (Tr. at 100:10-13; 186:9-11.) During their time in the office, Respondent Velez said to Ms. Fernandez that her "fucking hair smells amazing." (*Id.* at 89:16-17). Respondent Velez told Ms. Fernandez that that he wanted to "fuck [her]," (*Id.* at 89:15-16) "[a]lmost every day, every time [she] saw him" during the "entire time" she worked for him. (*Id.* at 92:2-8.) In addition to explicit sexual references, Respondent Velez also bombarded Ms. Fernandez with comments that her "ass looked fucking amazing," that she "looked too fucking sexy" the way she dressed, and that the way she dressed "aroused him." (*Id.* at 92:19-20,93:1.) Mr. Velez made inappropriate comments about Ms. Fernandez's buttocks "every chance," which included multiple times during her work week. (*Id.* at 93:24-25, 94:1-5.)

Respondent Velez escalated to pressuring Ms. Fernandez to engage in sexual relations with him. On one occasion when Respondent Velez took Ms. Fernandez to his boat,[6] he said "this can all be fucking yours if you just give in to it. I'll buy you a house, a car, you will never have to work again." (*Id.* at 96:13-16.) Ms. Fernandez discerned Respondent Velez's statements to be offers of money, a house, and cars in exchange for sex. (*Id.* at 97:15-25, 98:1-5.) Similar transgressions occurred weekly through remarks to Ms. Fernandez about how she would get to "live a luxury life if [she] was to give in to him." (*Id.* at 98:6-13.) These comments had a significant impact on Ms. Fernandez, making her feel "disrespected," "uncomfortable," "upset," and "angry." (*Id.* at 98:20-21.)

2. Comments in Front of Colleagues

Respondent Velez did not only make remarks about Ms. Fernandez's appearance and body when they were alone. He made his elicit remarks "every chance he got that [they] were around anybody," including in front of other employees and individuals. (*Id.* at 94:11-15, 19-25, 95:1-4.) For example, Ms. Fernandez heard him say to employees Darren, Jason, Rashad, and other friends of Respondent Velez "[l]ook at how fucking gorgeous she is." (*Id.* at 94:11-25.) On one occasion, Respondent Velez told Ms. Fernandez that she had "big fucking titties" in front of another employee. (*Id.* at 90:6-11.) On another occasion, when Ms. Fernandez was speaking with a coworker in the reception area, Respondent Velez commented that he could help her "lose weight by fucking and exercising [her] pussy." (*Id.* at 101:1-13,102:1-5.) Both Respondent Velez and the coworker proceeded to laugh, and Ms. Fernandez walked away feeling "embarrassed" and "disrespected." (*Id*. at 102:10-12.) Respondent Velez's public comments left Ms. Fernandez feeling "disgusted." (*Id.* at 103:2-4.) She would attempt to avoid interactions when possible. (*Id.*)

3. Comments in Front of Complainant's Mother

Respondent Velez's unwelcome comments occurred in front of Ms. Hernandez's family, in addition to her colleagues. When Ms. Fernandez's mother, Francesca Abreu, picked her up from work, Respondent Velez said "[h]ola, suegra," to Ms. Abreu. (*Id.* at 105:21.) "Suegra" translates to "mother-in-law" in English. (*Id.* at 105:22-25, 301:7-8). Respondent Velez called Ms. Abreu his mother-in-law on each of the occasions she picked Ms. Fernandez up from work. (*Id.* at 105-106, 301:9-15). Ms. Fernandez informed Respondent Velez that this was "very inappropriate" and "[her] mother should not be subjected to this." (*Id.* at 106:1-3.) It made Ms. Abreu feel bad because she knew her daughter did not like Respondent Velez's innuendos. (*Id.* at 302:2-10.) Ms. Abreu asked Respondent Velez why he referred to Ms. Abreu as his mother-in-law, and she told him she

[6] Occasionally Respondent Velez would have Ms. Fernandez work with him outside of the office to answer calls and take messages, including twice on his boat. Tr. 95-96.

did not like it. (*Id*. at 302:15-16) In response, Velez laughed. (*Id.* at 302:21) Respondent Velez's behavior toward her mother made Ms. Fernandez feel both "embarrassed" and "disrespected." (*Id.* at 106:22.)

Ms. Abreu asked her daughter about Respondent Velez's inappropriate behavior towards her and asked her how she was doing. (*Id.* at 106:3-4). Ms. Abreu was concerned that something had happened to her daughter at work. (*Id.* at 106:10-12.) Ms. Fernandez proceeded to tell her mother about Respondent Velez's comments and advances. (*Id.* at 106:4-6. 12-14, 303-305.) As a result, Ms. Abreu did not want her daughter working for Respondents. (*Id.* at 106-107.) Ms. Fernandez informed her sister about the office as well, telling her about "the sexual comments on a frequently daily basis." (*Id.* at 107:10-11.) The Complainant also began opening up to her mother, which compounded her negative feelings, including embarrassment because, as she indicated, "talking to [your] mom about something like that is usually not something you want to speak to your parents about." (*Id.* at 107:17-21.)

4. Comments about Other Women

Respondent Velez also made crude comments about other women in Ms. Fernandez's presence. At the time Ms. Fernandez's employment began, Respondent Velez told Ms. Fernandez that he "wouldn't fuck" a woman whom they both knew because "she looks like she has few kids." (*Id.* at 99:7-14.) Respondent Velez would also "let everybody know" if he "got a good fuck." (*Id.* at 99:22-25, 100:1-2.) He said this on multiple occasions in front of Ms. Fernandez in addition to four other employees. (*Id.* at 100:3-6.)

C. Respondent Velez's Unwanted Lewd Touching and Related Remarks

A few months after Ms. Fernandez began working for Respondents, Respondent Velez grabbed her leg while she was working out of his car. (*Id.* at 90-91; *supra* note 5.) She pushed his hand away and said "it's very inappropriate, do not touch me." (*Id.* at 91:16-17.) In response, Velez "laughed it off like it was a joke." (*Id.*) This entire incident made her feel uncomfortable and disrespected. (*Id*. at 91:24-25, 92:1.)

Rather than ceasing the inappropriate touching as Ms. Fernandez requested, Respondent Velez escalated his behavior. On September 16, 2014, he groped Ms. Fernandez's breasts. (*See id.* at 108, 110, 123; Pet. Ex. 12.) This incident took place while Ms. Fernandez was working at the computer in the office. (Tr. 108:16-17.) The incident started when Velez said "how [her] fucking hair smells good" and told her how she looked good that day. (*Id.* at 108:15-17.) Velez then positioned himself behind her and "took both hands and squeezed [her] breasts." (*Id.* at 108:16, 19-25.) Ms. Fernandez became upset, cursed at him, began to cry, and went outside to call her sister. (*Id.* at 109:1-3, 16-18.) When she left the room, Respondent Velez was laughing. (*Id.* at 109:6-8.)

When Ms. Fernandez finished speaking on the phone with her sister, she went back inside the office (*Id.* at 109:19-21) While sitting at the computer, Respondent Velez came into the office and attempted to speak to her. (*Id.* at 109-111.) She tried to ignore him but Velez eventually sat "[r]ight next to [her]," and commanded "look at me, look at me," cornering her into conversation. (*Id*. at 111:1-6.) Ms. Fernandez told Respondent Velez that he had upset her and that grabbing her breasts was inappropriate. (*Id*. at 111:10-14.) In response "[h]e was laughing," which caused her to feel that "[he] [t]ook it as a joke." (*Id.*at 111:15-16.) Velez said "I just couldn't hold myself back

from holding . . . your titties." (*Id.* at 111:24-25, 112:1.) While laughing, he offered an apology, which Ms. Fernandez found to be insincere. (*Id*. at 111:17-20) She explained that a simple apology was inadequate for his behavior, and recounted how she had repeatedly asked him to stop making her uncomfortable. (*Id.* at 112:15-23) Respondent Velez told her that her "fucking hair smells good" and commented on Ms. Fernandez's breasts and how she dressed. (*Id.* at 112:6-9.) Velez suggested that his behavior was her fault, stating that Ms. Fernandez "shouldn't be picking up [her] hair, that [she] shouldn't be shampooing [her] hair with the shampoo that [she] was using at the time because it smelled so fucking good." (*Id.* at 112:10-13.) Velez also told her to "[s]top dressing so fucking sexy." (*Id.* at 113:2-3.)

Ms. Fernandez recorded this conversation on her cell phone. (*Id.* at 109, 113.) In the recording, Respondent Velez can be heard saying "I'm sorry . . . [b]ut you like fucking turn me on like crazy," "[d]on't look so cute," and "[s]melling fucking delicious, swear to God." (*Id.* at 135:17-21; Pet. Ex. 12.) Ms. Fernandez tells Respondent Velez "[t]hat's not appropriate." (Tr. at 136:3, Pet. Ex. 12.) He proceeds to ask her "[w]hy you go [sic] to look like that?" (Tr. at 136:6; Pet. Ex. 12.) Respondent Velez also states "I'm sorry. You want me to fire you?" (Pet. Ex. 12 at 1:40.)

The groping incident made Ms. Fernandez feel upset, disrespected, and "embarrassed at the fact that he actually had accomplished touching [her]." (Tr. 109:10-12.) When speaking with Respondent Velez after he groped her, she felt "[v]ery angry, disrespected, disgusting." (*Id.* at 144:16-17.) She also felt "depressed" afterwards (*Id.* at 144:18-19.) Ms. Fernandez stated that her self-esteem was impacted by the perpetual disrespect, and that the groping incident left her feeling "degraded." (*Id.* at 145:3-8.)

D. Ms. Fernandez's Employment Following the Groping Incident

The day after Respondent Velez groped her in the office, Ms. Fernandez reported to work. (*Id.* at 182:14-17.) Due to Respondent Velez's behavior the previous day, Ms. Fernandez tried to create distance from him in the office. (*Id.* at 182:25, 183:1-4.) She would not speak to him unless it was work-related. (*Id*.) Her impression was that Respondent Velez "didn't like that." (*Id.* at 183:10-14.)

When Ms. Fernandez came to work on September 17th, she told her colleagues how Respondent Velez groped her the day before. (*Id.* at 183:16-25; 184:1.) Her colleague Darren informed her that Respondent Velez had already talked about the incident in the office. (*Id.* at 183:18-24.) Her colleagues told her that Respondent Velez was laughing about it while he told them about touching Ms. Fernandez, and that Respondent Velez spoke about firing her. (*Id*. at 184:2-7.)

In the week following the incident, Respondents substantially reduced her hours. (*Id.* at 184:12-15, 19.) Ms. Fernandez's hours were reduced so much that she was unsure if she remained employed by Respondents. (*Id.*at 184:16-20.) She was also worried about being fired because Respondent Velez made comments about firing her to her colleagues. (Tr. at 184:5-7, 206:3-9.)

Ms. Fernandez shared with Respondent Velez that she was concerned about the status of her employment. On September 18, 2014, Ms. Fernandez texted Respondent Velez to say "if you are going to fire me please give me at least two weeks [sic] notice. *I know you say your employees have no rights* but I would appreciate it if I had two." (Pet Ex. 15; Tr. 205:21-23) (emphasis added).

Subsequent text messages from September 29, 2014, October 4, 2014 and October 6, 2014, October 8, 2014, October 12, 2014, and October 16, 2014 show Ms. Fernandez contacting Respondent Velez and continuously inquiring about the status of her job. (Tr. at 206-12; Pet. Exs. 16-17.)

Respondent Velez's subsequent actions did not assuage Ms. Fernandez's fears. On September 29, 2014, she was instructed not come to work because there was something wrong with the computer. (Tr. at 207-08; Pet. Exs. 16-17.) This message was relayed by Darren at the direction of Mr. Velez. (Tr. at 207-08.) Ms. Fernandez questioned Respondent Velez's assertion that she could not work because of a computer issue since computer tasks were only a small part of her job (Pet. Ex. 17.) Typically, Ms. Fernandez only performed about 30-40 minutes of work on the computer at the end of each eight-hour workday, and she spent the other seven to seven and a half hours answering phone calls for the business. (Tr. at 208-09, 211; Pet. Exs. 16-17.) On October 6, 2014, Ms. Fernandez texted Respondent Velez, in reference her understanding that the business had a working computer: "I thought the guy had the computer, so I'm guessing I won't be working anymore?" (Tr. at 211; Pet. Ex. 17.) Velez replied "[t]hat's what you want. Don't come back no more." (Tr. at 211; Pet. Ex. 17.) Ms. Fernandez then followed up: "Gil I'm asking you [sic] it's not that hard to answer. It's your business [sic] I'm only your employee. If you don't want me to come back to work just say so. You dont [sic] need to make something up. . . It's simple [sic] are you firing me yes or no?" (Tr. at 211; Pet. Ex. 17.) On October 8, 2014, Ms. Fernandez texted again: "Gil, I need to know if you are firing me or I'm I already fired [sic]. It has been more then [sic] enough time." (Pet. Ex. 17.) On October 12, 2014, Fernandez asked via text: "Do I have to come in to work tomorrow?" (*Id.*) Finally, on October 16, 2014, she texted Respondent Velez, *inter alia*, "You can't even have the decency to tell me I'm no longer working. Why can't you just simply say that you no longer need me . . ." (*Id.*)

During this period Ms. Fernandez also called Velez two to three times each day to inquire about her employment, but Respondent Velez never answered Ms. Fernandez after his October 6 text message. (Tr. at 208, 210-11, 213-14.) Ms. Fernandez ceased contacting Respondent Velez in mid-October 2014, as she understood from the silence that her employment had been terminated. (Tr. 211-14.)

E. Impacts of Lewd Comments and Physical Violations on Ms. Fernandez

Respondent Velez's frequent physical transgressions and lewd comments caused Ms. Fernandez physical and emotional torment – while she worked for Respondents – and for years after.

1. Emotional and Physical Effects

Ms. Fernandez's mental state worsened following the end of her employment. Her anger and defensiveness increased, and she became depressed and anxious. (*Id.* at 214-16.) Ms. Fernandez experienced feelings of depression "mostly every day for about a year or two" after her time working for Respondents. (*Id.* at 216-:25-25.) She struggled to get out of bed, and she distanced herself from family members. (*Id.* at 217.) At the trial, Ms. Fernandez stated that she no longer feels comfortable working around a lot of men, and avoids situations where multiple men are present. (*Id.* at 221:21-25; 222:1-3.)

Respondent Velez's comments took a physical toll on Ms. Fernandez as well. Within three to four months of starting to work for Respondent Velez, she developed a sleeping problem because of her workplace experiences. (*Id.* at 103-05.) Ms. Fernandez "[b]arely slept" and began taking medication to treat her sleeping problem, which she was still taking more than five years later at the time of her testimony. (*Id.* at 103-05, 214-17.) Moreover, she coped with Respondent Velez's treatment of her by increasing her alcohol consumption, which her mother observed. (*Id.* at 104:15-22, 218:8-9, 307:11-17.)

Circumstances in the work environment left Ms. Fernandez angry outside of the workplace. (*Id.* at 103:7-8.) As set forth above, Ms. Fernandez felt angry and upset when Respondent Velez made sexualized comments to her and subjected her to unwanted touching. In her experience, "[Respondent Velez's] words make you feel disgusting on a constant basis." (*Id.* at 102:18-20.) Most of the time when she was in the office, she felt "upset" and "nasty." (*Id.* at 102:22-23.) She was "very family-oriented," but as a result of Respondent Velez's behavior, she did not want to be around her family and felt embarrassed. (*Id.* at 221:6-10.)

Anger affected Ms. Fernandez's friendships and relationships. (*Id.* at 103:7-8.) She became aggressive and defensive. (*Id.* at 103:10-12.) When not at work, she "frequently" thought of Respondent Velez's treatment of her, and she felt "[d]isappointed in [herself] for actually working there."[7] (*Id.* at 104:2-5.) She could not have "normal conversations" with her family until she began seeing a psychologist months after her employment ended. (*See id.* at 221:17-20; *infra* "Psychological Intervention.") The impacts were visible to family, and Ms. Fernandez's mother noticed significant changes in her daughter. (*Id.* at 306-307.) Ms. Abreu said that after Ms. Fernandez began working for Respondents her personality and behavior altered; Ms. Fernandez began to cry a lot and did not engage with her anymore. (*Id.* at 306-07). They spent less time together and Fernandez's sleeping patterns changed. (*Id.* at 308.) Ms. Fernandez's mother attributed these changes to Respondent Velez's treatment of her daughter. (*Id.* at 309.) Being withdrawn, crying, and sleeping difficulties lasted for about two years. (*Id.* at 309-310.)

2. Psychological Intervention

A few months after Ms. Fernandez's employment by Respondents ended, she sought treatment from a psychologist, whom she saw weekly. (*Id.* at 215.) The psychologist diagnosed her with Post Traumatic Stress Disorder (PTSD) resulting from Respondents' treatment. (Tr. 215-16.) A May 3, 2019 letter from the psychologist states that she's been treating Ms. Fernandez since February 2015 for PTSD as a result of sexual harassment she experienced while employed by Respondents. (Pet. Ex. 18.)[8] The psychologist reported that Ms. Fernandez's symptoms included "anxiety, depression, flashbacks, irritability, and lack of trust." (*Id*.) At the time of the trial, Fernandez continued to experience flashbacks and hyperventilate. (Tr. at 222.) According to her psychologist, Ms. Fernandez "continues to experience negative emotional and physical consequences as a result of this harassment[,]" and she "is working to resolve her issues of fear

[7] Despite his untoward behavior, Ms. Fernandez stayed working for Respondent Velez until her employment ceased for financial reasons. (Tr. at 104:6-8).

[8] The Report and Recommendation states that Ms. Fernandez began seeing the psychologist in February 2014. (R & R at 8.) However, Ms. Fernandez testified that she began treatment with the psychologist in 2015, (Tr. 215), and documentation from the psychologist clarifies that Ms. Fernandez began treatment in February of 2015. (Pet. Ex. 18).

and anxiety, in order to participate fully in her life." (Pet. Ex. 18.) Ms. Fernandez remained under her psychologist's care at the time of the trial. (Tr. at 215; Pet. Ex. 18.)

F. Efforts to Secure New Employment

Approximately a month after her employment ended, Ms. Fernandez began to look for other work. (Tr. at 223-24.) Due to her emotional state following her workplace experiences with Respondents, she was unable to immediately seek a new position. (Tr. at 224.)

She searched for jobs twice a week and applied for multiple positions at retail establishments. (*Id.* at 224.) Ms. Fernandez was unable to find work until October of 2016 when she began working as a tax preparer. (*Id.* at 225-26.) She worked this job for 40 to 50 hours per week at $15 per hour. (*Id.* at 226.) It was a seasonal position that lasted six months. (*Id*. at 226.) After that employment ended, Ms. Fernandez filed for unemployment and began to look for work again. (*Id.* at 226-27.)[9] After six months of searching, Fernandez began to work as a package handler. (*Id.* at 228-229, 230). She worked 30 to 40 hours per week at $10 per hour.[10] (*Id.* at 229.) She also worked as a receptionist at an urgent care facility beginning on August 28, 2017 at the same time she began work as a package handler. (*Id.* at 230.)

IV. DISCUSSION

A. Legal Standard

The NYCHRL "shall be construed liberally for the accomplishment of the uniquely broad and remedial purposes thereof, regardless of whether federal or New York state civil and human rights laws, including those laws with provisions worded comparably to provisions of [the NYCHRL] have been so construed." N.Y.C. Admin. Code § 8-130(a). Pursuant to the Local Civil Rights Restoration Act of 2005, "[i]nterpretations of New York state or federal statutes with similar wording may be used to aid in interpretation of the New York City Human Rights Law, viewing similarly worded provisions of federal and state civil rights laws as a floor below which the City's Human Rights law cannot fall, rather than a ceiling above which the local law cannot rise." Local Law No. 85 § 1 (2005). *See also* Local Law No. 35 § 1 (2016).

Moreover, "case law interpreting analogous anti-discrimination statutes under state and federal law, though perhaps persuasive, is not precedential in the interpretation of the NYCHRL." *Ondaan*, 2020 WL 7212457, at *6 (citing *Albunio* v. *City of New York.*, 23 N.Y.3d 65, 77, n.1 (2014) ("the New York City Council's 2005 amendment to the NYCHRL was, in part, an effort to emphasize the broader remedial scope of the NYCHRL in comparison with its state and federal counterparts and, therefore, to curtail courts' reliance on case law interpreting textually analogous state and federal statutes.")).

[9] While using unemployment insurance she documented her job search in detail, as was required to stay qualified to receive the payments. (Tr. at 227.)

[10] Ms. Fernandez left the job after six or seven months when a male coworker asked her out on a date and made comments about her that made her uncomfortable. (Tr. at 229.) Although she reported his behavior to the company and the company spoke to him, his behavior continued, leading her to leave the employer. (*Id.*)

B. Respondents Constitute[d] Employers Under the NYCHRL

As set forth above, Respondents claimed that they were not covered by the NYCHRL at the time of the alleged violations because they did not employ four or more employees.[11] The evidence presented at trial disproves this claim.

Financial records and testimony showed that the Gil Entities – Gil's Collision, Gil's Towing, Gil's Autobody, and Gil's Transportation – all operated as a "single employer." A "single employer" operation exists where "nominally separate entities are actually part of a single integrated enterprise . . .' " *Arculeo v. On-Site Sales & Mktg., LLC*, 425 F.3d 193, 198 (2d Cir. 2005) (quoting *Clinton's Ditch Cooperative Co. v. NLRB,* 778 F.2d 132, 137 (2d Cir.1985)). Nominally distinct separate corporations under common ownership and management can be deemed to constitute a single enterprise. *Id.* (citing *Cook v. Arrowsmith Shelburne, Inc.*, 69 F.3d 1235, 1240–41 (2d Cir.1995)). Courts consider four factors in determining whether multiple employers constitute a single employer: (1) interrelation of operations, (2) centralized control of labor relations, (3) common management, and (4) common ownership or financial control. *Centeno v. 75 Lenox Realty LLC*, No. 14 -cv-1916, 2017 WL 9482090, at *9 (E.D.N.Y. Feb. 1, 2017), report and recommendation adopted, No. 14-cv-1916, 2017 WL 1214451 (E.D.N.Y. Mar. 31, 2017) (citing *Cook*, 69 F.3d at 1240). "[T]he use of common office facilities and equipment . . . between or among enterprises" are also relevant to the single employer doctrine. *Trustees of Elevator Constructors Union Loc. No. 1 Annuity & 401(K) Fund v. K.A.N. Elevator Inc.*, No. 16 -cv-7408, 2018 WL 2727884, at *6 (S.D.N.Y. June 5, 2018) (citing *Lihli Fashions Corp. v. NLRB*, 80 F.3d 743, 747 (2d Cir. 1996), as amended (May 9, 1996)). Moreover, "[t]o demonstrate single employer status, not every factor need be present, and no particular factor is controlling." *Id.* (citing *Lihli*, 80 F.3d at 747).

Regarding interrelation of operations, Ms. Fernandez described how the four companies used the same phone number, explaining how she would answer the phone with "Gil's, how can I help you?" to avoid distinguishing between the companies when they were contacted for towing services under the DARP program. As to centralized control of labor relations, Ms. Fernandez identified at least eight other individuals who worked for Velez and his interrelated companies, and evidence showed that Respondents employed at least three other individuals in addition to Ms. Fernandez. For the common management, common ownership, and financial control factors, Respondent Velez admitted that he had an ownership interest, management position, or corporate officer position in each of the four related companies during Ms. Fernandez's employment. (Pet. Ex. 8, Ex. M.) In addition, financial records also show that Respondent Velez was the sole owner and/or president of each corporation at various points in time. Facilities and equipment could not be distinguished between the entities, all companies operated out of 646 Liberty Ave.

The robust evidentiary record demonstrates that Respondents are covered employers.[12] *See Centeno v. 75 Lenox Realty LLC*, No. 14-cv-1916, 2017 WL 9482090, at *9-10 (E.D.N.Y. Feb. 1,

[11] As explained at *supra* note 2, the NYCHRL was amended in 2018 to cover employers with any number of employees for gender-based harassment claims.

[12] The evidence in the record showing that Respondents were covered employers under the NYCHRL. Additionally the Bureau would be permitted an adverse inference of same. An adverse inference is "limited to the strongest inference that 'opposing evidence in the record permits." *Police Dep't v. Williams*, OATH Index No. 747/07, Mem.

2017), *report and recommendation adopted*, No. 14-CV-1916, 2017 WL 1214451 (E.D.N.Y. Mar. 31, 2017) ("single employer" established where two separate entities share operation, business aspects, and personnel issues, and aggregation of employees of "single employers" to establish coverage appropriate under anti-discrimination laws); *Comm'n on Human Rights v. Framboise Pastry, Inc. and Comm'n on Human Rights ex rel. DaCosta v. Framboise Pastry, Inc.*, OATH Index Nos. 727/13, 728/13, 2013 WL 5912574 (Sept. 25, 2013), *aff'd Framboise Pastry Inc. v. New York City Comm'n on Hum. Rts.*, 30 N.Y.S.3d 49 (1st Dept. 2016) (finding a "single employer" under the NYCHRL when two entities, *inter alia*, share the same address); (*Comm'n on Human Rights ex rel. Hsu v. HSBC Bank*, OATH Index No. 522/09 at 6-8 (Jan. 22, 2010) (finding sufficient facts to establish that a bank and its subsidiary constitute a single employer for purposes of the NYCHRL because, *inter alia*, they have the same addresses and share officers).

C. Respondents Discriminated Against Ms. Fernandez Based on Her Gender in Violation of NYCHRL § 8-107(1)(a)

It is a violation of the NYCHRL to treat a person less well than others, in whole or in part, because of their gender, including through gender-based harassment. *Desir*, 2020 WL 1234455, at *6 (citing *Williams v. N.Y.C. Hous. Auth.*, 872 N.Y.S.2d 27, 39 (1st Dep't 2009)). *See also Martinez*, 2017 WL 4510797, at *5; *Cardenas*, 2015 WL 7260567, at *7. It is unlawful for employers and their agents or employees, "because of the actual or perceived . . . gender . . . of any person, . . . to discriminate against such person in compensation or in terms, conditions or privileges of employment." N.Y.C. Admin. Code § 8-107(1)(a); *Cardenas*, 2015 WL 7260567, at *7. An actionable claim of gender discrimination under § 8-107(1)(a) of the NYCHRL requires a showing by a preponderance of the evidence that a complainant was treated less well than other employees because of their gender. *See Williams*, 872 N.Y.S.2d at 39; *Martinez*, 2017 WL 4510797, at *5; *Cardenas*, 2015 WL 7260567, at *7; *Comm'n on Human Rights ex rel. Zoleo v. Weinstein Family Servs. of N.Y., Inc.*, OATH Index No. 623/09, Report and Recommendation, at 8 (Dec. 7, 2009), *adopted*, Comm'n Dec. & Order (Sept. 17, 2010). "Gender discrimination may be shown 'simply by the existence of unwanted gender-based conduct.' " *Martinez*, 2017 WL 4510797, at *5 (citing *Williams*, 872 N.Y.S.2d at 38). "Once the Bureau has established a *prima facie* case, 'the burden then shifts to the [respondent] to present legitimate, independent, and nondiscriminatory reasons to support its actions.' " *Id.* (citing *Brightman v. Prison Health Serv., Inc.*, 970 N.Y.S.2d 789, 791 (2d Dep't 2013). " 'Then, if the [respondent] meets this burden, the [Bureau] has the obligation to show that the reasons put forth by the defendant were merely a pretext.' " *Id.*

Dec., at 5 (Oct. 27, 2006) (citing *Noce v. Kaufman*, 2 N.Y.2d 347, 353 (1957); *Comm'r of Soc. Servs. v. Philip De G.*, 59 N.Y.2d 137, 141 (1983)). Here, Respondents' failure to provide documentation to the Bureau in discovery regarding their employee count, coupled with their refusal to offer evidence at trial related to same, permit an adverse inference that, as Ms. Fernandez testified, Respondents were covered employers with four or more employees under the NYCHRL at the time of Ms. Fernandez's employment. *See Love v. New York City Hous. Auth.*, 251 A.D.2d 553, 554 (2d Dep't 1998).

The Bureau clearly established a *prima facie* case of gender discrimination against Respondents. Ms. Fernandez credibly testified to persistent harassment that began at the outset of her employment. Almost every day she was at work, Respondent Velez made lascivious comments about her body. These included salacious statements about her buttocks, her breasts, her weight, and her hair. Velez told Ms. Fernandez almost daily that he wanted to "fuck [her]," and eventually pressured her by telling her to "give in." He made lewd comments in front of her colleagues and in front of her mother. He also made demeaning, sexual comments about other women in Ms. Fernandez's presence. Ms. Fernandez repeatedly told Respondent Velez that his comments were inappropriate. He would not stop. Oftentimes, he laughed in response, further belittling Ms. Fernandez's reactions. As "[e]ven a single comment that sexually objectifies a person or evinces stereotypical views about a person's role in the workplace can establish gender discrimination under the NYCHRL," *Cardenas*, 2015 WL 7260567, at *8 (citing *Williams*, 872 N.Y.S. 2d at 41 n.30), the constant barrage of sexually-objectifying comments and advances constituted harassment based on Ms. Fernandez's gender.

Ms. Fernandez's testimony also revealed how Respondent Velez's verbal mistreatment escalated into physical sexual harassment. First Respondent Velez grabbed her leg. When Ms. Fernandez told him it was inappropriate, and not to touch her, Respondent Velez laughed. Subsequently, toward the end of her employment,[13] Respondent Velez stood behind her and groped her breasts while she was working at the computer. Ms. Fernandez left the office in tears. Respondent Velez was laughing. When she returned, Respondent Velez cornered her and forced her into conversation, where he blamed Ms. Fernandez and the way she looked for his past advances. These instances of unwanted touching and threatening behavior, constitute gender-based harassment.

The Bureau established a *prima facie* claim of gender-based discrimination, and the burden shifts to Respondents to present legitimate, independent, and nondiscriminatory reasons for the behavior of Respondent Velez. Respondents did not rebut any evidence presented by the Bureau. They did not cross examine Ms. Fernandez or her mother, and they did not present any formal testimony or evidence at trial with any alternative explanations of what transpired during Ms. Fernandez's employment.

Accordingly, the Bureau proved that Respondents harassed Ms. Fernandez in violation of § 8-107(1)(a) of the NYCHRL, and the Commission adopts Judge Spooner's finding of same.

D. Respondents Retaliated Against Ms. Fernandez in Violation of NYCHRL § 8-107(7)

The Bureau alleged that Respondents retaliated against Ms. Fernandez by, *inter alia*, reducing her hours and ultimately terminating her employment after she objected to Respondent Velez groping her breasts. In order to establish a *prima facie* case of retaliation under the NYCHRL, the Bureau must show that: (1) the complainant engaged in protected activity (which,

[13] As set forth at *infra* IV. D, Respondents' constructively discharged Ms. Fernandez in retaliation for protesting the sexual harassment.

among other things, includes acting to oppose unlawful discrimination), (2) the respondent was aware of the complainant's protected activity, and (3) the respondent reacted to the complainant's protected activity in a manner that is reasonably likely to deter someone from engaging in such protected activity. N.Y.C. Admin. Code § 8-107(7); *Ondaan*, 2020 WL 7212457, at *11; *Martinez*, 2017 WL 4510797, at *6; *Comm'n on Human Rights ex rel. Joo v. UBM Building Maintenance Inc.*, OATH Index No. 384/16, Comm'n Dec. & Order, 2018 WL 6978286, at *6 (Dec. 20, 2018). *See also Mihalik v. Credit Agricole Cheuvreux N. Am., Inc.*, 715 F.3d 102, 112 (2d Cir. 2013) (citing *Williams*, 872 N.Y.S.2d at 33-34); *Brightman v. Prison Health Serv., Inc.*, 108 A.D.3d 739, 740 (2d Dep't 2013); *Forrest v. Jewish Guild for the Blind*, 3 N.Y.3d 295, 313 (2004).

As an initial matter, the Report and Recommendation states, without citation, that the third element of a retaliation claim under the NYCHRL is "the respondent negatively reacted to complainant's protected activity to deter [protected activity]." (R&R at 11). The Bureau posits that the correct element is "the respondent reacted to the complainant's protected activity in a manner that is *reasonably likely to deter someone from engaging in such protected activity*." *Id.* at 8 (emphasis added), and seeks clarity from the Commission. In support of its position, the Bureau cites the text of the NYCHRL, which states in relevant part that the "retaliation or discrimination complained of under this subdivision need not result in an ultimate action with respect to employment . . . or in a materially adverse change in the terms and conditions of employment . . . provided, however, that the retaliatory or discriminatory act or acts complained of must be reasonably likely to deter a person from engaging in protected activity." N.Y.C. Admin. Code § 8-107(7). The Bureau cites previous Decision and Orders issued by the Commission, as well as state case law in support of this interpretation. (Bureau Comments at 8 (citing *Ondaan*, 2020 WL 7212457, at *11)); *Joo*, 2018 WL 6978286, at *6; *Brightman*, 108 A.D.3d at 740.

The Commission finds that the correct third element of a NYCHRL retaliation claim is "the respondent reacted to the complainant's protected activity in a manner that is reasonably likely to deter someone from engaging in such protected activity." This reflects both the statute and cases and is used herein.

Turning to the substance of the retaliation, Ms. Fernandez engaged in protected activity each time she objected to Respondent Velez's harassment. That includes the multiple occasions she spoke out against his sexualized comments and non-consensual physical touching throughout her employment. *See Albunio v. City of New York*, 16 N.Y.3d 472 (2011) (broadly interpreting the term "opposed" when analyzing retaliation claims under the NYCHRL). Respondent Velez engaged in retaliation each time he negatively responded to Ms. Fernandez's protected activity, including by dismissing her objections, and ultimately ending her employment. These actions were reasonably likely to deter his employee, Ms. Fernandez, from engaging in protected activity.

Ms. Fernandez engaged in protected activity when she: told Respondent Velez that his comments about her appearance made her uncomfortable, (Tr. 89), told Respondent Velez that grabbing her leg was inappropriate and pushed his hand away, (Tr. 90-91), and when she told Respondent Velez it was inappropriate to refer to Ms. Abreu as his mother-in-law and that she should not be subjected to this behavior. (Tr. 106).

The final protected activity took place on September 16, 2014. After Respondent Velez groped her, Ms. Fernandez began to cry, cursed at him, and stepped out to call her sister. (Tr. 109). When Ms. Fernandez returned to the office after calling her sister, she told Mr. Velez that his behavior was inappropriate, and recounted that she had asked him to cease making her

uncomfortable before. Ms. Fernandez indicated that his brief apology was inadequate. From that date forward, Ms. Fernandez was detached and avoided Respondent Velez when possible. She discerned that he resented her rejection and her lack of engagement. When she returned to work the next day, Ms. Fernandez told her colleagues about Respondent Velez's treatment. Her coworker revealed that Velez had already described the incident to them and was thinking of firing her. In addition, Respondent Velez drastically reduced Ms. Fernandez's hours thereafter. He had another employee relay the reduction in hours to Ms. Fernandez, and tell her it was because of an issue with the office computer, even though very little of her work was on the computer. Despite repeated attempts by Ms. Fernandez to clarify the status of her employment, Respondent Velez ignored her. He did not respond to her numerous text messages or daily phone inquiries. By mid-October, about a month after the groping incident and numerous attempts by Ms. Fernandez to contact Respondents, Ms. Fernandez discerned that Respondents had terminated her employment.

Ms. Fernandez's testimony, coupled with the recorded conversation and text messages, demonstrate her efforts to get Respondent Velez's unlawful gender-based harassment to cease. In response to his inappropriate comments and touching, she admonished his behavior, asked him to stop, reported it to her sister, and made an effort to keep her distance in the workplace. Respondent Velez's direct and indirect responses— laughing at Ms. Fernandez's complaints, cornering her, reducing her hours, and ignoring her– constitute behaviors that are reasonably likely to deter someone from engaging in such protected activity.

It was retaliation when Respondent Velez laughed at Ms. Fernandez after she told him it was inappropriate to grab her leg, (Tr. 91), and when he responded to Ms. Fernandez's objections by laughing at her and blaming her for his unlawful behavior on September 16, 2014. *See e.g. Salemi v. Gloria's Tribeca Inc.,* 982 N.Y.S.2d 458, 460 (2014) ("plaintiff was retaliated against for objecting to [respondent's] offensive comments"); *See Martinez*, 2017 WL 4510797 at *13 ("[P]rotesting discrimination - as [employee] did when she asked [employer] to keep things professional and refrain from commenting in a sexual manner about her physical appearance - is activity that is protected from retaliation under the NYCHRL.") (citing *Albunio*, 16 N.Y.3d at 478); *Cardenas*, 2015 WL 7260567 at *8-9 (violation of NYCHRL to laugh at employee and ignore when she protested unlawful behavior by leaving room and asking employer to stop). Respondent Velez further retaliated when, after he groped her, he asked Ms. Hernandez if she wanted him to fire her. Pet. Ex. 12 at 1:40. It was also retaliation when Respondent Velez told Ms. Fernandez's colleagues he was thinking of firing her the following day. Finally, it was retaliation when Velez: cut Ms. Fernandez's hours, positing a rationale with no basis in fact; declined to give Ms. Fernandez any work at all; and when he failed to respond to her questions about her job status. *Kolja v. R.A. Cohen & Associates, Inc*., No. 152078/2014, 2017 WL 1550192, at *12 (N.Y. Sup. Ct. Apr. 27, 2017) (citing *Brightman*, 108 A.D.3d) ("defendants' alleged retaliatory acts of threatening plaintiff with termination, modifying the his [sic] job responsibilities and work schedule and issuing the warning letter due to alleged insubordination . . . satisfy the requirement of the New York City Human Rights Law that they must be reasonably likely to deter a person from engaging in protected activity.") (internal quotation marks omitted). These actions are likely to deter employees from the protected activities of speaking out or vindicating their rights, and thus constitute retaliation.

Respondents' unlawful retaliation also rose to the level of a constructive discharge under the NYCHRL. "To prove a constructive discharge, the Bureau must establish that [an employee] "was subjected to an environment hostile enough to force her to quit *because of* some factor prohibited by the statute." *Cardenas*, 2015 WL 7260567 at *9 (quoting *Zick v. Waterfront Comm'n of N. Y. Harbor*, No. 11-cv-5093, 2012 WL 4785703, at *8 (S.D.N.Y. Oct. 4, 2012)) (internal citations omitted)) (italics in original). Here, Respondents' retaliatory statements that Ms. Fernandez may be fired, the reduction in her hours, the pretextual claims that a computer issue prevented her work, and Respondent Velez's refusal to affirm Ms. Fernandez's employment status or to provide her sufficient work hours created a hostile environment that precluded Ms. Fernandez from continuing her employment. This amounted to a constructive discharge. *See id*. (constructive discharge under NYCHRL where employer "engaged in a continuous campaign of sexually hostile, offensive, and discriminatory harassment" up to the point of physical harassment, which was "the final breaking point that caused [employee] to leave her job.")

As set forth above, Respondents did not rebut any of the evidence proffered by the Bureau, choosing not to defend against the charges at trial.

Accordingly, the Bureau proved that Respondents retaliated against Ms. Fernandez in violation of § 8-107(7) of the NYCHRL, and the Commission adopts Judge Spooner's finding of same.

V. DAMAGES, CIVIL PENALTIES, AND AFFIRMATIVE RELIEF

Where the Commission finds that respondents have engaged in an unlawful discriminatory practice, the NYCHRL authorizes the Commission to order respondents to cease and desist from such practices, and order respondents to take actions that effectuate the purposes of the NYCHRL. N.Y.C. Admin. Code § 8-120(a). The Commission may also award damages to complainants, *see id.* § 8-120(a)(8), and impose civil penalties up to $250,000.00 per discriminatory act in the circumstance of willful, wanton or malicious action. *Id.* § 8-126(a). *See Automatic Meter Reading Corp. v. New York City*, 63 Misc.3d 1211(A) (N.Y. Sup. Ct. 2019) (upholding $250,000.00 civil penalty issued by the Commission upon a finding that respondent engaged in willful and wanton sexual harassment over a three-year period).

A. Compensatory Damages

1. Ms. Fernandez Is Entitled to $24,550 in Back Pay Plus Interest

Back pay is calculated according to what a complainant would have earned if a respondent's discriminatory action had not occurred. *Martinez*, 2017 WL 4510797, at *8 (citing *N.Y. State Office of Mental Health v. NY. State Div. of Human Rights*, 53 A.D.3d 887, 890 (3d Dep't 2008)); *Cardenas*, 2015 WL 7260567, at *10 (citing *Claudio v. Mattituck-Cutchogue Union Free Sch. Dist.*, 955 F. Supp. 2d 118, 161 (E.D.N.Y. 2013). If, prior to the date of an administrative determination, a complainant obtains a comparable or better paying job than the one they were discharged from, back pay spans from the date of the discriminatory termination to the start of the comparable or better paying job. *Martinez*, 2017 WL 4510797, at *8 (citing *Tosha Rest., LLC v. N.Y. State Div. of Human Rights*, 911 N.Y.S.2d 734, 739 (3d Dep't 2010). Any award for back pay should be offset by a complainant's interim earnings for the period from the date of unlawful termination to the start of the comparable or higher paying job. *Id.* (citing *Club Swamp Annex v.*

White, 561 N.Y.S.2d 609, 611 (2d Dep't 1990). *See, e.g.*, *Poliard v. Saintilus Day Care Ctr., Inc.*, No. 11-cv-5174, 2013 WL 1346238, at *5 (E.D.N.Y. Mar. 7, 2013), *report and recommendation adopted*, No. 11-cv-5174, 2013 WL 1346398 (E.D.N.Y. Apr. 2, 2013) (offsetting backpay award in employment discrimination case by plaintiff's earnings from subsequent employment following unlawful termination.); *Cardenas*, 2015 WL 7260567, at *11 (calculating plaintiff's back pay from the date of unlawful termination through the date of judgment, reduced by earnings from subsequent employment, under the NYCHRL). However, "[t]he decision of whether or not to deduct benefits received from a collateral source, such as unemployment benefits, from an award of back pay rests in the sound discretion of the factfinder." *Cardenas*, 2015 WL 7260567, at *12 (citing *Shannon v. Fireman's Fund Ins. Co.,* 136 F. Supp.2d 225, 231-32 (S.D.N.Y. 2001)). *See also Automatic Meter Reading Corp.*, 2019 WL 1475080 at *9 ("the [Commission] was within its discretion to apply the collateral source rule and decline to offset any unemployment benefits Cardenas was awarded against her recovery"); *Tse v. New York Univ.,* 190 F. Supp. 3d 366, 373 (S.D.N.Y. 2016) (citing *Dailey v. Societe Generale*, 108 F.3d 451, 460 (2d Cir.1997)) ("[T]he decision to offset a lost wages award in an employment discrimination case rests in the sound discretion of [the court]."). "Following an unlawful termination, a complainant is obligated to mitigate damages by making reasonable attempts to search for and secure a new job, and it is the respondent's burden to demonstrate that the complainant failed to do so." *Martinez*, 2017 WL 4510797, at *8 (citing *Cardenas*, 2015 WL 7260567, at * 10; *Comm'n on Human Rights ex rel. Lukasiewicz v. Cutri*, OATH Index No. 2131/10, Report and Recommendation, 2011 WL 12472971, at *13 (December 8, 2010), *modified by* Dec. & Order (February 17, 2011)).

Judge Spooner recommended a back pay award of $24,550 plus nine percent interest up to the issue date of this decision. (R & R, 13-14.) The Commission adopts this recommendation for the reasons that follow.

During the approximately 140-week period between Respondent Velez's constructive discharge of Ms. Fernandez and obtaining her permanent position at an urgent care, Ms. Fernandez would have earned $320 per week, or a total of $44,800, from Respondents since she was working 40 hours per week at a rate of $8 per hour**.** (*Id.*) Subtracting the $20,250 Ms. Fernandez earned doing tax preparation in 2016, where she was working 40 to 50 hours per week at a rate of $15 per hour, her total wages lost were $24,550. (*Id.*) While Ms. Fernandez took some time to cope with her mental and emotional state after Respondents' retaliation, she actively sought employment from 2015 through 2017. Ms. Fernandez found three different jobs in this time period, illustrating an ongoing effort to secure work. The documented ongoing search illustrate that Ms. Fernandez met the requirement to mitigate the damages from her lost wages. *See Cardenas*, 2015 WL 7260567, at *10-11. No evidence or testimony was offered contrary to this conclusion.

Ms. Fernandez is additionally entitled to statutory interest of nine per cent on the back pay award up until the date of this decision. *See Insinga v. Cooperatieve Centrale Raiffeisen Boerenleenbank B.A.*, 478 F. Supp. 2d 508, 512 (S.D.N.Y. 2007); *Tipaldo v. Lynn*, 907 N.Y.S.2d 177, 180 (2010), *aff'd*, 26 N.Y.3d 204 (2015); *Argyle Realty Assocs. v. N.Y. State Div. of Human Rts.*, 882 N.Y.S.2d 458, 468 (N.Y. Sup. Ct. 2009); *Cardenas*, 2015 WL 7260567, at * 12 (citing CPLR 5004). *See also Aurecchione v. New York State Div. of Human Rights,* 98 N.Y.2d 21, 26 (2002))(quoting *Gierlinger v. Gleason,* 160 F.3d 858, 873 (2d Cir 1998) ("[T]he Second Circuit has consistently held that '[t]o the extent *** that the damages awarded to the plaintiff represent

compensation for lost wages, it is ordinarily an abuse of discretion *not* to include pre-judgment interest' ") (internal citations omitted).

"The interest should be calculated from an intermediate date between the date of [termination] and the date of judgment at New York's statutory rate of interest, nine percent per annum." *Martinez*, 2017 WL 4510797, at *2 (quoting Cardenas, 2015 WL 7260567, at *12 (citing CPLR 5004)); *see Argyle Realty Assocs.*, 882 N.Y.S.2d at 468. The Commission uses February 6, 2019 as the intermediate date between the date of constructive discharge, October 16, 2014, and the date of this Decision and Order. Applying a simple annual interest rate of nine percent to a principal amount of $24,550 for the period from February 6, 2019 through today's date, May 31, 2023 (or a period of approximately 4.318 years), produces a total predetermination interest amount of $9,540.62.

Finally, while Ms. Fernandez received unemployment compensation for part of her period of unemployment, Respondents are not entitled to a deduction of her unemployment compensation earnings from the back pay award because Respondents' unlawful termination caused her salary loss. *Cardenas*, 2015 WL 7260567, at * 12. *See also Siracuse v. Program for the Dev. of Human Potential*, No. 07-cv-2205 CLP, 2012 WL 1624291, at *14 (E.D.N.Y. Apr. 30, 2012) (declining to subtract amount of disability benefits from plaintiff's award in NYCHRL case because that would "merely reduce the amount that the employer is required to pay for its unlawful conduct" and lead to "a windfall for the very party found responsible for plaintiff's damages"); *Shannon v. Fireman's Fund Ins. Co.*, 136 F. Supp.2d 225, 232 (S.D.N.Y. 2001) (declining to offset backpay award in NYSHRL and NYCHRL case with plaintiff's unemployment benefits to avoid unjust windfall to employer).

Accordingly, consistent with Judge Spooner's recommendation, Respondents are ordered to pay Ms. Fernandez $24,550 in back pay plus pre-determination interest of $9,540.62.

2. Ms. Fernandez Is Entitled to $275,000 in Emotional Distress Damages

Compensatory damages, including emotional distress damages, are intended to redress a specific loss that a complainant suffered by reason of a respondent's wrongful conduct. *Martinez*, 2017 WL 4510797, at *7 (citing *Comm'n on Human Rights ex rel. Agosto v. Am. Constr. Assocs.*, Dec. & Order, 2017 WL 1335244, at *7 (Apr. 5, 2017); *Comm'n on Human Rights ex rel. Howe v. Best Apartments*, OATH Index No. 2602/14, Comm'n Dec. & Order, 2016 WL 1050864, at *6-7 (Mar. 14, 2016)). "To support an award of emotional distress damages, the record 'must be sufficient to satisfy the Commissioner that the mental anguish does in fact exist, and that it was caused by the act of discrimination.'" *Id.* at *9 (citing *Howe v. Best Apartments*, 2016 WL 1050864, at *6); *Agosto,* 2017 WL 1335244, at *7. An award for compensatory damages can rely solely on the complainant's credible testimony, and may also be premised on other evidence, including testimony from other witnesses, circumstantial evidence, and objective indicators of harm, such as medical evidence. *Desir*, 2020 WL 1234455, at *8 (citing *Agosto*, 2017 WL 1335244, at *7). *See also Martinez*, 2017 WL 4510797, at *9; *Cardenas*, 2015 WL 7260567, at *14. The NYCHRL places no limitation on the size of compensatory damages awards, *see* N.Y.C.

Admin. Code § 8-120(a)(8), and courts have consistently recognized the Commission's "special experience in weighing the merit and value of mental anguish claims." *Automatic Meter Reading Corp.*, 63 Misc. 3d 1211(A), at *10 (citing *Matter of Cutri v. Comm'n on Human Rights*, 113 A.D.3d 608, 608 (2d Dep't 2014)). In assessing compensatory damages in a particular case, the Commission evaluates the nature of the violation, the amount of harm indicated by the evidentiary record, and awards that have been issued for similar harms. *Ondaan*, 2020 WL 7212457, at *12 (citing *Comm'n on Human Rights ex rel. Nieves v. Rojas*, 2019 WL 2252369, at *6 (May 16, 2019)); *Desir*, 2020 WL 1234455, at *8 (citing *In re Sch. Bd. of Educ. of the Chapel of the Redeemer Lutheran Church v. N.Y.C. Comm'n on Human Rights*, 188 A.D.2d 653, 654 (2d Dep't 1992)); *Martinez*, 2017 WL 4510797, at *7; *Agosto*, 2017 WL 1335244, at *8.

The Commission agrees with Judge Spooner that Ms. Fernandez is entitled to emotional distress damages, and that a substantial award is warranted. *See* R & R at 16 ("Claims of severe emotional distress, substantiated by proof of significant suffering and treatment, merit higher awards."). As Judge Spooner noted, Respondents' harassment was "egregious" and caused "substantial pain and distress to Ms. Fernandez." (*Id.*) Respondents' persistent sexual comments, his physical harassment, and consistent attempts to belittle Ms. Fernandez, followed by the constructive discharge caused Ms. Fernandez to experience anger, anxiety, and depression. It affected her relationships with family and lowered her self-esteem. Ms. Fernandez developed a sleeping problem and an increased reliance on alcohol as a result of Respondents' unlawful and discriminatory treatment. Moreover, Ms. Fernandez was diagnosed with PTSD, and at the time of trial was still experiencing flashbacks and receiving treatment from a psychologist. A psychologist corroborated Ms. Fernandez's reports of the harm and its lasting impact.

The Report and Recommendation proposes an emotional distress damages award of $150,000. Both the Bureau proposes, and Complainant seeks, an emotional distress damages award of $275,000. (Bureau Comments at 12; Complainant Comments at 2.) For the reasons set forth below, Ms. Fernandez is entitled to $275,000 in emotional distress damages.

a. Nature of Violation

Ms. Fernandez endured substantial gender-based harassment almost daily over the course of her employment, and eventually lost her job because she spoke up and objected to this unlawful treatment. Respondent Velez's uninvited sexualized comments occurred when they were alone, in front of coworkers, and in front of Ms. Fernandez's mother. Respondent Velez laughed at Ms. Fernandez when she expressed discomfort. As time went on, Respondent Velez's behavior escalated. He pressured Fernandez to engage in sexual acts with him. Eventually, the persistent verbal harassment became physical. Respondent Velez grabbed Ms. Fernandez's breasts while she was working. Respondent Velez proceeded to blame Ms. Fernandez for his thoughts and behavior, and ultimately constructively discharged her by significantly reducing her hours and ceasing to respond to her inquiries about returning to work and her employment status.

The persistent nature of the gender-based harassment, and its verbal and physical manifestations, weigh in favor of a $275,000 emotional distress damages award.

b. Amount of Harm

During her employment with Respondents, Ms. Fernandez's psychological status was fundamentally altered. While working, Ms. Fernandez developed ongoing feelings of anger, which impacted her friendships and familial relationships. She no longer wanted to be around her family and felt embarrassed. She started to cry often and had difficulty sleeping. Ms. Fernandez began to take medicine to treat her sleep struggles. She began trying to cope with the abuse by increasing her alcohol consumption. Her mother witnessed these effects, which her testimony corroborated.

After Respondents ended her employment, the impacts of the sexual harassment worsened. Ms. Fernandez's anger intensified, and she became depressed, and anxious. The depression continued for over a year. Moreover, she began seeing a psychologist weekly. Ms. Fernandez was diagnosed with PTSD. In a letter, her psychologist stated that Ms. Fernandez's PTSD was a result of the sexual harassment she experienced while employed by Respondents.

At the time of the trial, more than five years after the discrimination occurred, Ms. Fernandez was still taking medication to help her sleep and had difficulty working with men, which she attributed to her experiences at Gil's Collision. She described flashbacks that led her to hyperventilate, and she continued to be treated by a psychologist. This psychologist stated in her letter that Ms. Fernandez was still coping with both emotional and physical challenges resulting from the harassment, and continuing to wrestle with fear and anxiety. The mental anguish Ms. Fernandez suffered continues to affect her.

The psychological and emotional harm, which impact personal relationships and professional interactions, support a $275,000 emotional distress damages award.

c. Awards for Similar Harms

A review of prior cases with similar circumstances affirm that $275,000 is appropriate for the mental anguish and harm that Ms. Fernandez experienced. The impacts are well supported by medical documentation and a corroborating witness. A multitude of cases with similar facts and consequences have resulted in even higher damages awards. *See, e.g. Ravina v. Columbia Univ.*, No. 16-cv-2137, 2019 WL 1450449 (S.D.N.Y. Mar. 31, 2019) ($500,000 remitted from $750,000 in a retaliation case where the complaint experienced anxiety, insomnia, and required [prolonged] treatment for depression and post-traumatic distress as a result of the discriminatory conduct); *Quinby v. WestLB AG*, No. 04-cv-7406, 2008 WL 3826695, at *4 (S.D.N.Y. Aug. 15, 2008) ($300,000 remitted from $500,000 in a retaliatory termination case based on testimony alone and no medical diagnosis); *Marchisotto v. City of New York*, No. 05-cv-2699, 2007 WL 1098678 (S.D.N.Y. Apr. 11, 2007), *aff'd,* 299 F. App'x 79 (2d Cir. 2008) ($300,000 upheld in a retaliation case where the complainant was diagnosed with panic disorder, major depressive order, and PTSD; corroborated by his doctors' testimony); *Katt v. City of New York*, 151 F. Supp. 2d 313 (S.D.N.Y. 2001), *aff'd in part sub nom. Krohn v. New York City Police Dep't*, 60 F. App'x 357 (2d Cir. 2003), and *aff'd sub nom. Krohn v. New York City Police Dep't,* 372 F.3d 83 (2d Cir. 2004) ($400,000 not excessive in a sexual harassment case where the unlawful actions resulted in, *inter alia*,

insomnia and a PTSD diagnosis corroborated by a psychiatrist's testimony).[14] Some of these awards are based on witness accounts, with no documented medical corroboration.

Judge Spooner's proposed $150,000 emotional distress damages award relies significantly on *Cardenas*. In *Cardenas*, over a thirty-four month period, an employer made various sexist and lewd comments to the complainant, subjected her to unwanted physical touching, and ultimately constructively discharged her. *See Cardenas*, 2015 WL 7260567. The *Cardenas* complainant was diagnosed with depression, she met with a medical professional for treatment over a five-month period, and she was prescribed medication as a result. *See id.*; *Comm'n on Human Rights ex rel. Cardenas v. Automatic Meter Reading Corp.*, OATH Index No. 1240/13, Report and Recommendation, 2014 WL 10713106, at *21 (March 14, 2014), *adopted in part and rejected in part on other grounds*, *Cardenas*, 2015 WL 7260567 at *21. Judge Spooner noted that the complainant in *Cardenas* experienced harassment for a period of almost three years, whereas Respondents' harassment of Ms. Fernandez lasted ten months. (R & R at 15-16). However, the duration of harassment is one factor in a damages award. Substantial emotional distress damage awards are appropriate in cases of significant harassment that occur over a time period of months. *See, e.g.*, *Lopez v. Mama's Fried Chicken, Inc.,* 159 N.Y.S.3d 834 (1st Dept. 2022) (affirming lower court's denial of motion to vacate a default judgment awarding plaintiff $300,000 emotional distress damages in a NYCHRL sexual harassment case[15] following an inquest where the employer's harassment, included, *inter alia*, making comments about the complainant's breasts, propositioning her for sex, making comments about his sexual relations with others, and unwanted touching, took place daily over the course of six months, included retaliatory conduct, and caused the complainant depression, stress, and to seek therapy for three months[16]).

Accordingly, the Commission declines to adopt OATH's recommendation of a $150,000 emotional distress damages awards, and orders Respondents to pay Ms. Fernandez $275,000 in emotional distress damages.

B. Civil Penalties

The NYCHRL grants the Commission the authority to impose civil penalties in order to vindicate the public interest and provides discretion to impose such civil penalties up to $250,000 where unlawful conduct is willful, wanton, or malicious. N.Y.C. Admin. Code § 8-126(a); *see Automatic Meter Reading Corp.*, 2019 WL 1475080, at *11 (upholding $250,000.00 civil penalty issued by the Commission under the NYCHRL upon a finding that respondent engaged in willful

[14] Similar cases with comparable awards notwithstanding, it is worth noting that courts also consider inflation when examining prior cases with comparable awards. *See Ravina*, 2019 WL 1450449 at *18 n. 5 ("The Court has taken into account inflation when comparing Ravina's award to the compensatory damages awards upheld in prior cases."); *Mayo-Coleman v. Am. Sugar Holdings, Inc.*, No. 14-cv-79, 2018 WL 2684100, at *5 (S.D.N.Y. June 5, 2018) (citing *DiSorbo v. Hoy*, 343 F.3d 172, 185 (2d Cir. 2003)) (accounting for inflation when considering emotional distress damages amounts awarded in prior sexual harassment cases). As an illustration for the case at hand, the $300,000 awards made in 2007 by the *Marchisotto* and *Quinby* juries would exceed $400,000 today. *See* https://www.bls.gov/data/inflation_calculator.htm. Here, today's $275,000 award would have amounted to approximately $190,000 in early 2007. *Id.*

[15] *Lopez v. Mama's Fried Chicken, Inc.*, Index No. 154638/18, Decision after Inquest (Sup. Ct., N.Y. Cnty., Sept. 16, 2019); *Lopez v. Mama's Fried Chicken, Inc.*, Index No. 154638/18, Judgment, (Sup. Ct., N.Y. Cnty., Jan. 14, 2020).

[16] Transcript of Proceedings, *Lopez v. Mama's Fried Chicken, Inc.*, (Sup. Ct., N.Y. Cnty., Sept. 16, 2019) (Index No. 154638/18).

and wanton sexual harassment over a three-year period). Factors relevant to a civil penalties determination include the length of time a respondent committed the discrimination, the egregiousness of the discrimination, a respondent's financial situation, and a respondent's failure to cooperate with the Commission. *See, e.g.*, *Comm'n on Human Rights v. Tanillo*, OATH Index Nos. 105/11, 106/11 & 107/11 at 7-8 (Feb. 24, 2011), *modified on penalty*, Comm'n Dec. & Order (May 23, 2011); *Comm'n on Human Rights v. Rent The Bronx, Inc.*, OATH Index No. 1619/11, (July 27, 2011), *report and recommendation adopted*, Dec. & Order (Oct. 27, 2011).

While acknowledging that Respondents' violations were willful and that Respondents were uncooperative, Judge Spooner proposes a civil penalty amount of $75,000. In its comments, the Bureau requests a civil penalty amount of $250,000. (Bureau Comments at 13-14.) For the reasons set forth below, the Commission finds that Respondents are liable for a $250,000 civil penalty.

1. Length of Time

Respondents' repeat violations of the NYCHRL took place over ten months, and during this time Ms. Fernandez had to engage with Mr. Velez almost daily. The discrimination ceased when Respondents constructively discharged Ms. Fernandez in retaliation for opposing the persistent discrimination. The Commission's analysis below will focus on the additional three relevant factors: the egregiousness of discrimination, respondent's financial situation, and respondent's failure to cooperate with the Commission.

2. Egregiousness of Discrimination

The Commission agrees with Judge Spooner that Respondents' violations were willful. From the time the unwanted sexualized and harassing comments began, up until her constructive termination, Ms. Fernandez repeatedly asked Mr. Velez to cease his inappropriate behavior and communicated that it made her uncomfortable. Respondent Velez laughed at Ms. Fernandez, and his behavior escalated from inappropriate comments to unwanted touching to constructive discharge. Respondent Velez was on notice that his harassing behavior was unwanted from the beginning, and rather than complying with the NYCHRL, he conveyed to Ms. Fernandez that his employees had "no rights" and his violations intensified. Respondent Velez's actions in turn traumatized Ms. Fernandez and disrupted her life for years after the violations took place. This factor weighs in favor of the maximum civil penalty. *See Cardenas*, 2015 WL 7260567, at *15 (ordering a $250,000 civil penalty where an employer repeatedly ignored and laughed at an employee's requests to stop sexually harassing her, resulting in her constructive discharge).

3. Respondents' Financial Situation

Since this matter commenced, Respondents have never requested that their finances be considered a mitigating factor in assessing civil penalties to OATH or the Commission. (R & R at 17.) At trial, Ms. Fernandez testified that Respondents were part of a sizeable business enterprise with considerable assets. Respondent Gil's Collision, operated by Respondent Velez, was a towing and auto body shop operation that, along with four corporate names based at the same address, were sharing the same telephone number. The Gil Entities, which had eight employees, could service three tow trucks and could work on ten cars at the same time. (Tr. 71, 76.) Moreover, through four unique corporate names, Respondent Velez was able to maximize earnings through the DARP program by listing each unique name on the tow list used by the

NYPD, and increasing the calls he received because NYPD would cycle serially through the list. (Tr. 78-80.) Respondents did not rebut any of this evidence at trial.

In an effort to determine if evidence of financial resources existed, OATH ordered Respondents to produce a statement of assets and liabilities regarding their businesses on November 27, 2019. Respondents never produced the statement. Respondent Velez stated in a pre-trial deposition that he sold all his businesses in 2017. (Pet. Ex. 7 at 26.) However, documentation submitted by the Bureau suggests that Respondents' business operations continued.

Several documents, including Amendments of Certificates of Incorporation as well as deeds, show that Respondent Velez changed some of the business' names in 2017, but continued to operate the businesses at various locations under different names, until amending some back to their original names later that year. (Pet. Exs. 25 - 28; 47-49, 51.) In addition, Department of Consumer Affairs (DCA) tow company license renewal applications from 2018 and related documentation include Respondent Velez's statements that he was the 100% owner and operator of Gil's Transport Corp., Gil's Towing Inc., and the successor corporations for Gil's Collision and Gil's Autobody— Jo-Z Collision Services Inc., and Independent Auto Body & Towing Inc. (Pet. Exs. 38-42; R & R at 18.). These four corporations were operating as late as December 2019, and that month alone received no less than fifty-four DARP referrals from the NYPD. (Pet. Ex. 37.) Moreover, DCA records from January 2020 show that Respondent Velez owned Gil's Towing and Transport as late as January 2020. (Pet. Ex. 42.) Finally, Respondents' business website for Gil's Collision was up and running as of December 2019. (Pet Ex. 19.)

In addition, evidence shows that Respondent Velez has sizeable personal assets. As set forth above, Ms. Fernandez testified that Respondent Velez owned a boat. Further, during a November 2019 conference, Respondent Velez stated that he owned property in Florida valued at $800,000. (Pet. Ex. 35 at 42.) Finally, records show that he was the president of 646 Liberty Avenue Realty Corp., which owned the real property located at 646 Liberty Avenue from 2009 to June 24, 2019 (Pet. Exs. 31-34). Records show that in June 2019 he sold the property for $1,300,000. (Pet. Ex. 32.) That date was after this case was referred to OATH.

The existence of multiple businesses and real properties in Florida and New York further support maximum civil penalties.

4. Respondents' Cooperation

Although Respondents initially filed an answer with the Bureau, cooperation with the Bureau's investigation dwindled over time. Throughout the investigation, Respondents failed to provide most of the documents sought in discovery. At a scheduled deposition, Respondent Velez refused to answer any substantive questions regarding the allegations in the Complaint, (Pet. Ex. 7), further hindering the Bureau's investigation. Respondents delayed proceedings and sought adjournments. Despite efforts to accommodate Respondent Velez, he did not appear for the last scheduled trial date.

The Commission agrees with OATH that Velez's behavior warrants a sizable civil penalty. (R & R at 19.) Notwithstanding that conclusion, Judge Spooner recommends a civil penalty of $75,000 without detail. Based on the willful, egregious nature of the violations, Respondents' lack

of cooperation with the investigation, and evidence of financial assets and sizeable business operations, the Commission orders Respondents to pay a $250,000 civil penalty.

C. Affirmative Relief

The NYCHRL authorizes the Commission to require affirmative measures, including trainings to prevent further discrimination. Admin. Code § 8-120(a)(4). *See, e.g.*, *Desir*, 2020 WL 1234455 at *13-14; *Ondaan*, 2020 WL 7212457, at *18, *Martinez*, 2017 WL 4510797, at *5**;** *Cardenas*, 2015 WL 7260567 at *15-16. Accordingly, the Commission adopts Judge Spooner's recommendation and orders Respondents, at their open businesses, to:

1. institute a written anti-discrimination policy that includes a clear reporting and investigation procedure;
2. train all of their future and current staff on the NYCHRL; and
3. Respondent Velez, with any employees, shall take an anti-sexual harassment training offered by the New York City Commission on Human Rights.

VI. CONCLUSION

FOR THE REASONS DISCUSSED HEREIN, IT IS HEREBY ORDERED that no later than sixty (60) calendar days after service of this Order, Respondents pay Complainant Fernandez a total of $309,090.62 (comprising of $24,550 in back pay, $9,540.62 in pre-determination interest, and $275,000 in emotional distress damages) by sending to the New York City Commission on Human Rights, 22 Reade Street, New York, New York 10007, Attn: General Counsel, a bank certified or business check made payable to Liserny Fernandez, including a written reference to OATH Index No. 1245/19.

IT IS FURTHER ORDERED that no later than sixty (60) calendar days after service of this Order, Respondents pay a fine of $250,000.00 to the City of New York, by sending to the New York City Commission on Human Rights, 22 Reade Street, New York, New York 10007, Attn: General Counsel, a bank certified or business check made payable to the City of New York, including a written reference to OATH Index No. 1245/19.

IT IS FURTHER ORDERED that no later than sixty (60) calendar days after service of this Order, Respondent Gilbert Velez, Jr. and all other staff of Gil's Collision Services Inc., its related companies, and its successor companies, including but not limited to Gil's Towing, Gil's Autobody, Gil's Transportation, Jo-Z Collision Services Inc., and Independent Auto Body & Towing Inc., that are currently operating as of the date of this decision, must participate in the Commission's "Sexual Harassment in the Workplace" training and the Commission's "Human Rights Law Overview" training. The trainings can be arranged by calling the Managing Director of Education and Compliance at (212) 416-0193 or emailing trainings@cchr.nyc.gov.

IT IS FURTHER ORDERED that, no later than sixty (60) calendar days after service of this Order, Respondent Gilbert Velez, Jr. and all other staff of Gil's Collision Services Inc., its related companies, and its successor companies, including but not limited to Gil's Towing, Gil's Autobody, Gil's Transportation, Jo-Z Collision Services Inc., and Independent Auto Body & Towing Inc., that are currently operating as of the date of this decision shall complete the Commission's online Sexual Harassment Prevention Training at

https://www1.nyc.gov/site/cchr/law/sexual-harassment-training.page and Respondent Gilbert Velez, Jr. shall provide the Commission with certificates of completion confirming that they have completed the training. The training certificates must be either mailed or provided in electronic copy to General Counsel Damion Stodola at dastodola@cchr.nyc.gov and include written reference to "Fernandez v. Gil's Collision Services Inc., OATH Index No. 1245/19."

IT IS FURTHER ORDERED, that no later than sixty (60) calendar days after service of this Order, Respondents post the "Notice of Rights Poster" and the "Stop Sexual Harassment in NYC Act Legal Notice" at Gil's Collision Services Inc., its related companies, and its successor companies, including but not limited to Gil's Towing, Gil's Autobody, Gil's Transportation, Jo-Z Collision Services Inc., and Independent Auto Body & Towing Inc., that are currently operating as of the date of this decision, available here, https://www.nyc.gov/site/cchr/law/legal-resources.page, on Legal Size (8.5 x 14 inch) paper in a conspicuous location where it will be visible to both employees and members of the public for a period of three (3) years after the date of this Order.

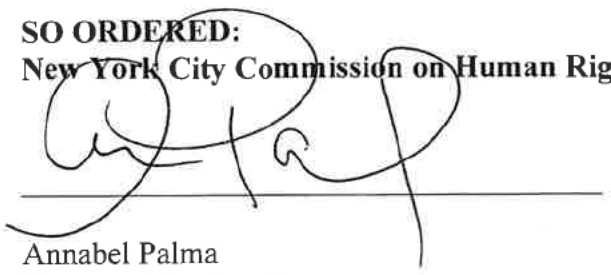
IT IS FURTHER ORDERED that no later than sixty (60) calendar days after service of this Order, Respondents shall institute a written anti-discrimination policy that includes a clear reporting and investigation procedure at Gil's Collision Services Inc., its related companies, and its successor companies, including but not limited to Gil's Towing, Gil's Autobody, Gil's Transportation, Jo-Z Collision Services Inc., and Independent Auto Body & Towing Inc., that are currently operating as of the date of this decision. The policy must also be provided as an electronic copy to General Counsel Damion Stodola at dastodola@cchr.nyc.gov no later than sixty (60) calendar days after Service of this Order. The email shall include written reference to "Fernandez v. Gil's Collision Services Inc., OATH Index No. 1245/19.

Failure to timely comply with any of the foregoing provisions shall constitute non-compliance with a Commission Order. In addition to civil penalties that are assessed against Respondents pursuant to this Order, Respondents shall pay a civil penalty of $100.00 per day for every day the violation continues. N.Y.C. Admin. Code § 8-124. Furthermore, failure to abide by this Order may result in criminal penalties. *Id.* at § 8-129.

Civil penalties are paid to the general fund of the City of New York.

Dated: New York, New York
May 31, 2023

SO ORDERED:
New York City Commission on Human Rights



Annabel Palma
Commissioner/Chair