CITY OF NEW YORK
COMMISSION ON HUMAN RIGHTS

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In the Matter of

COMMISSION ON HUMAN RIGHTS ex rel. DONG C. JOO,

Petitioner,

-against-

UBM BUILDING MAINTENANCE INC., KUANG H. LEE, and JEHWAN KIM,

Respondents.

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Complaint No. M-E-AO-12-1027258-E
Federal Charge No. 16F-2012-00188C
OATH Index No. 384/16

DECISION AND ORDER

On August 24, 2012, the Law Enforcement Bureau of the New York City Commission on Human Rights ("Bureau") filed a verified complaint ("Complaint") on behalf of Complainant Dong Chung Joo, alleging that he was subjected to age discrimination and retaliation by his former employer UBM Building Maintenance Inc. ("UBM"), UBM's owner, Kuang H. Lee,[1] and Complainant's supervisor, Jehwan Kim (collectively, "Respondents"), in violation of the New York City Human Rights Law ("NYCHRL"). (Compl., ALJ Ex. 1.) The Bureau filed an amended verified complaint ("Amended Complaint") on September 20, 2012, expanding on the initial allegations of retaliation. (Am. Compl., ALJ Ex. 1.) The Bureau alleges that Respondents fired Complainant because of UBM's policy against employing individuals over age 65. (*Id.* at

[1] Respondent Lee also goes by the names Danny Lee and Kyung H. Lee. (Tr. 13:22-23.)

¶ 6.) The Bureau further alleges that, after Complainant approached the Bureau about filing a complaint, Respondents retaliated by verbally threatening him. (*Id.* at ¶¶ 7-9.)[2]

Respondent Kim did not appear at all in the case, but Respondents UBM and Lee filed a verified answer ("Answer") on October 24, 2012, denying that they discriminated or retaliated against Complainant. (Answer, ALJ Ex. 1.) Thereafter, Respondents UBM and Lee failed to participate in any aspect of the case. (Tr. 5:12-6:7.)

The Bureau issued a notice of probable cause determination on August 14, 2015 and, on August 24, 2015, referred the case to the Office of Administrative Trials and Hearings ("OATH"). *In re Comm'n on Human Rights ex rel. Joo v. UBM Bldg. Maint. Inc.*, OATH Index No. 384/16, Mem. & Dec., 2015 WL 9694284, at *1 (Dec. 1, 2015). Respondents remained completely unresponsive, despite being served by the Bureau: (i) on August 14, 2015, with the notice of probable cause (Cukor Aff. at Ex. E); (ii) on August 24, 2015, with a notice of referral to OATH (*id.* at Ex. F); (iii) on August 26, 2015, with a notice of settlement conference scheduled for September 25, 2015 (*id.* at Ex. G); (iii) on September 28, 2015, with a notice of trial and of discovery schedule (ALJ Ex. 2; Cukor Aff. at Ex. H); (iv) on October 8, 2015, with discovery demands (Cukor Aff. at Ex. I); and (v) on November 6, 2015, with the Bureau's witness list for trial (*id.* at Ex. J). On November 16, 2015, the Bureau filed a motion with OATH, seeking an order compelling Respondents to provide discovery. *Joo*, 2015 WL 9694284, at *1. OATH granted the motion on December 1, 2015, and required that Respondents provide responses to the Bureau's discovery demands within five days of the order. *Id.* at *2. Respondents failed to do so. (Tr. 6:10-12.)

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[2] The Amended Complaint also alleges that Respondents retaliated against Complainant by contesting his claim for unemployment benefits. (Am. Compl. ¶¶ 10, 11). However, no evidence was presented at the hearing related to that allegation.

On December 8, 2015, a hearing was held at OATH before the Honorable John Spooner. (*Id.* at 4:2.) On March 25, 2016, Judge Spooner issued a Report and Recommendation, recommending that the Office of the Chair of the New York City Commission on Human Rights ("Commission"): (1) hold that Respondents UBM and Lee discriminated against Complainant based on his age and retaliated against him, in violation of §§ 8-107(1) and 8-107(7) of the NYCHRL; (2) dismiss the claims against Respondent Kim; (3) award Complainant $72,808.00 in compensatory damages (inclusive of $33,888.00 in back pay, an undetermined amount of pre-decision interest, $23,920.00 in front-pay, and $15,000.00 in emotional distress damages); (4) impose a civil penalty of $15,000.00; and (5) order Respondents to undergo anti-discrimination training. *In re Comm'n on Human Rights ex rel. Joo v. UBM Bldg. Maint. Inc.*, OATH Index No. 384/16, R&R, 2016 WL 2846431, at *2, *6 (Mar. 25, 2016).

The Bureau filed timely comments in response to the Report and Recommendation. *See* 47 RCNY § 1-76. Respondents did not file comments. On May 16, 2018, the Commission ordered the Bureau to submit a supplemental filing concerning Complainant's employment and earnings subsequent to the hearing, accompanied by supporting evidence.[3] The Bureau did so on June 7, 2018. Respondents did not file an opposition.

For the reasons set forth below, the Commission holds that (1) each of the three Respondents is liable for discriminating against Complainant based on his age, in violation of § 8-107(1) of the NYCHRL; (2) Respondents UBM and Lee are liable for retaliating against Complainant, in violation of § 8-107(7); (3) Respondents UBM and Lee must pay Complainant $70,216.48 (comprised of $42,788.02 in back pay, $12,428.46 in pre-decision interest, and

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[3] The Commission mailed six copies of the order to Respondents at various addresses on record. Although four were returned as undeliverable, two copies mailed to Respondents UBM and Lee in New Jersey were not returned.

$15,000.00 in emotional distress damages), for which Respondents UBM and Lee are jointly and severally liable; (4) Respondents UBM and Lee must pay a civil penalty of $30,000.00; (5) all managers at Respondent UBM must undergo training on the NYCHRL; and (6) Respondent UBM must develop and distribute to all staff new anti-discrimination policies.

I. 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 may be helpful to the Commission in assessing the weight of the evidence, the Commission is ultimately responsible for making its own determinations as to the credibility of witnesses, the weight of the evidence, and other findings of fact. *In re Comm'n on Human Rights ex rel. Agosto v. Am. Constr. Assocs.*, OATH Index No. 1964/15, Am. Dec. & Order, 2017 WL 1335244, at *2 (Apr. 5, 2017); *In re Comm'n on Human Rights ex rel. Spitzer v. Dahbi*, OATH Index No. 883/15, Dec. & Order, 2016 WL 7106071, at *2 (July 7, 2016). The Commission is also tasked with the responsibility of interpreting the NYCHRL and ensuring the law is correctly applied to the facts. *See In re Comm'n on Human Rights v. Aksoy*, OATH Index No. 1617/15, Dec. & Order, 2017 WL 2817840, at *4-5 (June 21, 2017); *Spitzer*, 2016 WL 7106071, at *2. The Commission reviews a report and recommendation and the parties' comments and objections *de novo* as to findings of fact and conclusions of law. *In re Comm'n on Human Rights ex rel. Gibson v. N.Y.C. Fried Chicken Corp.*, OATH Index No. 279/17, 2018 WL 4901030, at *2 (Sept. 28, 2018); *In re Comm'n on Human Rights ex rel. Martinez v. Joseph "J.P." Musso Home Improvement*, OATH Index No. 2167/14, Dec. & Order, 2017 WL 4510797, at *8 (Sept. 29, 2017).

II. THE EVIDENTIARY RECORD

At the hearing, the Bureau provided copies of the Complaint, Amended Complaint, and notice of trial, accompanied by proof of proper service. (ALJ Exs. 1 & 2.) The Bureau also submitted a copy of the Answer filed by Respondents UBM and Lee. (ALJ Ex. 1.) The Bureau noted that the attorney for Respondents UBM and Lee advised in or about January 2015 that he had been unable to reach his clients for several months and, on June 30, 2015, withdrew representation in the case. (Tr. 5:5-10.) The Bureau reiterated for Judge Spooner the information set forth in its November 16, 2015 motion to compel, noting that it had called Respondents multiple times and served them with all notices of case proceedings, but received no response. (*Id.* at 5:15-6:7; *see also* Cukor Aff.) The Bureau also confirmed that Respondents failed to respond to the order to compel issued by OATH on December 1, 2015. (Tr. 6:8-11.) Based on Respondents' failure to appear at the hearing, despite clear evidence that they had been properly notified, Judge Spooner declared Respondents in default. (*Id.* at 7:1-12.)

During the hearing, the Bureau offered testimony from two witnesses, Complainant[4] and Bureau Staff Attorney Aarti Garg. The Bureau also entered seven documents into evidence: Complainant's W-2 statement for 2012 (Bureau Ex. 1); a termination letter from Respondent Lee to Complainant, dated July 9, 2012 (Bureau Ex. 2); a photo of Complainant's phone, documenting a call received from Danny Lee on August 10, 2012 (Bureau Ex. 3); Complainant's phone bill for August 2012 (Bureau Ex. 4); a chart documenting Complainant's employment and income from July 9, 2012 to the date of the hearing (Bureau Ex. 5); the New York State Certification of Incorporation for Respondent UBM (Bureau Ex. 6); and a report from the New Jersey Secretary of State concerning Respondent UBM (Bureau Ex. 7). In lieu of a closing

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[4] Complaintant testified through a Korean-language interpreter, Jiyoung Emma Kim.

argument, the Bureau submitted a post-trial brief on January 22, 2016. *Joo*, 2016 WL 2846431, at *1. At the request of OATH, the Bureau also filed a supplemental post-trial brief on February 12, 2016, addressing the question of "whether a private company's policy of enforcing a mandatory retirement age" violates the NYCHRL. *Id.*

For purposes of this Decision and Order, familiarity with the hearing record and with Judge Spooner's Report and Recommendation is generally assumed. However, the following is a summary of the most salient facts established during the hearing. Complainant worked for Respondent UBM as a security guard at the Korean embassy for approximately four years. (Tr. 12:1-5; 14:14-15.) In or about July 2012, he was told by his supervisor, Respondent Kim, that he was being terminated because he was 65 years old. (*Id.* at 15:6-10.) Complainant requested a formal letter of termination from the owner of UBM. (*Id.* at 15:13-16:3.) In response, he received a letter dated July 9, 2012, signed by Respondent Lee on UBM letterhead, stating that UBM was "discontinu[ing]" Complainant's work "by our policy which we do not employ the person over 65 years old." (Bureau Ex. 2; Tr. 16:6-17.)

On or about August 10, 2012, Complainant visited the Bureau to discuss the possibility of filing a formal complaint of discrimination. (Tr. 17:10-15, 30:1-12; *see* Bureau Ex. 3.) During that visit, a former Deputy Commissioner, Cliff Mulqueen, called the number listed on Complainant's letter of termination and advised Respondent Lee that the the termination letter constituted a violation of the NYCHRL. (*Id.* at 17:16-18, 30:22-31:12.) Within moments, Complainant received a call from Respondent Lee, who stated that Complainant would "regret" filing a lawsuit against Respondents and would see "what consequences you're going to have to face." (*Id.* at 17:16-25; *see also id.* at 31:20-32:12.)

III. DISCUSSION

A. Legal Standard

The NYCHRL expressly provides that it "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 comparably-worded to provisions of [the NYCHRL] have been so construed." N.Y.C. Admin. Code § 8-130. 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 (2005); *see also* Local Law No. 35 (2016). Similarly, case law interpreting analogous anti-discrimination statutes under state and federal law, though perhaps persuasive, is not precedential in the interpretation of the NYCHRL. *See Albunio v. City of N.Y.*, 23 N.Y.3d 65, 73 (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").

B. Respondents Unlawfully Discriminated Against Mr. Joo by Terminating His Employment Because of His Age, in Violation of § 8-107(1) of the NYCHRL

The NYCHRL prohibits "an employer or an employee or agent thereof, because of the actual or perceived age . . . of any person . . . [t]o discharge from employment such person." N.Y.C. Admin. Code § 8-107(1)(a)(2). To qualify as a covered employer under § 8-107(1), an employer must have four or more employees. *See* N.Y.C. Admin. Code § 8-102(5).

The record in this case establishes that each of the three Respondents is subject to liability under § 8-107(1). Complainant testified that while he was working for UBM, there were eight other UBM employees working with him in the Korean embassy, as well as an unknown number of additional employees at UBM's company headquarters in Queens. (Tr. 14:5-7.) That testimony establishes that, during the relevant period, UBM was an employer with at least four employees and, thus, was subject to the prohibitions on employment discrimination under § 8-107(1) of the NYCHRL. N.Y.C. Admin. Code § 8-107(1). Complainant's testimony also establishes that Respondents Lee and Kim are subject to liability as the employees or agents of a covered employer. Specifically, Complainant testified that Respondent Lee is the owner of UBM and Respondent Kim is the company manager. (Tr. 13:18-21.) Respondent Kim's role as a manager at UBM was also confirmed in the Answer filed by Respondents UBM and Lee. (Answer ¶ 3.)

In his Report and Recommendation, Judge Spooner opined that Respondent Kim should not be held liable as an "employer" under § 8-107(1) of the NYCHRL because there is no evidence that he held an ownership interest in the company or had discretionary authority to make final personnel decisions. *Joo,* 2016 WL 2846431, at *6 (citing *Comm'n on Human Rights ex rel. Manning v. HealthFirst, LLC*, OATH Index No. 462/05 at 2 (March 15, 2006), *adopted* (May 10, 2006)). That reasoning relies on a line of cases that trace back to the Court of Appeals case of *Patrowich v. Chemical Bank*, 63 N.Y.2d 541 (1984). *See, e.g.*, *Comm'n on Human Rights ex rel. Rhodes v. Apollo*, OATH Index No. 676/91, R&R, 1991 WL 11663014 (1991); *Nemhauser v. NMU Pension & Welfare Plan*, Compl. No. EM00377 7/27/88, Dec. & Order, 1990 WL 712655 (1990). In *Patrowich*, the Court of Appeals examined whether a corporate employee could be held liable for employment discrimination under the New York State Human Rights Law ("NYSHRL"), Executive Law art. 15. *Patrowich*, 63 N.Y.2d at 542-43. Since the

§ 296(1)(a) of the NYSHRL limits liability to "an employer or licensing agency," the court looked to the law's definition of employer under § 292(5) but concluded that it "provides no clue to whether individual employees of a corporate employer may be sued." *Id.* at 543. The court then observed that whereas a different provision of the law applied explicitly to "any real estate broker, real estate salesman or *employee or agent thereof*," *id.* (discussing § 296(3-b)) (emphasis in original), the language of § 292(5) made no mention of employees or agents. *Id.* Based on the absence of such language, the court held that liability of individual employees is limited under the NYSHRL to cases where the employee is "shown to have any ownership interest or any power to do more than carry out personnel decisions made by others." *Id.* at 542.

Notably, however, the NYCHRL expressly provides for liability of "an employer or an *employee or agent thereof*," N.Y.C. Admin. Code § 8-107(1)(a) (emphasis added), using the very same language that the Court of Appeals suggested in *Patrowich* would be indicative of individual employee liability. Indeed, originally the NYCHRL limited liability to "an employer," Local Law 97 § 4 (1965), but was amended in 1991 (after the Court of Appeals' decision in *Patrowich*) to reach "an employer or an employee or agent thereof," Local Law 39 (1991).

The Second Department interprets the NYCHRL to cover discrimination claims against individual co-employees, regardless of ownership interest or the power to make personnel decisions. *Murphy v. ERA United Realty*, 251 A.D.2d 469, 471 (2d Dep't 1998). While the First Department held to the contrary in 2003, before passage of the Restoration Act, *see Priore v. N.Y. Yankees*, 307 A.D.2d 67, 74 (1st Dep't 2003), it has subsequently made clear that such restrictive interpretations of the NYCHRL are untenable. *See, e.g.*, *Morse v. Fidessa Corp.*, 165 A.D.3d 61, 67 (1st Dep't 2018) (declining to follow *Levin v. Yeshiva Univ.*, 96 N.Y.2d 484 (2001), which "failed to engage in liberal construction analysis"); *Hernandez v. Kaisman*,

103 A.D.3d 106, 114 (1st Dep't 2012). It is therefore unlikely that *Priore* remains good law. *See Nicholson v. Staffing Auth.*, No. 10-Civ-2332, 2011 WL 344101, *4 (S.D.N.Y. Feb. 1, 2011).

In any event, the record in this case supports a finding of liability against Respondent Kim, even under the restrictive standard set forth in *Manning* and *Priore*. The uncontested evidence shows that Respondent Kim held a supervisory role at UBM and was the person who actually fired Complainant. (Tr. 15:6-10.) Thus, the evidence shows that Respondent Kim had authority over personnel decisions.

The uncontested evidence in this case also clearly establishes that all three Respondents discriminated against Complainant based on his age. Complainant testified that Respondent Kim told him that he was being fired because he was over age 65. (Tr. 15:6-10.) After Complainant requested an official letter of termination from Respondents, he received a letter printed on UBM letterhead and signed by Respondent Lee as "President of UBM Building Maintenance INC.," which clearly stated that he was being discharged because "we do not employ the person over 65 years old." (Bureau Ex. 2; *see also* Tr. 16:4-17.) There was no other reason stated for Complainant's termination. Based on this record, the Commission finds that Respondents unlawfully terminated Complainant based on his age, in violation of § 8-107(1)(a)(2) of the NYCHRL.[5]

C. Respondents UBM and Lee Retaliated Against Mr. Joo in Violation of § 8-107(7) of the NYCHRL

In relevant part, § 8-107(7) of the NYCHRL prohibits employers and their agents from "retaliat[ing] or discriminat[ing] in any manner against any person because such person has . . .

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[5] Complainant testified that the same day that he was terminated, another colleague, Chung Hee Kim, was also fired because he was 65 years old. (Tr. 20:5-10.) That testimony was confirmed by Bureau Staff Attorney Aarti Garg, who testified that Chung Hee Kim told her that he had been fired from UBM based on his age. (*Id.* at 32:17-20.)

opposed any practice forbidden under this chapter." A *prima facie* case of retaliation under the NYCHRL requires a showing that: (1) the complainant engaged in protected activity (which, among other things, includes filing a complaint under the NYCHRL); (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. *See Mihalik v. Credit Agricole Cheuvreux N. Am., Inc.*, 715 F.3d 102, 112 (2d Cir. 2013) (citations omitted); *Forrest v. Jewish Guild for the Blind*, 3 N.Y.3d 295, 313 (2004); *Brightman v. Prison Health Serv., Inc.*, 108 A.D.3d 739, 740 (2d Dep't 2014).

Here, the record supports a finding that Respondents UBM and Lee retaliated against Complainant.[6] First, there is no question that by seeking to file a discrimination complaint with the Bureau, Complainant was engaging in protected activity. N.Y.C. Admin. Code § 8-107(7)(ii) (prohibiting retaliation against any person who has, among other things, "filed a complaint"). Second, the record clearly establishes that Respondent Lee was made aware of Complainant's protected activity when a Bureau attorney reached out to him to discuss Complainant's termination. (Tr. 31:10-12.) Last, Respondent Lee retaliated against Complainant by immediately calling him to threaten and dissuade him from filing a formal complaint of discrimination. Specifically, Respondent Lee told Complainant that he would "regret that [he] filed a lawsuit" and would see "what consequences [he was] going to have to face." (*Id.* at 17:16-25.) The Commission finds that the threats that Respondent Lee made to Complainant are the sort that are "reasonably likely to deter a person from engaging in protected activity." N.Y.C. Admin. Code

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[6] In contrast, there is no evidence in the record that Respondent Kim played any role in retaliating against Complainant.

§ 8-107(7). The Commission therefore concludes that Respondent Lee retaliated against Complainant in violation of § 8-107(7) of the NYCHRL. *See Williams v. N.Y.C. Hous. Auth.*, 61 A.D.3d 62, 70-71 (1st Dep't 2009) ("the Restoration Act of 2005 amended § 8-107(7) to emphasize that [t]he 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 . . . however . . . the retaliatory or discriminatory act or acts complained of must be reasonably likely to deter a person from engaging in protected activity.") Moreover, because Respondent Lee is an employee of UBM, Respondent UBM is strictly liable for his retaliatory conduct. *See* N.Y.C. Admin. Code § 8-107(13)(a); *Zakrzewska v. New Sch.*, 14 N.Y.3d 469, 481 (2010).

IV. DAMAGES, CIVIL PENALTIES, AND REMEDIAL ACTION

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 such other "affirmative action as, in the judgment of the commission, will 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). In addition, the Commission may impose civil penalties of not more than $125,000.00, unless the "unlawful discriminatory practice was the result of the respondent's willful, wanton or malicious act," in which case a civil penalty of not more than $250,000.00 may be imposed. *Id.* § 8-126(a). Civil penalties are paid to the general fund of the City of New York. N.Y.C. Admin. Code § 8-127(a).

A. Compensatory Damages

Compensatory damages are intended to redress a specific loss that the complainant suffered because of the respondent's wrongful conduct and should correspond to the

complainant's injuries, as supported by the record. *See Agosto*, 2017 WL 1335244, at *7; *In re Comm'n on Human Rights ex rel. Howe v. Best Apartments*, OATH Index No. 2602/14, Dec. & Order, 2016 WL 1050864, at *6 (Mar. 14, 2016). In valuing compensatory damages in a particular case, the Commission assesses the nature of the violation, the amount of harm indicated by the evidentiary record, and awards that have been issued for similar harms. *See 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). The NYCHRL places no limitation on the size of compensatory damages awards. *See* N.Y.C. Admin. Code § 8-120(a)(8). Here, the Bureau is seeking back pay, front pay, and emotional distress damages for Complainant. (*See* Bureau Post-Trial Br. at 11-19.)

1. Back Pay

Back pay is calculated as the amount a complainant would have earned if the respondent's discriminatory action had not occurred. *See Martinez*, 2017 WL 4510797, at *8; *N.Y. State Office of Mental Health v. N.Y. State Div. of Human Rights*, 53 A.D.3d 887, 890 (3d Dep't 2008). If, prior to the date of an administrative determination, the complainant obtains a comparable or better paying job than the one he or she was discharged from, back pay spans from the date of the discriminatory termination to the start of the comparable or better paying job. *See Tosha Rest., LLC v. N.Y. State Div. of Human Rights*, 79 A.D.3d 1337, 1341 (3d Dep't 2010); *Pioneer Grp. v. State Div. of Human Rights*, 174 A.D.2d 1041, 1041 (4th Dep't 1991).

Whether the complainant has obtained a comparable job is not a mere mechanical comparison of gross earnings. *See Buckley v. Reynolds Metals Co.*, 690 F. Supp. 211, 215-6 (S.D.N.Y. 1988) (finding that despite only a small salary differential two positions were not

comparable when the respective salaries were considered "in conjunction with the wide range of benefits plaintiff [had] been deprived of as a result of his illegal discharge."). In addition to differences in salary, the consistency of work, number of hours worked, availablility of benefits, and the type of work may prove relevant to the Commission's determination. *See Martinez*, 2017 WL 4510797, at *8 (considering whether complainant had found a "consistent or better paying job"); *Hawkins v. 1115 Legal Serv. Care*, 163 F.3d 684, 696 (2d Cir. 1998) (affirming the reasoning of the district court that new employment that involved "longer hours, fewer fringe benefits, and more stressful work" was not comparable to plaintiff's prior position). Back pay must also include overtime pay for any time that the complainant would have worked in excess of a forty hour week, even if the employer had not actually been paying overtime as required by law. *See Morales v. Mw Bronx, Inc.*, No. 15 Civ. 6296, 2016 WL 4084159, at *8 (S.D.N.Y. Aug. 1, 2016); *Johnson v. N.Y.C. Dep't of Envtl. Prot.*, 34 A.D.3d 241, 242 (1st Dep't 2006).

Following an unlawful termination, a complainant is obligated to mitigate damages by making reasonable attempts to search for and obtain 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; *In re Comm'n on Human Rights ex rel. Lukasiewicz v. Cutri*, OATH Index No. 2131/10, R&R, 2011 WL 12472971, at *13 (Dec. 8, 2010), *modified on other grounds* Dec. & Order (Feb. 17, 2011). Any calculated amount that the complainant would have earned if he or she had not been fired must be offset by amounts that he or she earned from new employment following the discriminatory discharge. *See Pollock v. Kiryas Joel Union Free Sch. Dist.*, 52 A.D.3d 722, 724 (2d Dep't 2008); *Club Swamp Annex v. White*, 167 A.D.2d 400, 402 (2d Dep't 1990).

While working at UBM, Complainant earned approximately $461.54 per week in regular, non-overtime pay.[7] He also earned, though he was not paid, four hours of overtime each week. Overtime is paid at a rate of 1.5 times the regular hourly rate, 29 U.S.C. § 207(a)(1); 12 NYCRR § 142-2.2, meaning that for each of the four hours that Complainant worked in excess of the regular forty hour workweek he is entitled to $17.31 per hour (or 1.5 times his regular hourly pay of $11.54).[8] In total, he earned $69.23 in overtime pay each week.[9] Complainant's back pay award should be calculated by multiplying his total weekly earnings of $530.77 (comprised of $461.54 in regular pay and $69.23 in overtime) by the number of weeks from the date of Complainant's termination to his start of comparable employment, less any amounts Complainant earned during that period. *See Pollock*, 52 A.D.3d at 724.

The Bureau has reported in its post-hearing supplement that, starting in January 2018, Complainant earned $12,700.00 in a five-month period working for both BBC Cleaning Corp. and Cleaning Pro Services, Inc. (Bureau Suppl. at 2.) That is approximately $747.05 per week, amounting to $216.88 more than Complainant would have earned each week at UBM inclusive of overtime. While gross salary alone is not determinative of whether or not Complainant's new employment is comparable to his former position at UBM, the Bureau has not provided the Commission sufficient information to perform a more holistic analysis – such as Complainant's

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[7] This value is calculated by dividing $2,000.00 (Complainant's monthly salary) by 52 (the number of weeks per year) and multiplying by 12 (the number of months per year).

[8] In a one-month period, the number of work hours paid at a regular hourly rate can be calculated by multiplying 40 (the number of hours per week paid at a regular rate, pursuant to statute) by 52 (the number of weeks per year) and dividing by 12 (the number of months per year), for a total of 173.33 regular-pay hours per month. Complainant's regular hourly rate of $11.54 per hour is calculated by dividing $2,000.00 (his monthly salary) by 173.33 (the total number of regular-pay hours per month).

[9] An hourly overtime rate of $17.31 multiplied by 4 hours of overtime worked each week amounts to a total of $69.23 in weekly overtime pay.

true hourly wage, information about benefits, or the numbers of hours Complainant worked per week – and the Commission has no basis to find that his work was incomparable to his job at UBM. (*See id.*) Therefore, the Commission finds that Complainant found employment comparable to his work for Respondents as of January 1, 2018. Because the Commission finds that Complainant has gained comparable employment, front pay is not available.

Over the 286 weeks between Complainant's termination and his start of comparable employment, he should have earned $151,724.40 from Respondents (comprised of $131,934.51 for his regular hours worked and $19,789.89 in overtime). Between Complainant's termination and the start of his comparable employment in 2018, he earned a total of $108,936.37 working at Hope & Heaven Cleaners, Spot Cleaners, UBS America, Regent Cleaners, BBC Cleaning Corp, and Cleaning Pro Service, Inc. (*See* Bureau Ex. 5; Bureau Post-Trial Br. at 14; Bureau Suppl. at 1-3.) His back pay award should therefore be **$42,788.02** ($151,724.40 less $108,936.37 in interim earnings from the period before he found comparable employment).

Complainant is also entitled to an award of pre-determination interest on the award of back pay. *See Aurecchione v. N.Y. State Div. of Human Rights*, 98 N.Y.2d 21, 27 (2002); *In re Comm'n on Human Rights ex rel. Cardenas v. Automatic Meter Reading Corp.*, OATH Index No. 1240/13, Dec. & Order, 2015 WL 7260567, at *12 (Oct. 28, 2015). "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." *Cardenas*, 2015 WL 7260567, at *12 (citing CPLR 5004); *see Argyle Realty Assocs. v. N.Y. State Div. of Human Rights*, 65 A.D.3d 273, 286 (2d Dep't 2009).[10] The Commission uses September 29, 2015 as the

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10 The mid-point between the date of unlawful termination and the date of the Commission's determination is a "single reasonable intermediate date," within the meaning of the CPLR. *See Argyle Realty Assocs.*, 65 A.D.3d at 286.

intermediate date between the date of termination (July 9, 2012) and the date of this order. Applying a simple annual interest rate of nine percent to a principal amount of $42,788.02 for the period from September 29, 2015 through today's date, December 20, 2018, (or a period of approximately 3.23 years) produces a total pre-determination interest amount of **$12,428.46**.

2. Emotional Distress Damages

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." *See Howe*, 2016 WL 1050864, at *6. When valuing emotional distress damages in a particular case, the Commission assesses the nature of the violation, the amount of harm indicated by the evidentiary record, and awards that have been issued for similar harms. *See In re Sch. Bd. of Educ. of Chapel of Redeemer Lutheran Church*, 188 A.D.2d at 654. Other factors that may be relevant to valuing emotional distress damages include "the duration of a complainant's condition, its severity or consequences, any physical manifestations, and any medical treatment." *N.Y.C. Transit Auth. v. State Div. of Human Rights*, 78 N.Y.2d 207, 218 (1991) (discussing damages under the NYSHRL).

Judge Spooner recommended an award of $15,000.00 in emotional distress damages, noting that Complainant had found new employment, earning only $20 per week less than at UBM, with no indication of long-lasting trauma or emotional harm. *Joo*, 2016 WL 2846431, at *11. The Bureau seeks an award of $125,000.00. (Bureau Comments at 5; Bureau Post-Trial Br. at 17.) It argues that Respondents' conduct was egregious, leaving Complainant financially insecure for reasons explicitly unrelated to his job performance, and involved threatening him with further harm in retaliation for pursuing help through the Bureau. (Bureau Comments at 5-6.)

Mr. Joo testified that for about three to four months after he was fired, he felt "anxious," experienced "severe depression and phobia" and was "unable to focus." (*Id.* at 24:5-8.) He also experienced severe nightmares that continued for about one year and began to diminish when he found new part-time work with Regent Cleaners. (Tr. 25:24:15-25; 28:6-7.) In one version of his nightmares, he "would be in a jail or a concentration camp" where someone would go down a line of people telling each one they were fired. (*Id.* at 24:15-19). In others, he was fed "with poison water" or was in a "big, huge machine" being squeezed like a lemon. (*Id.* at 24:19-23.) Mr. Joo's testimony makes clear that he was significantly harmed by Respondents' discrimination. Based on the record and awards in comparable cases, the Commission concludes that Complainant should be awarded $15,000.00 in emotional distress damages. *See Munson v. Diamond*, No. 15-Civ.-425, 2017 WL 4862789, at *1 (S.D.N.Y. Oct. 26, 2017), *adopting* R&R, 2017 WL 4863096 (June 1, 2017) (awarding $15,000.00 in emotional distress damages where plaintiff "'experienced and continue[s] to experience distress, mental anguish, loss of self-esteem, anxiety, disturbed sleep, stomach problems, embarrassment, and migraines,'" and "'felt intimidated, abused, anxious, [and] physically ill'" as a result of the defendant's conduct, but did not provide any corroborating evidence); *N.Y. State Div. of Human Rights v. Ben Rottenstein Assocs., Inc.*, 89 A.D.3d 852, 852-53 (2d Dep't 2011) (awarding $15,000.00 for mental anguish where respondents discriminated against the complainant on the basis of age and retaliated against him for opposing the discriminatory practices); *State Div. of Human Rights ex rel. Cottongim v. Onondaga Cty. Sheriff's Dep't*, 127 A.D.2d 986, 986 (4th Dep't 1987) (reducing award for mental anguish to $15,000.00 where complainant "was upset, depressed, felt demeaned and insecure and still experiences nightmares" but there was no indication of the frequency or duration of the nightmares), *aff'd*, 71 N.Y.2d 623 (1988); *Agosto*, 2017 WL

1335244, at *1 (awarding $13,000.00 in emotional distress damages where complainant was rendered street homeless, unable to sleep, and without ready access to a shower for approximately two months).

B. Civil Penalties

In assessing whether the imposition of civil penalties will vindicate the public interest, the Commission may consider several factors, including, but not limited to: (1) respondent's financial resources; (2) the sophistication of respondent's enterprise; (3) respondent's size; (4) the willfulness of the violation; and (5) the impact on the public of issuing civil penalties. *See, e.g., In re Comm'n on Human Rights v. A Nanny on the Net*, OATH Index Nos. 1364/14 & 1365/14, Dec. & Order, 2017 WL 694027, at *8 (Feb. 10, 2017); *In re Comm'n on Human Rights v. CU 29 Copper Rest. & Bar*, OATH Index No. 647/15, Dec. & Order, 2015 WL 7260570, at *4 (Oct. 28, 2015). The Commission also considers the extent to which the respondent cooperated with the Bureau's investigation and with OATH, *see, e.g., A Nanny on the Net*, 2017 WL 694027, at *9; *Howe*, 2016 WL 1050864, at *8; *Cardenas*, 2015 WL 7260567, at *15; *In re Comm'n on Human Rights v. Crazy Asylum*, OATH Index Nos. 2262/13, 2263/13, 2264/13, Dec. & Order, 2015 WL 7260568, at *6 (Oct. 28, 2015), as well as the amount of remedial action that the respondent may have already undertaken, *see, e.g., A Nanny on the Net*, 2017 WL 694027, at *8; *CU 29 Copper Rest. & Bar*, 2015 WL 7260570, at *4.

In this case, Judge Spooner recommended a civil penalty of $15,000.00. *Joo*, 2016 WL 2846431, at *12-13. He found that "UBM is a small company with slightly more than eight employees" and noted that UBM may no longer be in business, since mailings were returned to OATH as "undeliverable unable to forward." *Id.* at *13. Judge Spooner noted Respondents' failure to cooperate in the case, but suggested that "a lesser penalty is called for"

because there was insufficient proof of willfulness and, although Respondents' conduct violated the NYCHRL, mandatory retirement ages are permitted under other laws. *Id.* at *12-13. The Bureau initially sought a maximum civil penalty of $250,000.00 (Bureau Post-Trial Br. at 19), but in comments now seeks an award of $125,000.00 to be imposed solely against Respondents UBM and Lee (Bureau Comments at 8). The Bureau notes that Respondents' mandatory retirement policy impacted Complainant and at least one other employee, but likely impacted more. (Bureau Post-Trial Br. at 20.) In addition, the Bureau notes that when Respondents were advised that their policy was a violation of the NYCHRL, they responded by retaliating against Complainant and, thereafter, failed to cooperate with the Bureau's investigation or in proceedings before OATH. (Bureau Post-Trial Br. at 20.) The Commission agrees that civil penalties should be imposed only against Respondents UBM and Lee.

1. The Size, Sophistication, and Financial Resources of Respondents UBM and Lee

Respondents UBM and Lee did not produce any information related to their size or financial resources, despite Judge Spooner's clear warning that failure to do so could "result in sanctions . . . including . . . adverse inferences." *Joo*, 2015 WL 9694284, at *2. The Commission therefore concludes that an adverse inference is warranted concerning the size and sophistication of UBM's business. The record shows that, at a minimum, UBM employed approximately nine individuals at the Korean embassy and maintained headquarters at a separate location in Queens. From that record, the Commission infers that UBM was a mid-sized, sophisticated company.

2. Willfulness of the Violations by Respondents UBM and Lee

The record also indicates that Respondents UBM and Lee acted willfully in violating the NYCHRL. *See Agosto*, 2017 WL 1335244, at *12 (observing that willfulness entails a reckless disregard for another's rights). In particular, their retaliatory conduct reveals that they

intentionally sought to interfere with Mr. Joo's right to oppose their discrimination. Such willful misconduct warrants increased civil penalties.

3. Failure to Cooperate With the Investigation and Hearing Process

After filing their Answer, Respondents UBM and Lee completely disengaged from the case and refused to respond to or cooperate with the Bureau or OATH. Such "steadfast refusal to take this process seriously militates in favor of a higher penalty '[b]ecause it is in the public interest to have individuals respond and participate in a process designed to cure discriminatory practices." *Howe*, 2016 WL 1050864, at *8 (quoting *Crazy Asylum*, 2015 WL 7260568, at *6).

4. Impact of Civil Penalties on the Public

The public interest also warrants civil penalties in this case. The record shows that Complainant and one other employee were both fired on the same day because they were over age 65, and the Commission infers that others have been impacted by the company's discriminatory policy. Policies that force people from the workforce based on age alone, without regard to their work abilities, are an affront to their dignity and, among seniors, may significantly undermine their financial security. Approximately 30 percent of seniors in New York City live in poverty, *see* N.Y.C. Comptroller, *Aging with Dignity: A Blueprint for Serving NYC's Growing Senior Population,* 14 (Mar. 2017),[11] and it is particularly difficult for older individuals to find new employment, *see* Gary Koenig, Lori Trawinski, and Sara Rix, *The Long Road Back: Struggling to Find Work after Unemployment*, AARP (Mar. 2015).[12] In light of all the considerations discussed above, the Commission finds that a civil penalty of $30,000.00 should

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[11] Available at https://comptroller.nyc.gov/wp-content/uploads/documents/Aging_with_Dignity_A_Blueprint_for_Serving_NYC_Growing_Senior_Population.pdf.

[12] Available at https://www.aarp.org/content/dam/aarp/ppi/2015-03/The-Long-Road-Back_INSIGHT.pdf.

be imposed. *See Marine Holdings, LLC v. N.Y.C. Comm'n on Human Rights*, 31 N.Y.3d 1045, 1047 (2018) (declining to disturb Commission's determination in case imposing civil penalty of $125,000.00); *In re Cutri v. N.Y.C. Comm'n on Human Rights*, 113 A.D.3d 608, 609 (2d Dep't 2014) (upholding civil penalty of $20,000.00); *In re Jovic v. N.Y.C. Comm'n on Human Rights*, Index No. 17/100838, Order (Sup. Ct. N.Y. Cty. Feb. 27, 2018) (upholding civil penalty of $60,000.00); *accord Agosto*, 2017 WL 1335244, at *7 (civil penalty of $20,000.00); *Martinez*, 2017 WL 4510797, at *13 (civil penalty of $18,000.00); *In re Comm'n on Human Rights v. Tantillo*, OATH Index Nos. 105/11, 106/11 & 107/11, Dec. & Order, 2011 WL 7809914, at *2 (May 2011) (civil penalty of $20,000.00).

C. Remedial Action

As set forth below, Respondent UBM is required to submit written anti-discrimination policies to the Bureau for its review within 60 days of this order. Within 30 days of receiving approval of those policies from the Bureau, Respondent UBM must post them in its workplace and distribute them to all employees in their primary language.

The Commission has frequently required individuals who have been found liable for violations of the NYCHRL to attend Commission-led trainings to strengthen their understanding of their obligations under the law. *See, e.g., Spitzer,* 2016 WL 7106071, at *10; *In re Comm'n on Human Rights ex rel. Jordan v. Raza*, OATH Index No. 716/15, 2016 WL 7106070, at *11 (July 7, 2016); *In re Comm'n on Human Rights ex rel. Stamm v. E&E Bagels, Inc.*, OATH Index No. 803/14, Dec. & Order, 2016 WL 1644879, at *11 (Apr. 20, 2016). As set forth below, all of the Respondents are required to attend such a training.

V. CONCLUSION

FOR THE REASONS DISCUSSED HEREIN, IT IS HEREBY ORDERED that Respondents immediately cease and desist from engaging in discriminatory conduct.

IT IS FURTHER ORDERED that no later than 60 calendar days after service of this order, Respondent UBM and Respondent Lee pay Complainant $70,216.48 (comprised of $42,788.02 in back pay, $12,428.46 in interest, and $15,000.00 in emotional distress damages), by sending to the New York City Commission on Human Rights, 22 Reade Street, New York, New York 10007, Attn: Recoveries, a bank certified or business check made payable to Dong Chung Joo, including a written reference to OATH Index No. 384/16.

IT IS FURTHER ORDERED that no later than 60 calendar days after service of this order, Respondent UBM and Respondent Lee pay a civil penalty of $30,000.00 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: Recoveries, a bank certified or business check made payable to the City of New York, including a written reference to OATH Index No. 384/16.

IT IS FURTHER ORDERED that no later than 60 calendar days after service of this order, Respondent UBM submit written anti-discrimination policies to the Bureau for its approval. Upon receiving approval for its policies, Respondent UBM must post those policies in a prominent location in its workplace and provide copies of the policies to all employees in their primary language.

IT IS FURTHER ORDERED that no later than 60 calendar days after service of this order, Respondent Kim, Respondent Lee, and all managerial staff at UBM register for a Commission-led training on the NYCHRL, to be completed no later than 120 days after service

of this order. A schedule of available trainings may be obtained by calling the Director of Training and Development at (212) 416-0193 or emailing trainings@cchr.nyc.gov.

Failure to timely comply with any of the foregoing provisions shall constitute non-compliance with a Commission order. In addition to any civil penalties that may be assessed against them, 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.* § 8-129.

Dated: New York, New York
December 20, 2018

SO ORDERED:

New York City Commission on Human Rights

Carmelyn P. Malalis
Commissioner/Chair

To: