CITY OF NEW YORK
COMMISSION ON HUMAN RIGHTS

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In the Matter of

COMMISSION ON HUMAN RIGHTS
ex rel. BREHSHIEK MARQUEZ,

Complaint No.: M-E-S-17-1034994-E

Petitioner,

-against-

OATH Index No.: 434/22

FRESH & CO.,

Respondent.

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DECISION AND ORDER

Complainant Brehshiek Marquez ("Complainant" or "Marquez") filed a verified complaint ("Complaint") with the Law Enforcement Bureau of the New York City Commission on Human Rights ("Petitioner" or "Bureau") alleging gender-based employment discrimination against Fresh & Co. ("Fresh" or "Respondent"). The Bureau served the Complaint on the Complainant and Respondent (collectively "Parties") on November 3, 2016. The Complaint alleges that: (1) Respondent, through the actions and comments of its supervisors repeatedly sexually harassed Complainant at the Fresh store where she worked, and created a hostile work environment through their actions and comments; (2) Respondent failed to act when Ms. Marquez complained of the discriminatory behavior she was experiencing; and (3) the harassment, hostile work environment, and Respondent's subsequent failure to eliminate them resulted in Ms. Marquez's constructive discharge from her job, 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 Ingrid M. Addison, Administrative Law Judge of the New York City Office of Administrative Trials and Hearings ("OATH") on May 25 and 26, 2022.

Presently before the Office of the Chair of the New York City Commission on Human Rights ("the Commission") are the findings and recommendations of Judge Addison in *Comm'n on Human Rights ex rel. Brehshiek Marquez v. Fresh & Co*., Report and Recommendation, 2022 WL 19569284 (August 9, 2022) ("Report and Recommendation" or "R & R") for Decision and Order. For the reasons set forth herein, the Commission adopts the R & R's findings and recommendations with modifications as to the elements of constructive discharge and the

emotional distress damages award, and rejects the R & R's finding of a negative inference against Petitioner.

The Commission adopts the findings that Respondent violated N.Y.C. Admin. Code § 8-107(1)(a) when its supervisory employee discriminated against Marquez by sexually harassing her due to her gender and then failing to act when the discrimination was reported to Fresh Managers, creating a hostile work environment. Further, while the Commission adopts Judge Addison's finding that Petitioner did not establish constructive discharge of Ms. Marquez in violation of NYC Admin. Code § 8-107(7), the reasoning to support this conclusion is modified as detailed in this Decision and Order. Regarding a civil penalty, the Commission adopts the R & R's recommendation to impose $60,000. Regarding the emotional distress damages award, the Commission orders an award of $45,000, increased from the recommendation of $30,000 in the R & R. As a result, the Commission orders Respondent to: (1) pay Complainant $45,000.00 in emotional distress damages; (2) pay a $60,000.00 civil penalty; (3) train employees on the NYCHRL and complete, along with its employees, the NYCHRL overview training offered by the New York City Commission on Human Rights; (3) create and implement new and effective anti-discrimination and anti-harassment policies and distribute the policies to all current and future employees; (4) monitor, respond to, and report on employee reports of harassment; and (5) post the Commission's Notice of Rights poster and the Stop Sexual Harassment in New York City Act Legal Notice ("Anti-Sexual Harassment Notice") in all Fresh locations in New York City to inform employees and customers of their rights.

I. BACKGROUND

The Bureau served the Complaint on the Parties on November 3, 2016 (Pet. Ex. 1). On December 21, 2016, Respondent filed a verified answer ("Answer") with the Bureau denying the allegations in the Complaint and asserting that Complainant's employment was terminated for "lawful, legitimate, and non-discriminatory business reasons." (Pet. Ex. 2) On December 16, 2019, the Bureau issued a Notice of Probable Cause Determination, advising Respondent of their intention to proceed to trial if the matter was not resolved by a Conciliation Agreement (ALJ Ex. 3). The matter was scheduled for trial on September 7, 2021. On November 4, 2021, Marquez, by her independent counsel and on notice to all parties, moved to intervene in the proceedings. Judge Addison granted Complainant's motion pursuant to section 2-25(b) of OATH's Rules of Practice. The trial was held on May 25 and May 26, 2022.

On August 9, 2022, Judge Addison issued her R & R, finding *inter alia* that Complainant experienced sexual harassment in the workplace in violation of Admin. Code § 8-107(1)(a), Respondent's store manager was made aware of the sexual harassment and failed to act, in violation of Admin. Code § 8-107(1)(a), and Petitioner failed to establish that Complainant was constructively discharged from her job. (R & R at 29.) In addition, pursuant to a request made by Respondent in its closing brief, the R & R granted a negative inference against Petitioner on the basis that two former Fresh employees with knowledge of the workplace did not testify. Judge Addison recommended an award to Complainant of $30,000 in mental anguish damages, and a civil penalty of $60,000. (*Id.*) Judge Addison also recommended that Respondent engage in the following affirmative relief to deter future occurrences of discrimination: (1) attend anti-

discrimination training; (2) create and implement new and effective anti-discrimination and anti-sexual harassment policies; (3) monitor oral and written reports of harassment; and (4) post notices informing employees and customers of their rights. (*Id.* at 33)

Pursuant to 47 RCNY § 1-66, the Bureau, Ms. Marquez, and Respondent submitted written comments ("Comments") on the R & R to the Commission on April 13, 2023. The Bureau's Comments call for the adoption of Judge Addison's recommendation with respect to liability, the emotional distress damages award, civil penalty, and non-monetary relief (Bureau Comments at 6). The Bureau Comments also request that the Commission clarify its standard for constructive discharge and reject the Court's granting of a negative inference against Petitioner based on missing witnesses (Bureau Comments at 7). Ms. Marquez's Comments urge the Commission to adopt Judge Addison's recommendations regarding liability and seek an increase in the emotional distress damages award to $60,000 (Marquez Comments at 1, 3-4). Respondent's Comments urge the Commission to reject Judge Addison's findings that Respondent: (1) engaged in workplace sexual harassment of Ms. Marquez and other female Fresh employees; and (2) had a managerial employee who was made aware of the harassment and failed to stop it, and to also reject the R & R's recommendation of a $60,000 civil penalty (Respondent Comments at 1).

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 an 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. Cazares v. INS Handbags, Inc.*, 2025 WL 897951, at *3 (March 18, 2025); *Comm'n on Human Rights ex rel. Fernandez v. Gil's Collision Services Inc. d/b/a D&R Collision Corp.*, OATH Index No. 1245/19, 2023 WL 3974499 at *3 (May 31, 2023); *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 1475080 (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. *Cazares*, 2025 WL 897951, at *3; *Fernandez*, 2023 WL 3974499, at *4; *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. *Cazares*, 2025 WL 897951, at *3; *Fernandez*, 2023 WL 3974499, at *4; *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 trial record. During the trial, the Bureau offered the testimony of three individuals: the Complainant; Dynasia Mackins, a former Fresh employee who had a pre-existing relationship with Complainant; and Ray Warren, Complainant's partner. Respondent offered the testimony of five individuals who are current or former Fresh employees: Panayiotis Boyiakis,[1] the senior operations supervisor; Tensin Tsering, Rehana Haque, and Ocean Sari, supervisors who worked at the same time and same store as Complainant; and Lisa Grant, the Human Resources ("HR") Director.

The Commission finds the R & R's discussion of the evidence presented at trial to be comprehensive and adopts the R & R's evidentiary findings; the most pertinent facts are outlined herein. Petitioner's witnesses testified that male Fresh employees, including a supervisor, engaged in gender-based harassment of female employees over time. Ms. Mackins testified that she was employed at the Fresh store located at 1211 6th Avenue in Manhattan ("Fresh location") until 2016 – at which time she told Complainant that Fresh was hiring. Mackins also testified that during her employment, male Fresh employees, including Mr. Tsering, subjected her to unwelcome comments and behavior related to her gender, which included calling Mackins beautiful, telling her she looked pretty, and winking and blowing kisses at Mackins on an almost daily basis, and that she navigated this by generally trying to ignore the behavior.

Complainant testified that in May 2016, she applied for the job at Fresh that Mackins told her about, and she was hired at the same Fresh location. Complainant testified that she worked for Fresh for approximately five (5) months, and that, for approximately the last two (2) months of Complainant's employment, Tsering subjected Complainant to repeated incidents of sexual harassment such as unwanted comments indicating that he would like to cheat on his wife with Complainant and that Complainant had a large backside, as well as unwelcome physical contact when he brushed up against Complainant. Marquez also testified that she experienced threats of unwelcome physical contact including an incident in which Tsering intimated that he would smack Complainant's buttocks with a spatula. Complainant testified that she told another supervisor, Ms. Haque, about Tsering's harassing behavior on multiple occasions, but Haque took no action. Ms. Haque did not stop the harassment or support Complainant in any way. Complainant testified that she left her job at Fresh in September of 2016 due to the gender discrimination she experienced.

The testimony of Respondent's witnesses, including Tsering, senior operations supervisor Boyiakis, and HR Director Grant, differed substantially from that put forth by Petitioner's witnesses in several respects. For example, while there was agreement that Mackins and Complainant were hired to work at the same Fresh location, testimonies diverged regarding how

[1] This individual is referred to as Peter in the record.

and where Complainant and Mackins were onboarded. Further, Respondent's witnesses testified extensively about employment matters, such as Fresh's policies and procedures, individuals' specific roles as Fresh employees, Complainant's work performance, and the circumstances surrounding the end of Complainant's employment with Fresh. Complainant's witnesses, while testifying about similar aspects of the Fresh workplace, also focused on individual interactions in the workplace, and the impact of the workplace on Ms. Marquez.

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." *Cazares*, 2025 WL 897951, at *9; *Fernandez*, 2023 WL 3974499, at *11; *Desir*, 2020 WL 1234455, at *6; *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.")).

b. Respondents Discriminated Against Ms. Marquez Based on Her Gender in Violation of § 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. Housing Auth.*, 872 N.Y.S.2d 27, 39 (1st Dep't 2009)); *see also Fernandez*, 2023 WL 3974499, at *13; *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. Amin. Code § 8-107(1)(a); *see also Fernandez*, 2023 WL 3974499, at *13; *Martinez*, 2017 WL 4510797, at *5; *Cardenas*, 2015 WL 7260567, at *7. NYCHRL § 8-107(1)(a) 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; *Fernandez*, 2023 WL 3974499, at *13; *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); *see also Mihalik v. Credit Agricole Cheuvreux N. Am., Inc*., 715 F.3d 102, 110 (2d Cir. 2013)(quoting *Williams*, 872 N.Y.S.2d at 39)(internal quotation marks omitted)). "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). The NYCHRL imposes strict liability on employers for the discriminatory actions of their supervisory and managerial employees. (N.Y.C. Admin. Code § 8-113(b)(1)). Demonstrating the existence of a hostile work environment based on a protected class at the relevant timeframe is evidence of being treated less well based on that basis. *See Cardenas*, 2015 WL 7260567, at *7 (citing *Clarke v. InterContinental Hotels Grp., PLC*, No. 12 Civ. 2671, 2013 WL 2358596, at *11 (S.D.N.Y. May 30, 2013).

The Commission adopts Judge Addison's finding that Respondent subjected Complainant to employment discrimination because of her gender, due to the unwelcome remarks and actions of a supervisor in the workplace. (R & R at 1-2). Specifically, the Commission finds that Complainant's testimony is credible regarding the unwelcome comments and gestures Tsering made to her and about her based on her gender, the non-consensual contact Tsering made with Complainant's buttocks, and his verbal and physical indication that he would smack Complainant's buttocks with a spatula he was holding. (Tr. at 57-60).

As set forth in the R & R, Ms. Marquez engaged in a text message exchange with her former co-worker Yaritza Muniz in the month after Ms. Marquez's employment ended at Fresh about work (R & R at 23; Pet. Ex. 9). Marquez wrote that she did not miss "the nasty stuff [Tsering] used to say," and Muniz appears to corroborate Marquez's statement by responding, "Who you telling . . . ."[2] (R & R at 7, 23). While the text message conversation does not reference the specific incidents that Marquez testified about during the trial, it shows that Complainant and at least one coworker were aware of Tsering's behavior and found it unwelcome. (Pet. Ex. 9). The Commission further credits Complainant's testimony that Tsering acted differently around Complainant than he did around other people. (Tr. at 57). As described in Section III of this D & O, Complainant provided detailed testimony about multiple incidents of unwelcome comments Complainant received from Tsering related to her gender, unwelcome comments about Complainant's body, an incident in which Tsering touched Complainant's buttocks against Complainant's will, and an indication from Tsering that he would smack her on the buttocks with his spatula. (Tr. at 57-59). Complainant also testified about the multiple times she attempted to get assistance from her supervisor, Haque, to address the harassment and that Haque did nothing to punish Tsering or stop him from engaging in the harassing behavior. (Tr. at 61-64)

[2] In its comments to the Chair, Respondent argues that the text message exchange between Complainant and Muniz should not be relied upon on the basis that Complainant could not produce the original cell phone Complainant sent the messages from and because Petitioner did not establish that the individual engaging in the text exchange was Muniz. Respondent's arguments on this point are unavailing because Complainant credibly testified as to the authenticity of the text exchange. Hearsay is admissible in Commission proceedings before the Office of Administrative Trials & Hearings and under the NYCHRL. *See* OATH Rule of Practice § 1-46(a). Accordingly, the Commission finds that the text messages were properly admitted and appropriately relied on.

Mackins' testimony lends support to Complainant's narrative by indicating that Tsering engaged in similar behavior while Mackins worked at the Fresh location in the months immediately preceding Marquez's employment. (Tr. at 166 - 67). Specifically, Mackins testified that, almost daily, Tsering would wink at her and blow kisses, call her beautiful and tell Mackins she looked pretty. (*Id*.). Mackins further testified that when Tsering made remarks or gestures, she would show that Tsering's behavior was unwanted by making faces or leaving the area, but Mackins' negative reactions did not stop Tsering. (Tr. at 171 - 72).

Complainant's testimony is bolstered by two other Fresh employees, one who testified to Tsering engaging in similar behavior with her and one who affirmed via text that male employees at the Fresh location engaged in inappropriate behavior with female employees.[3]

Tsering testified that he was a supervisor at the Fresh location during the period of time when the interactions with Marquez occurred, (Tr. at 317-18), but he denied engaging in the discriminatory behavior Marquez described. (Tr. at 307-309). Tsering did not contest Mackins' testimony about the remarks and gestures that Tsering directed at her.

Respondent's Comments to the Chair assert several arguments in support of its request that the Commission reject the R & R. (Respondent Comments at 1 - 2). The bulk of the arguments relate to issues with limited relevance to the underlying charges of discrimination, including the nature of the relationship between Marquez and Mackins, Marquez's hiring and onboarding, the method by which Marquez was paid, whether Marquez and the senior operations supervisor at Fresh interacted, and the fact that Marquez did not report Tsering's behavior to Fresh's HR department. The Commission finds that these arguments, as well as the testimony and evidence put forth by Respondent in support of their positions, are of little probative value regarding the underlying allegations of what occurred in the workplace, whereas Complainant's testimony regarding harassment is corroborated by other Fresh employees. NYCHRL § 8-107(13)(b) does not require employees to make internal complaints about the discriminatory acts of managerial or supervisory employees to establish employer liability, so whether or not Marquez reported Tsering's behavior to Respondent's HR director during her exit interview is not probative. Pursuant to an amendment in 1991, the NYCHRL, in § 8-107(13)(b)(1), imposes strict liability on employers for the actions of their supervisors. *See also Zakrzewska v. New School*, 902 N.Y.S.2d 838, 842-43 (N.Y. 2010)(discussing how certain defenses to sexual harassment by managers and supervisors are precluded under the NYCHRL strict liability standard). Respondent's argument regarding where Marquez and Mackins were onboarded is of limited relevance to the discriminatory behavior central to this case. (R & R at 22). Respondent's arguments about how Marquez and Mackins know each other, whether Marquez saw the senior

[3] In its comments, Respondent argues that Muniz's response of, "who you tellin [*sic*]," in her text exchange with Complainant is not properly construed because English language construction would indicate the phrase is a question. (Respondent Comments at 11). The Commission disagrees. The Commission reads Muniz's text message that states, "who you tellin,[*sic*]" as a colloquial form of agreement with Complainant's prior statement about the gender-based harassment occurring at the workplace they both had first-hand knowledge of. (R & R at 7) The Commission's view is further supported by the context provided from the larger text conversation, which includes texts regarding whether newer female employees at Fresh are also being harassed. *See id*.

operations supervisor at the Fresh location, and how Marquez was paid also stray from the core of the instant matter.

The Commission recognizes that witnesses for both Petitioner and Respondent presented credibility issues at trial, and adopts the R & R's analysis and conclusions regarding witness credibility. (R & R at 20 - 24). Despite the credibility findings, Judge Addison weighed the totality of the witness testimony elicited and the evidence presented, and she concluded that Respondent violated the NYCHRL by a preponderance of the evidence. Specifically, Respondent subjected Ms. Marquez to gender-based discrimination by permitting a hostile work environment based on gender to exist at the Fresh location through the comments and actions of a supervisor, and by ignoring the Complainant's internal complaints to other supervisors at the Fresh location. Accordingly, the Commission adopts the R & R's finding that Respondent discriminated against Complainant based on her gender due to the unlawful actions of its supervisory employees.

For the reasons described above, and as discussed in the R & R, the Commission finds that Complainant's testimony regarding Tsering's harassing behavior is credible, and because Tsering was a supervisor employed by Respondent, Respondent violated § 8-107(1).

c. Respondents Failed to Act on Ms. Marquez's Reports of Discrimination in Violation of § 8-107(1)

As set forth at *supra* in Section III of this D & O, the Commission adopts the findings and conclusions of the R & R regarding the failure of the general manager at the Fresh location, Ms. Haque, to stop or address the discriminatory behavior of Tsering despite multiple complaints from Marquez.[4] Specifically, Complainant testified that she went to Haque repeatedly attempting to get Haque's support in stopping Tsering's harassment, but Haque either declined Complainant's entreaties or promised future action - action that never took place. Haque had a supervisory role and her failure to act violated the NYCHRL.

d. Ms. Marquez Was Not Constructively Discharged

The Commission adopts the R & R's finding that the Complainant was not constructively discharged, with modifications to the reasoning underlying this conclusion.

The appropriate standard for evaluating constructive discharge claims under the NYCHRL is that an individual finds quitting their employment is necessary because of acts or omissions prohibited by NYCHRL. *See Cardenas*, 2015 WL 7260567, at *9. In *Cardenas,* the Commission reasoned that the Restoration Act, which amended § 8-130 of the NYCHRL and reads "the provisions of [the NYCHRL] shall be construed liberally for the accomplishment of the uniquely broad and remedial purposes thereof, regardless of the whether . . . New York state civil and human rights laws, including those laws with provisions worded comparably to provisions of this time, have been so construed," requires a trier of fact to undertake an independent analysis of NYCHRL claims, regardless of the similar wording of other laws. (N.Y.C. Admin. Code § 8-130(a)). The Commission also noted that section one of the enacting law provides additional guidance on the interplay of the NYCHRL and other laws, explaining

[4] *See* N.Y.C. Admin. Code §§ 8-107(1) and 8-107(13)(b).

that "[i]nterpretations of New York state or federal statutes with similar wording may be used to aid in the interpretation of the [NYCHRL], 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). Given the NYCHRL's broad interpretation, the appropriate standard for a constructive discharge under the NYCHRL, as stated in *Cardenas,* is that quitting is necessary because of acts or omissions prohibited by NYCHRL.

In contrast, the R & R inappropriately applies a standard set forth in the Second Department case *Golston-Green v. City of New York*, which states that a claim of constructive discharge is successful where, "[the] employer, rather than discharging the [employee] directly, deliberately created working conditions so intolerable that a reasonable person in the [employee's] position would have felt compelled to resign." (184 A.D.3d 24, 44 (2d Dep't 2020). However, in *Golston-Green,* the Second Department relied on two cases that failed to analyze the NYCHRL claims separately from the concurrent New York State Human Rights Law claims as required by the Restoration Act of 2005 and reflected in *Cardenas*.[5]

Applying the NYCHRL standard set forth in *Cardenas*, the Commission nevertheless agrees with Judge Addison's finding that Petitioner did not prove that Complainant was subjected to a constructive discharge by a preponderance of the evidence. Although Ms. Marquez faced a hostile environment, the evidence does not establish a direct causal link between Complainant's departure and the hostile behavior. The final conversation between Complainant and her supervisor involved Complainant calling out last-minute for a shift she was scheduled to work, which the supervisor responded to with an immediate offer to take more time off. While the Commission agrees with the R & R's conclusion that Ms. Marquez's claim of unlawful constructive discharge was not proven at trial, the Commission does so on the basis of the NYCHRL standard for constructive discharge claims, articulated in *Cardenas*.

e. Negative Inference

While ultimately finding for the Petitioner on claims of gender-based harassment, Judge Addison granted a negative inference against Petitioner based on Petitioner's failure to call two former Fresh employees as witnesses. The former employees, Yaritza Muniz and Manuela Lawrence, texted with Marquez in the month after she departed Fresh and less than a month before the filing of the instant complaint. The Commission rejects the R & R's finding that a negative inference is appropriate in this matter. Respondent's request was made for the first time in its closing brief, which Judge Addison set for simultaneous submission with Petitioner's closing brief. As a result, Petitioner did not have sufficient notice or opportunity to address Respondent's request.

In some circumstances, negative inferences regarding missing witnesses are appropriate to resolve evidentiary issues that arise when one party believes that the opposing party failed to call a witness with testimony relevant to the proceedings; but such circumstances are not present here. The New York Court of Appeals case, *People v. Gonzalez*, 68 N.Y.2d 424 (N.Y. 1986), is

[5] *See* https://www.nyc.gov/assets/cchr/downloads/pdf/amendments/amend2005.pdf, and N.Y.C. Admin. Code § 8-130.

instructive. The *Gonzalez* Court explained that a party seeking a negative inference regarding the testimony of an uncalled witness has the initial burden "to *promptly* notify the court that there is an uncalled witness believed to be knowledgeable about a material issue in the pending case, that such witness can be expected to testify favorably to the opposing party and that such party has failed to call [the witness] to testify." *Id.* at 427 (emphasis added). The Court elaborated that a request for a negative inference must be made as soon as practicable after learning that the opposing party does not intend to call the witness in question. *Id*. at 428. The Court of Appeals explained that, "once the party seeking the charge has established *prima facie* that an uncalled witness is knowledgeable about a pending material issue and that such witness would be expected to testify favorably to the opposing party, it becomes incumbent upon the opposing party, in order to defeat the requested charge, to account for the witness' absence or otherwise demonstrate that the charge would not be appropriate." *Id*. Ultimately, inference requests must be discussed clearly on the record "in order to allow for effective judicial review." *Id*.

In this matter Respondent did not timely make its request for a negative inference. Respondent was aware that Petitioner would not call Muniz or Lawrence to testify when Petitioner ended its case without doing so, if not earlier. Consistent with *Gonzalez*, a request could have been made after Petitioner rested its case, or during Respondent's presentation of its case, or at the close of trial, when the scheduling for closing briefs was set. Respondent failed to do so at any of these points. Judge Addison, though, posits that Respondent's cross-examination of Ms. Marquez on the whereabouts of Muniz and Lawrence constitutes sufficient notice of their intent to seek a negative inference charge for these witnesses. (R & R at 24-25). The Commission finds that this does not constitute proper notice as it was not "as soon as practicable," was not on the trial record, and there was insufficient opportunity for Petitioner to oppose the request for a negative inference.[6]

In support of its negative inference request, Respondent cites two cases. Both are inapposite. In *Adam K. v. Iverson,* 970 N.Y.S. 297 (2nd Dept. 2013) and *IA2 Service, LLP v. Quinipanta*, 117 N.Y.S. 3d 451 (Civ. Ct. 2019), negative inferences were granted *sua sponte* against a party that had demonstrable control over the witnesses that did not participate in the proceeding. The appellate court affirmed the negative inference in *Adam K.*, where a psychiatric facility declined to have the treating psychiatrist - a current, full-time employee - testify in the facility's case seeking the ability to administer antipsychotic drugs to a patient over their objection. The inference allowed the Court to determine that the missing witnesses' testimony would be unfavorable to the institution. *Id*. The second case, *Quinipanta*, involves a negative

[6] Even if Respondent became aware of a missing witness later in the proceedings, it still could have requested a negative inference in a manner that allowed Petitioner to offer its position on the request. As an instructive example of a party making a timely negative inference request regarding a missing witness, the Commission looks to the trial record underlying the Commission's *Cazares* decision. In *Cazares,* the Bureau requested a negative witness inference at the close of trial after the individual respondent in that matter, who indicated that he would testify at trial, ultimately did not. (*See Cazares* at 16 and *Cazares* Tr. at 373 - 74) The judge presiding over the *Cazares* proceedings was then able to discuss the negative inference request with both parties present and set forth a staggered schedule for the parties to submit their closing briefs so that both sides were afforded an opportunity to set forth their positions regarding the request. The example in *Cazares* is one way, but not the only available means, to ensure all parties have notice of and opportunity to discuss a request for a negative inference.

inference against the petitioner regarding a witness who had provided a written statement in support of the petitioner, and for whom respondents produced an audio recording that included subsequent verbal statements inconsistent with the written statement. The Court in *Quinipanta* imputed control over the witness to the petitioner, on the basis that they were previously able to locate the witness to obtain his affidavit but failed to call him as a witness. *Id.*

The Commission finds that *Adam K.* and *Quinipanta* are distinguishable from the instant matter. Respondent made no showing that Muniz and Lawrence were under Petitioner's control at the time of the trial or investigation, and the record does not demonstrate otherwise. In *Adam K.,* the missing witness was a current employee of the party against whom the inference was applied and the treating physician of the individual the facility sought to treat over their objection. In *Quinipanta*, the witness had been under the control of the party against whom the inference was sought. In addition, the witness at issue in *Quinipanta* provided a written statement in favor of the party against whom the inference was being sought at an earlier part of the litigation, thus helping that party succeed at that stage of litigation, but the witness later made a statement inconsistent with the earlier written statement, cutting against the party against whom the inference was being sought. Unique circumstances such as these, which lent support to the negative inferences granted *sua sponte* in *Adam K.* and *Quinipanta*, are not present here, as neither Muniz nor Lawrence were in an employment relationship with Marquez, and the record indicates neither individual had provided statements to Petitioner or Complainant at any time during the pendency of the litigation. Nor did these individuals proffer any contradictory statement - or any statement at all. While the Commission declines to adopt the negative inference, the ultimate findings of liability would not be impacted if the inference was granted against Petitioner.

As set forth above, the Commission adopts the R & R's finding that Petitioner proved by a preponderance of the evidence that Respondent discriminated against Ms. Marquez by subjecting her to a hostile work environment due to gender-based harassment, in violation of the NYCHRL.

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 take actions that effectuate the purposes of the Law. N.Y.C. Admin. Code § 8-120(a). The Commission may also award damages to complaints, *see id.* § 8-120(a), 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*, No. 162211/2015, 2019 WL 1475080 (Sup. Ct. NY. Cty. Feb. 28, 2019) (upholding $250,000.00 civil penalty issued by Commission upon a finding that respondent engaged in willful and wanton sexual harassment over a three-year period).

a. Ms. Marquez Is Entitled to $45,000 in Emotional Distress Damages

Compensatory damages, including emotional distress damages, are intended to redress a specific loss that a complainant suffered due to 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 *67 (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.*, 2019 WL 1475080, 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 R & R proposes an emotional damages award of $30,000. Petitioner asks the Commission to adopt the R & R's proposed award of $30,000. Counsel for Ms. Marquez seeks an award of $60,000. For the reasons set forth below, the Commission determines that Ms. Marquez is entitled to an emotional distress damages award of $45,000.

The Commission agrees with Judge Addison that Ms. Marquez is entitled to emotional distress damages. (R & R at 30). As the R & R states, the record in this case shows that Ms. Marquez experienced emotional distress as she endured Tsering's behavior and remarks, and added distress due to Haque's failure to take action after Ms. Marquez told Haque about Tsering's discriminatory, harassing behavior.

Ms. Marquez testified that her experience at Fresh made her feel disgusted, betrayed, annoyed, angry, and depressed. (Tr. 64). According to the record and Marquez's testimony, the harassment she experienced occurred for two months. Given the complainant's testimony and text exchange with a former co-worker, Muniz, Judge Addison recommended an award of $30,000.00. (R & R at 30). Judge Addison found that the remarks made by Tsering to Marquez were sufficient to cause distress. (R & R at 30). Ray Warren, Complainant's boyfriend since 2014, described Ms. Marquez as "loving, kind, affectionate, outgoing, a great mom" (Tr. 210). While Ms. Marquez suffered real distress because of Respondent's discriminatory actions, the mental anguish established in the case law cited by Complainant does not support the $60,000 Complainant requested. Complainant's testimony regarding the suffering she experienced as a result of the harassment at Fresh, the record, and comparable case law do, however, support a

damages award higher than the $30,000 recommended by Judge Addison. Taking into consideration all the evidence and relevant case law, the Commission determines that Ms. Marquez is entitled to $45,000 for her mental anguish.

i. Nature of the Violation

For two (2) months of her employment, approximately half of the time she worked at Fresh, Ms. Marquez experienced discriminatory and harassing behavior based on her gender from an assistant manager, Tsering. (Tr. at 57-60; 108) Tsering subjected her to this behavior regularly, between two to three times per week. (Tr. at 63). Complainant's testimony detailed how Tsering made unwanted comments to Complainant about her body, unwelcome comments about being in a relationship with her, made unwanted physical contact with her, and indicated that he would smack her on the buttocks with his spatula. (Tr. 57-61). Complainant further testified that the store's general manager at that time, Ms. Haque, did nothing to stop Tsering's behavior, despite Complainant approaching Ms. Haque multiple times to request her help to stop the harassment Complainant was enduring. (Tr. at 61-65).

Respondent's managerial employee subjected Complainant to regular, discriminatory comments and actions based on Complainant's gender, and the general manager of the Fresh location failed to take action to address the discrimination Complainant faced, violating the NYCHRL and weighing in favor of a $45,000 emotional distress damages award.

ii. Amount of Harm

Complainant testified extensively about the harm she experienced due to Respondent's unlawful discrimination. Complainant described feeling disgusted, betrayed, annoyed, and angry while she was being harassed at Fresh. (Tr. at 64). Ms. Marquez explained that she was depressed because she had to work to earn money to support herself and her daughter, all while regularly experiencing sexual harassment from a manager at her workplace. (Tr. at 64 - 65). This resulted in Ms. Marquez crying multiple times a week at home because the harassment made her feel like she needed a new job, but continuing to work at Fresh was financially necessary. (Tr. at 85 – 86). Ms. Marquez also testified that she experienced anxiety due to Haque's repeated failure to take action to stop Tsering's harassment. (Tr. at 65). Complainant further testified about the lasting emotional damage that resulted from Respondent's discrimination, including becoming less trusting of men. Ms. Marquez explained that she continued to regularly cry after she quit her job with Fresh and years after she endured workplace gender-based harassment at Fresh, she testified that she still cried over the discrimination she experienced. (Tr. at 86). Ms. Marquez recounted how, in November or December of 2016, she turned down a job out of concern that she might experience further sexual harassment. (Tr. at 77-78; 138). The psychological and emotional harm Ms. Marquez suffered, which caused her to turn down a job and impacted her work and personal life, further support a $45,000.00 emotional distress damages award.

iii. Awards for Similar Harms

A review of prior cases sounding in gender-based discrimination supports an emotional damages award of $45,000.00 for the mental anguish and harm that Ms. Marquez experienced.

As noted in the R & R, two (2) prior Commission D & O's concerning gender-based harassment in employment, *Cardenas* and *Fernandez*, involving damage awards of $200,000 and $275,000, respectively, are distinguishable from the present matter. Both *Cardenas* and *Fernandez* involve persistent workplace harassment that occurred over long periods of time. In both cases, the impacted employees provided evidence of long-lasting, substantial psychological and physical impacts. In *Cardenas* and *Fernandez*, the substantial damages awards reflect testimonial or documentary evidence that the sexual harassment they endured manifested in emotional distress substantial enough that they sought and received medical diagnoses and treatment to ameliorate the impacts of the discrimination.

Additionally, Complainant's comments to the Chair cite another gender-based discrimination Commission decision, *Comm'n on Human Rights ex rel. Desir v. Empire State Realty Mgmt., LLC*, in support of their request for a $60,000 emotional distress damages award. (OATH Index No. 1253/19, Comm'n Dec. & Order, 2020 WL 1234455 (March 2, 2020). This case is also distinguishable. In this housing discrimination matter, the Commission awarded $50,000 in emotional distress damages, which, adjusted for inflation, amounts to approximately $62,918 in present-day value.[7] *Desir* at *10. The complainant in *Desir,* a transgender woman, testified to severe emotional distress that caused her to question her transition, and contributed to suicidal ideation. *Id*. at *9. These three cited Commission decisions are distinguishable from the instant matter.

In its assessment, the Commission also has considered a decision involving gender-based harassment in employment with a lower damages award, *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 (Sep. 29, 2017)). In *Martinez,* the Complainant endured gender-based harassment for several days and described feeling significant emotional distress for a short period of time thereafter. Complainant was awarded an emotional distress damages award of $12,000, which adjusted for inflation amounts to approximately $15,791 in present-day value.[8] This matter is instructive, but also distinguishable.

Recent settlements by the United States Equal Employment Opportunity Commission ("EEOC") provide support for the Commission's $45,000 emotional distress damages award. *See e.g.,* Press Release, U.S. Equal Emp. Opp. Comm'n., Doubletree Hotel to Pay $45,000 and Change Policies and Procedures to Settle Sexual Harassment Lawsuit (Aug. 05, 2020) (EEOC sexual harassment case involving a hotel's employees — where management and hotel owner were aware of the harassment and failed to act — settled for $45,000 and required changes to

[7] The $62,918 amount is based on the United States Bureau of Labor Statistics' Consumer Price Index calculator, using the period from the month and year in which *Desir* was published, March 2020, through the most recent month available in the calculator September 2025, https://www.bls.gov/data/inflation_calculator.htm. *See Secor v. City of N.Y.*, 13 Misc. 3d 1220(A) (Sup. Ct. N.Y. Cnty. October 3, 2006)(considering the amount of inflation in assessing reasonable of Commission award for mental anguish).

[8] The $15,791 amount is based on the United States Bureau of Labor Statistics' Consumer Price Index calculator, using the period from the month and year in which *Martinez* was published, November 2020, through the most recent month available in the calculator September 2025, https://www.bls.gov/data/inflation_calculator.htm. *See Secor v. City of N.Y.*, 2006 WL 2918060 (Sup. Ct. N.Y. Cnty. October 3, 2006)(considering the amount of inflation in assessing reasonable of Commission award for mental anguish).

policies and procedures); Press Release, U.S. Equal Emp. Opp. Comm'n., Wall Street Grill to Pay $45,000 in EEOC Sexual Harassment Lawsuit (Apr. 24, 2025)(EEOC case involving allegations that restaurant managers and employees harassed a pastry cook by making sexual overtures, verbally abusing the cook, and subjecting the cook to unwanted physical contact settled for $45,000 and required the creation of anti-discrimination policies and meaningful complaint procedures).[9]

The discrimination and harassment that Ms. Marquez endured and the emotional distress impacts she and other witnesses testified to occurred for months of her employment, and they continued on to influence her job search and her interactions outside of work. The length of the impacts and their severity merit an emotional distress damages award of $45,000. Ms. Marquez, for a period of two (2) to three (3) months, endured regular and persistent sexual harassment by a managerial employee of Respondent in the form of unwelcome comments, prolonged and lascivious stares, at least one occasion where the manager made unwanted physical contact with Complainant, and another occasion where he threatened Ms. Marquez with unwanted physical contact. Ms. Marquez attempted to stop the harassment by telling Tsering directly and by telling another supervisor about Tsering's unwanted conduct, but Tsering persisted and the other manager did not take steps to stop it. This prolonged period of emotional distress manifested in a range of negative emotions, impacted her relationship with her child and her partner, and made her wary of men in the workplace.

For the reasons stated, the Commission adopts the R & R's recommendation to award emotional distress damages to Ms. Marquez but modifies the amount of the award, and orders Respondent to pay Ms. Marquez $45,000.00 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 the Commission with discretion to impose such civil penalties up to $125,000 per violation and $250,000 where the Commission determines that the 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 a $250,000.00 civil penalty issued by the Commission under the NYCHRL upon a finding that respondent engaged in willful and wanton sexual harassment over a three-year period). Factors relevant to a civil penalty determination include, but are not limited to, 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 ex rel. Joo v. UBM Building Maintenance Inc.,* OATH Index No. 384/16, Comm'n Dec. & Order, 2018 WL 6978286, at *10; *Comm'n on Human Rights v. A Nanny on the Net*, OATH Index Nos. 1364/14 & 1365/14, Comm'n Dec. & Order, 2017 WL 694027, at *8 (Feb. 10, 2017); *Comm'n on Human Rights v. CU 29 Copper Rest. & Bar*, OATH Index No. 647/15, Comm'n Dec. 7 Order, 2015 WL 7260570, at *4 (Oct. 28, 2015); *Cardenas*, 2015 WL 7260567, at *2;

[9] EEOC Press Releases, *available at* https://www.eeoc.gov/newsroom/doubletree-hotel-pay-45000-and-change-policies-and-procedures-settle-sexual-harassment; https://www.eeoc.gov/newsroom/wall-street-grill-pay-45000-eeoc-sexual-harassment-lawsuit.

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).

Judge Addison proposes a civil penalty amount of $60,000 in the R & R. (R & R at 2, 33). In separate comments, the Bureau and counsel for Ms. Marquez request that the Commission adopt this $60,000 civil penalty. (Bureau Comments at 1, 4; Marquez Comments at 1.) The Respondent's comments request that the Commission reject the recommended civil penalty because Respondent has not previously been found to have engaged in unlawful discrimination, and it maintains compliant policies and trainings. (Respondent Comments at 11). For the reasons set forth below, the Commission adopts the R & R's recommendation and orders Respondent to pay $60,000 in civil penalties.

Respondent argues that it should not be subjected to a civil penalty because it has not previously been found liable for unlawful discrimination, it has compliant anti-discrimination and harassment policies, and it conducts trainings on these topics for staff. *Id*. Respondent's arguments are unavailing. First, a total elimination of the civil penalty is unwarranted, as the Bureau met its burden of proving that Respondent violated Ms. Marquez's rights under the NYCHRL by permitting a hostile work environment. The $60,000 civil penalty reflects a fact-specific and measured consideration of the totality of the circumstances, as set forth in the proceeding paragraphs, and falls well below the maximum civil penalty authorized by the statute. *See* N.Y.C. Admin. Code § 8-126(a). Second, although the NYCHRL does permit respondents to plead and prove that they have taken certain measures that may warrant mitigation of a civil penalty, which include the establishment of policies and the lack of prior discriminatory conduct by employees, the NYCHRL also looks to, *inter alia*, whether respondents had "a meaningful and responsive procedure for investigating complaints . . . and for taking appropriate action against those persons who are found to have engaged in such practices," and that respondent's policies were "effectively communicated to its employees." N.Y.C. Admin. Code §§ 8-107(13)(d)-(e); *see also CU29 Copper*, 2015 WL 7260570, at *4. Here, although Respondent demonstrated that it had a policy with some procedures written down, the trial record showed a deficient internal investigation that focused on the reporting employee's work performance, rather than the alleged harasser's actions. (*See* Pet. Exs. 11 and 12; Tr. at 394-99, 464-65). In addition, conflicting testimony from various employees revealed uncertainty about when the policy was distributed, how the policy was distributed, and basic procedures about who at Fresh an employee experiencing harassment should report to. (*See* Pet. Ex. 19; Tr. at 46-47, 267-68, 274, 283-84, 348-49, 366-68, 383-86). Respondent did not show that it clearly communicated policies to employees, or that its policies resulted in adequate investigations of complaints and appropriate resulting action. Thus, mitigation of penalties on this basis would not be appropriate in this matter. The Commission has considered Respondent's arguments as well as the trial record and concludes that, although authorized to impose a civil penalty of up to $125,000 based on the facts of the instant matter, a $60,000 civil penalty is appropriate. *See* N.Y.C. Admin. Code §§ 8-107(13), 8-126.

Furthermore, the egregiousness of the violations in the instant case supports the $60,000 penalty assessment. This case concerns gender-based discrimination of an employee by a supervisor, in the form of repeated unwelcome comments and an incident of non-consensual

touching, incidents that took place for over two (2) months. The magnitude of the violation is compounded by the fact that another supervisor repeatedly was made aware of the ongoing harassment, yet she took no steps to respond to or investigate the discrimination. These factors also weigh in favor of the Commission's $60,000 civil penalty assessment.

The Commission looks at a variety of factors when determining whether a civil penalty is appropriate in a specific matter. *See, e.g. Nanny*, 2017 WL 694027 at *7-*10. While analysis of these factors can contribute to a reduced penalty, the Commission's review of these factors as applied to the instant case supports a $60,000 civil penalty. For example, employer size is a factor that can impact a civil penalty assessment. *Id.* at *8. However, Respondent here has a sizable operation, with at least eight (8) locations in Manhattan (R & R at 32), and employs hundreds of individuals. (Respondent Comments at 11; Pet. Ex. 18). Thus, Respondent's size does not weigh in favor of reducing the civil penalty amount. Additionally, Respondents are permitted to plead and prove financial hardship to seek mitigation of a civil penalty. *See Cardenas,* 2015 WL 7260567, at *15. Respondent did not assert or offer proof that any civil penalty imposition should be reduced due to financial hardship, which further supports the Commission's adoption of the R & R's civil penalty recommendation.

The Commission adopts the R & R's recommendation regarding civil penalties in this matter, and the Commission finds that Respondents are liable for a $60,000 civil penalty.

c. Affirmative Relief

The NYCHRL authorizes the Commission to require affirmative measures, including *inter alia* trainings and policy changes, 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. The R & R recommended a number of actions aimed at preventing future gender-based harassment and hostile work environment. Accordingly, the Commission adopts Judge Addison's recommendation and orders Respondent to:

1. Require its employees at all of its New York City locations attend the Commission's free Human Rights Law Overview training.
2. Create new, effective anti-discrimination and anti-sexual harassment policies that are reviewed and approved by the Commission, implement the approved policies, and distribute the approved policies to all current and future employees at all of Respondent's New York City locations.
3. Create an effective process to monitor oral and written reports of harassment.
4. Post the Commission's Notice of Rights poster and Anti-Sexual Harassment Notice, informing employees and customers of their rights under the NYCHRL, in all of Respondent's New York City locations.

VI. CONCLUSION

FOR THE REASONS DISCUSSED HEREIN, IT IS HEREBY ORDERED that no later than thirty (30) calendar days after service of this Order, Respondents pay Complainant Marquez a total of $45,000.00 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 Brehshiek Marquez including a written reference to OATH Index No. 434/22.

IT IS FURTHER ORDERED that no later than sixty (60) calendar days after service of this Order, Respondents pay a fine of $60,000.00 to the New York City Department of Finance, 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. 434/22.

IT IS FURTHER ORDERED that no later than sixty (60) calendar days after service of this Order, Respondent's staff in all New York City locations that are currently operating as of the date of this decision, must participate in the Commission's free "Human Rights Law Overview" training. The trainings can be arranged by emailing trainings@cchr.nyc.gov.

IT IS FURTHER ORDERED that no later than sixty (60) calendar days after service of this Order, Respondents shall create or update and submit for Commission review and approval, written anti-discrimination and anti-gender-based harassment policies that outline the rights of Respondents' employees in NYC and informs employees of the ability to file complaints with the Commission. Once approved, the policy shall be circulated to all current Fresh employees at its New York City locations, and Respondent shall thereafter distribute the anti-discrimination and anti-gender-based harassment policies to all current and future employees. Respondent shall provide the draft and final policies to the Commission's General Counsel via electronic mail to: cchrgeneralcounsel@cchr.nyc.gov, and reference "*CCHR ex rel. Marquez v. Fresh & Co.,* OATH Index No. 434/22."

IT IS FURTHER ORDERED that, for a three-year period, Respondent shall submit to the Commission's General Counsel/Office of the Chair, an annual written summary containing each oral and written report of gender-based harassment Respondent received in the prior calendar year at its New York City locations. The first report is due January 15, 2026. The second report is due January 15, 2027, and the third report is due January 15, 2028. The annual summary shall be e-mailed to the Commission's General Counsel via electronic mail to: cchrgeneralcounsel@cchr.nyc.gov, and reference "*CCHR ex rel. Marquez v. Fresh & Co.,* OATH Index No. 434/22."

IT IS FURTHER ORDERED, that no later than thirty (30) calendar days after service of this Order, Respondent shall post the "Notice of Rights Poster" and the legally required notices about the NYCHRL's prohibitions on sexual harassment at all of its all New York City locations that are currently operating as of the date of this decision, available here, https://www.nyc.gov/site/cchr/law/legal-resources.page, on 11 x 17 paper in a conspicuous location where it will be visible to both employees and members of the public.

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

October 30, 2025

SO ORDERED:
New York City Commission on Human Rights

Annabel Palma
Commissioner/Chair