CITY OF NEW YORK
COMMISSION ON HUMAN RIGHTS

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In the Matter of

COMMISSION ON HUMAN RIGHTS
ex rel. VALERIE MARTINEZ,

Petitioner,

-against-

JOSEPH "J.P." MUSSO HOME IMPROVEMENT and JOSEPH "J.P." MUSSO,

Respondents.

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Complaint No. M-E-S-14-1029013-E
Federal Charge No. 16F-2014-00052C
OATH Index No. 2167/14

DECISION AND ORDER

On October 31, 2013, Complainant Valerie Martinez filed a verified complaint ("Complaint") with the Law Enforcement Bureau of the New York City Commission on Human Rights ("Bureau"), alleging that her former employers, Respondents Joseph "J.P." Musso Home Improvement ("Musso Home Improvement") and Joseph "J.P." Musso ("Respondent Musso" or "Mr. Musso") (collectively, "Respondents"), sexually harassed her and then fired her in retaliation for complaining about the harassment. (Bureau Ex. 1, Compl.) The Bureau asserts claims against Respondents under §§ 8-107(1)(a) and 8-107(7) of the New York City Human Rights Law ("NYCHRL"), codified as N.Y.C. Admin. Code tit. 8. (*Id.* at ¶¶ 12-13.)

Respondents did not submit an answer to the Complaint or otherwise cooperate with the Bureau's efforts to investigate the case. (*See* Bureau Ex. 10(B)-(C).) On April 9, 2014, the Bureau issued a finding of probable cause against Respondents and referred the matter to the Office of Administrative Trials and Hearings ("OATH") for a hearing. (*Id.* at Ex. 4.) On June 2, 2014, OATH held a settlement conference at which Respondents did not appear. *In re Comm'n*

on Human Rights ex rel. Martinez v. Joseph "J.P." Musso Home Improvements, OATH Index No. 2167/14, Report & Recommendation ("R&R"), 2015 WL 992697, at *1 (Feb. 27, 2015). A hearing was scheduled for August 12, 2014 and was initially adjourned to October 20, 2014 to accommodate Complainant's schedule, then adjourned again to November 25, 2014 after Respondents failed to appear on the scheduled date in October. *Id.* The hearing was finally held on November 25, 2014, but Respondents once again failed to appear. *Id.*

At the hearing, the Bureau presented evidence that it had served Respondents with copies of: (1) the Complaint on November 11, 2013; (2) a letter dated December 31, 2013, reminding Respondents of the need to respond to the Complaint; (3) a letter dated February 6, 2014, that again reminded Respondents of the need to respond to the Complaint and noted that a Bureau attorney had left voicemail messages for Respondent Musso on February 5, 2014 and February 6, 2014; (4) a notice of probable cause, served on April 9, 2014; (5) a notice of referral to OATH, served on April 16, 2014; (6) a notice of conference scheduled for June 2, 2014, which was served on May 8, 2014; (7) a notice of trial scheduled for August 12, 2014, which was served on June 9, 2014; (8) a notice of trial adjournment, which rescheduled the trial for October 20, 2014 and was served on August 7, 2014; and (9) a second notice of trial adjournment, which rescheduled the trial for November 25, 2014 and was served on October 22, 2014. (Bureau Exs. 1-9A; *see also id.* at Ex. 10.) After reviewing the Bureau's evidence of service on Respondents, Administrative Law Judge Kevin Casey found Respondents in default and proceeded with the hearing as an inquest. (Hearing Tr. ("Tr.") at 8:1-9.)

On February 27, 2015, Judge Casey issued his report and recommendation ("Report and Recommendation"), recommending that the Office of the Chair of the New York City Commission on Human Rights ("the Commission") hold that Respondents violated § 8-107(1)(a)

and § 8-107(7) of the NYCHRL. *Martinez*, 2015 WL 992697, at *3. Judge Casey recommended an award to Ms. Martinez of $17,020.00 plus interest for lost wages and $10,000.00 for emotional distress damages, civil penalties of $10,000.00, and an order requiring that Respondents attend anti-discrimination training. *Id.* at *6.

The parties had the right to submit written comments and objections to the Report and Recommendation within 20 days after the Commission commenced consideration thereof. *See* 47 RCNY § 1-76. The Bureau submitted written comments on April 10, 2015, asking the Commission to adopt Judge Casey's recommendation with respect to liability, the award of back pay, and the requirement that Respondents undergo anti-discrimination training, but requested that the Commission increase Complainant's emotional distress damages to $15,000.00 and increase the civil penalties to $20,000.00. (Bureau Comments at 2.) Respondents did not submit written comments.

On April 28, 2017, the Commission ordered the Bureau to submit a supplemental filing concerning Complainant's claim for back pay damages for the period subsequent to the November 25, 2014 hearing. The deadline for the Bureau's submission was May 30, 2017 and the deadline for Respondents' opposition was June 13, 2017. On May 19, 2017, the Bureau submitted a declaration from Complainant concerning her post-hearing earnings, accompanied by supporting evidence, and served a copy of it on Respondents. Respondents did not file a response to the Bureau's supplemental filing.

After reviewing the Report and Recommendation, the hearing transcript, the evidence admitted during the hearing, the Bureau's post-trial brief, the Bureau's comments to the Report and Recommendation, and the Bureau's May 19, 2017 supplemental filing, the Commission adopts the Report and Recommendation with respect to Respondents' liability and orders that

Respondents pay Complainant $22,277.89 in back pay, $4,170.42 in pre-determination interest, and $12,000.00 in emotional distress damages; pay a civil penalty of $18,000.00; undergo anti-discrimination training; and post a notice of rights at all of Respondents' work sites in the City of New York.

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 assessments to be made by a factfinder. *In re Comm'n on Human Rights ex rel. Agosto v. Am. Constr. Assocs.*, 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. Therefore, the Commission has the final authority to determine "whether there are sufficient facts in the record to support the Administrative Law Judge's decision, and whether the Administrative Law Judge correctly applied the New York City Human Rights Law to the facts." *N.Y.C. Comm'n on Human Rights v. Ancient Order of Hibernians in Am., Inc.*, Compl. No. MPA-0362, Dec. & Order, 1992 WL 814982, at *1 (Oct. 27, 1992); *see also In re Cutri v. N.Y.C. Comm'n on Human Rights*, 113 A.D.3d 608, 609 (2d Dep't 2014) ("As the Commission bears responsibility for rendering the

ultimate determination, it was not required to adopt the recommendation of the Administrative Law Judge assigned to the proceeding . . ."); *In re Orlic v. Gatling*, 44 A.D.3d 955, 957 (2d Dep't 2007) ("it is the Commission, not the Administrative Law Judge, that bears responsibility for rendering the ultimate factual determinations").

When parties submit comments, replies, or objections to a report and recommendation pursuant to 47 RCNY § 1-76, the Commission must review the comments, replies, or objections in the context of the Commission's other factual determinations and conclusions of law. 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. Stamm v. E&E Bagels*, OATH Index No. 803/14, Dec. & Order, 2016 WL 1644879, at *2 (Apr. 20, 2016); *In re Comm'n on Human Rights ex rel. Howe v. Best Apartments, Inc.*, OATH Index No. 2602/14, 2016 WL 1050864, at *3 (Mar. 14, 2016); *In re Comm'n on Human Rights v. CU 29 Copper Rest. & Bar*, OATH Index No. 647/15, Dec. & Order, 2015 WL 7260570, at *2 (Oct. 28, 2015).

II. THE EVIDENTIARY RECORD

For purposes of this Decision and Order, knowledge of the facts described in the Report and Recommendation is generally assumed. During the hearing, the Bureau took testimony from Ms. Martinez and Natalie Bryan, a program director for the Goodwill Jobs Plus Program ("Jobs Plus"), who assisted Ms. Martinez in obtaining a job with Respondents. (*See* Tr. at 30:14-31:15.)

Ms. Martinez testified that, in late July 2013, she learned through Ms. Bryan at Jobs Plus of a job cleaning construction sites for Respondents. (*Id.* at 15:2-16, 17:9-10.) During the job interview, Respondent Musso advised Ms. Martinez that the position would involve cleaning construction sites and babysitting for him on the side. (*Id.* at 17:14-16.) The same day as the

interview, Respondent Musso called Ms. Martinez to offer her the job and told her to report for work the next morning at 7:30 a.m. (*Id.* at 17:18-19.) The job paid $10.00 per hour. (*Id.* at 18:12.)

On her first day of work, July 25, 2013, Ms. Martinez babysat Respondent Musso's daughter for about seven or eight hours. (*Id.* at 17:22, 18:6-10.) The following day, she worked cleaning a construction site for seven hours and, on her third day, July 29, 2013, she again babysat for seven hours. (*Id.* at 18:16-19:1, 19:6-9.) On July 30, 2013, Ms. Martinez babysat Respondent Musso's daughter and his daughter's friend, as well as Ms. Martinez's son, who she brought with her to work. (*Id.* at 19:10-17.) At the end of the day, Respondent Musso took Ms. Martinez and the children to eat and then on a boat ride. (*See id.* at 19:17-20:17.) After the meal, Respondent Musso commented to Ms. Martinez, in sum and substance, "since I'm feeding you so much you're getting fat," and attempted to touch her belly. (*Id.* at 21:7-12.) Ms. Martinez put her arms around her stomach to block him, but she tried to remain respectful out of fear of losing her job. (*Id.* at 21:11-14.) Respondent Musso suggested to her that she go out with him on weekends and he would buy her clothes, making specific mention of the lingerie store Victoria's Secret. (*See id.* at 21:19-23.) To avoid provoking him further, Ms. Martinez did not respond. (*Id.* at 21:22-23:5.)

Respondent Musso told Ms. Martinez that he did not need her to work on July 31 or August 1, 2013. (*Id.* at 25:4-7.) On August 2, 2013, Ms. Martinez texted him to ask if she could get paid and they agreed to meet at a bus stop so she could pick up her earned wages. (*See id.* at 22:12-16.) After Ms. Martinez received her pay and departed the bus stop, she received a text message from Respondent Musso stating "How come u dont look that good when u come 2 work?" (*Id.* at 22:15-22; Bureau Ex. 11.) Ms. Martinez testified that she had been dressed more

casually on that day, in tights, a tank top, and a sweater, as opposed to her usual work attire of jeans and a short-sleeved sweater. (Tr. at 25:11-25.) The conversation continued by text message, as follows:

> Ms. Martinez: "That's inappropriate I am your employee and I don't want to feel uncomfortable working for you. I believe it's best to stay professional."
>
> Respondent Musso: "Ok. Ur fired."
>
> Ms. Martinez: "Are you serious? So I take it you don't need me tomorrow anymore."
>
> Respondent Musso: "I never needed u 2 work. [I] just made work 4 u. If u call what u were getting paid 4 work."
>
> Ms. Martinez: "I went to you with the understanding that it would be a cleaning job[.] I'm not a stranger to hard work if you changed the job description that had nothing to do with my ability and everything to do with your intentions on what you thought [I] was willing to do for you and not the job itself."
>
> Respondent Musso: "Very well said. Ur a very nice perso[n] anyone who spends time around u will start to like u."
>
> Ms. Martinez: "Understood but liking a person is very different than being inappropriate[.] [I] thought you would have understood my having to let you know that [I] was uncomfortable."
>
> Respondent Musso: "Now u don't have 2 worry about being uncomfortable anymore."

(Bureau Ex. 11, photos of text message exchange.) At the hearing, Ms. Bryan corroborated Ms. Martinez's account, testifying that Ms. Martinez visited sometime after starting her job with Respondents and was very upset because she had received sexually harassing text messages from Respondent Musso. (*See* Tr. at 34:2-7.)

Ms. Martinez testified that her interactions with Mr. Musso left her feeling "hurt and shocked and disappointed." (*Id.* at 26:1-3.) After being fired, she was unemployed for about

three or four months. (*Id.* at 27:7-9.) Because she had been the sole income earner in her household, the financial stress of providing for her two children and being able to afford essentials, such as diapers, caused her to lose weight and fight more with her children's father. (*Id.* at 26:7-21.)

Ms. Martinez attests that she consistently sought work during her intermittent periods of unemployment after she was fired by Mr. Musso. (*See* Martinez Decl. dated May 19, 2017 at ¶¶ 3, 4, 7, 10, 13.) After her initial period of unemployment, Ms. Martinez secured a government subsidy for childcare work for a period of about five months at a rate of between $400.00 and $600.00 per month. (*See id.* at 27:11-28:4.) Assuming an average of $500.00 per month over that five-month period, she earned a total of approximately $2,500.00. She subsequently found a position in retail at Marshalls, where she worked three to four days each week over a five-month period, for approximately four to five hours a day at a rate of $8.25 an hour. (*Id.* at 28:7-20.) Her total earnings in that position were approximately $2,887.50. Ms. Martinez's next job was at a supermarket, where she worked from April to August 2015, earning a total of $3,886.61. (Martinez Decl. dated May 19, 2017 at ¶¶ 4-5.) In or around September 2015, she moved to North Carolina. (*Id.* at ¶ 6.) She briefly worked at a Dollar Tree Store, earning a total of $269.87, but was forced to resign because the hourly wage of $7.25 and limited hours of six to eight hours per week were insufficient to meet her financial needs. (*Id.* at ¶ 8.) Between January and June 2016, Ms. Martinez worked as a temporary employee for the Durham County Department of Social Services, earning a total of $10,594.43. (*Id.* at ¶ 9.) Then, from September 2016 to February 2017, Ms. Martinez worked at a movie theater earning $8.00 per hour for six hours per day, four days a week. (*Id.* at ¶¶ 11-12.) She was forced to leave the job in February 2017 when her hours were cut to one day per week. (*Id.* at ¶ 12.) In total, she earned $4,623.70 at the movie

theater. (*See id.* at Exs. D & E.)[1] On May 8, 2017, Ms. Martinez started working at a liquor store for 40 hours per week at $14.00 per hour. (*Id.* at ¶ 13.) Ms. Martinez provided W2 statements, in addition to her affidavit, from April 2015 to the present. (*Id.* at Exs. A-E.)

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); *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").

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[1] While Ms. Martinez's declaration states that she earned a total of $815.20 at the movie theatre in 2017, her paystubs indicate gross earnings of $1,266.00. (*Compare* Martinez Decl. dated May 19, 2017 at ¶ 12 *with id.* at Ex. E.) In total, her W2 statement for 2016 and her paystubs for 2017 suggest that she earned $4,623.70 gross from the movie theatre. (*See id.* at Exs. D & E.)

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

Among other prohibitions, § 8-107(1)(a) of the NYCHRL protects against sexual harassment as a form of gender discrimination in the workplace. *See Williams v. N.Y.C. Hous. Auth.*, 61 A.D.3d 62, 75 (1st Dep't 2009); *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 *7 (Oct. 28, 2015). In relevant part, the NYCHRL provides that it is unlawful for employers and their agents or employees, "because of the actual or perceived . . . gender . . . of any person, . . . to discriminate against such person in compensation or in terms, conditions or privileges of employment." N.Y.C. Admin. Code § 8-107(1)(a).

In a case of default such as this, the petitioner must establish a *prima facie* case of the respondents' liability. *See Walley v. Leatherstocking Healthcare, LLC*, 79 A.D.3d 1236, 1238 (3d Dep't 2010); *Agosto,* 2017 WL 1335244, at *5; *Stamm*, 2016 WL 1644879, at *4. To make out a claim of gender discrimination under § 8-107(1)(a) of the NYCHRL, the Bureau must show by a preponderance of the evidence that the complainant was treated less well than other employees because of the complainant's gender. *See Williams*, 61 A.D.3d at 78; *Comm'n on Human Rights ex rel. Zoleo v. Weinstein Family Servs. of N.Y, Inc..*, OATH Index No. 623/09, R&R at 8 (Dec. 7, 2009), *adopted*, Dec. & Order (Sept. 17, 2010). Under the NYCHRL, gender discrimination may be shown "simply by the existence of unwanted gender-based conduct." *Williams*, 61 A.D.3d at 76. Once the Bureau has established a *prima facie* case, "the burden then shifts to the [respondent] to present legitimate, independent, and nondiscriminatory reasons to support its actions." *Brightman v. Prison Health Serv., Inc.*, 108 A.D.3d 739, 740 (2d Dep't 2013). "Then, if the [respondent] meets this burden, the [Bureau] has the obligation to show that the reasons put forth by the defendant were merely a pretext." *Id.*

In this case, the Bureau has established a *prima facie* case of disparate treatment based on gender. The record shows that Respondents treated Ms. Martinez less well because she is a woman.[2] Even "a single comment that objectifies women [and which is] made in circumstances where that comment would . . . signal views about the role of women in the workplace [can] be actionable" as gender discrimination under the NYCHRL. *Williams*, 61 A.D.3d at 80 n.30. Here, Respondent Musso sexually harassed and discriminated against Ms. Martinez regularly over the course of her brief employment. As Judge Casey found, "Mr. Musso's references to Victoria's Secret, his thwarted attempt to touch the complainant's waist, his comments regarding her attire, and his text suggesting that her job was 'make-work' all diminished the role of women in respondents' workplace." *Martinez*, 2015 WL 992697, at *3.[3] Indeed, Respondent Musso expressly conceded to Ms. Martinez that his reason for initially hiring her was related to his expectations about her gender and her sexual availability. (*See* Bureau Ex. 11 (Respondent Musso: "I never needed u 2 work. [I] just made work 4 u. If u call what u were getting paid 4 work." Ms. Martinez: "if you changed the job description that had nothing to do with my ability and everything to do with your intentions on what you thought [I] was willing to do for you and not the job itself," Respondent Musso: "Very well said".)) Similarly, Respondent Musso's text

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[2] Because Respondent Musso is the owner of Musso Home Improvement and exercised managerial responsibility, his violations of § 8-107(1) of the NYCHRL are attributable to the company. *See* N.Y.C. Admin. Code § 8-107(13)(b)(1).

[3] Under the NYCHRL, in contrast with state and federal law, the contention that a respondent's conduct amounts to "petty slights and trivial inconveniences" must be pled by the respondent as an affirmative defense. *Williams*, 61 A.D.3d at 80. Here, Respondents did not raise such a defense and would, in any event, be unable to establish that Respondent Musso's conduct, which included unwanted physical touching, amounted to only petty slights and trivial inconveniences. *See, e.g.*, *Davis v. Phoenix Ancient Art, S.A.*, 39 Misc. 3d 1214(A), *2 (Sup. Ct. N.Y. Cnty. 2013).

messages evince his determination to fire Ms. Martinez was motivated by the fact that she had rejected his sexual advances.

By defaulting despite ample and well-documented notice (*see* Bureau Exs. 1-9A), Respondents have failed to rebut the Bureau's *prima facie* case of discrimination. The Commission therefore concludes that Respondent Musso discriminated against Ms. Martinez based on gender, in violation of § 8-107(1)(a) of the NYCHRL. Under § 8-107(13)(a) of the NYCHRL, Musso Home Improvement is strictly liable for Mr. Musso's unlawful discrimination. *See* N.Y.C. Admin. Code § 8-107(13)(a).

C. Respondents Retaliated Against Ms. Martinez by Firing Her for Opposing Their Discrimination, 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 . . . 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 acting to oppose unlawful discrimination); (2) the respondent was aware of the complainant's protected activity; and (3) the respondent reacted to the complainant's protected activity in a manner that is reasonably likely to deter someone from engaging in such protected activity. *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*, 108 A.D.3d at 740.

Here, the record amply supports a finding that Respondents retaliated against Ms. Martinez. The Court of Appeals has specifically held that protesting discrimination – as Ms. Martinez did when she asked Mr. Musso to keep things professional and refrain from

commenting in a sexual manner about her physical appearance – is activity that is protected from retaliation under the NYCHRL. *See Albunio*, 16 N.Y.3d at 478.

The evidence also clearly shows that Mr. Musso was aware of Ms. Martinez's protest, which she communicated directly to him, and that his immediate response was to fire her. Unquestionably, the act of terminating an individual's employment is likely to deter a person from engaging in protected activity and constitutes retaliation under the NYCHRL. *See St. Jean Jeudy v. City of N.Y.*, 142 A.D.3d 821, 824 (1st Dep't 2016); *Krebaum v. Capital One, N.A.*, 138 A.D.3d 528, 528 (1st Dep't 2016).

The Bureau has succeeded in establishing a *prima facie* case of retaliation by Respondent Musso. By defaulting, despite repeated and well-documented notice (*see* Bureau Exs. 1-9A)), Respondents waived the opportunity to rebut the Bureau's *prima facie* case. The Commission therefore finds Respondent Musso liable for violating § 8-107(7) of the NYCHRL. Furthermore, under § 8-107(13)(a) of the NYCHRL, Musso Home Improvement is strictly liable for Mr. Musso's unlawful retaliation. *See* N.Y.C. Admin. Code § 8-107(13)(a).

IV. DAMAGES, CIVIL PENALITES, AND AFFIRMATIVE RELIEF

Where the Commission finds that respondents have engaged in an unlawful discriminatory practice, the NYCHRL authorizes the Commission to order respondents to cease and desist from such practices and order 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 persons aggrieved by violations of the law, including 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); *see Thomas v. iStar Fin., Inc.*, 652 F.3d 141, 149 (2d Cir. 2011); *Cardenas*, 2015 WL 7260567, at *15 (finding $250,000.00 civil penalty appropriate where respondent engaged in willful and wanton sexual harassment over a three-year period). 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; *Howe*, 2016 WL 1050864, at *6. The NYCHRL places no limitation on the size of compensatory damages awards. N.Y.C. Admin. Code § 8-120(a)(8). 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).

a. Economic Damages

In this case, Judge Casey recommended an award of $17,020.00 in back pay, which the Bureau endorsed in its comments. *Martinez*, 2015 WL 992697, at *6; (Bureau Comments 2).[4] However, that recommended award reflects earning records only up through the date of the hearing and does not reflect the supplemental evidence that the Commission has received from the Bureau of Complainant's subsequent earnings.

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[4] The Bureau did not seek front pay damages in this case. In any event, Complainant is currently earning more in her job at the liquor store, obviating the need for front pay.

Back pay is calculated according to what a complainant would have earned if the respondent's discriminatory action had not occurred. *See Cardenas*, 2015 WL 7260567, at *10; *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 on Complaint of Foote*, 174 A.D.2d 1041, 1041 (4th Dep't 1991). In addition, an award for back pay should be offset by the complainant's interim earnings for the period from the date of unlawful termination to the start of the comparable or better paying job. *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). 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. *Cardenas*, 2015 WL 7260567, at *10; *In re Comm'n on Human Rights ex rel. Lukasiewicz v. Cutri*, OATH Index No. 2131/10, R&R, 2011 WL 12472971, at *13 (December 8, 2010), *modified* Dec. & Order (February 17, 2011).

During her four-day period of employment with Respondents, Complainant earned $240.00 and the Commission infers that if Complainant had not been unlawfully terminated, she would have continued to earn at a rate of approximately $240.00 per week.[5] Although Complainant worked several jobs following her unlawful termination, she did not secure a

[5] Absent additional evidence about Complainant's expected weekly or monthly hours or earnings, the Commission is unable to conclude that Complainant would have continued working for Respondents more than four days each week.

consistent or better paying job until May 8, 2017, when she began working for a liquor store on a permanent basis, earning $14.00 per hour and working 40 hours per week. Complainant's back pay therefore spans a period of about 196 weeks, from her date of termination on August 2, 2013 to May 8, 2017, when she began working at the liquor store. The Bureau also submitted credible evidence that Ms. Martinez mitigated her damages by seeking and obtaining new employment following her unlawful termination by Respondents. By defaulting, Respondents waived the opportunity to contest that evidence.

Complainant's projected earnings from the date of firing until the start of her job at the liquor store is approximately $240.00 per week multiplied by 196 weeks, or $47,040.00. During the same period, Ms. Martinez earned a total of $24,762.11 in interim earnings from other employment (comprised of $2,500.00 for childcare work, $2,887.50 from retail work, $3,886.61 from the supermarket job, $269.87 from the dollar store, $10,594.43 from the Durham County Department of Social Services, and $4,623.70 from the movie theatre). An award for back pay equals the difference between Complainant's lost earnings ($47,040.00) and her interim earnings ($24,762.11) from the date of her termination until the start of her job at the liquor store, or a total of $22,277.89.

Ms. Martinez 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); *Cardenas*, 2015 WL 7260567, at *12. "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).[6] The Commission uses August 31, 2015 as the intermediate date between the date of termination, August 2, 2013, and the date of this Decision and Order. Applying a simple annual interest rate of nine percent to a principal amount of $22,277.89 for the period from August 31, 2015 through today's date, September 29, 2017, (or a period of approximately 2.08 years) produces a total pre-determination interest amount of $4,170.42.

b. Emotional Distress Damages

Judge Casey recommended that the Commission award Ms. Martinez $10,000.00 in emotional distress damages, while the Bureau seeks an award of $15,000.00. *Martinez*, 2015 WL 992697, at *6; (Bureau Comments at 2). 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." *Howe*, 2016 WL 1050864, at *6. An award for compensatory damages may be premised on the complainant's credible testimony, objective indicators of the complainant's emotional and mental state, or other circumstantial evidence. *See Agosto*, 2017 WL 1335244, at *7.

Ms. Martinez credibly testified that Respondent Musso's conduct "hurt," "shocked," and "disappointed" her. (Tr. at 26:1-3.) She also explained that after losing her job, she worried constantly about being able to afford diapers for her baby and to provide for her family, and she noted that these financial stresses strained her relationship with her children's father and caused her to lose weight. (*Id.* at 26:7-21.)[7]

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[6] 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.

[7] In his Report and Recommendation, Judge Casey offers no rationale for his conclusion that Complainant's weight loss and the fights with her children's father cannot be attributed to

Judge Casey cites *In re Chen v. NOC Construction Inc.*, OATH Index No. 1011/11, Dec. & Order, 2011 WL 7809916 (June 26, 2011) in support of his recommendation that the Commission award Complainant $10,000.00 in emotional distress damages. *Martinez*, 2015 WL 992697, at *6. In comments to the Report and Recommendation, the Bureau agrees that *Chen* provides useful guidance in assessing Ms. Martinez's emotional distress damages but, without explaining its reasoning or citing any additional caselaw, argues for an increased award of $15,000.00. (Bureau Comments at 8.)

Like Ms. Martinez, the complainant in *Chen* testified that she was shocked by her termination based on her gender. *In re Chen v. NOC Construction Inc.*, OATH Index No. 1011/11, R&R, 4-5 (Apr. 21, 2011),[8] *adopted* 2011 WL 7809916. She also testified that she felt "angry and depressed" and like she had been treated like "trash." *Id.* at 5. The complainant in *Chen* further testified that her family became angry at her for losing her job and that she experienced heightened financial pressure following her termination. *Id.* at 5, 15-16. Nonetheless, the judge in that case found that the complainant had "coped with the situation and quickly got another job" and "appeared for the most part to have put the event behind her." *Id.* at 16. In *Chen*, the Commission awarded the complainant $7,500.00 in emotional distress damages, or approximately $8,261.00 in present day value, adjusted for inflation based on the U.S. Bureau of Labor Statistics' Consumer Price Index. *Chen,* 2011 WL 7809916, at *3; *see Secor v. City of N.Y.*, 13 Misc. 3d 1220(A) (Sup. Ct. N.Y. Cnty. 2006) (considering amount of inflation in assessing reasonableness of Commission award for mental anguish).

Respondents' actions. *Martinez*, 2015 WL 992697, at *5. Based on an independent review of the transcript, the Commission finds Ms. Martinez's testimony on those matters to be credible and finds that they provide adequate support for the conclusion that the changes that Ms. Martinez described were proximately caused by Respondents' discrimination.

[8] Available at OATH's website.

In this case and in *Chen*, both complainants experienced similar shock, financial burdens, and strains to their familial relationships because they were fired based on their gender. However, as Judge Casey found, Ms. Martinez experienced a more extended period of emotional distress over the three- or four-month period of her unemployment, compared to the 10-day period of unemployment for the complainant in *Chen*. *See Martinez*, 2015 WL 992697, at *5.

The emotional harm that Ms. Martinez experienced is also not dissimilar to that described in *In re Commission on Human Rights ex rel. Cherry v. Stars Model Management*, OATH Index No. 1464/05, R&R (Mar. 7, 2006), *adopted* Dec. & Order (Apr. 13, 2006).[9] In that case, the evidence showed that the respondents' racial discrimination caused the complainant to "cr[y] a great deal," lose sleep, and feel "humiliated, embarrassed, and ashamed." *Id.* at 5-6. As a result of the discrimination in their respective cases, Ms. Cherry and Ms. Martinez each experienced strains to their familial relationships and testified to the physical impact of their mental anguish, which caused sleeplessness and loss of appetite for Ms. Cherry and weight loss for Ms. Martinez. *See id.* In *Cherry*, the Commission awarded $10,000.00 in emotional distress damages – or about $12,267.00 in current day value. *Id.* at 21; *see also Secor*, 13 Misc. 3d 1220(A) (upholding reasonableness of the award in *Cherry*).

Based on the record and a review of the relevant caselaw, the Commission concludes that an award of $12,000.00 in emotional distress damages is appropriate. *Accord Drice v. My Merchant Servs.*, No. 15 Civ. 0395, 2016 WL 1266866, R&R, at *7 (E.D.N.Y. Mar. 4, 2016), *adopted* 2016 WL 1266948, at *2 (E.D.N.Y. Mar. 31, 2016) (awarding $20,000.00 in emotional distress damages where plaintiff experienced "substantial distress" due to sexual harassment, but "the duration of her employment was brief" and there was no evidence of prolonged symptoms);

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9 Available at OATH's website.

Luciano v. Olsten Corp., 912 F. Supp. 663, 673-74 (E.D.N.Y. 1996), *aff'd* 110 F.3d 210 (2d Cir. 1997) (awarding $11,400.00, valued today at about $17,353.00, for emotional distress where plaintiff was denied a promotion based on sex and testified that she felt "hurt, shocked, upset, overcome with sadness and depression," and that "she cried, worried about finances, had trouble sleeping and eating and felt purposeless.").

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) respondents' financial resources; (2) the sophistication of respondents' enterprise; (3) respondents' size; (4) the willfulness of the violation; (5) the ability of respondents to obtain counsel; and (6) the impact on the public of issuing civil penalties. *See, e.g., CU 29 Copper Rest. & Bar*, 2015 WL 7260570, at *4. The Commission also considers the extent to which respondents cooperated with the Bureau's investigation and with OATH, *see, e.g., Howe*, 2016 WL 1050864, at *8; *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 respondents may have already undertaken, *see, e.g., CU 29 Copper Rest. & Bar*, 2015 WL 7260570, at *4 (holding "civil penalties are not necessary to deter Respondents from future violations of the NYCHRL, as they have committed to publishing advertisements that comply with the law").

In this case, Judge Casey recommended civil penalties of $10,000.00, which the Bureau argues should be increased to $20,000.00 because Respondents have committed two violations of the NYCHRL and failed to cooperate with the Bureau's investigation. *Martinez*, 2015 WL 992697, at *6; (Bureau Comments at 2, 9).

The evidence of Respondents' size, sophistication, financial resources, and ability to retain counsel is limited, largely because Respondents failed to produce financial records or cooperate with the Bureau's investigation. *Id.* at *1. Respondents' failure to cooperate with the Bureau and their scofflaw approach to the entire administrative process require a heightened fine. *See Agosto*, 2017 WL 1335244, at *11. Although the Bureau did not present publicly available documents indicative of Respondents' resources, Respondents are deemed to have admitted the allegation in the Complaint that they employ at least 15 employees. (Bureau Ex. 1 ¶ 2); N.Y.C. Admin. Code § 8-111(c).

In addition to considerations of Respondents' size, sophistication, and resources, the Commission also considers the egregious nature of Respondents' conduct, the willfulness of their violations, and the likely impact of civil penalties on the public. *See, e.g., id.* at *11-12. By attempting to touch Ms. Martinez without her consent, commenting on her attire and physical appearance, and sexually objectifying her, Respondent Musso grossly abused his position of economic power as her employer. His conduct belittled Ms. Martinez and violated her right to physical security. In addition, Respondent Musso's expectation that Ms. Martinez should submit to his inappropriate sexual conduct as a condition of her employment is reminiscent of the sort of *quid pro quo* sexual harassment that courts have roundly condemned. *See, e.g., Carrero v. N.Y.C. Hous. Auth.*, 890 F.2d 569, 577 (2d Cir. 1989); *N.Y. State Div. of Human Rights v. Young Legends, LLC*, 90 A.D.3d 1265, 1267 (3d Dep't 2011); *Father Belle Cmty. Ctr. v. N.Y. State Div. of Human Rights on Compl. of King*, 221 A.D.2d 44, 50 (4th Dep't 1996). Such egregious conduct is unacceptable. It is, moreover, clear that Respondent Musso's misconduct was willful. When Ms. Martinez requested that he keep things professional, he immediately responded by

firing her, then proceeded to demean her work and to admit that he had only hired her because of his interest in her sexually.

New York City has a strong public interest in stamping out gender discrimination and sexual harassment in the workplace. As the Commission has previously noted, "sexual harassment can have dire financial, physical, and emotional consequences for women in the workplace because it undermines the long-term earning capacity, job performance, and professional credibility of women workers." *Cardenas*, 2015 WL 7260567, at *14 (citing Equal Rights Advocates, *Moving Women Forward: On the Fiftieth Anniversary of the Civil Rights Act, Part 1: Sexual Harassment Still Exacting A Hefty Toll* (2014) at 7). Gender discrimination also remains disturbingly common in the employment sector in New York City, representing the second most common form of employment discrimination reported to the Commission in 2016. *See* N.Y.C. Comm'n on Human Rights, *2016 Annual Report*, 19 (2017), *available at* http://www1.nyc.gov/assets/cchr/downloads/pdf/publications/AnnualReport2016FINAL.pdf. For these reasons, there is a strong public interest in discouraging sexual harassment in the workplace.

Judge Casey analogized this case to *Chen* in recommending a civil penalty of $10,000.00. He opined that there was no evidence in either case about the respondents' size or prior acts of discrimination, but also observed that several factors in this case warrant an upward adjustment of the $5,000.00 fine imposed in *Chen.* Specifically, Judge Casey noted that Respondents in this case are liable for two separate violations of the NYCHRL – sexual harassment and retaliation – and refused to cooperate with the administrative investigation and hearing processes. *Martinez,* 2015 WL 992697, at *6. The Commission agrees that those considerations warrant a higher civil penalty, but finds that additional factors require an even greater fine than the $10,000.00 that

Judge Casey recommends. First, as noted above, Respondents engaged in unwanted physical touching unlike anything described in *Chen*. Such conduct is particularly reprehensible and harmful to the public welfare, warranting strong condemnation. Second, in contrast with *Chen*, the Commission has made a finding in this case that Respondents acted willfully to violate the NYCHRL. Third, based on considerations about the ongoing prevalence of gender discrimination in the workplace and its broad detrimental effects, the Commission concludes that more robust fines are necessary to deter future acts of workplace sexual harassment than were previously imposed. *See Agosto,* 2017 WL 1335244, at *12 (discussing need for heightened civil penalty because of "high incidence of discrimination based on lawful source of income").

For these reasons, the Commission concludes that a civil penalty of $18,000.00 is appropriate. *See Cutri*, 113 A.D.3d at 609 (upholding reasonableness of $20,000.00 civil penalty for housing discrimination based on sexual orientation); *AMG Managing Partners, LLC v. N.Y. State Div. of Human Rights*, 148 A.D.3d 1765, 1768 (4th Dep't 2017) (upholding $15,000.00 civil penalty in sexual harassment case involving hostile work environment and constructive discharge); *Agosto,* 2017 WL 1335244, at *12 (imposing $20,000.00 civil penalty on moderately sized business that willfully violated NYCHRL and refused to cooperate in administrative process); *In re Russell v. Chae Choe*, OATH Index No. 09-1021033, Dec. & Order, 2009 WL 6958753 (Dec. 10, 2009) ($50,000.00 civil penalty imposed where respondent refused to provide reasonable accommodation for over one year and failed to cooperate with administrative process).

C. Additional Affirmative Relief

The Commission regularly requires 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); *Stamm*, 2016 WL 1644879, at *11. The Commission finds that Respondents would benefit from such a training and orders Respondent Joseph Musso and all other managerial staff of Respondent Joseph "J.P." Musso Home Improvement to attend a Commission-led training, as set forth below. In addition, for a period of two years, Respondents must post a notice of rights in a place conspicuously visible to employees on their worksites, as set forth in further detail below.

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 30 calendar days after service of this Order, Respondents pay Complainant Martinez a total of **$38,448.31** (comprising $22,277.89 in back pay, $4,170.42 in pre-determination interest, and $12,000.00 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 Valerie Martinez, including a written reference to OATH Index No. 2167/14.

IT IS FURTHER ORDERED that no later than 30 calendar days after service of this Order, Respondents pay a fine of **$18,000.00** 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. 2167/14.

IT IS FURTHER ORDERED that no later than 60 calendar days after service of this Order, Respondent Joseph Musso and all other managerial staff of Respondent Joseph "J.P."

Musso Home Improvement must attend a Commission-led training on the NYCHRL. 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.

IT IS FURTHER ORDERED that within 30 calendar days of service of this Order, and for a period of no less than two (2) years Respondents post, in a conspicuous location on each of their worksites, a copy of the Notice of Rights available at http://www1.nyc.gov/assets/cchr/downloads/pdf/publications/CCHR_NoticeOfRights2.pdf.

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.

Dated: New York, New York
September 29, 2017

SO ORDERED:
New York City Commission on Human Rights

Carmelyn P. Malalis
Commissioner/Chair