

CITY OF NEW YORK
COMMISSION ON HUMAN RIGHTS

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In the Matter of

COMMISSION ON HUMAN RIGHTS
ex rel. GIANA DESIR,

Complaint No. M-H-S-17-11067
OATH Index No. 1253/19

Petitioner,
-against-

HENRY WALTER and EMPIRE STATE
REALTY MANAGEMENT, LLC,

Respondents
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DECISION AND ORDER

On May 20, 2016, the Law Enforcement Bureau of the New York City Commission on Human Rights (“Bureau”) filed a verified complaint (“Complaint”) on behalf of Complainant Giana Desir, alleging that Respondent Henry Walter and Respondent Empire State Realty Management, LLC (“Empire”) (collectively, “Respondents”) subjected her to sexual harassment and refused to lease an apartment to her because she is a transgender woman, in violation of §§ 8-107(5)(a) and (c) of the New York City Human Rights Law (“NYCHRL”). (Ahern Aff. at Ex. A, Compl.)¹

Respondents failed to file an answer and, on January 26, 2018, the Bureau issued a finding of probable cause. (*Id.* at Ex. P.) On February 9, 2018, an attorney contacted the Bureau and indicated that he represented Respondents. (*Id.* ¶ 23.) The attorney subsequently sent a short letter to the Bureau stating broadly that Respondents “denied all charges,” but never filed a

¹ At the hearing, the Bureau entered into the record a motion to declare Respondents in default (“Default Motion”). (Bureau Ex. 2.) The Default Motion is comprised of a notice of motion; memorandum of law; and the April 30, 2019 affirmation of Bureau attorney Conor Ahern (“Ahern Aff.”), to which twenty-five lettered exhibits are attached.

verified answer. (*Id.* at Ex. R.) On December 20, 2018, the Bureau referred the case to the Office of Administrative Trials and Hearings (“OATH”) for a hearing. (*Id.* at Ex. T.)

The Honorable John B. Spooner presided over the hearing held at OATH on May 13, 2019. At the hearing, the Bureau presented two notices of trial, dated March 6, 2019 and April 2, 2019 (Bureau Ex. 1), as well as the affirmation of attorney Conor Ahern, which included proof that the Bureau had served Respondents with copies of: (1) the Complaint, by mail and by a process server (Ahern Aff. at Ex. M); (2) four warning letters for failure to file a verified answer, dated November 29, 2016, March 20, 2017, July 24, 2017, and October 2, 2017 (*id.*); (3) the notice of probable cause, dated January 26, 2018 (*id.* at Exs. P & Q); (4) the notice of referral to OATH, dated December 18, 2018 (*id.* at Ex. T); and (5) two notices of conference, dated December 20, 2018 and February 20, 2019 (*id.* at Ex. V). The affirmation also stated that the Bureau called Respondent Walter five times, leaving voice messages seeking to discuss the case, and that, on one occasion, the Bureau spoke over the phone with the attorney who represented Respondents. (Ahern Aff. ¶¶ 10–13, 17, 18, 23.) The affirmation explains that when the Bureau got hold of the attorney a second time while trying to schedule a hearing, the attorney stated that he no longer represented Respondents. (*Id.* ¶ 25.)

In sum, Respondents’ engagement in the case consisted of two phone calls (dated March 28, 2017 and February 9, 2018) and one letter to the Bureau (dated March 8, 2018), none of which addressed in a legally sufficient manner the specific allegations in the Complaint. (*See generally* Ahern Aff.) Respondents disappeared entirely after March 8, 2018. (*See id.* ¶¶ 24–36.) After reviewing the Bureau’s evidence of service on Respondents, Judge Spooner found Respondents in default and proceeded with the hearing as an inquest. (Hearing Tr. (“Tr.”) at 6:15–20.)

On May 31, 2019, Judge Spooner issued a Report and Recommendation, recommending that the Office of the Chair of the New York City Commission on Human Rights (“Commission”): (1) find that Respondents violated § 8-107(5) of the NYCHRL by refusing to rent Ms. Desir an apartment based on her gender identity; (2) require Respondents to pay Ms. Desir \$15,000.00 in emotional distress damages; (3) impose civil penalties of \$10,000.00 against Respondents; (4) require that Respondents undergo anti-discrimination training; and (5) require that Respondents undergo a policy audit. (Report & Recommendation (“R&R”) at 2–3, 8.)

The Bureau submitted timely written comments and objections to the Report and Recommendation on July 8, 2019, asking the Commission to increase emotional distress damages from \$15,000.00 to \$50,000.00, and civil penalties from \$10,000.00 to \$50,000.00. (Bureau Comments at 2.) The Bureau argued that rather than characterizing Respondents’ discrimination as a general violation of § 8-107(5) of the NYCHRL, the Commission should hold Respondents liable for multiple violations of the NYCHRL, first for subjecting Ms. Desir to gender-based harassment, commonly understood as sexual harassment, under § 8-107(5)(a),² and second, for denying her a rental due to her gender identity under § 8-107(5)(c). The Bureau also argued that the Commission should require Respondents to undergo a policy audit of all corporate and individual anti-discrimination policies maintained and enforced by Respondents, post the Commission’s “Fair Housing: It’s the Law” poster at all of their places of business, and

² Conduct that is often colloquially referred to as “sexual harassment” is more accurately described under the NYCHRL as “gender-based harassment.” “Sex” was eliminated from the NYCHRL in 1991 and replaced with “gender.” New York, N.Y., Local Law No. 39 (June 18, 1991). Gender-based harassment includes conduct that is connected to gender, including, but not limited to conduct that is sexual in nature. Because the term “sexual harassment” is more commonly used and generally understood, it is used throughout this opinion.

implement policies that comply with the NYCHRL. (Bureau Comments at 4–5.) Ms. Desir, through counsel, also submitted timely comments and objections to the Report and Recommendation, arguing that the Commission increase emotional distress damages to \$50,000.00. (Complainant’s Comments at 3.) Respondents did not submit any comments.

After reviewing the Report and Recommendation, the hearing transcript, the evidence from the hearing, the Bureau’s Comments, and Complainant’s Comments, the Commission finds Respondents liable both for engaging in disturbing acts of sexual harassment by subjecting Complainant to demeaning, humiliating, and offensive sexualized comments, in violation of § 8-107(5)(a)(1)(b), and for discriminatorily denying Complainant a rental based on her gender identity, in violation of § 8-107(5)(c)(1). The Commission orders that Respondents pay Ms. Desir \$50,000.00 in emotional distress damages; pay either \$25,000.00 in civil penalties or, if Respondents agree to engage in a restorative justice process facilitated by the Commission, a reduced civil penalty of \$15,000.00; undergo anti-discrimination trainings provided by the Commission on the NYCHRL, transgender rights, and sexual harassment prevention; undergo a policy audit; and post a “Fair Housing: It’s the Law” poster at each of Respondents’ places of business in New York City.

I. STANDARD OF REVIEW

In reviewing a report and recommendation, the Commission may accept, reject, or modify, in whole or in part, the findings or recommendations made by the administrative law judge. Though the findings of an administrative law judge may be helpful to the Commission in assessing the weight of the evidence, the Commission is ultimately responsible for making its own determinations as to the credibility of witnesses, the weight of the evidence, and other findings of fact. *Comm’n on Human Rights ex rel. Agosto v. Am. Constr. Assocs.*, OATH Index

No. 1964/15, Comm'n Dec. & Order, 2017 WL 1335244, at *2 (Apr. 5, 2017); *Comm'n on Human Rights ex rel. Spitzer v. Dahbi*, OATH Index No. 883/15, Comm'n 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 Comm'n on Human Rights v. Aksoy*, OATH Index No. 1617/15, Comm'n Dec. & Order, 2017 WL 2817840, at *4–5 (June 21, 2017); *Spitzer*, 2016 WL 7106071, at *2. The Commission reviews a report and recommendation and the parties' comments and objections *de novo* as to findings of fact and conclusions of law. *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); *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 *8 (Sep. 29, 2017).

II. THE EVIDENTIARY RECORD

For purposes of this Decision and Order, familiarity with the hearing record and with Judge Spooner's Report and Recommendation is generally assumed. During the hearing, the Bureau presented testimony from two witnesses, Ms. Desir and her former coworker, Jay Gabor. The documentary evidence entered into the record includes the notice of trial (Bureau Ex. 1) and the Bureau's Default Motion (Bureau Ex. 2). Attached to the Default Motion is the affidavit of Bureau attorney Conor Ahern, which has twenty-five exhibits, including: the Complaint (Ahern Aff. at Ex. A); proof of service (*id.* at Exs. F, G, L, M, N, O) and evidence of warnings to Respondents about the consequences of default (*id.* at Exs. B, H, J, K); screenshots of Respondents' LinkedIn pages (*id.* at Exs. D, E); and a letter from Respondents' attorney, Henry W. Blaylock, Esq. (*id.* at Ex. R).

Ms. Desir testified that, in 2013, she began her gender transition and, as she explained, “visibly started looking as if [she was] transitioning.” (Tr. 11:10–11.) Ms. Desir testified that her landlord at the time had begun giving her “weird looks,” and in November 2015, she was forced to seek new housing after her landlord refused to renew her lease. (*Id.* at 11:17–21.) On the recommendation of a friend, Ms. Desir reached out to Respondent Henry Walter, a real estate broker with Respondent Empire, for help in finding an apartment. (*Id.* at 13:1–12.) Ms. Desir spoke with Respondent Walter by phone at least five times before meeting him in person. (*Id.* at 13:15–20.) At the time, Ms. Desir “still had not changed [her] name legally” and so initially identified herself to Respondent Walter by her then-legal name. (*Id.* at 14:8–10.) Over the phone, Respondent Walter was positive and “jovial,” indicating that he had a number of apartments available that would suit Ms. Desir’s needs. (*Id.* at 14:2–25.) Late one evening in November 2015, Respondent Walter called Ms. Desir and asked her to come to his office to discuss possible apartments. (*Id.* at 16:16–21.)

A. Respondent Walter’s Sexually Harassing and Demeaning Conduct

Ms. Desir testified that Respondent Walter made several sexually suggestive, lewd, and highly inappropriate statements immediately upon her arrival to his office. Specifically, she alleges Respondent Walter stated that he could not let anyone know he had helped her find an apartment because “everyone will think that I let you suck my dick.” (*Id.* at 19:16–17.) Respondent Walter made overtly sexualized comments about Ms. Desir’s body, stating she looked very feminine and “really good,” and that she had “a nice body,” exclaiming “Oh, my God, your ass is big.” (*Id.* at 21:9–10; 22:1–3; 23:3–5.) Respondent Walter asked Ms. Desir invasive questions about her body, including her genitalia, her sexual activity, and her transition; he asked her “if [she] still had [a] penis,” and “about [her] sex life, . . . who [she] was dating, . . .

what type of guys [she] like[d].” (*Id.* at 21:9–11; 22:1–3.) Respondent Walter also asked to see Ms. Desir’s phone, which she showed to him due to, as she described, the “power dynamic in the room,” explaining that she sought to do “whatever he said . . . in the hope that he would help [her].” However, this resulted in him having access to some 200 photos of Ms. Desir, including some unclothed. (*Id.* at 22:7–14.) Respondent Walter spent an extended period of time, approximately fifteen minutes, looking through Ms. Desir’s phone. (*Id.* at 23:10–11.) Respondent Walter also “pointed to a couch that was in his office and he said this is where [he] bend[s] people over to show them that [he’s] the boss,” telling Ms. Desir that if she did not behave, “he’s going to spank [her] with his ruler.” (*Id.* at 26:12–18.)

B. Respondent Walter’s Offensive and Discriminatory Statements Concerning Ms. Desir’s Gender Identity

Ms. Desir testified that as soon as Respondent Walter met Ms. Desir in person, he appeared “shocked and surprised,” exclaiming, “Wow, wow, why didn’t you tell me you were transgender? Thank God I had you come here at night. What would people have thought if they had seen you?” (*Id.* at 17:16–20.) Respondent Walter told Ms. Desir that he could not place her in the apartments he had discussed with her on the phone because “your [sic] being transgender changes everything. I can’t possibly rent you an apartment and place you around people and children.” (*Id.* at 18:12–17.) Respondent Walter further stated that he might still be able to find her an apartment “in a basement somewhere with its own entrance, as to not be around too many people.” (*Id.* at 18:23–24.) He suggested Ms. Desir should stop transitioning and “go back to dressing like a man” until she found an apartment, but then said that as a man she “would look really crazy.” (*Id.* at 20:9–13.)

C. Testimony about the Harmful Impact of Respondent Walter’s Conduct on Ms. Desir

Ms. Desir testified that she endured the interaction with Respondent Walter because she was desperate to find any apartment at all and was “deadly afraid to not really have a place to stay in New York . . . afraid she would have to resort back to [] the shelter system.”

(*Id.* at 15:8–11.) She explained that, because of prior discrimination she had faced for being transgender and her fear of homelessness, she felt she had “to be really submissive” toward Respondent Walter. (*Id.* at 20:15–20.) She noted that “[she] felt beaten down . . . like [she] was being abused. But as he was saying these things [to her], he would give [her] a flicker of hope that he would still give [her] an apartment.” (*Id.* at 20:17–20.) Respondent Walter, despite his promises over the phone, did not make any progress in helping Ms. Desir find an apartment. (*Id.* at 23:12–25.)

Ms. Desir subsequently called Respondent Walter, hoping he could still help her find an apartment, but he repeatedly gave her non-committal answers that “never materialized to anything.” (*Id.* at 24:4–11.) Ms. Desir eventually moved into supportive housing, known as scattered-site housing,³ because she could not find an apartment on her own before her lease

³ The New York City Human Resources Administration describes scattered-site housing as follows:

Apartments scattered throughout the city in different buildings owned by private landlords. Non-profit providers hold contracts with government agencies to secure safe affordable units for tenants to move into and to also provide the social services support needed by tenants.

Leases are most often between the landlord and non-profit provider. All tenants have a sub-lease and are responsible to contribute 30% of their income towards the rent and utilities. A subsidy managed by the non-profit provider is connected to each rented apartment so that the unit is affordable for the tenant. Social services staff are available 24-7, visit tenants in the apartments and are also available in offices that are conveniently located.

expired. (*Id.* at 24:20–23.) She explained that this housing arrangement meant that she was required to see a social worker monthly and follow certain rules, noting that such housing was less desirable because “[y]ou’re no longer living independent[ly].” (*Id.* at 29:23–30:12.)

The interaction with Respondent Walter had a “devastating” effect on Ms. Desir’s life. (*Id.* at 25:2.) She testified that it made her feel “horrible,” “belittled,” “frightened,” “angry,” and “abused.” (*Id.* at 19:19–21; 20:15–19.) Ms. Desir explained how these events, which occurred early in her transition, had a severe negative impact on her, describing the event as “the straw that broke the camel’s back,” dissuading her from continuing her housing hunt through the private market and forcing her to turn to supportive housing. (*Id.* at 24:17–18; 27:18–21.) Ms. Desir said she felt powerless after she left Respondent Empire’s office and that, after having briefly enjoyed the freedom of beginning her transition and the independence of having previously escaped the shelter system, she suddenly doubted whether she wanted to continue to transition. (*Id.* at 27:15–28:10.) Respondent Walter’s discrimination caused Ms. Desir to question herself and her identity, and she asked herself, “should I just not do this?” (*Id.* at 28:3–5.) Ms. Desir stated that she went into a deep depression for the first week after the interaction with Respondent Walter and “couldn’t even get out, leave the house.” (*Id.* at 28:6.) She felt “suicidal,” and after having “felt so happy about transitioning,” perceived “the situation [was] just slapping [her] back in the f[ace], and [] refusing to allow [her] to grow.” (*Id.* at 28:7–10.) Ms. Desir testified further that she discussed the event and its effects on her with her therapist during most of her monthly therapy sessions between November 2015 and April 2019. (*See id.* at 28:14–24.) She also described feeling further wounded by Respondents’ failure to

N.Y.C. Human Resources Administration, *Supportive Housing*, <https://www1.nyc.gov/site/hra/help/supportive-housing.page> (last visited Feb. 24, 2020).

appear and participate in this case, because “[Respondent Walter] not showing up . . . just tells [her] that he doesn’t even realize that [] what he did was inappropriate or wrong.” (*See id.* at 29:2–8.)

Ms. Desir’s former coworker, Jay Gabor, also testified at the hearing. Mr. Gabor met Ms. Desir in November 2015 through his work at Gay Men’s Health Crisis, where Ms. Desir first volunteered and eventually became an employee. (*Id.* at 32:13–15, 18–21.) Mr. Gabor testified that Ms. Desir discussed with him that she was in need of housing and noted “how stressful it is to find an apartment in New York.” (*Id.* at 33:1–3.) At some point after the incident between Ms. Desir and Respondent Walter, Mr. Gabor noticed that “it was obvious [Ms. Desir] was disturbed” and “asked her if everything was ok.” (*Id.* at 33:23–24; 34:1–3.) In his testimony, Mr. Gabor corroborated that Ms. Desir was “upset, and it was visible” for several weeks following the interaction with Respondent Walter. (*Id.* at 33:24.) He explained that he observed Ms. Desir change from being open to being introverted, unlike her normal self. (*Id.* at 35:4–9; 37:23–25; 38:1–3.) Mr. Gabor stated that Ms. Desir had shared with him that Respondent Walter knew she was a transgender woman, told her she could not be around children, had threatened to spank her, and made many other offensive sexual comments. (*Id.* at 34:17–19, 22–23; 36:19–22.)

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 worded comparably 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). Case law interpreting analogous anti-discrimination statutes under state and federal law, though sometimes persuasive, is not precedential in the interpretation of the NYCHRL. *See Alburio v. City of N.Y.*, 23 N.Y.3d 65, 73 (2014) (“the New York City Council’s 2005 amendment to the NYCHRL was, in part, an effort to emphasize the broader remedial scope of the NYCHRL in comparison with its state and federal counterparts and, therefore, to curtail courts’ reliance on case law interpreting textually analogous state and federal statutes”).

B. Liability Analysis

1. Respondents Discriminated Against Complainant by Subjecting Her to Gender-Based Harassment in Violation of § 8-107(5)(a)(1)(b) of the NYCHRL

Under § 8-107(5)(a)(1)(b) of the NYCHRL, it is unlawful for a “person having the right to sell, rent or lease or approve the sale, rental or lease of a housing accommodation,” or “any agent or employee thereof” to discriminate against a person “in the terms, conditions or privileges of the sale, rental or lease” of a housing accommodation, based on their gender or other protected status. N.Y.C. Admin. Code § 8-107(5)(a)(1)(b). The NYCHRL prohibits treating a person less well than others, in whole or in part, because of their gender, including by engaging in sexual harassment. *See Williams v. N.Y.C. Hous. Auth.*, 61 A.D.3d 62, 67 (1st Dep’t 2009); *Martinez*, 2017 WL 4510797, at *10; *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 *7 (Oct. 28, 2015), *aff’d*, *Automatic Meter Reading Corp. v. N.Y.C. Comm’n on Human Rights*, No. 162211/2015, 2019 WL 1129210 (Sup. Ct. N.Y. Cty. Feb. 28, 2019).

Harassment may be shown “simply by the existence of unwanted gender-based conduct.” *Williams*, 61 A.D.3d at 76. Under the NYCHRL, gender includes a person’s gender identity. *Id.* § 8-102; *Wilson v. Phoenix House*, 978 N.Y.S.2d 748, 766 (Sup. Ct. Kings Cty. 2013).⁴ There is no question that Ms. Desir is protected under the NYCHRL based on her gender identity, nor that Respondents are covered entities under the law. The record, moreover, unambiguously demonstrates that Respondent Walter subjected Ms. Desir to sexual harassment. (See Tr. 17–28.) Respondent Walter told Ms. Desir that if he helped her, “everyone will think” she performed sexual favors for him (*see id.* at 19:12–17), and he proceeded to make egregiously offensive remarks related to Ms. Desir’s gender and sexual activity. Respondent Walter inappropriately asked Ms. Desir if she “still [had] a penis,” what she liked to do sexually, and “what kind of guys [she] like[d].” (*Id.* at 22:1–3.) At some point, Respondent Walter also asked to see her phone and proceeded to look through Ms. Desir’s personal pictures, ogling her and making overtly sexualized comments about her body. (*See id.* at 23:8–11.) In short, Respondent Walter grossly abused his position of power over Ms. Desir as a gatekeeper with the ability to grant or deny access to a home, and he used that power to demean and objectify her based on her gender. Respondent Empire is strictly liable for Respondent Walter’s conduct. *See* N.Y.C. Admin. Code § 8-107(13)(a) (“An employer shall be liable for an unlawful discriminatory practice based upon the conduct of an employee or agent which is in violation of any provision of this section other than subdivisions 1 and 2 of this section.”). For these reasons, the Commission concludes that Respondents are liable for engaging in sexual harassment against Ms. Desir, in violation of § 8-107(5)(a)(1) of the NYCHRL.

⁴ “‘Gender identity’ is the internal deeply-held sense of one’s gender which may be the same as or different from one’s sex assigned at birth.” 47 R.C.N.Y. § 2-01.

2. Respondents Discriminated Against Complainant by Denying Her Housing in Violation of § 8-107(5)(c)(1) of the NYCHRL

Section 8-107(5)(c)(1) of the NYCHRL states that it is unlawful for any “real estate broker, real estate salesperson or agent or employee thereof . . . to refuse to sell, rent or lease . . . any housing accommodation” because of their actual or perceived gender. N.Y.C. Admin. Code § 8-107(5)(c).

To make out a *prima facie* claim for denial of a housing opportunity under § 8-107(5), the Bureau must show that respondents refused to sell, rent, or lease a housing accommodation and acted in such a manner and circumstances as to give rise to the inference that its actions constituted discrimination in violation of § 8-107(5). *See Agosto*, 2017 WL 1335244, at *9–10 (citing *Comm’n on Human Rights ex rel. Howe v. Best Apartments, Inc.*, OATH Index No. 2602/14, Comm’n Dec. & Order, 2016 WL 1050864, at *5 (Mar. 14, 2016)). Alternatively, the Bureau may also establish its *prima facie* case with direct evidence of discrimination, such as evidence that the respondent expressly denied a person a rental based on a person’s protected status. *Id.*

As noted by Judge Spooner, the credible and un rebutted testimony makes clear that Respondents discriminated against Ms. Desir and expressly denied her an opportunity to rent an apartment because she is a transgender woman. (R&R at 4.) Respondent Walter told Ms. Desir over the telephone that he had apartments available. However, when he met with her in person, he stated that her “being transgender changes everything” and that he could not rent her apartments near people or children. (Tr. 19:9–12.) Remarkably, during their interaction, Respondent Walter also told Ms. Desir that he was able to “discriminate against [her] *because* [she’s] transgender.” (*Id.* at 25:16–19 (emphasis added).) Respondent Walter ultimately refused to show Ms. Desir any of the apartments he had initially told her were available. For these

reasons the Commission finds Respondents liable for violating § 8-107(5)(c)(1) of the NYCHRL.

IV. DAMAGES, CIVIL PENALITIES, 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 complainants. *See id.* § 8-120(a)(8). In addition, the Commission may impose civil penalties of not more than \$125,000.00 per discriminatory act, 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 per discriminatory act. *Id.* § 8-126(a); *see Automatic Meter Reading Corp.*, 2019 WL 1129210, at *11 (upholding \$250,000.00 civil penalty upon a finding that 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. Emotional Distress Damages

“Compensatory damages, including emotional distress damages, are intended to redress a specific loss that the complainant suffered by reason of the respondent’s wrongful conduct,” and should—insofar as monetary compensation can ever compensate for emotional harm—correspond to the complainant’s specific injuries, as supported by the record. *See Howe*, 2016 WL 1050864, at *6. 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.” *Agosto*, 2017 WL 1335244, at *7. An award for

compensatory damages may be premised on the complainant's credible testimony alone, or other evidence including testimony from other witnesses, circumstantial evidence, and objective indicators of harm, such as medical evidence. *See Agosto*, 2017 WL 1335244, at *7 (collecting cases). The NYCHRL places no limitation on the size of compensatory damages awards, N.Y.C. Admin. Code § 8-120(a)(8), and courts have repeatedly recognized the Commission's "special experience in weighing the merit and value of mental anguish claims." *Automatic Meter Reading Corp.*, 2019 WL 1475080, at *9 (citing *Matter of Cutri v. Comm'n on Human Rights*, 113 A.D.3d 608, 608 (2d Dep't 2014)). 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).

Ms. Desir credibly and persuasively testified that she felt "belittled," "frightened," "angry," and "devastated" by Respondents' harassment and discrimination. (Tr. 19:19–21; 20:16; 23:17; 28:3–10.) She was made to "feel horrible," "beaten down and . . . like [she] was being abused." (*Id.* at 20:15–18.) Ms. Desir testified that after the interaction with Respondent Walter, she went into a "real deep depression where . . . for the first week [she] couldn't even get out, leave the house." (*Id.* at 28:5–6.) She went on to say that she had felt "so happy about transitioning, and then . . . [she] felt like situations were just slapping [her] . . . and refusing to allow [her] to grow" (*id.* at 28:3–10), causing her to question the most fundamental aspects of her life—her identity and, for a time, her will to live (*id.*). Ms. Desir recounted that she had approached Respondent Walter from an already vulnerable position, because she had been denied a lease renewal because of her landlord's discrimination, and her concerns about the

prospect of returning to a shelter contributed to her sense that she had to endure Respondent Walter's humiliating conduct to secure housing. (*See id.* at 20:15–20.) Ms. Desir concluded her testimony by expressing her disbelief and devastation at the discrimination she experienced due to her gender identity:

[T]o deny someone even someplace to live because they don't think the way you do or love the way you do or dress the way you do is just, I don't get it. Like I don't expect the whole world to accept my [] transition, but I would like to hope that I'm allowed to be alive and I'm allowed to live and I'm allowed to have a place to go home to.

(*Id.* at 29:11–16.) The Commission has previously observed that “studies document[] the negative psychological effects of sexual harassment . . . which include anxiety, depression, and posttraumatic stress, and can last several years after the harassment occurs.” *Cardenas*, 2015 WL 7260567, at *14 (citation omitted). As the #MeToo movement has demonstrated, sexual harassment is often a dehumanizing experience that can have longstanding, negative repercussions that ripple across an individual's life, including as related to their own health and their ability to work, gain financial security, and maintain personal relationships.⁵

Judge Spooner cites *Comm'n on Human Rights ex rel. Nieves v. Rojas*, OATH Index No. 2153/17 (Oct. 24, 2017), *adopted in part*, *Comm'n Dec. & Order*, 2019 WL 2252369 (May 16, 2019), in support of his recommendation that the Commission award Ms. Desir

⁵ See Nancy Chi Cantalupo & William C. Kidder, *A Systematic Look at a Serial Problem: Sexual Harassment of Students by University Faculty*, 2018 UTAH L. REV. 671, 696 (2018) (“Meta-analytic studies . . . show that sexual harassment has substantial negative consequences for the mental health and wellbeing of victims; including symptoms of depression, anxiety, withdrawal and post-traumatic stress disorder . . . [T]hese mental health costs are the negative workplace and organizational effects of sexual harassment, including declines in job satisfaction, retention rates, organizational commitment and job performance, as well as increased absenteeism.”) (citations omitted); *see also* NEW YORK CITY COMM'N ON HUMAN RIGHTS, *Combating Sexual Harassment in the Workplace: Trends and Recommendations Based on 2017 Public Hearing Testimony*, 1, 2 (Apr. 2018), https://www1.nyc.gov/assets/cchr/downloads/pdf/SexHarass_Report.pdf.

\$15,000.00 in emotional distress damages based on the fact that the complainant in that case, as in this case, suffered housing discrimination. (R&R at 7.) In comments, the Bureau and Ms. Desir ask the Commission to increase the award to \$50,000.00. (Bureau Comments at 9; Complainant's Comments at 3.) The Bureau argues that a heightened award is warranted based on Ms. Desir's clear testimony of significant emotional distress. (Bureau Comments at 7–9.) Ms. Desir asserts that Judge Spooner's reliance on *Nieves* is misplaced because, unlike the complainant in that case, Ms. Desir experienced a compound injury—she was both sexually harassed and denied a housing opportunity—warranting a higher damages award than Judge Spooner recommends. (Complainant's Comments at 3.)

The Commission agrees that Ms. Desir's testimony of her emotional distress is significantly more robust than that in *Nieves*. In *Nieves*, a broker refused to show the complainant an available apartment because he relied on a housing voucher to pay his rent. 2019 WL 2252369, at *1. The complainant in that case provided very limited testimony about himself and the emotional impact on him and, instead, primarily discussed the despair felt by his family. *Id.* at *12. The award was premised substantially on the objective circumstances of the complainant being left in the shelter system with his family. *Id.* In contrast, Ms. Desir provided more extensive and vivid testimony as to Respondent Walter's actions and their effects on her wellbeing, including discussion of profound emotional harm such as suicidal ideations (*see* Tr. 28:7–10) and an observable shift in her mood, as corroborated by a witness (*id.* at 33:23–24; 35:4–9; 37:23–25).

Ms. Desir's case is also distinguishable from *Nieves* in another significant way: in addition to being denied housing, Ms. Desir was subjected to humiliating and degrading sexual harassment. In contrast to the testimony in *Nieves*, Ms. Desir described how Respondent

Walter’s discriminatory behavior caused severe negative effects on her deeply-held sense of identity, leading her to question her transition and to contemplate suicide. (*Id.* at 28:3–10.) For these reasons, *Nieves* is distinguishable in both the nature of discrimination and the evidence of its emotional impact on Ms. Desir, warranting a significantly higher award of emotional distress damages.

The reported impact that Respondents’ discrimination had on Ms. Desir is not surprising. Prejudice and harassment toward transgender people remain pervasive in our society and studies have repeatedly shown that discrimination against transgender people has a direct and profound impact on their health and wellbeing.⁶ It is understandably damaging for someone such as Ms. Desir to have their gender identity—their deeply-felt sense of self—questioned, rejected, and sexualized, especially when in a vulnerable housing situation and having experienced the accumulated impact of past discrimination from others. The specific harm perpetrated against Ms. Desir is a reflection of the all-too-common experiences of transgender people, especially transgender women of color, that society has tolerated and ignored for too long. The record reflects that Ms. Desir, having been denied access to a home, sexually objectified, and told to stop living as her true self, experienced substantial emotional distress. In light of these

⁶ Kellan Baker and Nathaniel Frank, *Anti-LGBT discrimination has a huge human toll. Research proves it.* WASH. POST (Dec. 19, 2019), <https://www.washingtonpost.com/outlook/2019/12/19/anti-lgbt-discrimination-has-huge-human-toll-research-proves-it/> (discussing almost 300 studies showing unambiguous evidence of discrimination linked to health harms); see also National Center for Transgender Equality, *Report of the 2015 U.S. Transgender Survey*, Executive Summary (Dec. 17, 2016), available at <https://transequality.org/sites/default/files/docs/usts/USTS-Executive-Summary-Dec17.pdf> (national online survey of 27,715 transgender adults found “disturbing patterns of mistreatment and discrimination . . . across the most basic elements of life, such as finding a job, having a place to live, accessing medical care, and enjoying the support of family and community. Survey respondents also experienced harassment and violence at alarmingly high rates.”).

considerations, and based on the record and a review of comparable cases, the Commission awards Ms. Desir \$50,000.00 in emotional distress damages. *See N.Y. State Div. of Human Rights v. Muia*, 176 A.D.2d 1142, 1145 (3d Dep't 1991) (awarding \$25,000.00, or \$46,756.55 in today's dollars,⁷ for discriminatory housing denial that caused complainant to lose sleep and experience nausea); *see also N.Y. State Div. of Human Rights v. Team Taco Mexico, Corp.*, 140 A.D.3d 965, 966 (2d Dep't 2016) (upholding New York State Division of Human Rights Award of \$50,000.00 where complainant was sexually harassed by her employer); *Twelfth St. Corp. v. Kirkland*, 106 A.D.3d 1098, 1099 (2d Dep't 2013) (upholding award of \$50,000.00 where complainant was subjected to sexual harassment in the workplace); *Columbia Sussex Corp. v. N.Y. State Div. of Human Rights*, 63 A.D.3d 736, 736 (2d Dep't 2009) (upholding award of \$50,000.00 for mental anguish for sex discrimination); *Matter of City of New York v. N.Y. State Div. of Human Rights*, 283 A.D.2d 215, 216 (1st Dep't 2001) (modified mental anguish award from \$100,000.00 to \$50,000.00 where "complainant's testimony as to the severity and duration of the distress," was not corroborated or substantiated by "any medical or other objective evidence."); *Szpilzinger v. N.Y. State Div. of Human Rights*, 160 A.D.2d 196 (1st Dep't 1990) (upholding a mental anguish award of \$25,000.00, or \$49,839.80 in today's dollars, for complainant who was refused a rental apartment because of race); *Comm'n on Human Rights ex rel. L.D. v. Riverbay Corp.*, OATH Index No. 1300/11, Comm'n Dec. & Order, 2012 WL 1657555, at *8–11 (Jan. 9, 2012) (awarding \$50,000.00 where respondent's discrimination worsened complainant's mental health condition, causing "flashbacks, nightmares, crying spells, [and] dissociation" that left her nearly incapacitated and caused her suicidal ideations).

⁷ U.S. BUREAU OF LABOR STATISTICS, CPI Inflation Calculator, *available at* <https://data.bls.gov/cgi-bin/cpicalc.pl>.

B. Civil Penalties

Where the Commission finds that respondents have engaged in an unlawful discriminatory practice, the NYCHRL authorizes the Commission to, among other things, impose civil penalties of not more than \$125,000.00 per discriminatory act, 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 per discriminatory act. *Id.* § 8-126(a); *see Automatic Meter Reading Corp.*, 2019 WL 1475080, at *11 (upholding \$250,000.00 civil penalty upon a finding that 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).

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) the respondent’s financial resources; (2) the sophistication of the respondent’s enterprise; (3) the respondent’s size; (4) the willfulness of the violation; and (5) the impact on the public of issuing civil penalties. *See, e.g., 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. & Order, 2015 WL 7260570, at *4 (Oct. 28, 2015). The Commission also considers the extent to which the respondent cooperated with the Bureau’s investigation and with OATH, *see, e.g., A Nanny on the Net*, 2017 WL 694027, at *9; *Comm’n on Human Rights v. Crazy Asylum*, OATH Index Nos. 2262/13, 2263/13, 2264/13, Comm’n Dec. & Order, 2015 WL 7260568, at *6 (Oct. 28, 2015), as well as the amount of remedial action that the respondent may have already

undertaken, *see, e.g., A Nanny on the Net*, 2017 WL 694027, at *8; *CU 29 Copper Rest. & Bar*, 2015 WL 7260570, at *4.

Judge Spooner recommended civil penalties of \$10,000.00. (R&R at 6.) The Bureau, however, has requested that the Commission increase this penalty to \$50,000.00 because Respondent Walter's behavior was "wanton and malicious," Respondents refused to cooperate in the investigation, and there is a strong public interest in punishing gender identity discrimination, particularly in housing. (Bureau Comments at 9–11.) The Bureau argues that Judge Spooner's recommendation does not adequately reflect Respondent Walter's egregious and disturbing behavior, Respondents' ability to retain counsel, or the impact of their discrimination on the public. (*Id.* at 9–10.) Complainant's counsel did not address penalties.

The evidence of Respondents' size, sophistication, and financial resources is limited due to Respondents' failure to produce financial records or cooperate with the Bureau's investigation—a factor that weighs in favor of heightened civil penalties. *See Comm'n on Human Rights v. Shalom Bombay 2 LLC*, OATH Index No. 544/15, Comm'n Dec. & Order, 2017 WL 2817844, at *5 (June 21, 2017). Through online investigation using Respondent Walter's LinkedIn website, CLEAR searches, and the New York State Department of State's Division of Corporations website, the Bureau found Respondent Walter connected to, and potentially owning, three separately named, though seemingly related, business entities. (*See Ahern Aff.* ¶¶ 5, 6, 16, 20.) From the un rebutted evidence it can be reasonably inferred that Respondents run a moderately-sized and sophisticated business enterprise. (*Id.*)

In addition to Respondents' size and sophistication, the Commission also considers the egregious nature of Respondents' conduct, the willfulness of their violations, their lack of cooperation with the investigation and hearing processes, and the likely impact of civil penalties

on the public. *See, e.g., Martinez*, 2017 WL 4510797, at *21–23; *Agosto*, 2017 WL 1335244, at *11–12. Ms. Desir sought help with housing from Respondent Walter out of a fear of being homeless following the rejection she already experienced by her landlord at the time. By telling Ms. Desir that she cannot live near other people and children, commenting on her body, questioning her about her transition, and making vulgar, sexually suggestive comments, Respondent Walter abused his position of power as a real estate broker who could help secure housing for Ms. Desir. Moreover, it is clear that Respondent Walter’s conduct was willful. He stated to Ms. Desir, “I can’t discriminate against you because you’re black, I can’t discriminate against you because you’re gay, but I could discriminate against you because you’re transgender.” (Tr. 25:16–19.) He repeatedly harassed Ms. Desir with comments about her gender and sexual activity. The repeated and willful nature of his discriminatory conduct weighs in favor of heightened penalties. Furthermore, Respondents’ stubborn lack of cooperation in Commission proceedings must be taken into consideration when assessing civil penalties. The failure to participate in the process undermines the public interest and warrants higher penalties. *See Agosto*, 2017 WL 1335244, at *13. Moreover, Respondents’ multiple acts of discrimination—sexually harassing Ms. Desir and denying her access to a housing opportunity because of her gender—also weigh in favor of heightened penalties.

As the Bureau correctly notes, New York City has a strong public interest in stamping out gender discrimination of all kinds, particularly willful discrimination. (*See Bureau Comments at *10–11.*) In 2002, the NYCHRL was amended to explicitly expand prohibitions against gender discrimination to people whose “gender and self-image do not fully accord with the legal sex assigned to them at birth.” Local Law 3 (2002) (Transgender Bill of Rights). The legislative history of this amendment reflects that “people face frequent and severe discrimination based on

gender identity, and protection from discrimination is ‘very often a matter of life and death.’”⁸

The National Center for Transgender Equality reported in 2016 that approximately one-fifth of transgender people who responded and were New York residents had experienced housing discrimination in the prior year, one-third had experienced homelessness at some point in their lives and, of those who reported homelessness, 30% reported avoiding staying in a shelter because they feared being mistreated as a result of their gender identity.⁹ Nationally, 70% of respondents reported some form of harassment or assault as a result of their gender identity while in the shelter system.¹⁰ Moreover, transgender adults are more likely to experience homelessness than the general population.¹¹ In short, housing discrimination and gender-based harassment toward transgender people is a problem of epidemic proportions that has gone largely unrecognized. Indeed, against this backdrop and where it is possible to do so safely, it is a courageous act for a transgender person to live openly as their true self, despite awareness of the harsh reception that often greets them.

Taking into account the public interest in addressing the level of discrimination transgender people face, the egregious and willful nature of Respondents’ discrimination, Respondents’ moderate business sophistication and failure to cooperate in the case, as well as

⁸ N.Y.C. Council, Governmental Affairs Division, Committee on General Welfare, Report on Intro. No. 24, 3–4 (Apr. 24, 2002), *available at* <http://legistar.council.nyc.gov/Legislation.aspx>.

⁹ National Center for Transgender Equality, *Report of the 2015 U.S. Transgender Survey*, New York State Report (Oct. 2017), *available at* <https://www.transequality.org/sites/default/files/USTS%20NY%20State%20Report%20%281017%29.pdf>.

¹⁰ National Center for Transgender Equality, *Report of the 2015 U.S. Transgender Survey*, Executive Summary (Dec. 17, 2016), *available at* <https://transequality.org/sites/default/files/docs/usts/USTS-Executive-Summary-Dec17.pdf>.

¹¹ National Alliance to End Homelessness, *Demographic Data Project: Gender Minorities* (2018) <https://endhomelessness.org/wp-content/uploads/2019/06/Gender-Minority-Homelessness-Article-Revised-6-24-19-JJ-002.pdf>.

penalties in similar cases, the Commission concludes that a civil penalty of \$25,000.00 is appropriate. *See Agosto*, 2017 WL 1335244, at *13 (civil penalty of \$20,000.00 on a medium-sized housing provider where penalty was aggravated by respondent's failure to cooperate with the Bureau and to present relevant financial information, the willfulness of respondent's conduct, and the necessity of robust civil penalties to prevent discrimination on the basis of source of income); *Martinez*, 2017 WL 4510797, at *23 (imposing civil penalty of \$18,000.00 on employer who engaged in willful sexual harassment, failed to cooperate in the Commission process, and was found to employ at least fifteen people). Alternatively, Respondents may pay reduced civil penalties of \$15,000.00 if they agree to participate in a mediated process with representatives of transgender communities, facilitated by the Commission and oriented toward understanding the challenges and issues facing transgender people and the impact that discrimination has on them, as well as developing cultural competency for working with transgender people.

C. Additional Affirmative Relief

The Commission regularly requires individuals who are 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; *Comm'n on Human Rights ex rel. Jordan v. Raza*, OATH Index No. 716/2015, *Comm'n Dec. & Order*, 2016 WL 7106070, at *11 (July 7, 2016). The Commission finds that Respondents would benefit from three such anti-discrimination trainings in particular related to understanding the NYCHRL, transgender rights, and the prevention of sexual harassment, and orders Respondents to complete the Commission-led trainings as set forth below. Respondents must also undergo a formal review

by the Bureau of their written anti-discrimination policies and post the Commission's "Fair Housing: It's the Law" poster at each of their places of business in New York City.

V. CONCLUSION

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

IT IS FURTHER ORDERED that, no later than 60 calendar days after service of this Order, Respondents pay Complainant Desir \$50,000.00 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 Gigi Desir, including a written reference to OATH Index No. 1253/19.

IT IS FURTHER ORDERED that, no later than 60 calendar days after service of this Order, Respondents provide written notice of their intent to engage in a mediated process with representatives of the transgender community, by mailing or emailing the notice to Assistant Commissioner for Law Enforcement Katherine Carroll and including written reference to "Desir v. Henry Walter and Empire State Realty Management, LLC, OATH Index No. 1253/19." If Respondents elect to participate in a mediated process, which will be facilitated by the Commission, they must within 120 days of service of this Order pay a reduced civil penalty of \$15,000.00 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. 1253/19. If Respondents fail to participate in good faith in the mediated process, the full \$25,000.00 civil penalty will be reinstated. If Respondents fail to provide timely notice to the

Commission of their intent to participate in a mediated process, they must, within 120 days after service of this Order, pay a civil penalty of \$25,000.00 in the same manner as stated above.

IT IS FURTHER ORDERED that, no later than 60 calendar days after service of this Order, Respondents register for two in-person Commission-led trainings, Human Rights Overview and Working with Transgender and Gender Non-Conforming Communities, to each be completed no later than 120 days after service of this Order. A schedule of available trainings may be obtained by calling the Director of Training and Development at (212) 416-0193 or emailing trainings@cchr.nyc.gov.

IT IS FURTHER ORDERED that, no later than 60 calendar days after service of this Order, Respondents provide the Commission with a certificate of completion confirming that they have completed the Commission's online Sexual Harassment Prevention Training at <https://www1.nyc.gov/site/cchr/law/sexual-harassment-training.page>. The training certificates must be either mailed or provided in electronic copy to Assistant Commissioner for Law Enforcement Katherine Carroll and include written reference to "Desir v. Henry Walter and Empire State Realty Management, LLC, OATH Index No. 1253/19."

IT IS FURTHER ORDERED that, no later than 60 calendar days after service of this Order, Respondents submit to the Bureau written copies of their anti-discrimination policies. The policies must be either mailed or provided in electronic copy to Assistant Commissioner for Law Enforcement Katherine Carroll and include written reference to "Desir v. Henry Walter and Empire State Realty Management, LLC, OATH Index No. 1253/19."

IT IS FURTHER ORDERED that, no later than 60 calendar days after service of this Order, Respondents conspicuously post the "Fair Housing: It's the Law" poster, available at

<https://www1.nyc.gov/site/cchr/media/posters.page>, at the entrance of all of their New York City places of business.

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

Dated: New York, New York
March 2, 2020

SO ORDERED:
New York City Commission on Human Rights



Carmelyn P. Malalis
Commissioner/Chair

To:

Complainant
Ms. Gigi Desir
c/o Cathy Bowman, Esq.

[Redacted]

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Respondents
Mr. Henry Walter

[Redacted]

Mr. Henry Walter

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Empire State Realty Management, LLC

[Redacted]

Empire State Realty Management, LLC