SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 17

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AUTOMATIC METER READING CORP. and MELANIE PIEN, as personal representative of the estate of JERRY FUND,

Petitioners,

Index No.: 162211/2015

- against -

DECISION/ORDER

NEW YORK CITY, NYC COMMISSION ON HUMAN RIGHTS AND CARMELYN P. MALALIS, individually and as NYC COMMISSION ON HUMAN RIGHTS COMMISSIONER/CHAIR, and MONICA CARDENAS,

Respondents.

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HON. SHLOMO S. HAGLER, J.S.C.:

In this special proceeding brought pursuant to Article 78 of the CPLR and section 8-123 (b) of the Administrative Code of the City of New York ("Administrative Code"), petitioners Automatic Meter Reading Corp. ("AMRC") and Melanie Pien, as personal representative of the estate of Jerry Fund ("Fund") move pursuant to CPLR 7801 and 7803, for an order annulling or modifying the decision and order issued by the New York City Commission on Human Rights ("NYCCHR") dated October 28, 2015 (the "NYCCHR Decision").

Respondents City of New York, New York City Commission on Human Rights (the "Commission") and Carmelyn P. Malalis oppose and cross-move for an order dismissing the petition and enforcing the NYCCHR Decision. Respondent Monica Cardenas also opposes.

The parties appeared for oral argument before this Court on May 23, 2016, wherein this Court denied the cross-motion (May 23, 2016 hearing tr at 43, 45). For the reasons set forth more fully below, the motion for an Order seeking an annulment or modification of the

NYCCHR Decision is denied, and the petition is dismissed.

BACKGROUND FACTS

Underlying Facts Before NYCCHR

In 1995, respondent Monica Cardenas was hired to work as a billing clerk at AMRC. In 2008, Cardenas was promoted by Fund, owner of AMRC, to the office manager position, at which point Cardenas began directly reporting to Fund.

On March 1, 2011, Fund touched Cardenas' backside with an umbrella. On March 4, 2011, Cardenas and Fund got into a dispute about Cardenas' work performance. Cardenas left the office. On March 5, 2011, Cardenas wrote a resignation letter wherein she stated:

> "After 15 years of dutiful service to your company I have reached the end of my employment with AMRC.
> In recent months it has become difficult to work with you, FOR you. Every decision I make is always wrong, stupid, lacking judgment etc. . . In your words ...
> This past week of 3/1-3/4 was the breaking point when you continued to everyday yell and scream at me for something that was beyond my control. You have become very angry i.e. yelling at the top of your lungs, punching your desk, slamming your phone.
> But at worst is your inappropriate behaviors towards me that left me feeling defensive. On Tues. evening as you were leaving for the day you slapped my buttocks with your umbrella and when I clearly asked you 'to stop and NOT TO DO THAT' you did it once again and then laughed in my face.
> Your so called humor by posting on the office copier a cartoon of a scantily dressed woman with the words 'our own Monica' has left no respect from you or my co-workers. You have made a stressful environment a demeaning and humiliating situation for me.
> You have left me in an emotional nervous wreck and therefore effective immediately I resign my position with your company"

Thereafter, Cardenas began receiving unemployment insurance payments, Medicaid and other benefits. Cardenas turned down a number of job offers, but ultimately accepted one with the United States Postal Service, which she began in January 2013.

Underlying NYCCHR Complaint

On May 4, 2011, Monica Cardenas filed a Verified Complaint with the NYCCHR alleging sexual harassment and hostile work environment by Fund, her direct supervisor. A probable cause determination was issued by the NYCCHR in December 2012. The matter was then prosecuted before NYCCHR Administrative Law Judge Alessandra F. Zorgniotti (the "ALJ"). The ALJ conducted a six-day hearing during September, October and December of 2013. Petitioners claim that the ALJ permitted witnesses to introduce testimony to events outside the one-year jurisdictional period. Specifically, Ms. Romero, a former AMRC employee who left the company in 2002, and Mr. Alfano, a former employee who left the company in 2006, were permitted to testify for Cardenas. Petitioners presented the testimony of Fund, Ms. Li, a former AMRC employee, and Ms. Begum, a then-current AMRC employee. At the close of the evidentiary hearings, the record was left open for submission of proposed findings of fact and conclusions of law. All parties made submissions and replies were filed, closing the record.

Thereafter, the ALJ released a "Report and Recommendation" dated March 14, 2014 (the "RAR"), which was transmitted to then Commissioner Patricia L. Gatling. According to the RAR, the ALJ found the following based on the testimony and evidence submitted during the hearing, finding Cardenas more credible than Fund, that AMRC and Fund violated the New York City Human Rights Law ("NYCHRL") section 8-107 (a) in that; 1) Fund confirms that he hit Cardenas' buttock with an umbrella, and after she told him to stop, he laughed and hit her buttock again; 2) Fund also confirms that he posted a cartoon, depicting a large breasted woman, with a pronounced buttock, and big hair bending forward so that her breasts and buttock were jutting out, with the quote "Can't a Girl Walk Down the Street Peacefully" from the Daily News

by the office copier and wrote on top of it "OUR OWN MONICA?"; and 3) Fund also concedes that he compared Cardenas to a Sports Illustrated swimsuit model, stating to Cardenas's coworkers that Cardenas used to have a body like that (hearing tr at 59-62, 68-69, 652-653).

Moreover, during the hearing, Fund testified in response to the umbrella incident that after 15 years of working with Cardenas, he "has the right to have a little fun" with Cardenas. Fund also testified that the cartoon depicted a "very well-dressed young lady" who was fired for coming to work well dressed. Fund thought labeling the cartoon with Cardenas's name on it was a compliment (hearing tr at 649-650). Based on the six days of testimony of the parties and various witness, the ALJ found Cardenas' allegations credible, finding that throughout her tenure as office manager at AMRC, for a period of three years, Fund regularly made sexualized and sexist comments to Cardenas, such as "Why did I put a woman in charge?", "sex helps" with headaches, offering to rub her chest when Cardenas had a cough, and would suggest they run away together saying he would remember to bring Viagra and Cialis, among other comments. Fund also repeatedly humiliated Cardenas in front of her coworkers and clients as verified by both current and former employees, and an AMRC client, Steven Liebel (hearing tr at 31, 44, 46-47, 49-50, 72-73, 185, 308, 780, 786-788).

Petitioners contend that the parties were not given notice that the ALJ had added material to the record, on March 11, 2014, after the close of the record in February 2014, which was not referenced as exhibits in the transcripts of the hearings. The added material consists of correspondence with the ALJ concerning document production, and was marked as ALJ exhibit 7. On November 20, 2015, petitioners reviewed the record pursuant to Administrative Code § 8-123 (g), and learned of this additional production.

Additionally, on March 18, 2014, after the RAR was transmitted to Commissioner Gatling, a press conference was held at which Commissioner Gatling declared petitioners guilty of misconduct. Petitioners then filed an action in federal court, seeking, among other things, injunctive relief to bar the NYCCHR action in connection with the RAR. The Southern District of New York, federal district court, dismissed the claims for injunctive and declaratory relief, but stayed the action with respect to money damages pending final determinations in the NYCCHR and any challenges to said determination in the state courts (*see* Honig aff Exhibits "I" & "J", respectively).

On May 14, 2014, the Deputy Counsel of the NYCCHR, Rudolph Pyatt, pursuant to his own declaration, declared that Commissioner Gatling recused herself from the matter, and that he would randomly select three other Commissioners to issue a final decision and order.

On October 28, 2015, the NYCCHR issued its decision and order signed by Commissioner Carmelyn P. Malalis. The NYCCHR adopted the ALJ's report finding that petitioners engaged in unlawful discriminatory practice and awarded Cardenas a total of $422,67026 in back pay, prejudgment interest, front pay and emotional distress damages. The NYCCHR also imposed a $250,000 civil penalty on petitioners. The NYCCHR Decision modified the RAR in that it: (1) updated the back pay award to reflect Cardenas's lost income through the date of judgment, i.e., October 28, 2015, and calculated interest; (2) increased the front pay award from one to five years; and 3) increased the civil penalty from $75,000 to $250,000. At the same time, the NYCCHR issued a press release stating that petitioners' failure to produce documents caused the civil penalty to be raised to the maximum possible.

Arguments

Petitioners argue that the NYCCHR Decision is legally defective and should be annulled because: (1) the NYCCHR Decision involves a lack of due process in that: (i) documents were added to the record without notice to petitioners and were considered by the NYCCHR without the ability of petitioners to address them; (ii) the NYCCHR press release announcing the NYCCHR Decision references the ability to obtain counsel as a factor in the NYCCHR's decisions; (iii) it is retaliatory to the federal action; and (iv) petitioners' rights were violated by the Gatling Press Conference, wherein she publicly declared petitioners guilty before any review or decision by the NYCCHR; (b) the NYCCHR acted outside of its jurisdiction, which is set at one year pursuant to Administrative Code § 8-109 (e), by relying on matters outside of the statutory period, one year prior to the filing of the NYCCHR complaint on May 4, 2011; (c) the NYCCHR Decision is infected by multiple errors of law, including the consideration of matters beyond the one-year time frame, failure to apply New York State law with respect to constructive discharge; failure to apply New York State law with respect to the mitigation of damages; awarding of excessive lost earnings damages inconsistent with the law, an award of excessive emotional distress damages that is inconsistent with the law, and a legally unjustifiable award of a civil penalty more than tripled from the finding of the ALJ without a stated explanation; (d) the NYCCHR Decision is arbitrary and capricious for the above-referenced reasons; (e) the NYCCHR Decision is not supported by substantial evidence because the witness testimony and documentary evidence is inconsistent with the NYCCHR Decision's findings; and (f) the NYCCHR failed to follow its own declared practice with respect to issuance of the NYCCHR Decision in that one commissioner rather than three made the determination contrary to the

operating procedure that was set forth in NYCCHR's counsel's sworn statement in the federal action.

DISCUSSION

When, as here, the petitioners seek judicial review of an order of the Commission, an Article 78 proceeding cannot be maintained (*Matter of Maloff v City Commn. on Human Rights*, 45 AD2d 834 [1st Dept 1974], *on remand*, 46 AD2d 852 [1st Dept 1974], *affd* 38 NY2d 329 [1975]; *Matter of Shahbain v Commission on Human Rights*, 50 Misc3d 1213[A] [Sup Ct, NY County 2016]). However, Section 8–123 (f) of the Administrative Code provides that "[t]he jurisdiction of the supreme court shall be exclusive and its judgment and order shall be final, subject to review by the appellate division of the Supreme Court and the court of appeals in the same manner and form and with the same effect as provided for appeals from a judgment in a special proceeding."

"Where the commission has made findings of fact, the sole question before the reviewing court is whether there is sufficient evidence in the record to support the administrative findings" (*Matter of New York Times Co. v City of N.Y. Commn. on Human Rights*, 41 NY2d 345, 349 [1977], quoting *Matter of Pace Coll. v Commission on Human Rights of City of N.Y.*, 38 NY2d 28, 35 [1974]; *see also* Admin. Code §8-123 [e] ["the findings of the commission as to the facts shall be conclusive if supported by sufficient evidence on the record considered as a whole"]).

"The standard of review which guides us with 'sufficient evidence' pursuant to Administrative Code § 8–[123 (e)] is similar, if not identical, to the 'substantial evidence' rule applied in CPLR 7803 [4] proceedings" (*Matter of 119-121 East 97th St. Corp. v New York City Commn. on Human Rights*, 220 AD2d 79, 81 [1st Dept 1996], quoting *Burlington Indus. v New*

York City Human Rights Commn., 82 AD2d 415, 417 [1st Dept 1981], *affd* 58 NY2d 983 [1983]; *see also Matter of Pace Coll. v Commission on Human Rights of City of N.Y.*, 38 NY2d 28, 35 [1975] ["(t)his provision is comparable in effect to State legislation providing for administrative regulation of unlawful discrimination in employment"]). "[T]he substantial evidence test demands only that a given inference is reasonable and plausible, not necessarily the most probable. . .[C]ourts may not weigh the evidence or reject [a] determination where the evidence is conflicting and room for choice exists. Instead, when a rational basis for the conclusion adopted by the [agency] is found, the judicial function is exhausted. The question, thus, is not whether [the reviewing court] finds[s] the proof ... convincing, but whether the [agency] could do so" (*Matter of Marine Holdings, LLC v New York City Commn.on Human Rights*, 31 NY3d 1045, 1047 [2018] [internal quotation marks and citations omitted].

Failure to Provide Due Process

Petitioners argue that the NYCCHR failed to provide it with requisite due process in that: (a) the NYCCHR relied on material that was added to the record after the record was closed in February 2014; (b) a November 2015 press release set forth that the ability to obtain counsel was a factor in the NYCCHR decision making process; (c) Commissioner Gatling's prejudgment press release, resulting in her recusal, infected the NYCCHR's decision making process thereby prejudicing petitioners; and (d) the NYCCHR's increase of the civil penalty to the maximum of $250,000 should be considered unlawful retaliation for petitioners' filing the federal action.

Respondents counter that there is no legal or factual basis for the assertions above, as they are meritless and disingenuous.

With respect to the "added" materials offered as part of the record beyond the closing of

the record, this Court has reviewed ALJ Exhibit "7". Exhibit "7" consists of email correspondence dated August 29, 2013 between the ALJ and counsel for all parties, including petitioners, wherein the ALJ ordered petitioners to produce certain financial documents (Okereke aff, Exhibit "P"). Petitioners did not comply with the order. Based on the subject matter of the August 2013 emails, the ALJ ordered petitioners to provide the financial information requested from complainant's counsel, as it was "relevant to the issues at the upcoming trial." Petitioners had a chance to raise any objections to the RAR after it was issued (*see* 47 NYCRR § 1-76). Further, it is clear after reviewing the hearing transcript that this issue, i.e., petitioners' failure to produce financial records of which a complete set was never produced, was raised numerous times during the hearing before the ALJ (hearing tr at 677-711). Given petitioners' repeated failure to comply with said orders, the NYCCHR was within its discretion to draw an adverse inference against them, as petitioners were warned (hearing tr at 713, 728-748; *see generally Horizon Inc. v Wolkowicki*, 55 AD3d 337, 337-338) [1st Dept 2008]). Accordingly, there was no deprivation of due process in this regard.

Petitioners' remaining due process arguments are found to be red herrings. Petitioners assert that the general press release by the NYCCHR, wherein the NYCCHR indicated that under the new leadership, the NYCCHR would consider a "range of factors" including but not limited to a party's ability to obtain counsel is in and of itself evidence that their due process rights were violated. However, this allegation is nothing more than a speculative assertion, which is unsupported by the record. Neither the NYCCHR Decision nor the RAR make any mention of the fact that petitioners were represented by counsel. Moreover, the press release does not indicate that the ruling against petitioners was in any way related to petitioners' ability to obtain

counsel.

Likewise, petitioners allege that former Commissioner Gatling's declaration of petitioners' guilt based on the ALJ's RAR tainted the NYCCHR's decision making process. However, any negative commentary about petitioners made by Gatling was rectified by her recusal from adjudicating the matter. Moreover, at the time the NYCCHR issued its decision, Gatling was no longer Commission Chair, rather Carmelyn Malalais had subsequently been appointed. Petitioners proffer no evidence other than their blanket conclusory assertion that the Commissioner's public comments influenced her subordinates, which, without more, is insufficient to support such a finding. Moreover, as Gatling was not involved in the NYCCHR Decision, aside from petitioners' bare conclusory allegations, there is no evidence to support that the increase in civil penalties was some form of retaliation for petitioners filing the federal court action in this regard.

Statutory Jurisdiction of One Year and applicability of the Continuing Violation Doctrine

Pursuant to Administrative Code § 8-109 (e), "The Commission shall not have jurisdiction over any complaint that has been filed for more than one year after the alleged unlawful discriminatory practice or an act of discriminatory harassment or violence as set forth in chapter six of this title occurred."

Petitioners argue that since the NYCCHR complaint was filed on May 4, 2011, the one-year statutory period runs from May 4, 2010 to May 4, 2011. Therefore, they claim that the NYCCHR erred when it considered any alleged discriminatory acts prior to May 4, 2010, and that any acts related to the umbrella incident or the cartoon should be considered separate and discrete acts.

Respondents counter that Cardenas' NYCCHR complaint described a continuous violation which created a hostile work environment from May 2008 to March 2011. Under the continuing violation doctrine, "[t]ime-barred discrete acts can be considered timely where specific and related instances of discrimination are permitted by the employer to continue unremedied for so long as to amount to a discriminatory policy or practice" (NYCCHR Decision at 9-10 [internal quotation marks and citations omitted]).

The ALJ and NYCCHR found that all of Cardenas' allegations between May 2008 and March 2011 constituted one continuing violation and were therefore tolled until the occurrence of the last act in March 2011, and as such, the complaint was timely filed within the Commissioner's one-year statute of limitations.[1] New York State Courts hold that the more liberal continuing violations doctrine applies to claims brought under the NYCHRL (*Williams v New York City Hous. Auth.*, 61 AD3d 62, 72-73 [1st Dept 2009]). The NYCCHR's application of the continuing violation theory, therefore, was not in contravention of the Administrative Code and must be upheld (*id.*; *see also James v City of New York*, 144 AD3d 466, 467 [permitting consideration under the continuing violations doctrine of all actions relevant to NYCHRL discrimination claim]; *Jeudy v City of New York*, 142 AD3d 821 [1st Dept 2016] [applying continuing violation doctrine to NYCHRL claim]; *Ferraro v New York City Dept. of Educ.*, 115 AD3d 497, 497-498 [1st Dept 2014]). As such, the NYCCHR Decision in applying the continuing violation doctrine was rational and supported by substantial evidence.

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[1] While petitioners allege that the NYCCHR Decision considered witnesses testimony from 2002 and 2006 by former coworkers Romero and Alfano regarding Fund's sexualized comments, the NYCCHR and ALJ made clear in the RAR and NYCCHR Decision that they only looked back to incidents of sexual harassment that began in 2008 after Ms. Cardenas took the office manager position.

Alleged Errors of Law

Petitioners further assert that the NYCCHR Decision is based on multiple errors of law. Namely, that: (1) the NYCCHR found a constructive discharge; (2) the NYCCHR Decision did not require claimant to mitigate damages; (3) there was an improper finding of damages; (4) the emotional distress damage award is not compatible with New York law; and (5) there was no basis for a civil penalty, and even if it was warranted, it should be nominal.

Constructive Discharge

To state a claim for constructive discharge, plaintiff must allege facts showing that defendant "deliberately creat[ed] working conditions that were so intolerable 'that a reasonable person would have felt compelled to resign'" (*Teran v JetBlue Airways Corp.*, 132 AD3d 493, 494 [1st Dept 2015], quoting *Short v Deutsche Bank Sec., Inc.*, 79 AD3d 503, 504 [1st Dept 2010]). "To establish the employer's deliberate conduct, plaintiff must show more than its 'lack of concern' and 'mere negligence or ineffectiveness'" (*Zimmer v Warner Bros. Pictures, Inc.*, 56 Misc 3d 1208[A], *4 [Sup Ct, NY County 2016], quoting *Polidor v Societe Generale Groupe*, 39 AD3d 404, 405 [1st Dept 2007]). Petitioners argue that the standard was not even remotely met, and is belied by Cardenas' 15 years of employment with petitioners, Cardenas' alleged failure to attempt to rectify the alleged discrimination, and Cardenas' resignation for reasons unrelated to discrimination.

The NYCCHR found that "[t]he undisputed facts support the conclusion that in the three years preceding Cardenas' termination, Fund engaged in a continuous campaign of sexually hostile, offensive and discriminatory harassment . . . conduct that was hostile enough to force [Cardenas] to quit" (NYCCHR Decision at 19), i.e., that Fund "deliberately created the working

conditions that [Cardenas] claims were intolerable and forced [her] to resign" (*Zimmer*, 56 Misc 3d 1208[A] at *4).

Moreover, the record reflects that Cardenas, had in fact, on multiple occasions objected to the way Fund spoke to her and treated her in front of her colleagues and clients throughout the tenure of her employment, all to no avail (hearing tr at 49-50; 73). Fund himself claimed that he was "the court of last resort" (hearing tr at 803). Fund also admitted that he repeated behavior, such as hitting Cardenas in the buttocks with the umbrella despite Cardenas asking him to stop, because he thought it was funny. Courts have found that humiliating an employee in front of colleagues and failing to remedy the situation after complaining could compel a reasonable person to resign (*see Thomas v Tam Equities Inc.*, 6 Misc 3d 1021[A], *3 [Sup Ct, Queens County 2005]). Given the breadth of incidents having occurred to Cardenas over the course of her employment at AMRC as found by the ALJ and confirmed by the NYCCHR, there is substantial evidence to warrant a finding of constructive discharge, and the NYCCHR's Decision in this regard is rational.

Mitigation of Damages

Petitioners contend that the NYCCHR Decision did not require Cardenas to mitigate any damages, and that based on Cardenas' testimony she had been offered a job and declined it, for "purely and subjective reasons." Given the job offer, petitioners claim that any claims for back and/or front pay are barred. Respondents counter that the awards of backpay, prejudgment interest and front pay are reasonable and supported by the facts and legal precedent and should not be disturbed.

The NYCCHR noted that "Cardenas was obligated to mitigate her damages by making

reasonable attempts to search for and obtain a new job" (NYCCHR Decision at 17). "Generally, an individual complaining of discrimination has a duty to mitigate his or her damages by making reasonable efforts to obtain comparable employment. The burden of proving a lack of diligent efforts to mitigate damages and showing the extent to which efforts would have diminished damages is on the employer" (*see Matter of Goldberg v New York State Div. of Human Rights*, 85 AD3d 1166, 1167 [2d Dept 2011] [under New York State Human Rights Law ["NYDHRL"]); *Hawkins v 1115 Legal Serv. Care,* 163 F3d 684, 695 [2d Cir 1998] [under Title VII]).

Cardenas was found to have credibly testified to her attempts to find work and kept detailed records of several hundred jobs inquired of and/or applied for (hearing tr at 96-104; Hong aff, Exhibit "L"; *see also Matter of Goldberg v New York State Div. of Human Rights*, 85 AD3d at 1168 [award of back pay "should be sustained if supported by substantial evidence"]). The NYCCHR found that though Cardenas received a job offer with an investment company in December 2011, she did not accept the position because the interview made her feel uncomfortable and would have paid her "nearly half as much as she was earning at AMRC" (NYCCHR Decision at 18, citing hearing tr at 106). There is no requirement that Cardenas had to take any job she was offered (*Becerril v East Bronx NAACP Child Dev. Ctr.*, 2009 WL 2611950, *3 [SD NY 2009] ["the plaintiff's duty . . . 'does not require her to be successful in mitigation'"], quoting *Dailey v Societe Generale*, 108 F3d 451, 456 [2d Cir 1997]), and it was reasonable for her to reject a position that paid significantly lower wages, as well as one, that paid her no benefits. Ultimately, in January 2013, Cardenas took a one-year position with the United States Postal Service.

As is the case in the current motion before this Court, petitioners did not "explore the

reasonableness of [Cardenas'] decision . . . beyond making the conclusory statement that rejecting the job offer 'was not reasonably prudent and not consistent with reasonable efforts'" (NYCCHR Decision at 18, quoting petitioners' comments to the RAR at 21). The NYCCHR noted that petitioners "chose not to question Cardenas . . . on her decision to turn down an offer of employment" (*id.*). Petitioners' comments also "failed to address why it would be unreasonable for Cardenas to reject a job offer . . ." (*id.* at 18-19), and admit that they themselves failed to take testimony on the issue (NYCCHR Decision at 19 citing petitioners' comments to the RAR at 19-20).

Particularly given petitioners' failure to meet their burden to address the mitigation issues at the hearing, the NYCCHR was within its authority to find that the duty to mitigate did not obligate Cardenas to leave one sexually hostile work environment only to potentially work at another. Moreover, the job in question would have paid her approximately half of what she was making at AMRC. Based on the foregoing, this Court cannot say that the NYCCHR's Decision as to mitigation was unreasonable, an abuse of discretion or an error of law.

Back Pay Damages

Petitioners also argue that the NYCCHR Decision improperly calculated the back pay award in that the NYCCHR failed to offset the determination based on collateral payments Cardenas received as unemployment compensation. Petitioners claim that there was no reductions in the backpay award for the amount of unemployment insurance which is impermissible under and not in compliance with CPLR 4545.

"New York's common-law collateral source rule generally precludes a defendant from offering evidence that a plaintiff is being reimbursed by another source (to which the defendant

has not contributed), or from seeking an offset on that basis" (*Turnbull v USAir, Inc.*, 133 F3d 184, 186 [2d Cir 1998]; *see also Siracuse v Program for the Development of Human Potential*, 2012 WL 1624292 *12 [EDNY 2012] [under New York common law, "an injured plaintiff's damages should not be mitigated or reduced based on payments the injured plaintiff received from a source wholly independent of and collateral to the wrongdoer"]). However, the collateral source rule has been modified by CPLR 4545(c), which applies to all "actions for personal injury, injury to property or wrongful death" (CPLR 4545(c); *Oden v Chemung County Indus. Dev. Agency*, 87 NY2d 81 [1995]. CPLR 4545(c) authorizes a reduction in "the amount of the plaintiff's award if any element of that economic award encompassed in the award was or will be replaced, in whole or in part, from a collateral source" (*Id.* at 83-84).[2]

While the rationale of the collateral source rule is to prevent "a windfall for the plaintiff if they are not deducted and for the defendant if they are deducted" (*Sass v MTA Bus Co.*, 6 FSupp3d 238, 255 [ED NY 2014] [internal quotation marks and citation omitted]), whether or not to offset lost wages is left to the "sound discretion of the court" (*Dailey v Societe Generale*, 108 F3d at 460; *Shannon v Fireman's Fund Insurance Co.*, 136 FSupp2d 225, 231 [SDNY 2001]).

Here, unemployment benefits are paid by a state agency rather than by respondents directly. As such, either Petitioners or Cardenas would receive a windfall depending on how the unemployment benefits are treated (*Sass v MTA Bus Co.*, 6 F Supp 3d at 255). "[F]airness

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[2] As stated in *EEOC v Yellow Freight System, Inc.* (2001 WL 1568322 *2 [EDNY 2001]), "CPLR § 4545(c) applies only to personal injury actions. Plaintiffs [in that case] [did] not cite, nor has [the] Court found, a New York case applying N.Y. C.P.L.R. § 4545(c) to a discrimination claim."

dictates that the "windfall" be awarded to the victim of the discrimination [Cardenas] rather than the perpetrator [Fund]" (*Shannon v Fireman's Fund Insurance Co.*, 136 FSupp2d at 232). Accordingly, the NYCCHR was within its discretion to apply the collateral source rule and decline to offset any unemployment benefits Cardenas was awarded against her recovery (*id.* ["The decision whether to offset unemployment benefits is entrusted to the sound discretion of the trial court"]).

Accordingly, the NYCCHR was acting within its discretion and within the purposes of the NYCHRL in its award of back pay and without deducting her unemployment insurance compensation.[3]

Front Pay Damages

Petitioners also argue that the NYCCHR's award increasing front pay from one to five years was unduly speculative and unreasonable under the law. Front pay is "money awarded for lost compensation during the period between judgment and reinstatement or in lieu of reinstatement" (*Pollard v E.I. du Pont de Nemours & Co.*, 532 US 843, 846 [2001]).

Here, the NYCCHR awarded front pay in the amount of $284.36 per week for five years from the date of judgment, for a total of $73,933.60. The NYCCHR stated that it would be unduly speculative to determine that Cardenas would be unable to find equivalent employment as an office manager at all, however, given that it took Cardenas two years to find a one-year position with the US Postal Service, which was potentially renewable, the NYCCHR found five

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[3]Petitioners rely on *Pioneer Group v State Div. of Human Rights*, 174 AD2d 1041 [4th Dept 1991] to support their argument that unemployment benefits should be deducted from a damages award. However, *Pioneer* is distinguishable as the Court applied the NYSHRL, not the broad and remedial NYCHRL (*see also Matter of Allender v Mercado*, 233 AD2d 153 [1st Dept 1996]).

years to be more reasonable that the one year awarded by the ALJ. Looking to the factors in determining front pay awards, i.e., age, qualifications, and skill set, the NYCCHR considered Cardenas' 16 years of employment and her testimony that she planned to retire from AMRC, and would have continued her employment there had she not been constructively discharged due to the hostile work environment.

As such, the NYCCHR's determination in this regard was not unreasonable, arbitrary or capricious (*see Rivera v United Parcel Serv., Inc.*, 148 AD3d 574 [1st Dept 2017] [$300,000 front pay award to supervisor employed by defendant where evidence showed that plaintiff complained that she was the subject of widespread and unfounded rumors that she was having affairs with multiple coworkers]).

Emotional Distress Damages

Petitioners also argue that the NYCCHR's award of emotional distress damages does not comply with New York law. A complainant who prevails on an employment discrimination claim under the NYCHRL is entitled to recover compensatory damages including damages for emotional distress (*see generally* Admin. Code § 8-120 [a] [8]). An award of compensatory damages for mental anguish must be upheld if supported by substantial evidence, and is consistent with similar awards (*Matter of ISS Action Sec. v New York City Commn. on Human Rights*, 114 AD3d 943, 944 [2d Dept 2014]; *see Matter of Goldberg v New York State Div. of Human Rights*, 85 AD3d at 1168 [award for mental anguish under the NYSHRL). "Deference must be accorded to the assessment of damages by the [NYCCHR], in view of its special experience in weighing the merit and value of mental anguish claims" (*Matter of Cutri v New York City Commn. on Human Rights*, 113 AD3d 608, 608 [2d Dept 2014]). Here, the award for

mental anguish was supported by Cardenas' testimony which was corroborated by medical records (*see generally Matter of New York City Tr. Auth. v State Div. of Human Rights*, 78 NY2d 207, 216 [1991]; *Belton v Lal Chicken,* Inc., 138 AD3d 609, 611 [1st Dept 2016] [verdict of $300,000 in damages for emotional distress reasonable]; *Matter of State Div. of Human Rights v Steve's Pier One, Inc.*, 123 AD3d 728 [2d Dept 2014] [award of $200,000 plus interest at the rate of 9% per year in compensatory damages for mental anguish and humiliation affirmed]; *Salemi v Gloria's Tribeca Inc.*, 115 AD3d 569, 569-570 [1st Dept 2014] [verdict of $300,000 in compensatory damages for emotional distress did not materially deviate from awards in similar cases]; *Matter of Hartley Catering, Inc. v New York State Div. of Human Rights*, 66 AD3d 1022, 1023-1024 [2d Dept 2009] [$300,000 award plus interest for mental anguish "reasonably related to the wrongdoing and [s]upported by substantial evidence" under NYSHRL]; *Sier v Jacobs Persinger &* Parker, 276 AD2d 401 [1st Dept 2000] [nonjury trial emotional distress award reduced from $250,000 to $200,000]; *Bryer v New York City Commn. on Human Rights*, 251 AD2d 2, 2 [1st Dept 1998] [affirming Commission's modified award of compensatory damages for mental anguish from $50,000 to $100,0000; given extent of complainant's mental suffering, court found award was not arbitrary and capricious, nor did it constitute an abuse of discretion]; *cf. Matter of City of New York v New York State Div. of Human Rights*, 283 AD2d 215, 216 [1st Dept 2001] [modified mental anguish award from $100,000 to $50,000 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"]).

In view of the foregoing, NYCCHR's award of $200,000 to Cardenas in emotional

distress damages is supported by the record and comparable to awards in similar cases.[4]

Civil Penalties

Petitioners next argue that the Commission's award of $250,000 in civil penalties is egregious and unsupported by substantial evidence and should be annulled. Specifically, petitioners point out that there was never a written complaint with respect to any issue during the years Cardenas was employed at AMRC.

Respondents counter that the award should be affirmed because under the Administrative Code, the Commission is provided with the authority to impose a civil penalty of up to $250,000 for discriminatory acts that are wanton, willful or malicious (Admin. Code § 8-126 [a]), which is the case here.

Civil penalties are intended to "punish the violator" and "strengthen and expand enforcement mechanisms of the law" in order to prevent discrimination from playing a role in public life (*119-121 East 97th Street Holding Corp.*, 220 AD2d at 88). In determining the amount of the penalty, the Commission considers, among other factors, the egregiousness of the conduct, and the size of the violator's business (*id.*). It is petitioners, i.e., the respondent before the Commission, that bears the burden of pleading or providing "any relevant mitigating factor" with respect to the civil penalty (Admin. Code § 8-126 [b]). It is within the Commission's authority to find a negative inference when the respondents before the Commission (petitioners here) fail or refuse to substantiate a mitigating factor, such as in this case, their financial resources (*Howe v Best Apts., Inc.*, OATH index No. 2602/14 at 15 [Mar. 14, 2016]).

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[4]In addition, the NYCCHR Decision states "[t]he NYCHRL places no limitation on the size of compensatory damages awards" and cites numerous federal cases to support the emotional distress award.

This Court is required to give deference to the NYCCHR's assessment of damages (*Matter of Cutri v New York City Commn. on Human Rights*, 113 AD3d at 608). The Local Law 85 of 2005, known as the Local Civil Rights Restoration Act of 2005 ("Restoration Act"), gives the Commission a mandate to order large civil penalty awards under appropriate circumstances in order to deter unlawful discriminatory acts sending the message to both the people directly involved and the City as a whole that such discriminatory acts will not be tolerated (Berhardt aff, Exhibit "7").

In *Matter of Marine Holdings, LLC v New York City Commn. on Human Rights* (31 NY3d 1045 [2018], the Court of Appeals upheld a NYCCHR determination imposing a civil penalty of $125,000 finding that the landlord discriminated against the complainant on the basis of disability in violation of the NYCHRL. The Court of Appeals affirmed the NYCHRL's finding that the landlord failed to sustain its burden of proving that the proposed accommodation would cause it undue hardship.[5] There, the landlord did not dispute that complainant was a person with a disability and that it was obligated to make a reasonable accommodation to address her needs. The landlord also offered to relocate the complainant to an accessible apartment in another location,[6] and hired an architect and structural engineer to evaluate the feasability of constructing a ramp to accommodate the complainant. The NYCCHR found that the landlord failed to prove undue hardship and imposed a civil penalty $125,000.[7]

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[5]The NYCCHR rejected the report of the ALJ who found that the complainant failed to prove that the landlord discriminated against complainant.

[6]The alternative location was did not constitute a reasonable accommodation

[7]The NYCCHR also found that the landlord provided no explanation for installing two video cameras only at the subject location, one of which recorded the interior of complainant's

Here, there is substantial evidence that a higher civil penalty of $250,000 is warranted in light of the demonstration of Fund's continuous wanton, wilful and malicious conduct and his acknowledgment of many of his behaviors. The Commission found that for three years, between 2008 and 2011, Fund repeatedly offered to have sex with Cardenas, offered to rub Cardenas' chest when she had a cough, commented on Cardenas' body and sexual appeal and made other unwelcome, demeaning and sexually explicit remarks in front of colleagues and clients, which were corroborated by coworkers, clients and even Fund himself. Fund admitted to comparing Cardenas to a Sports Illustrated swimsuit model, and to posting a lewd cartoon depicting a voluptuous scantily clad woman surrounded by leering men with the handwritten note "OUR OWN MONICA" above the office's sole copy machine for all employees to see. He also engaged in admitted unwanted and unwelcome touching, testifying that given Cardenas' years of employment he had a right to have "a little fun". As found by the NYCCHR,

> "Fund's testimony and other evidence presented at trial show that Fund willfully ignored Cardenas' repeated requests to stop his degrading behavior and demonstrated no remorse for his actions. Indeed, Fund found Cardenas's reactions to his abuse entertaining and would laugh when [Cardenas] asked him to stop. Fund harassed Cardenas for three years and continued to harass her until she could simply not take it any longer and was forced to resign" (NYCCHR Decision at 26 [internal cites to the record omitted]).

Here, the record supports a finding that Fund admitted much of his egregious and willful conduct, subjected Cardenas to a hostile work environment for three years and ignored Cardenas' repeated requests for him to stop his behavior. As such, there is substantial evidence of

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apartment when the door was opened and that the landlord did not disclose the video recordings until three months prior to the hearing. Further, the NYCCHR determined that the landlord deliberately withheld the report of its architect until approximately one week before trial (*see* Decision [Hon. Frederick D.R. Sampson, J.S.C.] [Queens County], dated March 14, 2013 at 11, 18).

petitioners' wanton and willful conduct to support a maximum civil penalty award.[8]

CONCLUSION

On the basis of the foregoing, it is

ORDERED and ADJUDGED that the petition is denied and the proceeding is dismissed, with costs and disbursements to respondent; and it is further

ORDERED and ADJUDGED that the decision and order issued by the New York City Commission on Human Rights dated October 28, 2015 is hereby affirmed and enforced.

Settle Judgment on notice.

Dated: February 28, 2019

ENTER:

J.S.C.

SHLOMO HAGLER
J.S.C.

[8]A review of the limited New York case law presents cases where the civil penalty was $15,000 for one or two discrete acts (*see Matter of Framboise Pastry Inc. v New York City Commn. on Human Rights*, 138 AD3d 532, 532-533 [1st Dept 2016] [posting an employment advertisement seeking a "counter girl" $15,000 civil penalty upheld]; *Vance v New York City Commn.*, 2012 NY Slip Op 31759[U] [Sup Ct, NY County 2012] [civil penalty of $15,000 for making racially discriminatory comments and making complainant feel unwelcome as a customer); *Secor v City of New York*, 13 Misc3d 1220[A], *16 [Sup Ct, NY County 2006] [$15,000 for one act of discrimination]; *cf. Matter of ISS Action Sec. v New York City Commn. on Human Rights*, 114 AD3d 943, 944 [2d Dept 2014] [reducing civil penalty from $15,000 to $5,000 as the award of actual damages was $360]).