Division of Human Rights

NEW YORK STATE
DIVISION OF HUMAN RIGHTS

NEW YORK STATE DIVISION OF HUMAN RIGHTS on the Complaint of **MELANIE A. TRUITT-KLEIN,** Complainant, v. **HPSA ACUMEN INC.,** Respondent.	**NOTICE AND FINAL ORDER** Case No. 10192706

PLEASE TAKE NOTICE that the attached is a true copy of the Recommended Findings of Fact, Opinion and Decision, and Order ("Recommended Order"), issued on July 8, 2020, by Martin Erazo, Jr., an Administrative Law Judge of the New York State Division of Human Rights ("Division"). An opportunity was given to all parties to object to the Recommended Order, and all Objections received have been reviewed.

PLEASE BE ADVISED THAT, UPON REVIEW, THE RECOMMENDED ORDER IS HEREBY ADOPTED AND ISSUED BY THE HONORABLE JOHNATHAN J. SMITH, INTERIM COMMISSIONER, AS THE FINAL ORDER OF THE NEW YORK STATE DIVISION OF HUMAN RIGHTS ("ORDER"). In accordance with the Division's Rules of Practice, a copy of this Order has been filed in the offices maintained by the Division at One Fordham Plaza, 4th Floor, Bronx, New York 10458. The Order may be

inspected by any member of the public during the regular office hours of the Division.

PLEASE TAKE FURTHER NOTICE that any party to this proceeding may appeal this Order to the Supreme Court in the County wherein the unlawful discriminatory practice that is the subject of the Order occurred, or wherein any person required in the Order to cease and desist from an unlawful discriminatory practice, or to take other affirmative action, resides or transacts business, by filing with such Supreme Court of the State a Petition and Notice of Petition, within sixty (60) days after service of this Order. A copy of the Petition and Notice of Petition must also be served on all parties, including the General Counsel, New York State Division of Human Rights, One Fordham Plaza, 4th Floor, Bronx, New York 10458. Please do not file the original Notice or Petition with the Division.

ADOPTED, ISSUED, AND ORDERED.

DATED: **March 25, 2021**
Bronx, New York

JOHNATHAN J. SMITH
INTERIM COMMISSIONER

Division of
Human Rights

NEW YORK STATE
DIVISION OF HUMAN RIGHTS

NEW YORK STATE DIVISION OF HUMAN RIGHTS
on the Complaint of

MELANIE A. TRUITT-KLEIN,
Complainant,

v.

HPSA ACUMEN INC.,
Respondent.

RECOMMENDED FINDINGS OF FACT, OPINION AND DECISION, AND ORDER

Case No. **10192706**

SUMMARY

Complainant alleged that Respondent subjected her to unlawful discrimination based on her sex, pregnancy, and familial status. Complainant has proven her claim of discrimination, and she is awarded damages. A civil penalty is also assessed against Respondent.

PROCEEDINGS IN THE CASE

On February 5, 2018, Complainant filed a verified complaint with the New York State Division of Human Rights ("Division"), charging Respondent with unlawful discriminatory practices relating to employment in violation of N.Y. Exec. Law, art. 15 ("Human Rights Law").

After investigation, the Division found that it had jurisdiction over the complaint and that probable cause existed to believe that Respondent had engaged in unlawful discriminatory practices. The Division thereupon referred the case to public hearing.

After due notice, the case came on for hearing before Martin Erazo, Jr., an Administrative Law Judge ("ALJ") of the Division. Public hearing sessions were held on January 14 and 15, 2020.

Complainant and Respondent appeared at the hearing. Complainant was represented by Lipsitz Green Scime Cambria, LLP, Robert L. Boreanaz, Esq., of counsel. Respondent was represented by Phillip Lytle, LLP, James R. Grasso, Esq., of counsel.

On June 17, 2020, the parties timely filed post-hearing briefs. Complainant also submitted an application for attorney's fees. Complainant's application for attorney's fees is received in evidence as ALJ's Exhibit 4.

On June 24, 2020, ALJ Erazo directed Complainant's counsel to submit additional information clarifying Complainant's application for attorney's fees. Complainant's counsel replied on June 26, 2020. The ALJ's letter and Complainant's counsel response are respectively received in evidence as ALJ's Exhibits 5 and 6.

On July 1, 2020, Respondent replied to Complainant's application for attorney's fees. Respondent's objections are received in evidence as ALJ's Exhibit 7.

FINDINGS OF FACT

1. Complainant is female. (ALJ's Exhibit 1, p.8)

2. Respondent assists health care providers obtain governmental grants and benefits associated with working in state and federally designated geographical areas where there are shortages of health care services. (Tr. 152, 154-55, 297)

3. In March of 2017, Complainant worked on a provisional basis as an office assistant at the New York State Department of Corrections and Community Supervision ("Corrections"). Her last day of work was April 21, 2017. (Tr. 73, 77, 111, 454-55)

4. In or around March 2017, Complainant applied to Respondent for the position of medical information analyst, also known as surveyor. (Tr. 54, 191, 193, 252; Complainant's Exhibit 1)

5. The duties of a medical information analyst are to survey physicians in designated geographical areas, collect a variety of information that includes office hours, and appointment wait times, and ascertain if they are accepting patients. (Tr. 157, 252)

6. John Lampard is Respondent's president. (Tr. 55, 250)

7. Lampard makes the hiring and termination decisions for Respondent. (Tr. 399-401)

8. In March 2017, Megan TeCulver was Lampard's executive assistant and also a medical information analyst. (Tr. 159-60, 177-78, 192, 208-09, 404-05, 407; Complainant's Exhibit 14)

9. On April 5, 2017, Lampard and TeCulver interviewed Complainant in-person for the medical information analyst position. (Tr. 54, 177-78, 199-200; Complainant's Exhibits 1, 2)

10. After the interview, Lampard directed TeCulver to call Complainant and inquire if she would consider the position of benefit support specialist. TeCulver did so. (Tr. 61, 200; Complainant's Exhibit 13)

11. Complainant responded that she was interested in the benefit support specialist position. (Tr. 61, 200, 486; Complainant's Exhibit 13)

12. Up to this point, the duties of benefit support specialist had been performed by Lampard. Lampard felt he was performing too many jobs and "needed someone to fully take this off [his] plate." (Tr. 308, 312)

13. Lampard wanted to offer the benefit support specialist job to Complainant although he understood that she would require "a lot of training." (Tr. 313)

14. The duties of a benefit support specialist include performing research on behalf of clients, helping those clients obtain benefits, and assisting the clients through the benefits application process. (Tr. 152-53)

15. On April 18, 2017, Lampard emailed Complainant and offered her the position of benefit support specialist. (Tr. 296, 299, 484; Complainant's Exhibit 4)

16. Respondent valued Complainant's proposed compensation package at $37,700. The compensation package included $30,000 in wages, a $3,000 bonus, health care valued at $4,200, and a wellness plan valued at $500. Complainant would earn the bonus pay after six months based on performance. (Tr. 67; Complainant's Exhibit 4; Respondent's Exhibit 11)

17. The benefit support specialist was expected to work 40 hours a work. (Complainant's Exhibit 4)

18. On April 19, 2017, Complainant accepted Lampard's employment offer by email. (Tr. 67-69; Complainant's Exhibit 5)

19. On the same date, TeCulver acknowledged Complainant's acceptance, indicated that her start date was April 24, 2017, and gave her company materials to review. TeCulver also informed Complainant that TeCulver would meet her on her first day of work in order to secure a security card. (Tr. 72, 215-16; Complainant's Exhibit 6)

20. On April 20, 2017, Complainant informed TeCulver, by email, that she was pregnant and that she was due in August of 2017. (Tr. 67, 70; Complainant's Exhibit 7)

21. In her email, Complainant also stated that she was the "single mom of 3 girls," that her pregnancy would not interfere with the job duties/responsibilities, and that she expected to be away from work two or three weeks after delivery. (Tr. 71, 216-17; Complainant's Exhibit 7)

22. At that time, Complainant's daughters were ages 19, 13, and 8. (Tr. 47)

23. TeCulver "immediately forwarded" Complainant's email to Lampard and Joseph Lampard, Respondent's vice-president. (Tr. 217)

24. On the same date, Lampard told Complainant that he wanted to speak with her that evening. Lampard did not call. (Tr. 73-75; Complainant's Exhibit 8)

25. On April 21, 2017, Lampard spoke with Complainant. Lampard told Complainant that she was not "going to be a fit for the job," that she could not perform the job duties "due to [her] condition," that "it won't work" because she was pregnant, that she would not be able "to travel with a child," and that she would not be capable of working long hours in a job that at times required 60 hours a week. (Tr. 78, 80, 135, 316; Complainant's Exhibits 9, 10)

26. Lampard also told Complainant that he was revoking the job offer, that Complainant was too busy, and that he needed an employee that could travel. Lampard instructed Complainant not to show up at work on April 24, 2017. (Tr. 77-79, 84, 87; Complainant's Exhibits 9, 10)

27. Later that day Complainant emailed Lampard questioning the reasons he revoked her job offer. (Tr. 85-86; Complainant's Exhibits 9, 10)

28. Lampard replied by email with a message that included the following: "the unspoken reality is you could not pass the same civil service test that toll booth workers take to be allowed to collect quarters," "You did not interview very well relative to the rest of the applicants," "At

the end of the day, I had to deal with that fact that in my need I offered you a job but I do not believe you are fit to be the face of our company." (Tr. 89-93; Complainant's Exhibit 10)

29. Lampard told TeCulver that he spoke with Complainant and that "she was removing herself from the job position and that he also had cold feet on hiring someone for this position." (Tr. 219, 316-17)

30. I do not credit Lampard's claim that during the April 21, 2017 conversation with Complainant, she wanted to "back out of the job offer." Lampard's claim is inconsistent with all of Complainant's communications with him, inconsistent with his own version of events of April 21, 2017, when she told him "you are discriminating against me based on pregnancy" and that she would "still like the job." (Tr. 315-16, 319; Complainant's Exhibits 9, 10)

31. Complainant felt humiliated by the insults Lampard used when he revoked her job offer. (Tr. 95)

32. Complainant felt embarrassed by the revocation, experienced self-doubt, and second guessed herself in her decision making. (Tr. 95-96, 135)

33. On April 21, 2017, Captain Walter Moss, Complainant's supervisor at Corrections, heard a portion of Complainant's conversation with Lampard. Moss observed that Complainant was "absolutely devasted," "distraught," "crushed," and "very upset," when Lampard revoked the job offer. (Tr. 131-33, 135, 138)

34. From April 2017 to June 2017, Lampard hired two medical information specialists and an executive assistant. (Tr. 273-95, 420; Respondent's Exhibit 2)

35. TeCulver trained the new hires to perform her duties, including those of medical information analyst. (Tr. 159-161, 412-15)

36. In or about July 2017, Lampard reassigned TeCulver to work as a benefit support specialist. (Tr. 186, 408, 416, 420)

37. On May 1, 2017, Complainant started employment as an administrative assistant with The Resource Center earning $11.94 an hour, working 40 hours a week. (Tr. 94, 102; Joint Exhibit 2)

38. On July 14, 2017, Complainant gave birth. (Tr. 46, 102)

39. Complainant was absent from work for the period of July 13, 2017 to July 27, 2017. The Resource Center paid for Complainant's leave during those days. (Tr. 103-04; Joint Exhibit 2)

40. Complainant earned $13,913.17 from her employment with The Resource Center, from May 1, 2017 to December 31, 2017. (Joint Exhibit 2, p. 7)

41. Complainant earned $13,246.55 from her employment with The Resource Center, from January 1, 2017 to June 10, 2018. (Joint Exhibit 2, p. 8)

42. On June 11, 2018, Complainant was rehired as an office assistant at Corrections, at a starting salary of $30,632.00, working 37.5 hours a week. (Tr. 95, 99-100, 107, 115, 149; Joint Exhibit 2, p. 9)

43. Complainant's counsel, Boreanaz, is a senior partner in his firm and possesses nearly twenty-nine years of experience practicing law in New York State. Boreanaz worked on this matter during the years 2017 to 2020. (ALJ's Exhibit 4)

44. Angela Borkowski is a paralegal in Boreanaz' firm. Borkowski was an intern in 2013, graduated with a bachelor's degree in legal studies in 2014, and began full-time work as a paralegal in 2015. Borkowski worked on this matter during the years 2017 to 2020. (ALJ's Exhibit 4)

45. In prosecuting this case, Complainant incurred $20,829.20, in legal fees. The charges are based upon Boreanaz' fees of $250.00 per hour for 52.3 hours of attorney time for a total of $13,075; Borkowski's fees of $75.00 per hour for 103.20 hours of paralegal work for a total of $7,740; and $14.20 in costs related to copies. (ALJ's Exhibits 4, 6)

OPINION AND DECISION

Familial Status and Sex

N.Y. Exec. Law, art. 15 ("Human Rights Law") § 296.1(a) makes it an unlawful discriminatory practice for an employer to refuse to hire or employ or to bar or to discharge from employment or to discriminate against any individual in compensation or in terms, conditions or privileges of employment because of the individual's familial status and sex. Pregnancy discrimination is a form of sex discrimination. *Elaine W. v. Joint Diseases N. Gen. Hosp., Inc.*, 81 N.Y.2d 211, 216, 597 N.Y.S.2d 617, 619 (1993).

Human Rights Law § 292.26 defines familial status as "(a) any person who is pregnant or has a child or is in the process of securing legal custody of any individual who has not attained the age of eighteen years, or (b) one or more individuals (who have not attained the age of eighteen years) being domiciled with: (1) a parent or another person having legal custody of such individual or individuals, or (2) the designee of such parent." Therefore, discrimination based on familial status also provides overlapping protections in the areas of pregnancy and childbirth.

To make out a prima facie case of unlawful discrimination in employment, a complainant must show that 1) she is a member of a protected class, 2) she was qualified for the position, 3) she suffered an adverse employment action, and 4) the adverse employment action occurred under circumstances giving rise to an inference of unlawful discrimination. *Forrest v.*

Jewish Guild for the Blind, 3 N.Y.3d 295, 305, 786 N.Y.S.2d 382, 390 (2004) (citing *Ferrante v. Am. Lung Ass'n,* 90 N.Y.2d 623, 629, 665 N.Y.S.2d 25, 29 (1997)).

If a complainant makes out a prima facie case of unlawful discrimination, the burden shifts to the respondent to articulate a legitimate, independent, and non-discriminatory reason for its actions. *Id.* If the respondent does so, the complainant must show that the reasons presented by respondent were merely a pretext for the unlawful discrimination by demonstrating both that the respondent's stated reasons were false and that the real reason was unlawful discrimination. *Id.* at 305, 786 N.Y.S.2d at 391. The "burden of persuasion of the ultimate issue of discrimination always remains" with the complainant. *Stephenson v. Hotel Empls. and Rest. Empls. Union Local 100 of the AFL-CIO*, 6 N.Y.3d 265, 271, 811 N.Y.S.2d 633, 636 (2006).

Complainant was a member of several protected classes. Complainant was a pregnant female and a parent of minor children. The record shows that Complainant possessed the minimum qualifications for benefit support specialist, as evidenced by Respondent's own decision to hire her for the position on April 19, 2017. Complainant suffered an adverse employment action under circumstances giving rise to an inference of unlawful discrimination when Respondent revoked her offer of employment one day after learning that she was pregnant and had minor children.

Respondent articulated legitimate, non-discriminatory reasons for revoking Complainant's job offer. Lampard testified that after hiring Complainant, Complainant rejected Respondent's job offer. Lampard also testified that he also had "cold feet" about hiring someone for this position, that Complainant was not qualified to hold the position, and that he did not hire a benefit support specialist until July 2019.

Complainant established that Respondent's reasons for revoking her job offer were a

pretext for unlawful discrimination. On April 21, 2017, two days after hiring Complainant, and one day after Complainant told them that she was pregnant and had minor children, Lampard told Complainant that she was not "going to be a fit for the job." He also told her that she would not be able to perform the job duties due to her condition and that she would not be able to travel or work long hours.

Given the timing of Respondent's job offer, Respondent's notice of Complainant's protected class status, and Respondent's revocation of the job offer, the evidence established that Respondent acted unlawfully. Lampard revoked Complainant's job offer because of her pregnancy and familial status. As a result, Complainant's claims of unlawful discrimination must be sustained.

Compensatory Damages

The Human Rights Law provides various remedies to restore victims of unlawful discrimination to the economic position that they would have held had their employers not subjected them to unlawful discrimination. Human Rights Law § 297.4(c)(i)-(iv).

As a result of Respondent's unlawful discrimination, Complainant is awarded compensation for back wages in the amount of $6,878.56.

Complainant's yearly salary with Respondent would have been $30,000, if she had started working on April 24, 2017, working 40 hours a week, as originally scheduled. Complainant would have earned $30,000/52 weeks = $576.92 weekly. During the 36-week period between April 24, 2017 to December 31, 2017, Complainant would have earned with Respondent $576.92 a week, for a total of $20,769.12.

In 2017, Complainant mitigated her loses by securing employment with The Resource Center, working 40 hours a week, starting May 1, 2017. Complainant's wages with The

Resource Center from May 1, 2017 to December 31, 2017, were $13,913.17, which was $6,855.95 less than what she would have earned with Respondent during that time period.

Complainant gave birth on July 14, 2017. From July 13, 2017 to July 27, 2017, Complainant was paid by The Resource Center for her absence during that period of time.

In 2018, Complainant's wages with The Resource Center, working 40 hours a week, from January 1, 2018 to June 10, 2018, were $13,246.55, which was $22.61 less than what she would have earned with Respondent during that 23-week time period.

On June 11, 2018, Complainant started working as an office assistant with Corrections, for 37.5 hours a week, at a starting rate of $30,632, which was $632 a year more than she would have earned with Respondent.

Complainant is not entitled to recover a $3,000 bonus because it is speculative. The bonus would have been earned only after a review of Complainant's work performance during a period of six months. Complainant did not prove at the public hearing that any of the health care or wellness plans provided by her subsequent employers were inferior as alleged. As a result, these additional claims are dismissed. Speculative awards are highly disfavored and often "inappropriate." *Hancock v. City of New York*, 272 A.D.2d 80, 707 N.Y.S.2d 832 (1st Dep't. 2000).

A complainant is entitled to recover compensatory damages for mental anguish caused by a respondent's unlawful conduct. In considering an award of compensatory damages for mental anguish, the Division must be especially careful to ensure that the award is reasonably related to the wrongdoing, supported in the record and comparable to awards for similar injuries. *See State v. N.Y. State Div. of Human Rights,* 284 A.D.2d 882, 884, 772 N.Y.S.2d 499, 501 (3d Dept. 2001); *State Div. of Human Rights v. Muia*, 176 A.D.2d 1142, 1144, 575 N.Y.S.2d 957, 960 (3d

Dept. 1991).

Because of the strong anti-discrimination policy of the Human Rights Law, a complainant seeking an award for pain and suffering "need not produce the quantum and quality of evidence to prove compensatory damages [s]he would have had to produce under an analogous provision." *Batavia Lodge No. 196, Loyal Order of Moose v. N.Y. State Div. of Human Rights*, 35 N.Y.2d 143, 147, 359 N.Y.S.2d 25, 28 (1974). Indeed, "[m]ental injury may be proved by the complainant's own testimony, corroborated by reference to the circumstances of the alleged misconduct." *New York City Transit Auth. v. N.Y. State Div. of Human Rights*, 78 N.Y.2d 207, 216, 573 N.Y.S.2d 49, 54 (1991). The severity, frequency and duration of the conduct may be considered in fashioning an appropriate award. *See State Dept. of Correctional Servs. v. N.Y. State Div. of Human Rights*, 225 A.D.2d 856, 859, 638 N.Y.S.2d 827, 830 (3d Dept. 1996).

The record shows that Respondent's discriminatory actions had a negative effect on Complainant. Complainant felt humiliated by the insults Lampard used when he revoked her job offer. Complainant was devasted, distraught, crushed, and very upset, when her job offer was revoked. After the revocation, up to the time leading up to the public hearing, Complainant testified that she felt embarrassed, experienced self-doubt, and second guessed herself in her decision making.

Accordingly, an emotional distress damage award of $15,000 is appropriate to compensate Complainant for the pain and suffering she experienced due to Respondent's discriminatory actions. This is reasonably related to Respondent's wrongdoing, supported by the evidence and comparable to other awards for similar injuries. *Rivera v. Argyle Realty Associates*, DHR Case No. 2304680 (June 22, 2007), *aff'd Argyle Realty Associates v. N.Y. State*

Div. of Human Rights (Rivera), 65 A.D.3d 273, 882 N.Y.S.2d 458 (2nd Dept. 2009); *Sanders v. Esna Management Corporation, et.al,* DHR Case No. 10180618 (October 6, 2017)

Civil Fines

Pursuant to N.Y. Exec. Law, art. 15 ("Human Rights Law") § 297.4(c)(vi), the Division may assess civil fines and penalties,

> "in an amount not to exceed fifty thousand dollars, to be paid to the state by a respondent found to have committed an unlawful discriminatory act, or not to exceed one hundred thousand dollars to be paid to the state by a respondent found to have committed an unlawful discriminatory act which is found to be willful, wanton or malicious."

Pursuant to Human Rights Law § 297.4(e), "[a]ny civil penalty imposed pursuant to this subdivision shall be separately stated and shall be in addition to and not reduce or offset any other damages or payment imposed upon a respondent pursuant to this article." The factors that determine the appropriate amount of a civil fine and penalty are the goal of deterrence, the nature and circumstances of the violation, the degree of the respondent's culpability, any relevant history of the respondent's actions, the respondent's financial resources; and any other matters as justice may require. *Gostomski v. Sherwood Terrace Apartments.,* SDHR Case Nos. 10107538 and 10107540, November 15, 2007, *aff'd*, *Sherwood Terrace Apts. v. N.Y. State Div. of Human Rights,* 61 A.D.3d 1333, 877 N.Y.S.2d 595 (4th Dept. 2009); *See 119-121 E. 97th St. Corp. v. N.Y. City Commn. on Human Rights*, 220 A.D.2d 79, 642 N.Y.S.2d 638 (1st Dept. 1996).

A civil fine and penalty of $20,000 is appropriate in this matter. *Noe v. Kirkland,* 101 A.D.3d 1756, 957 N.Y.S.2d 796 (4th Dept. 2012) (Commissioner's penalty of $20,000 affirmed), *also see Johnston v. Kirkland*, 100 A.D.3d 1354, 953 N.Y.S.2d 757 (4th Dept. 2012), *New York State Div. of Human Rights v. Stennett*, 98 A.D.3d 512, 949 N.Y.S.2d 459 (2d Dept. 2012). The goal of deterrence, Respondent's degree of culpability, and the nature and

circumstances of Respondent's violation warrant this penalty. Respondent's decision to revoke Complainant's job offer one day after learning that she was pregnant and had minor children was deliberate and egregious. Respondent's revocation occurred three days after hiring Complainant, and one day after learning she was pregnant and had minor children. Additionally, Respondent humiliated Complainant by stating "the unspoken reality is you could not pass the same civil service test that toll booth workers take to be allowed to collect quarters" and "You did not interview very well relative to the rest of the applicants," among other insults.

The civil fine serves as an inducement for Respondent to comply with the Human Rights Law and presents an example to the public that the Division vigorously enforces the Human Rights Law. There was no proof that Respondent was adjudged to have committed any previous similar violation of the Human Rights Law or is incapable of paying any penalty.

Attorney's Fees

Effective January 19, 2016, Human Rights Law § 297.10 authorizes the Division to award attorney's fees to the prevailing party in employment cases where sex is the protected class.

A complainant's award of attorney's fees is to be calculated utilizing the "lodestar" method. *McGrath v. Toys "R" Us, Inc.,* 3 N.Y.3d 421, 430, 788 N.Y.S.2d 281, 285 (2004). This method calculates the amount of the fee award "by multiplying the number of hours reasonably expended on the litigation by a reasonable hourly rate." *Id.* at 430, 788 N.Y.S.2d at 285.

A reasonable attorney's fee is "based on the customary fee charged for similar services by lawyers in the community with like experience and of comparable reputation to those by whom the prevailing party was represented. Experience includes not only the number of years of practice but also the nature of the practice engaged in." *Ousmane v. City of New York,* 22

Misc.3d 1136(A), 880 N.Y.S.2d 874 (Sup.Ct. N.Y. Co. 2009) (citing *Rahmey v. Blum,* 95 A.D.2d 294, 466 N.Y.S.2d 350 (2d Dept. 1983)).

The following is considered in assessing the overall reasonableness of the hours expended for purposes of the lodestar calculations: 1) hours which reflect the inefficiency or duplication of services should be discounted, 2) hours that are excessive, unnecessary or which reflect "padding" should be disallowed, 3) legal work should be differentiated from nonlegal work such as investigation, clerical work, the compilation of facts and other types of work that can be accomplished by nonlawyers who command lesser rates, 4) time spent in court should be differentiated from time expended for out-of-court services, and 5) the hours claimed should be weighed against the court's own knowledge, experience and expertise as to the time required to complete similar activities. *See McGrath.,* 3 N.Y.3d at 430; *Osumane,* 22 Misc.3d at 9; *Olsen v. County of Nassau,* 2010 WL 376642 (E.D.N.Y. Jan. 26, 2010).

Based on the record presented, certain legal fees are denied.

Complainant's request for additional attorney's fees of $3,050.00 for anticipated fees related to a post-hearing reply brief is denied. The amount is speculative and no post-hearing reply briefs were directed by the presiding ALJ.

Complainant requests $444.20 associated with copies, legal research, and witness fees. Of the $444.20, only $14.20 related to copies is granted. The balance is denied. Of the $444.20, $390.00 is associated with Westlaw legal research. It appears that the research activity was already charged separately under attorney or paralegal time. Furthermore, the claimed Westlaw fees are disallowed in its entirety as an item of overhead. *Bell v Helmsley*, No. 111085/01, 2003 N.Y. Slip Op. 50866(U), 2003 WL 21057630 (Sup Ct, Mar. 27, 2003) ("An attorney's time spent performing computerized research is properly compensable. However, the cost of the

computer service used in the research is no more reimbursable than the cost of the West's Keynote Digests and the volumes of the Federal Reporter and the Federal Supplement that lawyers used to use (and many still use) to find authority and research issues of law. Westlaw fees are simply an item of overhead, and as such should be built into the fees charged, rather than unbundled and reimbursed separately.") Of the remaining $40.00, captioned "HRG," that charge is also denied as it is unclear what that entry means or how it relates to witness fees.

Complainant's application, for interest on attorneys' fees accrued since 2017, is denied. Complainant is not entitled to interest on attorneys' fees prior to the Commissioner's Final Order. *See, Ross v. Congregation B'Nai Abraham Mordechai, 12 Misc. 3d 559, 574, 814 N.Y.S.2d 837, 848 (2006)* (The entitlement to interest accrues from the date the petitioner prevailed in the underlying proceeding)*; also see, Sage Realty Corp. v Proskauer Rose*, 288 A.D.2d 14, 732 N.Y.S.2d 162, 2001 N.Y. Slip Op. 09030, 2001 WL 1352353 (N.Y.A.D. 1 Dept., Nov. 01, 2001), *citing to Hempstead Gen. Hosp. v Allstate Ins. Co.,* 106 AD2d 429, 431, *affd* 64 NY2d 958.

Complainant's application requests $2,784.00 for attorney's fees incurred on June 17, 2020, for 8.7 hours to "review hearing transcript, revise attorney affidavit on fees, revise memo of facts, revise proposed facts." The $2,784.00 is denied for two reasons. First, the amount of time spent on each activity cannot be determined. When a complainant uses "block billing" or numerous tasks under a single entry, these entries make it difficult to determine how much time was expended on each task. *See Matter of T.J. Roman Pain Corp.,* 98 A.D.2d 413, 419 (1st Dept. 1984) (A fee application "must be supported by a proper a sufficient affidavit of services. Reliance solely upon time records which fail to adequately set forth the nature of the services rendered is insufficient for that purpose.") Second, this entry clearly appears duplicative of

approximately 11 other entries made by Boreanaz or Borkowski that speak to legal research and review of transcripts that was performed in preparation for the post hearing brief.

Complainant's application for attorney's fees includes four entries for two individuals, Patrick Mackey and Brittany Murphy, who are not identified in the affidavit. The amounts respectively associated with those individuals are $638.00 and $205.00. Because the affidavit does not identify the experience and ability of these individuals, these fees are denied. *See People's United Bank v. Patio Gardens III LLC.,* 143 A.D.3d 689, 691 (2nd Dept. 2016) (The court rejected fees because the affidavit of services rendered submitted by plaintiff failed to set forth counsel's experience, ability and reputation.)

Finally, in determining the lodestar amount, to calculate a complainant's award of attorney's fees, the Division should look to the district in which the case is litigated. *See Costa v. Sears Home Improvement Products, Inc., 212 F.Supp.3d 412 (W.D.N.Y., 2016).* The instant case was heard in Erie County, which falls within the Western District of New York.

Courts in the Western District of New York have determined that "the hourly rates generally allowed in this District for a [Title VII] case… are in the range of $225-$250 for partner time or senior associate time, $150-$175 for junior associate time, and $75 for paralegal time." *See id.* at *420-21*; *Glenn v. Fuji Grill Niagara Falls, LLC,* 2016 WL 1557751, at *7 (W.D.N.Y., 2016) (Title VII action, prevailing party entitled to attorneys' fees based upon hourly rate of $250 for senior associate with 11 years' experience and $75 for paralegal); *Disabled Patriots of Am., Inc. v. Niagara Grp. Hotels, LLC,* 688 F.Supp.2d 216, 226 (W.D.N.Y.2010) (in an ADA claim, the hourly rate of a partner with more than 30 years of practice reduced from $425 to $240, another attorney with more than 20 years of practice reduced from $350 to $200, and paralegal hourly rate reduced to $75); *Tyo v. Lakeshore Hockey*

Arena, Inc., 2014 WL 2532447, at *3 (W.D.N.Y., 2014) (hourly rate of $250 reasonable for lawyers with 15 and 25 years' experience in labor and employment law); *Anello v. Anderson*, 191 F.Supp.3d 262, 282-83 (W.D.N.Y., 2016) (court applies rate of hourly rates of $200-250 for trial counsel; $225 per hour for partner; $150-175 per hour for associate; $75 per hour for paralegal)

Complainant's counsel, Boreanaz, is a senior partner in his firm, he possesses nearly twenty-nine years of experience practicing law in New York State, his customary hourly rate is $320.00, and for purposes of this matter, he is charging his 2017 rate of $305.00 per hour. Nonetheless, the supporting documents to the affidavit show differing hourly rates charged, that range from $305.00 to $320.00, during the years 2017-2020. In line with the fees granted to other senior partners with comparable experience, Complainant's counsel is awarded an hourly rate of $250.00. Complainant's counsel request for a $305.00 hourly rate is denied.

Boreanaz, performed 52.3 hours of substantive legal work on this case. At an hourly rate of $250.00, Boreanaz' attorney's fees in this matter amount to $13,075.00. The hours he has expended are reasonable, given his experience, and the fact that Boreanaz has been working on Complainant's case since November of 2017, prior to the filing of the complaint.

Boreanaz affirmed that Borkowski, a paralegal, charged an hourly rate of $96.00. However, the supporting documents also show differing hourly rates for Borkowski that range from $90.00 to $100.00, during the years 2017-2020. No document indicates a paralegal rate of $96.00 during any of those years.

In this district, a paralegal rate of $75.00 hour predominates. A paralegal with little experience was awarded $50.00 per hour. *Jarosz v. American Axle & Manufacturing, Inc.,* 2019 WL 6723741 at *6 (W.D.N.Y., 2019)*; also see Small v. New York State Department of*

Corrections and Community Supervision, 2019 WL 1593923 (W.D.N.Y., 2019) (A paralegal with 28 years' experience was awarded $100 per hour). Here, Borkowski was an intern in 2013, graduated with a bachelor's degree in legal studies in 2014, and began full-time work as a paralegal in 2015. Borkowski worked on this matter during the years 2017 to 2020. Given Borkowski's five years' experience as a paralegal, a rate of $75.00 per hour is appropriate. Complainant's request for a $96.00 per hour paralegal rate is denied.

Boreanaz submitted time records with a description of the paralegal work performed by Borkowski. Borkowski performed 103.20 hours of paralegal work at an hourly rate of $75.00. Borkowski's fees amount to $7,740.00. The hours sought for Borkowski's work are reasonable.

In conclusion, Complainant incurred $20,829.20 in legal fees that includes Boreanaz' attorney's fees, Bokowski's paralegal work, and $14.20 for copies.

ORDER

On the basis of the foregoing Findings of Fact, Opinion and Decision, and pursuant to the provisions of the Human Rights Law and the Division's Rules of Practice, it is hereby

ORDERED, that Respondent, its agents, representatives, employees, successors, and assigns, shall cease and desist from discriminating against any employee in the terms and conditions of employment; and it is further

ORDERED, that Respondent, its agents, representatives, employees, successors and assigns shall take the following affirmative action to effectuate the purposes of the Human Rights Law:

1. Within 60 days of the date of the Commissioner's Order, Respondent shall pay to Complainant, Melanie A, Truitt-Klein, the sum of $6,878.56 in back wages. Interest shall accrue on this award at the rate of nine percent per year, from November 16, 2017, a reasonable intermediate date, until payment is made by Respondent.

2. Within 60 days of the date of the Commissioner's Final Order, Respondent shall pay to Complainant, Melanie A, Truitt-Klein, the sum of $15,000.00 as compensatory damages for mental anguish and humiliation Complainant suffered as a result of Respondent's unlawful discrimination against her. Interest shall accrue on this award at the rate of nine percent per year, from the date of the Commissioner's Final Order until payment is actually made by Respondent.

3. The aforesaid payments shall be made by Respondent in the form of certified checks, made payable to the order of Complainant, Melanie A, Truitt-Klein, and delivered by certified mail, return receipt requested, to Robert L. Boreanaz, Esq., of Lipsitz Green Scime Cambria, LLP, 42 Delaware Avenue, Suite 120, Buffalo, NY 14202.

4. Within 60 days of the date of the Commissioner's Final Order, Respondent shall pay Robert L. Boreanaz, Esq., $20,829.20, as attorney's fees. The payment shall be made by Respondent in the form of a certified check, and delivered by certified mail, return receipt requested, to Lipsitz Green Scime Cambria, LLP, 42 Delaware Avenue, Suite 120, Buffalo, NY 14202. Interest shall accrue on this award at the rate of nine percent per year, from the date of the Commissioner's Final Order until payment is made by Respondent.

5. Within 60 days of the Commissioner's Final Order, Respondent shall pay to the State of New York the sum of $20,000.00 as a civil fine and penalty for its violation of the Human Rights Law. Interest shall accrue on this award at the rate of nine percent per year, from the date of the Commissioner's Final Order until payment is actually made by Respondent.

6. The payment of the civil fine and penalty shall be made by Respondent in the form of a certified check, made payable to the order of the State of New York and delivered by certified mail, return receipt requested, to Caroline Downey, Esq., General Counsel of the Division, One Fordham Plaza, 4th Floor, Bronx, New York 10458.

7. Within 60 days of the Final Order, Respondent shall provide a training session in the prevention of unlawful discrimination on the basis of sex, pregnancy, and familial status, to its employees in accordance with the Human Rights Law. Proof of the training session shall be provided to Caroline Downey, Esq., General Counsel of the Division, One Fordham Plaza, 4th Floor, Bronx, New York 10458.

8. Respondent shall cooperate with the representatives of the Division during any investigation into compliance with the directives contained in this Order.

DATED: July 8, 2020
Buffalo, New York

Martin Erazo, Jr.
Administrative Law Judge