



**Division of
Human Rights**

**NEW YORK STATE
DIVISION OF HUMAN RIGHTS**

**NEW YORK STATE DIVISION
OF HUMAN RIGHTS**

on the Complaint of

APRIL MCPHERSON,

Complainant,

v.

**WILD ORCHID BAR & LOUNGE, INC., RAYMON
MCADAM,**

Respondents.

**NOTICE AND
FINAL ORDER**

Case No. 10203757

Federal Charge No. 520-2019-03207

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 April 26, 2022, by Alexander Linzer, 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 MARIA L. IMPERIAL, COMMISSIONER, AS THE FINAL ORDER OF THE NEW YORK STATE DIVISION OF HUMAN RIGHTS (“ORDER”) WITH THE FOLLOWING AMENDMENT:

- Regardless of whether Complainant meets the definition of an independent

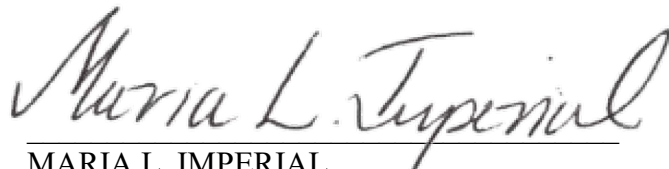
contractor, as a non-employee providing services (i.e., event hosting) pursuant to a contract in the workplace, her activities are covered by Human Rights Law § 296-d.

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: June 28, 2022
Bronx, New York


MARIA L. IMPERIAL
COMMISSIONER



**Division of
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on the Complaint of

APRIL MCPHERSON,

Complainant,

v.

WILD ORCHID BAR & LOUNGE, INC.

RAYMON MCADAM,

Respondents.

**RECOMMENDED FINDINGS OF
FACT, OPINION AND DECISION,
AND ORDER**

Case No. 10203757

Federal Charge No. 520-2019-03207

SUMMARY

Complainant alleged that Respondents subjected her to sexual harassment. Complainant has proven her claim and is awarded damages and attorney's fees. A civil fine and penalty is also assessed against Respondents.

PROCEEDINGS IN THE CASE

On April 19, 2019, Complainant filed a verified complaint with the New York State Division of Human Rights ("Division"), charging Respondents 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 Respondents 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 Alexander Linzer, an Administrative Law Judge (“ALJ”) of the Division. Virtual public hearing sessions were held on October 20, 2021, and October 21, 2021.

Complainant and Respondents appeared at the hearing. Complainant was represented by Adam T. Durham, Esq., of Borelli & Associates, P.L.L.C. Respondents were represented by Joseph F. Kilada, Esq., and Mindy Kallus, Esq., of the Law Office of Joseph F. Kilada, P.C.

At the hearing, the presiding ALJ amended the complaint to correct the name of Respondent Wild Orchid Bar & Lounge to “Wild Orchid Bar & Lounge, Inc.” (Tr. 7). During the second day of hearing, Complainant orally moved to amend the complaint to add Soorajanie Hardeo, part owner of Respondent Wild Orchid Bar & Lounge, Inc., as a respondent. The presiding ALJ denied the motion, but gave Complainant the opportunity to make a written motion to amend the complaint. (Tr. 250). Complainant did not submit a written motion to amend.

Permission to file post-hearing briefs was granted. Both parties timely submitted post-hearing briefs which were considered and, where appropriate, adopted.

Complainant filed an application for attorney’s fees as part of her post-trial brief dated January 24, 2022, which did not include a supporting attorney affirmation. At the request of the presiding ALJ, on April 7, 2022, Complainant’s attorney’s fee application was supplemented with an attorney affirmation. Both documents are entered into evidence as Administrative Law Judge Exhibit 5. Respondents opposed Complainant’s application and filed a motion seeking

attorney's fees for Respondents, which is entered into evidence as Administrative Law Judge Exhibit 6.

FINDINGS OF FACT

1. Complainant is female. (ALJ's Exhibit 1)
2. In or around 2013, Soorajanie Hardeo formed Respondent Wild Orchid Bar & Lounge, Inc. ("Wild Orchid"). (Tr. 209)
3. Respondent Wild Orchid operates a bar and lounge ("the bar") located at 111-48 Lefferts Boulevard in Queens, New York. (Tr. 209-10, 239, 306; ALJ's Exhibits 1, 4)
4. Prior to 2016, Respondent Wild Orchid employed Respondent McAdam as a manager. (Tr. 351)
5. In 2016, Respondent McAdam became owner of 40 percent of Respondent Wild Orchid. Hardeo owns the remaining 60 percent of Respondent Wild Orchid. (Tr. 206-09, 351; ALJ's Exhibit 4)
6. Respondent Wild Orchid occasionally hosts events, including karaoke and performances by singers. (Tr. 354-55)
7. On January 1, 2018, Complainant was introduced to Respondent McAdam by a mutual acquaintance, Barry Singh. (Tr. 14-15, 79, 153-56, 353-54)
8. During the relevant period, Complainant attended nursing school. (Tr. 104)
9. In or around 2018, Complainant was a bartender at a venue named Johnny's. (Tr. 87)
10. In or around February or March 2018, Singh spoke separately to Complainant and Respondent McAdam about the possibility of Complainant hosting an event at the bar one day per week. (Tr. 14-15, 354-57) Respondents were interested in increasing the bar's business and

Singh knew that Complainant had customers who would follow her to an event at the bar. (Tr. 15, 213, 218)

11. In or around early April, Respondent McAdam, Hardeo, Singh, and Complainant met at the bar. Complainant and Respondent McAdam agreed that Complainant would host and promote an event at the bar once a week on Sundays. (Tr. 14-15, 213-14, 357-58)

12. Respondent McAdam and Complainant named the event "Playhouse Sunday." (Tr. 84, 358; Respondents' Exhibit 4)

13. Complainant refers to herself as "Ms. Roget" on social media. (Tr. 58-59)

14. Complainant posted pictures of herself on social media to advertise the Playhouse Sunday event. (Tr. 32-33, 65, 85, 96)

15. Singh sometimes took promotional pictures of Complainant. (Tr. 65)

16. Starting in April 2018, Complainant hosted the Playhouse Sunday event at the bar on Sundays from approximately 9:00 p.m. to approximately 4:00 a.m. (Tr. 14, 95-96, 214, 358)

17. During the Playhouse Sunday event, Respondents would remove the menu with bottle prices from the bar tables so that Complainant could set her own prices for bottles of alcohol and drinks. (Tr. 283, 308, 359-60)

18. During the event, Complainant socialized with Respondent Wild Orchid's customers and would sell drinks and bottles of alcohol. Complainant would keep the difference between the price she set for the bottles and drinks and what Respondent Wild Orchid usually charged for them. (Tr. 22, 61, 215, 283-84, 306-08, 359-60)

19. Complainant also received tips directly from customers. (Tr. 85-86, 98, 215)

20. If customers ordered drinks or bottles from Complainant, she would ask Respondent Wild Orchid's bar manager, Peggy Judeh, to prepare the drinks and Judeh would give the drinks to Complainant to serve. (Tr. 83, 306-07)

21. Complainant was not allowed to use the bar's register. (Tr. 101, 215-16)

22. At the end of the night, Respondent McAdam or Judeh would pay Complainant her commissions from the register. (Tr. 33, 100-01)

23. Complainant would occasionally be late to the bar for the Playhouse Sunday event or not show up at all. (Tr. 88-89, 218-19, 361)

24. Complainant testified that Respondents also paid her "about" \$300 in cash per night in addition to her tips and commissions. (Tr. 22) Given Complainant's uncertain testimony concerning the amount she received, I credit Hardeo and Respondent McAdam's testimony that Respondents did not pay Complainant in addition to the commissions and tips she received. (Tr. 225, 359)

25. Hardeo and Judeh usually closed the bar at the end of the night. (Tr. 225-26)

26. The bar featured a cellphone located at the end of the bar for Respondents' employees to use and for customers to call. (Tr. 64, 226-27, 379-80)

27. On various occasions in April and May 2018, Respondent McAdam sent text messages to Complainant via the bar cellphone seeking to introduce her to potential bartenders who might work during the Playhouse Sunday event. (Tr. 18-19, 25-27, 69-71; Complainant's Exhibits 2, 3)

28. In or around April 2018, Respondent McAdam asked Complainant for a picture of her to use on a promotional flyer for Respondent Wild Orchid. (Tr. 25-26)

29. On April 9, 2018, Complainant sent Respondent McAdam a photograph of herself via text message to the bar cellphone. Respondent McAdam responded, "So can I please have my own bunny pic[?] I will be nice[.]" Complainant responded, "You need a picture for promo?" Respondent McAdam replied, "No for me to look at[.]" (Tr. 26-28; Complainant's Exhibit 4)

30. On April 10, 2018, Respondent McAdam sent Complainant a message via Facebook stating, "Happy 16th . [sic] birthday Our sexy bunny. Hope you are having a blast, enjoy and God bless." Complainant responded, "Thank you so much!" Respondent McAdam stated, "I was hopping [sic] I would have gotten that pic." (Tr. 401-03, 405; Complainant's Exhibit 9)

31. On April 11, 2018, Respondent McAdam sent a text message to Complainant via the bar cellphone stating, "I was saying that was my dream pic I wanted but I did not get any. I am so unlucky." (Tr. 29-30; Complainant's Exhibit 4)

32. On April 18, 2018, at 12:04 a.m., Respondent McAdam sent a text message to Complainant via the bar cellphone stating, "You really take long to cum girl you boyfriend must be real happy with you." Complainant responded, "I'm on my way," because she was on her way to the bar at that time. Respondent McAdam stated, "Is that what you does tell him??? Lol" (Tr. 30-31; Complainant's Exhibit 4)

33. On June 4, 2018, Respondent McAdam sent Complainant a text message via the bar cellphone stating, "You doing all these wonderful pictures and yet you would not send me one." (Tr. 32; Complainant's Exhibit 4)

34. I do not credit Respondent McAdam's testimony that he did not send text messages to Complainant from the Wild Orchid phone asking her for photographs. (Tr. 382, 399, 404-05) I also do not credit Singh's testimony that he sent the text messages to Complainant asking her for photographs using the bar's cellphone. (Tr. 157-59) On cross-examination, Respondent

McAdam admitted that he sent Complainant messages via Facebook on April 10, 2018, referring to her as a “sexy bunny” and stating that he was “hopping [sic] I would have gotten that pic” (Tr. 401-05; Complainant’s Exhibit 9) It is not plausible that Respondent McAdam authored the April 10, 2018, Facebook messages but not the various other similar text messages sent using the bar cellphone asking Complainant for photographs. (Tr. 382, 399, 404-05; Complainant’s Exhibits 4, 9)

35. Complainant would occasionally retrieve drinks from behind the bar while hosting. (Tr. 38, 137) Respondent McAdam would sometimes pass behind Complainant and brush up against her. (Tr. 34, 38, 139, 145)

36. Respondent McAdam would also make inappropriate comments to Complainant, such as, “I like when you bend over.” (Tr. 31)

37. During one Playhouse Sunday event, Complainant was adjusting her clothing and Singh took a photograph of her. (Tr. 157, 164-65, 251-54) Singh later sent the photograph to Complainant via text message from the bar phone with the text message, “beautiful.” (Tr. 157-58; Complainant’s Exhibit 4)

38. I do not credit Complainant’s testimony that Respondent McAdam took the photograph and sent it to her via text message. (Tr. 34-37) The photograph and text message stating “beautiful” are undated. Complainant testified that she received the photograph and text message during the first week of August 2018. (Tr. 37) However, the text message attaching the photograph occurs before a text message dated July 2, 2018, in a text chain. (Complainant’s Exhibit 4) These undated text messages contradict Complainant’s testimony. Accordingly, I credit the testimony of Hardeo and Singh that Singh took the photograph and sent it to Complainant. (Tr. 157-58, 251-53)

39. In the first week of August 2018, Complainant was working and had a hole in her stocking. Respondent McAdam approached her, put his finger through the hole, and told her that she had a hole in her stocking. (Tr. 37-38)

40. Complainant did not return to work at the bar after the first week of August. (Tr. 34)

41. After Complainant stopped hosting at the bar, she heard that Respondent McAdam and Singh were telling people that she was a stripper and was fired for stealing from the bar. (Tr. 40-41)

42. On September 12, 2018, Complainant sent a text message to Hardeo stating, "I want to apologize to you for whats [*sic*] about to happen because you and I never had any issues. But Barry and Raymond went Po [*sic*] far. Have a good night." (Tr. 40-42; Complainant's Exhibit 5)

43. When Complainant stated that Singh and Respondent McAdam went too far, she was referring to them trying to "assassinate [her] character" by saying that she was a stripper and was fired for stealing from the bar. (Tr. 40-41)

44. Hardeo never witnessed Respondent McAdam inappropriately touch Complainant in the area behind the bar. (Tr. 248)

45. Hardeo did not know that Complainant was having problems with Respondent McAdam or Singh until she received the text message from Complainant. (Tr. 256-58)

46. Complainant was "drained," "emotionally devastated," and humiliated because of the way she was treated by Respondent McAdam. (Tr. 43)

47. Complainant did not look for work after she stopped hosting the Playhouse Sunday event. (Tr. 103) As of the date of the public hearing, Complainant had not received income from any source since she stopped hosting Playhouse Sunday for Respondents. (Tr. 104)

48. Complainant did not receive unemployment compensation after she stopped hosting the Playhouse Sunday event. (Tr. 103)

49. At the time of the public hearing, Complainant was still a nursing student. (Tr. 57)

OPINION AND DECISION

Complainant alleged that she was subjected to a hostile work environment because Respondent McAdam sexually harassed her in violation of N.Y. Exec. Law, art. 15 (“Human Rights Law”) § 296.1(a), which provides that it is unlawful for an employer to discriminate against an employee on the basis of sex.

Respondents argue that Complainant was not an employee and is therefore outside the protections of Human Rights Law § 296.1(a). The Human Rights Law defines an “employer” by referring only to the number of persons in its employ and does not define the employer-employee relationship. Generally, four elements are considered when determining whether an employer-employee relationship exists: (1) the selection and engagement of the servant, (2) the payment of salary or wages, (3) the power of dismissal, and (4) the power of control of the servant’s conduct. The key element is the employer’s power to “order and control” the employee’s work performance. *See State Div. of Human Rights v. GTE Corp.*, 109 A.D.2d 1082, 1083, 487 N.Y.S.2d 234, 235 (4th Dept. 1985). “An independent contractor is a person who contracts with another to do something for [her] but who is not controlled by the other or subject to the other's right to control with respect to [her] physical conduct in the performance of the undertaking.” *E.B.A. Wholesale Corp. v. S.B. Mech. Corp.*, 127 A.D.2d 737, 739, 512 N.Y.S.2d 130, 131 (2d Dept. 1987) *quoting* Restatement, Agency 2d, § 2[3].

Complainant hosted an event at the bar one night per week on Sundays. Respondents agreed to hold the event so that Complainant could bring her customers to the bar and increase the bar's business. Complainant and Respondent McAdam came up with the name "Playhouse Sunday" for the event together. Complainant advertised the event herself on social media using photographs taken by Singh. Complainant was paid in tips and commissions on the bottles and drinks she sold to customers. Complainant did not have permission to use the bar's register. She sometimes arrived late to the bar and there is no evidence that she suffered any consequence for being late. In sum, there is no evidence that Respondents exercised any significant level of control over the manner in which Complainant advertised the event, socialized with customers, how she sold drinks, or how she received tips. Accordingly, Complainant was not Respondents' employee.

The evidence did establish that Complainant was an independent contractor working for Respondents. Respondents and Complainant formed an agreement pursuant to which Complainant was allowed to collect commissions and tips from customers in exchange for bringing new customers to the bar.

As an independent contractor, Complainant is outside of the protections of Human Rights Law § 296.1(a). However, Human Rights Law § 296-d protects independent contractors from sexual harassment. Human Rights Law § 296-d provides that it is an

unlawful discriminatory practice for an employer to permit sexual harassment of non-employees in its workplace. An employer may be held liable to a non-employee who is a contractor, subcontractor, vendor, consultant or other person providing services pursuant to a contract in the workplace or who is an employee of such contractor, subcontractor, vendor, consultant or other person providing services pursuant to a contract in the workplace, with respect to sexual harassment, when the employer, its agents or supervisors knew or should have known that such non-employee was subjected to sexual harassment in the

employer's workplace, and the employer failed to take immediate and appropriate corrective action.¹

The Human Rights Law in effect at the time Complainant's claims accrued does not define "sexual harassment," and New York State caselaw and Division precedent are silent concerning how to analyze a claim of sexual harassment under Human Rights Law § 296-d. Because it is not reasonable to assume, absent evidence to the contrary, that the state legislature intended to provide stronger protections for independent contractors than employees, Complainant's claim of sexual harassment under Human Rights Law § 296-d will be analyzed under the same standard as a hostile work environment claim under Human Rights Law § 296.1(a).²

To sustain a claim of hostile work environment under Human Rights Law § 296.1(a), a complainant must show that the workplace was permeated with discriminatory intimidation, ridicule, and insult that was sufficiently severe or pervasive to alter the conditions of her employment and create an abusive work environment. *Forrest v. Jewish Guild for the Blind*, 3 N.Y.3d 295, 310, 786 N.Y.S.2d 382, 394 (2004), quoting *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21, 114 S.Ct. 367 (1993). Whether an environment is hostile or abusive can be determined only by looking at all the circumstances, including the "frequency of the discriminatory conduct;

¹ Effective October 11, 2019, Human Rights Law § 296-d was amended to provide that it "shall be an unlawful discriminatory practice for an employer to permit unlawful discrimination against non-employees in its workplace . . ."

² Effective October 11, 2019, the Human Rights Law was amended to make it an unlawful discriminatory practice, "For an employer . . . to subject any individual to harassment because of an individual's . . . sex, . . . regardless of whether such harassment would be considered severe or pervasive under precedent applied to harassment claims. Such harassment is an unlawful discriminatory practice when it subjects an individual to inferior terms, conditions or privileges of employment because of the individual's membership in one or more of these protected categories." Human Rights Law § 296.1(h). Because Complainant's claim accrued before October 11, 2019, the amendment is not applicable to this case.

its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance. The effect on the employee's psychological well-being is, of course, relevant to determining whether the plaintiff actually found the environment abusive." *Id.* at 311, quoting *Harris*, at 23. "Moreover, the conduct must both have altered the conditions of Complainant's employment by being subjectively perceived as abusive by Complainant and have created an objectively hostile or abusive environment--one that a reasonable person would find to be so." *Id.* at 311, 786 N.Y.S.2d at 395, quoting *Harris*, at 21.

Complainant has established that she was subjected to a hostile work environment. Respondent McAdam repeatedly sent messages to Complainant with inappropriate language, referred to her as "sexy bunny," and requested that she send him photographs of her. He also brushed up against her and, on one occasion, put his finger through a hole in her stocking. Respondent McAdam's conduct was sufficient to establish that Complainant was sexually harassed. *See W. Taghkanic Diner II, Inc. v. N.Y. State Div. of Human Rights*, 105 A.D.3d 1106, 1107, 962 N.Y.S.2d 748, 750–51 (3d Dept. 2013).

Respondent McAdam, an owner and operator of Respondent Wild Orchid, is liable as an employer for his conduct pursuant to Human Rights Law § 296-d. *Patrowich v. Chemical Bank*, 63 N.Y.2d 541, 493 N.Y.S. 659 (1984); *State Div. of Human Rights v. Koch*, 60 A.D.3d 777, 777-778, 875 N.Y.S.2d 180, 181 (2d Dept. 2009); *Gallegos v. Elite Model Mgmt. Corp.*, 28 A.D.3d 50, 60, 807 N.Y.S.2d 44, 51 (1st Dept. 2005). Respondent Wild Orchid is also liable for Respondent McAdam's conduct. Where, as here, the individual alleged to be the harasser is a high-ranking officer of the employer, the employer is strictly liable for the harassment. The victim need not have complained to management, there is no notice or knowledge requirement,

and the existence of an anti-harassment policy is irrelevant. *See Faragher*, 524 U.S. at 789-90, 118 S. Ct. at 2284; *Randall v. Tod Nik Audiology, Inc.*, 270 A.D.2d 38, 704 N.Y.S.2d 228 (1st Dept. 2000).

Complainant alleged that Respondent McAdam's conduct compelled her to stop working for Respondents. To sustain a claim of constructive discharge, a complainant must show that a respondent deliberately made her working conditions so intolerable that a reasonable person in her position would have felt compelled to leave. *Albunio v. City of New York*, 67 A.D.3d 407, 408, 889 N.Y.S.2d 4, 6 (1st Dept. 2009); *Nelson v. HSBC Bank USA*, 41 A.D.3d 445, 447, 837 N.Y.S.2d 712, 714 (2d Dept. 2007). Complainant has demonstrated that Respondent McAdam's harassing conduct would compel a reasonable person in her position to terminate her arrangement with Respondents and stop hosting Playhouse Sunday at the bar.

However, Complainant is not entitled to damages in connection with the termination of her arrangement with Respondents because Respondents met their burden of proving that Complainant failed to mitigate her damages. *See Walter Motor Truck Co. v. New York State Human Rights Appeal Bd.*, 72 A.D.2d 635, 636, 421 N.Y.S.2d 131, 133 (3d Dept. 1979) (burden is on Respondents to prove Complainant's lack of diligent efforts to mitigate damages). Complainant did not seek work after she stopped hosting Playhouse Sunday. Complainant, who attended nursing school at the time she began hosting Playhouse Sunday, was still attending nursing school as of the time of the public hearing. Because Complainant failed to mitigate her damages, she is not entitled to an award for money she may have lost as a result of the termination of her arrangement with Respondents.

Complainant is entitled to recover compensatory damages for mental anguish caused by Respondents' 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 [she] 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).

Complainant was subjected to continuous sexual harassment by Respondent McAdam when he requested photographs of her, made inappropriate comments to her, brushed up against her, and placed his finger through a hole in her stocking. Respondent McAdam's conduct made Complainant feel “drained,” “emotionally devastated,” and “humiliated.” However, Complainant only worked one day a week at the bar for a period of a few months. Taking all the factors into account, an award of \$20,000.00 will compensate Complainant for her mental anguish due to unlawful discrimination. *See W. Taghkanic Diner II, Inc.*, at 1108–09, 962 N.Y.S.2d at 751–52;

HP Ronkonkoma, Inc. v. Kirkland, 122 A.D.3d 737, 996 N.Y.S.2d 343 (2d Dept. 2014).

Human Rights Law § 297.10 authorizes the Division to award attorney's fees to the prevailing party in claims of employment discrimination where sex is the basis of such unlawful discrimination.³ Because the Human Rights Law is construed liberally, I find that attorney's fees are available to Complainant because she has prevailed on a claim of sexual harassment under Human Rights Law § 296-d. *See* Human Rights Law § 300. Respondents' motion for attorney's fees is denied, as they did not prevail in this case.

Complainant seeks \$73,859.00 in attorney's fees, representing 337.4 hours of legal work performed by her attorneys, Borrelli & Associates, P.L.L.C. ("Borelli & Associates").

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." *Ousmane v. City of New York*, 22 Misc.3d 1136(A) at *10, 880 N.Y.S.2d 874 (Sup. Ct. N.Y. Co. 2009), quoting *Rahmey v. Blum*, 95 A.D.2d 294, 302, 466 N.Y.S.2d 350 (2d Dept. 1983).

This case arose in Queens, New York, within the Eastern District of New York. Courts in the Eastern District of New York "have determined that reasonable hourly rates . . . are approximately \$300–\$450 per hour for partners, \$200–\$300 per hour for senior associates, and \$100–\$200 per hour for junior associates." *Hugee v. Kimso Apartments, LLC*, 852 F. Supp. 2d

³ Effective October 11, 2019, the Human Rights Law was amended to allow attorney's fees in all claims of employment discrimination.

281, 298-99 (E.D.N.Y. 2012) quoting *Pilitz v. Inc. Village of Freeport*, 2011 WL 5825138, at *4 (E.D.N.Y. Nov. 17, 2011); *see also Francis v. Atl. Infiniti, Ltd.*, 2012 WL 398769 (N.Y. Sup. Ct. 2012) (holding that that the hourly rate of \$300.00 per hour is reasonable for the Queens County community for an experienced attorney of 10 to 15 years; \$250.00 per hour for 5 to 10 years; \$225.00 per hour for 5 or less years and \$85.00 per hour for a paralegal.”).

Complainant seeks the following hourly rates for eight Borelli & Associates attorneys who worked on this case:

- Michael Borrelli, managing partner of Borelli & Associates with over twenty years of experience with a focus on employment law -- \$400.00 per hour;
- Alexander Coleman, a partner at Borelli & Associates with over ten years of experience in employment law -- \$350.00 per hour;
- Jeffrey Maguire, a former attorney at Borelli & Associates with over ten years of experience -- \$250.00 per hour;
- Caroline Shulim, a former associate at Borelli & Associates who was admitted to the New York State bar in 2017 -- \$250 per hour.
- Shani J. Walker, a former associate at Borelli & Associates who who was admitted to the New York State bar in 2018 -- \$200 per hour;
- Adam T. Durham, an associate at Borelli & Associates who was admitted to the New York State bar in 2020 -- \$200 per hour;
- Caroline R. Bell, a former associate at Borelli & Associates with approximately 3 years of legal experience -- \$200 per hour; and
- Abeer Memon, a former attorney at Borelli & Associates who received a Bachelor of Laws degree from the University of Buckingham in 2017 - \$200 per hour.

Given the experience of these attorneys, the requested hourly rates are within the prevailing rate and are reasonable. Paralegal work will be compensated at the reasonable requested rate of \$90.00 per hour.

Counsel's billing records state that Borrelli & Associates performed 337.4 hours of legal work on this matter. In determining the number of hours reasonably expended,

(1) hours which reflect 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 which 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.

McIntyre v. Manhattan Ford, Lincoln-Mercury, Inc., 176 Misc.2d 325, 328 (N.Y. Sup. Ct. 1997) citing *Rahmey*, 95 A.D.2d at 300-301, 466 N.Y.S.2d 350.

In reviewing a fee application, a court examines the particular hours expended by counsel with a view to the value of the work product of the specific expenditures to the client's case. If the court concludes that any expenditure of time was unreasonable, it should exclude these hours from the lodestar calculation. *Luciano v. Olsten Corp.*, 109 F.3d 111, 116 (2d Cir. 1997) (internal citations omitted). "[I]n dealing with such surplusage, the court has discretion simply to deduct a reasonable percentage of the number of hours claimed 'as a practical means of trimming fat from a fee application.'" *Kirsch v. Fleet St., Ltd.*, 148 F.3d 149, 173 (2d Cir. 1998) quoting *New York Association for Retarded Children v. Carey*, 711 F.2d 1136, 1146 (2d Cir. 1983).

The attorney time records submitted in this case are extensive, consisting of 255 items spanning 43 pages. A review of these billing records reveals that many entries are either unnecessary, reflect inefficiency, or are unrelated to this proceeding. Various entries clearly relate to a court proceeding other than this case. (See, e.g., 3/10/2021 Walker entry concerning "settlement for both matters," entries dated 10/22/2020 through 10/27/2020 related to an "ECF bounce," and entries dated 3/17/2021 related to a Rule 26(f) report). Numerous entries reflect

internal law firm communications with office staff, which are excessive entries. *See Rozell v. Ross-Holstk*, 576 F.Supp.2d 527, 541 (S.D.N.Y. 2008) (*See, e.g.*, 4/2/2021 entries for Walker concerning “referrals” and 7/9/2021, 7/12/2021, and 7/13/2021 entries for Shulim concerning conferences with the firm’s office manager). Various entries reflect hours of work on an order to show cause, a motion for default, and a motion to amend, none of which were filed with the Division. (*See, e.g.*, 11/18/2019, 8/10/2020, 8/11/2020, 8/12/2020, 10/12/2020, and 10/28/2021 entries). Counsel also seeks compensation for drafting a letter to Complainant’s school and for engaging in non-substantive communications with client. (*See, e.g.*, 3/22/2021 entry by Walker regarding Complainant not wanting to “be texted every single day,” and 10/22/2021, 10/23/2021, and 10/25/2021 entries concerning drafting a letter for Complainant’s school).

In addition, Shulim spent 85.6 hours preparing for the hearing in this case. (*See* Shulim entries from September 17, 2021, through October 19, 2021). In the experience of the presiding ALJ, this is an excessive amount of time to prepare for a two-day administrative hearing in which Complainant called three witnesses.

Borelli & Associates also billed 14 hours for Durham to assist Shulim with the hearing. The issues raised in the verified complaint and the evidence produced at the hearing did not require the presence of two attorneys and these hours should be disallowed. *See Vassallo v. Head Injury Association*, Div. Case No. 10188923 (August 30, 2019). Counsel also billed a total of 66.1 hours for Complainant’s post-hearing brief, which is excessive in the experience of the presiding ALJ. (*See* Coleman and Durham entries from December 16, 2021, through January 21, 2021).

In summary, a review of counsel’s billing records revealed that the 337.4 hours billed by Borelli & Associates exceeded what was reasonably required to prosecute Complainant’s

relatively straightforward claim by approximately 148 hours. Given the excessive time spent by counsel on this administrative proceeding, and the fact that counsel apparently included claims for fees unrelated to this case, a 44 percent reduction in counsel's fees is appropriate. See *Kirsch*, 148 F.3d at 173 (reducing requested fees for an attorney's work by 20 percent due to vagueness, inconsistencies, and other deficiencies in the billing records); *Luciano v. Olsten Corp.*, 109 F.3d 111, 117 (2d Cir. 1997) (holding that a district court's disallowance of half of an attorney's hours in counsel fees for time unreasonably expended was not an abuse of its discretion); *Grievson v. Rochester Psychiatric Ctr.*, 746 F.Supp.2d 454, 469 (W.D.N.Y. 2010) (reducing requested attorney's fees by 20 percent for "excessive and redundant hours"); *Simmonds v. New York City Dep't of Corr.*, 2008 WL 4303474, at *7 (S.D.N.Y. Sept. 16, 2008) (reducing requested attorney's fees by 40 percent to correct for inefficiencies caused by a co-counsel arrangement where attorneys routinely reviewed and revised each other's work); *Lavelly v. Redheads, Inc.*, 2007 WL 5267679, at *8 (S.D.N.Y. Oct. 12, 2007) (reducing attorney's fees by 25 percent).

As a result, the presumptively reasonable amount of attorney's fees due to Complainant's attorneys is \$41,361.04, representing a 44 percent reduction of the requested attorney's fees of \$73,859.04.

The Division will also allow prevailing parties "to recover reasonable, identifiable out-of-pocket disbursements which are ordinarily charged to clients." See *Vassallo v. Head Injury Association*, S.D.H.R. No. 10188923 (February 27, 2020), quoting *Francis v. Atl. Infiniti, Ltd.*, 34 Misc. 3d 1221(A) at *9, 950 N.Y.S.2d 608 (Sup. Ct. 2012) (citations omitted). Borelli & Associates seeks \$134.86 in costs, which are properly identified and reasonable.

Accordingly, Respondents shall pay \$41,495.90 in attorney's fees as reasonable

compensation for the time spent by Complainant's attorneys in successfully presenting her claim of sexual harassment.

Pursuant to 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 Respondents' culpability; any relevant history of Respondents' actions; Respondents' financial resources; and any other matters as justice may require. *See Gostomski v. Sherwood Terr. Apts.*, SDHR Case Nos. 10107538 and 10107540 (November 15, 2007), *aff'd*, *Sherwood Terrace Apartments v. State Div. of Human Rights*, 61 A.D.3d 1333, 877 N.Y.S.2d 595 (4th Dept. 2009); *119-121 East 97th Street Corp. v. New York City Comm'n on Human Rights*, 220 A.D.2d 79, 88-89, 642 N.Y.S.2d 638, 644 (1st Dept. 1996).

The record does not include any information concerning the relevant history of Respondents' actions, Respondents' financial resources or other matters as justice may require. Therefore, Respondents are ordered to pay a civil fine to the State of New York in the amount of \$10,000.00. *See Oz Trucking & Rigging Corp. v. New York State Div. of Human Rights*, 178 A.D.3d 935, 937, 116 N.Y.S.3d 52, 55 (2d Dept. 2019) (affirming a civil penalty of \$10,000

against respondents where the complainant was subjected to “constant sexual badgering and inappropriate behavior.”).

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 Respondents, their agents, representatives, employees, successors, and assigns shall cease and desist from discriminating against any employee in the terms and conditions of employment, or independent contractor; and it is further

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

1. Within sixty (60) days of the date of the Commissioner’s Order, Respondents shall pay to Complainant \$20,000.00 as compensatory damages for mental anguish and humiliation Complainant suffered as a result of Respondents’ unlawful discrimination. Interest shall accrue on this award at the rate of nine percent per year, from the date of the Commissioner’s Order until payment is actually made by Respondents.
2. The aforesaid payment shall be made in the form of certified check, made payable to the order of April McPherson and delivered by certified mail, return receipt requested, to Adam T. Durham, Esq., Borrelli & Associates, P.L.L.C., 910 Franklin Avenue, Suite 200, Garden City, New York 11530.
3. Within sixty (60) days of the date of the Commissioner’s Order, Respondents shall pay to Complainant’s attorneys, Borrelli & Associates, P.L.L.C., reasonable attorneys’ fees in the amount of \$41,361.04. This payment shall be made by

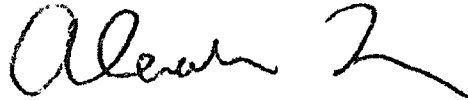
Respondents in the form of a certified check made payable to the order of Complainant's attorneys, Borrelli & Associates, P.L.L.C., and delivered by certified mail, return receipt requested, to Adam T. Durham, Esq., Borrelli & Associates, P.L.L.C., 910 Franklin Avenue, Suite 200, Garden City, New York 11530. Interest shall accrue on the award at the rate of nine (9) percent per year, from the date of the Commissioner's Order until payment is actually made by Respondents.

4. Within sixty (60) days of the date of the Commissioner's Order, Respondents shall pay to the State of New York \$10,000.00 as a civil fine and penalty for their violation of the Human Rights Law. Payment shall be made in the form of a certified check payable to the order of the State of New York and delivered by certified mail, return receipt requested, to General Counsel, New York State Division of Human Rights, One Fordham Plaza, 4th Floor, Bronx, NY 10458. Interest shall accrue on this award at the rate of nine percent per year, from the date of the Commissioner's Order until payment is actually made by Respondents.

5. Within sixty (60) days of the date of this Order, Respondents are to provide training to their supervisors and employees related to its obligations under the Human Rights Law to prevent unlawful discrimination and sexual harassment in the workplace. Upon completion of the training, Respondents shall provide the Division's General Counsel with proof that they have provided this training.

6. Respondents shall cooperate with representatives of the Division during any investigation into compliance with the directives herein contained.

DATED: April 26, 2022
Bronx, New York

A handwritten signature in black ink, appearing to read "Alexander Linzer", with a stylized flourish at the end.

Alexander Linzer
Administrative Law Judge