Tese-Milner v ATCO Props. & Mgt., Inc.
2020 NY Slip Op 33732(U)
November 10, 2020
Supreme Court, New York County
Docket Number: 113902/2007
Judge: Kathryn E. Freed

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. KATHRYN E. FREED **PART** IAS MOTION 2EFM

Justice

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INDEX NO. 113902/2007

ANGELA G. TESE-MILNER, AS CHAPTER 7 TRUSTEE FOR NEREIDA VELASQUEZ,

Plaintiff,

MOTION SEQ. NO. 005 and 006

- v -

ATCO PROPERTIES & MANAGEMENT, INC. and DESMOND BEGLIN,

DECISION + ORDER ON MOTION

Defendants.

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In this action commenced by Nereida Velasquez ("Velasquez") to recover damages for sexual discrimination, sexual harassment, and retaliation, defendants ATCO Properties & Management, Inc. ("ATCO") and Desmond Beglin ("Beglin") move (motion sequence 006), pursuant to CPLR 4404(a), for an order: 1) vacating the jury verdict rendered against them and in favor of plaintiff Angela G. Tese-Milner, As Chapter 7 Trustee for Velasquez, on July 29, 2019 and entering judgment in their favor; 2) alternatively, vacating the verdict and ordering that a new trial be conducted; 3) alternatively, modifying the jury's award to conform to the evidence and to what is reasonable compensation; and 4) for such other relief as this Court deems just and proper. Plaintiff opposes the motion.

Plaintiff moves (motion sequence 005), in effect, pursuant to New York City Administrative Code ("NYCAC") §8-502(g) for an award of reasonable attorneys' fees and defendants oppose the motion.

After oral argument, and after a review of the motion papers and the relevant statutes and case law, the motions are decided as follows.

FACTUAL AND PROCEDURAL BACKGROUND:

In her complaint, filed October 16, 2007, Velasquez alleged that defendant 40 Central Park South, Inc. ("40 CPS") owned an apartment building at 40 Central Park South ("40")/41 West 58th Street ("41"), New York, New York (collectively "the building") where she worked as a concierge from 1995-2006.[1] Pl. Aff. Ex. 3. Velasquez also alleged that defendant ATCO, her employer, managed the building, and that Hemmerdinger controlled 40 CPS and ATCO. Id. Additionally, she alleged that defendant Beglin, the superintendent of the building, became her immediate supervisor in 2004. Id.

As a first cause of action, Velasquez alleged sexual discrimination in violation of the New York State Human Rights Law, N.Y. Executive Law § 290 et seq. ("the NYSHRL"). Id. As a second cause of action, Velasquez alleged sexual discrimination in violation of the New York City Human Rights Law, NYCAC § 8-101 et seq. ("the NYCHRL"). Id. As a third cause of action, she alleged disability discrimination in violation of the NYSHRL. Id. As a fourth cause of action, she alleged disability discrimination in violation of the NYCHRL. Id. As a fifth cause of action, she alleged retaliation in violation of the NYSHRL. Id. As a sixth cause of action, she alleged retaliation in violation of the NYCHRL. Id.

Velasquez further claimed that, as a result of harassment by the defendants, she suffered health problems and went out on short-term disability from December of 2005 until she returned to work in July 2006, and that she was terminated from her position shortly after her return. Id.

[1]By order entered October 9, 2008, this Court (Tingling, J.) held that Velasquez's collective bargaining agreement required her to arbitrate with 40 CPS. In 2012, the claims against 40 CPS were dismissed with prejudice by stipulation. Defs. Memo of Law at 1. The claims against defendant Henry Dale Hemmerdinger ("Hemmerdinger") were dismissed during trial. Tr. 1252.

Velasquez sought reinstatement to her position, back pay, "front pay", lost benefits, and compensatory and punitive damages. Id.

Velasquez filed for Chapter 7 bankruptcy protection in 2011, at which time plaintiff was appointed as her Chapter 7 Trustee. In 2013, Velasquez passed away from causes unrelated to this action.

This case was tried before a jury on July 8, 10-12, 15, 17-19, 22, 24-26, and 29 of 2019. On July 29, 2019, the jury rendered a verdict in favor of plaintiff as follows: $300,000 in back pay; $700,000 for emotional distress; and punitive damages of $500,000.

Given that Velasquez passed away before trial, portions of her deposition testimony were read into the record. That testimony reflected, inter alia, that between 1995 and 2006, Velasquez worked the 3 p.m. – 11 p.m. shift as a concierge at the entrance to 41, which was connected to 40. Tr. 159-160. Plaintiff's employer, ATCO, was the managing agent for 40, which building was owned by 40 CPS. Tr. 116, 121, 1194-1196.[1] Although the entrance to 40 was staffed 24 hours per day, the entrance to 41 was staffed only during Velasquez's shift and the 8 hour shift prior to hers. Tr. 882-883. During the time of her employment, Velasquez was a member of Service Employees International Union Local 32BJ ("32BJ"). Tr. 1196.

Prior to working at 40, Velasquez worked at The Dakota, a building on Central Park West. Tr. 110-116. She was terminated from her position at The Dakota, sued the owners thereof, and settled the lawsuit after she began working at 40. Tr. 115-116. Although defendants attempted to introduce documents and deposition testimony related to that lawsuit, including the verified

[1] This Court notes, however, that Velasquez's W-2 forms reflect that she was paid by 40 CPS. Exs. 11-13.

complaint and arbitration award that denied Velasquez's grievance following her discharge (Exs. FFF and GGG for ID), this Court refused to allow the same into evidence.

Velasquez gave a great deal of detailed testimony regarding her treatment at the building, including that:

> Beglin told her that she was "working a man's position", and that he did not like women working for him (Tr. 139);
>
> Although she had fibroid tumors, her co-workers refused to relieve her at the desk when she needed to use the bathroom, causing her to have numerous accidents and, when she complained to Hemmerdinger, Chairman of the Board of ATCO, he told her that she could be replaced because she was a woman, that she was not performing her duties sufficiently, and that he needed male employees behind the desk (Tr. 128-129, 148-150);
>
> Her male co-workers called her a "bitch", a "whore", and a "cunt" (Tr. 266, 277, 285, 370-371);
>
> A male co-worker climbed under her desk and tried to reach up her skirt (Tr. 261);
>
> A male co-worker told her "you got beautiful breasts, mamma", rubbed her breasts on two or three occasions, and, when she reported the co-worker to Beglin, he called her a "bitchy complainer" (Tr. 378-380);
>
> A male co-worker asked her whether she wanted "some nuts in [her] mouth" (Tr. 377-378);
>
> A male co-worker told her that she had "big tits" (Tr. 372);
>
> When certain female tenants walked by, a male co-worker said those individuals "smelled like fish down there" or told Velasquez that the tenants' breasts were bigger than hers (Tr. 373);
>
> A male co-worker asked Velasquez to "[l]et [him] suck [her] breast" (Tr. 260);
>
> A male co-worker told Velasquez that "he was going to eat [her] private part" (Tr. 288);

On Christmas Eve, a male co-worker exposed himself to Velasquez and asked her if she could crush some ice in her mouth and give him a blowjob (Tr. 263-265);

A male co-worker masturbated in front of her (Tr. 297-298)

A male co-worker told her she looked "hot" and "sexy" (Tr. 372-373).

After complaining to Beglin about Henry Caban ("Caban"), one of her co-workers, Caban exposed himself to Velasquez and told her that "he was going to choke [her with his penis] the next time [she reported him] to [Beglin]." Tr. 268.

In November of 2005, Velasquez wrote a letter to Beglin complaining about unjust treatment because she was female. Tr. 433, 438. She said that the unjust treatment was causing her stress, anxiety, insomnia, and depression. Tr. 438-439. Beglin grabbed the letter, crumbled it up, and called Velasquez a "whining bitch." Tr. 440-441.

In December 2005, Velasquez took a leave of absence to undergo therapy. Tr. 443-444. In April 2006, she attempted to return to work on light duty but Beglin told her that she could not come to the building with a walker or a cane. Tr. 443-444. In July 2006, Velasquez met with Beglin at the building and, when she told Beglin that she could return to work, he said "[l]et's see how long you'll last." Tr. 445. After Velasquez left Beglin's office, she went to the package room and kissed Felix Manusis, the package room attendant, and George Rondo, a tenant, since she was so glad that she would be returning to work. Tr. 451-453, 456. She insisted that she did not lower her dress while in the package room. Tr. 451-452.

About one week later, on or about July 27, 2006, Velasquez received a letter from Beglin terminating her employment on the ground that Rondo "complained that [she] pulled down [her] dress, exposing her breasts to [Rondo] and [Manusis]." Tr. 445-446, 456.

Beglin, an employee of ATCO, testified that he has been resident manager at 40 since 2004. Tr. 878, 1054. Although he initially stated that he did not have the ability to hire or fire employees,

and that he would consult with 32BJ or the Realty Advisory Board ("RAB") before making personnel decisions, he later stated that, under certain circumstances, he had fired employees without such a consultation. Tr. 885-887.

Beglin insisted that he did not decide to fire Velasquez in July 2006 but rather that Rondo and Manusis advised him that Velasquez had entered the package room and exposed her breasts to them. Tr. 991-993. Rondo made the identical complaint about Velasquez to Mariana Gruia ("Gruia"), leasing director for ATCO. Tr. 962, 993, 1178. Beglin then contacted Avner Itzikowitz ("Itzikowitz"), director of operations for ATCO, to ask him how to respond to the complaint and Itzikowitz told him to speak to the Realty Advisory Board ("the RAB"), which he described as "the legal department of building owners and management companies." Tr. 993-994, 1194. Beglin represented that, after speaking to an attorney at the RAB, he believed that Velasquez could be fired for her actions and he sent her a termination letter. Tr. 994-999; Ex. 9. Beglin denied asking Rondo to sign a statement regarding the incident. Tr. 1127.

Beglin said that a video recording taken on the date of the incident reflected that Frank Conlon, another ATCO employee, entered the package room at or about the time of the occurrence. Tr. 1110, 1128-1129. However, Beglin asked Conlon about the incident and he said he had not seen what Beglin was told had occurred. Tr. 1129.

Beglin said that every letter he sent involving the discipline and termination of Velasquez, as well as other personnel decisions including hiring, firing, and reprimanding employees, was approved by ATCO. Tr. 1156, 1163-1164.

Manusis, the package room attendant at 40 and an employee of ATCO, recalled an occasion on which Velasquez came to the package room and exposed her bra to him and Rondo. Tr. 955-961. He reported the occurrence to Beglin the following day. Tr. 942-943. During his employment

at ATCO he never received training with respect to sexual harassment or appropriate conduct in the workplace. Tr. 955.

Since Rondo passed away prior to trial, portions of his deposition testimony were read to the jury. Tr. 7/17/19 at 180-200. Rondo's testimony reflected that, on July 24, 2006, he and Manusis were in the package room when Velasquez came by. Id. at 183-184. When Velasquez crossed her arms and appeared to be about to lift her halter top, Rondo "looked away in plain embarrassment" and made a cross with his two index fingers as if "to ward off vampires." Id. at 185, 195-196. After a second or two, he looked back at Velasquez and her top was on. Id. at 186. He never saw her bra or her bare breasts. Id. Manusis told Rondo that he had not seen Velasquez's breasts because she had a bra on. Id. at 187. Although Rondo insisted that he never complained to anyone about Velasquez's behavior in the package room that day, he admitted that he may have mentioned the incident to Beglin and Gruia but, if he did so, he described it as a "light moment." Id. at 187-189.

A few days after the incident, Gruia asked Rondo to sign a prepared statement reflecting that he was making a complaint about what had transpired in the package room. Tr. 7/17/19 at 189-190. Rondo refused to sign the statement because it did not accurately describe what had occurred in the package room. Id. at 190-192.

Gruia testified that Rondo came to her office to complain about "objectionable behavior" by Velasquez in the package room. Tr. 1178, 1182-1183. She insisted that she was not aware of any animus by Beglin against women or persons with disabilities. Tr. 1185-1186.

Itzikowitz testified that 40 CPS paid its employees directly but that "may have changed over time." Tr. 1193-96. He said that a collective bargaining agreement existed between 32BJ and the RAB, of which ATCO was a member. Tr. 1196-1197. He recalled that Velasquez was

fired in 2006 after Beglin reported to him that she had been involved in an incident. Tr. 1199. Itzikowitz told Beglin to contact the RAB, and Beglin in turn called Peter Finn, an attorney at the RAB. Tr. 1199-1200.

Hemmerdinger testified that ATCO was a management company, that he was President of the company during the entire time Velasquez was employed there, and that he had no involvement in any hiring or firing decisions. Tr. 1254-1255, 1260-1264, 1267.

Dr. Marilyn Chen, a licensed clinical psychologist called as an expert for plaintiff, testified that Velasquez was admitted to the psychiatric unit of New York Presbyterian Medical Center ("NYP") as an inpatient in December 2005. Tr. 7/17/19 at 2, 10. Prior to 2004, Velasquez was treated primarily for asthma and shortness of breath. Id at 14. After 2004, however, she was not only treated for chronic asthma, but also had a number of emergency room visits for panic attacks, anxiety, pain in her neck, back, legs, and arms, tingling and numbness in her lower extremities, and difficulty ambulating which required the use of a cane or walker. Id. A note dated September 28, 2006 reflects that Velasquez was depressed as a result of losing her job and that she had unsuccessfully attempted to hang herself with a belt. Id. at 71. A note written in June 2007 reflects that Velasquez had "a precipitous decline in functioning" since being fired. Id. at 91-92. A note written in October 2007 reflects that Velasquez "expresse[d] tremendous frustration and anger towards [Beglin]." Id. at 92. A note written in November 2008 reflects that she was $50,000 in debt, due mostly to bills for doctors and medications. Id. at 93. A note written in April 2009 reflects that, aside from asthma, Velasquez's major stressor was her financial situation. Id. at 94. Her last treatment at NYP was in December 2009. Id. at 94.

Dr. Chen concluded, within a reasonable degree of clinical psychological certainty, that Velasquez's mistreatment "had an impact on the decline in her functioning" and that she

experienced a "domino effect" in which her loss of employment led to significant financial strain, medical treatment, and problems with her fiancée. Id. at 93-96.

Dr. Stuart Kleinman, a forensic psychiatrist and specialist in traumatic stress, testified as an expert for defendants. Tr. 7/17/19 at 215. Dr. Kleinman admitted that, after Velasquez was terminated, she was "clinically significantly depressed." Id. at 254. He further opined that her depression, anxiety and physical illness were manifestations of her anger over her termination. Id. at 255. However, he also testified that Velasquez had other serious stressors, including that her mother was seriously ill in 2007; that she had a hysterectomy in 2009 as a result of bleeding fibroids; that he sister had a serious illness in 2010; and that her fiancée, with whom she had "a problematic relationship", was seriously ill in 2010-2011. Id. at 256-259.

The Verdict

The jury determined that ATCO was Velasquez's joint employer; that ATCO discriminated against Velasquez based on her gender in violation of the NYCHRL; that ATCO harassed Velasquez based on her gender in violation of the NYCHRL; that ATCO discriminated against Velasquez based on her disability in violation of the NYCHRL; that ATCO retaliated against Velasquez for complaining about discrimination and/or harassment in violation of the NYCHRL; that Beglin discriminated against Velasquez based on her gender in violation of the NYCHRL; that Beglin discriminated against Velasquez based on her disability in violation of the NYCHRL; and that Beglin retaliated against Velasquez for complaining about discrimination and/or harassment in violation of the NYCHRL. Pl. Aff. Ex. 1. With respect to damages, the jury awarded plaintiff $300,000 in back pay; $700,000 for emotional distress (including pain and suffering and mental anguish); and $500,000 in punitive damages. Pl. Aff. Ex. 1.

Defendants' Motion To Set Aside The Verdict (Motion Sequence 006)

Defendants now move for the relief set forth above. In support of the motion, defendants argue that, since ATCO and Beglin were the managing agent and resident manager for 40 CPS, respectively, neither was the employer of Velasquez. Def. MOL at 5. Rather, they assert, Velasquez's W-2 forms (Exs. 11-13) and the collective bargaining agreement ("CBA"), as interpreted by Justice Tingling in his order dated October 7, 2008 (Ex. DDD), establish that 40 CPS was Velasquez's employer. Def. MOL at 5.[2] Thus, maintain defendants, only 40 CPS could terminate Velasquez and she was required to arbitrate her claims against said entity. Id.

Additionally, defendants assert that, although the jury determined that ATCO and 40 CPS were co-employers of Velasquez, there was no basis for the jury's conclusion that ATCO had any discriminatory or retaliatory animus in its actions towards Velasquez. Defs. MOL at 7. They insist that Itzikowitz's decision to terminate Velasquez was based solely on Beglin's description of Velasquez's conduct in the package room. Tr. 1199-1201. Further, they maintain that ATCO cannot be held liable for 40 CPS' illegal conduct since it did not share 40 CPS' motive or intent. Defs. MOL at 7.

Next, defendants argue that, since Beglin is a union employee represented by Local 32BJ, he cannot be an "employer" within the scope of the NYCHRL. Defs. MOL at 9-10. Specifically, they argue that, since federal labor law preempts the NYCHRL, Beglin cannot be held liable under the NYCHRL. Defs. MOL at 10.

[2] Justice Tingling held, inter alia, that an issue of fact existed regarding whether Velasquez was employed by 40 CPS or ATCO and that neither ATCO, Beglin, nor Hemmerdinger could enforce the arbitration provision because they were not signatories to the CBA. Ex. DDD. Although defendants concede that Justice Tingling denied defendants' motion for summary judgment "without sufficient elaboration to understand why" he reached his decision (Def. MOL at 6), they do not contend that they appealed or moved to clarify or reargue his decision.

Alternatively, defendants argue that they are entitled to a new trial based on erroneous evidentiary rulings and jury charges, which resulted in a verdict rendered against the weight of the evidence. Initially, defendants maintain that this Court erred by excluding testimony by Beglin and Gruia regarding information told to them by Rondo, who passed away prior to the trial. They assert that Beglin and Gruia should have been permitted to testify about what Rondo told them since such testimony was not offered for its truth but rather to establish Beglin's state of mind in taking action in response to Velasquez's conduct. They further argue that they were prejudiced by this ruling since Velasquez claimed that she was fired for pretext, which differed from the account Beglin gave in the termination letter, and that this resulted in the undermining of Beglin's credibility. Defs. MOL at 11-12.

Defendants further argue that this Court erred in limiting their ability to introduce evidence regarding Velasquez's improper conduct in the workplace. Defs. MOL at 12. Specifically, they maintain this Court erred in ruling that Frank Kajtazi, a building employee, could not testify that Velasquez exposed herself to him and groped him. Defs. MOL at 12. Although this Court ruled that it would permit Kajtazi to testify regarding conduct by Velasquez which occurred in the presence of another employee who had been accused of harassment, defendants maintain that this effectively excluded his testimony. Defs. MOL at 12. Defendants argue that this was prejudicial because evidence of Velasquez's conduct in the workplace would reflect that she welcomed conduct she claimed was harassment and that she had a propensity for inappropriate conduct at work. Defs. MOL at 12-13.

Defendants argue that they were prejudiced by the exclusion of Kajtazi's testimony regarding inappropriate conduct by Velasquez because she was permitted to attack Caban's testimony regarding her acts of exposure and other conduct (Tr. 818-819) as "the words of an

accused harasser" trying to retaliate and since Kajtazi's testimony would not have been subject to impeachment. Defs MOL at 14. They maintain that Velasquez's conduct was relevant to the issue of whether she was offended by the conduct of others regardless of whether an alleged harasser saw or had knowledge of her conduct. Defs. MOL at 15. Defendants therefore assert that, since this Court limited Kajtazi's testimony, they are entitled to a new trial. Defs. MOL at 16.

Defendants also argue that this Court erred in excluding evidence of plaintiff's prior arbitration and lawsuit against The Dakota, since, inter alia, she alleged similar injuries in that matter and the arbitration award in that case established that she was terminated for cause. Def. Aff. Par. 6; Def. Aff. Ex. 2; Defs. MOL at 16-18. They maintain that "the arbitration award provides important evidence of Ms. Velasquez's familiarity with the grievance and arbitration procedure[s] of her union, which formed the core of an argument on mitigation" defendants seek to raise. Def. Aff. Par. 6. Defendants further assert that the complaint in Velasquez's prior lawsuit contains admissions regarding the sources of her alleged emotional distress, which was documented as having preceded this action.

In addition, defendants take umbrage with this Court's jury charge. First, they argue that this Court erred in refusing to instruct the jury "that 'awareness' by a party of the protected activity requires that the conduct be reasonably understood to be the assertion of protected rights." Defs. MOL at 18 citing Tr. 1487. They claim that this Court erred in merely instructing the jury that "the defendant must have known or reasonably been aware that [Velasquez] engaged in protected activity" since the term "aware" is vague and thus inures to the benefit of plaintiff. Defs. MOL at 18 citing Tr. 1528. Specifically, defendants argue that, in the letter Velasquez claimed to have given Beglin (Ex. 6), which Beglin denied receiving, she admitted to conduct for which she was suspended, then mentioned being a female in a male-dominated workplace, thereby clouding the

issue of whether the document could reasonably have been construed as a complaint about discriminatory treatment, and that a more specific jury instruction would have forced the jury to consider what ATCO knew, as opposed to what Beglin believed to be true. Defs. MOL at 18-19.

Additionally, defendants maintain that this Court erred in failing to give an instruction "explaining the grievance/arbitration theory of mitigation." Defs. MOL at 18 citing Tr. 1507. Specifically, they assert that this Court erred in refusing their request to charge the jury that Velasquez failed to mitigate her damages by pursuing arbitration. Defs. MOL at 19-20.

Despite conceding that "the threshold for setting aside a jury verdict based on the weight of the evidence is high", defendants maintain that the verdict must be set aside on this ground since plaintiff failed to establish that they discriminated against Velasquez on the basis of the disabilities she allegedly had, i.e., asthma and "an illness which required her to use a cane or a walker" (Tr. 1531). Defs. MOL at 20-22. They further assert that Velasquez's claim of sexual discrimination was speculative since she adduced no evidence regarding the treatment of male co-workers similarly situated to her. Defs. MOL at 22-23. Defendants also argue that plaintiff failed to substantiate her claim that she was sexually harassed. Defs. MOL at 24. Additionally, maintain defendants, plaintiff failed to establish that defendants retaliated against Velasquez. Defs. MOL at 26. They further contend that Beglin's termination of Velasquez was not based on a discriminatory motive, but rather on her misconduct. Defs. MOL at 27-29.

Defendants next contend that the award of punitive damages must be vacated. They urge that there is no basis upon which to impose a punitive damages award against ATCO which, at worst, was negligent. Defs. MOL at 29. Similarly, they maintain that Beglin did not act with the degree of culpability necessary to warrant punitive damages. Id. Alternatively, defendants argue

that, if this Court does not vacate the punitive damages award, then it must reduce the same to no more than $250,000, the maximum civil penalty permitted by the NYCHRL. Id. at 33-34.

Defendants argue that, if the verdict is not set aside, then it should be reduced as excessive. Initially, they assert that the wage loss award of $300,000 must be reduced since Velasquez failed to mitigate her losses through the CBA's grievance and arbitration mechanisms, since she was directed to arbitrate with 40 CPS by Justice Tingling's order dated October 7, 2008. Defs. MOL at 30. Defendants maintain that, since Itzikowitz testified that it takes approximately 90–120 days from grievance to arbitration, the back pay awarded to Velasquez could have been for a period of weeks, and not years. Tr. 1203. Further, argue defendants, her damages, including emotional distress, which both experts linked to her unemployment (Tr. 591-593; 752; Ex. CCC), could have been significantly reduced. Id.

Defendants argue that the $700,000 award for emotional distress, which was greater than the $500,000 requested by plaintiff, was excessive. Defs. MOL at 32. They maintain that a review of similar cases warrants a reduction of the emotional distress award to no more than $225,000. Id. at 33.

Finally, defendants maintain that the verdict must be capped at the amount owed to the creditors of the bankruptcy estate. Defs. MOL at 36-37. In support of this contention, defendants argue that although Estates, Powers and Trusts Law ("EPTL") §11-3.2(b) permits an action commenced by a deceased plaintiff to be continued by a representative of the estate, no such representative was appointed herein, and thus no award exceeding the amount owed to the bankruptcy creditors can be sustained. Id.

In opposition, plaintiff argues that the dismissal of the claims against 40 CPS on the ground that the claims against it had to be arbitrated under the CBA does not insulate ATCO from liability.

Pltf. Aff. in Opp. at 2. Plaintiff maintains that the only evidence even suggesting that Velasquez was employed by 40 CPS were tax forms, and there is no evidence that said entity, and not ATCO, controlled the terms and conditions of her employment. Id. at 4.

Additionally, plaintiff asserts that defendants' argument that ATCO had no discriminatory animus is belied by the record, which is replete with evidence that Beglin acted with discriminatory and retaliatory motives. Id. at 3. Plaintiff maintains that, since Beglin was authorized to act on ATCO's behalf, ATCO is liable for his acts under the doctrine of respondeat superior. Id. at 3-4. Further, claims plaintiff, Manusis, who falsely reported that Velasquez exposed her bra in retaliation for the fact that she (Velasquez) had previously accused him of harassing her, was an ATCO employee whose actions were also imputed to the company. Id. at 4.

Plaintiff stresses that defendants even concede that ATCO had no policies prohibiting discrimination or harassment, did not train its staff in this regard, and undertook no investigation to determine whether Manusis' accusation was true, despite having access to a video of Conlon which "circumstantially belied his account", and even though Conlon told Beglin he had not seen Velasquez do anything improper. Id. at 4.

Additionally, plaintiff asserts that this Court has already determined that federal pre-emption does not bar the instant claim due simply to the discontinuance of the action against 40 CPS, a nonparty to the litigation with a right to compel arbitration. Id. at 4.

Plaintiff further argues that this Court's evidentiary rulings were proper. Specifically, plaintiff asserts that this Court properly excluded Rondo's hearsay testimony (id. at 5); excluded the testimony of Kajtazi, with whom Velasquez allegedly engaged in unwitnessed "horseplay", and whom defendants wished to offer for his testimony regarding her general conduct at work (id.

at 6); and excluded proof of a prior lawsuit commenced by Velasquez against The Dakota. Id. at 6-7.

Additionally, plaintiff contends that this Court's jury instructions were proper. Plaintiff maintains that the jury did not need to be instructed that ATCO actually knew of the discrimination to establish her retaliation claim, since this was established by Velasquez's letter to Beglin complaining of unfair treatment based on her sex, as well as Hemmerdinger's statement that he needed male employees behind the desk and that she could be terminated because she was a woman. Id. at 7. Plaintiff also maintains that this Court was not required to instruct the jury that Velasquez could have mitigated her damages if she had arbitrated, since it is entirely speculative for defendants to argue that she would have been successful in an arbitration. Id. at 7-8, 11. Plaintiff further asserts that there was no evidence at trial that Velasquez was offered, but refused to accept, reinstatement or failed to seek other work. Id. at 11.

Next, plaintiff argues that defendants have failed to establish that the verdict was against the weight of the evidence. Id. at 8. Specifically, plaintiff states that there was ample evidence of disability discrimination, including Beglin's refusal to allow Velasquez to return to work with a walker or cane. Id. Similarly, plaintiff asserts that there is ample evidence of sexual discrimination, including Beglin's statement that he did not want women working for him or working with men and her co-workers' refusal to relieve her when she needed to use the bathroom due to her fibroid tumors, a female condition. Id. In addition, plaintiff maintains that there was evidence of "pervasive incidents of sexual harassment" of Velasquez including, inter alia, Velasquez being called a "bitch", "whore", and "cunt"; being touched improperly; being subject to filthy jokes; being told that she had "big tits" and that "women's [genitalia] smells like catfish", and male co-workers exposing themselves to her and masturbating in her presence. Id. at 9. Even after

Velasquez complained to Beglin, claims plaintiff, the harassment continued including, among other things, Caban exposing himself to her and threatening to choke her with his penis for complaining to Beglin. Id.

Plaintiff also claims that there was sufficient evidence of retaliation, since soon after Velasquez gave Beglin a note complaining of being discriminated against on the basis of her sex in late 2005, and then took disability leave, Beglin refused to take her calls and fired her based on a false pretext, i.e., that she exposed herself to Rondo. Id. at 9-10. Plaintiff claims that this was clearly a pretext because Rondo testified that he did not see Velasquez expose her breasts, denied that he complained about Velasquez, and refused to sign a statement which Beglin asked to sign because it was false. Id. at 10. Additionally, Conlon told Beglin that Velasquez did not expose herself. Id. Beglin then terminated Velasquez before she even resumed working at the building, without even asking her for her side of the story. Id.

With respect to damages, plaintiff maintains that the $700,000 award for emotional distress is "fully supported by the facts and the law." Id. at 13. Additionally, plaintiff asserts that the $500,000 punitive damages award is "fully justified in this case for the purposes of punishment and deterring future unlawful conduct." Id. at 13.

In reply, defendants argue that the jury could not rationally conclude that Beglin and ATCO are liable because plaintiff discontinued her claims against 40 CPS and the claims against all of them are inextricably intertwined. Defs. Reply Aff. at 2-4. Defendants further assert that ATCO cannot be liable under a joint employer theory, that Beglin's acts cannot be imputed to ATCO, and that ATCO had no discriminatory intent. Id. at 4-5. Additionally, defendants reiterate their federal preemption argument. Id. at 5-6. Further, defendants assert that they are entitled to a new trial based on this Court's erroneous evidentiary rulings and jury instructions, and that the verdict was

against the weight of the evidence. Id. at 7-11. Finally, they assert that the verdict was excessive. Id. at 16-20.

Plaintiff's Motion For Attorneys' Fees (Motion Sequence 005)

As prevailing party in this matter, plaintiff moves, in effect, pursuant to NYCAC §8-502(g) for an award of $410,083 in legal fees and costs and disbursements of $13,543.24, a total of $423,626.24, through the end of October, 2019. Pltf. Aff. In Supp. at 1-3. In support of the motion, plaintiff submits legal bills generated during the course of this litigation and seeks reimbursement based on her attorneys' hourly rate.

Defendants oppose the motion, arguing that the terms of retention of plaintiff's counsel were governed by the United States Bankruptcy Code under the auspices of United States Bankruptcy Court for the Southern District of New York ("the SDNY Bankruptcy Court") and that said terms set forth certain parameters regarding his compensation. Defs. Aff. in Opp. at 1. Specifically, argue defendants, although Velasquez commenced the captioned action in 2007, she filed for Chapter 7 protection in 2011 and plaintiff was appointed as Trustee in September 2012. Id. at 3-4. In her application to the SDNY Bankruptcy Court seeking to hire counsel, plaintiff represented that counsel "shall apply" to said court "for allowance of compensation and reimbursement of expenses in accordance with "the Bankruptcy Code, the Bankruptcy Rules, [and] the Local Bankruptcy Rules and orders of the [SDNY Bankruptcy Court]." Ex. 2 to Defs. Aff. In Opp. at par. 19. Plaintiff also represented that counsel would be paid on a contingency basis. Ex. 2 to Defs. Aff. in Opp. at par. 3. Additionally, plaintiff represented that her attorney "shall apply to be compensated for any pre-petition work that it performed on the employment discrimination action." Ex. 2 to Defs. Aff. in Opp. at par. 20.

In applying to serve as counsel for plaintiff, plaintiff's counsel represented in an affirmation filed with the SDNY Bankruptcy Court on May 1, 2012 that he agreed to certain conditions, including that he was "aware that [his] fees and expenses incurred in prosecuting the [employment discrimination] action will only be paid upon submission of an appropriate fee application to [plaintiff] and the Bankruptcy Court and after a hearing on notice and only from the proceeds of any recovery which may be obtained from [Velasquez's] employment discrimination claim." Ex. 3 to Defs. Aff. in Opp. at par. 4. Counsel also agreed that his "fees exclusive of disbursements will not exceed one third of any recovery plus expenses, unless a greater fee is awarded by the Bankruptcy Court" and that his fees for prosecuting "the employment discrimination action and disbursements shall only be paid from the proceeds of any recovery from the employment discrimination claim herein, and only after approval of the [SDNY Bankruptcy Court]." Ex. 3 to Defs. Aff. in Opp. at par. 6.

By order entered September 4, 2012, Judge Stuart M. Bernstein of the SDNY Bankruptcy Court directed, inter alia, that plaintiff was authorized to retain plaintiff's counsel to prosecute Velasquez's employment discrimination action pursuant to a contingency retainer; that upon the settlement or other liquidation of the claims in the employment discrimination action, the gross proceeds of Velasquez's recovery were to be turned over to plaintiff for distribution; that plaintiff's counsel was to apply to the SDNY Bankruptcy Court "for allowance of compensation and reimbursement of expenses incurred in the [employment discrimination] litigation" in accordance with the Bankruptcy Code, the Bankruptcy Rules, and the Local Bankruptcy Rules; and that plaintiff's counsel was to be compensated for his services in the employment litigation action in accordance with "sections 330 and 331 of the Bankruptcy Code, the Bankruptcy Rules, the Local Rules, the Amended Guidelines for Fees and Disbursements for Professionals in the Southern

District of New York, dated November 25, 2009, and the United States Trustee Fee Guidelines." Ex. 4 to Defs. Aff. in Opp. at 2-4.

Alternatively, argue defendants, if this Court decides it should award attorneys' fees to plaintiff's counsel, then it should award a "substantially smaller" sum than counsel requests so as to bring such compensation to a "level commensurate with" the services he performed. Id. at 2.

In reply, plaintiff's counsel argues that the SDNY Bankruptcy Court should have no role in determining the attorneys' fees to which he is entitled, and that the fees and disbursements he requests are reasonable. Pltf. Reply Aff. at 1-8.

By correspondence dated March 11, 2020, defendants urged this Court not to consider evidence regarding plaintiff's legal fees which plaintiff's counsel submitted with plaintiff's reply papers.

LEGAL CONCLUSIONS:

A. Defendants' Motion To Set Aside The Verdict

CPLR 4404(a) provides as follows:

> **(a) Motion after trial where jury required.** After a trial of a cause of action or issue triable of right by a jury, upon the motion of any party or on its own initiative, the court may set aside a verdict or any judgment entered thereon and direct that judgment be entered in favor of a party entitled to judgment as a matter of law or it may order a new trial of a cause of action or separable issue where the verdict is contrary to the weight of the evidence, in the interest of justice or where the jury cannot agree after being kept together for as long as is deemed reasonable by the court.

A jury verdict may not be set aside as against the weight of the evidence unless "the evidence so preponderate[d] in favor of the [moving party] that [it] could not have been reached

on any fair interpretation of the evidence." *Killon v Parrotta*, 28 NY3d 101, 107-108 (2016) (citation omitted).

Liability Issues

This Court declines to set aside the jury's verdict on the ground that it was against the weight of the evidence. Given Velasquez's ample testimony regarding how she was treated at the building, set forth at pages 4-5, *supra*, defendants cannot establish that the verdict on the sexual and disability discrimination claims could not have been reached based on a fair interpretation of the evidence. Similarly, the jury could have fairly determined that defendants retaliated against her since plaintiff complained to Beglin about how she was treated and was thereafter terminated based on Manusis's complaint that she had exposed herself to him and Rondo, an incident which she claimed did not occur.

Although defendants argue that ATCO cannot be liable herein because Velasquez was employed by 40 CPS, against which plaintiff discontinued its claims, the jury determined that ATCO and 40 CPS were co-employers of Velasquez.[3] This conclusion was based on a fair interpretation of the evidence given that, although Velasquez's tax forms reflected that 40 CPS was her employer, there were several indicia of her employment by ATCO, including her deposition testimony to this effect; her supervisor was Beglin, an employee of ATCO; exhibits marked at trial reflect that correspondence to Velasquez regarding personnel issues was sent to her by ATCO (Pltf. Exs. 5, 7, and 9 and Defs. Exs. B, Q, and R; Ex. A to Pltf. Aff. In Opp.); and Beglin consulted with Itzikowitz, ATCO's director of operations, regarding how to respond to the complaint about Velasquez exposing herself.

[3] As noted previously, Justice Tingling found that an issue of fact existed regarding whether plaintiff was employed by 40 CPS or ATCO.

Defendants cite no valid authority for their contention that plaintiff's discontinuance of her claims against 40 CPS bars recovery against Beglin and ATCO. Although they maintain that this argument is supported by *Ibarra v Sunset Scavenger Co.*, 2003 US Dist LEXIS 8711 (ND Cal 2003), that case is clearly distinguishable insofar as it there was no evidence of discrimination by either of the two entities alleged to have been co-employers. Id. at *29, n. 4.

In asserting that a finding of liability against them would violate "the primacy that federal labor law places on the CBA and its remedial scheme" (Def. MOL at 6), defendants rely on *Antol v Esposto*, 100 F3d 1111 (3d Cir 1996), in which plaintiffs commenced suit against their corporate employer's officers and shareholders for wages due under the Pennsylvania Wage Payment and Collection Law (the WCL). The Court held that, because the claims were based on a [CBA], the WCL was preempted by the LMRA and the National Labor Relations Act. *Antol* is distinguishable, however, as this Court held in an order dated April 24, 2018 rejecting defendants' identical argument raised by motion in limine, since the claims of plaintiff herein do not arise from a CBA but, rather, are statutory civil rights claims.

Defendants contention that ATCO cannot be liable pursuant to the joint employer doctrine is without merit. "A joint employer relationship may be found to exist where [as here] there is sufficient evidence that [ATCO] had immediate control over [40 CPS's] employees." *N.L.R.B. v Solid Waste Servs.*, 38 F3d 93, 94 (2d Cir 1994) (citation omitted). "Relevant factors include commonality of hiring, firing, discipline, pay, insurance, records, and supervision." Id. Despite defendants' insistence that Velasquez was an employee of 40 CPS, the evidence adduced at trial establishes that ATCO had the ability to hire, fire, supervise and discipline her. Thus, the jury reasonably concluded that ATCO was a joint employer of Velasquez. Any doubt regarding ATCO's liability is dispelled by Manusis' testimony that the company did not provide sexual

harassment training and Beglin's testimony that he would not make any personnel move without the company's approval.

Additionally, defendants' argument that Beglin cannot be liable pursuant to the NYCHRL is without merit. That statute allows actions against co-employees who "act with or on behalf of the employer in hiring, firing, paying, or in administering the 'terms, conditions or privileges of employment' - - in other words, in some agency or supervisory capacity." *Priorie v. New York Yankees*, 307 AD2d 67, 74 (1st Dept 2003). Since it is undisputed that Beglin was Velasquez's supervisor, he may thus be held liable under the statute.

Evidentiary Rulings

Contrary to defendants' contentions, this Court properly exercised its discretion in making evidentiary rulings. *See Rivera v United Parcel Serv., Inc.*, 148 AD3d 574 (1st Dept 2017). They maintain that this Court should have admitted testimony by Beglin and Gruia regarding what they had been told by Rondo, since such testimony was not offered for its truth but rather to establish Beglin's state of mind in taking action in response to Velasquez allegedly exposing herself in the package room. They argue that they were prejudiced by this ruling since Velasquez claimed that she was fired for pretext, which differed from the account Beglin gave in his termination letter to Velasquez, and that this undermined his credibility. Defs. MOL at 11-12. However, Gruia and Beglin *were* permitted to testify that Rondo made a complaint about Velasquez's conduct in the package room. Tr. 1122, 1182-1184.

Nor did this Court err in refusing to allow Kajtazi to testify about any inappropriate sexual conduct by Velasquez in the workplace unless it occurred in the presence of other employees. Tr. 1308-1312. As this Court explained, private conduct between Kajtazi and Velasquez would not

be probative of the allegedly hostile work environment in the building, whereas events occurring in the presence of others would be. Id. In any event, the ruling did not result in any prejudice to defendants. *See Ramirez v Willow Ridge Country Club, Inc.*, 84 AD3d 452 (1st Dept 2011).

Defendants further assert that this Court erred by excluding evidence of Velasquez's prior arbitration and lawsuit against The Dakota because plaintiff alleged similar injuries in that action and admission of this information would have demonstrated that she was familiar with the arbitration process and thus could have mitigated her damages herein. Although the nature and extent of prior injuries are proper subjects of cross-examination, such information cannot be used to persuade a jury to infer that a plaintiff is litigious and therefore unworthy of belief. *See Molinari v Conforti & Eisele, Inc.*, 54 AD2d 1113 (4th Dept 1976) (citations omitted). Velasquez's 1995 complaint against The Dakota for sexual harassment and discrimination merely alleged that she sustained, among other things, "humiliation, embarrassment and mental anguish." Ex. 3 to Pltf. Aff. in Supp. at par. 25. This general allegation is hardly probative of any specific prior injuries Velasquez may have had, especially given that it was made 12 years before the commencement of this action and could have led the jury to believe that Velasquez had a proclivity to litigate. Thus, the admission of evidence of the prior suit would have been more prejudicial than probative of the issues in this matter.

This Court also rejects defendants' argument that the admission of evidence of Velasquez's arbitration against The Dakota "dovetails with [their] mitigation argument." Defs. MOL in Supp. at 16. As plaintiff contends, defendants' argument that Velasquez failed to mitigate her damages by failing to arbitrate is utterly speculative, since it is by no means certain that she would have been successful in an arbitration. Pltf. Aff. in Opp. at 11.

Jury Instructions

Defendants maintain that this Court erred in instructing the jury as to the second element of a retaliation claim pursuant to the NYCHRL, which is that the employer "was aware that [the employee] engage in a protected activity as that term is defined in the NYCHRL." *Brightman v Prison Health Serv., Inc.*, 108 AD3d 739, 740 (2d Dept 2013). Defendants urge that, by instructing the jury that "the defendant must have known or reasonably been aware that [Velasquez] engaged in a protected activity" (Tr. 1528), this Court relaxed the standard required by the statute. However, they ignore the fact that this Court also instructed the jury that the second element of the claim was that "Velasquez's employer *was aware* that she was engaged in a protected activity" (Tr. 1527) (emphasis added), which is precisely what they say should have been charged. Thus, although this Court misstated a portion of the charge, the error was harmless given that the charge as a whole conveyed the correct legal principle. *See Manna v Diego*, 261 AD2d 590 (2d Dept 1999); *McCummings v New York City Transit Authority*, 177 AD2d 24 (1st Dept 1992). To the extent defendants contend that the jury was confused in any way by the charge, they do not mention any jury note being submitted seeking a clarification of the instruction.

For the reasons set forth above, defendants' argument that this Court erred in failing to give an instruction "explaining the grievance/arbitration theory of mitigation" (Defs. MOL at 18) is without merit.

Compensatory Damages

Defendants claim that the compensatory damages awarded, i.e., $300,000 in back pay and $700,000 for emotional distress, must be reduced. Their principal argument in support of reducing the back pay award is that Velasquez should have mitigated her damages, which argument was

rejected above. Nor do they cite any legal authority for their contention that plaintiff's damages must be limited to the amount Velasquez owed to her creditors in bankruptcy, which argument is in any event without merit. See *Middleton-Coulibaly v Danco, Inc.*, 31 Misc 3d 952, 961-962 (Civ Ct, Bronx County 2011) (defendant, who was not an interested party in plaintiff/debtor's bankruptcy case, could not claim that representations to the Bankruptcy Court regarding the value of the claim could control its potential value in Civil Court).

Once Velasquez filed for bankruptcy, she lost her capacity to sue as an individual and plaintiff, as Bankruptcy Trustee, obtained the authority to sue on her behalf. Defendants are not absolved from paying the full value of the judgment merely because the creditors' claims may total an amount less than the judgment, since any overage arising from the verdict awarded based on Velasquez's injuries is an asset of her estate. The judgment is an asset of the bankruptcy estate against which creditors' claims are asserted and plaintiff, as Bankruptcy Trustee, must pay those claims from the amount awarded in the employment discrimination action. To the extent that the judgment in the employment discrimination action exceeds the amount claimed by the creditors in bankruptcy, this money would become part of Velasquez's residuary estate and a personal representative would need to be appointed on behalf of Velasquez's estate by the Surrogate's Court so that he or she could seek payment for any overage from the bankruptcy trustee. See. EPTL 11-3.2(b). This may require plaintiff to obtain permission from the SDNY Bankruptcy Court to deposit the funds with the Commissioner of Finance of the State of New York for the benefit of Velasquez's heirs pending the appointment of a representative of the estate.

This Court now turns to the reasonableness of the awards for compensatory damages.

> 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.

Automatic Meter Reading Corp. v New York City, 63 Misc 3d 1211(A), 2019 NY Slip Op 50464(U) (Sup Ct, NY County 2019) (citations omitted).

In *Automatic Meter Reading*, a male employer touched the complaining female employee's backside with an umbrella and, when she asked him not to do it again, he ignored her and laughed in her face; he screamed at her about her work; told her that every decision she made was wrong; he posted on the copier a cartoon of a scantily clad woman with the words "our own Monica"; and posted a photograph of a Sports Illustrated swimsuit model stating that the female employee used to have a body like that; the employer said "[w]hy did I put a woman in charge?"; told her that "sex helps with headaches"; offered to rub her chest when she had a cough; and suggested that they run away together and that he would remember to bring Viagra and Cialis. In October 2015, the New York City Commission on Human Rights ("NYCCHR") adopted an ALJ's report finding that the employer engaged in unlawful discriminatory practice and awarded the complainant $422,670.26, which represented $200,000 for mental anguish plus back pay and front pay. The NYCCHR also imposed a $250,000 civil penalty. In its decision, this Court (Hagler, J.), comparing the case to others in which discrimination awards were made, found that:

> the award for mental anguish was supported by [the complainant's] 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 Comm'n on Human Rights*, 251 A.D.2d 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 [the complainant] in emotional distress damages is supported by the record and comparable to awards in similar cases.

In *Belton v Lal Chicken*, *supra*, one of the cases relied on in the *Automatic Meter Reading* decision, plaintiff was awarded $300,000 for emotional distress where she was subjected to unwanted touching and sexual advances by her supervisor for months, despite telling him that she was not interested. This Court finds that the conduct of the defendants in the captioned action is far more offensive and outrageous than that in *Automatic Meter Reading* and *Belton.* The specific actions taken against Velasquez are set forth above, but warrant repeating below to highlight their vile nature.

In another case, *Albunio v. City of New York*, 67 AD3d 407 (1st Dept. 2009), *affirmed, in part, by* 16 NY3d 472 (2011), the Appellate Division, First Department determined that a jury award of $491,706 in compensatory damages was supported by evidence that the plaintiff had major reactive depression and suicidal ideation, as well as damage to his reputation, resulting from being stereotyped as a pedophile and homosexual. Thus, an award of nearly $500,000 was made for emotional distress under the NYCHRL over 10 years ago.

Here, as noted above, Beglin told Velasquez that she was "working a man's position", and that he did not like women working for him (Tr. 139); although she had fibroid tumors, her co-workers refused to relieve her at the desk when she needed to use the bathroom, causing her to have numerous accidents and, when she complained to Hemmerdinger, Chairman of the Board of ATCO, he told her that she could be replaced because she was a woman, that she was not performing her duties sufficiently, and that he needed male employees behind the desk (Tr. 128-129, 148-150); her male co-workers called her a "bitch", a "whore", and a "cunt" (Tr. 266, 277, 285, 370-371); a male co-worker climbed under her desk and tried to reach up her skirt (Tr. 261); a male co-worker repeatedly rubbed her breasts and, when she reported the co-worker to Beglin, he called her a "bitchy complainer" (Tr. 378-380); a male co-worker asked her whether she "want[ed] some nuts in [her] mouth" (Tr. 377-378); a male co-worker told her that she had "big tits" (Tr. 372); when certain female tenants walked by, a male co-worker said they "smelled like fish down there" or told Velasquez that the tenants' breasts were bigger than hers (Tr. 373); a male co-worker asked Velasquez to "[l]et [him] suck [her] breast" (Tr. 260); a male co-worker told Velasquez that "he was going to eat [her] private part" (Tr. 288); a male co-worker exposed himself to Velasquez and asked her to crush some ice in her mouth and give him a blowjob (Tr. 263-265); a male co-worker masturbated in front of her (Tr. 297-298); a male co-worker told her she looked "hot" and "sexy" (Tr. 372-373); and, after complaining to Beglin about Henry Caban ("Caban"), one of her co-workers, Caban exposed himself to Velasquez and told her that "he was going to choke [her with his penis] the next time [she went] to [Beglin]." Tr. 268.

It is this Court's opinion that the foregoing conduct, which was essentially an ongoing barrage of acts of a graphic sexual nature, threats, intimidation, and indifference to Velasquez's mental and/or medical condition, constitutes conduct far more egregious than that in *Automatic*

Meter Reading, *Belton*, and *Albunio* and that the award of $700,000 for compensatory damages should thus be sustained. Plaintiff's expert Dr. Chen found that Velasquez was depressed a result of losing her job and that she had unsuccessfully attempted to hang herself with a belt and that she had "a precipitous decline in functioning" since being fired. Dr. Chen concluded, within a reasonable degree of clinical psychological certainty, that Velasquez's mistreatment "had an impact on the decline in her functioning" and that she experienced a "domino effect" in which her loss of employment led to significant financial strain, medical treatment, and problems with her fiancée. Id. at 93-96.

Defendants' expert Dr. Kleinman admitted that Velasquez was "clinically significantly depressed" after she was terminated. Although he found that she had significant stressors other than those arising from her employment, he opined that her depression, anxiety and physical illness were manifestations of her anger following her termination.

Since plaintiff's expert and defendants' expert agreed that that Velasquez had a great deal of emotional suffering as a result of her termination, this Court declines to disturb the jury's award of $700,000 for pain and suffering.

Punitive Damages

Pursuant to NYCAC § 8-502 (a), a plaintiff can recover punitive damages under the NYCHRL. This Court declines to reduce the award of $500,000 in punitive damages awarded to plaintiff.

> "[T]he standard for determining damages under the NYCHRL is whether the wrongdoer has engaged in discrimination with willful or wanton negligence, or recklessness, or a 'conscious disregard of the rights of others or conduct so reckless as to amount to such disregard.'" *Chauca v. Abraham*, 885 F.3d 122, 124 (2d Cir. 2018) (quoting *Chauca v. Abraham*, 30 N.Y.3d 325 (2017)). "This standard requires 'a lower degree of culpability' than is required for punitive damages under

> other statutes, as it 'requires neither a showing of malice nor awareness of the violation of a protected right.'" *Kreisler v. Humane Soc'y of New York*, 2018 U.S. Dist. LEXIS 171147, 2018 WL 4778914, at *9 (S.D.N.Y. Oct. 3, 2018) (quoting *Chauca*, 89 N.E.3d at 481).

Garcia v Comprehensive Ctr., LLC, 2019 US Dist LEXIS 203447, at *21-22 (SDNY Nov. 21, 2019), No. 17-CV-8970 (JPO) (BCM).

Defendants' conduct meets the standard for punitive damages under the NYCHRL. Beglin's conduct, including his failure to respond to Velasquez's complaints, clearly evinced a conscious disregard for her rights or, at the very least, conduct so reckless that it amounted to such disregard. Additionally, since Beglin was a supervisor for ATCO, and ATCO has not shown that it made "good-faith efforts to prevent discrimination in the workplace," Beglin's acts may be imputed to the corporate defendants for the purpose of awarding punitive damages. *Kolstad v ADA*, 527 U.S. 526, 546 (1999).

Nor was the punitive damages award of $500,000 excessive, particularly when compared to awards for similar claims under the NYCHRL. *See Rivera v United Parcel Serv., Inc.*, 148 AD3d 574, 575-576 (1st Dept 2017) ($300,000) citing *Salemi v Gloria's Tribeca Inc.*, 115 AD3d 569, 569, 570 (1st Dept 2014) ($1.2 million); *McIntyre v Manhattan Ford, Lincoln-Mercury*, 256 AD2d 269, 269, 271 (1st Dept 1998) ($1.5 million), *appeal dismissed* 93 NY2d 919 (1999), *lv denied* 94 NY2d 753 (1999). Defendants have not set forth any authority supporting their argument that the amount of punitive damages, if any, must be capped at $250,000 simply because NYCAC §8-126(a) authorizes the NYCHRC, an administrative agency but not a court, to impose a civil penalty in that amount.

B. Motion By Plaintiff's Counsel For Attorneys' Fees

In a civil action commenced pursuant to the NYCHRL, "the court, in its discretion, may award the prevailing party reasonable attorney's fees, expert fees and other costs." NYCAC § 8-502 (g). An award of attorney's fees, whether pursuant to agreement or statute, must be reasonable and not excessive. *See RMP Capital Corp. v Victory Jet, LLC*, 139 AD3d 836, 839 (2d Dept 2016). In determining reasonable compensation for an attorney, the court may consider a number of factors, including, inter alia, the time and labor required, the difficulty of the questions involved, and the skill required to handle the problems presented, the lawyer's experience, ability, and reputation, the customary fee charged for similar services, and the results obtained. *RMP Capital Corp. v Victory Jet, LLC*, 139 AD3d at 839.

Although the determination of reasonable attorneys' fees is generally left to the discretion of the trial court, which is generally in the best position to assess the factors to be considered in determining the amount of a reasonable fee (*see RMP Capital Corp. v Victory Jet, LLC*, 139 AD3d at 840), such is not the case herein, where, as noted above, plaintiff's attorney expressly agreed to have his fees determined by the SDNY Bankruptcy Court.

As discussed previously, in her application to the SDNY Bankruptcy Court seeking to hire counsel, plaintiff represented that counsel "shall apply" to said court "for allowance of compensation and reimbursement of expenses in accordance with "the Bankruptcy Code, the Bankruptcy Rules, [and] the Local Bankruptcy Rules and orders of the [SDNY Bankruptcy Court]." Ex. 2 to Defs. Aff. In Opp. at par. 19. Plaintiff also represented that counsel would be paid on a contingency basis. Ex. 2 to Defs. Aff. in Opp. at par. 3. Additionally, plaintiff represented that her attorney "shall apply to be compensated for any pre-petition work that it performed on the employment discrimination action." Ex. 2 to Defs. Aff. in Opp. at par. 20.

Plaintiff's counsel himself represented to the SDNY Bankruptcy Court in May 2012 that he agreed to certain conditions, including that he was "aware that [his] fees and expenses incurred in prosecuting the [employment discrimination] action will only be paid upon submission of an appropriate fee application to [plaintiff] and the Bankruptcy Court and after a hearing on notice and only from the proceeds of any recovery which may be obtained from [Velasquez's] employment discrimination claim." Ex. 3 to Defs. Aff. in Opp. at par. 4. Counsel also agreed that his "fees exclusive of disbursements will not exceed one third of any recovery plus expenses, unless a greater fee is awarded by the Bankruptcy Court" and that his fees for prosecuting "the employment discrimination action and disbursements shall only be paid from the proceeds of any recovery from the employment discrimination claim herein, and only after approval of the [SDNY Bankruptcy Court]." Ex. 3 to Defs. Aff. in Opp. at par. 6.

By order entered September 4, 2012, Judge Stuart M. Bernstein of the SDNY Bankruptcy Court directed, inter alia, that plaintiff was authorized to retain plaintiff's counsel to prosecute Velasquez's employment discrimination action pursuant to a contingency retainer; that upon the settlement or other liquidation of the claims in the employment discrimination action, the gross proceeds of Velasquez's recovery were to be turned over to plaintiff for distribution; that plaintiff's counsel was to apply to the SDNY Bankruptcy Court "for allowance of compensation and reimbursement of expenses incurred in the [employment discrimination] litigation" in accordance with the Bankruptcy Code, the Bankruptcy Rules, and the Local Bankruptcy Rules; and that plaintiff's counsel was to be compensated for his services in the employment litigation action in accordance with "sections 330 and 331 of the Bankruptcy Code, the Bankruptcy Rules, the Local Rules, the Amended Guidelines for Fees and Disbursements for Professionals in the Southern

District of New York, dated November 25, 2009, and the United States Trustee Fee Guidelines." Ex. 4 to Defs. Aff. in Opp. at 2-4.

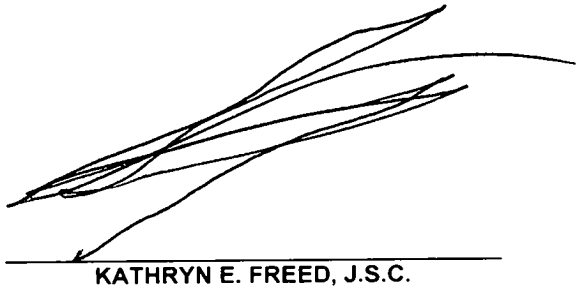
The foregoing conditions agreed to by plaintiff and plaintiff's counsel, as well as the directives of Judge Bernstein, clearly establish that the SDNY Bankruptcy Court is to determine the amount of the attorneys' fees, costs and disbursements to be paid to plaintiff's counsel. Thus, this Court denies the motion by plaintiff's counsel seeking attorneys' fees and respectfully refers that issue to the SDNY Bankruptcy Court for determination.

Therefore, in light of the foregoing, it is hereby:

ORDERED that defendants' motion (motion sequence 006) is denied in all respects; and it is further

ORDERED that plaintiff's motion (motion sequence 005) is denied in all respects; and it is further

ORDERED that this constitutes the decision and order of the court.



11/10/2020
DATE

KATHRYN E. FREED, J.S.C.

CHECK ONE:	[X]	CASE DISPOSED		[ ]	NON-FINAL DISPOSITION		
	[ ]	GRANTED	[X] DENIED	[ ]	GRANTED IN PART	[ ]	OTHER
APPLICATION:	[ ]	SETTLE ORDER		[ ]	SUBMIT ORDER		
CHECK IF APPROPRIATE:	[ ]	INCLUDES TRANSFER/REASSIGN		[ ]	FIDUCIARY APPOINTMENT	[ ]	REFERENCE