CITY OF NEW YORK
COMMISSION ON HUMAN RIGHTS

----------x

In the Matter of

COMMISSION ON HUMAN RIGHTS
ex rel. ESTELLE STAMM,

Petitioner,

-against-

E & E BAGELS, INC. d/b/a
EMPIRE CITY BAGELS d/b/a
THE CORNER CAFÉ,

Respondent.

----------x

Complaint No.
M-P-D-12-1026467

OATH Index No.
803/14

DECISION AND ORDER

Complainant Estelle Stamm initiated this public accommodation discrimination action with the Law Enforcement Bureau of the New York City Commission on Human Rights (the "Bureau") against Respondent E & E Bagels, Inc. On February 16, 2012, the Bureau filed a complaint against Respondent alleging violations of Sections 8-107(4) and (15) of the Administrative Code of the City of New York ("New York City Human Rights Law" or "NYCHRL"). The Complaint alleged that Respondent unlawfully discriminated against Ms. Stamm by: (1) denying her service because of her status as a person with a disability; and (2) denying her a reasonable accommodation for her disability. (Administrative Law Judge ("ALJ") Exhibit ("Ex.") 1 ¶ 6 ("Complaint").) On September 30, 2012, Respondent filed an Answer pursuant to 47 RCNY § 1-14. (ALJ Ex. 2 ("Answer").)

After issuing a Probable Cause Determination pursuant to NYCHRL Section 8-116 against Respondent on June 6, 2013, the Bureau referred the matter to the Office of Administrative Trials and Hearings ("OATH") for trial and a recommendation ("Report and

Recommendation" or "R&R"). (ALJ Ex. 3.) Respondent failed to appear for a settlement conference on December 3, 2013, and failed to appear for trial on February 20, 2014, which was held by the Honorable Astrid B. Gloade. (R&R at 1.) After reviewing the record and finding sufficient documentary proof that the Bureau notified Respondent of the proceedings, both as to the settlement conference and the trial, Judge Gloade found Respondent in default and proceeded to conduct a damages inquest. (*Id.* at 1-2.) At the inquest, the Bureau solicited testimony from Ms. Stamm and a witness, Dennis Owens. (*Id.* at 2.)

On March 21, 2014, Judge Gloade issued a R&R finding that Respondent violated the NYCHRL by discriminating against her "because she uses a service animal" and denying Ms. Stamm a reasonable accommodation for her disability; and recommending an award of $7,000 in compensatory damages to Ms. Stamm, the imposition of $7,000 in civil penalties against Respondent, and that Respondent be ordered to provide NYCHRL training to its employees. (*Id.*)

The parties had the right to submit written comments and objections to the Report and Recommendation within 20 days after the Commission commenced consideration of the Report and Recommendation unless good cause for additional time was shown. *See* 47 RCNY § 1-76. The Commission commenced consideration of the R&R on May 12, 2015 and sought comments from the parties. The Bureau submitted written comments on June 17, 2015. Respondent did not submit comments. In its comments, the Bureau requested that the Commission adopt Judge Gloade's recommendation finding Respondent liable, and requested that the Commission increase the compensatory damages award to $15,000, increase the civil penalty to $15,000, and require that Respondent's staff undergo anti-discrimination training on the NYCHRL.

For the reasons set forth in this Decision and Order, the Commission adopts the Report and Recommendation, except as indicated below.

I. STANDARD OF REVIEW

In reviewing a Report and Recommendation, the Commission may accept, reject, or modify, in whole or in part, the findings or recommendations made by the administrative law judge. Though the findings of an administrative law judge may be helpful to the Commission in assessing the weight of the evidence, the Commission is ultimately responsible for making its own determinations as to the credibility of witnesses, the weight of the evidence, and other assessments to be made by a factfinder. *Howe v. Best Apartments, Inc.*, OATH 2602/14, Dec. & Ord., 2016 WL 1050864, at *2 (Mar. 14, 2016); *Cardenas v. Automatic Meter Reading Corp.*, OATH 1240/13, Dec. & Ord., 2015 WL 7260567, at *2 (Oct. 28, 2015); *Comm'n on Human Rights v. Crazy Asylum LLC*, OATH 2262/13, 2263/13, 2264/13, Dec. & Ord., 2015 WL 7260568, at *3 (Oct. 28, 2015); *Comm'n on Human Rights v. CU29 Copper Rest. & Bar*, OATH 647/15, Dec. & Ord., 2015 WL 7260570, at *2 (Oct. 28, 2015).

The Commission has the final authority to determine "whether there are sufficient facts in the record to support the Administrative Law Judge's decision, and whether the Administrative Law Judge has correctly applied the [New York City Human Rights Law] to the facts." *Comm'n on Human Rights v. Ancient Order of Hibernians*, Comp. No. MPA-0362, Dec. & Ord., 1992 WL 814982, at *1 (Oct. 27, 1992); *see Orlic v. Gatling*, 844 N.Y.S.2d 366, 368 (App. Div. 2007) ("[I]t is the Commission, not the Administrative Law Judge, that bears responsibility for rendering the ultimate factual determinations, and the Commission would not be bound by the report and recommendation of an Administrative Law Judge."); *see also Cutri v. Comm'n on Human Rights*, 977 N.Y.S.2d 909, 910 (App. Div. 2014) (Commission not required to adopt the Administrative Law Judge's recommendation).

When parties submit comments, replies, or objections to a Report and Recommendation pursuant to 47 RCNY § 1-76, the Commission must review the comments, replies, or objections in the context of the Commission's other factual determinations and conclusions of law. *Howe*, 2016 WL 1050864, at *3; *Cardenas*, 2015 WL 7260567, at *2. Accordingly, the Commission reviews the Report and Recommendation and the parties' comments and objections *de novo* as to findings of fact and conclusions of law. *Howe*, 2016 WL 1050864, at *3; *CU29 Copper Rest. & Bar*, 2015 WL 7260570, at *2.

II. TRIAL TESTIMONY

Knowledge of the facts as described in Judge Gloade's Report and Recommendation is assumed for purposes of this Decision and Order. Because Respondent chose not to appear at trial, Judge Gloade could only consider the testimony and documentary evidence of the Bureau's witnesses, and the Commission's review is limited to the trial record. Therefore, the facts described below are based on the Bureau's presentation of its case.

Ms. Stamm testified that she has chronic depression, balance and mobility issues, and some hearing deficits. (Trial Transcript ("Tr.") at 15.) As a result, Ms. Stamm uses a service dog to alert her to sounds and to provide physical support for her balance and mobility issues. (*Id.*)

On June 11, 2011, Ms. Stamm entered Respondent's premises with her service dog and her friend, witness Dennis Owens. (*Id.* at 14-15.) Ms. Stamm testified that an employee of Respondent, who stood behind the counter, told her that her dog could not be in the restaurant. (*Id.* at 17.) Ms. Stamm explained that she is "a person with a disability and that the dog is [her] service dog." (*Id.* at 18.) Respondent's employee told Ms. Stamm again that she had to leave. (*Id.*) Ms. Stamm then replied, "This is my service dog and you're violating the law." (*Id.*) Ms.

Stamm testified that Respondent's employee told her to leave for a third time, after which Ms. Stamm left the premises with her dog and Mr. Owens. (*Id.* at 18-19.)

Ms. Stamm testified to feeling "really upset and depressed and angry that this had happened." (*Id.* at 20.) She described feeling "humiliated, nervous, [and] embarrassed," "angry and disgusted," and then "withdrawn and depressed." (*Id.* at 18, 21.) After leaving Respondent's restaurant, Ms. Stamm described feeling apprehensive that the next food establishment she and Mr. Owens went to would deny her service. (*Id.* at 20; R&R at 3.) For fear that the "same thing [would] happen again," Ms. Stamm waited outside with her service dog while Mr. Owens got his food. (Tr. 20.) Ms. Stamm further explained that she did not file her complaint with the Bureau for seven months after the incident because she did not "feel strong enough to come [to the Bureau] and revisit what had happened." (*Id.* at 21.)

The Bureau's witness, Mr. Owens, provided testimony that corroborated Ms. Stamm's version of events, including the verbal exchange between Ms. Stamm and Respondent's employee. Mr. Owens described Ms. Stamm's reaction to the incident, stating Ms. Stamm was "frustrated" and "embarrassed." (*Id.* at 31.) Mr. Owens testified that he felt that he needed to walk Ms. Stamm home to ensure she arrived safely because "when she's upset in that way, she doesn't necessarily pay attention to the environment...[as] she normally would." (*Id.* at 32.)

III. DISCUSSION

A. Legal Standard

The NYCHRL "shall be construed liberally for the accomplishment of the uniquely broad and remedial purposes thereof, regardless of whether federal or New York State civil and human rights laws, including those laws with provisions comparably-worded to provisions of this title, have been so construed." N.Y.C. Admin. Code § 8-130. Pursuant to the Local Civil Rights Restoration Act of 2005, "[i]nterpretations of New York state or federal statutes with similar

wording may be used to aid in interpretation of the New York City Human Rights Law, viewing similarly worded provisions of federal and state civil rights laws as a floor below which the City's Human Rights law cannot fall, rather than a ceiling above which the local law cannot rise." N.Y.C. Local Law No. 85 ¶ 1 (2005).

This statutory language makes plain that while the Commission may cite federal and state anti-discrimination jurisprudence, it has neither precedential nor persuasive authority over the Commission's interpretation of the NYCHRL. (*Id.*) Further, while the Commission's interpretation and application of state and federal case law addressing the NYCHRL informs the Commission's jurisprudence, "'an agency's interpretation of the statutes it administers must be upheld absent demonstrated irrationality or unreasonableness.'" *Cardenas*, 2015 WL 7260567, at *6 (quoting *Lorillard Tobacco Co. v. Roth*, 99 N.Y.2d 316, 322 (2003) (citing *Seittelman v. Sabol*, 91 N.Y.2d 618, 625 (1998))).

B. Liability

The Complaint alleged that Respondent unlawfully discriminated against Ms. Stamm by: (1) denying her service because of her status as a person with a disability in violation of Section 8-107(4)(a) of the NYCHRL; and (2) denying her a reasonable accommodation for her disability in violation of Section 8-107(15) of the NYCHRL.

Section 8-107(4)(a) of the NYCHRL prohibits "any place or provider of public accommodation because of the actual or perceived...disability...of any person directly or indirectly, to refuse, withhold from or deny to such person any of the accommodations, advantages, facilities or privileges thereof...." Places or providers of public accommodation are defined as "providers, whether licensed or unlicensed, of goods, services, facilities, accommodations, advantages or privileges of any kind, and places, whether licensed or

unlicensed, where goods, services, facilities, accommodations, advantages or privileges of any kind are extended, offered, sold or otherwise made available." *Id.* § 8-102(9). The term "disability" is defined as "any physical, medical, mental or psychological impairment, or a history or record of such impairment." *Id.* § 8-102(16)(a). The term "physical, medical, mental, or psychological impairment" means:

> (1) An impairment of any system of the body; including, but not limited to: the neurological system; the musculoskeletal system; the special sense organs and respiratory organs, including, but not limited to, speech organs; the cardiovascular system; the reproductive system; the digestive and genito-urinary systems; the hemic and lymphatic systems; the immunological systems; the skin; and the endocrine system; or (2) A mental or psychological impairment.

Id. §§ 8-102(16)(b)(1), (2).

The Bureau bears the burden of establishing a *prima facie* case of disparate treatment based on a disability. *See Romo v. ISS Action Sec.*, OATH 674/11, Rep. & Rec., 2011 WL 12521359, at *5 (Apr. 12, 2011), *adopted*, Dec. & Ord. (June 26, 2011). To do so under Section 8-107(4), the Bureau must show that: (1) complainant is a member of a protected class as defined by the NYCHRL; (2) respondent directly or indirectly refused, withheld from, or denied an accommodation, advantage, facility, or privilege thereof based, in whole or in part, on complainant's membership in a protected group; and (3) respondent acted in such a manner and circumstances as to give rise to the inference that its actions constituted discrimination in violation of Section 8-107(4). *See id.* Once the Bureau establishes a *prima facie* case of discrimination, respondent may advance a legitimate, non-discriminatory reason for its actions. *See Howe*, 2016 WL 1050864, at *5 (citing *Lukasiewicz v. Cutri*, OATH 2131/10, Rep. & Rec., 2011 WL 12472971, at *7 (Dec. 8, 2010), *modified on penalty*, Dec. & Ord. (Feb. 17, 2011)). If the respondent articulates a clear and specific non-discriminatory reason for its actions, the burden shifts to the Bureau to demonstrate that discriminatory animus was at least a factor in the

adverse action. *See id.* (citing *Melman v. Montefiore Med. Ctr.*, 946 N.Y.S.2d 27, 31 (App. Div. 2012)). The Bureau may also establish its *prima facie* case with direct evidence of discrimination. *See id.* (citing *Lukasiewicz*, 2011 WL 12472971, at *7 (citations omitted)).

The Bureau also asserts a second claim alleging that Respondent failed to accommodate Ms. Stamm based on her disability under Section 8-107(15) of the NYCHRL. To establish a failure to accommodate claim under Section 8-107(15)(a) of the NYCHRL, the Bureau must show that respondent failed to "make [a] reasonable accommodation to enable a person with a disability to...enjoy the right or rights in question provided that the disability is known or should have been known by the covered entity." The term "reasonable accommodation" means "such accommodation that can be made that shall not cause undue hardship in the conduct of the covered entity's business." N.Y.C. Admin. Code § 8-102(18). In making a determination of undue hardship, the factors which may be considered include, but are not be limited to:

> (a) The nature and cost of the accommodation; (b) The overall financial resources of the facility or the facilities involved in the provision of the reasonable accommodation; the number of persons employed at such facility; the effect on expenses and resources, or the impact otherwise of such accommodation upon the operation of the facility; (c) The overall financial resources of the covered entity; the overall size of the business of a covered entity with respect to the number of its employees, the number, type, and location of its facilities; and (d) The type of operation or operations of the covered entity, including the composition, structure, and functions of the workforce of such entity; the geographic separateness, administrative, or fiscal relationship of the facility or facilities in question to the covered entity.

Id. §§ 8-102(18)(a)-(d). The covered entity has the burden of proving an undue hardship. *Id.* § 8-102(18).

In addressing Ms. Stamm's failure to accommodate claim, Judge Gloade adopted a legal standard applied previously in *L.D. v. Riverbay Corp.*, finding that in order for the Bureau to prevail, it must establish "(i) complainant has a disability; (ii) respondent knew or should have

known of the disability; (iii) an accommodation enables the complainant to use and enjoy her apartment; (iv) *the accommodation is reasonable*; and (v) respondent refused to provide it." (R&R at 9 (citing *L.D. v. Riverbay Corp.*, OATH 1300/11, Rep. & Rec., 2011 WL 12687937, at *11 (Aug. 26, 2011), *adopted*, Dec. & Ord., 2012 WL 1657555 (Jan. 9, 2012) (emphasis added).) While *Riverbay* may set forth the standard for assessing failure to accommodate claims under the federal Americans with Disabilities Act ("ADA"), *see, e.g.*, *McBride v. BIC Consumer Prods. Mfg. Co.*, 583 F.3d 92, 96-97 (2d Cir. 2009) (identifying the *prima facie* case under the ADA to require "(1) plaintiff is a person with a disability under the meaning of the ADA; (2) an employer covered by the statute had notice of his disability; (3) with reasonable accommodation, plaintiff could perform the essential functions of the job at issue; and (4) the employer has refused to make such accommodations"), it does not reflect the well-established standard of such claims under the NYCHRL. *See Jacobson v. N.Y.C. Health & Hosps. Corp.*, 11 N.E.3d 159, 167 (N.Y. 2014).

The NYCHRL's definition of "reasonable accommodation" establishes that the proper inquiry is not whether the Bureau can establish the reasonableness of the accommodation, but whether the respondent can establish that the proposed accommodation causes an undue hardship on its business: "[t]he term 'reasonable accommodation' means such accommodation that can be made *that shall not cause undue hardship in the conduct of the covered entity's business*." N.Y.C. Admin. Code § 8-102(18) (emphasis added). The NYCHRL therefore places the burden on the respondent to "show the unavailability of any safe and reasonable accommodation." *Jacobson*, 11 N.E.3d at 167; *see also Romanello v. Intesa Sanpaolo, S.p.A.*, 22 N.Y.3d 881, 885 (2013) (under the NYCHRL, "it is the employer's burden to prove undue hardship...Thus, the employer, not the employee, has the pleading obligation to prove that the employee could not,

with reasonable accommodation, satisfy the essential requisites of the job.") (internal citation omitted)).

An accommodation is only unreasonable if it causes an undue hardship. *Vangas v. Montefiore Med. Ctr.*, 6 F. Supp. 3d 400, 416 (S.D.N.Y. 2014) (citing *Phillips v. City of New York*, 884 N.Y.S.2d 369, 378 (App. Div. 2009), *rejected on other grounds*, *Jacobsen*, 11 N.E.3d 159); *Cruz v. Schriro*, 51 Misc. 3d 1203(A), 2016 WL 1173184 (Table), at *8 (N.Y. Sup. Ct. 2016) (quoting *Phillips*, 884 N.Y.S.2d at 378). Because "the concepts of 'reasonable accommodation' and 'undue hardship' are inextricably intertwined," the complainant does not need to prove reasonableness; reasonableness is established through the respondent's failure to prove undue hardship. *Phillips*, 884 N.Y.S. 2d at 380. A covered entity need not provide the specific accommodation sought; rather, a covered entity may propose reasonable alternatives that meet the specific needs of the person with the disability or that specifically address the limitation at issue. Accordingly, under the appropriate *prima facie* standard of Section 8-107(15) of the NYCHRL in the context of public accommodations, the Bureau must show that: (1) complainant has a disability; (2) respondent knew or should have known of the disability; (3) an accommodation would enable complainant to use or enjoy the public accommodation; (4) and respondent refused to provide an accommodation. Respondent may then, as a defense, establish that the sought accommodation poses an undue hardship.

Claims under the NYCHRL must be proven by a preponderance of the evidence. *See Cardenas*, 2015 WL 7260567, at *7 (citing *Mihalik v. Credit Agricole Cheuvreux N. Am., Inc.*, 715 F.3d 102, 110 (2d Cir. 2013)).

1. Complainant Is a Member of a Protected Class.

The Bureau has established, based on the allegations in the Complaint and Ms. Stamm's credible testimony, that Ms. Stamm has the following conditions: chronic depression, hearing deficits, and balance and mobility issues. (Tr. at 15.) These conditions constitute disabilities within the meaning of the NYCHRL. *See* N.Y.C. Admin. Code § 8-102(16); *see also, e.g.*, *Hernandez v. Int'l Shoppes, LLC*, 100 F. Supp. 3d 232, 254 (E.D.N.Y. 2015) (quoting *Harris v. NYU Langone Med. Ctr.*, No. 12 Civ. 0454, 2013 WL 3487032, at *26 (S.D.N.Y. July 9, 2013), *report and recommendation adopted as modified*, 2013 WL 5425336 (S.D.N.Y. Sept. 27, 2013) ("The definition of disability under the NYCHRL, which includes 'any physical, medical, mental or psychological impairment,' is broader than the definition of disability in the ADA.")); *Gorbea v. Verizon N.Y., Inc.*, No. 11 Civ. 3758, 2014 WL 917198, at *8 (E.D.N.Y. Mar. 10, 2014) (surmising that "plaintiff likely meets the more expansive standard for disability due to her asthma under the NYCHRL.").

2. Respondent Discriminated Against Complainant in Violation of Sections 8-107(4) and 8-107(15) of the NYCHRL.

The Bureau established that Ms. Stamm was forced to leave the public accommodation and was made to feel unwelcome due to her disability in violation of Section 8-107(4). (Tr. 17-19.)

With respect to the failure to accommodate claim under Section 8-107(15) of the NYCHRL, the Bureau established that Respondent knew or should have known of Ms. Stamm's disabilities. (Tr. 18, 30.) Had her conditions not been immediately apparent, both Ms. Stamm's and Mr. Owens's testimonies described Ms. Stamm's clear verbalization that she is a person with disabilities and her dog is a service animal. (*Id.*) Ms. Stamm credibly testified that her service animal enabled her to navigate public spaces. (*Id.* at 15-16.) In doing so, the Bureau established

that the accommodation Ms. Stamm sought – use of her service dog while on Respondent's premises – would have allowed her to enjoy the services of the restaurant.

As the Bureau established its *prima facie* case, the burden then shifts to Respondent to show, with respect to the disparate treatment claim, a clear and specific non-discriminatory reason to justify its actions; and, with respect to the failure to accommodate claim, that an accommodation would cause an undue hardship on the business. However, Respondent fell short in both regards, as it failed to cooperate in the Bureau's investigation and failed to participate in the OATH trial process.

First, Respondent failed to submit an answer "verified as to the truth of the statements therein" within thirty days of service of the Complaint pursuant to the NYCHRL and the Commission's Rules of Practice. N.Y.C. Admin. Code § 8-111(a); 47 RCNY §§ 1-14(a), (b). The New York Civil Practice Law and Rules instructs that "a verification is a statement under oath that the pleading is true to the knowledge of the deponent, except as to matters alleged on information and belief, and that as to those matters he believes it to be true." N.Y. C.P.L.R. 3020(a). Failure to properly verify a pleading may result in a "nullity" of that pleading. *Id.* at 3022.

The document Respondent submitted seven months after service of the Complaint is titled "Verified Answer," yet the document is unsigned, not notarized or sworn as to the truth of the statements made therein, and apparently authored by an individual named "Evita Alexiades," whose relationship to Respondent is unidentified on the document. (ALJ Ex. 2.) Respondent's submission of an unverified Answer – deficient on multiple levels – dictates that the Commission deem all allegations in the complaint admitted, and therefore proceed as though no answer was submitted at all. N.Y.C. Admin. Code § 8-111(c) ("Any allegation in the complaint not

specifically denied or explained shall be deemed admitted and shall be so found by the commission unless good cause to the contrary is shown.").

Second, Respondent, by failing to appear at trial, squandered its opportunity to put forth any evidence that there was a clear and specific non-discriminatory reason for its actions, or that the accommodation sought by Ms. Stamm would pose an undue hardship on the business. Respondent could have cured the defects of its Answer by submitting evidence at trial to rebut the Bureau's showing. Respondent's failure to cooperate in the investigative and adjudicatory processes therefore leaves the Commission with no choice but to find that the Bureau has met its burden on the two claims of discrimination based on the allegations in the Complaint, its witnesses' credible testimony, and documentary evidence.

IV. DAMAGES, PENALTIES, AND SPECIFIC PERFORMANCE

Where the Commission finds that respondents have engaged in an unlawful discriminatory practice, the NYCHRL authorizes the Commission to order respondents to cease and desist from such practices and order such other "affirmative action as, in the judgment of the commission, will effectuate the purposes of" the NYCHRL. N.Y.C. Admin. Code § 8-120(a). The Commission may also award the complainant damages. *See id.* § 8-120(a)(8). In addition, the Commission may impose civil penalties on respondents who engage in discriminatory practices of not more than $125,000, unless the "unlawful discriminatory practice was the result of the respondent's willful, wanton or malicious act," in which case a civil penalty of not more than $250,000 may be imposed. *Id.* § 8-126(a); *see Cardenas*, 2015 WL 7260567, at *15 (finding $250,000 civil penalty appropriate where respondent engaged in willful and wanton sexual harassment over a three year period). The penalties are paid to the general fund of the City of New York. N.Y.C. Admin. Code § 8-127(a).

A. Emotional Distress Damages

Judge Gloade recommended an award of $7,000 for emotional distress damages. (R&R at 2, 14.) The Bureau, in its comments to the Report and Recommendation, requested an award of $15,000, the same request it made at trial. (Bureau Comments to the R&R at 8-9.)

The NYCHRL empowers the Commission to award "compensatory damages," a category of damages that includes compensation for emotional distress. *See* N.Y.C. Admin. Code § 8-120(8). Compensatory damages, including emotional distress damages, are intended to redress a specific loss that the complainant suffered by reason of the respondent's wrongful conduct. *See Vasquez v. N.Y.C. Dep't of Educ.*, No. 11 Civ. 3674, 2015 WL 3619432, at *13 (S.D.N.Y. June 10, 2015) (citing *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 416 (2003)); *see also Patrolmen's Benevolent Ass'n of City of N.Y. v. City of New York*, 310 F.3d 43, 55 (2d Cir. 2002) (citing cases). The complainant must present evidence establishing actual injury in order to be awarded compensatory damages for emotional distress. *See Patrolmen's Benevolent Ass'n*, 310 F.3d at 55; *Najnin v. Dollar Mountain, Inc.*, No. 14 Civ. 5758, 2015 WL 6125436, at *3 (S.D.N.Y. Sept. 25, 2015). Such evidence may consist solely of complainant's credible testimony. *See N.Y.C. Transit Auth. v. N.Y. State Div. Human Rights*, 577 N.E.2d 40, 44, 45 (N.Y. 1991).

Where evidence regarding complainant's emotional harm, which encompasses humiliation, shame, shock, moodiness, and being upset, is limited to complainant's own testimony without other evidence of actual injury, such as medical treatment or physical manifestation, tribunals generally award between $30,000 and $125,000 in emotional distress damages. *See Dotson v. City of Syracuse*, No. 5:04 Civ. 1388, 2011 WL 817499, at *15 (N.D.N.Y. Mar. 2, 2011), *aff'd*, 549 Fed. App'x 6 (2d Cir. 2013). Courts have also awarded

emotional distress damages at a lower range when "evidence of mental suffering is generally limited to the testimony of the [complainant] who describes his or her injury in vague or conclusory terms...." *Holness v. Nat'l Mobile Television, Inc.*, No. 09 Civ. 2601, 2012 WL 1744847, at *5 (E.D.N.Y. Feb. 14, 2012), *rep. & rec. adopted as modified*, 2012 WL 1744744 (E.D.N.Y. May 15, 2012) (quoting *Rainone v. Potter*, 388 F. Supp. 2d 120, 122 (E.D.N.Y. 2005)); *see Najnin*, 2015 WL 6125436, at *3; *see also Manson v. Friedberg*, No. 08 Civ. 3890, 2013 WL 2896971, at *7 (S.D.N.Y. June 13, 2013); *Fowler v. N.Y. Transit Auth.*, No. 96 Civ. 6796, 2001 WL 83228, at *13 (S.D.N.Y. Jan. 31, 2001).

Where aggrieved parties have presented courts with bare evidence of emotional distress, courts have commonly approved awards in the range of $2,500 to $30,000. *See Perez v. Jasper Trading, Inc.*, No. 05 Civ. 1725, 2007 WL 4441062, at *9 (E.D.N.Y. Dec.17, 2007) (noting that evidence in such cases "usually consists of the plaintiff's own testimony describing the emotional distress, with little or no supporting medical evidence"); *see also, e.g.*, *Holness*, 2012 WL 1744847, at *5; *Fowler*, 2001 WL 83228, at *13; *Bick v. City of New York*, No. 95 Civ. 8781, 1998 WL 190283, at *25 (S.D.N.Y. Apr. 21, 1998) (surveying cases in which emotional distress awards ranged between $5,000 and $30,000).

Ms. Stamm credibly testified to feeling "really upset and depressed and angry that this had happened." (Tr. at 20.) She described feeling "humiliated, nervous, [and] embarrassed," "angry and disgusted," and then "withdrawn and depressed." (*Id.* at 18, 21.) Ms. Stamm further explained that she did not file her complaint with the Bureau for seven months after the incident because she did not "feel strong enough to come [to the Bureau] and revisit what had happened." (*Id.* at 21.)

While Ms. Stamm did not testify regarding any *physical* manifestations of the anger, humiliation, embarrassment, or sadness she felt, she did credibly testify to the emotional distress she experienced as a result of the discrimination, and her credible testimony alone justifies an emotional distress award. The Bureau, in its Comments to the R&R, argues that Ms. Stamm should be awarded $15,000 in emotional distress damages and cites *Romo*, a case in which the complainant was awarded $20,000 in emotional distress damages. (Bureau Comments to R&R at 8 (citing *Romo*, 2011 WL 12521359, at *11).) The Bureau, however, fails to provide any justification for a higher award. The facts of *Romo* are highly distinguishable: the complainant testified to severe emotional distress and physical manifestations of the distress, including feeling "very depressed and scared," "shocked and humiliated about being asked to disclose his HIV status in public," was "so upset that he stayed in his apartment all weekend crying...lost 15-20 pounds,...did not take [his service dog] out which caused the dog to relieve himself inside," and that "his level of distress became so extreme that he sought the comfort of his family in Texas." *Romo*, 2011 WL 12521359, at *11. Here, the Commission has much less information regarding Ms. Stamm's emotional distress, how it was expressed, or how it affected her. The information provided was that she was upset, depressed, angry, and humiliated, and that she did not file her Complaint with the Bureau for seven months after the incident because she did not feel strong enough to revisit the events of that day. (Tr. 18-21.)

Considering this information, which Ms. Stamm testified resulted from her being summarily denied service and then ordered to leave a restaurant because of her disability, and the indignity of the situation, the Commission finds no reason to deviate from Judge Gloade's recommendation of $7,000 in emotional distress damages. *Compare Howe*, 2016 WL 1050864, at *7, 10 (awarding $2,500 in emotional distress damages where complainant testified that

respondent's actions caused him to feel "pretty upset," but where there was no further explanation of the severity or impact of the discriminatory act on complainant's emotional or physical well-being), *and Perez*, 2007 WL 4441062, at *8, 11 (awarding $2,500 in emotional distress damages where plaintiff testified that defendants' threats caused him to be "scared," but did not elaborate further about any emotional distress), *with Press v. Concord Mortg. Corp.*, No. 08 Civ. 9497, 2009 WL 6758998, at *8 (S.D.N.Y. Dec. 7, 2009), *rep. & rec. adopted as modified*, No. 08 Civ. 09497, 2010 WL 3199684 (S.D.N.Y. Aug. 11, 2010) (finding $5,000 award for emotional distress appropriate where plaintiff submitted an affidavit stating that he "suffered substantial emotional distress" but did not put forth any evidence showing specific and concrete examples of mental anguish and/or emotional injuries), *and Manson*, 2013 WL 2896971, at *8 (finding $10,000 in emotional distress damages appropriate where plaintiff alleged in testimony that she "had low self-esteem, felt 'unworthy,'...'was having a difficult time feeling trust,'...'didn't have confidence' in herself anymore, that her 'thinking process was difficult,' that she didn't have any energy, and that she only wanted to find a job 'that didn't require too much'").

B. Remedial Action/Civil Penalties

In arriving at her recommendation of a $7,000 civil penalty, Judge Gloade considered such an amount appropriate because the case "involves a single incident of brief duration and offensive language was not used." (R&R at 13.) The Bureau argued at trial, and repeated its request in its Comments to the Report and Recommendation, that Respondent's failure to take part in the investigative and OATH processes should be considered an aggravating factor warranting a higher civil penalty of $15,000. (Bureau Comments to R&R at 9-10.)

In determining the civil penalty necessary to vindicate the public interest, the Commission may consider several additional factors, including, but not limited to: "1) respondents' financial resources; 2) the sophistication of respondents' enterprise; 3) respondents' size; 4) the willfulness of the violation; 5) the ability of respondents to obtain counsel; 6) whether respondents cooperated with the Bureau's investigation and the OATH proceedings; and 7) the impact on the public of issuing civil penalties." *Howe*, 2016 WL 1050864, at *8; *see Cardenas*, 2015 WL 7260567, at *15; *see also CU29 Copper Rest. & Bar*, 2015 WL 7260570, at *4.

While there may be circumstances in which "a single incident of brief duration" not involving offensive language warrants higher penalties, the Commission does not find that to be the case here. The Commission has no information or reason to disturb Judge Gloade's recommendation of $7,000. Respondent chose to flout Commission and OATH procedures by not appearing at either the scheduled hearing or trial dates. In doing so, it failed to provide information helpful to the analysis of civil penalties. For its part, the Bureau failed to present any information about Respondent's financial resources, sophistication, or size. In this circumstance, balancing Respondent's failure to comply with the Bureau and OATH processes and the lack of information presented by the Bureau about Respondent's size, sophistication, and impact on the public, the Commission affirms Judge Gloade's recommendation and orders Respondent to pay a civil penalty of $7,000 to the general fund of the City of New York.

In addition, consistent with the Commission's desire to assist respondents' understanding of their obligations under the NYCHRL, the Commission regularly orders respondents to complete training and finds such training appropriate here for Respondent's managerial employees.

IT IS HEREBY ORDERED, that Respondent immediately cease and desist from engaging in discriminatory conduct;

IT IS FURTHER ORDERED, that no later than thirty (30) calendar days after service of this Order, Respondent pay Ms. Stamm $7,000 in emotional distress damages;

IT IS FURTHER ORDERED, that no later than thirty (30) calendar days after service of this Order, Respondent pay $7,000 in civil penalties to the general fund of the City of New York;

IT IS FURTHER ORDERED, that no later than sixty (60) calendar days after service of this Order, Respondent's managerial staff attend a Commission-led training on the NYCHRL;

IT IS FURTHER ORDERED, that no later than thirty (30) calendar days after service of this Order, Respondent post a notice of rights, in a form to be provided by the Commission, in a conspicuous location where it will be visible to both employees and members of the public for a period of three (3) years after the date of this Order.

IT IS FURTHER ORDERED, that no later than thirty (30) calendar days after service of this Order, Respondent post a notice on its business's door, in a form to be provided by the Commission, notifying the public that individuals with disabilities who use service animals are welcome to bring their service animals onto the premise;

Failure to comply with any of the foregoing provisions in a timely manner shall constitute non-compliance with a Commission Order. In addition to any civil penalties that may be

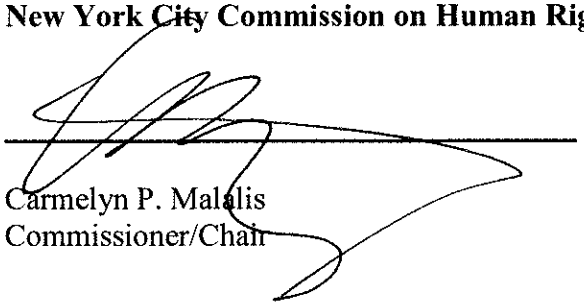
assessed against Respondent, Respondent shall pay a civil penalty of one hundred (100) dollars per day for every day the violation continues. N.Y.C. Admin. Code § 8-124.

Failure to abide by this Order may result in criminal penalties. *Id.* at § 8-129.

Dated: New York, New York
April 20, 2016

SO ORDERED:

New York City Commission on Human Rights



Carmelyn P. Malalis
Commissioner/Chair