CITY OF NEW YORK
COMMISSION ON HUMAN RIGHTS

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In the Matter of

Complaint No. M-P-P-12-1025824

COMMISSION ON HUMAN RIGHTS
ex. rel. CHRISTINA SPITZER and KASSIE THORTON,

OATH Index No. 883/15

Petitioner,

-against-

MOHAMMED DAHBI,

Respondent.

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DECISION AND ORDER

Christina Spitzer and Kassie Thorton ("Complainants") initiated this discrimination action with the Law Enforcement Bureau of the New York City Commission on Human Rights (the "Bureau") against Mohammed Dahbi, Boulevard Taxi Leasing Inc., and Stanley Cobos. On October 25, 2011, the Bureau filed a complaint alleging violations of the New York City Human Rights Law, New York City Administrative Code Section 8-107(4)(a) ("NYCHRL"). On December 9, 2011, the Bureau filed an Amended Complaint alleging that Mohammed Dahbi ("Respondent Dahbi" or "Respondent"), a taxi driver, employed by Boulevard Taxi Leasing Inc. ("Boulevard") and Stanley Cobos, discriminated against Complainants based on their sexual orientation by denying them the advantages, facilities, and privileges of a public accommodation. (Administrative Law Judge ("ALJ") Exhibit ("Ex.") 1 (Amended Complaint).) On December 27, 2011, Respondent Dahbi filed a Verified Answer pursuant to 47 RCNY § 1-14, denying most of the allegations in the Amended Complaint. (ALJ Ex. 2 (Answer).)

After issuing a Probable Cause Determination pursuant to NYCHRL Section 8-116 against Respondent Dahbi,[1] 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"). On December 19, 2014, Respondent Dahbi filed a motion to dismiss asserting that the factual allegations in the complaint were insufficient to state a violation of Section 8-107(4) of the NYCHRL because Respondent Dahbi did not refuse Complainants service. The OATH tribunal denied the motion to dismiss. That ruling is not reviewable by the Commission. The case was heard by the Honorable John B. Spooner, Administrative Law Judge, for a one-day trial on March 13, 2015.

On March 27, 2015, Judge Spooner issued a Report and Recommendation finding that Respondent Dahbi violated Section 8-107(4) of the NYCHRL by telling Complainants that he would not transport them unless they stopped kissing, thereby denying them a public accommodation due to their sexual orientation, and recommending 1) an award of $5,000 to each Complainant in emotional distress damages; 2) the imposition of $5,000 in civil penalties to be paid to the general fund of the City of New York; and 3) that Respondent Dahbi participate in anti-discrimination training pursuant to the NYCHRL.

The parties had the right to submit written comments and objections to the Report and Recommendation within twenty days after the Commission commenced consideration of the Report and Recommendation unless good cause for additional time was shown. 47 RCNY § 1-76. The Commission granted the parties an extension to submit their Comments by June 1, 2015. The Bureau submitted written comments on June 1, 2015, asking the Commission to adopt the Report and Recommendation, except requested that the Commission: 1) find that

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[1] The Bureau did not find probable cause against Boulevard and Cobos. (Trial Transcript ("Tr.") at 4-5.)

Respondent Dahbi violated the NYCHRL, not only for Respondent Dahbi's statement that he would not continue the ride unless Complainants stopped kissing, but also for stopping the cab and hurling discriminatory epithets at them; 2) increase the emotional distress damages from $5,000 to $12,500 for each Complainant; and 3) increase the civil penalty from $5,000 to $15,000. (Bureau Comments to the R&R at 2, 4.) Respondent Dahbi also submitted written comments on June 1, 2015, urging the Commission to reject the Report and Recommendation in its entirety. Respondent Dahbi argued that Judge Spooner's Report and Recommendation erred in concluding that Respondent Dahbi violated Section 8-107(4) of the NYCHRL based on Judge Spooner's own conclusion that Respondent Dahbi only criticized Complainants for kissing in his cab, and did not actually refuse to transport Complainants to their destination, which, Respondent argues, is not a violation of the NYCHRL. (Resp't Comments to the R&R at 1.)

The Commission has reviewed Judge Spooner's Report and Recommendation, the trial transcript, the trial exhibits, and the parties' comments to the Report and Recommendation. 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. *Stamm v. E&E Bagels, Inc.*, OATH 803/14, Dec. & Ord., 2016 WL 1644879, at *2 (Apr. 20, 2016); *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).

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. *Stamm*, 2016 WL 1644879, at *2; *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.

II. TRIAL TESTIMONY

Knowledge of the facts as described in Judge Spooner's Report and Recommendation is assumed for purposes of this Decision and Order. Where Complainants' testimony conflicted with that of Respondent Dahbi, Judge Spooner credited Complainants' testimony, with some

limited exceptions. Judge Spooner found that Complainants were "highly credible witnesses" and their accounts of the events at issue were consistent with each other and corroborated by prompt reporting to the Bureau. (R&R at 4.) By contrast, Judge Spooner found the majority of Respondent Dahbi's testimony not credible, inconsistent, and at odds with his Answer, which was submitted in 2011. (*Id.* at 4-5.) The factual disputes are noted below.

Complainants Spitzer and Thorton both testified that Complainant Spitzer hailed a cab, picked up Complainant Thorton, and the two engaged in a "peck" on the lips soon after Complainant Thorton entered the cab. (Tr. at 11, 24.) In response to seeing this, Complainant Spitzer testified that Respondent Dahbi immediately pulled over, stopped the cab, and told Complainants to "Keep that for [the] bedroom or [] get out of the cab." (*Id.* at 11.) Complainant Thorton similarly testified that Respondent Dahbi pulled over and said "if you continue doing that, you have to get out or stop it," and "save that behavior for your bedroom." (*Id.* at 24.) Complainants testified that at that point they both felt "unsafe" and decided they did not have a choice and needed to exit the taxi. (*Id.* at 12, 25.) Complainants then exited the taxi, obtained their luggage from the trunk, and informed Respondent Dahbi that they would not be paying the fare. (*Id.* at 25.) Complainants testified that in response, Respondent Dahbi yelled offensive epithets at Complainants as he drove away, including "cunts, whores, bitches." (*Id.* at 13, 25.)

Respondent Dahbi's testimony, by contrast, reflects a different version of the relevant facts. Respondent Dahbi testified that Complainants engaged in more physical contact than a mere "peck" on the lips, and that he found the behavior to be distracting. (*Id.* at 49.) Respondent Dahbi further testified that he told Complainants to "stop [engaging in the behavior] till you go home" (*Id.* at 79), and that Respondent Dahbi pulled over because Complainants requested that he do so. (*Id.* at 75.) Respondent Dahbi further testified that his request that

Complainants refrain from engaging in physical contact was neither unique to this particular situation nor motivated by Complainants' sexual orientation; Respondent Dahbi testified that he has, in the past, requested that heterosexual couples refrain from the same behavior in his taxi. (*Id.* at 49.) Finally, Respondent Dahbi, who is Muslim, testified that as Complainants removed their luggage from the car, they yelled at him and called him a "terrorist." (*Id.* at 51.)

Both Complainants described the emotional impact of their interaction with Respondent. Complainant Spitzer testified that she was "outraged, scared, ... very physically shaken and shaking." (*Id.* at 13.) Complainant Spitzer further testified that she felt "violated," "judged," and as if "an injustice had happened." (*Id.* at 14.) Since the incident, Complainant Spitzer has felt "hyper aware" when taking taxis. (*Id.* at 17.) Complainant Spitzer testified that when she saw Respondent Dahbi for the first time since the incident, at a settlement conference in December 2014, she felt "fearful" and experienced having "all of the emotions that [she] experienced the night of the incident return[] to [her]." (*Id.*) Complainant Spitzer also testified that she and Complainant Thorton regularly discuss the incident and that it has been "a weight and a burden that [they've] carried throughout [their] entire relationship." (*Id.* at 18.) Complainant Thorton testified that she felt "less than," and that she "was being treated [like] this because [she is] a lesbian and that [Dahbi] didn't believe in [her] lifestyle." (*Id.* at 26.) Complainant Thorton further testified that it was the first time she "felt fear" and "hate" on account of her sexual orientation. (*Id.*) Complainant Thorton described "feel[ing] aware every time I get in [a taxi]." (*Id.* at 28.) She testified that seeing Respondent Dahbi at the settlement conference in December 2014 made her feel "sad...and angry." (*Id.* at 29.) Complainant Thorton further testified that the incident is "constantly in my head...wondering what people

think, if they're treating me a certain way because they don't like how I live or who I love. Just super aware and uncomfortable." (*Id.* at 29.)

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.'" *Exxon Mobil Corp. v. State of New York Tax Appeals Trib.*, 5 N.Y.S.3d 555, 556 (N.Y. App. Div. 2015) (quoting *Lorillard Tobacco Co. v. Roth*, 99 N.Y.2d 316, 322 (2003)) (internal quotation marks and citation omitted).

The NYCHRL makes it unlawful for "any person, being the owner, lessee...or employee of any place or provider of public accommodation, because of the actual or perceived race...[or]

color...of any person, directly or indirectly, to refuse, withhold from or deny to such person any of the accommodations, advantages, facilities or privileges thereof...." N.Y.C. Admin. Code § 8-107(4)(a). 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 Bureau bears the burden of establishing a *prima facie* case of discrimination. *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 circumstance as to give rise to the inference that its actions constituted discrimination in violation of Section 8-107(4). *See* N.Y.C. Admin. Code § 8-107(4); *see also Romo v. ISS Action Sec.*, OATH 674/11, Rep. & Rec., 2011 WL 12521359, at *5 (Apr. 12, 2011), *adopted*, Dec. & Ord. (June 26, 2011). In establishing the second element above, the Bureau can also show that respondent made a declaration to the effect that complainant's patronage is unwelcome, objectionable or not acceptable, desired, or solicited. N.Y.C. Admin. Code § 8-107(4). Once the Bureau establishes a *prima facie* case of discrimination, respondent may advance a legitimate, non-discriminatory reason for its actions. *See Stamm*, 2016 WL 1644879, at *4. 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 v. Cutri*, OATH 2131/10, Dec. & Ord., 2011 WL 12472971, at *7 (citations omitted)). Claims of discrimination 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)).

B. Liability

The Bureau has established its *prima facie* case. It is uncontroverted that Complainants, a same-sex couple, are members of a protected class under the NYCHRL based on their sexual orientation. (Tr. at 10); N.Y.C. Admin. Code §§ 8-102(20); 8-107(4). It is also well-settled that Respondent, as a driver of a medallion taxicab, is a provider of services to the public, and therefore is a provider of a public accommodation. (R&R at 2); *see Gardner v. I.J.K. Serv., Inc.*, OATH 1921/08, Rep. & Rec., 2008 WL 8115730, at *6-7 (Oct. 10, 2008), *aff'd in part, rev'd in part*, Dec. & Order (Feb. 19, 2009) (for-hire vehicle driver of livery service was provider of a "public accommodation").

While Complainants and Respondent dispute who initiated the stop, Respondent admits that he told Complainants something to the effect of, "stop [that behavior] till you go home," (Tr. at 77), when he saw them kissing. That statement constitutes a "declaration...that the patronage" of Complainants is "unwelcome, objectionable or not acceptable, desired or solicited." N.Y.C. Admin. Code § 8-107(4). This statement gives rise to an inference that it was motivated by discrimination because Respondent welcomed Complainants in the taxicab until their behavior made it apparent that they were a same-sex couple. The Commission can infer that their

behavior – engaging in a kiss – served as a proxy for their membership or perceived membership in a protected group.

Respondent attempted to put forth a legitimate non-discriminatory reason for his statement. He testified that Complainants' behavior was "distracting" and that he had acted no differently than he would have had an opposite-sex couple engaged in the same behavior. (Tr. at 49.) Respondent asserted that Complainants were touching each other "all over," and that their behavior obstructed his view through the rear view mirror. (*Id.* at 49, 73.) The Commission agrees with Judge Spooner's finding that Respondent's account of the incident and his argument is both implausible and not credible. (R&R at 4-6.) Under Respondent's very low standard of what constitutes "distracting" behavior, he would not be able to complete a significant percentage of his rides given the typical behavior of passengers in New York City taxicabs. (*Id.* at 4, 6.) Further, Respondent's standard is at odds with the TLC's rules regarding when a taxi driver may deny service based on passenger behavior: where the passenger is "disorderly" or "intoxicated." (Tr. at 72-73); *see also* 35 RCNY § 54-20(b)(9). The Commission therefore does not credit Respondent's non-discriminatory justification and agrees with Judge Spooner's conclusion that "the more likely reason for [R]espondent's stopping the taxicab and directing Complainants to stop kissing was, not that he objected to all kissing, but that he was uncomfortable with two women sharing a romantic kiss." (R&R at 6 (citing *Lizardo v. Denny's, Inc.*, 270 F.3d 94, 101 (2d Cir. 2001); *300 Gramatan Ave. Assocs. v. N.Y. State Div. of Human Rights*, 45 N.Y.2d 176, 183 (1978) ("[D]iscrimination is rarely so obvious or its practices so overt that recognition of it is instant and conclusive, it being accomplished usually by devious and subtle means.")). Accordingly, the Commission finds that the Bureau met its burden to establish by a preponderance of the evidence that Respondent discriminated against

Complainants on the basis of sexual orientation. The Commission need not determine who initiated the stop, as Respondent's comment, on its own, is enough to establish a violation of the NYCHRL. *See* N.Y.C. Admin. Code § 8-107(4)(a).

Complainants also testified that Respondent Dahbi yelled offensive gender-based slurs at them. (Tr. at 13, 25 (testifying that Respondent Dahbi yelled "cunts, whores, bitches" at Complainants).) Respondent Dahbi denied saying those words and testified that Complainants yelled at Respondent something to the effect of "terrorist" or "Muslim terrorist." (Tr. at 51.) Complainant Thorton denied saying anything derogatory to Respondent, (Tr. at 44); Complainant Spitzer was not asked on direct examination or cross-examination about the derogatory statements Respondent Dahbi alleged Complainants made, and therefore did not deny saying anything derogatory to Respondent. The pleadings are relatively consistent with the parties' testimony; Complainants allege in the Amended Complaint that Respondent Dahbi yelled "cunts, whores, bitches," at Complainants and the Answer asserts that Complainants yelled at Respondent Dahbi, "in sum and substance" that Respondent was a "f**king arab terrorist" and a "radical Muslim a**hole." (ALJ Ex. 1; ALJ Ex. 2.) Because both parties testified credibly and consistently with their pleadings regarding this exchange, the Commission credits both parties with respect to these allegations. The Commission condemns both parties' actions, and acknowledges how such offensive language has the power to harm. The Commission, however, does not have jurisdiction to address the allegations asserted by Respondent with respect to Complainants' use of derogatory slurs. Respondent Dahbi did not include a counter claim addressing this incident, and, in fact, the NYCHRL does not include protections for providers of public accommodations who experience discrimination by

customers, unless it rises to the level of discriminatory harassment. *See* N.Y.C. Admin. Code § 8-603.

IV. DAMAGES, AFFIRMATIVE ACTION, AND PENALTIES

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 Spooner recommended an award of $5,000 in emotional distress damages to each Complainant. (R&R at 8.) The Bureau, in its Comments to the R&R, argued that an award of $12,500 in emotional distress damages to each Complainant was appropriate and cited other Commission cases to support its position. (Bureau Comments to the R&R at 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 the emotional harm, 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) (citing *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).

In such cases, 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); *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).

Judge Spooner, in recommending an emotional distress award of $5,000 each, refers to cases in which emotional distress damages of less than $5,000 were awarded involving discriminatory acts that were "brief and minor." (R&R at 8.) Specifically, Judge Spooner describes a case in which emotional distress damages are tied to the duration, severity, or consequences of the discriminatory act, and where the discriminatory act is "brief and minor, damages should be minimal." (*Id.* (citing *Suffolk Cnty. Cmty. Coll. v. N.Y. State Div. of Human Rights*, 75 A.D.3d 513 (App. Div. 2010) (reducing a damage award from $50,000 to $5,000)).) After a close reading of that case, however, it appears that the court focused primarily on the duration of the complaining party's *emotional distress*, and not the duration of the discriminatory act causing the emotional distress. The court in *Suffolk County Community College* reduced the emotional distress award not because the underlying act itself was brief and minor, but because the complaining party "failed to demonstrate the *duration, severity, or consequences of the mental anguish* he suffered...." *Id.* at 513-14) (emphasis added). The assignment of a value to an emotional distress award is dependent on the evidence put forward of the severity of the emotional distress and any physical manifestations or long-term impact of the emotional distress,

not the duration of the discriminatory act itself. *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) *with Stamm*, 2016 WL 1644879, at *9 (awarding $7,000 in emotional distress damages where complainant testified to feeling "really upset and depressed and angry," "humiliated, nervous, [and] embarrassed," "angry and disgusted," and then "withdrawn and depressed.").

In its Comments to the R&R, the Bureau argues that the Complainants should be awarded $12,500 in emotional distress damages each, and cites only one case, *Romo v. ISS Action Security*, which is highly distinguishable from the facts at issue here, in which a complainant was awarded damages at or above $12,500. In *Romo*, 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.

Complainants each testified to feeling sad, angry, and afraid after the incident. They both testified that seeing Respondent again brought these feelings back. There is no record evidence to suggest that either Complainant experienced any physical manifestations of the emotions they felt or any deleterious long-term effects of the discrimination. Considering this information, the Commission finds emotional distress damages in the amount of $7,000 appropriate for each Complainant. *See Stamm*, 2016 WL 1644879, at *9-10.

The Commission recognizes the difficulty of assigning a monetary sum to an individual's emotional distress. Money may seem like an insufficient method of addressing the harm inflicted by discriminatory behavior. In recognition of the limitations of this framework, the Commission also looks to restorative justice to present alternative options to compensate Complainants for the emotional harm of experiencing discrimination.

The New York City Human Rights Law empowers the Commission to take any actions to "eliminate and prevent" discrimination, and even more broadly, to "take other actions against prejudice, intolerance, bigotry, discrimination and bias-related violence or harassment." N.Y.C. Admin. Code § 8-101. The New York City Human Rights Law further empowers the Commission to mandate "such affirmative action, as in the judgment of the commission, will effectuate the purposes of this chapter." *Id.* § 8-120. The Commission, with its broad mandate to combat discrimination, vindicate the public interest, and require such affirmative action, is framed under a holistic human rights model.

The concept of restorative justice emerges from the belief that a conventional civil process may be ineffective in separating an offender from the consequences of a wrongful act, in the timing of a remedial action, and in the inattention to the personal nature of the wrong. *See* Carrie Menkel-Meadow, *Restorative Justice: What Is It and Does It Work?*, 3 Ann. Rev. L. & Soc. Sci. 161, 164 (2007). As such, "restorative justice creates space for an alternate dialogue of reparation of harm focused on maintaining membership within a specific community...." Thalia González, *Reorienting Restorative Justice: Initiating A New Dialogue of Rights Consciousness, Community Empowerment and Politicization*, 16 Cardozo J. Conflict Resol. 457, 458 (2015). In short, restorative justice focuses on "healing rather than hurting, moral learning, community participation and community caring, respectful dialogue, forgiveness, responsibility, apology,

and making amends." John Braithwaite, *Restorative Justice: Assessing Optimistic and Pessimistic Accounts*, 25 Crime & Just. 1, 6 (1999).

The Commission orders the Bureau and Complainants to consider the possibility of an alternative resolution that may involve, for example, a mediated apology or other method of resolution, in lieu of payment of emotional distress damages, and to provide a letter to the Commission within thirty days of the date of this Order informing the Commission as to whether Complainants will consider an alternative resolution. If Complainants do not wish to consider an alternative resolution or fails to submit the letter within thirty days of this Order, the Commission will notify Respondent of his obligation to pay the emotional distress damages within thirty days of the date of the Commission's notification letter.

If the parties agree to consider an alternative resolution, the parties have sixty days from the date of the letter submitted to the Commission to mediate an alternative resolution and submit a proposed conciliation agreement outlining the proposed resolution. If no such resolution is reached within sixty days, the parties must inform the Commission in writing and Respondent must pay the emotional distress damages as outlined above within thirty days. The Commission will not entertain any requests for extensions to the timelines detailed above.

B. Other Affirmative Actions To Effectuate the Purposes of the NYCHRL

The Commission is empowered to order respondents "to take such affirmative action as, in the judgment of the commission, will effectuate the purposes of" the NYCHRL. N.Y.C. Admin. Code § 8-120. The Commission finds that such affirmative action is appropriate here.

Individual respondents are uniquely situated when they are not business owners, corporate entities, or partnerships, as the burden of any action ordered rests squarely on them. Taking account of Respondent Dahbi's situation as well as the Commission's mandate to

vindicate the public interest and prevent discrimination, the Commission again applies the principles of restorative justice in fashioning affirmative action in this case. The Commission orders Respondent Dahbi to work with the Commission's Community Relations Bureau to educate taxi drivers on the NYCHRL. Respondent Dahbi will perform this work in an effort to prevent future violations of the NYCHRL and inform taxi drivers of the importance of cooperation in the Bureau's and OATH's processes. The Commission, therefore, orders Respondent Dahbi to work with the Commission's Community Relations Bureau for 164 hours over the course of the next year. Based on an approximate gross income of $30.50/hour in earnings as a taxi driver,[2] this period of time is valued at $5,000, the same amount recommended by Judge Spooner to be appropriate as a civil penalty. (R&R at 9.)

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 Dahbi. The Commission therefore orders Respondent Dahbi to complete training on the NYCHRL, available, free of charge, through the Commission's Community Relations Bureau.

C. Civil Penalties

In arriving at his recommendation of a $5,000 civil penalty, Judge Spooner identified the following factors: 1) the pervasiveness of the violations, 2) the pubic impact, and 3) aggravating factors, such as the use of offensive language. (R&R at 9.) Judge Spooner also considered the fact that Respondent has not been found to have committed previous violations and does not

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[2] *See* New York City Taxi and Limousine Commission, "2016 Taxicab Fact Book" at 7, *available at* http://www.nyc.gov/html/tlc/downloads/pdf/2016_tlc_factbook.pdf (last accessed July 5, 2016).

seem likely to repeat this behavior, that he is an individual supporting a family with limited means and income, and that he generally cooperated with the investigation by the Bureau. *Id.*

In determining the civil penalty necessary to vindicate the public interest, the Commission may consider several additional factors, including, but not limited to: 1) respondent's financial resources; 2) sophistication of respondent's enterprise; 3) respondent's size; 4) the willfulness of the violation; 5) the ability of respondent to obtain counsel; 6) whether respondent cooperated with the Bureau's investigation and the OATH proceedings; and 7) the impact on the public of issuing civil penalties. *See Stamm*, 2016 WL 1644879, at *10; *Howe*, 2016 WL 1050864, at *8; *Cardenas*, 2015 WL 7260567, at *15.

The Commission is tasked with imposing civil penalties to vindicate the public interest and deter future discriminatory conduct. A civil penalty that achieves these goals must be tailored to the specific circumstances of the respondent. For example, the amount of a civil penalty that would deter future discriminatory conduct when the respondent is a business with hundreds of employees, multiple locations, and millions of dollars in revenue in New York City looks very different than a civil penalty ordered against a business with five employees, one location, and is barely breaking even. Because the Commission has ordered Respondent Dahbi to work with the Commission's Community Relations Bureau for 164 hours, which equals approximately $5,000 worth of his time, the Commission does not find it necessary to order additional civil penalties in this circumstance. In this case, the affirmative action ordered will serve the same purpose of deterrence and vindicating the public interest that a civil penalty would.

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

IT IS FURTHER ORDERED, that no later than sixty (60) calendar days after service of this Order, Respondent will 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, Complainants and the Bureau will communicate with the Commission regarding whether they will pursue an alternative resolution or whether they will accept emotional distress damages from Respondent Dahbi in the following amounts: $7,000 for Complainant Spitzer and $7,000 for Complainant Thorton;

IT IS FURTHER ORDERED, that no later than thirty (30) calendar days after service of this Order, Respondent Dahbi contact the Community Relations Bureau of the Commission on Human Rights to coordinate his community service.

If Respondent Dahbi fails to timely contact the Community Relations Bureau of the Commission regarding the community service as set forth above, or fails to perform such community service, an automatic penalty of $5,000 will be levied against Respondent Dahbi.

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.* § 8-129.

Dated: New York, New York
July 7, 2016

SO ORDERED:

New York City Commission on Human Rights

Carmelyn P. Malalis
Commissioner/Chair