

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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KATARZYNA STYKA, :

Plaintiff, :

-against- :

MY MERCHANTS SERVICES :

LLC, and :

JOSE VALERIOS, individually, :

Defendants. :

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REPORT AND
RECOMMENDATIONS

14 Civ. 6198 (ENV) (VMS)

Scanlon, Vera M., United States Magistrate Judge:

Plaintiff Katarzyna Styka (“Plaintiff”) brings this action against Defendants My Merchants Services LLC and Jose Valerios (“Mr. Valerios”) (collectively “Defendants”) asserting claims for sexual harassment and employment discrimination under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e–2000e–17 (“Title VII”); New York State Human Rights Law, Executive Law § 296 (“NYSHRL”); New York City Human Rights Law, N.Y.C. Admin. Code § 8–107 (“NYCHRL”); intentional infliction of emotional distress; and civil

assault and battery. See generally Compl., ECF No. 1. Presently before the Court, on referral from the Honorable Eric N. Vitaliano, is a damages calculation for the liability default judgment that the District Court entered against Defendants. See generally Default Mem. and Order, ECF No. 21. This Court makes this report and recommendation on the basis of the allegations pled in the complaint, the testimony of the Plaintiff at the inquest hearing, and Plaintiff's submissions on the motion. The Court respectfully recommends that the District Judge award Plaintiff \$122,000 in compensatory damages, which includes \$120,000 for compensatory damages for pain and suffering and \$2,000 in back pay; \$50,000 in punitive damages; and \$11,060 in attorney's fees, for a total of \$183,060.

I. BACKGROUND

Plaintiff filed this action seeking damages (both compensatory and punitive) and attorney's fees against Defendants to redress her injuries as a result of Defendants' creation of a hostile work environment, sexual harassment, sexual assault, race and gender discrimination, retaliation and wrongful discharge. See Compl. ¶ 1. Plaintiff's Complaint

specifically claimed that from December 2014 through April 2014: (1) Defendants engaged in unlawful employment practices by discriminating against Plaintiff because of her sex and gender in violation of 42 U.S.C. § 2000e-2, id. ¶¶ 69-71; (2) Defendants engaged in unlawful employment practices by retaliating against Plaintiff because of her opposition to Defendants' unlawful employment practices in violation of 42 U.S.C. § 2000e-3, id. ¶¶ 72-74; (3) Defendants engaged in unlawful discriminatory practices by discriminating against Plaintiff because of her gender and by creating a hostile work environment in violation of NYSHRL, id. ¶¶ 75-78; (4) Defendants engaged in an unlawful discriminatory practice by wrongfully retaliating against Plaintiff in violation of NYSHRL, id. ¶¶ 79-81; (5) Defendants aided and abetted, incited, compelled and coerced discriminatory conduct against Plaintiff in violation of NYSHRL, id. ¶¶ 82-84; (6) Defendants engaged in an unlawful discriminatory practice by creating and maintaining discriminatory working conditions, discriminating against Plaintiff because of her gender, sexually harassing Plaintiff and creating a hostile work environment in violation of NYCHRL, id. ¶¶ 85-88; (7)

Defendants engaged in an unlawful discriminatory practice by retaliating against Plaintiff for her opposition to Defendants' practices in violation of NYCHRL, id. ¶¶ 89-91; (8) Defendants aided and abetted, incited, compelled and coerced discriminatory conduct against Plaintiff in violation of NYCHRL, id. ¶¶ 92-94; (9) Defendants violated NYCHRL, which makes them liable for the discriminatory conduct of their employee, id. ¶¶ 95-97; (10) Defendants, by acting with extreme and outrageous behavior, intentionally inflicted emotional distress on Plaintiff, id. ¶¶ 98-102; and (11) Defendants physically assaulted and battered Plaintiff, id. ¶¶ 103-104. Plaintiff's Complaint also set forth with specificity the facts surrounding these claims, to which Plaintiff testified at an inquest hearing, discussed infra.

Defendants failed to answer the Complaint, and the Clerk of the Court entered default against them. Plaintiff moved for default judgment against both Defendants, which the District Judge granted. The District Judge referred the matter to this Court in order to conduct an inquest to determine the amount of damages owed Plaintiff. An inquest hearing was held during which Plaintiff was the only witness

who testified about her damages. Defendants failed to appear at the inquest hearing, although Plaintiff had notified them of it. See Tr. of Inquest Hearing (“Tr.”), ECF No. 26 at 3; Letter & Aff. of Svc., ECF No. 24. The Court also permitted Plaintiff’s counsel to submit supplemental post-hearing briefing as to the amount of attorney’s fees owed and case law supporting Plaintiff’s damages award. Plaintiff submitted the supplemental briefing; although she cited to some case law with damages awards, she did not request any specific damages amount in her papers. See generally Mot. for Damages, ECF No. 27.

Plaintiff testified to the facts set out in the Complaint at the inquest hearing. She stated that she was employed at Defendant My Merchants Services from December 2013 to April 2014 and that Defendant Jose Valerios was her supervisor. Tr. at 5. The company’s office consisted of one small room; thus, Plaintiff worked near Mr. Valerios every day. Tr. at 5, 16. Plaintiff and Mr. Valerios also maintained similar work hours, as Plaintiff arrived every day between 9:00 AM and 9:30 AM; Mr. Valerios arrived between 10:00 AM and 10:30 AM; and both Plaintiff and Mr. Valerios left at about 6:00 PM. Tr. at 16. Plaintiff and

Mr. Valerios were sometimes alone in the office together either at the beginning or end of the day, and sometimes Mr. Valerios would ask to speak alone with Plaintiff in the building hallway. Tr. at 17-18.

After Plaintiff started working for Defendant My Merchants Services, Mr. Valerios began making racially discriminatory comments, saying that Plaintiff was his “white Polish girl” and “whitey reddish girl,” and calling her a “Polack.” Tr. at 6, 16. He made these comments every day and in front of Plaintiff’s coworkers and the company’s clients. Tr. at 17-18. One month into her employment, Mr. Valerios began directing sexual comments at Plaintiff, including saying that he wanted to touch and have sex with Plaintiff. Tr. at 6, 15-16, 25.

Plaintiff testified that he made these comments daily. Tr. at 18. At one point, Mr. Valerios offered to pay Plaintiff more money if she would agree to have sex with him once per week. Compl. ¶ 32. Mr. Valerios also made sexual comments daily to Plaintiff via text message, when she was at work and home. Tr. at 9, 21, 24. Plaintiff testified about many explicit texts that Mr. Valerios sent, see Tr. 21, 24; Compl. ¶ 34, including:

- “You know I love you with all my heart. I wanted a kiss, not a scratch . . .” Compl. ¶ 24.
- “My Polish love, you look so freaking hot . . . I’m going to have you and blame your mum for making you so tasty.” Tr. at 9, 24; Compl. ¶ 61.
- “I really want to have you. Even if its [sic] a one time thing. But I want you locaaa.” Tr. at 21; Compl. ¶ 34.
- “Just give me some . . . and get it over with. Only you and me are going to know about it.” Tr. at 24; Compl. ¶ 58.
- Mr. Valerios told Plaintiff he was “going to ask until you say yes.” Compl. ¶ 47.
- In response to a text from Plaintiff that she was hungry, Mr. Valerios stated that he would “filler her up.” Compl. ¶ 44.

Plaintiff testified that there were several instances where Mr.

Valerios sexually assaulted Plaintiff:

- Mr. Valerios followed Plaintiff into the hallway, pushed Plaintiff onto the elevator, inappropriately groped and touched her, and tried to kiss her. Tr. at 8, 22.
- Mr. Valerios inappropriately grabbed Plaintiff in the hallway. Tr. at 8, 24.
- Mr. Valerios grabbed Plaintiff and tried to pull her into his car. Tr. at 22.
- Mr. Valerios made sexually explicit comments and grabbed Plaintiff's legs and thighs twice when she was alone in the car with him shopping for office supplies. Tr. at 20; Compl. ¶ 21.
- As Plaintiff was leaving the office, Mr. Valerios tried to grab and kiss her. Tr. at 20; Compl. ¶ 22.

During the period that Plaintiff worked for Defendants, she asked Mr. Valerios to stop touching her, making sexually explicit comments to her and texting her at least five times. Tr. at 6-7, 10, 15. She explained that his comments made her uncomfortable and asked that he please

respect her as a coworker and employee. Tr. at 10. Mr. Valerios's behavior only escalated after she made these requests. Tr. at 15. Plaintiff additionally spoke about his behavior to Mr. Valerios's sons, who also worked at the company. Tr. at 25. They told her that he had done this before and that he would eventually stop. Tr. at 25.

Plaintiff never consented to Mr. Valerios touching her. Tr. at 7. Plaintiff threatened to report his behavior to the police if Mr. Valerios continued, Tr. at 8-9. On one occasion, Plaintiff testified that she told Mr. Valerios that she would not have sex with him and that if he continued his behavior she was going to go to the police or quit her job. Tr. at 9, 23; Compl. ¶ 46. Mr. Valerios replied that if Plaintiff did not like it, she could leave. Tr. at 9; Compl. ¶ 48. Plaintiff explained that his behavior made her feel vulnerable, and that she was careful not to wear "inappropriate" clothing to work. Tr. at 11. Plaintiff was also going through a divorce at the time, which Mr. Valerios knew, and she was unable to leave her position for financial reasons. Tr. at 8, 9. Mr. Valerios told Plaintiff that he knew she needed him and could not leave her job. Tr. at 9.

Plaintiff testified that Mr. Valerios terminated Plaintiff twice. The first time Mr. Valerios terminated Plaintiff for half of an hour and then rehired her. Tr. at 23. Plaintiff was also offered a job at another company, but when the company asked Mr. Valerios for a reference, he told them not to hire her. Tr. at 9, 23. As a result, Plaintiff was not offered the position. Tr. at 23. The second time Mr. Valerios terminated Plaintiff was on April 15, 2014, seven days after Plaintiff made a final request for Mr. Valerios to stop harassing her. Tr. at 10. After Mr. Valerios dismissed Plaintiff, she filed a police report about his behavior. Tr. at 11. According to Plaintiff, Mr. Valerios pled guilty to sexual harassment, and his sentence was to take sexual harassment classes. Tr. at 11. Plaintiff testified that, after she was dismissed, she initially felt relieved that she no longer had to see Mr. Valerios, but that it was “hard” as she had no income and no savings. Tr. at 31.

Plaintiff was hired in May 2014 by a company in the same industry and for the same salary, but at a different job. Tr. at 30-31. Plaintiff estimated that she lost about \$2,000 in wages during her period of unemployment. Tr. at 35. In May 2014 she also began seeking

treatment for symptoms that Plaintiff states are a result of Defendants' discrimination and sexual harassment. Tr. at 12, 29. Her symptoms had begun in February and March 2014. Tr. at 27. Plaintiff described being unable to get out of bed in the morning and not wanting to be around her daughter and her boyfriend during that time. Tr. at 28. She also reports that her new employer told her that she has trouble looking into people's eyes, and that it was difficult to have meetings and conversations with her. Tr. at 12. She still sees a psychiatrist once per month to treat her symptoms.¹ Tr. at 32. She takes the prescription drug, Lexapro, to treat her anxiety and depression. Tr. at 12, 29, 32. Plaintiff also experiences fluctuations in her weight and feelings of helplessness, hopelessness and worthlessness; she has trouble sleeping through the night; and she has fatigue and loss of energy. Tr. at 14, 32. Plaintiff testified that she did not have these symptoms and diagnoses before she worked for Defendants. Tr. at 14. Although Plaintiff was going through a divorce

¹ Although Plaintiff did submit some medical records from her treating psychiatrist, the psychiatrist did not testify at the hearing, and the records were not admitted into evidence at the hearing. Tr. at 34. The Court therefore cannot rely on them in making its damages calculation.

around the same time that she worked for Defendants, Plaintiff testified that she felt strong when she was leaving her husband, but that Mr. Valerios's behavior made her feel violated and as if she were "nothing" or a "piece of meat." Tr. at 30.

II. DISCUSSION

A. Legal Standard

Although "a party's default is deemed to constitute a concession of all well pleaded allegations of liability, it is not considered an admission of damages." Greyhound Exhibitgroup, Inc. v. E.L.U.L. Realty Corp., 973 F.2d 155, 158 (2d Cir. 1992). On a motion for default judgment, the plaintiff bears the burden to present proof of damages. See Profi-Parkiet Sp. Zoo v. Seneca Hardwoods LLC, 13 Civ. 4358 (PKC) (LB), 2014 WL 2169769, at *6 (E.D.N.Y. May 23, 2014), R. & R. adopted, 13 Civ. 4358 (PKC) (LB), 2014 WL 2765793 (E.D.N.Y. June 18, 2014). The amount of damages awarded, if any, must be ascertained "with reasonable certainty." Credit Lyonnais Sec. (USA), Inc. v. Alcantara, 183 F.3d 151, 155 (2d Cir. 1999); see Cement & Concrete Workers Dist. Council Welfare Fund, Pension Fund, Annuity Fund, Educ. & Training

Fund & Other Funds v. Metro Found. Contractors Inc., 699 F.3d 230, 232 (2d Cir. 2012).

As discussed above, the Court held an inquest hearing to ascertain the amount of damages. The Court relies primarily on Plaintiff's testimony and her Complaint in calculating the amount of damages awarded.

B. Compensatory Damages

"Victims of employment discrimination are entitled to reasonable damages that would make the plaintiff whole for injuries suffered on account of unlawful employment discrimination." Rodriguez v. Express World Wide, LLC, 12 Civ. 4572 (RJD) (RML), 2014 WL 1347369, at *5 (E.D.N.Y. Jan. 16, 2014), adopted by 12 Civ. 4572 (RJD) (RML), 2014 WL 1350350 (E.D.N.Y. Mar. 31, 2014) (internal quotations & citations omitted). Title VII, NYSHRL, NYCHRL and common law tort claims of assault and battery and intentional infliction of emotional distress entitle a plaintiff to compensatory damages for pecuniary loss as

well as pain and suffering.² Title VII sets a cap on compensatory damages in cases of employment discrimination, the amount of which depends on the employer's size. See 42 U.S.C. § 1981a(b)(3).³ Yet,

² Although Defendants' liability was already determined when the District Judge granted Plaintiff's motion for default judgment, the Court notes that, as to Plaintiff's common law tort claims of assault and battery and intentional infliction of emotional distress, Defendant My Merchants Services would likely not be liable for damages caused by Mr. Valerios's conduct as his actions were outside the scope of his employment. See Dykes v. McRoberts Protective Agency, Inc., 256 A.D.2d 2, 3 (1st Dep't 1998). Yet, Plaintiff's damages are also covered under NYCHRL, which states that employers are strictly liable for the acts of an employee when that employee was in a managerial role. Thus Defendant My Merchants Services is liable for all damages, both compensatory and punitive, caused by Mr. Valerios's conduct as he was Plaintiff's supervisor. See Tr. at 5; Caravantes v. 53rd St. Partners, LLC, 09 Civ. 7821 (RPP), 2012 WL 3631276, at *25 (S.D.N.Y. Aug. 23, 2012); N.Y.C. Admin. Code § 8-107(13).

³ Here, Plaintiff did not present evidence as to the size of the employer. As the district judge granted Plaintiff's default judgment motion in its entirety, which included Title VII claims, and the Equal Employment Opportunity Commission issued Plaintiff a right to sue letter, the Court assumes that the employer met the minimum threshold to bring a lawsuit suit under Title VII. See Compl. ¶¶ 5-6; Default Mem. & Order; 42 U.S.C. § 2000e(b). As Plaintiff did not present any evidence that the company has more than 100 employees, the Court would normally apply the Title VII damages cap applicable to employer's with 15 to 100 employees, which is \$50,000. See 1981a(b)(3). Yet, as discussed above, the NYCHRL and NYSHRL have no cap on damages, and the

“[a]lthough Title VII limits the amount of damages that may be awarded, the NYSHRL and NYCHRL do not. The Title VII damages cap, therefore, does not bar compensatory damages in excess of this cap where a plaintiff pleads pendant state law claims.” Moore v. Houlihan’s Rest., Inc., 07 Civ. 3129 (ENV) (RER), 2011 WL 2470023, at *4 (E.D.N.Y. May 10, 2011), adopted by 07 Civ. 3129 (ENV) (RER), 2011 WL 2462194 (E.D.N.Y. June 17, 2011). “[A]ppropriate compensatory awards should be made in consideration of the amounts awarded in other, comparable cases.” Lent v. CCNH, Inc., 13 Civ. 942 (MAD) (ATB), 2015 WL 7283186, at *5 (N.D.N.Y. Nov. 16, 2015).

1. Emotional Distress Damages

“Cases in the Second Circuit involving awards for emotional distress can generally be grouped into three categories of claims: ‘garden-variety,’ ‘significant’ and ‘egregious.’” Rodriguez, 2014 WL 1347369, at *6 (citing Rainone v. Potter, 388 F. Supp. 2d 120, 122 (E.D.N.Y. 2005) (citation omitted). In garden-variety claims, in which

Court is permitted to find damages above the Title VII cap under those statutes.

appropriate damages range from \$5,000 to \$35,000, “the evidence of mental suffering is generally limited to the testimony of the plaintiff, who describes his or her injury in vague or conclusory terms, without relating either the severity or consequences of the injury.” Id. (internal quotation omitted). In significant claims cases, in which appropriate damages range from \$50,000 to \$100,000, the claims “are based on more substantial harm or more offensive conduct, are sometimes supported by medical testimony or evidence, evidence of treatment by a healthcare professional and/or medication, and testimony from other, corroborating witnesses.” Id. (internal quotation omitted). “Finally, ‘egregious’ emotional distress claims, where courts have upheld awards of over \$100,000, have only been warranted where the discriminatory conduct was outrageous and shocking or where the physical health of plaintiff was significantly affected.’” Id. (internal quotation omitted).

In this case, Plaintiff’s claims for emotional distress are supported by her Complaint, affidavit, testimony at the hearing and her post-hearing submission. At the inquest hearing, Plaintiff testified regarding Mr. Valerios’s sexual and race-based harassment of her over a five-

month period and the effect of his behavior on her mental and emotional health. She stated that his constant sexually explicit comments, sexual advances, which included grabbing parts of her body and attempting to kiss her, and racially charged comments made her feel very vulnerable and worthless, and as if she were a “piece of meat.” Tr. at 30. Plaintiff testified that Mr. Valerios grabbed her inappropriately and tried to kiss her on five different occasions. Tr. at 8, 20-24. Plaintiff also felt as if Mr. Valerios used the knowledge that she was going through a divorce and could not afford to quit her job as a license to continue to harass her. Tr. at 9. Mr. Valerios’s behavior only became worse over the five-month period that Plaintiff worked for him, despite the many times that she asked him to stop and threatened to report his behavior to the police. Tr. at 6-7, 10, 15. After Plaintiff eventually reported his behavior to the police, Mr. Valerios pled guilty to sexual harassment. Tr. at 11. As a result of his harassment, Plaintiff testified that she now experiences fluctuations in her weight, insomnia, difficulty relating to her daughter and boyfriend, fatigue and trouble communicating with her colleagues in her new position. Tr. at 12, 29, 32. She takes anti-anxiety medication to

help address some of these symptoms. Tr. at 12, 29, 32. Plaintiff is still experiencing these symptoms almost two years after her employment with Defendants ended. Tr. at 12, 29, 32.

Plaintiff's allegations of emotional distress are significant, especially as she continues to experience symptoms almost two years after the incident and sometimes takes anti-anxiety medication. Yet, the allegations are supported through Plaintiff's testimony only.

Additionally, while the symptoms have persisted, Plaintiff's employment was brief, and Plaintiff was also experiencing other life events that caused her to experience distress. Accordingly, based on Plaintiff's submissions and testimony, the severity and intensity of Mr. Valerios's sexually harassing behavior, the brief duration of her employment, the continuation of Plaintiff's symptoms and the applicable case law, the Court respectfully recommends that the District Judge award Plaintiff \$120,000 in emotional distress damages, which is the upward limit for significant claims between those cases in which the plaintiff did not seek medical attention and claims on the upward range where the plaintiff experiences more severe symptoms than Plaintiff.

See, e.g., Equal Emp't Opportunity Comm. v. Suffolk Laundry Svcs., Inc., 12 Civ. 409 (MKB) (ARL), Order on Consent Decree, ECF No. 88 (E.D.N.Y. Nov. 30, 2015) (defendant agreed to pay \$582,000 to seven plaintiffs who complained that defendant's manager physically and verbally sexually harassed them, including allegedly regularly touching them on their buttocks, hips, and backs, forcibly kissing them and making comments about their appearance and body parts); Echevarria v. Insight Med., P.C., 72 F. Supp. 3d 442, 445 (S.D.N.Y. 2014) (upholding jury award of \$50,000 in compensatory damages where plaintiff was sexually harassed over a two-month period via text and in-person by her supervisor and then fired when she rejected his sexual advances; plaintiff's social worker testified at trial that plaintiff was subsequently diagnosed with post-traumatic stress disorder and major depressive disorder); Offei, 2012 WL 2086294, at *7 (awarding \$250,000 in damages for one-time incident of sexual assault where plaintiff experienced severe emotional distress that required her to take anti-anxiety medication on a daily basis); Manzo v. Sovereign Motor Cars, Ltd., No. 08 Civ. 1229 (JG) (SMG), 2010 WL 1930237, at *1 (E.D.N.Y.

May 11, 2010), aff'd 419 F. App'x 102 (2d Cir. 2011) (upholding jury award of \$50,000 in compensatory damages where plaintiff was sexually harassed by her supervisor over a five-month period, fired for rejecting his sexual advances and suffered significant psychological and emotional distress; evidence was also introduced at trial that plaintiff's supervisor used plaintiff's "precarious financial situation" to exert power over her); Becerril v. E. Bronx NAACP Child Dev. Ctr., 08 Civ. 10283 (PAC) (KNF), 2009 WL 2611950, at *6 (S.D.N.Y. Aug. 18, 2009), adopted by 08 Civ. 10283 (PAC) (KNF), 2009 WL 2972992 (S.D.N.Y. Sept. 17, 2009) (awarding \$50,000 in compensatory damages in pregnancy discrimination case where plaintiff's symptoms of emotional distress lasted a few months after defendants terminated her employment); Boodram v. Brooklyn Developmental Ctr., 773 N.Y.S.2d 817, 835 (Kings Cty. Civ. Ct. 2003) (upholding jury award of \$172,000 in pain and suffering damages where plaintiff was grabbed sexually at least 20 times by her employer); see also Rodriguez, 2014 WL 1347369, at *7 (awarding \$10,000 in emotional distress damages where plaintiff was sexually harassed by her employer for one day before quitting her

job); Jowers v. DME Interactive Holdings, Inc., 00 Civ. 4753 (LTS) (KNF), 2006 WL 1408671, at *13 (S.D.N.Y. May 22, 2006) (awarding \$15,000 in pain and suffering where plaintiff was discriminated against over several months but did not seek medical treatment for her injuries); Laurie Marie M. v. Jeffrey T.M., 159 A.D.2d 52, 53 (1st Dep’t 1990), aff’d, Laurie Marie M. v. Jeffery T.M., 77 N.Y.2d 981 (1991) (upholding jury award of \$200,000 in compensatory damages for plaintiff’s battery and intentional infliction of emotional distress claims where plaintiff was sexually touched as a child by her stepfather).

2. Back Pay

Plaintiff seeks economic damages to cover her lost wages for her period of unemployment only and does not seek any other economic damages. “When a defendant has violated Title VII, a court may award back pay.” Rodriguez, 2014 WL 1347369, at *5 (citing 42 U.S.C. § 2000e–5(g)(1)). “Back pay also is available under the NYCHRL.” Id. (citing N.Y.C. Admin. Code § 8–502(a)).

Here, Plaintiff seeks back pay in the amount of \$2,000 to cover her lost wages during her one-month period of unemployment. Tr. at 35.

Plaintiff almost immediately found work for comparable pay in the same industry. The Court finds her request for \$2,000, which represents her lost wages for the one month that she was unemployed, a reasonable request and respectfully recommends that the District Judge grant Plaintiff \$2,000 in back pay.

C. Punitive Damages

Title VII and NYCHRL also permit recovery of punitive damages for violations of those statutes. See 42 U.S.C. § 1981a(a)(1); N.Y.C. Admin. Code § 8–502(a). Although NYSHRL does not permit recovery of punitive damages for sexual harassment claims, Plaintiff may recover punitive damages on her state law claims of assault and battery and intentional infliction of emotional distress. See Collins v. Willcox, Inc., 600 N.Y.S.2d 884, 887 (N.Y. Cty. Sup. Ct. 1992) (holding that, while not available for plaintiff’s sexual harassment claim under NYSHRL, punitive damages were available for plaintiff’s battery and intentional infliction of emotional harm claims). Here, Plaintiff included a general request for punitive damages in her complaint, but although her post-hearing supplemental brief included a request to punitive damages, she

did not include a specific amount sought or any method for the Court to calculate the amount of punitive damages. The Court could deem her punitive damages claim abandoned. See, e.g., Moore v. Houlihan's Rest., Inc., 07 Civ. 3129 (ENV) (RER), 2011 WL 2470023, at *4 (E.D.N.Y. May 10, 2011), adopted by, 07 Civ. 3129 (ENV) (RER), 2011 WL 2462194 (E.D.N.Y. June 17, 2011) (recommending that punitive damages' claim be deemed abandon where, although plaintiff requested them in the complaint, counsel only made a vague reference to punitive damages at the inquest hearing and did not provide a method for calculating them); Leisure Direct, Inc. v. Glendale Capital, LLC, 05 Civ. 4473 (KAM) (JO), 2010 WL 3782049, at *6 (E.D.N.Y. July 27, 2010), adopted by 05 Civ. 4473 (KAM) (JO), 2010 WL 3782042 (E.D.N.Y. Sept. 20, 2010) (recommending that punitive damages' claim be deemed abandoned where, although plaintiff requested them in the complaint, plaintiff did not mention them in its affidavit and did not give any explanation of why such relief would be available). Upon review of the record, the Court finds Defendants' behavior particularly egregious and, as such, punitive damages are warranted.

As the Court will have already exceeded Title VII's cap for an employer of Defendants' size, the Court finds punitive damages under NYCHRL and common law torts, which do not have caps on punitive damages. See Caravantes, 2012 WL 3631276, at *21, 25 (“[W]here Title VII claims are pled alongside . . . NYCHRL claims, courts have awarded [punitive] damages in excess of the Title VII statutory cap by allocating the excess award to the . . . city law claims”). The Court applies the same standard as it would apply awarding punitive damages under Title VII in awarding damages under NYCHRL. See MacMillan v. Millennium Broadway Hotel, 873 F. Supp. 2d 546, 563 (S.D.N.Y. 2012) (citing Farias v. Instructional Sys., Inc., 259 F.3d 91, 101-02 (2d Cir. 2001)) (“The NYCHRL does not provide a standard to use in assessing whether punitive damages are warranted. Accordingly, the Second Circuit has determined that the federal standard applies to claims for punitive damages under the NYCHRL.” (internal quotations omitted)). “To recover punitive damages under NYCHRL, the plaintiff must show either: (1) the employer acted with ‘malice and reckless indifference [,] refer[ing] to the employer’s knowledge that it may be

acting in violation of federal law;’ or (2) ‘egregious or outrageous acts’ by the employer, that support ‘an inference of the requisite evil motive.’” Becerril, 2009 WL 2611950, at *7 (quoting Farias, 259 F.3d at 101-02); see Grella v. Avis Budget Grp., Inc., 14 Civ. 8273 (CM), 2016 WL 638748, at *7 (S.D.N.Y. Feb. 11, 2016) (applying the same standard for evaluating punitive damages under the NYCHRL as Title VII). “[U]nder the NYCHRL, punitive damages are available against both the employer and the individual harasser.” Caravantes, 2012 WL 3631276, at *25 (citing Sier v. Jacobs Persinger & Parker, 276 A.D.2d 401, 401-02 (2d Dep’t 2000)). Similarly, as to Plaintiff’s common law claims, “[p]unitive damages are recoverable in all actions based upon tortious acts which involve ingredients of malice, fraud, oppression, insult, wanton or reckless disregard of one’s rights, or other circumstances of aggravation, as a punishment of the defendant and admonition to others.” Collins, 600 N.Y.S.2d at 887.

Here, the Court finds that Mr. Valerios acted with malice and reckless indifference to Plaintiff’s rights, and that Mr. Valerios’s conduct was egregious and outrageous; thus, punitive damages are

warranted. At the inquest hearing, Plaintiff testified that she confronted Mr. Valerios and asked him to stop harassing her, and told him that if he did not stop she would report him to the police. Plaintiff testified that Mr. Valerios's sons, who also worked at My Merchants Services, told her that it was not the first time Mr. Valerios had behaved in this manner. It appears that Mr. Valerios knew his conduct was violating the law and interfering with Plaintiff's rights, which supports a finding that Mr. Valerios acted with malice and reckless indifference. Furthermore, Mr. Valerios's conduct was egregious and outrageous in that he sexually assaulted Plaintiff on at least five separate occasions by grabbing her in a sexual manner and attempting to kiss her. These incidents occurred after Plaintiff asked him to stop. Seven days after the last time Plaintiff asked Mr. Valerios to stop his behavior, Mr. Valerios dismissed her. As discussed above, Plaintiff continues to experience physical and emotional symptoms as a result of her experience working for Defendants. Other courts in the Second Circuit have awarded punitive damages in similarly egregious situations. See, e.g., Caravantes, 2012 WL 3631276, at *26 (awarding \$40,000 in punitive damages for

ongoing sexual assaults by plaintiff's manager); Offei, 2012 WL 2086294, at *8 (awarding \$100,000 in punitive damages where defendant sexually assaulted plaintiff by grabbing her on one occasion); Cash v. Cty. of Erie, 04 Civ. 182 (JTC) (JJM), 2009 WL 3199558, at *4 (W.D.N.Y. Sept. 30, 2009) (awarding \$150,000 in punitive damages where plaintiff was raped by corrections officer); Deborah S. v. Diorio, 583 N.Y.S.2d 872, 879 (N.Y. Civ. Ct. 1992), aff'd, 612 N.Y.S.2d 542 (1st Dep't) (awarding \$200,000 in punitive damages where plaintiff was victim of rape).

Punitive damages should be limited to the amount necessary to deter future behavior while being not so high as to result in the financial ruin of the defendant. See Caravantes, 2012 WL 3631276, at *25. Yet, it is the defendant's burden to show that financial circumstances "warrant a limitation of the award." Offei, 2012 WL 2086294, at *8. As Defendants defaulted here and thus made no such showing, the Court awards an amount it deems fair considering the small size of Defendant My Merchants Services. Therefore, the Court respectfully recommends that the District Judge award Plaintiff \$50,000 in punitive damages,

\$25,000 to be paid by Defendant My Merchants Services and \$25,000 to be paid by Mr. Valerios. An award of this magnitude should also deter Defendants and others from similar conduct in the future, which is also a goal of punitive damages. See Caravantes, 2012 WL 3631276, at *25; Offei, 2012 WL 2086294, at *8.

D. Attorney's Fees

Plaintiff also seeks attorney's fees in the amount of \$11,060.⁴ See Timesheet attached as Exhibit 3 to Mot. for Damages. A plaintiff prevailing in a Title VII suit is entitled to recover reasonable attorney's fees and costs. See 42 U.S.C. § 2000e-5(k). Attorney's fees and costs are also available under the NYCHRL. See N.Y.C. Admin. Code § 8-502(f).

The prevailing method for determining a fee award is the lodestar method, by which the court multiplies a reasonable hourly rate by the

⁴ Although Plaintiff's Complaint states that she seeks both attorney's fees and costs, Plaintiff neither requested costs in her supplemental brief nor gave the Court any receipts for costs she incurred while litigating this case. See Compl. at 14; see generally Mot. for Damages. Thus, the Court does not award any costs here.

reasonable number of hours expended. See Perdue v. Kenny A., 559 U.S. 542, 546, 551 (2010). “[A] ‘reasonable’ fee is a fee that is sufficient to induce a capable attorney to undertake the representation of a meritorious civil rights case.” Perdue, 559 U.S. at 552. The calculation of a reasonable fee is within the district court’s discretion. See Millea v. Metro-N. R. Co., 658 F.3d 154, 166 (2d Cir. 2011). The burden is on the party seeking the fee award to prove that the requested fees and hours are reasonable. See Hensley v. Eckerhart, 461 U.S. 424, 437 (1983); see also Lewis v. Coughlin, 801 F.2d 570, 577 (2d Cir. 1986); Jones v. Amalgamated Warbasse Houses, Inc., 721 F.2d 881, 885 (2d Cir. 1983); New York State Ass’n for Retarded Children, Inc. v. Carey, 711 F.2d 1136, 1147 (2d Cir. 1983).

1. The Reasonable Hourly Rate For Plaintiff’s

Attorney

Plaintiff’s attorney seeks an hourly rate of \$280. See Timesheet attached to Mot. for Damages. In the Second Circuit, “[t]he reasonable hourly rate is the rate a paying client would be willing to pay bear[ing] in mind that a reasonable, paying client wishes to spend the

minimum necessary to litigate the case effectively.” Arbor Hill

Concerned Citizens Neighborhood Ass’n v. Cty. of Albany, 522 F.3d

182, 190 (2d Cir. 2007). In making this determination, courts should

consider the following twelve factors:

(1) the time and labor required; (2) the novelty and difficulty of the questions; (3) the level of skill required to perform the legal service properly; (4) the preclusion of employment by the attorney due to acceptance of the case; (5) the attorneys’ customary hourly rate; (6) whether the fee is fixed or contingent; (7) the time limitations imposed by the client or the circumstances; (8) the amount involved in the case and the results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the “undesirability” of the case; (11) the nature and length of the professional relationship with the client, and (12) awards in similar cases.

Id. at 186 n.3, 190 (citing Johnson v. Georgia Highway Exp., Inc., 488

F.2d 714, 717-19 (5th Cir. 1974), abrogated on other grounds by

Blanchard v. Bergeron, 489 U.S. 87 (1989). This calculus is locality-

sensitive; in order to determine a reasonable hourly rate the court must

look to “the prevailing market rates in the relevant community.” Blum

v. Stenson, 465 U.S. 886, 895 (1984); see Reiter v. MTA N.Y.C. Transit

Auth., 457 F.3d 224, 232 (2d Cir. 2006) (stating that the court must use

current, prevailing rates for that court’s district); Brady v. Wal-Mart Stores, Inc., 455 F. Supp. 2d 157, 214 (E.D.N.Y. 2006) (recognizing that “the law of this circuit” is to “use[] current rates in the lodestar”), aff’d, 531 F.3d 127 (2d Cir. 2008).

“Reasonable hourly rates in the Eastern District of New York are ‘approximately \$300–\$450 per hour for partners, \$200–\$300 per hour for senior associates, and \$100–\$200 per hour for junior associates.’” Medina v. Donaldson, 10 Civ. 5922 (VMS), 2015 WL 77430, at *6 (E.D.N.Y. Jan. 6, 2015) (quoting Hugee v. Kimso Apartments, LLC, 852 F. Supp. 2d 281, 298-99) (E.D.N.Y. 2012); see D’Annunzio v. Ayken, Inc., 11 Civ. 3303 (WFK) (WDW), 2015 WL 5308094, at *4-5 (E.D.N.Y. Sept. 10, 2015) (“Courts in the Eastern District of New York award hourly rates ranging from \$200 to \$450 per hour for partners, \$100 to \$300 per hour for associates, and \$70 to \$100 per hour for paralegals.”); U.S. Bank, N.A. v. Byrd, 854 F. Supp. 2d 278, 286 (E.D.N.Y. 2012) (“In the Eastern District of New York, hourly rates range from approximately \$300 to 400 per hour for partners, \$200 to \$300 per hour for senior associates, and \$100 to \$200 per hour for junior

associates.”). Congress intended that fee awards in civil rights cases “be governed by the same standards which prevail in other types of equally complex Federal litigation, such as antitrust cases[,] and not be reduced because the rights involved may be nonpecuniary in nature.” Blum, 465 U.S. at 893 (quoting S. Rept. No. 94–1011, p. 6 (1976)).

As stated above Plaintiff’s counsel requests an hourly rate of \$280, which the Court deems reasonable in light of Plaintiff’s experience and the reasonable hourly rates in this District. Plaintiff’s attorney has been practicing law for the past six years and has litigated at least twenty-three employment cases before the Eastern and Southern Districts of New York, the District of Columbia and New York State courts. Aff. of John C. Luke Jr. (“Luke Aff.”) attached as Exhibit 1 to Mot. for Damages ¶¶ 1, 6. His requested rate of \$280 is within the rate for attorneys at his level in this District, which is \$200 to \$300 per hour.

2. Reasonable Number of Hours Expended

A party seeking attorney’s fees must substantiate its requested number of hours expended through contemporaneous time records. See Hensley, 461 U.S. at 437-38, 438 n.13; U.S. Bank, N.A., 854 F. Supp.

2d at 287 (listing cases). “[E]xcessive, redundant, or otherwise unnecessary” hours will not be compensated. Bliven v. Hunt, 579 F.3d 204, 213 (2d Cir. 2009) (quoting Hensley, 461 U.S. at 434). The Second Circuit has “recognized the authority of district courts ‘to make across-the-board percentage cuts in hours as a practical means of trimming fat from a fee application.’” Green v. City of New York, 403 F. App’x 626, 630 (2d Cir. 2010) (quoting In re Agent Orange Prod. Liab. Litig., 818 F.2d 226, 237 (2d Cir. 1987)).

Here, Plaintiff’s attorney submitted contemporaneous time records that, although they are not detailed, provide the Court with a sufficient basis to evaluate whether the hours requested by Plaintiff’s attorney are reasonable. The Court, after a review of the requested hours, finds them reasonable. Plaintiff’s attorney spent 39.5 hours litigating this case against defaulting Defendants, and much of the time was spent on preparing the motions for default and also preparing his client for the damages hearing. See Timesheet. Overall, 39.5 hours spent litigating a fairly straightforward employment discrimination case are not excessive.

Cf. Becerril, 2009 WL 2611950, at *9 (finding 175.8 hours reasonable in an employment discrimination case against defaulting defendants).

Therefore, the Court respectfully recommends that the District Judge award Plaintiff's attorney for 39.5 hours of his time at an hourly rate of \$280, for a total of \$11,060 in attorney's fees.

III. CONCLUSION

For the reasons stated herein, this Court respectfully recommends that Plaintiff's motion for damages be granted and that the District Judge award Plaintiff \$183,060, which includes:

- (1) \$120,000 in compensatory damages for pain and suffering;
- (2) \$2,000 in back pay;
- (3) \$50,000 in punitive damages; and
- (4) \$11,060 in attorney's fees.

IV. OBJECTIONS

This Report and Recommendations will be filed electronically. Chambers will mail a copy of this Report and Recommendations to the defaulting Defendants at the addresses listed in Plaintiff's most recent affidavits of service.

Written objections to this Report and Recommendation must be filed with the Clerk of Court and in accordance with the Individual Rules of the District Judge within fourteen days of service of this report. 28 U.S.C. § 636(b)(1); Fed. R. Civ. Proc. 72(b). A failure to file objections within the specified time waives the right to appeal any order or judgment entered based on this report and recommendation. 28 U.S.C. § 636(b)(1); Fed. R. Civ. Proc. 72(b); see Caidor v. Onondaga Cnty., 517 F.3d 601, 604 (2d Cir. 2008).

Dated: Brooklyn, New York
March 15, 2016

Vera M. Scanlon

VERA M. SCANLON
United States Magistrate
Judge