SUPREME COURT OF THE CITY OF NEW YORK
COUNTY OF THE BRONX - Trial Part IA - 24

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DENISE RIVERA

Plaintiff,

-against-

UNITED PARCEL SERVICE, INC.,

Defendant.

----------x

Index No.: 303092/2008

Present:
Hon. SHARON A.M. AARONS
Justice of the Supreme Court

Recitation, as required by CPLR 2219(a), of the papers considered in the review of motion(s) and/or cross-motion(s), as indicated below:

Papers	**Numbered**
Notice of Motion and Affidavits Annexed	**1**
Answering Affidavits	**2**
Reply	**3**

Papers	**Numbered**
Notice of Motion and Affidavits Annexed	**1, 2**
Answering Affidavits	**3**
Reply	**4**

Upon the foregoing papers, the defendant's post-trial motion pursuant to CPLR 4404 seeking to set aside the jury verdict, for an order granting a new trial, or alternatively, granting a remittitur, and plaintiff's motion for attorney's fees, pre-judgment interest and costs, are decided in accordance with the accompanying Decision and Order of the same date hereof.

Dated: December 24, 2015

SHARON A. M. AARONS, J.S.C.

This decision refers to 2 motions

SUPREME COURT OF THE CITY OF NEW YORK
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DENISE RIVERA **Index No.: 303092/2008**

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Hon. Sharon A. M. Aarons:

After a jury trial on plaintiff's claims of sexual harassment and retaliation, the jury awarded plaintiff damages in the total amount of $1,330,000 – i.e., $420,000 for back pay, $310,000 for front pay, $300,000 for emotional distress, and $300,00 for punitive damages. Defendant UPS now moves post-trial pursuant to CPLR 4404 to set aside the jury verdict, and for an order granting a new trial, or in the alternative, for a grant of remittitur. By separate motion, plaintiff moves for attorney's fees, pre-judgment interest and costs.

The foregoing motions are consolidated for disposition and decided as follows.

Facts

Plaintiff commenced this action for damages for alleged sexual harassment and retaliation under the New York City Human Rights Law (NYCHRL) as codified in the Administrative Code of the City of New York (Admin. Code).[1]

Plaintiff was first employed by defendant UPS effective September 11, 2001. She was promoted several times, eventually to the position of "on-car supervisor" in August 2004. In that capacity, she worked with fellow on-car supervisor Greg Devany, at the Eastside Center in Long

[1]No causes of action based on violation of federal law were set forth in the complaint.

Island City. There was testimony that Devany was the "lead " on-car supervisor.

In March 2006, plaintiff made an internal complaint to Michael Coscia, a Labor Manager, that she was being sexually harassed by on-car supervisor Greg Devany. Mr. Devany frequently called the plaintiff at her home late at night, and on one occasion visited her apartment in an inebriated condition "in the middle of the night." While plaintiff testified at trial that Mr. Devany's late night calls were laced with sexual commentary, she admittedly did not report these lewd comments to Mr. Coscia.

While the defendant argues on the present motion that the alleged unwanted contact occurred only off-premises and after work hours, plaintiff testified that Devany frequently walked by and remarked, "I wish I could f— you," leading to arguments which occurred in front of other drivers.[2]

Mr. Coscia reviewed these complaints in a joint meeting with Mr. Devany and his manager, George Finelli, the day following the plaintiff's complaint. Mr. Devany admitted the calls, but stated that he had never been requested to stop. Mr. Coscia directed Mr. Devany to stop calling the plaintiff. Mr. Coscia viewed the situation as involving a consensual relationship, because the plaintiff herself admitted that she had frequently called Mr. Devany late at night and on weekends.

Three months after making her complaint, in June, 2006, the plaintiff was transferred to

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[2]The Court denied a defense motion in limine to exclude anticipated testimony that a driver named Carlos Guevara told the plaintiff that driver Arthur Singleton stated that "I cannot wait to f— Denise that b----." The Court reasoned that the statement, "I cannot wait to f— Denise that b----," was not being offered for the truth of what was being said, and was thus not hearsay. As stated in *Gelpi v. 37th Ave. Realty Corp.* (281 A.D.2d 392, 721 N.Y.S.2d 380 [2d Dept. 2001]), "[h]earsay is an out-of-court statement offered to prove the truth of the matter asserted therein. However, a statement which is not offered to establish the truth of the facts asserted therein is not hearsay (*See Stern v. Waldbaum, Inc.*, 234 AD2d 534 [2d Dept. 1996])."

another UPS facility called "The Remote." The pay and other terms of employment remained the same.

In December 2006, the wife of driver Rob Cosentino, one of the full-time drivers who reported to the plaintiff, complained to UPS supervisors that the plaintiff was calling her husband outside of business hours. Mrs. Cosentino believed her husband was having an affair with the plaintiff. According to the defendant, on numerous occasions, co-workers observed the plaintiff in the company of two other male subordinates, Anthony Brikes and David Gaitan, leading to rumors that she was having extra-marital affairs.

On December 16, 2006, plaintiff was directed to meet with Henry Beards, a Human Resources Manager, concerning these allegations. Plaintiff denied any inappropriate conduct with Rob Cosentino, but admitted that she had gone to dinner and attended a UPS Christmas party with a different driver. Plaintiff also reported to Mr. Beards that she had been the subject of rumors spread by drivers that she was having extra-marital affairs.[3]

Following the meeting, UPS Security Manager, Tim Almquist, investigated the alleged

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[3]Prior to trial, plaintiff moved in limine to preclude evidence of a consensual sexual relationship which the plaintiff admitted she had engaged in with a co-employee. Plaintiff alleged that the relationship commenced after she had been terminated from her employment at UPS. The Court ruled that private sexual relationships are essentially irrelevant in sexual harassment cases, and that a plaintiff's private sexual behavior does not change his or her expectations or entitlement to a workplace free of sexual harassment. "Whether a sexual advance was welcome, or whether an alleged victim in fact perceived an environment to be sexually offensive, does not turn on the private sexual behavior of the alleged victim, because a woman's expectations about her work environment cannot be said to change depending upon her sexual sophistication." (*Wolak v. Spucci*, 217 F.3d 157 [2d Cir. 2000]; *Burns v. McGregor Electronics Indus.*, 989 F.2d 959, 962-63 [8th Cir. 1993)] [holding that plaintiff's posing for nude pictures for magazine did not indicate sexual advances at work were welcome]; *Gallagher v. Delaney*, 139 F.3d 338, 346 [2d Cir. 1998] [holding that plaintiff's extramarital office affair did not permit court to find as a matter of law that plaintiff was open to sexual advances]).

rumors surrounding plaintiff's conduct by speaking with the drivers identified by plaintiff as "spreading rumors." None of the drivers admitted to spreading rumors concerning the plaintiff. [4]

In January 2007, Mr. Beards transferred the plaintiff to Manhattan North. This was done to remove her from contact with the drivers who were allegedly spreading rumors concerning the plaintiff's conduct. A few months later, in March, 2007, she was transferred to Manhattan South. Within a few days of the transfer, she was observed having coffee with driver Anthony Brikes (who was still assigned to Eastside) in lower Manhattan, far beyond his midtown driving route. Plaintiff was interviewed concerning this conduct, but not disciplined.

Subsequently, plaintiff was investigated for four incidents, i.e, (1) a customer complaint; (2) the failure to deliver packages to a building; (3) a security breach, where she permitted an employee to re-enter the building after he had left for the day; and, (4) falsification of delivery scans. After an investigation by UPS security officers, plaintiff met with Division Manager, Andrew Jurasits, to explain her conduct. Mr. Jurasist testified at trial that he was not satisfied with plaintiff's explanations,[5] and thus made the decision to terminate her employment based on the conduct relating to the security breach and the falsification of the delivery scans. He testified that he had no knowledge of plaintiff's prior complaints to Mr. Coscia or Mr. Beards.

Following her termination at UPS, at which time she was making $75,000, plaintiff obtained

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[4]At trial, UPS Supervisor David Rodriguez testified that he followed plaintiff and observed her interacting with Brikes, but explained that he did so ". . . kind of sort of to help her, to keep her out of her own way. She was a relatively new supervisor coming on car and maybe she didn't know how to interact with drivers being a female." (Trial Tr. 1172 – 1173, February 11, 2014).

[5]Plaintiff explained at trial that she simply allowed a driver to retrieve his jacket after he had passed through the metal detectors, and further, that Mr. Weaver had directed her to fill out the documents which she was accused of falsifying.

temporary employment at odd jobs. In January 2008, she was hired by Binder & Binder as a clerical worker at a salary of $26,000. She was terminated from Binder & Binder in March, 2009, although after her union grieved her termination, she was offered, and declined, continued employment.

The Court's Charge

With respect to the key issues of gender discrimination and retaliation, the Court fashioned the following charges:

> SEXUAL HARASSMENT
>
> Plaintiff seeks to recover for alleged sexual harassment under the New York City Human Rights Law. What is commonly referred to as sexual harassment is a form of gender discrimination under the NYCHRL.
>
> In order to establish a claim of gender discrimination under New York City Human Rights Law (NYCHRL), plaintiff must prove by a preponderance of the evidence each of the following elements:
>
> (1) That she belongs to a protected group (in this case, there is no dispute that Ms. Rivera is a female and as such is a member of a protected group)
>
> (2) That she was subjected to unwelcome harassment; and
>
> (3) That the harassment was based upon her gender.
>
> In order for plaintiff to establish her claim that she was sexually harassed, she must show that she was treated less well at least in part because of her gender. You must consider the totality of the circumstances because "the overall context in which the challenged conduct occurs cannot be ignored."
>
> The NYCHRL is not a general civility code. Petty slights and minor inconveniences do not constitute harassment. However, the burden of proof on the issue of whether the harassing conduct (if you find there to be any) was slight or trivial is on the defendant.
>
> The alleged sexual conduct must have been "unwelcome." "In determining whether conduct was unwelcome, the nature of the sexual advances and the context in which they occurred are to be viewed in light of the totality of the circumstances at issue." If plaintiff's actions in the workplace show that she was a "willing participant" in the conduct at issue, the conduct is not "unwelcome." If you find that plaintiff has proven that she was harassed on the basis of gender by employees of defendant UPS, you

must next decide whether defendant UPS should be held liable for those actions. Defendant UPS is not automatically liable for the actions of every one of its employees. An employer is liable for harassment or retaliation by its employees under the NYCHRL when:

(1) The harassing conduct was by an employee with "managerial or supervisory responsibility" over the plaintiff; or,

(2) Defendant UPS knew about the harassing conduct and acquiesced to the conduct or failed to take immediate and appropriate corrective action. An employer is deemed to have knowledge of harassing conduct if it was known by an employee with managerial or supervisory authority.

In order to determine whether an employee is a "managerial or supervisory employee," you must consider whether the employee had the authority to affect the terms and conditions of plaintiff's employment. In making this decision, you should consider the nature of the relationship and whether the individual had the authority to direct daily work activities, hire, fire, promote, transfer or discipline the plaintiff.

If the harassing conduct was by an employee with managerial or supervisory authority over the plaintiff, or if UPS knew of the conduct and acquiesced to it or failed to take immediate and appropriate action, then defendant UPS is liable.

If, on the other hand, the harassing conduct was not by an employee with managerial or supervisory authority, or if defendant UPS did not know of the harassing conduct, you will consider whether UPS should have known of the harassing conduct and failed to exercise reasonable care to prevent it. In considering whether defendant UPS exercised reasonable care, you must consider whether UPS established and complied with policies, programs and procedures for the prevention and detection of harassing conduct by employees, agents and persons employed as independent contractors, including but not limited to:

a. A meaningful and responsive procedure for investigating complaints of discriminatory practices by employees and for taking appropriate action against those persons who are found to have engaged in such practices;
b. A firm policy against such practices which is effectively communicated to employees;
c. A program to educate employees about unlawful discriminatory practices under local, state and federal law; and
d. Procedures for the supervision of employees specifically directed at the prevention and detection of such practices; and
e. A record of no, or relatively few, prior incidents of

discriminatory conduct by the person or persons alleged to have harassed plaintiff.

If you find that in the exercise of reasonable care, defendant UPS would not have known of the harassing conduct, or that UPS used reasonable care to prevent it, you will find that UPS is not liable.

Plaintiff also claims that defendant UPS retaliated against her because she opposed a practice made unlawful by New York City Human Rights Law. She alleges that she was transferred to a less desirable location, and that she was eventually fired. Defendant UPS asserts that plaintiff was transferred for her benefit; and that she was terminated for falsifying records and authorizing a breach of security. To establish a claim of retaliation, plaintiff must prove by a preponderance of the evidence that:

(1) She engaged in conduct protected by the New York City Human Rights Law;

Activity that is protected by the New York City Human Rights Law includes opposing any practice forbidden under that law; filing a complaint; testifying or assisting in a proceeding under the NYCHRL; commencing a civil action alleging unlawful or discriminatory practices under the NYCHRL; and assisting in an investigation commenced under the NYCHRL. Protected activities include informal as well as formal complaints and complaints to management concerning discriminatory practices.

(2) Defendant UPS was aware of the conduct;

(3) Defendant UPS thereafter took some adverse employment action against her which was reasonably likely to deter a person from engaging in protected activity;

The adverse employment action need not be firing or a materially adverse change in conditions of employment. Rather, it is for you to determine if the adverse employment action was something which would have a chilling effect on persons. And,

(4) There was a causal connection between her participation in the protected activity and the adverse employment action.

A causal connection may be established either (1) indirectly, by showing that the protected activity was followed closely by discriminatory treatment, or through other circumstantial evidence such as disparate treatment of fellow employees who engaged in similar conduct; or (2) directly, through evidence of retaliatory animus directed against the plaintiff by the defendant. However, the mere fact that protected activity may have been followed by adverse action is not enough to establish that retaliation occurred. You may find that defendant retaliated against plaintiff for complaining about sexual harassment, even if you do not return a verdict in plaintiff's favor on her claim for sexual harassment. It is possible for an employee to complain that specified conduct amounts to discrimination and

complain about that specific conduct, even when that conduct would not actually qualify as discrimination under the law. If the employee protests and is retaliated against by the employer, retaliation would exist so long as plaintiff had a reasonable, good faith basis to believe that she was subjected to discrimination. Defendant UPS has presented evidence that plaintiff was transferred for legitimate reasons, and that her eventual termination was based on non-retaliatory reasons. Plaintiff has the burden of proving by a preponderance of the evidence that defendant UPS's asserted explanation for her termination is not true, and is merely a pretext for impermissible retaliation.

If you find that defendant UPS's stated reasons for plaintiff's discharge was "pretextual," that is, they were not the real reasons for the discharge, then you may infer or not infer, as you choose, that the pretext was designed to conceal retaliation. If you believe the reasons given by UPS for Ms. Rivera's discharge and you find that the decision was not motivated by retaliation, you will find in favor of defendant UPS on the charge of retaliation.

The Court submitted a verdict sheet to the jury containing the following questions, which the jury answered, as indicated:

(1) Was plaintiff DENISE RIVERA subjected to gender discrimination under the New York City Human Rights Law by harassing conduct? "Yes." (5 of 6).
(2) Was the harassing conduct, as found in Question 1, done by an employee with managerial or supervisory responsibility over the plaintiff DENISE RIVERA? "No." (6 of 6).
(3) Did defendant UNITED PARCEL SERVICE, INC. know about the harassing conduct, as found in Question 1, and acquiesce to it, or fail to take immediate and appropriate corrective action? "Yes." (6 of 6).
(4) Should defendant UNITED PARCEL SERVICE, INC. have known of the harassing conduct, as found in Question 1, and failed to exercise reasonable care to prevent it? (Not answered pursuant to Court's instructions).
(5) Did defendant UNITED PARCEL SERVICE, INC. retaliate against plaintiff DENISE RIVERA in violation of the New York City Human Rights Law? "Yes." (6 of 6).
(6) Please enter the dollar amount that would fairly and adequately compensate the plaintiff DENISE RIVERA for any loss of back pay, which is the period from the date her employment ended with defendant UNITED PARCEL SERVICE, INC., until the date of this verdict. "$420,000." (6 of 6)

(7) Please enter the dollar amount that would fairly and adequately compensate plaintiff DENISE RIVERA for any loss of front pay, which is the period from the date of this verdict into the future. "$310,000." (6 of 6)
(8) Please enter the dollar amount that would fairly and adequately compensate plaintiff DENISE RIVERA for emotional distress, pain and suffering caused by defendant UNITED PARCEL SERVICE, INC. "$300,000." (6 of 6)
(9) Is the plaintiff DENISE RIVERA entitled to an award of punitive damages: "Yes." (6 of 6)

After a separate trial on punitive damages, the jury awarded $300,000 as exemplary damages.

Argument

The Finding of Sexual Harassment

The defendant argues that the finding of sexual harassment is unsupported by the evidence, first, because Mr. Devany's actions were "exclusively personal," occurring outside of UPS premises and outside of normal business hours. Defendant UPS argues that the plaintiff failed to establish a connection between the alleged harassing conduct which occurred outside of the workplace by Mr. Devany, and plaintiff's employment.

Secondly, defendant maintains that the conduct of Mr. Devany was not unwelcome, since plaintiff herself admittedly called Mr. Devany numerous times outside of business hours, late at night and on weekends, both before and after she complained of his conduct. In addition, plaintiff frequently drove Mr. Devany home after work, both before and after her complaint. Further, when Devany appeared at her apartment, she instructed the doorman to permit him to enter the building; opened the door to him; and allowed him to sleep on her couch. Defendant thus characterizes the plaintiff as a "willing participant" in a relationship with Mr. Devany. (*See Harris v. Franziska*

Racker Centers, Inc., 340 F. Supp.2d 225, 233 [N.D.N.Y. 2004].)

Third, defendant argues that the rumors concerning plaintiff's conduct with other drivers was triggered by plaintiff's own conduct, and thus she was not treated less well than other employees "because of her gender." Further, defendant argues that statements that employees are engaging in consensual relationships, albeit embarrassing or humiliating, do not constitute sexual discrimination.

Plaintiff asserts that because the defendant UPS unsuccessfully moved for a directed verdict at trial, the Court's prior rulings constitute the "law of the case," precluding the present motion. In any event, plaintiff maintains that the defendant's characterization of the evidence is skewed, ignoring crucial evidence favoring plaintiff's case. Plaintiff argues that defendant ignores the plaintiff's testimony (1) that she felt compelled to comply with Devany's advances or face repercussions at work, and (2) that his inappropriate verbal comments also occurred at work, in the presence of other drivers, causing a loss of respect for the plaintiff. Further, plaintiff argues that the sexually-charged and inappropriate comments in the workplace created a hostile environment for her, despite the fact that the comments were also experienced by men.

Vicarious Liability

UPS also argues that it is not vicariously liable for the conduct of Mr. Devany or the drivers who were "spreading rumors" because (1) Mr. Devany was not a managerial employee; (2) Mr. Coscia took prompt action to address the plaintiff'sz concerns, telling him not to call plaintiff, and plaintiff made no further complaint; and, (3) Mr. Beards took prompt action when notified of the "rumors."

Plaintiff maintains that the evidence amply demonstrated that defendant UPS knew of the harassing conduct and failed to take immediate and appropriate action. In this regard, plaintiff

argues that Mr. Devany's conduct was open and obvious; that the complaint to Mr. Coscia resulted in plaintiff being sent to The Remote; that manager George Finelli was aware of widespread rumors concerning plaintiff's relationships with drivers, which he related to the plaintiff; that plaintiff was placed under the supervision of Robert Weaver, who concededly "thought of Devany as a son," and knew of the plaintiff's complaints.

The Finding as to Retaliation

With respect to the claim of retaliation, defendant UPS maintains that because none of the underlying conduct of which plaintiff complained, based on the arguments advanced above, constitute sexual harassment, and thus there could be no retaliation, as plaintiff did not complain of "any practice forbidden" by the NYCHRL. (Admin. Code § 8-107[7]). In any event, defendant contends that the various job reassignments given to the plaintiff in 2006 and 2007 did not impact her salary or other benefits, and did not constitute adverse employment actions. *(See Chin v. New York City Housing Authority*, (106 A.D.3d 443, 965 N.Y.S.2d 42 [1st Dept. 2013].) Lastly, defendant maintains that the termination of plaintiff's employment, sixteen months after her complaint to Coscia and seven months after her complaint to Beards, was wholly unrelated to the conduct she alleged as the basis of this action, and was imposed by an actor who had no knowledge of, and was not acting in relation to the plaintiff's earlier complaints.

Plaintiff, on the other hand, contends that her complaints clearly constituted complaints of sexual harassment, and that the reassignment of the plaintiff to "undesirable locations," and her eventual termination from employment, clearly constituted retaliation. Plaintiff contends that the transfers occurred almost immediately after the plaintiff made complaints regarding her employment conditions, suggesting that there was a causal relation between the complaints and the transfers.

Further, plaintiff asserts that after she was assigned to report to Mr. Weaver (who thought of Devany "as a son") in 2007, he recommended her termination on insubstantial charges.

Compensatory Damages

As to the award of $300,000 in compensatory damages, defendant notes that the plaintiff did not begin counseling for her alleged mental anguish until two years after she left UPS, and then, she attended counseling only sporadically. Moreover, defendant contends that the need for counseling was caused by events in her life unrelated to UPS, including the break-up of her marriage, domestic violence, and her termination from employment at Binder & Binder in March 2009, causing her to move into a homeless shelter with her children.

Plaintiff asserts that the award was supported by the evidence, and within acceptable ranges, citing *Albuino v. City of New York* (67 A.D.3d 407, 409 [1st Dept. 2009]) and *McIntyr v. Manhattan Ford, Lincoln-Mercury, Inc.* (256 AD.2d 269 [1st Dept. 1998].)

Economic Damages

As to economic damages, at the time of her termination in July 2007, plaintiff was earning $75,000 annually. Defendant argues that although plaintiff was terminated from Binder & Binder, she grieved that decision and was offered continued employment, which she declined. Defendant thus argues that plaintiff's damages should cease as of March 2009 based on her failure to mitigate. Moreover, defendant contends that plaintiff's back pay could not have exceeded $307,750, taking into account monies she made in other jobs, the difference between her pay at UPS and her pay at Binder & Binder, and amounts received in unemployment benefits. Defendant thus maintains that back pay was excessive by at least $112,250.

Plaintiff counters that the defendant's calculations did not take into account raises or bonuses.

With regard to front pay, defendant argues that the award for ten years could be no more than $300,000, as this was the amount requested by the plaintiff in summation, and thus should be reduced by $10,000.

Punitive Damages

As to punitive damages, the defendant argues that none of the actors involved in the various decision-making positions concerning the plaintiff had a sufficiently high level of management authority so as to bind the defendant, and that even if they did, the conduct alleged did not warrant the imposition of punitive damages.

Plaintiff's maintains that UPS's policy against discrimination "was worth nothing more that the paper it was written on and that, in reality, UPS paid no attention to the human rights laws in its workplace."

Standard of Review

Sufficiency of the Evidence

The CPLR 4404 standard for setting aside a verdict as insufficient is whether there exists a "valid line of reasoning and permissible inferences which could possibly lead rational [people] to the conclusion reached by the jury on the basis of the evidence presented at trial." (*Cohen v. Hallmark Cards*, 45 N.Y.2d 493, 499, 382 N.E.2d 1145, 410 N.Y.S.2d 282 [1978]; *Guthrie v. Overmyer*, 19 A.D.3d 1169, 797 N.Y.S.2d 203 [4th Dept. 2005]).

Weight of the Evidence

To set aside the verdict as contrary to the weight of the evidence, the defendant is required

to show that the evidence so preponderates in its favor that the verdict could not have been reached on any fair interpretation of the evidence. (*Lolik v. Big V Supermarkets*, 86 NY2d 744, 746, 655 N.E.2d 163, 631 N.Y.S.2d 122 [1995]). "The question of whether a verdict is against the weight of the evidence is discretion-laden, and the critical inquiry is whether the verdict rested on a fair interpretation of the evidence" (*Gartech Elec. Contr. Corp. v Coastal Elec. Constr. Corp.*, 66 AD3d 463, 480, 887 N.Y.S.2d 24 [1st Dept 2009], *appeal dismissed* 14 N.Y.3d 748, 925 N.E.2d 84, 898 N.Y.S.2d 81 [2010]). "[I]n the absence of an indication that substantial justice has not been done, a litigant is entitled to the benefit of a favorable verdict." *(Cholewinski v. Wisnicki*, 21 AD3d 791, 801 N.Y.S.2d 576 [1st Dept 2005].) Moreover, in deciding this motion the evidence supporting the verdict is entitled to every favorable inference. (*Broadie v. St. Francis Hosp.*, 25 A.D.3d 745, 807 N.Y.S.2d 656 [2nd Dept. 2006].) "It is for the jury to make determinations as to the credibility of the witnesses, and great deference in this regard is accorded to the jury, which had the opportunity to see and hear the witnesses" (*Exarhouleas v Green 317 Madison, LLC*, 46 AD3d 854, 855, 847 N.Y.S.2d 866 [2d Dept 2007]). In determining the motion, "the trial court must afford the party opposing the motion every inference which may properly be drawn from the facts presented, and the facts must be considered in a light most favorable to the non-movant" (*Szczerbiak v Pilat*, 90 NY2d 553, 556, 686 N.E.2d 1346, 664 N.Y.S.2d 252 [1997]).

The New York City Human Rights Law

The Local Civil Rights Restoration Act of 2005 was enacted by the City Council of the City of New York "to clarify the scope of New York City's Human Rights Law," which, the Council found "has been construed too narrowly to ensure protection of the civil rights of all persons covered by the law." (Local Law No. 85, 2005, § 1.), among other things, amended Administrative Code §

8-130 to read: "The provisions of this title [i.e., the New York City Human Rights Law] 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." The application of the Local Civil Rights Restoration Act requires the Court to construe the City's Human Rights Law, broadly in favor of discrimination plaintiffs, to the extent that such a construction is reasonably possible. *Albunio v. City of New York*, 16 N.Y.3d 472, 947 N.E.2d 135, 922 N.Y.S.2d 244 (2011) (in an Administrative Code § 8-107 (7) retaliation case, upholding jury verdict that plaintiff was retaliated against for "opposing" discrimination).

In *Faragher v. City of Boca Raton,* (524 US.. 775, 118 S. Ct. 2275, 141 L. Ed. 2d 662 [1998]) and *Burlington Industries, Inc. v, Ellerth,* (524 U.S. 742, 118 S. Ct. 2257, 141 L. Ed. 2d 633 [1998]), the United States Supreme Court recognized an affirmative defense in Title VII sexual harassment cases where the employer shows

that (1) no tangible employment action such as discharge, demotion, or undesirable reassignment was taken as part of the alleged harassment; (2) the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior; and, (3) the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise. That defense may mitigate damages in a case brought under the New York City Human Rights Law, but does not bar liability. (*Zakrzewska v. New School*, 14 N.Y.3d 469, 479-480, 928 N.E.2d 1035, 902 N.Y.S.2d 838 [2010]; *McRedmond v. Sutton Place Rest. & Bar, Inc.*, 95 A.D.3d 671, 945 N.Y.S.2d 35 [1st Dept. 2012] [NYCHRL imposes strict liability on employers for the acts of managers and supervisors].)

Specifically, the NYCHRL (Administrative Code art. 8), imposes liability on the employer

for sexual harassment in three instances:

> (1) where the offending employee exercised managerial or supervisory responsibility, or[6]
>
> (2) where the employer knew of the offending employee's unlawful discriminatory conduct and acquiesced in it or failed to take immediate and appropriate corrective action, or
>
> (3) where the employer should have known of the offending employee's

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[6]It was sharply contested at trial whether or not Mr. Devany, who, like the plaintiff, held the job title "on-car supervisor," was a managerial employee. Plaintiff attempted to show that Mr. Devany was a de facto manager because he was the "lead supervisor" and had some alleged degree of oversight over the other on-car supervisors. The NYCHRL does not define "supervisor" or "managerial or supervisory responsibility," and the standard for determining, under the NYCHRL, who should be considered a supervisor is not well settled. Under federal law an employer may be vicariously liable for an employee's unlawful harassment only when the employer has empowered that employee to take tangible employment actions against the victim, *i.e.*, to effect a "significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits." (*Vance v. Ball State Univ.*, 133 S. Ct. 2434, 2443, 186 L. Ed. 2d 565, 2013 U.S. LEXIS 4703 [2013]). The Supreme Court rejected the reasoning of some New York federal courts which adopted a broader definition, one derived in part from the Equal Employment Opportunity Commission (EEOC) enforcement guidelines, which found supervisory authority where an employee "has authority to direct the employee's daily work activities.'" *(See Heskin v InSite Adver., Inc.*, 2005 WL 407646, 2005 U.S. Dist LEXIS 2546, [S.D.N.Y. 2005]). However, this broader definition has been held "more compatible with the City law's formulation 'managerial or supervisory responsibility.'" (*O'Neil v. Roman Catholic Diocese of Brooklyn*, 31 Misc 3d 1219[A],927 N.Y.S.2d 818, 2011 NY Slip Op 50738[U], *affirmed on other grounds*, 98 A.D.3d 485, 949 N.Y.S.2d 447 [2d. Dept. 2012]; *see also*, *Cajamarca v. Regal Entertainment Group*, 2013 N.Y. Misc. LEXIS 4851, 2013 NY Slip Op 32615[U] [N.Y. Sup. Ct. Oct. 17, 2013]. As federal precedent "is not binding in light of the remedial purposes of the City statute," the more liberal standard should apply. *(Fornuto v Nisi*, 84 AD3d 617, 617, 923 N.Y.S.2d 493 [1st. Dept. 2011]; *see Williams*, 61 AD3d, at 66-67) (interpretations of similar federal provisions should be viewed "'as a floor below which the [NYCHRL] cannot fall, rather than a ceiling above which the local law cannot rise'" [citation omitted]). The jury ultimately made a unanimous finding that Mr. Devany was not a managerial employee. The Court finds no basis to disturb the jury's conclusion in this regard.

unlawful discriminatory conduct yet failed to exercise reasonable diligence to prevent it. Administrative Code of the City of NY § 8-107(13)(b)(1)-(3). Regarding the first two instances, an employer's anti-discrimination policies and procedures may be considered only in mitigation of the amount of civil penalties or punitive damages recoverable in a civil action. Administrative Code of the City of NY § 8-107(e). As to the third instance, mitigation does not apply. As a result, even in cases where mitigation applies, compensatory damages, costs, and reasonable attorneys' fees are still recoverable.

With respect to sexual harassment by a nonmanagerial employee, the NYCHRL prohibits, *inter alia*, discrimination on the basis of sex by employers. (*See* Administrative Code of City of NY § 8-107 [1] [a]). Where an employee complains of sex discrimination, which includes sexual harassment (Ssee Williams v New York City Hous. Auth., 61 AD3d 62, 75, 872 NYS2d 27 [2009]), the employer will be held liable, inter alia, where "the employer should have known of the employee's or agent's discriminatory conduct and failed to exercise reasonable diligence to prevent such discriminatory conduct" (Administrative Code of City of NY § 8-107 [13] [b] [3]; *see, O'Neil v. Roman Catholic Diocese of Brooklyn*, 98 A.D.3d 485, 949 N.Y.S.2d 447 [2d. Dept. 2012]).

Discussion

Prior Rulings Not Law of the Case

Plaintiff asserts that because the defendant UPS unsuccessfully moved for a directed verdict at trial, the Court's prior rulings constitute the "law of the case," precluding the present motion. However, a directed verdict in favor of the defendant at trial would have been warranted only if "there [was] no rational process by which the trier of fact could base a finding in favor of the nonmoving party." (*Szcerbiak v. Pilat*, 90 N.Y.2d 553, 556, 664 N.Y.S.2d 252 [1997].) The Court's

trial rulings held only that there existed a rational process by which the jury could find in favor of the plaintiff, and thus applied a different standard from that at issue here – the weight of the evidence.

The Finding of Sexual Harassment

Under the NYCHRL, it is unlawful for an employer to fire or refuse to hire or employ, or otherwise to discriminate in the terms, conditions and privileges of employment, because of, as relevant here, an individual's sex or gender. (Administrative Code § 8-107 [1][a].) As under Title VII, sexual harassment which results in a hostile or abusive work environment is a form of gender discrimination prohibited by the NYCHRL. (*See Williams v New York City Hous. Auth.*, 61 A.D.3d 62, 75, 872 N.Y.S.2d 27 [1st Dept 2009]).

The NYCHRL was intended to be more protective than its state and federal counterparts and its provisions accordingly must be liberally construed to accomplish "the uniquely broad and remedial purposes" of the law. (Administrative Code § 8-130; *see Williams*, 61 AD3d at 66.) In contrast to the standards applied in Title VII cases, to establish sexual harassment under the NYCHRL, a plaintiff need not establish that the conduct was severe or pervasive, only that "she has been treated less well than other employees because of her gender" and that the conduct consisted of something more than "petty slights or trivial inconveniences." In *Williams v New York City Hous. Auth.* (61 AD3d 62, 872 NYS2d 27 [1st Dept. 2009]), the First department concluded that the standard does not apply to the NYCHRL. In *Williams* that, for purposes of hostile workplace environment claims brought under the NYCHRL, "... the primary issue for a trier of fact in harassment cases, as in other terms and conditions cases, is whether the plaintiff has proven by a preponderance of the evidence that she has been treated less well than other employees because of her gender." (*See also Hernandez v. Kaisman*, 103 A.D.3d 106, 957 N.Y.S.2d 53 [1st Dept. 2012]).

Defendant UPS argues that the plaintiff failed to establish a connection between the alleged harassing conduct which occurred outside of the workplace by Mr. Devany, and plaintiff's employment. Yet defendant ignores the testimony of inappropriate conduct and comments which were pervasive in the workplace, as well as the sexually-charged rumors which were permitted to circulate concerning the plaintiff. Plaintiff argues, and the Court finds, that there was ample evidence that the sexually-charged and inappropriate comments in the workplace created a hostile environment for her, despite the fact that the comments were also experienced by men. As plaintiff was the subject of sexually charged comments and rumors, it can hardly be said that she was not treated different because of her gender – albeit certain UPS drivers were also implicated as having had an intimate relationship with the plaintiff.

Defendant maintains that the conduct of Mr. Devany was not unwelcome. While there was much conflicting evidence on this subject, the jury had ample basis to find that the plaintiff attempted to both appease and put off Mr. Devany at the same time, in an effort to avoid adverse employment consequences. As Devany was a popular employee and supervisor at UPS, plaintiff might well have believed that cutting off all ties to him would incur his wrath.

Defendant argues that the rumors concerning plaintiff's conduct with other drivers was triggered by plaintiff's own conduct, and thus she was not treated less well than other employees "because of her gender." There are, indeed, cases holding that statements that employees are engaging in consensual relationships, albeit embarrassing or humiliating, does not constitute sexual discrimination. "Even if embarrassing or even humiliating, a statement that an employee is having a consensual relationship with a co-worker cannot be construed as discrimination or harassment on the basis of sex absent some additional showing, such as that the plaintiff was singled out for such comments because of his or her gender." (*DelleFave v. Access Temporaries, Inc.*, 2001 U.S. Dist.

LEXIS 97 [S.D.N.Y. 2001]) But here, the rumors concerning the plaintiff were not the sole source of harassment, as the rumors were joined with Mr. Devany's conduct, as well as evidence of sexual comments made by other drivers. This case is accordingly more akin to *Townsend v. New York State Dep't of Corr. & Cmty. Supervision* (2012 U.S. Dist. LEXIS 140745 [W.D.N.Y. Sept. 28, 2012]), in which the court denied summary judgment where plaintiff averred that hostile employment actions began after she declined a supervisor's sexual advances, and other persons allegedly made, and permitted others to make, comments indicating that plaintiff was sexually promiscuous, and that she was attempting to "sleep her way to the top." There was no indication that similar comments were made about males. Accordingly, "in the predominantly male setting in which the parties worked," these comments were sufficient to suggest that they were motivated by plaintiff's gender.

Vicarious Liability

UPS argues that it is not vicariously liable for the conduct of Mr. Devany or the drivers who were "spreading rumors" because immediate and appropriate corrective action was taken.

Nevertheless, the jury could find, consistent with the evidence, that defendant UPS knew of the harassing conduct, and that the job transfers were not "immediate and appropriate action," but were, in fact, punitive. In this regard, the job transfers could well be construed as punishment for the plaintiff's complaints, especially as the plaintiff was eventually placed under the supervision of Robert Weaver, who concededly "thought of Devany as a son," and knew of the plaintiff's complaints.

The Finding as to Retaliation

The Court rejects defendant UPS's argument that the underlying conduct of which plaintiff

complained did not constitute sexual harassment, and thus, there is a basis for a retaliation claim based upon plaintiff's complaint of "any practice forbidden" by the NYCHRL. (Admin. Code § 8-107[7].) This Court further rejects defendant's argument that the various job reassignments given to the plaintiff in 2006 and 2007 did not impact her salary or other benefits, and did not constitute adverse employment actions. To the extent that defendant relies on *Chin v. New York City Hous. Auth.* (*supra*, 106 A.D.3d 443, 965 N.Y.S.2d 42 [1st Dept. 2013]) as standing for the proposition that a lateral reassignment can not constitute retaliation, defendant's reliance is misplaced. In *Chin*, plaintiff alleged that her transfer from headquarters in downtown Manhattan to a field office in Harlem was discriminatory, but according to the First Department, "she failed to raise an issue of fact whether the legitimate, nondiscriminatory reasons proffered therefor by defendant were merely a pretext for discrimination." (*Id.* at 444.) Here, plaintiff adduced sufficient evidence for the jury to find that the transfers were a pretext.

As to her termination, plaintiff similarly adduced evidence that her termination was a pretext, as it was based on evaluations by Weaver, who considered Devany "a son." The jury was thus entitled to find that in 2007, he recommended her termination on insubstantial charges as a means of retaliation.

Compensatory Damages

The award of $300,000 in damages for emotional distress was consistent with the evidence, and not excessive. (*Albuino v. City of New York*, 67 A.D.3d 407, 409, 889 N.Y.S.2d 4 [1st Dept. 2009] [jury's determination to award $491,706 in compensatory damages was supported by the evidence of major reactive depression was that plaintiff was being stereotyped as a pedophile, and the damage to his reputation and professional career caused by his being perceived as a gay man and

stereotyped as a child molester], *affirmed by, in part* 16 N.Y.3d 472, 947 N.E.2d 135, 922 N.Y.S.2d 244 [2011]; *Worthen-Caldwell v. Special Touch Home Care Servs., Inc.*, 78 A.D.3d 822, 911 N.Y.S.2d 122 [2d Dept. 2010] [reducing verdict as to damages for sexual harassment for past pain and suffering from the principal sum of $1,300,000 to the principal sum of $200,000 and as to damages for future pain and suffering from the principal sum of $560,000 to the principal sum of $50,000]).

Economic Damages

As to economic damages, at the time of her termination in July 2007, plaintiff was earning $75,000 annually. Defendant argues that because plaintiff was terminated from subsequent employment with Binder & Binder, the jury's award should be reduced. Plaintiff counters that the defendant's calculations did not take into account raises or bonuses.

There is a duty to mitigate damages on the part of the plaintiff in a gender discrimination action. "[A]n award of front pay in lieu of reinstatement does not contemplate that a plaintiff will sit idly by and be compensated for doing nothing, because the duty to mitigate damages by seeking employment elsewhere significantly limits the amount of front pay available." (*Whittlesey v Union Carbide Corp.*, 742 F.2d 724, 728 [2d. Cir. 1984].) New York courts have recognized a duty to mitigate under the New York State Human Rights Law. (*See Rio Mar Rest. v New York State Div. of Human Rights*, 270 A.D.2d 47 [1st Dept. 2000].) At least one case has recognized a duty to mitigate under the NYCHRL. (*McIver v. Cooperative Centrale Raiffeisen Boerenleenbank B. A.*, 2009 N.Y. Misc. LEXIS 5565, 2009 NY Slip Op. 32472[U] [N.Y. Sup. Ct. Oct. 21, 2009].)

The burden of proof as to mitigation is on the defendant. The employer "bear[s] the burden of proving that the complainant did not make a diligent effort to mitigate damages." (*Matter of State*

Div. of Human Rights v North Queensview Homes, 75 A.D.2d 819, 821, 427 N.Y.S.2d 483 [2d Dept. 1980]; *see also Matter of New York State Div. of Human Rights v Wackenhut Corp.*, 248 A.D.2d 926, 670 N.Y.S.2d 134 [4th Dept 1998].) The employer must also show "the amount by which . . . available substitute employment would have mitigated [plaintiff's] damages." (*Matter of Northeast Cent. School Dist. v Webutuck Teachers Assn.*, 121 A.D.2d 544, 545, 503 N.Y.S.2d 603 [2d Dept. 1986].)

Where a plaintiff obtains equivalent employment elsewhere and quits without sufficient reason, the backpay award must be offset by the amount the plaintiff would have earned had he kept the job. This rule also applies where the plaintiff engages in willful misconduct in order to be fired. (*Strauss v. Microsoft Corp.*, 1995 U.S. Dist. LEXIS 7433 [S.D.N.Y. 1995]). But the burden remains on the defendant employer to prove a failure to mitigate by demonstrating that substantially equivalent work was available, and that the claimant did not exercise reasonable diligence to obtain it.

The Court agrees with the defendant's arguments and conclusions that the award rendered by the jury deviated from the reasonable evidence in this case, and did not take into account the amounts which plaintiff did earn, as well as the salary which she was earning and lost due to her own willful conduct. The award for back pay must be reduced by $112, 250.

Similarly, the award for front pay must be be reduced by $10,000, as the amount awarded was not based on credible evidence, and in fact exceeded the amount demanded by the plaintiff's counsel in summation.

Punitive Damages

As to punitive damages, the jury's assessment in the amount of $300,000 was, again,

supported by the evidence and not excessive. (*McIntyr v. Manhattan Ford, Lincoln-Mercury, Inc.*, 256 A.D.2d 269, 682 N.Y.S.2d 167 [1st Dept. 1998] [awarding $1.5 million in punitive damages in sexual harassment action]; *Walsh v. Covenant House*, 244 A.D.2d 214, 664 N.Y.S.2d 282 [1st Dept. 1997] [reinstating claim for punitive damages]).

Motion for Attorney's Fees

Plaintiff separately moves for attorneys' fees pursuant to NYC Human Rights Law 8-502(f), and pre-judgment interest pursuant to CPLR 5004. Brian Heller seeks fees for 606 hours at a billing rate of $485, amounting to $293,910. Davida S. Perry, Esq., seeks fees for assisting Mr. Heller at trial, commencing with preparation for voir dire in November, 2013. She states that she expended 196 hours at a rate of $685, representing a total fee of $134,260. In addition, they seek costs of $21,575.50.

In opposition, the defendant contends that the hourly rates sought by the plaintiff's attorneys are not reasonable, noting that much lower hourly rates – i.e., $225 for Mr. Heller, and $350 for Ms. Perry – were awarded by the Southern District Federal Court in *Insigna v. Cooperatieve Centrale Raiffeisen Boerenleenbank B.A.* (478 F. Supp. 2d 508, 510 [S.D.N.Y. 2007]). Further, defendant contends that fees should be awarded under NYC Human Rights Law 8-502(f) only for work performed after the commencement of litigation. In addition, the defendant points to numerous entries on the plaintiff's attorneys' billing records which do not specifically identify the work performed (i.e., "Spoke with Denise," or "Discussed Rivera with BH and MS"), or which are largely clerical in nature (i.e., leaving phone messages in an unsuccessful attempt to contact the plaintiff), all of which amounts to approximately 13 hours of time. The defendant contends that Mr. Heller's hourly rate should be reduced to $400 from $485, and his 606 hours reduced to a total of 571 hours,

for a total fee of $228, 736 for his work on the case. Similarly, the defendant contends that Ms. Perry's fee should be reduced to $57,575 (164.5 hours at $350 per hour).

The Court finds that Ms. Perry, while a capable attorney, played a subordinate role in the trial of this action. Without disparaging her professionalism, her ability as an attorney, or her experience, the simple fact is that Mr. Heller was primarily responsible for arguing and presenting the case, both to the jury and in the numerous conferences and arguments taken outside of the presence of the jury. This Court further agrees with the defendant's assessment with respect to the proper hourly rates and time expended in this action. Further, this Court notes that the request for costs contains charges for improper items, such as electronic legal research ($4,715.28) and meals ($480.86). Therefore, the costs will be reduced to $16,379.46.

The Court, taking into account all of the applicable considerations, awards a total fee inclusive of costs of $347,354.46 (Mr. Heller's fee being calculated as $450/hour at 571 hours, amounting to $256,950; Ms. Perry's fee being calculated as $450/hour at 164.5 hours, amounting to $74,025; and cumulative fees amounting to $330,975). (*See Fornuto v. Nisi*, 84 A.D.3d 617, 923 N.Y.S.2d 493 [1st Dept. 2011] [Administrative Code of City of NY § 8-502 [f] provides that the court, in its discretion, may award the prevailing party costs and reasonable attorney's fees; a case which involves a jury verdict warrants the award of "some fees."]).

With regard to the pre-judgment interest pursuant to CPLR 5004, "decision whether to award prejudgment interest rests entirely within the trial court's discretion." (*National Communs. Ass'n v. AT&T*, 1999 U.S. Dist. LEXIS 6318 [S.D.N.Y. Apr. 29, 1999]). Furthermore, "since Title VII authorizes interest awards as a normal incident of suits against private parties, and since Congress has waived the Postal Service's immunity from such awards," it follows that plaintiffs may recover prejudgment interest awards as part of the backpay remedy in actions brought under Title VII."

(*Loeffler v. Frank*, 486 U.S. 549, 558 [1988]). In its determination of whether or not to award prejudgment interest, a Court must consider the following factors: "(i) the need to fully compensate the wronged party for actual damages suffered, (ii) considerations of fairness and the relative equities of the award, (iii) the remedial purpose of the statute involved, and/or (iv) such other general principles as are deemed relevant by the court." (*Wickham Contracting Co. v. Local Union No. 3, International Brotherhood of Electrical Workers*, 955 F.2d 831, 833-834 [2d Cir. 1992]).

In the instant case, the Court declines to award pre-judgment interest as the reduced backpay award is fair and fully compensates the Plaintiff.

CONCLUSION

Accordingly, it is hereby

ORDERED that defendant's motion is granted to the extent of ordering a new trial on damages for future pain and suffering, unless plaintiff stipulates to a reduced award of $307,750 for back pay, and $300,000 for front pay, with the verdict otherwise unchanged, within 30 days after service of a copy of this order with notice of entry, and it is further

ORDERED that plaintiff is awarded attorney's fees inclusive of costs and disbursements of $347,354.46.

Dated: December 24, 2015

SHARON A. M. AARONS, J.S.C.