STATE OF NEW JERSEY
OFFICE OF THE ATTORNEY GENERAL
DEPARTMENT OF LAW &PUBLIC SAFETY
DIVISION ON CIVIL RIGHTS
OAL DOCKET NO. CRT 00208-16
DCR DOCKET NO. EQ29WB-64851

Malika Whitfield, Complainant, v. Statewide Roadside Assistance and Neal Prasad, Respondents.	)	Administrative Action **Final Decision & Order**

Malika M. Whitfield, complainant, *pro se*

Megan Harris, Deputy Attorney General for the New Jersey Division on Civil Rights (Christopher S. Porrino, Attorney General of New Jersey)

Angela Vidal, Esq., for Respondents Statewide Roadside Assistance and Neal Prasad

BY THE DIRECTOR:

This matter arises from an employment discrimination complaint filed by Malika Whitfield (Complainant), in which she alleged that Stateside Roadside Assistance and its owner Neal Prasad (collectively "Respondents") violated the New Jersey Law Against Discrimination (LAD) by subjecting her to a sexually hostile work environment and constructively discharging her from employment.

On June 19, 2017, the assigned Administrative Law Judge (ALJ) issued an initial decision concluding that Respondents had violated N.J.S.A. 10:5-1 to -49 and recommending remedies.[1] After an independent evaluation of the ALJ's decision and the record, including the exceptions and replies of the parties, the Director adopts in part and modifies in part the ALJ's decision, as set forth below.

---

[1] The citation "ID" will be used to refer to the ALJ's initial decision. The citations "CE" and "RE" will refer to Complainant's and Respondents' exceptions and replies to the initial decision.

Procedural History

On September 19, 2014, Complainant filed a verified complaint with the Division on Civil Rights (DCR) asserting claims of a hostile work environment and constructive discharge against her former employer and the company's owner/manager. Respondents filed their joint answer to the verified complaint on October 13, 2014. On April 29, 2015, DCR issued a finding of probable cause with respect to both claims. DCR's attempts to resolve the matter through mandatory conciliation per N.J.A.C. 13:4-9.4(a) were unsuccessful. On December 28, 2015, the matter was referred to the Office of Administrative Law (OAL) for a hearing pursuant to N.J.A.C. 13:4-11.1(b).

On March 30, 2016, the ALJ held a prehearing conference on this matter. On May 12, 2016, the ALJ held a second conference during which the ALJ announced a discovery schedule. On September 6, 2016, the ALJ set November 29, 2016 and December 2, 2016 as dates for the plenary hearing.

During the November 29, 2016 hearing, the prosecuting deputy attorney general (DAG) informed the ALJ that Respondents' responses to Complainant's May 20, 2016 discovery requests were six months overdue and, as a result, Complainant's ability to prepare for the plenary hearing had been materially compromised. Complainant moved to convert the November 29, 2016 plenary hearing to a proof hearing on that basis. The ALJ denied that request. The ALJ ordered Respondents to provide discovery by November 30, 2016, and rescheduled the plenary hearing for January 13, 2017.

All parties appeared for the January 13, 2017 hearing. The DAG called Complainant and another female witness, former Statewide dispatcher Odell Morris, as witnesses. Respondents' counsel cross-examined both women. The ALJ refused to allow the DAG to enter into evidence the certification of a third witness, former Statewide bookkeeper Christine Kelly. The ALJ ruled that Complainant must produce Ms. Kelly as a witness on a second hearing day if she wanted to rely on her testimony. Respondents' counsel stated that her clients' case would consist of the testimony of former Statewide mechanic Norman Scank, Mr. Prasad, and his wife Kim Prasad. Respondent called Mr. Scank who testified. At the conclusion of Mr. Scank's testimony, the ALJ adjourned the proceedings to January 27, 2017, during which Ms. Kelly, and Mr. and Mrs. Prasad were scheduled to testify.

On January 27, 2017, as the second day of the proceeding was set to begin, the ALJ announced that Respondents' attorney had phoned her chambers that morning and informed her assistant that she would be unable to attend the hearing due to an emergent medical issue. The ALJ stated that she interpreted the call as a request for an adjournment of the day's proceedings. Respondent Prasad and his wife Kim Prasad, who were scheduled to appear as Respondents' witnesses that day, were not present. The DAG stated that her scheduled witness, Ms. Kelly, had taken time off from work to attend the hearing and may have difficulty appearing at a later date if

the ALJ granted an adjournment. For that reason, the ALJ allowed the DAG to take Ms. Kelly's testimony in Respondents' absence.

The ALJ interjected her own questions to Ms. Kelly (as she did for all other witnesses) and noted on the record the emotional toll extracted on Ms. Kelly. The ALJ told Ms. Kelly that she may need to return at a later date for Respondents' cross-examination of her testimony.[2] Before concluding the January 27, 2017 hearing, the ALJ stated that the tribunal would await an explanatory written notice from Respondents' attorney regarding her last-minute failure to appear, before deciding how to proceed, and stated that counsel would need to provide her with medical documentation of the condition that caused her absence before the ALJ would excuse Respondents' absence and re-open the proceedings for Respondents' continued participation.

On February 10, 2017, the DAG asked the ALJ to close the record and render an initial decision in view of Respondents' failure to request a continuance or submit a written explanation for their absence at the second day of hearings.

On February 23, 2017, the ALJ sent written notice to the parties that she was closing the record as of that date, noting that her assistant had attempted to reach Respondents' counsel by telephone and e-mail and had received no response. (ID2-3.). Nor had the ALJ received an explanation for Respondents' failure to appear at the second day of hearings.

On March 7, 2017, the ALJ advised the parties by letter that the tribunal had temporarily reopened the record for submission of the parties' proposed findings and conclusions of law.

On May 26, 2017, the DAG submitted proposed findings of fact, conclusions of law, and remedies, as well as a certification of DCR's attorney's fees. The DAG argued, among other things, that the record supported an emotional distress award of $75,000, and statutory penalties for the two violations—(i) hostile work environment sexual harassment and (ii) constructive discharge—totaling $20,000. The DAG copied Respondents' counsel on that submission via overnight mail.

Respondents failed to submit to the ALJ proposed findings of fact or conclusions of law. Nor did they submit any other response to the ALJ's March 7, 2017 letter.

The ALJ filed her initial decision on June 19, 2017. The DCR Director's final decision was initially due on August 3, 2017. On July 28, 2017, DCR requested a 45-day extension of that date. Pursuant to N.J.S.A. 52:14B-10(c) and N.J.A.C. 1:1-18.8, the OAL granted DCR's first request to extend the deadline to September 18, 2017. After obtaining the consent of the parties' counsel, DCR requested a second 45-day extension, which OAL granted on September 18, 2017. The Director's final decision is now due on November 2, 2017.

---

[2] In particular, the ALJ stated, "I understand that this is a little emotional for you so you don't want to have to relive this again but we have had an unusual circumstance today . . ."

The ALJ's Decision

Before issuing her findings, the ALJ noted that Respondents' counsel failed to respond to the OAL's numerous letters and phone calls requesting additional information regarding her and her clients' absence at the January 27, 2017 hearing. The ALJ wrote, "Ms. Vidal never sent anything in writing to the undersigned. My assistant called and emailed her several times and received nothing in response. To date, nothing in the form of a letter, email, or telephone call have been received from Ms. Vidal or Mr. Prasad regarding the failure to appear on the final day of hearing." (ID2-3.)

The ALJ made the following factual findings and conclusions of law. Complainant worked for Statewide Roadside Assistance between June 2013 and July 2014 as a dispatcher.[3] (ID7.) Statewide Roadside Assistance was owned by Neal Prasad. (ID7.) Mr. Prasad ran the company on a day-to-day basis and was Complainant's boss. (ID7.) On a regular basis, Mr. Prasad made inappropriate sexual comments that were either directed at Complainant or in her presence. (ID7.) On a regular basis, Mr. Prasad also asked inappropriate sexual questions to Complainant and other female employees. (ID8.) On several occasions, he inappropriately rubbed, touched, or screamed at Complainant and other female employees. (ID8.) In taking those actions, Mr. Prasad created a hostile and abusive working environment based on sex that was so severe and pervasive that it altered the employment working environment. (ID8.)

As a result of that severe and pervasive hostile working environment, Complainant quit her job. (ID8.) Complainant waited to quit her job until after she cashed her final paycheck because of Mr. Prasad's history of stopping payments on paychecks when employees announced their decision to leave. (ID8.) Complainant suffered emotional distress as a result of the hostile and abusive working conditions. (ID8.) The ALJ found that Complainant was entitled to lost wages, but did not award same because Complainant did not set forth in written form the amount of lost wages she had suffered. (ID8.)

Applying those findings of fact to the LAD, the ALJ found in favor of Complainant on both her hostile work environment claim and her constructive discharge claim. (ID11.) The ALJ ruled that "no reasonable person could be expected to tolerate this environment." (ID11.) She awarded Complainant a total of $7,500 for her pain and humiliation, and assessed a $7,500 statutory penalty against Respondent for its violation of the LAD. (ID11.) She also ruled that as a prevailing party, Complainant was entitled to an award of counsel fees. (ID11.) However, the ALJ found that the certification of counsel fees contained an insufficient description of the work completed, and asked the DAG to submit a more detailed certification or file such a certification elsewhere. (ID11.) The ALJ found that Complainant failed to provide specific details or evidence of lost wages and, therefore, did not order damages for economic loss. (ID11.)

---

[3] Complainant's testimony reflects that there was a break in her employment with Respondent, from approximately February to June, 2014.

The Parties' Exceptions

On July 31, 2017, Ms. Vidal submitted Respondents' exceptions to the initial decision. She argued that her call to the ALJ's chambers on the morning of January 27, 2017 constituted good cause for an adjournment of the hearing that nonetheless went forward in Respondents' absence and, therefore, the ALJ had committed judicial error in closing the record and rendering a decision. (RE3.) She requested that the Director reopen the plenary hearing for Respondents to present the remainder of their witnesses and cross-examine Ms. Kelly. (RE2.)

Ms. Vidal also produced a copy of a letter that she allegedly sent to the ALJ on January 30, 2017, explaining in detail the circumstances of her January 27, 2017 absence. That letter requested a trial date adjournment for after February 13, 2017, to allow her sufficient time to recover from her medical condition.

Respondents' exceptions took issue with what they viewed as the "coincidental" similarity of Ms. Kelly's testimony and Complainant's testimony (RE2), finding it suspicious that the incidents of harassment to which both testified were "identical." (RE3). Respondents' exceptions also noted a potential hearsay issue. (RE3.)[4]

Respondents' submission did not set forth the expected nature of Mr. and Mrs. Prasad's testimony, or how counsel intended to impeach the substance of Ms. Kelly's testimony, or how reopening the proceedings for Respondents' further participation would have materially altered the ALJ's decision.

Respondents' submission concludes by stating, "Respondents take exception to a decision being issued without their full participation in the hearing process, particularly since there was clearly good cause for an adjournment of the second hearing date," and requests that the Director re-open the hearing "for presentation of Respondents' case." (RE3.)

On August 2, 2017, the DAG submitted exceptions to the initial decision and a revised certification of attorneys' fees. The DAG concurred with the ALJ's findings of fact and law, but requested an upward modification of the ALJ's $7,500 statutory penalty and continued to argue that the record supported an emotional distress award of $75,000 (CE3-7), a statutory penalty of $20,000 (CE9), and requested an inclusion of injunctive relief into the final decision. (CE10-11). The DAG included a detailed calculation of Complainant's lost wages based on Complainant's January 13, 2017 witness testimony that had previously not been available due to OAL's technical issues with its audio recordings (CE7-9), and requested an award of attorney's fees based on its revised certification. (CE10.) The DAG noted that the initial decision did not recite

---

[4] In particular, Respondents take issue with Ms. Kelly's testimony about office talk that Mr. Prasad asked another female employee to show her breasts. Respondents characterize the testimony as "classic hearsay." The ALJ mentioned that testimony in her Initial Decision. (ID6.)

Complainant's testimony that Prasad asked her for a kiss and suggested that sexual favors would be required as a condition of employment. (CE3.)

On August 7, 2017, the DAG submitted a certification in opposition to Respondents' July 31, 2017 request to reopen the plenary hearing. The DAG noted that like the ALJ, she never received the letter that Respondents' counsel purportedly sent on January 30, 2017, explaining her absence. The DAG argued that Respondents' counsel had demonstrated a persistent pattern of non-responsiveness from the inception of the action and a "lack of regard for the proceedings and rules of administrative practice." She submitted a certification based on her first-hand knowledge of what she characterized as counsel's pattern and practice of not complying with tribunal rules, including Respondents' failure to timely respond to DCR's discovery requests. The DAG objected to Respondents' request to reopen the hearing "as against the interests of justice, fairness to Complainant and the Division as parties and judicial economy."

The Director's Decision

After reviewing the record submitted by an ALJ, an agency head can adopt, reject, or modify the initial decision. N.J.S.A. 52-14B-10(c). If the agency head rejects or modifies findings of fact, conclusions of law, or interpretations of policy, he or she must state clearly the reasons for doing so. Ibid. An agency head cannot reject or modify findings of fact as to issues of credibility of lay witness testimony "unless it is first determined from a review of the record that the findings are arbitrary, capricious or unreasonable or are not supported by sufficient, competent, and credible evidence in the record." Ibid.; S.D. v. Division of Med. Assist. And Health Services, 349 N.J. Super. 480, 485 (App. Div. 2002). That rule recognizes that it is the ALJ—and not the agency head—who heard the testimony in person and therefore is uniquely situated to assess the witness' credibility. Clowes v. Terminix Int'l, 109 N.J. 575, 587 (1988).

As an initial matter, the Director adopts and defers to the ALJ's recommendation that the record be closed, and therefore rejects Respondents' request to reopen this matter for the presentation of additional evidence or cross-examination. The Director notes that Respondents' counsel cross-examined Complainant and another female former employee (Odell Morris) who corroborated Complainant's allegations. The Director notes that the ALJ took an active role throughout the proceedings, actively questioning each witness on both hearing dates. The ALJ therefore developed a sufficient record of evidence upon which to base her factual findings and legal conclusions in this matter, notwithstanding the absence of testimony from Respondent Prasad or his wife.[5]

[5] The ALJ had the authority to suppress Respondents' defenses or completely exclude Respondents' evidence pursuant to N.J.A.C. 1:1-14.14. It appears that she instead took a middle ground and considered the evidence presented by Respondents on the first day of the hearing.

Respondents' exceptions, besides noting the similarity of Ms. Kelly and Complainant's testimony and characterizing a small portion of Ms. Kelly's testimony as hearsay, failed to provide the Director with an evidentiary basis to reopen these proceedings.[6] Respondents' exceptions do not set forth the nature of Mr. and Mrs. Prasad's testimony, or detail the manner in which counsel would impeach Ms. Kelly's testimony. Such information would have been the bare minimum needed to support reopening in the face of the ample evidence against Respondents on the record. In the absence of a good faith foundation of evidence that Respondents planned to introduce at a second day of trial and that could have materially altered the ALJ's decision, the Director has no basis to reopen these proceedings.

Moreover, the ALJ delayed issuing her decision for more than four months after the trial, and attempted to contact Respondents' counsel numerous times via phone and written correspondence over the course of those four months. Although Respondents' exceptions include a January 30, 2017 letter allegedly sent to the ALJ on that date, they never specified the manner by which it was sent. They did not attach a certification or any other proof of service. The ALJ's June 19, 2017 decision states that the tribunal never received that letter or any other contact from Respondents following their counsel's January 27, 2017 call to her chambers. (ID2-3.) And the DAG stated that she received no such letter.

But even assuming for the moment that counsel's January 30, 2017 letter was sent but inadvertently lost or discarded before it reached the ALJ, Respondents' July 31, 2017 submission nonetheless acknowledged that they were aware of the post-hearing status of this matter as early as March 7, 2017, the approximate date counsel received the ALJ's letter reopening the record for the parties' submissions of their proposed findings and conclusions of law. Upon receipt of that letter, however, Respondents never sought clarification regarding the reason that the ALJ requested such submissions given their January 30, 2017 written adjournment request. Nor did receipt of that letter prompt Respondents or their counsel to contact the ALJ, OAL, or the DAG to seek confirmation that the January 30, 2017 letter was received. Nor did the ALJ's letter prompt Respondents to submit a formal motion to reopen or its own proposed findings and conclusions based on the existing record.

In view of the specific circumstances of this proceeding, including but not limited to defense counsel's continued failure—despite repeated opportunities—to communicate with the tribunal, Respondents' failure to describe any evidence in their exceptions that would have materially altered the ALJ's decision, the nature of the behavior to which each witness testified, and the ALJ's notice on the record of the emotional toll extracted on each of the female witnesses who gave their testimony, the Director cannot conclude that the ALJ's decision to

---

[6] The Rules of Evidence do not apply in administrative hearings. N.J.A.C. 1:1-15.1. Hearsay is admissible and the ALJ has the discretion to accord it whatever weight she deems appropriate, as long as "some legally competent evidence exists to support each ultimate finding of fact to an extent sufficient to provide assurances of reliability and to avoid the fact or appearance of arbitrariness." N.J.A.C. 1:1-15.5.

close this matter and render a decision after a four-month waiting period was arbitrary, capricious, or unreasonable, under the circumstances.

Complainant alleged that Respondent discriminated against her by creating a sexually hostile working environment. The LAD prohibits an employer from discriminating against an employee on account of that employee's gender. N.J.S.A. 10:5-12(a). A hostile working environment is a form of gender discrimination. See Lehmann v. Toys R Us, Inc., 132 N.J. 587, 607 (1993). In cases where a complainant has alleged that she has been subjected to a hostile working environment based on her gender, the critical inquiry is whether a reasonable woman would find the conduct to be severe or pervasive enough to alter the conditions of employment and create an intimidating working environment. Id. at 603. In reaching that determination, courts have focused on the conduct itself, not its effect upon the plaintiff or the workplace. Cutler v. Dorn, 196 N.J. 419, 430-31 (2008). Neither a plaintiff's subjective response to the harassment, nor the defendant's subjective intent, is controlling as to whether a hostile environment claim is viable. Ibid. Moreover, the Supreme Court has recognized that where the harasser is the ultimate supervisor, the employee's dilemma is "acute and insoluble" because she has "nowhere to turn." Taylor v. Metzger, 152 N.J. 490, 503-505 (1998).

Complainant also alleged that the hostile work environment to which she was subjected resulted in her constructive discharge from her employment. A constructive discharge occurs under the LAD where an "employer knowingly permit[s] conditions of discrimination in employment so intolerable that a reasonable person subject to them would resign." Muench v. Township of Haddon, 255 N.J. Super. 288, 302 (App. Div. 1992). Constructive discharge is a "heavily fact-driven determination." Id. at 302.

Guided by those legal standards, the Director does not find that the ALJ acted arbitrarily, capriciously or unreasonably when she found that the behavior to which Respondents subjected Complainant was sufficient to establish both her sexually hostile work environment and constructive discharge claims under the LAD. Respondent Prasad, who was the owner of the company and was at the premises throughout the workday, routinely yelled obscenities at her and subjected her to remarks that were sexual and demeaning in nature. For example, based on the testimony of the three female employees, the ALJ found that Mr. Prasad asked Complainant if she performed Kegel exercises, whether she shaved her vagina, enjoyed anal sex, and about the sexual performance of her partners and the genitalia of black men. Complainant testified about an incident in which, as they were locking up for the day, Prasad followed her into the garage and said, "Give the big guy a kiss." When she refused, he kissed her on the cheek anyway, and she left the premises. Complainant also testified that on her last day of work, Prasad said, "You're in a really good mood today. If you were not in a good mood today, I would have bent you over the desk and spanked your ass." She testified that when she tried to ignore the comment and got up to leave, he brushed his body against hers.

The ALJ found that Mr. Prasad was also volatile and inappropriate with her and her female colleagues, at times rubbing up against them, touching them inappropriately, and using foul language among them on a daily basis. For example, Ms. Morris testified that Mr. Prasad would angrily refer to his wife as a "stupid bitch." Complainant, Ms. Morris and Ms. Kelly testified that this kind of behavior occurred regularly. And Ms. Morris testified that Prasad asked her to sit on his lap, and when he invited male friends to the office, they would drink and join in the sexually harassing conduct. For example, one man rubbed up against her, and Prasad once directed her to look at a schedule posted above a man's chair, requiring her to lean over him. (ID5.) Complainant, Morris, and Kelly also testified that Prasad often threatened employees' continued employment for no reason, was loud and openly disrespectful of his employees, and, in separate incidents, hurled a full soda can and an office chair around the office. Complainant endured this environment for nine months.

The ALJ considered and rejected Respondents' defense that Complainant's allegations of sexual harassment and constructive discharge were not credible because, they alleged, she was about to be fired for a pattern of tardiness. (ID10.) Weighing the testimony, the ALJ instead found as fact that Complainant endured severe and pervasive sexual harassment, and was constructively discharged when the harassment became more than she could tolerate. The ALJ found Complainant, Ms. Morris, and Ms. Kelly to be credible witnesses.[7]

The ALJ's factual findings support her conclusion that Respondents' actions created a hostile work environment that was so severe and pervasive that it altered the conditions of Complainant's employment and, ultimately made her employment so intolerable that she had no choice but to resign. (ID11.) In the absence of any evidence that any factual findings were arbitrary, capricious, unreasonable, or not supported by sufficient competent and credible evidence, the Director has no basis for rejecting those determinations. N.J.A.C. 1:1-18.6; N.J.S.A. 52-14B-10(c); Clowes, supra, 109 N.J. at 587. Accordingly, the Director adopts the ALJ's factual findings and conclusions of law with regard to Complainant's hostile work environment and constructive discharge claims. The Director, however, modifies the ALJ's remedies, as provided below.

a. Lost Wages

In LAD cases, lost wages may be awarded to a complainant as the prevailing party. N.J.S.A. 10:5-3. A complainant holds the burden of providing an evidentiary basis for calculating lost wages. See Brooks v. Andolina, 826 F.2d 1266, 1270 (3rd. Cir. 1987).

---

[7] The ALJ found that "the witnesses were all credible" (ID7), presumably also including Respondents' witness, Norman Scank, III.

Here, Complainant's prayer for relief included a request for the wages she lost as a result of her constructive discharge from employment. Complainant's sworn testimony at trial detailed the length of her unemployment and her diligence in mitigating her damages after her discharge through her procurement of subsequent employment. Although Respondents' counsel cross-examined Complainant on a number of issues, there was no cross-examination on that issue. Thus, Complainant's testimony regarding her lost wages was uncontroverted. Due to a technical delay in producing audio recordings of the hearing, the DAG was unable to provide a calculation of Complainant's lost wages to the ALJ before the record closed and the ALJ issued her decision. Because of that delay, the ALJ was unable to award damages for Complainant's economic loss.

The DAG received the OAL's audio recordings after the Court had filed its initial decision and suggested in her exceptions a lost wage amount of $7,920 based on Complainant's detailed hearing testimony. In particular, Complainant testified that she worked nine-hour to ten-hour shifts, five to six days per week at $13/hour. Given Complainant's unchallenged testimony that her job hunt yielded a lower paying job ($10/hour) only five days after her constructive discharge, and that her earnings did not increase and return to wages comparable to her former job until January 2015, the Director finds an award of $7,920 to be a reasonable amount consistent with the LAD's policy to "make all victims whole." See Terry v. Mercer County Bd. of Chosen Freeholders, 86 N.J. 141, 157 (1981) (quoting Director, Div. on Civil Rights v. Slumber, Inc., 166 N.J. Super. 95, 108 (App. Div. 1979), mod., 82 N.J. 412 (1980)(ellipses omitted)).

b. Emotional Distress

In LAD cases, a victim of unlawful discrimination is entitled to recover non-economic losses such as mental anguish or emotional distress proximately related to unlawful discrimination. See Anderson v. Exxon Co., 89 N.J. 483, 502-03 (1982). A victim is entitled to receive, at a minimum, a threshold pain and humiliation award for enduring the indignity that may be presumed to be a "natural and proximate" result of discrimination. See Tarr v. Ciasulli, 181 N.J. 70, 82 (2004).

Our Supreme Court has emphasized that the standard of proof for emotional distress awards under the LAD is "far less stringent" than for a common law claim of intentional infliction of emotional distress. Ibid. "[I]n discrimination cases, which by definition involve willful conduct, the victim may recover all natural consequences of that wrongful conduct, including emotional distress and mental anguish damages arising out of embarrassment, humiliation, and other intangible injuries." Ibid.; N.J.S.A. 10:5-3.

The New Jersey Supreme Court has declared that the Director has the "unique discretion and expertise to effectuate fully the 'make-whole' policy of the [LAD]." See Terry, supra, 86 N.J. 141, 157. "A pain and suffering award is reviewed to determine whether it is fair and

reasonable." Klawitter v. City of Trenton, 395 N.J. Super. 302, 336 (App. Div. 2007) (noting that "there is no gauge for pain and suffering . . . a certain amount of imprecision is acceptable as long as it appears that the damage award was not based upon speculation, passion, or prejudice.").

In this case, the ALJ found that Complainant suffered emotional distress as a direct cause of Respondents' unlawful discrimination and awarded Complainant $7,500 in emotional distress damages without any analysis as to how that figure was reached. After a thorough analysis of the record, the testimony, the nature, extent, and duration of the Complainant's injuries, and the impact of those injuries on her life, the Director finds the ALJ's award of $7,500 to be insufficient under the circumstances, and increases the emotional distress award to $50,000. In so doing, the Director considered the hearing testimony and the awards for emotional distress made to other prevailing complainants. See, e.g., Klawitter, supra, 395 N.J. Super. at 302, 335-36 (upholding a $79,538 award); L.W. ex rel. L.G. v. Toms River Reg'l Schs. Bd. of Educ., 381 N.J. Super. 465, 500 (App. Div. 2005), aff'd as modified, 189 N.J. 381 (2007) (upholding a $50,000 award)); Lin v. Dane Construction, 2015 N.J. Super. Unpub. LEXIS 570 (App. Div., Mar. 17, 2015); see generally, Cuevas v. Wentworth Group, 226 N.J. 480, 510 (2016) (emotional distress awards of $800,000 and $600,000 to plaintiffs were not excessive based on hostile work environment over a nine-month period); Lockley v. Turner, 344 N.J. Super. 1, 12-14 (App. Div. 2001) (upholding $750,000 emotional distress award in sexual harassment claim), aff'd in part and modified in part on other grounds, 177 N.J. 413 (2003)); Besler v. Board of Education of West Windsor, 201 N.J. 544, 580 (2010) (plaintiff must exhibit more than *de minimis*, transient mental anguish to justify a $100,000 mental anguish award.).

Complainant testified that she was used to handling the type of "shop talk" prevalent in a male-dominated industry, but that Prasad's comments and conduct went beyond that and made her feel like "less of a person." She testified that she spoke with her mother and friends about the stress she was experiencing as a result of the harassment, but that as a single parent of three children, she had no time to pursue professional counseling, and felt that she had no recourse to deal with the harassment. Complainant testified that as a result of her constructive discharge and her inability to find a job with comparable pay right away, she and her three children were evicted from their home and spent three months in a temporary housing situation until she was able to secure another home for her family.

The Director finds that an award of $50,000 is fair and reasonable given the severity of the conduct that Complainant was subjected to on a daily basis while working full-time, five days a week, for nine months, the public and persistent nature of the conduct, the extent of the injuries caused, and the fact that Respondent Prasad was not only the highest-ranking supervisor in the workplace, but also the company's owner. See Taylor, supra, 152 N.J. at 503-505 (reasoning that a supervisor's "unique role in shaping the work environment" gives him ample power to contaminate the workplace and alter the terms and conditions of a subordinate's employment, and leaves that employee essentially without recourse).

c. Counsel Fees

A prevailing party in an LAD action may be awarded reasonable attorney fees. N.J.S.A. 10:5-27.1. Fees should ordinarily be awarded unless special circumstances would make a fee award unjust. Hunter v. Trenton Housing Auth., 304 N.J. Super. 70, 74-75 (App. Div. 1997). When a complainant's case is prosecuted by a DCR attorney, reasonable fees for such representation may be assessed against the respondent. N.J.S.A. 10:5-27.1. The Supreme Court has held that to be compensable, the time expended must be supported by a certification of services that is sufficiently detailed to allow meaningful review and scrutiny, and must include more than a raw compilation of hours. Rendine v. Pantzer, 141 N.J. 292, 334-35 (1995).

Here the ALJ found it was impossible for her to assess the reasonableness of fees after reviewing the certification of fees submitted by counsel. (ID11.) She allowed leave for counsel "to submit a detailed certification of fees to the undersigned or file it elsewhere as the prevailing party." (ID11.) On August 1, 2017, the DAG submitted a revised certification of attorney's fees to the Director. The revised certification represents that the DAG incurred fees of $44,850 based on 172.5 hours spent on this matter at a rate of $260 per attorney hour. After reviewing the revised certification, the Director finds that an award of attorney fees for prosecuting this case serves the public interest, and that the DAG's certification supports her hourly rate and the reasonableness of the time expended in prosecuting this case.

d. Statutory Penalty

The LAD states that any person who violates its provisions "shall be liable" in addition to any other remedies, for statutory penalties payable to the State Treasury. N.J.S.A. 10:5-14.1(a). The ALJ found that a $7,500 penalty was appropriate in this case, and assessed that amount as a penalty against Respondent. After a review of the record, the Director finds that the penalty is not unreasonable in these the circumstances.

e. Injunctive Relief

Pursuant to N.J.S.A. 10:5-17, the Director orders that from the date of this Order and any time thereafter, Respondent shall cease and desist from any and all unlawful conduct in violation of the LAD or any other governing laws, for as long as Respondent continues to do business or operate in any manner, whether as "Statewide Roadside Assistance LLC" or under another title as a successor entity.

ORDER

After a thorough and independent evaluation of the initial decision and the OAL record, the Director finds no basis to reject any of the ALJ's factual findings or conclusions of law. Accordingly, the Director adopts and incorporates same by reference and concludes that

Respondent subjected Complainant to unlawful gender discrimination that resulted in her constructive discharge from employment. Therefore the Director orders as follows:

1. Within 45 days from the date of this order, Respondent shall forward to DCR a certified check payable to Complainant in the amount of $57,920, comprised of $7,920 as compensation for lost wages, and $50,000 as compensation for emotional distress.

2. Within 45 days from the date of this order, Respondent shall forward to DCR a certified check payable to "Treasurer, State of New Jersey" in the amount of $52,350, comprised of $7,500 as a statutory penalty, and $44,850 as payment for DCR's attorney's fees and costs incurred in this matter;

3. Respondent shall cease and desist from any and all unlawful conduct in violation of the LAD or any other governing laws, for as long as Respondent continues to do business or operate in any manner, whether as "Statewide Roadside Assistance LLC" or under another title as a successor entity.

4. The penalty and all payments made by Respondent under this order shall be forwarded to Carlos Bellido, Esq., New Jersey Division on Civil Rights, P.O. Box 46001, Newark, New Jersey 07102; and

5. Any late payments will be subject to post-judgment interest calculated as prescribed by the Rules Governing the Courts of New Jersey, from the due date until such payment is received by DCR.

DATE: 11-2-17

Craig Sashihara, Director
NJ DIVISION ON CIVIL RIGHTS