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United States District Court,
E.D. New York.

Elizabeth **SIRACUSE**, Plaintiff,

v.

PROGRAM FOR THE **DEVELOPMENT** OF **HUMAN POTENTIAL**, Defendant.

No.
07
CV
2205
CLP

.

April 30, 2012.

Attorneys and Law Firms

Margaret Ellen McIntyre, Margaret McIntyre, Attorney at Law, John A. Beranbaum, Beranbaum Menken LLP, New York, NY, for Plaintiff.

Marc J. Monte, Richard John Cea, Wingate Kearney & Cullen LLP, Brooklyn, NY, for Defendant.

MEMORANDUM & ORDER

CHERYL L. POLLAK, United States Magistrate Judge Eastern District of New York.

***1** On May 31, 2007, plaintiff Elizabeth **Siracuse** filed this action against her employer, **Program** for the **Development** of **Human Potential** ("PDHP"), alleging claims of discrimination and retaliation under the Family and Medical Leave Act of 1993 ("FMLA"), 29 U.S.C. §§ 2601 et seq., and Section 8–107(a) of the Administrative Code of the City of New York ("NYCHRL"), based on defendant's failure to promote plaintiff after she took leave to deal with her disability. The case proceeded to trial, and on May 4, 2011, the jury found in favor of plaintiff, awarding her $78,472 in damages on her claim of disability discrimination under the NYCHRL.[1]

Presently before the Court are three motions: 1) defendant's motion to set aside the verdict under Rule 50 of the Federal Rules of Civil Procedure; 2) defendant's motion to alter the judgment; and 3) plaintiff's motion for attorneys' fees.

DISCUSSION

I. *Defendant's Rule 50(b) Motion to Set Aside the Verdict*

Defendant moves, pursuant to Fed.R.Civ.P. 50(b), to set aside that portion of the jury's verdict that found in favor of plaintiff on her claim of disability discrimination under the NYCHRL. Defendant contends that plaintiff failed to present legally sufficient evidence that the position plaintiff sought existed at the time she requested the promotion to it. Accordingly, defendant argues that no reasonable jury could find it liable for discrimination against plaintiff for failing to promote her to a position that did not exist.

Plaintiff argues that defendant is barred from pursuing this motion under Rule 50(b) because defendant failed to raise the issue prior to the case being submitted to the jury; therefore, plaintiff asserts the claim was not preserved. In the alternative, plaintiff argues that even if the motion is not procedurally barred, the evidence, viewed in the light most favorable to plaintiff as the non-moving party, was sufficient to support the jury's decision.

A. *Legal Standards*

Under Rule 50(b) of the Federal Rules of Civil Procedure, a party may file a post-trial motion "direct[ing] the entry of judgment as a matter of law." Fed.R.Civ.P. 50(b). However, Rule 50(b) requires the moving party to have first made a similar motion for judgment as a matter of law pursuant to Rule 50(a) " 'at any time before the case [was] submitted to the jury.' " *Barton Group, Inc. v. NCR Corp.,* 796 F.Supp.2d 473, 487–488 (S.D.N.Y.2011) (quoting Fed.R.Civ.P. 50(a)(2)); *see also Ali v. AMG Trucking L.L.C.,* No. 10 **CV** 2667, 2011 **WL** 5184219, at *1 (**E.D.N.Y**. Oct.31, 2011). The Rule 50(b) motion serves to renew the Rule 50(a) motion. *Id.* "There is no provision for a [motion for judgment as a matter of law] to be made for the first time after trial." *Rojas v. Theobald,* No. 02 **CV** 3623, 2007 **WL** 2455133, at *2 (**E.D.N.Y**. Aug. 23, 2007) (citing *McCardle v. Haddad,* 131 F.3d 43, 50–51 (2d Cir.1997).

"Rule 50(a), in turn, requires that such a motion specify the judgment sought and the law and the facts that establish that the moving party is entitled to judgment." *Barton Group, Inc. v. NCR Corp.,* 796 F.Supp.2d at 487–488 (citing Fed.R.Civ.P. 50(a)). Since a Rule 50(b) motion made post-trial renews the pre-verdict Rule 50(a) motion, *Rojas v. Theobald,* 2007 WL 2455133, at *2, courts will only consider arguments raised in a Rule 50(b) motion that "overlap with those raised in the earlier Rule 50(a) motion." *Ali v. AMG Trucking L.L.C.,* 2011 WL 5184219, at *1 (citing cases).

***2** Here, defendant timely raised its Rule 50(a) motion at the functional conclusion[2] of plaintiff's presentation of evidence, moving for judgment as a matter of law on both plaintiff's FMLA and NYCHRL claims. (Tr. at 923–24). Satisfying the requirements of Rule 50(a), defendant specified that it sought to have the action "dismiss[ed] for insufficiency of the evidence as a matter of law" (*id.* at 924), and detailed the facts that it contended supported such a judgment. (Tr. at 924–26, 28–29). In regard to plaintiff's NYCHRL claim specifically, defendant argued that "there's insufficiency of evidence in general to support that her health was a reason [for the non-promotion], because the defendant has put forth a legitimate reason."[3] (*Id.* at 925). Accordingly, defendant's Rule 50(b) motion currently pending before this Court is procedurally proper, and the Court must consider the merits of the motion.

It is well-settled that a trial court, in determining whether to grant a motion for judgment as a matter of law, must view the evidence in the light most favorable to the party against whom the motion is made, *see Simblest v. Maynard,* 427 F.2d 1, 4 (2d Cir.1970), and the non-moving party must be given the benefit of all reasonable inferences that may be drawn in his or her favor from the evidence presented at trial. *See id.* Judgment as a matter of law should be entered when "the evidence is such that, without weighing the credibility of the witnesses or otherwise considering the weight of the evidence, there can be but one conclusion as to the verdict that reasonable juror[s] could have reached." *Id.; accord Caruso v. Forslund,* 47 F.3d 27, 32 (2d Cir.1995). In other words, judgment as a matter of law should be granted where there is " 'such a complete absence of evidence supporting the verdict that the jury's findings could only have been the result of sheer surmise and conjecture....' " *Song v. Ives Labs., Inc.,* 957 F.2d 1041, 1046 (2d Cir.1992) (quoting *Mattivi v. South African Marine Corp.,* 618 F.2d 163, 168 (2d Cir.1980)).

B. *Testimony at Trial*

At trial, plaintiff testified that she began working for the defendant, **Program** for the **Development** of **Human Potential** ("PDHP"), in 1989 as an alcohol and substance abuse counselor for children attending two Catholic High Schools. (Tr.[4] at 11–12). During her 16 years of employment with PDHP (*id.* at 41), Ms. **Siracuse** held a number of positions, including elementary-school counselor and drug and alcohol abuse prevention counselor at various high schools. (*Id.* at 12–17). During the course of her employment, Ms. **Siracuse** initiated various other **programs** that were not part of her regular duties. (*Id.* at 18–23, 70). In 1998 or 1999, Ms. **Siracuse** was assigned to work at the Mary Louis Academy in Brooklyn, where she was responsible for teaching classes as a drug and alcohol prevention counselor, running group therapy classes for children who had suffered losses, providing family therapy, and conducting individual counseling sessions. (*Id.*) At the time she left active service at PDHP on November 21, 2004, Ms. **Siracuse** was one of the most senior counselors at PDHP and had the most years of experience; she earned an annual salary of $46,472. (*Id.* at 42).

***3** In approximately 1998, PDHP began operating a new **program**, the Reconnecting Youth or "RY" **Program**. (*Id.* at 61). Plaintiff testified that Julia McEvoy, borough director of the Brooklyn office of PDHP, approached Ms. **Siracuse** and told her that PDHP had "an exciting new **program**. We're going to need a supervisor on it. You'd be perfect for it. The only problem is you don't have a master's degree." (*Id.* at 62). According to Ms. **Siracuse**, prior to 2004, there was a requirement at PDHP that in order to hold a supervisory position, one had to have a master's degree in social work or some other advanced degree. (*Id.* at 63). Although Ms. **Siracuse** described the RY **Program** supervisor position as her "dream job," she had just learned that her father was terminally ill. (*Id.*) Instead of pursuing the position, she requested the opportunity to work three-fifths of the time in order to care for him. (*Id.*) The director of PDHP at the time, Gil Ortiz, granted her request, and plaintiff worked three-fifths time and cared for her father until his death in October 2000. (*Id.* at 63–4, 66). Meanwhile, Linda Babolcsay was given the job of RY supervisor. (*Id.* at 64).

Following her father's death, Ms. **Siracuse** continued working at PDHP while also returning to school, taking graduate courses in social work at Columbia University in order "to be prepared the next time something like [the RY supervisor

position] came up again." (*Id.* at 66). Plaintiff graduated with a master's degree in social work in May 2003. (*Id.* at 72).

In September of 2003, Ms. **Siracuse** was diagnosed with Hodgkin's Lymphoma and underwent treatment at Sloan Kettering Memorial Hospital in Manhattan. (*Id.,* at 73–4, 81). She completed chemotherapy in January 2004 and underwent radiation treatment that began in February and ended in March of 2004. (*Id.*) While undergoing treatment, Ms. **Siracuse** continued to perform her duties as a substance and alcohol abuse counselor at Mary Louis Academy, but she was forced to cut back on some of her activities. (*Id.* at 93). She reduced the number of group therapy sessions and began conducting more assessments, which she then referred out to other therapists for actual counseling. (*Id.*) Occasionally, Ms. **Siracuse** also had to miss work because of the effects of the cancer treatments. (*Id.* at 95). At one point in May 2004, the director of PDHP, Eileen Dwyer, approached plaintiff regarding her leave time and suggested that because plaintiff was now "out of sick time, it would be easier for the timekeeper if [plaintiff] worked a reduced schedule." (*Id.* at 110). Plaintiff testified that Ms. Dwyer had approached her once before about going on disability or reducing her hours. (*Id.*) Plaintiff felt that it was not necessary for her to work a reduced schedule at this time because she had "finished the hardest part of the journey;" nevertheless she went along with it. (*Id.* at 110–11).

***4** During the time Ms. **Siracuse** was undergoing treatment for cancer, Linda Babolcsay continued to supervise the RY **program**. (*Id.* at 114). According to plaintiff, Ms. Babolcsay supervised one full-time RY counselor and three part-time RY counselors or facilitators. (*Id.* at 114). Toward the end of May 2004, plaintiff learned that Ms. Babolcsay was leaving PDHP, (*Id.*) Ms. **Siracuse** "immediately" told her supervisor, Sonia McAuley, that she was interested in applying for the RY supervisor position. (*Id.*) She testified that she was excited about the position, which had been offered to her four years earlier, and now that she had her graduate degree, she could "run this wonderful **program**." (*Id.* at 115), According to Ms. **Siracuse**, her supervisor, Ms. McAuley, told her that she would be "great" for the job and advised her to approach Julia McEvoy, who was the director of the RY **Program**, to discuss it. (*Id.*)

Ms. **Siracuse** then spoke to Ms. McEvoy shortly thereafter and indicated her interest in the position. (*Id.* at 115–16). According to Ms. **Siracuse**, Ms. McEvoy's response was, "I'm just concerned. What about all you've been through? This being the year for change, should you be thinking about taking care of yourself and taking it easy this year?" (*Id.* at 116). Later, on June 16, 2004, Ms. **Siracuse** spoke to another supervisor, Judy Shiller–Rabi, director of the Queens office, about the position. (*Id.* at 117). Ms. Shiller–Rabi told the plaintiff that she did not get the job; she told plaintiff, "I'm sorry. It's not the year for change for you.... You need to be taking care of yourself. What if you get sick next year?" (*Id.* at 118). When asked who got the position, Ms. Shiller–Rabi told plaintiff that Ellen Fitzpatrick, another RY counselor, had gotten the job, (*Id.* at 119).

The following day, Ms. **Siracuse** spoke again to Julia McEvoy, who told her that it was not just her health that prevented her from being promoted, but that they were "reconfiguring the **program**." (*Id.* at 121). However, according to Ms. **Siracuse**, Ms. McEvoy did not give her any details about how the **program** was being reconfigured or how that impacted the RY supervisor position formerly held by Ms. Babolcsay. (*Id.* at 122).

Shortly after that conversation, plaintiff received a call from her supervisor, Sonia McAuley, who apologized by saying that "she felt bad, she felt guilty that her concerns about my health impacted a decision about whether or not I get a job and she ... told me that I should speak with Eileen Dwyer, the executive director." (*Id.* at 123). Approximately one week later, plaintiff approached Ms. Dwyer at a staff retreat and spoke to her about the RY supervisor position. (*Id.* at 124). According to plaintiff, Ms. Dwyer asked plaintiff what she wanted to discuss, and plaintiff responded, "the supervisor position." (*Id.* at 125). Ms. Dwyer responded by saying, "What supervisor position? There's no supervisor position." (*Id.*) When plaintiff responded, "the supervisor position that my colleague who is about twelve years junior to ... me was just promoted to," Ms. Dwyer responded. "Oh, that supervisor position. Oh, you wouldn't want that." (*Id.*) Plaintiff testified that although Ms. Dwyer told plaintiff that she was not qualified for the position because she had not taken certain training, Dwyer also said, "You are overqualified." (*Id.* at 126). She also commented that "[i]t's not much money anyhow." (*Id.* at 127). Ms. Dwyer did say that Christ the King no longer wanted the **program** and that the principal at Mary Louis Academy would not want it either. (*Id.*) She told Ms. **Siracuse** that "I already made ... my decision. I can't go back on it now." (*Id.*) She "clearly stated that Ellen [Fitzpatrick] had the job and that was the final decision." (*Id.* at 128).

***5** At the end of September or early October, Ms. Siracuse attended a training session where she had a conversation with Ellen Fitzpatrick, and learned from speaking to Ms. Fitzpatrick that Ms. Fitzpatrick had been given Babolcsay's job as supervisor of the RY Program. (*Id.* at 141, 397). According to plaintiff, during that conversation, Ms. Fitzpatrick told plaintiff that she had been "offered Linda's [Babolcsay] job last year as supervisor and they offered [her a] $5,000 raise." (*Id.* at 142). Fitzpatrick was surprised to learn that plaintiff had also applied for the position. (*Id.* at 143), When Ms. Fitzpatrick remarked that plaintiff was more qualified and that Fitzpatrick could not take the job, plaintiff told her that it was not her fault and that she should take the position, (*Id.*)

According to plaintiff, Ms. Fitzpatrick performed the same job functions in 2004–2005 as Linda Babolcsay had in 2003–2004, as well as the responsibilities Ms. Babolcsay was supposed to perform but had not been doing. (*Id.* at 314–15). When asked to explain the functions performed by the RY supervisor, plaintiff testified that Babolcsay was to provide supervision for the three part-time counselors in the RY Program, including helping the counselors understand how to meet the needs of the children. (*Id.* at 315, 398). The RY supervisor also ran several classes of her own. (*Id.* at 398). When questioned, plaintiff testified clearly that "I was told [the RY supervisor position] was not available to me. I was not told it was not available because it wasn't in existence. I was told Ellen Fitzpatrick got the position." (*Id.* at 320), Plaintiff's counsel offered Exhibit P–83, a notice issued by PDHP, which stated: "As of September 1, 2004, Ellen Fitzpatrick's salary is $39,698. This reflects an increase in job responsibilities in the RY Program." (*See id.* at 407; Ex. P–83).

On cross-examination, defendant's counsel questioned plaintiff extensively on whether she believed that PDHP should have started an RY Program at Mary Louis Academy, where plaintiff worked. (*Id.* at 312–13). Plaintiff responded that PDHP could have started a program at Mary Louis and, contrary to Eileen Dwyer's suggestion that Sister Kathleen, the school principal, would not have wanted an RY Program, plaintiff believed that Sister Kathleen would have wanted one if asked. (*Id.* at 313). When asked where she expected to work if she had been put in charge of the RY Program, plaintiff testified that "there were several options." (*Id.* at 328). One option would have been for her to remain at Mary Louis Academy, supervising from there, or she could have taught an RY class there while supervising the other RY counselors. (*Id.*) Furthermore, to the extent that defendant claimed that the position was divided between two people, with Sonia McAuley being assigned to cover certain of Ms. Babolcsay's supervisory responsibilities, including the supervision of Ellen Fitzpatrick, plaintiff contended that she just as easily could have supervised Ms. Fitzpatrick. (*Id.* at 397).

***6** Ellen Fitzpatrick testified that she had a Bachelor of Science degree in physical education and had been employed at PDIIP since 1999, beginning as an RY counselor supervised by Linda Babolcsay. (*Id.* at 827–28). She testified that a week or so after Babolcsay left PDHP, she informed Julia McEvoy, the director of the RY Program, that she was interested in the RY supervisor job. (*Id.* at 838). Although Ms. Fitzpatrick did not have a master's degree, she asked Ms. McEvoy if her years of experience in teaching could serve as a substitute for the degree. (*Id.* at 839). She also pointed out that no one else had the experience in the RY Program that she had. (*Id.*) McEvoy told Fitzpatrick that she would talk to Ms. Dwyer, PDHP's executive director. (*Id.*) Subsequently, McEvoy told Fitzpatrick that she had spoken with Dwyer and that "they had agreed that since I had so many years' teaching experience, that they would substitute the experience for the master's." (*Id.* at 840). According to Ms. Fitzpatrick, she was then offered the RY supervisor job and told that she would receive an increase in her salary of $5,000. (*Id.*)

Ms. Fitzpatrick conceded that she thought she was taking over Babolcsay's job except for its clinical aspects, which Fitzpatrick could not perform because she was not a social worker. (*Id.* at 840, 845). Therefore, Sonia McAuley would be Fitzpatrick's immediate supervisor, taking care of the clinical aspects of the RY Program if any such cases arose. (*Id.* at 841). According to Fitzpatrick, her duties were also somewhat different from those of Babolcsay in that she did not attend administrative meetings and that she reported crises to her supervisor; she could not act on her own. (*Id.* at 848–49). Nevertheless, Ms. Fitzpatrick identified a letter of recommendation she had written for RY counselor Anna Steegman, with the title "RY Supervisor" appearing under her signature. (*Id.* at 851, Ex. P–86). The body of the letter further represents that Fitzpatrick had been Anna Steegmann's supervisor in the Reconnecting Youth Program for the prior two years. (*Id.*)

Ms. Fitzpatrick testified that she did not remember McEvoy telling her at any point that the RY Program was going to be reconfigured. (*Id.* at 844), Fitzpatrick did not discover until later that plaintiff had applied for the job also. (*Id.* at 846).

Anna Steegmann testified that beginning in 1988, she worked for PDHP as a school counselor for "10 or 11 years," (*Id.* at 25–26). Subsequently, she then served as a guidance counselor at St. Joseph's High School for two years, before returning to PDHP in 2000 to join the newly-created Reconnecting Youth **Program** as an RY counselor (*id.* at 28–29), a position she held until 2006. (*Id.* at 33). Steegmann explained that in her role as an RY counselor, she was supervised by Linda Babolcsay. (*Id.* at 31). According to Steegmann, "[a]ll the supervisors had to have master's degrees," and she did not know of any supervisors at PDHP who did not have either a master's degree or another advanced degree. (*Id.* at 31–32). Nevertheless, Steegmann testified that when Babolcsay resigned (*id.* at 33), Ellen Fitzpatrick "took [Babolcsay's] position" and became her supervisor. (*Id.* at 34). Ms. Fitzpatrick met with her individually once a week and conducted monthly group meetings with all the RY counselors together.[5] (*Id.* at 35). Steegmann testified that when she decided to leave the RY **Program** in 2006 to pursue a different career, she asked Ms. Fitzpatrick to write a letter of recommendation for her in case she ever needed to go back to doing social work. (*Id.* at 36). Steegmann identified a copy of the letter and verified that Ms. Fitzpatrick refers to herself as Steegmann's "supervisor for the last two years" within the letter body. (*Id.* at 37, Ex. P–86). Steegmann also confirmed that the title "RY Supervisor" appears underneath Ms. Fitzpatrick's signature. (*Id.* at 38, Ex. P–86).

***7** Eileen Dwyer, executive director of PDHP, testified that the RY **Program** was implemented in September of 1999, with five schools participating: Christ the King and Holy Cross High Schools in Queens, and Bishop Ford, McAuley, and St. Joseph's High Schools in Brooklyn, (*Id.* at 432). The decision to hire Linda Babolcsay as the original supervisor of the RY **Program** was made by a committee consisting of Ms. McEvoy. Ms. Schiller–Rabi, and the two high school coordinators; Ms. Dwyer approved the committee's recommendation. (*Id.*) As supervisor, Babolcsay supervised Ellen Fitzpatrick and three facilitators in the high schools; Babolcsay also ran her own RY classes at Christ the King, and attended administrative meetings with the other supervisors. (*Id.* at 434).

According to Ms. Dwyer, in the spring prior to Babolcsay's resignation on June 1, 2004, Dwyer had a conversation with McEvoy questioning the efficiency of staffing a full-time person in Babolcsay's position. (*Id.* at 434). Subsequently, beginning in June 2004 and running through September 2004, PDHP faced "major funding problems." (*Id.* at 434–35), Consequently, when Babolcsay resigned, Dwyer did not post any notice for a replacement and never replaced her. (*Id.* at 447). According to Dwyer, she instead reconfigured the **Program** and redistributed the position's workload to Ellen Fitzpatrick and Sonia McAuley, the Queens high school director. (*Id.* at 447, 450). Ms. Dwyer further testified that Fitzpatrick was given the job of coordinating services with the RY facilitators and that McAuley was "really the person in charge of the **program**." (*Id.* at 452). According to Dwyer, she paid Fitzpatrick out of the RY **Program** budget and moved 50% of McAuley's salary to the RY budget as well. (*Id.*) On October 1, 2004, Dwyer sent a memo to Fitzpatrick stating: "As of September 1st, 2004, you have agreed to take on [the] additional responsibility of supervising the RY facilitators. The supervision will be individual and group as determined by the **program** and your supervisor." (*Id.* at 455).

However, on cross-examination, Ms. Dwyer admitted that during the period that she was reconfiguring the RY **Program**, the State did not cut her budget; instead, it actually increased the RY budget. (*Id.* at 608–09). Thus, it is clear that cuts in the **Program** were not the reason for the reconfiguration.

As for the distribution of Ms. Babolcsay's responsibilities, Ms. Dwyer testified on cross-examination that Ms. McAuley was assigned to supervise Fitzpatrick under the reconfigured plan. (*Id.* at 617–18). McAuley added this responsibility to her current workload; her duties as a high school regional coordinator were not commensurately reduced to balance the additional supervisory role. (*Id.* at 618). Ms. Dwyer conceded that because Ms. Fitzpatrick was not qualified with a master's level degree as a social worker, she could not make the final decision as to whether clinical intervention was necessary for a child; she had to consult Ms. McAuley. (*Id.* at 630, 634). When asked if plaintiff, who had a master's degree in social work, could have made such a decision, Ms. Dwyer dodged the question, explaining that she always asks supervisors to consult in an emergency, that Ms. **Siracuse's** degree was a "very recent master's," and that McAuley had had a master's degree for a while. (*Id.* at 631, 634, 636).

***8** When asked why plaintiff could not have done the job that was given to Fitzpatrick, Ms. Dwyer testified that "[a] lot of people could have done it very capably." She also testified that Ms. Fitzpatrick was told that she would receive a four to five thousand dollar raise, making her salary comparable to Babloscay's salary at the time she left. (*Id.* at 644). She also

admitted that prior to May 18, 2004, when she prepared the work plan, she had no intention of eliminating Babolcsay's position. (*Id.* at 651).

Ms. Dwyer conceded that they discussed plaintiff's health "at many times and at many levels in the **program** out of concern for her, for her health." (*Id.* at 701). She testified that she did not investigate the claim that two of her senior people had told plaintiff that her health played a role in the decision not to give her a supervisory job, because "I did not think I needed to seek legal counsel because there was no position to be interviewed for and then the question of her health would have been a moot point" (*Id.* at 713).

Judith Schiller–Rabi testified that she was clinical director of PDHP for approximately ten years and became Queens borough director in 1990, the position she held until she left PDHP in 2007. (*Id.* at 492–93). According to Ms. Schiller–Rabi, it is a requirement at PDHP that supervisors have master's degrees. (*Id.* at 494). She testified that when it appeared unlikely that Ms. Babolcsay would continue in her position as supervisor of the RY **Program**, Schiller–Rabi had a number of conversations with Dwyer and McEvoy about plaintiff's interest in the job. (*Id.* at 509). According to Schiller–Rabi, she expressed the view that plaintiff had done a fine job for the **Program** and that "she would be a good supervisor." (*Id.* at 510). She testified that "eventually Eileen [Dwyer] ... decided that she wasn't going to reconstitute the job the way it was." (*Id.* at 511). She denied telling Sonia McAuley that she felt guilty about some of the things that McAuley claimed she had said about plaintiff's health. (*Id.* at 512). Schiller–Rabi did, however, admit that she had concerns about whether plaintiff could handle the job, which was a full-time position that involved traveling from school to school. (*Id.* at 515–16).

When asked about what she said to plaintiff about the job, Schiller–Rabi claimed that she did not recall what she had said about the RY **Program**; she testified that she did not recall whether a decision had been made at that time as to how the **Program** was going to be reconstituted or whether she and Ms. **Siracuse** discussed the fact that Fitzpatrick was getting a supervisory position. (*Id.* at 518), However, she claimed that Ms. **Siracuse** had come to talk to her because "she found out the position was reconstituted" (*Id.* at 516), and admitted that plaintiff was "crying pretty hard" during their conversation. (*Id.* at 519). Ms. Schiller–Rabi testified that at some point she learned that Fitzpatrick was going to be doing some supervising, but she contended that "this was no longer the same position" because Sonia McAuley was going to supervise the **Program**. (*Id.* at 521). Nevertheless, Ms. Schiller–Rabi conceded that in discussing with Ms. **Siracuse** why she did not get the position, she "may have" told plaintiff, "This isn't a good year for change for you" because she "was concerned about her health." (*Id.* at 526).

C. *Analysis*

***9** At the conclusion of the evidence, the jury was charged as to the law and given a Verdict Form, which required them to answer certain questions. Item No. 3 on the Verdict Form asked the jury to decide if the plaintiff had established "by a preponderance of the evidence that defendant failed to promote her to an RY Supervisor position that existed at the time?" In finding in favor of plaintiff on her discrimination charge, the jury checked "Yes" in answer to Item No. 3. Defendant now argues that the jury's verdict should be set aside because there was no evidence to support this finding. Instead, defendant argues that the evidence established that Babolcsay's position as RY supervisor was eliminated; the responsibilities of the position were divided between two people; and therefore, plaintiff could not have been promoted to that position because it no longer existed.

In support of this argument, defendant points to plaintiff's own testimony. (Def.'s Set Aside Mem.[6] at 5). According to plaintiff's own testimony, she told her supervisor that she was interested in applying for the position held by Linda Babolcsay. (*Id.* (citing Tr. at 114)). Ms. McAuley's testimony confirmed that plaintiff had approached her about Babolcsay's position. (*Id.* (citing Tr. at 89–91)).

Defendant cites as further support for its argument Eileen Dwyer's testimony that PDHP ceased to operate an RY **Program** at Christ the King High School after the Babolcsay incident[7] because the School no longer wanted it; therefore, according to defendant, the position ceased to exist before plaintiff even applied for it. (*Id.* at 6–7 (citing Tr. at 460, 462, 463)). Dwyer testified that when she spoke to plaintiff about her interest in the position, she asked Ms. **Siracuse**, "Which position because there is no position available?" (Tr. at 463). Sonia McAuley confirmed that "RY group [was] discontinued" at Christ the King after Babolcsay resigned. (Def.'s Set Aside Mem. at 8 (citing Tr. at 111)). Even plaintiff conceded that, as RY supervisor, Babolcsay was assigned to work out of Christ the King High School, and that the position at Christ the King High School no longer existed when plaintiff applied to be the RY supervisor. (*Id.* (citing

Tr. at 313–14)). She was aware that the school ceased to participate altogether in the RY **Program** after Babolcsay left. (*Id.* at 5 (citing Tr. at 305–06)). Plaintiff further admitted that "all existing RY positions" were filled for the 2004–05 school year. (*Id.* at 8 (citing Tr. at 313–14)).[8]

In addition, defendant contends that Dwyer and McEvoy testified consistently that the decision to eliminate the RY supervisor position was made before anyone spoke to plaintiff about the position. (*Id.* at **7** (citing Tr. at 462, 726)). Dwyer stated that she had considered eliminating the RY supervisor position before Babolcsay's resignation, and that no replacement was hired; instead, the workload was simply redistributed. (*Id.* (citing Tr. at 111, 451–52, 462, 726)). Similarly, Judith Schiller–Rabi testified that the RY supervisor position had been reconstituted and had not been given to Ellen Fitzpatrick. (Tr. at 518).

***10** With respect to Ellen Fitzpatrick, defendant argues that the testimony demonstrates that Fitzpatrick was given "additional responsibilities in the RY **Program**, not a promotion to RY Supervisor ." (*Id.* at 10 (citing Tr. at 407)). Defendant further underscores that the memorandum announcing Fitzpatrick's position does not mention "supervisor" or "promotion." (*Id.* at 10–11 (citing Tr. at 411–12)). Moreover, the testimony was clear that Fitzpatrick's responsibilities were not exactly the same as those of Babolcsay. (*Id.* at 12 (citing Tr. at 848)). Thus, defendant argues that since plaintiff was seeking a promotion to Babolcsay's position at Christ the King High School, which was eliminated, and since plaintiff never pleaded in her Complaint that she asked for a new position to be created, the jury's verdict should be set aside.

In response to defendant's arguments, plaintiff points out that defendant has entirely disregarded the evidence favoring plaintiff's position and only cited to evidence in support of defendant's position. (Pl.'s Set Aside Mem.[9] at 3). Plaintiff contends that even though the RY position at Christ the King High School was eliminated after Babolcsay was terminated, this does not mean that the jury was constrained to find that there was no RY supervisory job to which plaintiff could have been promoted or that the position was not eliminated for discriminatory reasons. (*Id.*) Even if PDHP underwent a reduction in force of one person, an employer may not make such a decision for unlawful discriminatory reasons. *See Hagelthorn v. Kennecott Corp.*, 710 F.2d 76, 81 (2d Cir.1983), Plaintiff disputes defendant's argument that in order to prevail, plaintiff must demonstrate that Babolcsay's job still existed in all its particulars, including its location at Christ the King, at the time of the denial of her promotion. (Pl.'s Set Aside Mem. at 4). The Verdict Form did not ask the jury to decide if plaintiff was discriminated against when she was not promoted to Linda Babolcsay's position; it simply asked the jury to determine if she had been denied a promotion to *"an* RY Supervisor position." (*Id.*)

Indeed, to the extent that the PDHP witnesses testified that the position was eliminated or reconfigured for reasons other than to deny plaintiff the supervisory promotion that she sought, this Court finds that there was overwhelming evidence presented at trial on which the jury could have relied to discount this testimony of the PDHP witnesses as an after-the-fact justification for their discriminatory conduct. Without considering the questionable credibility of certain PDHP witnesses, ample testimony was presented in support of plaintiff's claims.

First, the jury could have credited the testimony of Ellen Fitzpatrick, who believed she was taking over Babolcsay's position and who believed that her new position was a promotion to a supervisory position. (Tr. at 838, 839, 840). Like plaintiff, Fitzpatrick testified that she was interested in the RY supervisor job recently vacated by Babolcsay, and she believed that was the job to which she was promoted. (*Id.* at 840). Also, like plaintiff, Ms. Fitzpatrick testified that she did not recall being told that the position was being reconfigured at the time she received the promotion. (*Id.* at 844). The evidence is very clear that Fitzpatrick did receive a promotion, in that the new position resulted in an increase in pay and new supervisory responsibilities. (*Id.* at 845, 847). Indeed, Ms. Fitzpatrick testified that with the exception of clinical diagnoses, which she was not qualified to do, she had the same supervisory responsibilities as Babolcsay in terms of supervising the RY counselors. (*Id.* at 849–50). She testified that PDHP officials made it clear to her that despite her lack of a master's degree, which is normally required for supervisors at PDHP, she was being given a supervisory position based on her extensive experience. (*Id.* at 840). She was informed that she would receive a raise that would bring her salary to the same level as Babolcsay's salary had been prior to her termination. (*Id.* at 642, 643).

***11** That Fitzpatrick believed she was promoted to supervisor is supported by the reference letter that Fitzpatrick wrote on behalf of Anna Steegman. (Tr. at 851; Pl.'s Ex. 86). In the letter, Fitzpatrick identified herself as the "RY Supervisor," and stated that she supervised Steegman.

(Tr. at 851; Pl.'s Ex. 86). In addition, Ms. Steegman corroborated Ms. Fitzpatrick's testimony. Steegman testified that she considered Fitzpatrick to be her supervisor and that Fitzpatrick performed supervisory duties for the RY **Program**. (Tr. at 58, 64, 67). If credited by the jury, the testimony of Fitzpatrick and Steegman could be seen as supporting plaintiff's claim that the RY supervisor position existed even after Babolcsay's termination.

In addition, the jury could have discounted defendant's argument that the **program** was intentionally reconfigured to eliminate the RY supervisor position and redistribute its duties across multiple people. Instead, the jury could have concluded that Ellen Fitzpatrick was given Babolcsay's supervisory position and that the reason certain of the job responsibilities previously performed by Babolcsay were given to Sonia McAuley was not due to the reconfiguration of the position but rather due to the fact that Fitzpatrick was not qualified to handle the job. This conclusion is supported by McAuley's testimony that shortly after Babolcsay's termination, PDHP's borough director told her that "they had made a decision that Ellen Fitzpatrick would be the person replacing Linda Babolcsay." (*Id.* at 91). Thus, even though there was evidence demonstrating that McAuley was assigned to supervise Fitzpatrick in areas that had been previously handled by Babolcsay (*id.* at 96, 101, 452, 728), the jury could have concluded that this was not due to a reconfiguration of the position but was instead done because, unlike Ms. **Siracuse**, Fitzpatrick was not qualified to perform certain mental health assessments that were required as part of the job because she lacked the necessary clinical credentials. (*Id.* at 629–630, 634–35, 840, 848–49). Despite defendant's claim that Sonia McAuley took over a large portion of Babolcsay's job responsibilities (*see* Def.'s Set Aside Mem. at 12), Judith Schiller–Rabi testified that McAuley only spent "maybe 10 percent of her time, 15 percent, maybe" on the RY **Program**. (Tr. at 526). Based on this evidence, the jury could have found that McAuley was given part of Babolcsay's job out of necessity—because Fitzpatrick lacked the requisite credentials—not because the **Program** was intentionally reconfigured to eliminate the RY supervisor position. (*Id.* at 96, 101).

Although defendant argues that the elimination of the RY **Program** at Christ the King High School meant that there was no supervisory position available to plaintiff, the jury could have found that the evidence presented at trial did not support that conclusion. There was no evidence presented that the supervisor of the RY counselors had to be located at Christ the King, or in any particular location whatsoever. Indeed, plaintiff argued that the principal of the Mary Louis Academy, where plaintiff was assigned, would have wanted an RY **Program**. (Pl.'s Set Aside Mem. at **7**; Tr. at 313). Regardless of whether this is true or whether plaintiff could have supervised the RY counselors from some other location, as McAuley and Fitzpatrick did, there was no evidence presented to suggest that there was something special about Christ the King High School that inextricably tied it to the supervisory position. Rather, it seems clear that the role required either traveling from school to school and supervising the other RY counselors, as Babolcsay and then Fitzpatrick did, or meeting with Fitzpatrick on a monthly basis to find out what was going on with the counselors, as McAuley did.

***12** The jury could have relied on the testimony of plaintiff, McAuley, Fitzpatrick, and Steegman to find that Fitzpatrick —who like plaintiff applied for Babolcsay's position—was given the bulk of Babolcsay's supervisory responsibilities with the exception of the clinical assessments, which Fitzpatrick was not qualified to do. The jury could have decided, based on their observation of the demeanor of the witnesses as they testified, not to credit the explanation provided by Dwyer and then McEvoy with respect to the elimination of the position, particularly when viewed in the context of the health-related statements made to plaintiff at the time, The jury could also have believed, as plaintiff's counsel argued, that the defendant's claimed "reconfiguration" of the position was a pretextual after-the-fact construct designed to blunt the appearance of discrimination that stemmed from PDHP's decision to give the job to Fitzpatrick even though she was less qualified than the plaintiff.

Consequently, this Court finds that sufficient evidence was presented at trial to support the jury's finding that defendant failed to promote plaintiff to an RY supervisor position that existed at the time she sought a promotion to it. (*See* Jury Verdict Form at 1).

II. *Motion for Offset*

Defendant PDHP also moves for an offset to plaintiff's damage award in the amount of $4,380.98, representing the amounts paid to plaintiff as short term disability benefits during the period from November 2004 to May 2005, and long-term disability benefits for the period from May 22, 2005 to June 9, 2005. Plaintiff argues that under New York's collateral source rule, these amounts paid by independent sources—here, the third-party insurer—should

not be deducted from the damages owed by her employer as a result of the employer's wrongdoing.

A. *Factual Contentions*

Plaintiff received an award from the jury for back pay in the amount of $38,472.00. According to defendant, plaintiff's salary for the 2004–2005 school year was $46,472.00. (*See* Ex. A to Cea Cert .[10]). Effective November 15, 2004, plaintiff filed for and began receiving short-term disability benefits, which ended as of May 22, 2005, (Cea Decl.[11] ¶¶ 6, 8). Defendant contends that during this period, plaintiff received benefits totaling $4,380.98. (*Id.* ¶ 10).

Defendant also asserts that plaintiff received long term disability benefits through PDHP's insurer during the two week period beginning May 22, 2005, and running through June 9, 2005. (Cea Decl. ¶¶ 12–13; Exs. K, L, M to Cea Cert.). The amount received in long term disability benefits was $538.01. (Cea Decl. ¶ 14).

Defendant seeks reimbursement for the amount paid as short and long term disability benefits, for a total offset of $4,918.99. (*Id.*)

B. *Collateral Source Rule*

The collateral source rule, rooted in New York's common law, provides, as a general rule, that an injured plaintiff's damages should not be mitigated or reduced based on payments the injured plaintiff received from a source wholly independent of and collateral to the wrongdoer. *See Healey v. Rennert,* 9 N.Y.2d 202, 213 N.Y.S.2d 44, 173 N.E.2d 777 (1961); *Rutzen v. Monroe Cty. Long Term Care* ***Program****, Inc.,* 104 Misc.2d 1000, 1001, 429 N.Y.S.2d 863, 864 (Sup.Ct.1980); *see also Applehead Pictures LLC v. Perelman,* 80 A.D.3d 181, 191, 913 N.Y.S.2d 165, 173 (1st Dep't 2010) (stating: "The 'collateral source rule' requires the tortfeasor to bear the full cost of the injury he or she has caused regardless of any benefit the victim has received from an independent or 'collateral' source") (citations omitted). The collateral source rule is "designed to ensure that tortfeasors pay for all damages caused by their tortious conduct," *Inchaustegui v. 666 5th Ave. Ltd. P'Ship,* 96 N.Y.2d 111, 115, 725 N.Y.S.2d 627, 630, 749 N.E.2d 196 (2001), and, as such, "has a punitive dimension." *Id.* at 116, 725 N.Y.S.2d at 631, 749 N.E.2d 196 (citation omitted). The theory behind the rule is that, in fairness, the wrongdoer should not benefit because the plaintiff enjoyed independent contractual or employment rights to reimbursement for damages. *See Kish v. Board of Ed. of the City of N.Y.,* 76 N.Y.2d 379, 384, 558 N.E.2d 1159, 1161, 559 N.Y.S.2d 687, 689 (1990).

13** New York, however, has created an exception to the collateral source rule for gratuitous services and payments received by an injured party for which he or she gave no consideration and was under no obligation to repay. *See Drinkwater v. Dinsmore,* 80 N.Y. 390, 392–93, 36 Am. Rep. 624 (1880); *see also Rutzen v. Monroe Cnty. Long Term Care* ***Program*, Inc.,* 104 Misc.2d at 1002, 429 N.Y.S.2d at 864–65. Known as the *"Drinkwater* doctrine," this exception provides that a plaintiff may not receive lost wages if "defendant was able to show 'that for some particular reason the plaintiff would not have earned any wages if he had not been injured, or that he was under such a contract with his employer that his wages went on without service, or that his employer paid his wages from mere benevolence.' " *Rutzen v. Monroe Cnty. Long Term Care* ***Program****, Inc.,* 104 Misc.2d at 1002, 429 N.Y.S.2d at 865 (quoting *Drinkwater v. Dinsmore,* 80 N.Y. at 393). However, in *Klein v. United States,* 339 F.2d 512 (2d Cir.1964), the Second Circuit determined that the *Drinkwater* doctrine only bars recovery for gratuitous benefits received from an employer; on the contrary, " 'benefits received by a plaintiff as a result of some consideration that has previously been extended to his employer (contract) no longer precludes such recovery.' " *Id.* at 517–18 (citing cases).

Defendant contends that because the collateral source rule " 'is inherently a tort concept' " (Def.'s Offset Mem.[12] at 2 (quoting *Inchaustegui v. 666 5th Ave. Ltd. P'Ship,* 96 N.Y.2d at 116, 725 N.Y.S.2d at 631, 749 N.E.2d 196),[13] the rule should not be applied in this case, which defendant characterizes as "an action for personal injury." (*Id.* at 3, 725 N.Y.S.2d 627, 749 N.E.2d 196). Defendant argues that the New York State legislature has held the collateral source rule in disfavor, expressly limiting its applicability in certain instances. (Def.'s Offset Mem, at 3 (citing N.Y.C.P.L.R. § 4545) (making collateral source evidence admissible in actions for medical, dental, or podiatric malpractice; certain actions against a public employer for personal injury or wrongful death; and other actions for personal injury, injury to property, or wrongful death)). Defendant asserts that by limiting the collateral source rule, the legislature was attempting to "eliminate windfalls and double recoveries for the same loss." ' (*Id.* (quoting *Fisher v. Qualico Contr. Corp.,* 98 N.Y.2d 534, 537, 749 N.Y.S.2d 467, 469, 779 N.E.2d 178 (2002))). Defendant further contends that since plaintiff's disability benefits were intended to replace lost earnings,

there is " 'a direct correspondence between the item of loss and the type of collateral reimbursement' " (*id.* (quoting *Oden v. Chemung County Indus. Dev. Agency,* 87 N.Y.2d 81, 87, 637 N.Y.S.2d 670, 672, 661 N.E.2d 142 (1995))), and therefore, the disability benefits already received by plaintiff should be deducted from the jury's award.

Although defendant is correct that the legislature has limited the applicability of the collateral source rule in certain circumstances, there is no precedent for applying these limitations in the context of a claim of employment discrimination. Beginning in 1975, the New York legislature enacted a series of statutory amendments to C.P.L.R. § 4010, and its successor statute, C.P.L.R. § 4545, limiting the collateral source rule, initially as a means of dealing with medical malpractice insurance issues. *See Kihl v. Pfeffer,* 47 A.D.3d 154, 848 N.Y.S.2d 200 (2d Dep't 2007). The statutory exceptions to the common law rule that were enacted included wrongful death awards, and were eventually extended to " 'any action' for personal injury, property damages or wrongful death where damages have been awarded for past or future economic loss." *Id.,* 47 A.D.3d at 162, 848 N.Y.S.2d at 206. The statute does not mention claims arising from discriminatory conduct, and as the court in *Kihl* noted, "[b]ecause C.P.L.R. § 4545(c) is in derogation of the common law, its provisions must be strictly construed." *Id.,* 47 A.D.3d at 163, 848 N.Y.S.2d at 206 (citing cases). Indeed, defendant has not cited a single case under either Federal or New York State law in which the court entertained an offset under circumstances where the claim was based on employment discrimination and the amount paid in benefits was paid by a third-party insurer, as it has been here. *Cf., EEOC v. Yellow Freight System, Inc.,* No. 98 **CV** 2270, 2001 **WL** 1568322, at *4 (S.D.N.Y. Dec. 6, 2001) (permitting the defendant, who was self-insured and who paid benefits directly to the employee-victim, to enter evidence demonstrating its right to an offset).

***14** Moreover, the Second Circuit has held that the decision whether to apply the collateral source rule to deduct benefits from a back pay award in an employment discrimination case " 'rests in the sound discretion of the district court.' " *Dailey v. Societe Generale,* 108 F.3d 451, 460 (2d Cir.1997). The Court explained: "We do not believe that the rule ... requiring the deduction of these collateral benefits is appropriate, particularly in view of the compelling reasons, expressed by many of our sister circuits, that a district court might decline to deduct unemployment insurance from back pay," *Id.* at 460–61; *see also Ramey v. District 141, Int'l Ass'n of Machinists & Aerospace Workers,* 362 Fed. Appx. 212, 2010 **WL** 292769 (2d Cir. Jan.27, 2010). When the benefits do not come from the employer, but instead come from a collateral public source, such as unemployment or social security benefits, the Second Circuit has noted that " '[a]s between the employer, whose action caused the discharge, and the employee, who may have experienced other noncompensable losses, it is fitting that the burden be placed on the employer.' " *Promisel v. First Am. Artificial Flowers, Inc.,* 943 F.2d 251, 258 (2d Cir.1991) (quoting *Maxfield v. Sinclair Int'l,* 766 F.2d 788, 795 (3d Cir.1985) (declining to set off social security benefits in ADEA lost wages context).

Plaintiff argues that here, the benefits were not paid by PDHP; instead, she contends they were paid by third-party insurers, pursuant to plaintiffs contractual and statutory right to receive benefits as part of her employment compensation. (Pl.'s Offset Mem.[14] at 4). Case law in this Court and in the Second Circuit supports the conclusion that under these facts, the *Drinkwater* exception does not apply, and any windfall should be to the benefit of the victim of bias—in this case, the plaintiff—and not to the perpetrator. *See, e.g., Klein v. United States,* 339 F.2d at 517–18 (holding that disability insurance benefits should not be offset against any recovery); *Meling v. St. Francis College,* 3 F.Supp.2d. 267, 276 (**E.D.N.Y**.1998) (refusing to deduct long term disability benefits from a back pay award in an ADA case and noting "I prefer to confer the unavoidable windfall on the victim of discrimination"). In *Meling v. St. Francis College,* this Court declined to deduct amounts received in disability benefits from the plaintiff's back pay award even though the defendant employer sent premiums to the insurance company on behalf of all employees. 3 F.Supp.2d at 277. Noting that the plaintiff would receive more than she would have had she not been terminated, the court determined that "a 'compelling reason' to exercise that discretion in favor of refusing to deduct benefit payments is that it is better to confer a windfall payment to the victim rather than the perpetrator of unlawful discrimination." *Id.* at 275–76 (quoting *Dailey v. Societe Generale,* 108 F.3d at 460–61).

***15** Other courts agree. The Sixth and Eighth Circuits have also declined to apply the collateral source rule in the context of employment cases. *See, e.g., Hamlin v. Charter Twp. of Flint,* 165 F.3d 426, 434–35 (6th Cir.1999) (declining to apply the collateral source rule in an employment discrimination context because to do so would undermine the deterrent functions of the statute); *Arenson v. Callahan,* 128 F.3d 1243, 1248 (8th Cir.1997) (declining to apply offset in the

context of an action brought before the NLRB). In *Sam Teague Ltd. v. Hawai'i Civil Rights Commission,* the Supreme Court of Hawaii noted that as of February 1999, "no federal circuit has determined that unemployment benefits should be deducted, as a matter of law, from back pay awards in discrimination cases." 89 Hawai'i 269, 282, 971 P.2d 1104, 1117 (Sup.Ct.1999) (citing cases). The Eighth Circuit explained in *Gaworski v. ITT Commercial Financial Corp.,* 17 F.3d 1104, 1112 (8th Cir., 1994) that "[b]ack pay awards in discrimination cases serve two general functions: (1) to make victimized employees whole for the injuries suffered as a result of the past discrimination; and (2) to deter future discrimination." Reducing a back pay award by amounts that are not paid by the employer " 'makes it less costly for the employer to wrongfully terminate a protected employee and thus dilutes the prophylactic purposes of a back pay award,' " conferring "a windfall to the employer who committed the illegal discrimination." *Sam Teague Ltd. v. Hawai'i Civil Rights Commission,* 89 Hawai'i at 282, 971 P.2d at 1117 (quoting *Gaworski v. ITT Commercial Financial Corp.,* 17 F.3d at 1113).

Although plaintiff's award in this case was based on the NYCHRL and not federal anti-discrimination laws, courts interpreting issues under the City and State **Human** Rights Laws typically look to the federal courts' construction of federal anti-discrimination statutes. *See, e.g., Argyle Realty Assocs. v. N.Y. State Div. of* ***Human*** *Rights,* 65 A.D.3d 273, 285–86, 882 N.Y.S.2d 458, 468–69 (2d Dep't 2009). In fact, as plaintiff argues, if anything, the NYCHRL is "to be construed liberally for the accomplishment of the uniquely broad and remedial purposes" of the statute; therefore, a determination to reduce the amount to be paid in damages and thus award a windfall to the defendant employer found liable for discriminatory conduct would seem to be contrary to the goals of the statute. *See Albunio v. City of New York,* 16 N.Y.3d 472, 477, 922 N.Y.S.2d 244, 246, 947 N.E.2d 135 (2011) (admonishing courts to construe the NYCHRL broadly in favor of discrimination plaintiffs) (internal citation omitted). In the absence of an explicit statutory exception to the collateral source rule, the Court is left to exercise its discretion in determining whether to reduce the plaintiff's award by the amounts paid from her disability insurers.

Having considered the competing policy concerns raised in this case, the Court finds that in the context of the jury's finding of employment discrimination based on plaintiff's suffering from cancer, the need to deter future discrimination outweighs the concern that the victim is receiving a windfall. Particularly in this case, where the disability benefits paid to plaintiff were not paid by the employer, the Court exercises its discretion in favor of plaintiff and declines to impose an offset that would merely reduce the amount that the employer is required to pay for its unlawful conduct, resulting in a windfall for the very party found responsible for plaintiff's damages. Accordingly, the Court denies defendant's motion for an offset.

III. *Attorneys' Fees and Costs*

***16** Plaintiff moves for an award of attorneys' fees and costs in the amount of $443,465 as a prevailing party under N.Y.C. Admin. Code § 8–502(f), and for pre-judgment interest under N.Y.C.P.L.R. §§ 5001 and 5004, Defendant does not appear to dispute that plaintiff was a prevailing party entitled to receive fees under the statute. Instead, defendant urges the Court to exercise its discretion in awarding fees by either: 1) denying fees altogether, in the alleged interest of public policy based on what defendant claims is plaintiff's counsels' flawed representation; or 2) reducing the amount of fees awarded.

A. *Standard for Calculating Attorneys' Fees*

Under the NYCHRL, "[i]n any civil action commenced pursuant to this section, the court, in its discretion, may award the prevailing party costs and reasonable attorney's fees." Admin. Code § 8–502(f). *See Fonuto v. Nisi,* 84 A.D.3d 617, 923 N.Y.S.2d 493 (1st Dep't 2011) (overturning a denial of fees following a jury trial where the plaintiff was a prevailing party and received more than nominal damages). Like the NYCHRL generally, the fees provision is to "be construed liberally ... in order to accomplish the statute's uniquely broad and remedial purpose." *Williams v. N.Y.C. Housing Auth.,* 61 A.D.3d 62, 872 N.Y.S.2d 27 (1st Dep't 2009) (quoting N.Y .C. Admin, Code § 8–130); *see also* 42 U.S.C. § 1988(b) (providing for the award of attorney's fees to prevailing parties in civil rights actions).

A plaintiff "prevails" for purposes of awarding fees "when actual relief on the merits of his claim materially alters the legal relationship between the parties by modifying the defendant's behavior in a way that directly benefits the plaintiff." *Farrar v. Hobby,* 506 U.S. 103, 111, 113 S.Ct. 566, 121 L.Ed.2d 494 (1992). Here, plaintiff in the case at issue is a prevailing party. *See id.* (holding that "to qualify as a prevailing party, a civil rights plaintiff must obtain at least some relief on the merits of his claim .... [either] an enforceable judgment against the defendant ... or comparable relief through a consent decree or settlement");

see also Raishevich v. Foster, 247 F.3d 337, 345 (2d Cir.2001) (holding that even where a plaintiff is awarded an amount in damages less than he sought, fees are warranted); *Cabrera v. Jakabovitz,* 24 F.3d 372, 393 (2d Cir.) (awarding fees after a jury verdict of nominal damages where plaintiffs "prevailed on a significant legal issue"), *cert. denied,* 513 U.S. 876, 115 S.Ct. 205, 130 L.Ed.2d 135 (1994); *Ruggiero v. Krzeminski,* 928 F.2d 558, 564 (2d Cir.1991)(holding that even when a party achieves only partial success, the party may be considered "prevailing" if he succeeds on a significant issue in the litigation that achieves some benefit). As prevailing parties, there is "a presumption" that they "should recover an attorney's fee unless special circumstances would render such an award unjust." *Kerr v. Quinn,* 692 F.2d 875, 877 (2d Cir.1982).

***17** However, the court does not automatically award a prevailing party its full claimed attorney's fees; first the fees must be found to be reasonable. In *Arbor Hill Concerned Citizens Neighborhood Association v. County of Albany and Albany County Board of Elections,* the Second Circuit held that when assessing whether claimed legal costs are reasonable, the Court determines the "presumptively reasonable fee" for an attorney's services by looking to what a reasonable client would be willing to pay, "bear[ing] in mind *all* of the case-specific variables" that the courts have identified as relevant in setting a reasonable hourly rate. 522 F.3d 182, 190 (2d Cir.2008) (emphasis in original); *see also Simmons v. New York City Transit Auth.,* 575 F.3d 170, 172 (2d Cir.2009). In *Arbor Hill,* the Second Circuit abandoned the traditional "lodestar" method of calculating fees by multiplying the number of hours reasonably spent by counsel on the matter by a reasonable hourly rate, *see Hensley v. Eckerhart,* 461 U.S. 424, 433, 103 S.Ct. 1933, 76 L.Ed.2d 40 (1983); *Cruz v. Local Union No. 3 of Int'l Bhd. of Elec. Workers,* 34 F.3d 1148, 1159 (2d Cir.1994), and instead set forth a number of factors to guide the court's inquiry as to what constitutes a reasonable hourly rate for legal services performed. As laid out in *Arbor Hill,* these include:

> (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 attorney's 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.

Arbor Hill Concerned Citizens Neighborhood Ass'n v. County of Albany, 522 F.3d at 187 n. 3 (citing *Johnson v. Ga. Highway Express, Inc.,* 488 F.2d 714, 717–19 (5th Cir.1974), *abrogated on other grounds by Blanchard v. Bergeron,* 489 U.S. 87, 109 S.Ct. 939, 103 L.Ed.2d 67 (1989)).

A number of recent cases have applied some of these *Arbor Hill* factors when awarding attorneys' fees. *See Vilkhu v. City of New York,* No. 06 CV 2095, 2009 WL 1851019, at *1 (E.D.N.Y. June 26, 2009); *see also Cruz v. Henry Modell & Co., Inc.,* No. 05 CV 1450, 2008 WL 905351, at *3 (E.D.N.Y. Mar. 31, 2008). Courts are also instructed to balance:

> the complexity and difficulty of the case, the available expertise and capacity of the client's other counsel (if any), the resources required to prosecute the case effectively ..., the timing demands of the case, whether an attorney might have an interest (independent of that of his client) in achieving the ends of the litigation or might initiate the representation himself, whether the attorney might have initially acted *pro bono* ..., and other returns (such as reputation, etc.) that an attorney might expect from the representation.

***18** *Arbor Hill Concerned Citizens Neighborhood Ass'n v. County of Albany,* 522 F.3d at 184 (emphasis in original). It remains the attorney's burden to maintain contemporaneous records, *see F.H. Krear & Co. v. Nineteen Named Trustees,* 810 F.2d 1260, 1265 (2d Cir.1987), and fee applications are subject to denial where the fees have not been adequately documented. *See, e.g., Riordan v. Nationwide Mut. Fire Ins. Co.,* 977 F.2d 47, 53 (2d Cir.1992).

B. *Defendant's Challenge to Any Award of Fees*

Defendant argues that the Court should deny plaintiff's request for attorneys' fees in its entirety due to the alleged "negligent performance" of plaintiff's counsel. (Def.'s Fee Mem.[15] at 3). Specifically, defendant relies on the failure of plaintiff's counsel to timely produce in discovery the Supplemental Report of plaintiffs treating psychiatric expert, Dr. Robert Goldstein, resulting in an order precluding the expert from testifying as to plaintiff's psychiatric condition after 2008. (*Id.* at 4; *see also* discussion *infra* at n. 35). As a consequence, in requesting emotional distress damages, plaintiff was limited to seeking compensation for damages she suffered in or before 2008, even though Dr. Goldstein would have testified that as of April 15, 2011, when he last saw plaintiff, she was still suffering significant emotional distress

and the resumption of treatment was indicated. (*See id.* at 4, Ex. A).

As further evidence of plaintiff's counsels' alleged flawed representation, defendant points to counsels' failure to disclose ongoing therapy provided by Garda J. Spaulding, a licensed clinical social worker. (*Id.* at 5–6). Spaulding had been treating plaintiff between 1994 and 1996 on matters unrelated to the incidents at issue in this suit. (*Id.*) Although Spaulding was deposed in 2008, defendant argues that plaintiff's counsel failed to disclose that plaintiff was currently seeing Spaulding for therapy. (*Id.* at 6). Defendant argues that: 1) plaintiff's counsel spent "excessive time" preparing Spaulding to testify "as to her current therapy sessions which remained undisclosed to Defendant;" and 2) "[i]t is obvious that Plaintiff and her counsel contrived with Spaulding to provide therapy without records ... in order to 'sand bag' the Defendant whom they believed would call Spaulding." (*Id.* at 6–7). Defendant also criticizes plaintiff's counsels' reliance on Theresa Riter, plaintiff's sister, whose testimony plaintiff offered to prove that plaintiff was depressed after 2008 in an effort to salvage the case for post–2008 damages. (*Id.* at 7). Defendant argues that this effort was unsuccessful because Ms. Riter admitted on cross-examination that she had in fact observed her sister's depression in earlier years. (*Id.* (citing Tr. at 760–763)).

Defendant contends that the "net result of counsel's misguided conduct [in pursuit of plaintiff's claim] was a jury award of merely $40,000 for emotional damages, rather than the windfall they expected while refusing Defendant's written offer of settlement of $125,000," (*Id.,* Ex. K). Defendant argues that plaintiff was "substantially harmed" by "sub-par counsel," and that "[a]s a matter of public policy, such willful or grossly negligent conduct should not be rewarded." (*Id.* at 7).

***19** Defendant also contends that plaintiff's counsel failed to engage in settlement negotiations in good faith and that "[a]s a matter of public policy, Plaintiff's counsel should not be permitted to increase 'damages' (legal fees) in a moderate case by unreasonably engaging in settlement discussions." (*Id.* at 9). Defendant reviews the settlement negotiations that have occurred in the case, arguing that the defendant's final written offer to plaintiff during the middle of trial was more generous than plaintiff received from the jury, suggesting that plaintiff's demand was unreasonable. (*Id* . at 10). Accordingly, defendant argues that public policy dictates that "no attorney's fees should be awarded within the context of this type of behavior." (*Id.* at 11).

In response, plaintiff contends that "successful civil rights litigants are entitled to a presumptive award of attorney's fees unless 'special circumstances would render such an award unjust.' " (Pl.'s Fee Mem. at 2) (quoting *Raishevich v. Foster,* 247 F.3d 337, 344 (2d Cir.2001) (citation omitted)). To overcome this presumption, the losing party must demonstrate that the "plaintiff's claim was so strong on the merits and so likely to result in a substantial judgment that counsel in similar cases could be easily and readily retained." *Raishevich v. Foster,* 247 F.3d at 344. The Court must also find "in light of all the circumstances and the size of the recovery, an award of such fees might work an injustice." *Id.* at 345 (citation omitted).

With respect to the strength of plaintiff's case, this was not a case where the defendant conceded liability prior to trial or where the liability was so clearly in favor of plaintiff that numerous attorneys would be eager to undertake the representation. To the contrary, defendant argues even now that there was insufficient evidence to support the jury's verdict. (*See* discussion *supra* at 16–20). Moreover, given the relatively small amount of economic loss suffered by Ms. **Siracuse** because of her generally low wage rate, it is unlikely that most attorneys would have taken this case.

As for the second prong of the test described in *Raishevich v. Foster,* defendant has made absolutely no showing that a fee award would be otherwise "unjust" in this case. *See* 247 F.3d at 344. To the extent that defendant argues for a denial of fees based on counsels' performance, defendant provides no case authority or precedent in support of this argument, With respect to the argument that testimony from Dr. Goldstein and Ms. Spaulding would have increased plaintiff's damage award, plaintiff argues that it would have been "irresponsible" for plaintiff's counsel to call Spaulding, who was Ms. **Siracuse's** therapist prior to the incident at PDHP. Plaintiff's counsel recognized that if called, Spaulding would have been subject to examination on all of Ms. **Siracuse's** pre-discrimination psychological history, which arguably could have produced a smaller jury award. (Pl.'s Fee Mem. at 5; Beranbaum Decl.[16] ¶¶ 10–18). Plaintiff further notes that Ms. **Siracuse** testified that her depression ended in the spring of 2009, and that she was "pretty much better now." (Tr. at 159–60). Indeed, plaintiff contends that not only would the testimony of Dr. Goldstein, which arguably disagreed with plaintiff's own assessment of her mental state,

have been confusing to the jury, but to the extent that Ms. Siracuse continued to suffer after May 2008, the jury could have evaluated plaintiff's testimony and that of her sister, Ms. Riter. (Pl.'s Supp. Fee Mem.[17] at 5). Ultimately, the jury awarded plaintiff $10,000 per year, or a total of $40,000, for the period in which she suffered severe depression. Thus, it is hard to understand why plaintiff's counsel should be entirely denied fees based on these circumstances.

***20** Similarly, defendant has failed to provide any support for the novel argument that plaintiff should be denied fees because, in defendant's view, plaintiff's counsel acted unreasonably in failing to accept defendant's settlement offer. As an initial matter, defendant's reference to the settlement discussions and amounts offered is inappropriate. Federal Rule of Evidence 408(a) states that "Evidence of the following is not admissible—on behalf of any party—either to prove or disprove the validity or amount of a disputed claim or to impeach by a prior inconsistent statement or a contradiction: ... (2) conduct or a statement made during compromise negotiations about the claim...." Fed.R.Evid. 408(b). While Rule 408(b) allows for certain exceptions, *see* Fed.R.Evid. 408(b) (providing that "[t]he court may admit this evidence for another purpose, such as proving a witness's bias or prejudice, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution"), neither challenging an attorney's fee request nor demonstrating the opposing attorney's poor performance appears on the short list of permissible other purposes within Rule 408. Indeed, in *HR U.S. LLC v. Mizco Intern., Inc.,* the court held that statements made in the context of settlement discussions, as well as settlement offers, "are inadmissible" in the context of a decision regarding whether to award attorney's fees in a patent case. No. 07 CV 2394, 2010 WL 3924548, at *11 (E.D.N.Y. Sept.29, 2010). The rationale offered by the court in that case was that liability for attorney's fees and the amount of fees were expressly at issue in the negotiations. *Id* . Similarly, in the instant case, which was brought under a fee-shifting statute, the potential settlement amount was considered in light of the outstanding attorney's fees.

Apart from defendant's questionable reliance on settlement discussions and figures, the Second Circuit has held that "[a]bsent a showing of bad faith, 'a party's declining settlement offers should [not] operate to reduce an appropriate fee award." ' *Ortiz v. Regan,* 980 F.2d 138, 141 (2d Cir.1992) (quoting *Cowan v. Prudential Ins. Co. of America,* 728 F.Supp. 87, 92 (D.Conn.1990) (stating that "[a] rule giving trial judges discretion to deny [attorney's] fees where the refusal of an offer is shown after the fact to have been unwise might well lead to very uneven results and even misuse in cases in which judges become involved in settlement negotiations")), *rev'd on other grounds,* 935 F.2d 522 (2d Cir.1991). In *Rozell v. Ross–Holst,* the court stated that it was not "appropriate to reduce the lodestar on the grounds that plaintiff might have settled earlier and still obtained a substantial recovery." 576 F.Supp.2d 527, 543 (S.D.N.Y.2008). Although *Rozell* addressed a situation where plaintiff had rejected a Rule 68 offer of judgment, the court explained that relying on any rejected settlement offer as a basis for reducing a fee award would undermine the policy of encouraging settlement negotiations and Rule 68 offers. *Id.*

***21** Thus, for this Court to deny the plaintiff fees because she rejected defendant's settlement offer would be considered an abuse of discretion. *See Ortiz v. Regan,* 980 F.2d at 141; *see also Raishevich v. Foster,* 247 F.3d at 347; *National Ass'n for the Advancement of Colored People v. Town of East Haven,* 259 F.3d 113, 120 (2d Cir.2001) (holding that a forfeiture of fees due to a party's refusal to accept a settlement offer is not "bad faith" and would be contrary to the holding in *Ortiz,* which was designed to "prohibit the use of informal negotiations as a basis for reducing fee awards in order to avoid just this sort of hindsight scrutiny of a litigant's tactical decisions that would 'improperly dissuade [ ]' 'plaintiffs with meritorious claims ... from pressing forward with their litigation' ").[18]

Moreover, apart from policy considerations, this Court has participated in numerous settlement conferences with the parties throughout the case, and is fully aware of the underlying circumstances that ultimately led to trial. Defendant's first offer, made three years in to the litigation, was rejected as way too low. (McIntyre Decl.[19] ¶¶ 11, 12, 20, 25, 30). While defendant is correct that its final two offers—the penultimate one made a week before trial and the last one, which was higher but offered in the middle of the trial—were more than the amount awarded by the jury, these offers were too little, too late. By the time these offers had been made, plaintiff had been forced to litigate the case for almost six years, incurring over $13,819.87 in costs, without taking into account any attorneys' fees whatsoever. (*See* McIntyre Decl. ¶ 33). Defendant's final offer, therefore, would have resulted in a net award to plaintiff of substantially less than she will receive, having been awarded $78,472 by the jury, plus costs and fees.

Finally, to criticize counsel and cut fees based on the rejection of defendant's settlement offer ignores the fact that, in the end, it is the client who decides whether or not to accept a settlement offer. Although counsel is required to inform their client of any offer and presumably advise the client as to the risks and benefits of any proposed settlement, in the end, the decision belongs to the client. Given the offers that came too late, after much expense and time had been invested in the case, the Court finds no basis to criticize counsel or plaintiff for rejecting these last offers. Accordingly, the Court denies defendant's request to completely deny plaintiff's motion for fees in its entirety.

C. *Reduction Due to Lack of Success*

Defendant also urges the Court to reduce plaintiffs fee award based on what defendant characterizes as a lack of success. (Def.'s Fee Mem. at 32–36). Specifically, defendant argues that plaintiff sought $700,000 in damages but only obtained approximately $72,000; therefore, defendant contends that the fee award should be reduced because "Plaintiff was significantly unsuccessful in this litigation." (*Id.* at 33). Thus, defendant argues that a reasonable paying client would not wish to spend the amount requested here in attorney's fees where she expected an award in excess of $700,000 but was awarded significantly less. (*Id.* at 36). Accordingly, defendant argues that there should be a 50% reduction in plaintiff's counsels' fees for their lack of success.

***22** Defendant also notes that the jury found no liability based on the plaintiffs claim that she was discriminated against for her **potential** need to take FMLA leave. Defendant argues that since this claim was not inextricably intertwined with her NYCHRL claim, and was "clearly an after though [*sic*]," there should be an additional 20% reduction in the fee award. (*Id.* at 37). Finally, defendant argues that there should be a further 10% reduction based on the unsuccessful claim brought against the Diocese of Brooklyn, which was originally named as a defendant but was dismissed more than two years before trial on December 3, 2008. (*Id.*)

As plaintiff notes, she was successful at trial, and it would be improper for the Court to reduce her attorney's fee award based on a consideration of her settlement demands. *See Pappas v. Watson Wyatt & Co.,* No. 3:04 **CV** 304, 2008 **WL** 45385 (D.Conn. Jan. 2, 2008). As the court in *Rozell v. Ross–Hoist* noted: "To be sure, [the recovery] was less than bargaining positions she had taken earlier in settlement talks, but a party's posturing during negotiations can hardly be taken as a fair measure of what would constitute a successful outcome." 576 F.Supp.2d at 542. Here, like the plaintiff in *Pappas,* Ms. **Siracuse** "most assuredly prevailed on a 'significant issue in litigation which achieve[d] some of the benefit [she] sought in bringing suit." *Id.* (quoting *Hensley v. Eckerhart,* 461 U.S. at 433). The jury found defendant liable on one of Ms. **Siracuse's** claims, and she was awarded essentially all of her lost wages for the period of November 2004 to December 2005, when she began receiving disability benefits. The fact that her salary was relatively small—and thus her award for lost earnings was relatively small—should not be a basis for reducing attorney's fees. *See Baird v. Boies, Schiller & Flexner, LLP,* 219 F.Supp.2d 510, 520 n. **7** (S.D.N.Y.2002).

To the extent that defendant has cited two cases in which fees were reduced due to a relative lack of success, *see Konits v. Karahalis,* 409 Fed. Appx. 418 (2d Cir.2011), and *Barfield v. N.Y.C. Health & Hosps. Corp.,* 537 F.3d 132, 152 (2d Cir.2008), the Court finds these cases distinguishable based on their circumstances. In *Barfield,* an FLSA case, the plaintiff spent months of litigation seeking to certify a class; when this was denied, the single plaintiff was left with an award of only $1,744.

In *Konits,* the fees were reduced when plaintiff's claims under New York State law and her claims for violations of her rights to equal protection and due process were all dismissed prior to trial, leaving only plaintiff's First Amendment claim, on which she prevailed against only one of six defendants. 409 Fed. Appx, at 419. The Second Circuit upheld the district court's reduction of fees because although plaintiff "maintain[ed] that all of the defendants were united in interest, the jury's finding in favor of the other individual defendants demonstrate[d] otherwise, and was supported by trial testimony and other evidence reflecting distinctions in defendants' conduct." *Id.* at 421 (internal citation omitted). Nevertheless, even there, attorney's fees were not denied in their entirety; instead, the court reduced fees by 25%, recognizing that it was impractical to attempt to parse the hours expended by counsel on a claim by claim basis because "in many civil rights cases the plaintiff's claims for relief will involve a common core of facts or will be based on related legal theories" and that because "[s]uch a lawsuit cannot be viewed as a series of discrete claims, ... the district court should focus on the significance of the overall relief obtained by the plaintiff in relation to the hours reasonably expended." *Id.* (citing *Hensley v. Eckerhart,* 461 U.S. at 435) (internal quotations omitted).

***23** Here, although the jury did not find for plaintiff on her FMLA retaliation claim, there were numerous factual issues in common and the claims were intertwined. The jury's decision to find liability under the NYCHRL discrimination claim simply suggests that while the jury found that PDHP had discriminated against plaintiff, the jury believed PDHP did so because of its view of plaintiff as a cancer survivor who would not have been able to handle the position for which she applied. In rejecting the FMLA claim, the jury could simply have found that concerns over plaintiff's health were the source of defendant's discriminatory animus rather than plaintiff's proffered alternative explanation for the way in which she was treated—namely, that she was discriminated against because she had taken FMLA leave.

To the extent that defendant argues that counsels' fees should be reduced for the time spent on the unsuccessful claim against the Diocese and the unsuccessful FMLA interference claim, which was dismissed on summary judgment, plaintiff contends that counsel spent a limited amount of time on these claims. The Court agrees that a reduction of the total award by 20% is not reasonably tied to the work spent on these claims.

Accordingly, the Court denies defendant's request to reduce plaintiff's counsels' fee request due to any claim of limited success.

D. *The Amounts Requested*

Plaintiff's counsel seeks a total award of fees of $443,465 for the time spent in prosecuting plaintiff's claims, beginning with the initial consultation with plaintiff on June 3, 2005, and continuing through post-verdict work performed in support of the fee request filed on June 13, 2011, and in opposition to defendant's motions for judgment as a matter of law and for an offset. (*See* Pl.'s Fee Mem.[20] at 3; Pl's Supp. Fee Mem. at 24). The time was spent primarily by Margaret McIntyre, Esq., a sole practitioner with offices in Manhattan, and by John A. Beranbaum, Esq., a founding partner of the firm of Beranbaum Menken, LLP (the "Beranbaum Firm" or the "Firm"), assisted by a paralegal and by Christine Clarke, Esq., an associate in the Beranbaum Firm, which is also located in Manhattan. (McIntyre Decl, ¶ 4; Beranbaum Decl. ¶ 5).

In connection with the fee application, counsel for plaintiff has submitted sworn Declarations, along with contemporaneous time records, in accordance with the holding in *New York State Association For Retarded Children, Inc. v. Carey,* 711 F.2d 1136, 1148 (2d Cir.1983) (holding that an attorney "who applies for court-ordered compensation ... must document the application with contemporaneous time records ....specify[ing], for each attorney, the date, the hours expended, and the nature of the work done"). The records provided describe the services rendered in connection with each of the matters. Specifying each attorney who worked on the matter, the records indicate the date that services were performed, the hours spent in performing the services, the hourly rate charged, the amount sought, and a description of the services performed. (*See, e.g.,* McIntyre Decl., Ex. D; Beranbaum Decl., Ex. 1). In addition, Ms. McIntyre provided records of the costs she incurred in representing plaintiff. (*See* McIntyre Decl., Ex. E), It is clearly the attorney's burden to maintain contemporaneous records, *see F.H. Krear & Co. v. Nioeteen Named Trustees,* 810 F.2d at 1265, and fee applications are subject to denial where the fees have not been adequately documented. *See, e.g., Riordan v. Nationwide Mut. Fire Ins. Co.,* 977 F.2d 47, 53 (2d Cir.1992).

1. *Hourly Rates*

***24** Ms. McIntyre requests fees calculated at the rate of $375 per hour, which is the usual and customary rate that she charges in her civil rights retainer agreements. (McIntyre Decl. ¶ 19). According to her Declaration, Ms. McIntyre is a 1995 graduate of CUNY Law School, and she has been admitted to practice law in the State of New York since June 1996. (*Id.* ¶¶ 3, 12). She has been admitted to the bars of the Southern and Eastern Districts of New York since that time, as well as having been subsequently admitted to the Northern District and the Second Circuit. (*Id.* ¶ 3). Ms. McIntyre has practiced almost exclusively in the area of employment law, representing plaintiffs, beginning with her position as an associate at the firm of Davis & Eisenberg, where she worked until she started her own practice in August 1997. (*Id.* ¶ 5). She has practiced primarily in the area of employment discrimination and is a member of the Executive Board of the National Employment Lawyers Association. (*Id.* ¶¶ 5, 8). According to her Declaration, Ms. McIntyre has authored and co-authored amicus briefs, made presentations on employment law, and organized continuing legal education courses. (*Id.* ¶¶ 7, 9, 10, 11, 12, 13, 14). She states that she has handled numerous cases in this and the Southern District, and handled "scores of cases involving claims of employment discrimination as well as wage and benefit claims that ended in favorable settlements for her clients." (*Id.* ¶¶ 15–17).

As additional support for her requested rate, Ms. McIntyre submitted sworn statements from Colleen Meenan, Esq., and Doris Traub, Esq., both civil right lawyers who practice before

this Court and who have worked with Ms. McIntyre. (*See* Meenan Decl.[21] ¶¶ 6–14; Traub Aff.[22] ¶ 6). According to Ms. Meenan's Declaration, the rate of $375 per hour requested here is reasonable in light of Ms. McIntyre's 15 years of experience in the field. (Meenan Decl. ¶ 33). Ms. Meenan cites a dozen cases in which rates of between $350 and $475 per hour have been awarded to attorneys with comparable experience. (*Id.* (citing cases)).[23]

Ms. Traub, who regularly charges $400 per hour, states in her Affirmation that she has known Ms. McIntyre for over a decade. (Traub Aff. ¶¶ 5, 6). According to Ms. Traub, tees for lawyers with Ms. McIntyre's experience range from $350 to $600 per hour. (*Id.* ¶ 5). Thus, she contends that the requested hourly rate of $375 per hour is well within the prevailing rates for at attorney of Ms. McIntyre's experience. (*Id.* ¶ 7).

The Beranbaum Firm requests fees calculated at the rate of $550 per hour for Mr. Beranbaum's time; $175 per hour for the time spent by his associate, Christine Clarke; and $100 per hour for the paralegal who worked on the case. (Beranbaum Decl. ¶¶ 4, 26, 28, 33).[24] According to his Declaration, Mr. Beranbaum is a 1977 graduate from Yale College, with a 1981 J.D. from New York University School of Law. (*Id.* ¶ 9). After graduating from law school, Mr. Beranbaum worked at the Hunterdon County Legal Services office in New Jersey, practicing poverty law until 1985, after which he worked for the New Jersey Department of the Public Advocate, representing people with disabilities. (*Id.* ¶ 10). Beginning in 1989, he was an associate at a firm in Philadelphia for three years, litigating products liability cases. (*Id.* ¶ 10). In 1992, he joined Vladeck, Waldman, Elias & Engelhard, P.C. and shifted his litigation concentration to employment claims. (*Id.* ¶ 12). While at the Vladeck firm, he participated in half a dozen employment discrimination cases. (*Id.*)

***25** Mr. Beranbaum started his own firm in 1995 and later joined three other attorneys to found what is now the firm of Beranbaum Menken. (*Id.* ¶ 13). He states that he has litigated over 60 state and federal actions, including cases involving claims of sex discrimination, disability discrimination, sexual harassment, and race and retaliation. (*Id.* ¶ 14). He has written numerous articles, spoken before numerous professional organizations on issues of employment law, and served for 15 years as a mediator for this Court. (*Id.* ¶ ¶ 16, 17, 20). Christine Clarke, an associate with the Firm, received her law degree from Yale and joined the Firm in August 2010. (*Id.* ¶ 27).

Mr. Beranbaum asks the Court to award him compensation at the hourly rate of $550. (Beranbaum Decl. ¶ 26). In support of his requested rates, Mr. Beranbaum submits an affirmation from Janice Goodman, Esq., and an affidavit from Pearl Zuchlewski, Esq., both of whom arc experienced practitioners in the area of employment law. (Beranbaum Decl., Exs. 2, 3). Ms. Goodman, who received her J.D. in 1971 from New York University School of Law, has been practicing in the area of employment discrimination law for 40 years and has been a member of the executive board and vice-president of the National Employment Lawyers Association, (Goodman Aff.[25] ¶¶ 3–5). Ms. Goodman states that she is familiar with Mr. Beranbaum's skills and experience, and that the hourly rates for experienced lawyers in this area range from $300 to $700 per hour. (*Id.* ¶ 6). Ms. Goodman currently charges $550 per hour, which she states is "below the market rate for a lawyer with my experience and background." (Goodman Aff. ¶ 6). Ms. Zuchlewski, a practicing attorney in the area of labor and employment law since 1979 and former chair of New York State Bar Association's Labor and Employment Section, also states that she is familiar with Mr. Beranbaum and his firm, whose reputation places it "among the best regarded firms in New York City which represents plaintiffs in employment and civil rights matters." (Zuchlewski Aff.[26] ¶¶ 4, 5, 6, 7, 8). According to Ms. Zuchleswksi, hourly rates for experienced senior attorneys in the community range from $450 to $850 per hour. (*Id.* ¶ 9). Ms. Zuchleswksi notes that she currently charges $675 per hour. (*Id.*) However, it is unclear whether these attorneys are distinguishing between prevailing rates in the Southern and Eastern Districts.

Defendant challenges plaintiff's counsels' billing rates as "inappropriate" and significantly higher than reasonable rates in this district. (Def.'s Fee Mem. at 15). Accordingly, defendant argues that the Court should apply much lower rates than plaintiff's counsel requested to determine reasonable fees for Ms. McIntyre and Mr. Beranbaum. (*Id.*) Specifically, defendant contends that based on a review of Ms. McIntyre's website, she focuses her practice mainly on administrative hearings before the EEOC and New York State Division of **Human** Rights. (Cea Decl. II[27] ¶ 10, Ex. H). Defendant further points out that Ms. McIntyre "lacks any substantial trial experience." (*Id.* ¶¶ 10, 11, Ex. H). Moreover, to the extent that Ms. Meenan's Declaration in support of Ms. McIntyre's claimed rate relies exclusively on Southern District of New York cases, defendant argues that the rates she suggests are "simply not applicable." (*Id.* ¶ 16). Similarly, with respect to Ms. Traub's Affirmation, counsel for defendant asserts that Ms. Traub's validation of Ms.

McIntyre's requested rate should be disregarded not only because she is a partner in a law firm—in contrast to Ms. McIntyre, who is a sole practitioner—but like Ms. Meenan, at least a substantial portion of Ms. Traub's practice is located in the Southern District. (*Id.* ¶ 17). Therefore, defendant argues that her supporting declaration is not relevant. (*Id.*) Defendant raises similar challenges to the supporting declarations supplied by Mr. Beranbeum in support of his fee rates. (*Id.* ¶ 18).

***26** The case law is clear that the rates charged must be " 'in line with those [rates] prevailing in the community for similar services of lawyers of reasonably comparable skill, experience, and reputation.' " *Cruz v. Local Union No. 3,* 34 F.3d at 1159 (quoting *Blum v. Stenson,* 465 U.S. 886, 896 n. 11, 104 S.Ct. 1541, 79 L.Ed.2d 891 (1984)); *see also Simmons v. New York City Transit Auth.,* 575 F.3d at 172; *Knoeffler v. Town of Manmakating,* 126 F.Supp.2d 305, 311 (S.D.N.Y.2000). Known as the "forum rule," this rule, specifying that courts should use the standard hourly rates in effect in the district where the court sits, was established well before the Second Circuit's decision in *Arbor Hill* and reconfirmed by the Court in *Simmons v. New York City Transit Authority,* 575 F.3d at 174. Indeed, in applying the now-disfavored "lodestar" approach, *see Arbor Hill Concerned Citizens Neighborhood Ass'n v. County of Albany,* 522 F.3d at 190, the Second Circuit, in *Luciano v. Olsten Corp.,* held that the rates used to calculate the "lodestar" had to be in line with those rates prevailing in " 'the district in which the court sits.' " *Luciano v. Olsten Corp.,* 109 F.3d 111, 115 (2d Cir.1997) (quoting *Polk v. New York State Dep't of Corr. Servs.,* 722 F.2d 23, 25 (2d Cir.1983)). Even though the Second Circuit has abandoned the lodestar method for calculating fees, the Circuit continues to endorse the forum rule, holding that, in order to determine the prevailing market rate for attorneys' fees in a community, the court should generally use the standard hourly rates in effect in the district in which the court sits and the proceedings occurred. *Simmons v. New York City Transit Authority,* 575 F.3d at 174. In *Vilkhu v. City of New York,* the Second Circuit explained that " 'a district court must first apply a presumption in favor of application of the forum rule,' and '[i]n order to overcome that presumption, a litigant must persuasively establish that a reasonable client would have selected out-of-district counsel because doing so would likely (not just possibly) produce a substantially better net result.' " 372 Fed. Appx. 222, 224, No. 09 **CV** 1178, 2010 **WL** 1571616, at *1 (2d Cir.2010) (citing *Simmons v. New York City Transp Auth.,* 575 F.3d at 175).

In this case, Mr. Beranbaum acknowledges that his requested rate of $550 per hour is in line with rates charged in the Southern District but not in the Eastern District. (Beranbaum Decl. ¶ 26). He contends that this case presents an exception to the "forum rule" established by the Second Circuit in *Simmons v. New York City Transit Authority,* and therefore, the Court is not required to apply Eastern District rates to determine reasonable attorney's fees in this case. (Pl.'s Fee Mem. at 7).

Mr. Beranbaum creatively asserts that the forum rule does not apply here for two reasons. First, he argues that since Ms. **Siracuse** lives in Manhattan—not Brooklyn, where the Eastern District court is located—it was reasonable for her to have selected counsel with offices in Manhattan, and thus the Court may apply the rate prevailing in Manhattan. (Pl.'s Fee Mem. at 8). Defendant contests plaintiff's position, arguing that plaintiff chose the Eastern District forum and could have filed suit in the Southern District instead, therefore securing Southern District rates for her Manhattan-based attorneys. (*See* Def.'s Fee Mem. at 24). However, given that PDHP is based in the Eastern District and exclusively serves schools in the Eastern District, defendant does not explain how the Southern District would have been a viable forum.

***27** While it may have been convenient and logistically reasonable for plaintiff to choose counsel based in the same district in which she resides, this does not constitute an exception to the forum rule for attorney's fees. In *Simmons,* the Second Circuit laid out the narrow circumstances in which an exception is warranted, limiting the exception to cases where the plaintiff demonstrates that she would have received a "substantially inferior result" by hiring an attorney from the forum district. *See* 575 F.3d at 175–76. In fact, the *Simmons* court explicitly rejected the proposition that the proximity of the Southern and Eastern Districts of New York to each other meant that a plaintiff who hired a Manhattan-based attorney to litigate a case in the Eastern District acted as a "reasonable paying client." *Id.* at 176. While reasonableness may have been among the "nebulous test[s]" used in prior cases, *see id.* at 175 (disapprovingly citing *Luca v. County of Nassau,* No. 04 **CV** 4894, 2008 **WL** 2435569, at *9 (**E.D.N.Y**. June 16, 2008) (holding that, in a civil rights case litigated in the Eastern District, the "uniquely permeable" border between the districts made it appropriate to award Southern District rates to attorneys whose main office was located in Manhattan), *rev'd and remanded by* 344 Fed. Appx. 637 (2d Cir.2009)), the Second Circuit replaced that standard

with a strong presumption in favor of the forum rule that geography alone does not trump.[28]

Plaintiff's counsel also contends that because plaintiff obtained her verdict under the NYCHRL, and the NYCHRL is not subject to the forum rule, the Court may apply Southern District rates in determining reasonable attorney's fees. (Pl.'s Fee Mem. at 7–12). Specifically, counsel asserts that the forum rule is "incompatible with the City HRL's mandate that victims of discrimination receive full compensation." (*Id.* at 8). Plaintiff argues that the New York City Council's Local Civil Rights Restoration Act of 2005 ("LCRA" or "Restoration Act") expressly provides that the NYCHRL should be construed liberally in favor of discrimination plaintiffs, and that "[t]he drafters of the Restoration Act, in particular, sought to redress previous court decisions that had imported into the City HRL restrictive judge-made rules on attorney's fees under federal law." (*Id.* at 10). Plaintiff contends that "[t]he forum rule ... is a judicial interpretation of a federal law limiting the remedy of attorney's fees" and that because it "restrict[s] ... a fundamental remedy of the civil rights laws," it is contrary to the "core principle" of LCRA that "victims of discrimination ... ought to receive *full* compensation." (*Id.* at 11–12) (citing *Williams v. NYC Housing Auth.,* 61 A.D.3d at 68, 872 N.Y.S.2d at 32) (emphasis added in brief)).

However, in announcing the contours of the forum rule, the Second Circuit in *Simmons* implicitly rejected plaintiff's argument. The NYCHRL was among the statutes under which the plaintiff in *Simmons* brought her disability discrimination claim. *See* 575 F.3d at 173. In pursuing attorney's fees as the prevailing party under, *inter alia,* the NYCHRL and N.Y.C. Admin. Code § 8–502(f), the plaintiff in *Simmons* relied in part on the same statutory provisions plaintiff proceeds under here. *Id.* In further parallel to the case here, the *Simmons* plaintiff retained counsel with offices in the Southern District to pursue her claim in the Eastern District, and subsequently requested that the court apply Southern District rates in calculating her award for attorney's fees. *Id.* Although the district court granted her request, the Second Circuit vacated the judgment, applying the forum rule and rejecting plaintiff's argument that out-of-district rates were reasonable under the circumstances and thus merited an exception. The court remanded the case to the district court to reduce the attorney's fee award by $45,000, accounting for the difference between the prevailing rates in the Southern and Eastern Districts. *Id.* at 177. In holding that the forum rule applied to a plaintiff seeking attorney's fees as a prevailing party under the NYCHRL and N.Y.C. Admin. Code § 8–502(f), the Second Circuit dictated that the same approach be applied to Ms. **Siracuse** here. Thus, Mr. Beranbaum's second argument against the application of the forum rule has no merit.

***28** Having determined that the forum rule applies in this case, the Court must determine whether the fee rates requested by plaintiff's counsel are in line with rates generally awarded in this district. In urging a reduction in the rates requested, defendant cites a number of recent cases in this district to argue that plaintiff's counsels' rates are unreasonable. (Def.'s Fee Mem. at 15). Specifically, defendant relies on the decision of the Honorable Joseph Bianco[29] in *Stair v. Calhoun,* 722 F.Supp.2d 258 (**E.D.N.Y**.2010), where the court held that rates of $400 to $415 per hour were "higher than the prevailing rate in this District given the particular circumstances in this case." *Id.* at 274. That case, which involved the calculation of fees in connection with a charging lien where counsel in a shareholder's derivative action moved to withdraw for nonpayment of fees, is distinguishable from the instant lawsuit in that the *Stair* case was not a civil rights action subject to a fee shifting statute. Moreover, although the claim there was litigated for three years, it was not litigated to a successful conclusion on behalf of the client. Unlike here, the *Stair* plaintiff was not a prevailing party, and the work performed by plaintiff's counsel was not particularly successful, given that defendants prevailed on two successful motions to dismiss. Nevertheless, the Court did not deny fees entirely; instead, it merely reduced the partner's fee rate to $350 per hour. *Id.* at 275–76.

On remand from the Second Circuit, the court in *Luca v. County of Nassau,* 698 F.Supp.2d 296, 301–02 (**E.D.N.Y**.2010), was charged with applying Eastern District rates instead of Southern District rates to the fee calculation for a civil rights case litigated in the Eastern District by attorneys whose main office was located in the Southern District. In re-calculating fees, the district court concluded that "numerous recent cases in the Eastern District convince the Court that the reasonable paying client would gladly pay $400 per hour for an attorney of Brewington's caliber."[30] The court cited several cases supporting its analysis. *See, e.g., Gutman v. Klein,* 2009 **WL** 3296072, at *2 (approving rates of between $300 and $400 for partners); *Rodriguez v. Pressler & Pressler, LLP,* No. 06 **CV** 5103, 2009 **WL** 689056, at *1 (**E.D.N.Y**. Mar. 16, 2009) (approving an award of $450 per hour to an attorney with 17 years of experience in an FDCPA case); *Morgenstern v. County of Nassau,* No. 04 **CV** 58, 2009

WL 5103158, at *16–18 (E.D.N.Y. Dec. 15, 2009) (awarding $400 per hour in a Section 1983 civil rights case).

While defendant is correct that there are cases in this district awarding fees at much lower rates than those requested here, *see, e.g., Gesualdi v. CFI Assocs., Inc.,* No. 09 CV 5454, 2011 WL 1253744, 2011 U.S. Dist. LEXIS 35429 (E.D.N.Y. Mar. 31, 2011) (awarding $200–250 for partner in ERISA default); *Jackson Hewitt v. Excellent Prof. Servs.,* No. 08 CV 5237, 2010 WL 5665033, 2010 U.S. Dist. LEXIS 141055 (E.D.N.Y. Nov. 8, 2010); *Wong v. Yoo,* No. 04 CV 4569, 2010 U.S. Dist. LEXIS 111142 (E.D.N.Y. Oct. 19, 2010); *Trustees of Local 813 I.B.T. Ins. Fund v. Sprint Recycling, Inc.,* No. 09 CV 4435, 2010 WL 3613839, 2010 U.S. Dist. LEXIS 96100 (E.D.N.Y. Aug. 6, 2010); *Rotella v. Board of Education of the City of New York,* No. 01 CV 434, 2002 WL 59106, at *2 (E.D.N.Y. Jan. 17, 2002) (holding that the prevalent rate in the Eastern District was between $200 and $250 per hour for partners, and $100 to $200 per hour for junior and senior associates); *Fink v. City of New York,* 154 F.Supp.2d 403, 407 (E.D.N.Y.2001) (finding reasonable rates ranging from $200 to $250 per hour for partners, $200 per hour for senior associates, and $100 per hour for junior associates), many of these cases involved defaults in which there was no opposition, leaving plaintiff's claims essentially unchallenged, or addressed claims that were not shown to require counsel to have any specialized knowledge or expertise.

***29** However, other cases have approved higher rates in this district. *See, e.g., Manzo v. Sovereign Motor Cars. Ltd.,* No. 08 CV 1229, 2010 WL 1930237, at *8, (E.D.N.Y. May 11, 2010), *aff'd,* No. 10 CV 2148, 2011 WL 1447610, at *1 (2d Cir.2011) (awarding $480 to lead trial counsel and $360 to attorney who served as lead counsel prior to trial); *Ueno v. Napolitano,* No. 04 CV 1873, 2007 WL 1395517, at *9–10 (E.D.N.Y. May 11, 2007) (in a housing discrimination case, awarding $450 to attorney with 42 years experience who "concentrat[ed] almost exclusively on civil rights litigation during that time," but recognizing that this rate is "clearly at the upper end of the scale in this ... district"); *Blue Cross & Blue Shield of New Jersey, Inc. v. Phillip Morris, Inc.,* 190 F.Supp.2d 407, 425–29 (E.D.N.Y.2002) (finding reasonable fees of $540 per hour for senior partners at Dewey Ballantine LLP; $312.00 to $449 per hour to be reasonable rates for other partners; $273 per hour reasonable for associates; and $122 reasonable for legal assistants in the context of tobacco litigation). Furthermore, as the court noted in *Tokyo Electron Arizona, Inc. v. Discrect Indus. Corp.,* 215 F.R.D. 60 (E.D.N.Y.2003), "when reviewing caselaw that comments on prevailing market rates, a court must take into account the rapidity with which such rates can rise. Thus, a case decided even as recently as 2000 could be out of date as far as the rates are concerned." *Id.* at 63 (awarding rates in 2003 of $400 per hour for partners in a case brought in Suffolk County).

Counsel for defendant argues that not only was Ms. **Siracuse's** case not extraordinarily complex, but neither Ms. McIntyre or Mr. Beranbaum have extensive trial experience. (Def.'s Fee Mem. at 19). Thus, defendant argues for a reduction in Mr. Beranbaum's rate to $275 per hour and in Ms. McIntyre's rate to $175 per hour. However, defendant's requested rates are more consistent with rates awarded in this district over 10 years ago in fairly simple cases of default. This Court holds that defendant's requested rates are neither consistent with rates generally awarded in this district nor are they fair under the circumstances.

The Court also disagrees with defendant's counsel's assessment of the complexity of the case and the quality of plaintiff's counsels' performance. This case has required almost 5 years of litigation, involving numerous discovery disputes, an extensive motion for summary judgment, two contested motions *in limine,* a contested motion to amend the pre-trial order, a jury trial lasting over 9 days, and three post-verdict motions currently pending before this Court.

Like the attorney in *Luca v. County of Nassau,* 698 F Supp.2d at 303–04, who had 20 years of experience and to whom the court awarded fees at a rate of $350 an hour, Ms. McIntyre's work is not comparable to that of a senior associate; she "had a level of responsibility that would normally be entrusted to a partner and [she] deserves to be compensated as such." *Id.* at 304. Although defendant points to Ms. McIntyre's failure to disclose the expert report as proof of her incompetence, the Court observed counsels' performance during discovery and trial and considered their written submissions in connection with the motion practice. As such, the Court finds plaintiff's counsels' performance to be above average for the attorneys appearing before this Court. Accordingly, the Court finds no basis for reducing the fees based on counsels' performance.

***30** However, having reviewed the various cases cited by both parties, and being familiar with the prevailing rates in the community through the numerous fee applications reviewed by this Court, *see Association for Retarded Citizens of Connecticut, Inc. v. Thorne,* 68 F.3d 547, 554 (2d Cir.1995) (holding that a court may " 'rely in part on [its] own

knowledge of private firm hourly rates in the community' ") (internal citation omitted), it is clear that the range of "reasonable" attorney fee rates in this district varies depending on the type of case, the nature of the litigation, the size of the firm, and the expertise of its attorneys. Here, although the attorneys for whom fees are sought have excellent reputations, possess a great deal of experience in this area, and invested a tremendous amount of effort on behalf of their client, this Court concludes that the rates requested are somewhat higher than the average fees charged by attorneys of similar skill in similar cases in this district. Remaining cognizant of the "prevailing" rates charged in this district and acknowledging the constraints of *Simmons* (*see supra* note 28), yet recognizing the *Arbor Hill* factors—the complexity and novelty of this case, as well as the particularly hard-fought nature of the case and the length of time involved—this Court finds that $400 per hour is the appropriate rate for Mr. Beranbaum's time; $350 per hour is reasonable for Ms. McIntyre's time; and the rate requested for Ms. Clarke at $175 is reasonable. With respect to the paralegal, the Court reduces that rate to $85 per hour, consistent with rates generally awarded in this district. *See, e.g., Gesualdi v. Interstate Masonry Corp.,* No. 11 **CV** 958, 2011 **WL** 7032900, at *10 (**E.D.N.Y**. Nov.16, 2011) (finding $80 per hour reasonable for a paralegal); *Ferrara v. All–Around Trucking Inc.,* No. 10 **CV** 5845, 2011 **WL** 6026300, at *6 (**E.D.N.Y**. Nov. 8, 2011) (finding $90 per hour reasonable for a paralegal).

2. *Number of Hours Billed*

Defendant not only challenges the rates charged but also challenges the number of hours billed for specific tasks as inflated by unnecessary and redundant work. Defendant argues that plaintiff's fees include "numerous instances of redundant and unnecessary work," requiring a reduction in the fee award. (Def.'s Fee Mem. at 25). Specifically, defendant contends that plaintiff spent time preparing witnesses for trial that were never called to testify. Rebutting plaintiff's explanation that she spent time preparing these witnesses because they were listed on the pretrial order as witnesses that defendant intended to call, defendant claims that it only subpoenaed the doctors because it was defendant's intent to introduce plaintiff's medical records at trial; "[t]here was no intent to call any doctors on Defendant's case in chief other than defendant's own expert." (*Id.*) Moreover, defendant explains that the doctors may have been needed as rebuttal witnesses and thus needed to be listed on the Pretrial Order, but "[i]t is not logical to assume that all witnesses on a PTO will be called." (*Id.*)

***31** Among the witnesses that defendant claims were unnecessary was Dr. O'Connor, plaintiff's treating oncologist. Defendant contends that if plaintiff had simply consented to the entry of Dr. O'Connor's medical records into evidence, his testimony at trial would have been completely unnecessary. (*Id.*) Similarly, with respect to Dr. Jimmie Holland, plaintiff's treating psychiatrist, defendant contends that her testimony was based exclusively on the contents of her treating records and thus her testimony was "entirely redundant ." (*Id.* at 27).

Plaintiff argues that, contrary to defendant's suggestions, Dr. O'Connor's testimony was necessary because he testified about plaintiff's treatment, her attitude toward treatment, and the fact that after her radiation treatments ended her prognosis was excellent. (Pl.'s Supp. Fee Mem. at 19). He also testified about the anxiety that she suffered as a result of the job promotion issues, and his testimony gave context to the records that were introduced. (*Id.*) His testimony, which went beyond the bare notations in the records, provided medical support for plaintiff's claim that although she was cancer-free and doing well, the people at PDHP perceived her as continuing to have health issues based on their own stereotypes of cancer, which guided their decisions. (*Id.*) Without the doctor's testimony to round out the information in the records, the jury would have been left without an explanation of things that were ultimately included in his testimony. (*Id.* at 19–20). To argue that the plaintiff should have simply relied on the records and should be penalized for calling the doctor is absurd.

Similarly, to the extent that defendant argues that Dr. Holland's testimony was redundant and that plaintiff again could have simply relied on Dr. Holland's records, the defendant's argument is frivolous. Dr. Holland, a psychiatrist at Sloan Kettering and the preeminent expert on the psychological issues faced by people suffering from cancer, testified about many things that were not reflected in the cold medical records. Her testimony regarding plaintiff's reactions to the cancer and to the employment discrimination was critical to the jury's understanding of the source of plaintiff's depression.

Defendant also argues that Anna Steegman was called to testify as to the existence of the RY Supervisor position after June 2004 and that Ellen Fitzpatrick was given the position. (Def.'s Fee Mem. at 27). Defendant contends that since Ms. Steegman's testimony "provided nothing beyond what Ellen Fitzpatrick testified to at trial and the contents of the letter of recommendation," plaintiff should not be awarded fees for

the time spent in connection with her testimony. (*Id.*) With respect to Anna Steegman, plaintiff notes that she testified to a number of issues, not just the two identified by defendant. (Pl.'s Supp. Fee Mem. at 21–22). Moreover, given defendant's focused attempt to prove that Ellen Fitzpatrick was not given a supervisory position, Ms. Steegman's testimony provided corroboration.

***32** As discussed earlier, defendant also seeks a reduction in fees for all time spent, including time spent at sidebar arguments, in connection with Dr. Goldstein and Garda Spaulding. (*See* Def.'s Fee Mem. at 28–29). This reduction is based on the fact that plaintiff failed to disclose the supplemental report of Dr. Goldstein and the fact of plaintiff's ongoing therapy with Spaulding. (*See* discussion *supra* at 33–36). As discussed earlier, the plaintiff believed that Dr. Goldstein's testimony was critical in explaining plaintiff's medical and psychiatric condition; thus to preclude all fees incurred in connection with Dr, Goldstein's testimony would be unjust. With respect to Ms. Spaulding, defendant listed her as a witness on the pre-trial order and listed her deposition transcript among defendant's exhibits. (*See* Docket Entry # 67). Thus, plaintiff's counsel had a reasonable basis to believe that defendant might call her to prove defendant's claim that Ms. **Siracuse's** psychological problems existed prior to defendant's refusal to promote plaintiff. Under these circumstances, it would have been irresponsible for plaintiff's counsel not to prepare Ms. Spaulding for trial.

With respect to Ms. McIntyre, defendant argues that she has failed to adequately document her fees. (Def.'s Fee Mem. at 29–31). Specifically, defendant notes that in her Declaration, Ms. McIntyre refers to her "statement of legal services rendered in ***Siracuse*** *v. PDHP"* as "my time sheets," and a "statement of time ... based on contemporaneous time records." (*Id.* at 29). Based on these disparate references, defendant argues that she has not provided contemporaneous time records, and under the holding in *Kirsch v. Fleet St., Ltd.,* 149 F.3d 149 (2d Cir.1998), her application should be denied in its entirety. (*Id.* at 32). At the very least, defendant argues that her application should be reduced by the number of hours spent in preparing the fee application "as a sanction for failure to properly document her claim." (*Id.* at 31). However, in her August 5, 2011 Declaration, Ms. McIntyre makes it clear that her time records are not only accurate but were prepared contemporaneously. (McIntyre Supp. Decl.[31] ¶¶ 55, 56). Accordingly, the Court finds no basis to reduce her fees on this ground.

Counsel for defendant also seeks a deduction in time spent on opening and closing statements, which he claims, without further explanation, were "excessive and/or redundant." (*Id.* at 29). In her Declaration, Ms. McIntyre states that she spent 3.2 hours drafting the opening statement, and does not list any time spent on the closing statement. (*See* McIntyre Decl., Ex. D at 17). Meanwhile, Mr. Beranbaum specifies 5.8 hours of work on the opening statement (*see* Beranbaum Decl., Ex. 1 at 4–5), an additional 10.4 hours dedicated to "trial preparation, including opening" (*id.*), and 8.5 hours spent on "preparation (closing; cross of McEvoy)." (*Id.* at 6). The Court finds these expenditures of time reasonable, not excessive or redundant as defendant claims.

***33** In total, defendant asks for Beranbaum's claimed time to be reduced by 25.55 hours, and for 18.30 hours to be deducted from Ms. McIntyre's fee request. (Def.'s Fee Mem. at 31). However, the Court concludes that none of the arguments advanced by defendant provide a basis for reducing plaintiff's counsels' fees.

3. *Reduction Due to an Excessive Number of Hours*

Although this Court does not agree that plaintiff's counsels' fees should be reduced for any of the reasons advanced by defendant, the Court's review of the records suggests that plaintiffs have billed an excessive number of hours on certain tasks. *See Grant v. Martinez,* 973 F.2d 96, 99 (2d Cir.1992) (holding that the question "is not whether hindsight vindicates an attorney's time expenditures, but whether, at the time the work was performed, a reasonable attorney would have engaged in similar time expenditures"); *see also Grant v. Martinez,* 973 F.2d at 101 (holding that "[i]f plaintiff has obtained excellent results, ... the attorney should be fully compensated"). In addition, there appears to be some duplication of effort by multiple attorneys. (*Compare* McIntyre Decl., Ex. D, *with* Beranbaum Decl., Ex. 1).

The law is clear that in reviewing a fee application, the court "should exclude excessive, redundant or otherwise unnecessary hours ." *Quaratino v. Tiffany & Co.,* 166 F.3d at 425 (citing *Hensley v. Eckerhart,* 461 U.S. at 434). In this case, the Court finds that the amount of time spent on various tasks was somewhat excessive. For example, although the Complaint was filed on May 31, 2007, and discovery on liability concluded prior to defendant's filing of the motion for summary judgment in December 2008, Mr. Beranbaum did not join the case as plaintiff's co-counsel until October 2010. According to his time records, Mr. Beranbaum appears to have spent 23.3 hours reviewing depositions,

medical records, notes, and document production in order to get up to speed. (*See* Beranbaum Decl., Ex, 1 at 1–2). Based on Mr. Beranbaum's claimed hourly rate of $550, this accounts for $12,815 of plaintiff's request for attorney's fees. Strikingly, Mr. Beranbaum then spent approximately 45.4 hours preparing for the direct examination of Ms. **Siracuse**. (*See id.* at 4–5). Priced at Mr. Beranbaum's claimed hourly rate of $550, this accounts for $24,970 of plaintiff's request for attorney's fees.

As for Ms. McIntyre, some of her excessive time expenditures include the 6.5 hours she spent drafting a letter in response to defendant's request for a pre-motion conference before Judge Amon (*see* McIntyre Decl., Ex. D at 10), and the 13.6 hours she spent researching and drafting plaintiff's motion *in limine.* (*See id.* at 14–15). Based on Ms. McIntyre's claimed hourly rate of $375, together these activities account for $7,537.50 of plaintiff's requested attorney's fees.

In addition, Mr. Beranbaum and Ms. McIntyre combined to spend 17.5 hours preparing their response to defendant's motion *in limine* (*see id.* at 15; Beranbaum Decl., Ex. 1 at 2), and 37.6 hours drafting, reviewing, and revising the jury instructions and verdict form. (*See* McIntyre Decl., Ex. D at 17–19; Beranbaum Decl., Ex. 1 at 1–2). Calculating the cost of these efforts based on counsels' respective claimed hourly rates, plaintiff is therefore requesting $7,637.50 in fees for responding to defendant's motion *in limine* and $16,917.50 for their work on the jury instructions.

***34** While some of these examples of duplicative or seemingly excessive hours might be considered reasonable, together Ms. McIntyre and Mr, Beranbaum spent a total of 83.9 hours on their application for attorney's fees—55 hours by Mr. Beranbaum (*see* Beranbaum Decl., Ex. I at 6–7), which includes the 12.6 hours Mr. Beranbaum spent drafting his 13 page Declaration (*see id.*), and 28.9 hours by Ms. McIntyre. (*See* McIntyre Decl., Ex. D at 19–20). Combined, the cost of plaintiff's counsels' work in support of their fee application added $41,087.50 to their requested fees. All together, the time spent on the fee application added with the other examples of seemingly excessive hours amounts to $110,515 in fees. This represents 24.9% of the total requested attorney's fees of $443,465. Clearly the tasks performed were necessary and are subject to reimbursement for some of the time spent. However, the Court finds that a fee reduction is necessary to deal with the excess time expended.

In evaluating time sheets and expense records, some courts have dealt with the problem posed by excessive or redundant billing by simply subtracting the redundant hours from the amount of hours used to calculate the lodestar. *See, e.g., Fernandez v. North Shore Orthopedic Surgery & Sports Medicine. P.C.,* No. 96 **CV** 4489, 2000 **WL** 130637, at *6 (**E.D.N.Y**. Feb.4, 2000); *see also Ruggiero v. Krzeminski,* 928 F.2d 558, 564 (2d Cir.1991) (affirming the lower court's decision to subtract 32 hours for irrelevant work and for work performed on post-trial motions before calculating the lodestar). However, the Second Circuit has stated that the district court is not required to "set forth item-by-item findings concerning what may be countless objections to individual billing items." *Lunday v. City of Albany,* 42 F.3d 131, 134 (2d Cir.1994); *see also Daiwa Special Asset Corp. v. Desnick,* No. 00 **CV** 3856, 2002 **WL** 31767817, at *5 (S.D.N.Y. Dec. 3, 2002) (reducing fee award by 50% due in part to excessive billing). Particularly where, as here, the billing records are voluminous, "it is less important that judges attain exactitude, than that they use their experience with the case, as well as their experience with the practice of law, to assess the reasonableness of the hours spent." *Amato v. City of Saratoga Springs,* 991 F.Supp., 62, 65 (N.D.N.Y.1998) (citing *Clarke v. Frank,* 960 F.2d 1146, 1153 (2d Cir.1992). The court in *Daiwa Special Asset Corp. v. Desnick* also recognized that what may be "reasonable" attorney's fees and expenses in the context of an order requiring a losing party to pay the prevailing party in a litigation "is not the same as the reasonableness of a bill that a law firm might present to its own paying client." 2002 **WL** 31767817, at *2 (citing *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air,* 478 U.S. 546, 565, 106 S.Ct. 3088, 92 L.Ed.2d 439 (1986)). Thus, "[i]n calculating the number of 'reasonable hours,' the court looks to 'its own familiarity with the case ... and its experience generally as well as to the evidentiary submissions and arguments of the parties.' " *Clarke v. Frank,* 960 F.2d at 1153 (internal citations omitted).

***35** Accordingly, courts have used percentage reductions "as a practical means of trimming fat from a fee application." *New York Ass'n Retarded Children v. Carey,* 711 F.2d at 1146 (finding percentage reductions to be an acceptable means for reducing fee applications); *see also Tokyo Electron Arizona, Inc. v. Discreet Industries Corp.,* 215 F.R.D. at 64–65 (applying percentage reduction to excessive fee application); *Rotella v. Board of Education,* 2002 **WL** 59106, at *3–4 (applying percentage reduction to fees of several attorneys for excessive and redundant billing); *Quinn v. Nassau County Police Dep't,* 75 F.Supp.2d 74, 78 (**E.D.N.Y**.1999) (reducing

one attorney's fees by 20% and another's by 30% for unnecessary and redundant time); *Perdue v. City Univ. of New York,* 13 F.Supp.2d 326, 346 (**E.D.N.Y**.1998) (imposing a 20% reduction for redundancy); *American Lung Ass'n v. Reilly,* 144 F.R.D. 622, 627 (**E.D.N.Y**.1992) (deducting 40% of plaintiffs' claimed hours, finding that "the use of so many lawyers for relatively straightforward legal tasks was excessive and led to duplication of work").

Having considered the papers submitted by the parties and having reviewed the time entries, this Court concludes that a fair and reasonable means for adjusting for the excessive amount of time spent by plaintiff's counsel on some tasks is to reduce the hours for which fees are to be awarded for those tasks by 15%. The Court notes that this percentage reduction only applies to the time entries described above as excessive. The remainder of plaintiffs counsels' work is to be compensated at 100%, based on the adjusted hourly rates described *supra* at 58.

4. *Travel Time*

Defendant also challenges the travel time requested by Mr. Beranbaum. This time included the half hour each way for him to come to the Eastern District Courthouse.

Courts in this Circuit routinely compensate prevailing attorneys for their travel time to the court for conferences, hearings, and other appearances. *See, e.g., Colburn Family Found. v. Chabad's Children of Chernobyl,* No. 06 **CV** 235J, 2011 **WL** 1758639, at *5 (S.D.N.Y. **Apr**.12, 2011); *Wong v. Yoo,* No. 04 **CV** 4569, 2010 **WL** 4137532, at *2 (**E.D.N.Y**. Oct. 19, 2010); *LV v. New York City Dept. of Educ.,* 700 F.Supp.2d 510, 526 (S.D.N.Y.2010). However, the courts have clearly held that travel time should be compensated at no more than 50% of the attorney's hourly rate. *See, e.g., Toussie v. County of Suffolk,* No. 01 **CV** 6716, 2011 **WL** 2173870, at *2 (**E.D.N.Y**. May 31, 2011); *Luciano v. Olsten Corp.,* 925 F.Supp. 956, 965 (**E.D.N.Y**.1996), *aff'd,* 109 F.3d Ill (2d Cir.1997); *Cruz v. Local Union No. 3,* 34 F.3d at 1161.

Here, Mr. Beranbaum seeks reimbursement for travel time at half his regular hourly rate. (Pl.'s Fee Mem. at 17). Accordingly, this Court rejects defendant's argument and holds that Mr. Beranbaum's request for reimbursement for travel expenses at half his adjusted hourly rate is compensable and appropriate.

***36** Applying all of the reductions and adjustments discussed above to plaintiff's request of $443,465 in fees, the Court limits plaintiffs total fee award to $353,609.75.[32]

E. *Costs*

In addition to seeking attorney's fees, plaintiff also seeks to recover costs incurred in connection with the case. As a prevailing party, plaintiff is entitled to an award of costs pursuant to Section 8–502(f) of the New York City Admin. Code. *See LeBlanc–Stemberg,* 143 F.3d at 763 (holding that it is an abuse of discretion to deny reasonable out-of-pocket costs).

Here plaintiff seeks a total of $13,819.87 in costs. (*See* McIntyre Decl. ¶ 33). Plaintiff's requested reimbursement for $9,000 in unspecified "Expert witness fees" comprises the majority of that sum.[33] (*Id.*) Tacitly conceding that plaintiff is entitled to reimbursement for most of what she claims,[34] defendant contends that plaintiff's reimbursement for costs should be limited to $12,319.87. (Def.'s Fee Mem. at 40). Defendant arrives at this figure by deducting $1,500 from plaintiff's request, arguing that the Court should deny plaintiff reimbursement for the amount Dr. Robert Goldstein billed plaintiff for his second court appearance, occurring on **April** 18, 2011, and the time he spent preparing his report, dated **April** 15, 2011.[35] (*Id.* at 39 (citing McIntyre Decl., Ex. E at 21)). According to defendant, "[b]oth services were necessitated by Plaintiff's counsel's negligence in not disclosing the fact of or findings from Plaintiff's subsequent examination by Dr. Goldstein in November 2010" and "[n]either plaintiff nor her counsel should be awarded monies to reimburse this clearly unnecessary expense." (*Id.* at 39–40).

However, Dr. Goldstein was not entirely precluded from testifying. This Court only precluded him from describing his assessment of plaintiff's condition after May 2008. (Tr. at 571, 574). Contrary to defendant's contention, the limited nature of Dr. Goldstein's testimony at trial does not amount to negligence on the part of plaintiff's counsel. (*See* discussion *supra* at 33–36). Moreover, defendant cites no authority for the proposition that a prevailing plaintiff should be denied reimbursement for the cost of an expert witness when some of that expert witness' testimony was precluded at trial. In addition, the Court does not credit defendant's contention that Dr. Goldstein's appearance on **April** 18, 2011 was an unnecessary expense, as his cross-examination would have required a second day of testimony. However, the Court recognizes that the time Dr. Goldstein spent preparing his

supplemental report was the result of plaintiff's failure to provide such a report in discovery. Accordingly, this Court reduces plaintiff's reimbursement for Dr. Goldstein's fees by $500, thus awarding plaintiff a total of $13,319.87 for costs.

CONCLUSION

For the reasons discussed above, this Court denies defendant's motion to set aside the verdict under Rule 50 of the Federal Rules of Civil Procedure and denies defendant's motion for an offset to plaintiff's damage award. Accordingly, the Court enters judgment for plaintiff in the amount awarded by the jury, $78,472. Additionally, the Court awards plaintiff attorney's fees and costs as follows: 1) defendant is to pay plaintiff's counsel $353,609.75 in attorney's fees; and 2) defendant is to reimburse plaintiff $13,319.87 for costs. In total, the Court awards plaintiff $445,401.62.

***37** The Clerk is directed to send copies of this Order to the parties either electronically through the Electronic Case Filing (ECF) system or by mail.

SO ORDERED.

All Citations

Not Reported in F.Supp.2d, 2012 WL 1624291

Footnotes

1 The jury awarded damages in the amount of $38,472 for lost earnings and benefits and an additional $40,000 for emotional distress based on plaintiff's NYCHRL claim. However, the jury found for defendant on plaintiff's FMLA claim, deciding that plaintiff's taking of FMLA leave was not a motivating factor in defendant's decision not to promote her.

2 Prior to bringing the jury in for the final day of trial, the Court stated: “The plaintiff will formally rest before the jury when we bring them in, But for the purpose of getting the motions heard, I'll assume that the plaintiff has rested and we'll move on from there.” (Tr. at 923).

3 Immediately prior to the discussion of defendant's Rule 50(a) motion, defendant had made clear during the discussion of the jury instructions and verdict form that this “legitimate reason” was defendant's contention that no RY supervisor position existed at the time plaintiff sought such a promotion. (*See* Tr. at 918–22).

4 Citations to “Tr.” refer to pages in the transcript of the trial proceedings that commenced on **April** 12, 2011 and concluded on **April** 25, 2011.

5 Ms. Babolcsay was supposed to conduct meetings of the same frequency, but “she did not fulfill that part of her job.” (*Id.* at 35–36). According to Ms. Steegmann, the RY counselors “didn't have supervision with Ms. Babolcsay.” (*Id.* at 35).

6 Citations to “Def.'s Set Aside Mem.” refer to Memorandum of Law in Support of Defendant's Motion for Judgment as a Matter of Law, filed on June 13, 2011.

7 Babolscay resigned her position after an incident involving alcohol at the Christ the King prom. (Tr. at 446–47, 956–957).

8 Defendant notes that plaintiff did not plead in her Complaint that she was seeking to have PDHP create a new position for her. (*Id.* at 3). However, the jury did not see the Complaint; therefore, this argument is of little relevance here.

9 Citations to “Pl.'s Set Aside Mem.” refer to Plaintiff's Memorandum of Law in Opposition to Defendant's Motion for Judgment as a Matter of Law, filed on July 20, 2011.

10 Citations to “Cea Cert.” refer to the Certification of Richard J. Cea in Support of the Defendant's Motion to Reduce Jury Verdict, dated June 13, 2011.

11 Citations to “Cea Decl.” refer to the Declaration of Richard J. Cea, dated June 13, 2011.

12 Citations to “Def.'s Offset Mem.” refer to the Memorandum of Law in Support of Defendant's Motion for Set Off Against Jury Award for Lost Wages, dated June 13, 2011.

13 Defendant cites to a footnote in *Inchaustegui* where the court referred to a number of cases from other jurisdictions holding that the rule should not be applied outside the context of a tort claim. (Def.'s Offset Mem. at 2–3 (quoting *Inchaustegui v. 666 5th Ave. Ltd. P'Ship,* 96 N.Y.2d at 116 n. 4, 725 N.Y.S.2d 627, 749 N.E.2d 196 (citing cases))).

14 Citations to “Pl.'s Offset Mem.” refer to Plaintiffs Memorandum of Law in Opposition to Defendant's Motion for Setoff Against Jury Award for Lost Wages, dated July 20, 2011.

15 Citations to “Def.'s Fee Mem.” refer to the Defendant's Memorandum of Law in Opposition to Plaintiff's Motion For Attorney's Fees, Etc., dated July 20, 2011.

16 Citations to “Beranbaum Decl.” refer to the Declaration of John A. Beranbaum in Support of Plaintiff's Motion for Attorney's Fees and Costs and Interest, filed on June 13, 2011.

17 Citations to "Pl.'s Supp. Fee Mem." refer to the Plaintiff's Supplemental Memorandum of Law In Support of Her Motion for Attorneys' Fees and Costs, dated August 5, 2011.

18 Plaintiff argues that defendant could have filed an offer pursuant to Rule 68 of the Federal Rules of Civil Procedure and thus limited the amount of attorneys' fees that were **potentially** subject to recovery. (Pl.'s Supp. Fee Mem. at **7**). Since no Rule 68 offer was made, the Court need not decide whether a "Rule 68 [offer] would act as a downward limitation which is not permitted by" the NYCHRL, as defendant argues, but without citing any authority. (Def.'s Fee Mem. at 10), Generally, however, where no Rule 68 offer has been made, "the parties' positions during settlement negotiations should have no bearing on the Court's assessment of the degree of success or any other element of the fee award that plaintiff may be entitled to," *Rozell v. Ross–Holst,* 576 F.Supp.2d at 543.

19 Citations to "McIntyre Decl." refer to the Declaration of Margaret McIntyre in Support of Plaintiff's Motion for Attorney's Fees and Other Discretionary Costs Pursuant to § 8–502(f) of the New York City Administrative Code, filed on June 13, 2011.

20 Citations to "Pl.'s Fee Mem." refer to Plaintiff's Supplemental Memorandum of Law in Support of Her Motion for Attorney's Fees and Costs, filed on June 13, 2011.

21 Citations to "Meenan Decl." refer to the Declaration of Colleen M. Meenan in Support of Plaintiff's Application for Attorney's Fees and Costs, attached as Exhibit B to the McIntyre Decl. and filed on June 13, 2011.

22 Citations to "Traub Aff." refer to the Affirmation in Support of Application for Attorney's Fees by Doris G. Traub, attached as Exhibit C to the McIntyre Decl. and filed on June 13, 2011.

23 Unfortunately, the cases cited by Ms. Meenan are all decisions rendered in cases brought before the Southern District of New York. Since the Court is required by the Second Circuit to apply reasonable rates from this district, *see Simmons v. New York City Transit Auth.,* 575 F.3d at 172, the case law cited is of marginal assistance.

24 As discussed below, Mr. Beranbaum seeks an award of fees calculated at trates currently prevailing in the Southern District of New York. (Beranbaum Decl. ¶¶ 4, 33). According to Mr. Beranbaum, he usually charges $550 per hour for his time, and $250 per hour for Ms. Clarke's time, consistent with Southern District rates. (*Id.* ¶¶ 3, 28).

25 Citations to "Goodman Aff." refer to the Affirmation of Janice Goodman, attached as Exhibit 2 to the Beranbaum Decl. and filed on June 13, 2011.

26 Citations to "Zuchlewski Aff." refer to the Affidavit of Pearl Zuchlewski in Support of Application for Attorneys' Fees and Costs, dated June 13, 2011, attached as Exhibit 3 to the Beranbaum Decl. and filed on June 13, 2011.

27 Citations to "Cea Decl. II" refer to the Declaration of Richard J. Cea in Opposition to Plaintiff's Application for Attorney's Fees, etc., dated July 20, 2011.

28 Although this Court recognizes that it is bound by *Simmons,* the Court believes that "[i]mposing the *Simmons* burden on litigants ignores ... the practical reality of practicing law in New York...." *Gutman v. Klein,* No. 03 **CV** 1570, 2009 **WL** 3296072, at *2 n. 1 (**E.D.N.Y**. Oct. 13, 2009) (Cogan, J.) (criticizing the *Simmons* decision for failing to recognize the "significant overlap between attorneys practicing in the Southern and Eastern Districts" and suggesting that "the concept of a geographically-based as opposed to case complexity-based lodestar will someday have as much relevance to the selection of an attorney as dinosaurs have to birds"); *see also Luca v. County of Nassau,* 698 F.Supp.2d at 300 (Block, J.) (noting the "condescending tone" of the *Simmons* court's statement that Southern District rates were inappropriate for an attorney practicing in the Eastern District because a losing defendant "should not be required to pay for a limousine when a sedan would have done the job"); *New Leadership Comm. v. Davidson,* 23 F.Supp.2d 301, 304 (**E.D.N.Y**.) (Gershon, J.) (cautioning that the hourly rate analysis "should not be read so strictly as to create an unreasonable disincentive for Manhattan-based attorneys to bring ... suits in Brooklyn").

29 The Court notes that although defendant's Memorandum consistently refers to the judge as "Magistrate Bianco," the Honorable Joseph Bianco is an Article III judge, appointed to the bench in 2006.

30 The court noted that plaintiff's attorney, Mr. Brewington, had "over 25 years' experience" and in 1987 had "started his own firm, specializing in plaintiffs-side [*sic*] civil rights cases." *Luca v. County of Nassau,* 698 F.Supp.2d at 301.

31 Citations to "McIntyre Supp. Decl." refer to the Declaration of Margaret McIntyre in Reply to Defendant's Opposition to Plaintiff's Motion for Attorney's Fees and Other Discretionary Costs Pursuant to 8–502(f) of the New York City Administrative Code, filed on August 5, 2011.

32 The Court calculated plaintiff's fee award in the following manner. Plaintiff's original fee request sought $199,537.50 in fees for Ms. McIntyre, based on 532.1 hours worked at a rate of $375. (*See* McIntyre Decl., Ex. D at 20). Plaintiff's supplemental fee request added 39.9 hours for time Ms. McIntyre spent on the post-verdict work, bringing the total fees sought for Ms. McIntyre to $214,500. (*See* McIntyre Supp. Decl. ¶ 60). However, the Court found 83.4 hours of Ms. McIntyre's claimed time excessive. (*See* discussion *supra* at 63–64). Applying a 15% reduction to these hours and

reimbursing the other time at Ms. McIntyre's full rate, the Court awards plaintiff $194,846.25 for Ms. McIntyre's services. As for Mr. Beranbaum, in his Declaration he states that he spent 322.7 hours working on the case and an additional 7.5 hours in travel time. (*See* Beranbaum Decl. ¶ 5, Ex. 1 at 7). Calculating the casework time at Mr. Beranbaum's requested rate of $550 per hour and the travel time at $275 per hour, Mr. Beranbaum initially sought $179,547.50 in fees. (*See* Beranbaum Decl. ¶ 33). Plaintiff's supplemental fee request added an additional 83.6 hours for time Mr. Beranbaum spent working on post-verdict motions (*see* Beranbaum Supp, Decl. ¶ 26), bringing Mr. Beranbaum's total requested fees to $225,527.50. However, the Court found 144.4 of Mr. Beranbaum's claimed hours excessive. (*See* discussion *supra* at 63–64). Adjusting Mr. Beranbaum's work rate to $400 per hour and his travel rate to $200 per hour (*see* discussion *supra* at 58, 66), then applying a 15% reduction to the hours of his work that the Court finds excessive, the Court awards plaintiff $155,356 for Mr. Beranbaum's services. In addition, plaintiff initially sought $1,732.50 for the work of Ms. Clarke, based on 9.9 hours of work at an hourly rate of $175. (*See* Beranbaum Decl. ¶¶ 5–6, 33). Plaintiff's supplemental fee request added an additional 8.6 hours of post-verdict work performed by Ms. Clarke. (*See* Beranbaum Supp. Decl. ¶ 26). Because this Court found Ms. Clarke's hourly rate reasonable (*see* discussion *supra* at 58), the Court grants plaintiff the full $3,237.50 in fees she has requested for Ms. Clarke. Finally, plaintiff sought $200 for two hours of work by an associate functioning as a paralegal, based on a rate of $100 per hour. (*See* Beranbaum Decl. ¶¶ 5–6). Adjusting the paralegal's compensation to the $85 per hour rate this Court finds reasonable in this district (*see* discussion *supra* at 58), the Court awards plaintiff $170 for the paralegal's efforts.

33 Plaintiff also specifically requests $40.00 for "Witness fee for Jimmie C. Holland, M.D." and a total of $1,002.09 for expenses related to the travel expenses of witness Teresa Riter. (McIntyre Decl. ¶ 33).

34 Indeed, as a prevailing party under the NYCHRL, plaintiff is entitled to expert fees as part of the fee-shifting scheme of the statute. (*See* NYCHRL § 8–502(f)). The NYCHRL is based on Title VII, which provides that, in the court's discretion, a prevailing party may be awarded "a reasonable attorney's fee (*including expert fees*) as part of the costs." *DeCurtis v. Upward Bound Intern., Inc.,* No. 09 **CV** 5378, 2011 **WL** 4549412, at *6 (S.D.N.Y. Sept. 27, 2011) (quoting 42 § 2000e–5(k) (emphasis added)). As the court explained in *DeCurtis,* "[t]he Title VII and NYCHRL provisions are substantively and textually similar; therefore, the reasonableness of fees in [a] case would be analyzed the same [way] regardless of which provision provides [the prevailing party's] recovery." 2011 **WL** 4549412, at *6 (internal citation omitted) (granting expert fees to a prevailing party in a discrimination action brought under the NYCHRL).

35 During his first court appearance on Friday, **April** 15, 2011, Dr. Goldstein testified, based on his treatment of plaintiff, that she was suffering from a "serious psychiatric condition," specifically, "a major depressive disorder which has some post-traumatic features." (Tr. at 543). Dr. Goldstein testified that he memorialized his assessment in a report he authored on May **7**, 2008. Pursuant to Federal Rule of Evidence 26, this report—and the materials Dr. Goldstein reviewed in preparing it—were disclosed to defendant prior to trial. However, Dr. Goldstein also testified that he reviewed additional documents related to Ms. **Siracuse** and her condition in the last few months prior to trial. (*Id.*) Defendant timely objected to Dr. Goldstein testifying further about his current assessment of Ms. **Siracuse's** condition, arguing that plaintiff had not disclosed whatever additional materials Dr. Goldstein had recently reviewed (*id.* at 543–55), and that Dr. Goldstein had met with Ms. **Siracuse** again in November 2010 but plaintiff had not provided defendant with any report documenting this evaluation. (*Id.* at 570–71). The Court credited defendant's argument that it would have been improper for Dr. Goldstein to continue testifying about his current evaluation of Ms. **Siracuse**, since he would not be able to separate out the influence of these undisclosed materials. Moreover, defendant's ability to prepare for cross-examination had been compromised. Accordingly, this Court limited Dr. Goldstein's direct examination to testimony about his assessment of plaintiff prior to May 2008 (*id.* at 574), instructed Dr. Goldstein to provide defendant with a supplemental report describing the November 2010 examination (*id.* at 573–74), and asked Dr. Goldstein to return to court on Monday, **April** 18, 2011. Dr. Goldstein provided defendant with his supplemental report on Saturday, **April** 16, 2011, and defendant had the weekend to prepare for cross-examination, which began on **April** 18, 2011. (*Id.* at 772).