UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

LORI FRANCHINA, Plaintiff,	)	C.A. No. 12-517M
v.	)	
CITY OF PROVIDENCE, Defendant.	)	

PLAINTIFF'S OPPOSITION TO DEFENDANT'S RENEWED MOTION FOR JUDGMENT AS A MATTER OF LAW OR, IN THE ALTERNATIVE, FOR A NEW TRIAL OR TO ALTER OR AMEND THE JUDGMENT

The Plaintiff, Lori Franchina ("Franchina"), submits the following opposition to Defendant City of Providence's ("the City" or "Providence") renewed Motion for Judgment as a Matter of Law (Fed. R. Civ. P. 50), or, in the alternative, Motion for New Trial (Fed. R. Civ. P. 59(a)), or Motion to Alter or Amend the Judgment (Fed. R. Civ. P. 59(e)). For ease of reference, the opposition is ordered in the same manner as the Memorandum of Law submitted by the City in support of these motions.

I. RENEWED MOTION FOR JUDGMENT AS A MATTER OF LAW (FED. R. CIV. P. 50)

When deciding a renewed motion under Fed. R. Civ. P. 50, "[a] party seeking to overturn a jury verdict faces an uphill battle and...our 'review is weighted toward preservation of the jury verdict....'" Monteagudo v. Asociacion de Empleados del Estado Libre Asociado de Puerto Rico, 554 F.3d 164, 170 (1st Cir. 2009), quoting Crowe v. Bolduc, 334 F.3d 124, 134 (1st Cir. 2003). "Courts may only grant a judgment contravening a jury's determination when the evidence points so strongly and overwhelmingly in favor of the moving party that no reasonable jury could have returned a verdict adverse to that party." Monteagudo, 554 F.3d at 170.

A. Defendant's Statute of Limitations arguments fail because Franchina submitted sufficient evidence of an act contributing to her claim within the filing period.

Defendant does not dispute this court's previous ruling, consistent with Nat'l R.R. Passenger Corp. v. Morgan, 536 U.S. 101, 122 (2002), that in a hostile work environment claim, such as this one, "provided that an act contributing to the claim occurs within the filing period, the entire period of the hostile work environment may be considered by a court for the purpose of determining liability." Memorandum and Order on March 31, 2016 (Docket Entry No. 65) (emphasis added). The defendant claims that the plaintiff did not introduce evidence of any Title VII violations within 300 days of the filing of the Charge of Discrimination, specifically between February 3, 2011 and November 30, 2011. This is incorrect.

There was an abundance of evidence at trial of acts of harassment occurring after February 3, 2011. Franchina testified that she was required to report to the station one to three times per month, well into March and April of 2011, in order to fill out IOD paperwork and make sure she was not scheduled for any shifts. Although Franchina could not say precisely what dates in March and April the ongoing harassment occurred, it was clear that while she was working on the computer in the station during this time period (she explained that even after applying for IOD status, she had to come to the station to use the computer there because it was connected to the proper IOD and scheduling programs), she was subjected to a litany of discriminatory and harassing statements, including: "Fuck that bitch!"; "What the fuck is that bitch doing here?"; "I'm stressed out too, can I take a vacation?"; "affirmative action is killing this job"; and "I don't care how many bars they give her, I would never take orders from that bitch." She described how Firefighter Miles Bonalewicz would shout across the station, "no way I am doing that fucking bitch's job!"

Second, workplace harassment that is tolerated by the employer, if sufficiently severe or pervasive to create a hostile work environment, may, in and of itself, constitute an adverse employment action under Title VII retaliation claims. Noviello v. City of Boston, 398 F.3d 76, 89 (1st Cir. 2005). And, where retaliation claims stem from complaints made regarding sexual harassment and hostile work environments, the retaliation and the underlying discrimination are part and parcel of the same Title VII violation. Id., citing O'Rourke v. City of Providence, 235 F.3d 713, 729 (1st Cir. 2001). In other words, even if Franchina had not testified to the harassment described above, which she plainly did, the continuing violation doctrine would still apply to both of Franchina's Title VII claims because the Defendant knew about the hostile work environment and failed to take appropriate measures to fix it well past February 3, 2011, which constitutes retaliation, and this retaliation, as an "act contributing to the claim," anchors the hostile work environment claim under the continuing violation doctrine. Lockridge v. The University of Maine System, 597 F3d. 464 (1st Cir. 2010).

To this day, Defendant has failed to remedy the hostile work environment that is the Providence Fire Department. Firefighters McGarty and McDougal were never disciplined. Firefighter Tang was never disciplined. Chiefs Mello, Horton, and Farrel testified that it would be "nearly impossible" to guarantee that Franchina was never scheduled alongside Firefighter McGarty. Chief Varone testified that he had no confidence in the other officers of the Department to address the situation properly following his retirement. Indeed, Danielle Masse testified that she heard male co-workers refer to Franchina as a "bitch" and as a "cunt" as recently as September 2015.

Moreover, Chief Crawford admitted in Exhibit 17 (Attorney Oredugba's email) that, as far back as November 2010, "there appears to be ample merit to her claim of multiple and repeated violations of PFD Rules & Regulations." It was undisputed at trial that Franchina was deemed unfit for duty in September 2013. Thus, until September 2013, she was eligible to return to work, but was unable to withstand the hostile environment which continued to exist, as explained by Dr. Yanni and Dr. Olson. Each and every day that went by where Franchina was eligible to work, but unable to do so because of the Department's refusal to rectify the hostile work environment, she was subjected to a continuing violation of Title VII. See Greer v. Paulson, 505 F.3d 1306, 1313-14 (D.C. Cir. 2007) ("a hostile work environment 'can be a continuing violation even though the employee is not working' where the employee claims her employer drove her out of the workplace due to harassment and 'she has received no indication that the environment of harassment has changed'"), quoting Jensen v. Henderson, 315 F.3d 854, 861–62 (8th Cir. 2002).

Whether through brand new acts of harassment, or ongoing retaliation, there was ample evidence at trial of Title VII violations occurring after February 3, 2011, and, therefore, Franchina's hostile work environment claim and retaliation claim were both properly submitted to the jury.

B. Franchina established Title VII discrimination based on gender through evidence that she was (1) harassed based on gender, *and* (2) that she was harassed because she belonged to a subclass of her gender.

i. *Franchina established harassment based on gender.*

Defendant's contention that "Plaintiff offered no testimony or evidence that any of the alleged harassment she suffered was based on her gender" is baseless. Defendant is well

aware that the evidence of gender discrimination was overwhelming, and so Defendant does the only thing it can do by trying to confuse the issue and arguing the technicalities of "sex-plus" discrimination. The simple fact of the matter is this: even without any evidence of "sex-plus" discrimination (of which there was an abundance too, as discussed below), the jury heard more than enough evidence to justify its verdict on straightforward, gender-based discrimination grounds.

Every single time Franchina was called a "bitch," "cunt," or "Frangina" (an obvious combination of her last name and "vagina"), she was harassed because of her gender. "Evidence of sexual remarks, innuendos, ridicule, and intimidation may be sufficient to support a jury verdict for a hostile work environment." O'Rourke v. City of Providence, 235 F.3d 713, 729 (1st Cir. 2001). These words are reserved specifically for women, and they are used specifically to degrade women. Franchina was called these things because she is a woman. She was not called these words once or twice in passing; these were not "offhand comments and isolated incidents." Id. This is exactly the sort of pervasive hostility Title VII is designed to address. She was called these things again and again, by too many firefighters to list here, for years. As Dr. Olson put it, Franchina was "tortured at work."

Acts of gender discrimination were not limited to degrading language. Franchina described how, when she was promoted to Lieutenant, a male firefighter approached her, flicked his finger on the new golden bars on her shoulder, and told her "I'll never take orders from you." Several other acts of insubordination were described as well, including Firefighter Tang flicking blood and brain matter in Franchina's face, and, following Franchina issuing an order at an accident scene to bring up a stretcher, a male coworker responding "you'll get your

stretcher when you get your stretcher." Everyone who testified on the issue agreed that, on the scene of a medical emergency, the Rescue Lieutenant is in charge, and that the Rescue Lieutenant's orders, here Franchina's, are to be followed without question. These acts of insubordination were not simply acts of retaliation for Franchina's complaints against male firefighters; they were evidence of gender discrimination. The plaintiff argued and the jury was free to credit the argument, developed throughout trial, that male firefighters resented Franchina's rapid rise through the ranks, specifically because she was a woman.

There was also testimony from Danielle Masse that the female employees of the Department who sleep with men get treated better, and that she was personally treated better when she was in a relationship with a male firefighter. This was corroborated by Chief Crawford, who reported to Attorney Oredugba in Exhibit 16 (Attorney Oredugba's email) that he "believes that they cut [Franchina] less slack b/c if guys think they have a chance they cut slack but if they don't—no slack." Basing the treatment of female firefighters on their willingness to sleep with their male coworkers is gender discrimination.

Defendant does not even attempt to rely on the testimony of the female firefighters it called in its case-in-chief, Lieutenants Wishart and Stukus. Lieutenant Wishart described how she was treated just fine, and how she also happened to be in a long-term relationship with a male firefighter. Lieutenant Stukus described being approached by a drunk superior officer at a union hall event, how he propositioned her, how she said no, how she got up and went into the ladies' restroom, and how he followed her into the ladies' room and had to be dragged out by other firefighters. The jury also heard that instead of disciplining this superior officer, the Department allowed him to retire at full-rank, with his full-rank pension.

For these reasons, there was ample evidence for the jury to find that Franchina was subjected to gender discrimination.

ii. *Though not necessary for liability to attach, Franchina also established harassment based on a sex-plus theory.*

As for Defendant's argument that Chadwick v. WellPoint, Inc., 561 F.3d 38 (1st Cir. 2009) was somehow misapplied, Defendant misreads the case:

> [Sex-plus discrimination] refers to the situation where an employer classifies employees on the basis of sex *plus* another characteristic. The terminology may be a bit misleading, however, because the "plus" does not mean that more than simple sex discrimination must be alleged; rather, it describes the situation where "not all members of a disfavored class are discriminated against." In other words, in such cases the employer does not discriminate against the class of men or women as a whole but rather treats differently a subclass of men or women.

Id. at 43 (internal citations omitted). Defendant concedes that Franchina, as a lesbian, belongs to a "subclass" of women: all lesbians are women, but not all women are lesbians.

Where Defendant goes astray is by insisting that a plaintiff can only prove a subclass of women has been discriminated against by proving that the equivalent subclass of men (in this case, gay men) has been discriminated against too.[1] This argument is wrong on its face. Assume an employer hires a lesbian, but has never hired any gay men. According to the Defendant, that lesbian employee cannot be subjected to sex-plus discrimination, by virtue of belonging to a subclass of women, simply because there are not any gay male employees against whom to compare her treatment. Whereas, according to the Defendant, a lesbian working for an employer who has happened to hire gay men does have the ability to prove sex-

[1] Even if this were the case, there was testimony concerning complaints made by a gay male firefighter involving his participation in a gay pride parade and discriminatory acts at the station following the march, including written degrading comments on the same whiteboard used to degrade Franchina.

plus discrimination. Surely, whether a particular lesbian plaintiff has been subjected to Title VII sex-plus discrimination cannot depend on whether she is fortunate enough to have gay male coworkers.

The flaw in Defendant's logic is that sex-plus discrimination is not only established by comparing a female subclass to its equivalent male subclass. Rather, sex-plus discrimination is established by showing that a member of a subclass has been treated differently than *other members of her own gender*. Chadwick, 561 F.3d at 43 ("In other words, in such cases the employer does not discriminate against the class of men or women as a whole but rather treats differently a subclass of men or women"). Sex-plus discrimination is concerned with treating a particular subclass differently because they do not comply with the stereotypical norms that their superiors and/or coworkers expect of them based on their gender. Here, Franchina's male superiors and coworkers treated her differently because she did not comply with their expectations that she would make herself available to them for sex.[2] In Chadwick, it was sex-

[2] The Plaintiff further contends, as she did in her Complaint, that sexual orientation is a protected class under Title VII because it is inherently related to her sex. That argument was advanced a second time in her Motion to Reconsider (Docket Entry No. 36), which this Court denied because "There is no controlling precedent that has changed in this Circuit that would cause this Court to reconsider its dismissal of Count II of her Complaint." See Order dated February 22, 2016. The Equal Employment Opportunity Commission ("EEOC"), in Baldwin v. Dep't of Transportation, EEOC Appeal No. 0120133080, 2015 WL 4397641 (July 15, 2015), has addressed the precise question of whether a claim of sexual orientation discrimination qualifies as a claim of sex discrimination under Title VII, and concluded "…sexual orientation is inherently a "sex-based consideration," and an allegation of discrimination based on sexual orientation is necessarily an allegation of sex discrimination under Title VII." Several Circuits have followed suit.

plus discrimination to pass over a mother for promotion based on the stereotypical and discriminatory assumption that a mother could not simultaneously care for her children and perform well in the workplace. Chadwick, in turn, cited to Price Waterhouse v. Hopkins, 490 U.S. 228, 235 (1989), where it was discrimination to deny a woman partnership at an accounting firm because she was "too aggressive a macho, should attend a charm school, and should dress and behave more femininely." As the Supreme Court put it in Price Waterhouse, "we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group." Id. at 251.

As discussed in the previous section, there was ample evidence at trial that female firefighters who did not make themselves available for sexual relationships with their male coworkers—specifically lesbian firefighters like Franchina and Danielle Masse—were treated differently than female firefighters who did. There was also an abundance of evidence concerning the City's complete inability to put a stop to the different treatment. This is exactly the sort of treatment directed at a particular subclass of women that the Title VII prohibition against sex-plus discrimination is designed to address. A lesbian cannot be subjected to different treatment than a non-lesbian woman because she does not sleep with men, or because she is not as dainty and feminine as the men she works with expect her to be. Franchina was discriminated against because she is a lesbian, which is the same thing as saying she was discriminated against because she is a woman who did not behave the way men expected her to behave. However you phrase it, discrimination against a woman because she is not a certain type of woman is gender discrimination under Title VII.

The cases cited by the Defendant are inapposite to the case-at-bar. In Rafilski v. Donahoe, Civil Action No. 10-cv-40060, 2012 WL 4753274 (D. Mass. Oct. 3, 2012), plaintiff's claims that she was discriminated against because she was a married woman were not simply dismissed because she made no showing of different treatment of married men (as the court pointed out, her husband, also a postal carrier, was treated the exact same way she was). Id. at *8. Rather, there was also no evidence that she was treated differently than single women. Or, as the court put it, "[t]he weakness of Plaintiff's gender-plus claim is that she lacks evidence that the Defendant changed her schedule *due to her sex.*" Id. at *7 (emphasis in original). Similarly, in Rolfs v. Home Depot U.S.A., Inc., 971 F.Supp.2d 197, 210 (2013), plaintiff's claims of same-sex harassment were dismissed because he "is not claiming that he was harassed for *being a man*, but that he was harassed for being a faithful spouse" (emphasis supplied). Here, by contrast, Franchina's sex-plus theory of discrimination was based on her *being a woman*, specifically a type of woman that did not conform to the stereotypes imposed upon her by men. The jury was presented with substantial, direct evidence of discrimination against Franchina because of her belonging to a particular subclass of women. Thus, under Chadwick, the sex-plus theory of Title VII discrimination was properly submitted to the jury.

iii. *Franchina established employer liability.*

Employer liability is established where "the employer [1] knew or should have known of the charged sexual harassment and [2] failed to implement prompt and appropriate action." Forrest v. Brinker Int'l Payroll Co., LP, 511 F.3d 225, 228 (1st Cir. 2007). Defendant does not contend that supervisory employees of the City did not know of the charged sexual harassment. The trial was replete with complaints of discrimination and harassment filed by Franchina, over

a course of years, both orally and in writing. As just an example, Exhibits 22, 24, 25, 26, 27, 29, 30, 31, 32, and 33 are all Form 17's filed by Franchina, wherein she describes numerous acts of discrimination and harassment.

Defendant's argument, instead, is that, in the face of the discrimination and harassment suffered by Franchina, the City of Providence took prompt and appropriate remedial action. Defendant points to the issuance of the email "order" regarding Firefighter McGarty as proof of this. Defendant ignores the conflict in the trial testimony about whether the email was, in fact, an "order," or a "suggestion," as explained by Chief Mello. Moreover, Defendant glosses over the undisputed fact that the email order/suggestion was violated several times, with McGarty being scheduled to work at stations with rescue units. When asked to explain why the order/suggestion was repeatedly violated, bringing Franchina into the presence of a man against whom she had an active restraining order, Chiefs Mello, Horton, and Farrel all testified that it was essentially impossible to comply with and to enforce the order/suggestion. There is nothing "appropriate" about an email that may or may not be an order, and that everyone agrees is unenforceable. This was remedial "action" in name only, never actually intended to address Franchina's problems in the workplace. Chief Mello even went so far as to testify he never had any intention of complying with the email.

Tellingly, the Defendant makes no mention at all about the instances of discrimination and harassment that went entirely unaddressed. Firefighter Tang was never disciplined. Firefighter McDougal was never disciplined. The firefighters who wrote degrading comments on the whiteboard were never disciplined. The firefighters who committed insubordination at various medical scenes were never disciplined. The firefighters who testified at McGarty's

restraining order hearing in a manner described by the hearing judge as "not credible" were never disciplined. The list goes on and on. To only focus on the McGarty order/suggestion as proof of "prompt and appropriate" action is to miss the forest for the trees.

Attorney Oredugba, the City's EEO officer, responsible for investigating and enforcing the City's sexual harassment policies, testified that her office is chronically understaffed and that she does not have the resources she needs to do her job effectively. She also could not identify the specific sexual harassment policy she was supposed to enforce, and she admitted to applying the wrong standard of proof in her EEO investigations. Even when she obtained assurances from the Fire Department that Firefighters McGarty and Jackson would be disciplined for their behavior towards Franchina, they never were, and Attorney Oredugba imposed no discipline on her own. In short, the evidence at trial portrayed a completely defunct EEO Office at the City, entirely incapable of taking "prompt and appropriate" action. One might have thought, given the O'Rourke case, that the City of Providence would have used all the years since 2001 to bolster and improve its Human Resources Department, to be able to properly enforce the City's sexual harassment policies at the Fire Department. Apparently, the City did not get the message.

C. Franchina established Title VII retaliation because she established (1) employer liability, (2) causation, and (3) damages.

i. *Franchina established employer liability.*

Defendant admits that "a hostile work environment, tolerated by the employer, is cognizable as a retaliatory adverse employment action" for purposes of a Title VII retaliation claim. Noviello, 398 F.3d at 89. Defendant claims, however, that the City did not tolerate the

hostile work environment because it took prompt and appropriate remedial action. For the reasons discussed above, this argument fails.

ii. *Franchina established that the adverse employment action was causally related to protected activity.*

Defendant's contention that the City's adverse employment actions (i.e. tolerating a hostile work environment) were not undertaken because of Franchina's filing complaints lacks merit. There was clear testimony that after Franchina made her (entirely warranted) complaints about Andre Ferro, she was confronted by Firefighter McDougal and asked "are you trying to cost him his fucking job?" She was then systematically excluded from meals. Eventually, a substance was put in her meals that made her sick. The various acts of insubordination described throughout trial all occurred after the complaints regarding Ferro had been made. To the extent there was any confusion about dates in interrogatories, Franchina explained to the jury that these were mistakes, and the jury was free to credit that explanation. Regardless, officers of the Department knew about the way Franchina was being treated and did nothing to stop it, as described above. "[A] hostile work environment, tolerated by the employer, is cognizable as a retaliatory adverse employment action" for purposes of a Title VII retaliation claim. Noviello, 398 F.3d at 89. As far as causation is concerned, there is no question that the City's tolerance of the hostile work environment went on for years following the Ferro incident, and that the tolerance continued to persist during the years after Franchina's complaints.

D. Franchina proved she was damaged by the City's Title VII violations.

First of all, the City glosses over the fact that Franchina had no duty to prove that she was caused to suffer post-traumatic stress disorder ("PTSD") as a result of the City's harassment and retaliation; she had to prove only that she suffered emotional distress. Notwithstanding her burden of proof, there was ample evidence that she suffered emotional distress and PTSD as a result of the City's Title VII violations. The jury heard lay testimony, from Franchina and her family, that Franchina has been severely emotionally damaged by the City's conduct. Franchina testified that she is now prescribed several medications that she was not prescribed prior to the City's conduct. Franchina's mother and sister testified that Franchina is not the same person she was before, even when she takes the medication.

The jury also heard the expert testimony of both of Franchina's doctors, Dr. Olson and Dr. Yanni. They both made it patently clear that in their opinions Franchina suffered PTSD as a result of the harrassment, and that the best that can be achieved is control and management of symptoms. The Defendant failed to object to the opinions of Franchina's doctors at trial as being insufficient because they did not use the magic language, "to a reasaonble degree of medical certainty," and as such the Defendant has waived any right to raise that objection now. See Fed. R. Evid. R. 103.

II. MOTION FOR NEW TRIAL (FED. R. CIV. P. 50 and 59)

A. The Court's jury instruction on the *Chadwick* case and sex-plus discrimination was proper.

For the reasons set forth, *supra*, on Chadwick and the law of sex-plus discrimination, the Court's instruction on the third element of Franchina's hostile work environment claim was

proper. As for Defendant's suggestion that the Court should have added the sentence, "If you find that Ms. Franchina was harassed solely because of her sexual orientation, then you have not found that she was harassed because of her gender," the instruction makes clear that "[Franchina] must prove that she was harassed at least in part because she was a woman." Juries, of course, are presumed to be fully capable of following the Court's instructions.

B. The Court's evidentiary rulings were proper.

Fed. R. Evid. 801(d)(2)(D) clearly applies to statements, oral and written, made by the City's employees on issues related to how they behave towards one another. Events and statements outside the workplace are, per the Court's own order, "admissible if the actions have consequences in the workplace." (ECF No. 65). To understand the consequences of an action in the workplace, the jury needs to understand what the action outside the workplace was itself. Similarly, evidence concerning discrimination against other individuals is admissible to show the extent of the hostile work environment experienced by the plaintiff. Bandera v. City of Quincy, 344 F.3d 47 (1st Cir. 2003). Finally, gender-based hostile work environment cases and retaliation cases are, by their nature, upsetting. Title VII exists precisely because society finds the sort of treatment Franchina received so revolting. That does not mean Franchina is prohibited from introducing evidence of what happened to her. If a party does not want a jury to hear evidence of its Title VII violations, it has a very simple recourse: do not violate Title VII.

III. MOTION TO AMEND OR ALTER THE JUDGMENT (FED. R. CIV. P. 59(e))

A. The punitive damages award should not be striken because *McDonough v. City of Quincy* provides controlling precedent.

Defendant cites to no case in this Circuit, or any other, where punitive damages in Title VII cases have been held to be unavailable against a municipality. The only Title VII case cited by Defendant, McDonough v. City of Quincy, 452 F.3d 8 (1st Cir. 2006), stands for the opposite proposition. McDonough supplies binding precedent in this matter. Also, to assume that both the District Court and the First Circuit in McDonough simply missed the statutory provision pointed to by the City is quite a leap, especially where the First Circuit was reviewing the matter *de novo*. Id.

Moreover, if there were ever a case justifying punitive damages, this is it. For years, Franchina was systematically discriminated against by her coworkers. She was physically and verbally abused, again and again and again. For years, Franchina's complaints were systematically ignored by her superiors. The treatment she received at the Fire Department left her severely and permanently disabled. And it is not as if the City of Providence can claim ignorance of Title VII or what it demands. In the O'Rourke case, not one, but two different juries found the City liable for Title VII violations.

Here, the jury did not have the case for five minutes before they came back with their one and only question during deliberations: "Can we have a ballpark on punitive damages?" Clearly, the jury believed that Providence displayed reckless indifference to Franchina's Title VII rights. Several jury members were from Providence. Surely, they understood that their tax dollars would be going towards the payment of their verdict, punitive damages and all. Just as

surely, they understood that this use of their tax dollars was fitting and just, given what the City had done to Franchina.

B. The front-pay award should not be stricken because there is sufficient evidence to support the jury's verdict.

Defendant's insistence that front-pay damages must be established through expert testimony, and that there must be expert testimony accounting for the reduction to present value, is incorrect. A recent First Circuit case, Travers v. Flight Services & Systems, Inc., 808 F.3d 525, 543-546 (1st Cir. 2015), is squarely on point and makes clear that the Plaintiff was not required to present expert testimony on the question of front pay, and that an award of front pay must stand.

In Travers, the First Circuit considered a $450,000 front-pay award rendered on the basis of the plaintiff's testimony alone, without any expert testimony. Following the jury's verdict, the District Court had struck the front-pay award as "too speculative." Id. The First Circuit reversed and remanded. The court held that proper question in this circumstance was not whether the amount of the award was proven with precision, but rather whether there was evidence to support the award of any amount of front pay. Id. (standard for decision was "taking the evidence in the light most favorable to the non-moving party, no reasonable jury would conclude that there could be a front-pay award in this case.") Id. at 544. The court held that the complete elimination of the front-pay award was error, explaining as follows:

> But the District Court did not merely reject a $450,000 front-pay award. The District Court ordered the complete elimination of front-pay damages, notwithstanding the evidence of the losses Travers testified that he would sustain going forward and notwithstanding his testimony that he had intended to stay in his job at FSS had he not been fired. That evidence, however, was sufficient to permit a reasonable jury to award some front-pay damages greater than zero.

Id. at 546 (emphasis added), citing Trainor v. HEI Hospitality, LLC, 699 F.3d 19, 31 (1st Cir. 2012) (affirming front-pay award based on estimation of loss and plaintiff's testimony that he would continue to work for three years). The First Circuit remanded the case for the District Court to reconsider, citing Handrahan v. Red Roof Inns, Inc., 43 Mass. App. Ct. 13 (1997) (finding excessive a front-pay award covering thirty years based on self-reported intention of employee but remanding for re-computation, not elimination, of front pay).

This approach is consistent with the source of the authority to award front pay under Title VII, which is equitable in nature. See Lussier v. Runyon, 50 F. 3d 1103, 1107 (1st Cir. 1995) ("we hold that front pay is an available equitable remedy under Title VII"). Equity disfavors rigid rules and favors flexibility in order to achieve a just result:

> Because the hallmarks of equity have long been flexibility and particularity, the imposition of a rigid rule, pro or con, concerning [an issue relating to] front pay (an equitable remedy) would be incongruent with the historic and essential conception of equity. In contrast, a rule that confers latitude upon the district court to handle [an issue relating to] front pay differently in different cases is fully consistent with this storied heritage.

Id. at 1110.

"Front pay is 'money awarded for lost compensation during the period between judgment and reinstatement or in lieu of reinstatement.'" Munoz v. Sociedad Espanola De Auxilio Mutuo Y Beneficiencia De Puerto Rico, 671 F.3d 49, 62 (1st Cir. 2012), quoting Pollard v. E.I du Pont de Nemours & Co., 532 U.S. 843, 846 (2001). All front-pay awards are, by nature, somewhat speculative, as the future is inherently uncertain. See Trainor, 699 F.3d at 31 (observing that "crafting a front pay award necessarily entails some degree of [permissible]

speculation") (addition by Munoz opinion). For this reason, several factors have been identified in calculating front-pay awards:

> (1) the plaintiff's age, (2) the length of time the plaintiff was employed by the defendant employer, (3) the likelihood the employment would have continued absent the discrimination, (4) the length of time it will take the plaintiff, using reasonable effort, to secure comparable employment, (5) the plaintiff's work and life expectancy, (6) the plaintiff's status as an at-will-employee, (7) the length of time other employees typically held the position lost, (8) the plaintiff's ability to work, (9) the plaintiff's ability to work for the defendant-employer, (10) the employee's efforts to mitigate damages, and (11) the amount of any liquidated or punitive damage award made to the plaintiff.

Ogden v. Wax Works, Inc., 29 F. Supp. 2d 1003, 1015 (N.D. Iowa 1998) (internal citations omitted). Given the amount of factors taken into consideration with a front-pay award, "'[A] party seeking remittitur bears a heavy burden of showing that an award is grossly excessive, inordinate, shocking to the conscience of the court, or so high that it would be a denial of justice to permit it to stand.'" Monteagudo v. Asociacion de Empleados del Estado Libre Asociado de Puerto Rico, 554 F.3d 164, 174 (1st Cir. 2009), quoting Johnson v. Spencer Press of Me., Inc., 364 F.3d 368, 375 (1st Cir.2004).

First, with regard to the basic calculation of front pay, there was extensive testimony regarding Franchina's earnings and her plans to work in the future, but for the Defendant's illegal acts. Franchina testified that working as a rescue Lieutenant was the only career she ever had, that her future benefits were dependent upon her longevity of service, and that she intended to work until the age of 62. Chief Curtis Varone testified that Franchina was quickly identified as someone with excellent professional skills, leadership qualities, and potential to be promoted. Chief Farrel echoed those sentiments and it is undisputed that she was quickly promoted to the rank of lieutenant and that she was performing those duties to the satisfaction

of her employer. Likewise, the jury learned that the employees of the Providence Fire Department, like many departments, have an overwhelming tendency to work for similar periods of time. Chiefs Varone, Farrel, Horton, and Mello all worked for the Department for more than twenty-five years, and in some instances for more than thirty years, just as Franchina intended to do. Rescue lieutenants Wishart, Stuckus and former-Rescue Captain Danielle Masse all testified that, like Franchina, they believed working as a rescue lieutenant was an excellent job and that they intended to stay until the age of retirement. Franchina testified that she can never work as a rescue lieutenant again because of her disability, a fact that was corroborated by both of her treating doctors and is uncontested by the Defendant who, itself, came to the same conclusion when they granted her disability retirement benefits. Thus, there was more than enough evidence not only for the jury to determine that Franchina, who was 44 years old at the time of trial, and testified that she planned to work until she was forced to retire at the age of 62, had just under 18 years of projected employment., but also that she had no ability to further mitigate those damages.

Second, Franchina testified that her base pay, prior to the time that she was forced to stop working due to the Defendant's illegal treatment and her resulting injuries, was seventy-five thousand dollars ($75,000.00) per year.[3] She also testified, and there was supporting testimony from former Chiefs of the Department Scott Mello and George Farrel, that lieutenants like Franchina always earned overtime because there were not enough lieutenants,

[3] Franchina also testified that by the time that the Defendant actually stopped paying her she was only earning $65,000 per year because she was on "injured-on-duty" status. This is irrelevant for the calculation of front pay, because front pay must be based on what Franchina would have earned had she not been the victim of sexual harassment and retaliation.

and that Franchina's annual overtime was sixty thousand dollars ($60,000.00). Thus, with base pay and overtime, at the time Franchina stopped working, she was earning one hundred thirty-five thousand dollars ($135,000.00) per year.

Franchina testified regarding her ability to mitigate her damages. Specifically, she testified that she was able to obtain disability retirement benefits from the Defendant, and as a result, she currently earns, and will continue to earn, twenty-five thousand dollars ($25,000.00) a year in disability retirement benefits. Thus, subtracting Franchina's mitigating income nets a total annual loss of income of one-hundred ten thousand dollars per year.

Given the length of time that Franchina worked for the Department as a rescue lieutenant, there was more than enough evidence for the jury to conclude that she would have continued to work in accordance with her plan to do so. Looking to the date of the judgment, April 18, 2016, Franchina would have worked another 17 years, 8 months, and 20 days, until January 7, 2034, her 62nd birthday. Although it is likely she would have received salary increases over the 17 years in accordance with future Collective Bargaining Agreements, at least to keep up with the cost of living, assuming most conservatively that she would have earned the same amount into the future as today—$110,000 net after accounting for the disability income -- her future damages, without adjustment to present day value, total $1,949,360.[4]

Plaintiff should not be denied the amount the jury awarded to her for front-pay because she did not present the testimony of an economist to reduce her losses to present day value

[4] $110,000 per year for 17 years is $1,870,000. Eight months, at $110,000 per year, is $73,333. Twenty days is $6,027. The total is $1,949,360.

where, as here, under any reasonable, or even highly favorable to the defendant, calculation of the reduction, the award would never be decreased to that which the jury saw fit to do on its own, specifically, to $545,000. Indeed it is likely the jury took into account the fact that the money was to be awarded now for later damages by discounting it using their own common knowledge. See St. Louis Southwestern Railway Company v. Dickerson, 470 U.S. 409, 412, 105 S. Ct. 1347, 1348-1349, 84 L. Ed. 2d 303 (1985): "It is self-evident that a given sum of money in hand is worth more than the like sum of money payable in the future," citing Chesapeake & Ohio R. Co. v. Kelly, 241 U.S. 485, 489(1916) (emphasis added).

The Supreme Court has stated that there are many methods by which present day value can be found, but that three factors go into the analysis: inflation, potential wage increases, and the rate of return on investments, often referred to as the discount rate. See St. Louis Southwestern Railway Company v. Dickerson, 470 U.S. 409, 412, 105 S. Ct. 1347, 1349, 84 L. Ed. 2d 303 (1985):

> Our decision in *Jones & Laughlin Steel Corp. v. Pfeifer,* 462 U.S. 523, 536-537, 103 S. Ct. 2541, 2550-2551, 76 L.Ed.2d 768 (1983), makes clear that no single method for determining present value is mandated by federal law and that the method of calculating present value should take into account inflation and other sources of wage increases as well as the rate of interest….

If we assume that Franchina would not have received any salary increases, but would have continued to earn just $110,000 net, and we assume that the cost of living does not increase over the next 17 years, so inflation is 0 (any inflation would decrease the future value of the money and thus increase the present day value), the only remaining factor is the rate of interest.

There is general agreement that the interest rate should be based on a rate of interest that would be earned on the "best and safest investments." Jones & Laughlin Steel Corp. v. Pfeifer, 462 U.S. 523, 537 (1983). In Federal Court, the average yield of U.S. Treasury bills is the most common source for applicable interest rates. See 28 U.S.C. § 1961 (interest on judgments in civil cases calculated using one-year constant maturity Treasury yield). The average historical rate of return on U.S. Treasury bills over the course of the last 10 years, as of June 14, 2016, was 2.15%.[5] Adjusting to present value, using the 2.15% discount rate and an on-line calculator, the value of Franchina's future wages is $1,586,920.[6] Looking to the opposite end of the spectrum, and using the relatively risky investments in the stock market, the historical average rate of return from the S&P 500, widely regarded as the most accurate index for stock market performance[7], adjusted for inflation, is 7%.[8] Using the 7% discount rate results in Franchina's future lost wages, adjusted to present day value, totaling $1,096,098.00.[9]

Under any set of calculations,[10] the amount awarded by the jury for front-pay cannot possibly be "grossly excessive, inordinate, shocking to the conscience of the court, or so high

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[5] See https://www.treasury.gov/resource-center/data-chart-center/interest-rates/Pages/TextView.aspx?data=longtermrate last accessed on June 15, 2016.

[6] A website that calculates future lost earnings reduced to present day value, including adjustment for mortality, is http://www.brownecon.com/bea_calculators/pvcalc/default.asp. The detailed analysis, using the 2.15% discount rate is attached as Exhibit 1.

[7] SELF-REGULATORY ORGANIZATIONS; THE NASDAQ STOCK MARKET LLC; NOTICE OF FILING AND IMMEDIATE EFFECTIVENESS OF A PROPOSAL TO AMEND NASDAQ RULE 11890 GOVERNING CLEARLY ERRONEOUS EXECUTIONS, Release No. 60776 (S.E.C. Release No. Oct. 2, 2009)

[8] See http://www.investopedia.com/ask/answers/042415/what-average-annual-return-sp-500.asp last accessed on June 15, 2016.

[9] The detailed analysis, using the very high interest rate of 7% as the discount rate, and adjusting for risk of mortality is attached as Exhibit 2.

[10] One can also calculate present value using a mathematical formula, which is well established and simple to apply. The formula is **PV = FV / (1+r)^n**. See Gary A. Porter, Financial Accounting

that it would be a denial of justice to permit it to stand," Monteagudo, 554 F.3d at 174, because $545,000.00 is substantially less than even the most defense-friendly calculation provides. The front-pay award was half what Franchina had shown she had lost, even adjusted for present day value, and was well under the amount requested by Plaintiff in closing argument. The Court instructed the jury that they "may not speculate in awarding damages." There was no error in the Court's instructions, the jury is presumed to have followed them, and the jury's award of damages for future lost earnings should not be stricken.

CONCLUSION

Defendant has not supplied sufficient justification for overturning the jury's verdict or amending any part thereof. The Defendant's renewed Motion for Judgment as a Matter of Law, Motion for New Trial, and Motion to Alter or Amend the Judgment should all be denied.

for Decision Makers, (6th Ed. 2010) pp. 442-443; Raiffa, Howard, "Methods of Calculating Net Present Value and Internal Rate of Return, Programmed Exercises." Harvard Business School Supplement 171-261, December 1970. (Revised May 1991.) **PV** = Present Value, **FV** = Future Value, **r** = the interest rate, and **n** = the number of projected years of employment. Thus, for this case, **FV** = $1,949,360 and **n**=17.72. Assuming **r** is 2.15% (T Bill) the projected present value (**PV**) of her wages is 1,337,174.59. This formula does not adjust for mortality.

Respectfully submitted,
The Plaintiff,
By her Attorneys,

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CERTIFICATE OF SERVICE

I, John T. Martin, hereby certify that on June 16, 2016, I served a copy of the foregoing document, via ECF, upon all counsel of record.

/s/ John T. Martin