DISTRICT OF COLUMBIA COMMISSION ON HUMAN RIGHTS

COMPLAINANT	**§**	
Complainant,	**§**	**DOCKET NO. 15-135 (CN)**
	§	**EEOC NO. 10C-2015-00110**
v.	**§**	**David C. Simmons, CALJ**
CARECO MENTAL HEALTH	**§**	
SERVICES, INC.	**§**	
Respondent.	**§**	

FINAL ORDER ON COMPLAINANT'S MOTION FOR DEFAULT JUDGMENT

For the reasons set forth in the Final Decision and Order on Complainant's Motion for Default Judgment, the Commission **ORDERS** that:

1. [Complainant] be awarded $30,734.79 in compensatory damages for embarrassment, humiliation, indignity, and pain and suffering experienced as a result of Respondent's hostile work environment on the basis of personal appearance and sex;
2. [Complainant] be reappointed to his position, if Careco is still in business at the time this Order is issued;
3. [Complainant] receive all regular promotional credit that he would have received had he not been discharged in January 2014, if Careco is still in business at the time this Order is issued;
4. The 2014 termination shall be expunged from [Complainant]'s record and all reference to it removed;
5. Counsel for [Complainant] shall submit a petition to the Commission outlining counsel's entitlement to attorney's fees on those matters upon which [Complainant] substantially prevailed no later than thirty (30) days after this Order is entered. *See* D.C. MUN. REGS. tit. 4, § 213.

So Ordered this 7th day of May, 2018.

/s/ *Wynter Allen* _____
Commissioner Wynter Allen

/s/ *Alberto Figueroa-Garcia*_____
Commissioner Alberto Figueroa-Garcia

/s/ *Michael Ward*_____
Commissioner Michael Ward

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FINAL DECISION AND ORDER ON COMPLAINANT'S MOTION FOR DEFAULT JUDGMENT

The undersigned has reviewed the entire record, as well as the pleadings and exhibits, with respect to the instant Motion. The issue has been fully briefed and no further hearing is deemed necessary. For the reasons stated more fully below, the undersigned recommends that the Commission **GRANT IN PART AND DENY IN PART** the Complainant's Motion for Default Judgment.

OVERVIEW

This case arises from [Complainant's] charge, filed with the D.C. Office of Human Rights ("OHR" or "Office"), alleging that Careco Mental Health Services ("Careco" or "Respondent") discriminated against him in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e through 2000e-17, and the D.C. Human Rights Act ("DCHRA"), D.C. CODE §§ 2–1401.01 through 2–1411.06. Compl.'s Charge (Dec. 17, 2014). Specifically, [Complainant] alleged that Careco subjected him to a hostile work environment on the basis of: (1) national origin, personal appearance, and religion; and (2) sex. *Id.* Complainant also alleged that Respondent (3) failed to promote him on the basis of religion and personal appearance and (4) retailed against him for reporting discriminatory conduct. *Id.* OHR conducted an independent investigation into [Complainant]'s allegations of discrimination and issued its findings in a Letter of Determination.

Letter of Determination (July 26, 2016) [hereinafter "LOD"]. The LOD found probable cause to believe that Respondent subjected Complainant to a hostile work environment on the basis of: (1) national origin, personal appearance and religion; and (2) sex. LOD at 25. The Office certified this matter to the Commission for a public hearing.[1]

Although Respondent replied to the Office's initial inquires in the investigation stage of this manner, *see* LOD at 4, it has failed to appear or defend at any other stage of this case. The undersigned has been unable to reach Respondent at its last known address. *See* Letter from Chief Administrative Law Judge David C. Simmons to David Miller, Owner of Careco (Feb. 14, 2017). In that letter, Respondent was directed to contact the undersigned by February 22, 2017 so as to arrange a Scheduling Conference. *Id.* Further, Respondent was expressly informed that if the undersigned had not heard from Respondent by that date, a motion from Complainant for entry of a default judgment would be entertained. *Id.* On February 23, 2017, Complainant's counsel had a telephone conference with the undersigned regarding the February 14, 2017 correspondence; during that conversation, it was determined that Respondent had failed to respond by February 22, 2017. Compl.'s Motion for Order of Default Judgment against Resp. (Feb 28, 2017) [hereinafter "Compl.'s Motion for Default Judgment"]. Accordingly, on February 28, 2017, Complainant filed a Motion for Default Judgment based upon Respondent's failure to appear and defend in this matter. *Id.*

On March 30, 2017, a hearing was held upon Complainant's Motion for a Default Judgment. Respondent failed to appear at this hearing. *See* Order for Post-Hearing Brief at 1 (April 6, 2017); Compl.'s Post-Trial Brief at 7. On April 6, 2017, the undersigned ordered Complainant to submit a post-hearing brief identifying the evidentiary basis to support his claim

[1] Proceedings before the Commission are *de novo,* and therefore we do not rely on findings of fact or conclusions of law stated in the LOD.

for liability and damages under the DCHRA. Order for Post-Hearing Brief (April 6, 2017). Specifically, Complainant was instructed to identify by citation to the time stamp of the audio recording of the hearing the testimony that established that [Complainant] was subjected to a hostile work environment based upon: (1) his national origin, personal appearance, and/or religion; and (2) his sex. *Id.* at 1. In presenting this evidence, Complainant was to set forth how this evidence established a *prima facie* case for each claim and to demonstrate that Respondent's articulation of a legitimate, non-discriminatory reason for the various occurrences was a pretext for intentional discrimination. *Id.* Complainant filed his post-hearing brief on May 1, 2017. Compl.'s Memorandum of Law in Support of Compl.'s Post-Trial Brief Related to the March 30, 2017 Hearing (May 1, 2017) [hereinafter "Compl.'s Post-Trial Brief"]. Thus, the matter is ripe for a determination as to whether Complainant is entitled to a default judgment.

STATEMENT OF THE ISSUES PRESENTED

1. Whether, on the basis of the undisputed material facts established by a preponderance of the evidence, [Complainant] is entitled to a default judgment on the claim that Careco subjected him to a hostile work environment on the basis of national origin, personal appearance, and/or religion; and
2. Whether, on the basis of the undisputed material facts established by a preponderance of the evidence, [Complainant] is entitled to a default judgment on the claim that Careco subjected him to a hostile work environment on the basis of sex.

FINDINGS OF FACT

1. [Director 1] ("Director 1") was the Clinical Director at Careco. Transcript of Hearing at 17:2-4 [hereinafter "Tr"].
2. [Director 2] ("Director 2") was Respondent's Director of Human Resources. Tr. at 17:2-4.

3. In March 2012, [Complainant] applied for a position as Community Support Specialist [hereinafter referred to as "Case Manager"] at Careco. Tr. at 16:18-21.
4. In March 2012, [Complainant] interviewed with [Director 1] and [Director 2]. Tr. at 16:22, 17:1-4.
5. Due to his lack of experience in the field, [Complainant] was offered the position of Residential Aide, on a temporary basis. Tr. at 18:4-12.
6. During [Complainant]'s interview, Director 1said that there was a "disconnect from [Complainant's] neck and suit." Tr. at 18:12-15.
7. Director 1also said that [Complainant]'s appearance (beard, hair) was not appropriate for the image that Careco inspired to have in the office. Tr. at 18:19-22.
8. [Complainant] was told that, to be promoted to the position of Case Manager, he would need to be more presentable; that is to say, to cut his beard and dreadlocks. Tr. at 19:3-7.
9. [Complainant] said that cutting his hair and beard would be against his religion. Tr. at 19:15-21.
10. After several months of training, [Complainant] was promoted to Case Manager. Tr. at 21:22, 22:1-4, 9-12.
11. In August 2012, [Complainant] was promoted to Case Manager. Tr. at 22:9-12.
12. As a Case Manager, [Complainant] received a salary of $11/hour. Tr. at 22:22, 23:1-3.
13. On or about February 25, 2013, [Complainant]'s salary rose to $15/hour. Tr: at 68:6-9.
14. [Complainant]'s salary was not raised beyond $15/hour. Tr. at 66:8-12.
15. In September 2012, [Complainant] wore a dashiki to work. Tr. at 23:13-15, 24:6-8.
16. [Complainant] described a dashiki as "African cultural clothing" that is worn to celebrate the Sabbath. Tr. at 27:3-8.

17. After seeing [Complainant] in his dashiki, Director 1called him to her office, where she said that "this is the problem with our people. We shouldn't allow our cultural background, or our heritage and our spiritual background to hold us back in the workplace. This is what I'm talking about here. This is why we cannot ever get anywhere." Tr. at 26:1-7.
18. Mr. David Miller ("Mr. Miller") owned Respondent. Tr. at 26:10-11.
19. During the meeting in her office, Director 1said that because Mr. Miller is Jewish, he would be offended by [Complainant]'s garment. Tr. at 26:14-19.
20. Director 1also said to "take that crap off" referring to [Complainant]'s garment and make sure that "you don't come back with it." Tr. at 27:12-16.
21. [Supervisor] ("Supervisor") was [Complainant]'s immediate supervisor. Tr. at 25:17-21.
22. Supervisor apologized for Director 1's comments following the dashiki incident, saying "that was so embarrassing" and "shouldn't have happened to you." Tr. at 28:5-8.
23. On a later date during Respondent's Christmas party, when Director 1saw [Complainant] wearing traditional African attire, she said "Who do you think you are? Why are you always pushing—?" Tr. at 29:15-19.
24. During the hearing, this judicial officer observed [Complainant] become emotional when testifying about Director1's comments at Respondent's Christmas party. *See generally* Tr. at 29:11-22, 30:1-18.
25. Director 1repeated that Mr. Miller "might be offended" by [Complainant]'s traditional African attire. Tr. at 30:3-9.
26. After Director 1's comments, [Complainant] left the Christmas party because he felt uncomfortable, Mr. Miller was going to be arriving soon, and because he was concerned that he may lose his job if Mr. Miller saw him in a dashiki. Tr. at 30:9-14.

27. [Complainant] reported Director 1's comments at Christmas Party to HR Director Washington. Tr. at 30:19-22, 31:1-9.
28. HR Director Washington told [Complainant] to ignore Director 1's comments. Tr. at 31:9-14.
29. Throughout 2013, when Director 1was introducing [Complainant] to new hires, she would make comments to the effect that there was a disconnect between Complainant's head and body. Tr. at 34:1-6.
30. While making these comments, Director 1would stroke his beard, saying "we will get rid of all of this." Tr. at 34:6-17.
31. Director 1touched his hair and beard in this manner almost every week. Tr. at 86:22, 87:1-9.
32. [Complainant] described Director 1 as a "very statured woman" and "intimidating," who is about 6 feet, 1 inch tall and weighed approximately 200 pounds. Tr. at 87:16-20.
33. [Witness 1]("Witness 1") was a co-worker of Complainant whom Complainant helped train. Tr. at 35:5-11.
34. [Nurse] worked for Respondent, doing medical intake, among other things. Tr. at 36:3-8.
35. In a meeting with Nurse, Witness 1, Director 1, and [Complainant], Director 1said to Complainant, "if we were in bed together, you wouldn't even be able to lift me up . . . . You have such a petite body." Tr. at 37:1-9.
36. At another meeting, attended by Director 1, Director 2, Witness 1, Complainant, and Supervisor, among others, Director 1said: "I'll take him [[Complainant]] Mondays or Wednesdays, and you [Witness 1] can have him on Fridays." Tr. at 38:9-22, 39:1.
37. Witness 1 responded to Director 1's comment, saying "You can have him every day." "I'm married." Tr. at 39:1-3.

38. In June or July 2013, Nurse and Director 1made inappropriate jokes during meetings, saying things such as “I like ‘em black.” Tr. at 39:17-22, 40:1-10.
39. At a team building event on the Chesapeake Bay, in June or July 2013, [Complainant] said that he was hot, and Director 1 responded, “Take your clothes off.” Tr. at 41:1-11.
40. [Complainant] interpreted these comments as sexual in nature. Tr. at 88:10-12.
41. [Complainant] found Director 1's behavior abusive and unwelcome and believed that it impacted his ability to work in that environment. Tr. at 88:3-9.
42. [Complainant] said that Careco did not have a sexual harassment handbook or on-line policy. Tr. at 89:5-13.
43. Careco did provide a training session on sexual harassment, in which employees were instructed to report sexual harassment to Human Resources. Tr. at 90:13-18.
44. However, when [Complainant] reported Director 1's inappropriate behavior to HR Director Washington, she said to ignore Director 1's comments and conduct. Tr. at 91:2-6.
45. Director 2 did not say whether Human Resources would investigate the matter. Tr. at 91:7-12.
46. On July 30, 2013, [Complainant] handed Supervisor some paperwork, which Supervisor grabbed and threw on the floor. Tr. at 47:3-11.
47. Immediately thereafter, Supervisor said “You’re f****** my hustle up.” Tr. at 47:13-17.
48. During this exchange, Supervisor referred to [Complainant] as an “f****** African snitch.” Tr. at 48:1-4.
49. Thereafter, Supervisor referred to [Complainant] as a “B-I-T-C-H African” and told [Complainant] to put his prayer beads away. Tr. at 51:20-22, 52:1-12.

50. [Complainant] admitted under oath that Supervisor made these comments because of [Complainant]'s refusal to participate in the latter's alleged illegal activities. Tr. at 52:17-22, 53:1-3.
51. On January 5, 2014, [Complainant] met with Director 1to request leave to attend his grandmother's funeral. Tr. at 55:3-12.
52. In response, Director 1 said that she would "not . . . let you get away with things just because people think I think you're cute." Tr. at 55:21-22, 56:1-5.
53. [Complainant] began to cry, to which Director 1 responded "get your sh** and get the f*** out of my building;" she pushed [Complainant] and attempted to grab the company laptop he was holding. Tr. at 59:10-22, 60:1-4.
54. [Complainant] was then escorted out of building. Tr. at 61:1-8.
55. After January 2014, [Complainant] applied to three positions: two not-for-profit organizations and one social work position. Tr. at 65:9-18.
56. [Complainant] has not held a paid job since January 2014. Tr. at 64:21-22. [Complainant] has listed "no income" on his tax returns. *Id.* at 65:1-8.

DISCUSSION

Default Judgment Standard

Title III of the DCHRA permits the Commission to promulgate procedural regulations, D.C. CODE § 2-1403.01(c), which are set forth at D.C. MUN. REGS. tit. 4, §§ 400-499. Under these regulations, the undersigned is authorized to recommend entry of a default judgment when the respondent has been duly served notice of a status conference, the pre-hearing conference, or a

hearing and has failed to appear in person or through a representative. *See* D.C. MUN. REGS. tit 4, §§ 405.1(g), 427.1. As outlined above, *see supra* at 2-3, Respondent has repeatedly failed to appear or defend this matter after it has been put on notice. Accordingly, it is appropriate to entertain Complainant's Motion for Default Judgment.

D.C. Human Rights Act

The DCHRA makes it unlawful to discriminate against any individual with respect to compensation, terms, conditions, or privileges of employment, because of such individual's national origin, personal appearance, religion, or sex, among other protected traits. D.C. CODE § 2-1402.11(a)(1). Because the DCHRA is not a "general civility code for the American workplace," *see Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 80 (1998) (describing Title VII), not all workplace harassment constitutes a hostile work environment under the DCHRA. A close reading of D.C. Court of Appeals caselaw can be synthesized so as to suggest that the following four elements are essential to establishing a *prima facie* case of harassment under the DCHRA: conduct that is (1) severe or pervasive; (2) abusive and hostile; (3) unwelcome; and (4) because of the protected trait. *See Daka, Inc. v. Breiner*, 711 A.2d 86, 92 (D.C. 1998).

The first element of the *prima facie* case involves conduct that is "severe or pervasive." This element should be understood to be read in the disjunctive; that is to say, one incident that is particularly severe, or several incidents of less severe conduct over a period of time, can constitute actionable harassment. *See Akonji v. Unity Healthcare, Inc.*, 517 F. Supp. 2d 83, 98-99 (D.D.C. 2007). With respect to the second element, harassment is actionable only if the complainant can demonstrate that it is both objectively and subjectively abusive and hostile; that is to say, a reasonable person in the victim's position would find the conduct to be abusive and hostile and the victim found it to be such. *Daka*, 711 A.2d at 93. This element requires examination of "[t]he

totality of the circumstances," which may include "the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." *Akonji*, 517 F. Supp. 2d at 93 (citing *Harris*, 510 U.S. at 23). The third element of the *prima facie* case is that the conduct is subjectively "unwelcome." *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 68 (1986). The last element concerns whether the conduct occurred because of a protected trait. Comments or actions that "expressly focus" on a protected trait or traits satisfy this element. *Peters v. District of Columbia*, 873 F. Supp. 2d 158, 189 (D.D.C. 2012).

Careco, as an employer, is vicariously liable for harassment carried out by a supervisor. *Burlington Indus. v. Ellerth*, 524 U.S. 742, 760-61 (1998). A supervisor is one who has the authority to take a tangible employment action against a victimized employee. *See id.* at 761-62. "A tangible employment action constitutes a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits." *Id.* at 761. Although the U.S. Supreme Court carved out an affirmative defense for employers in *Ellerth*, it is not applicable when a supervisor has taken a tangible employment action against the victimized employee. *Id.* at 765.

Complainant's Claims

[Complainant] claims that he suffered actionable harassment: (A) on the basis of national origin, personal appearance, and religion due to the conduct of (1) Director 1and (2) Supervisor; and (B) on the basis of sex. For the reasons provided below, [Complainant] has established that Director 1subjected him to a hostile work environment on the basis of personal appearance and sex.

A. Harassment on the Basis of Personal Appearance, Religion, and National Origin.

[Complainant] alleges that Director 1 and Supervisor subjected him to a hostile work environment based on [Complainant]'s national origin (Sierra Leone), personal appearance (dreadlocks and beard), and religion (Islam and Rastafarian). For harassment to be actionable, the complainant must demonstrate that it is: (1) severe or pervasive; (2) abusive and hostile; (3) unwelcome; and (4) because of the protected trait. *Cf. Daka, Inc. v. Breiner*, 711 A.2d 86, 92 (D.C. 1998); *see supra* at 9.

1. Director 1.

[Complainant] claims that Director 1subjected him to a hostile work environment. For the reasons provided below, [Complainant] has sufficiently stated a claim for harassment on the basis of personal appearance only.

[Complainant] cites three discrete incidents in which the alleged harassment occurred:

(1) During [Complainant]'s interview, when Director 1 said that there was a "disconnect" between his neck and suit, that his appearance (beard, hair) was not appropriate for the presentation that Respondent inspired to have in the office, and that to be promoted to the position of Case Manager, he would need to cut his beard and dreadlocks. *See* Findings of Fact at ¶¶ 6-8 [hereinafter cited as "Facts"].

(2) On or about September 2012, when [Complainant] wore a dashiki to work, Director 1 said that "[t]his is the problem with our people"; "[w]e shouldn't allow our cultural background, our heritage, and our spiritual background to hold us back in the workplace; "[t]his is why we can't ever get anywhere"; that because Respondent's owner, Mr. David Miller, is Jewish, he would be offended by [Complainant]'s garment; and that [Complainant] should "take that crap off" and "don't come back with it." Facts at ¶¶ 15-20.

(3) During Respondent's Christmas party, when [Complainant] wore traditional African attire, Director 1 said: "[w]ho do you think you are?"; "[w]hy are you always pushing—?"; and that Mr. Miller "might be offended" by his clothing. Facts at ¶¶ 23, 25.

In addition to these discrete incidents, [Complainant] also alleges that throughout 2013, whenever Director 1 introduced [Complainant] to new employees, she would repeat that there was

a disconnect between his head and body. While making these comments, Director 1would stroke his beard, saying that "we will get rid of all of this."[2] Facts at ¶¶ 29-30.

Severe or Pervasive. Director 1's comments, taken as a whole, were pervasive. Beginning with [Complainant]'s first day on the job, Director 1made derogatory remarks concerning his personal appearance (beard and dreadlocks) on a weekly basis. Conduct that occurs almost weekly has been found to be "pervasive" in employment discrimination situations. *Cf. White v. New York City Dep't of Educ.*, 2014 U.S. Dist. LEXIS 45419, at *48 (S.D.N.Y. Mar. 28, 2014) (suggesting that "daily" or "weekly" conduct would generally be pervasive under Title VII).

Abusive and Hostile. Director 1's comments were abusive and hostile. [Complainant] testified that he found her conduct to be subjectively hostile when, in recounting these events, [Complainant] became emotional. Facts at ¶ 24. In determining whether conduct is objectively abusive and hostile, the frequency of the discriminatory conduct and whether it is physically threatening or humiliating are relevant inquires. *See Akonji v. Unity Healthcare, Inc.*, 517 F. Supp. 2d 83, 93 (D.D.C. 2007) (citing *Harris*, 510 U.S. at 23). Director 1's conduct was frequent: [Complainant] testified that throughout 2013, whenever Director 1 introduced him to new employees, she would say that there was a disconnect between his head and body. *See* Facts at ¶ 29. Further, her conduct was humiliating, as shown by the fact that: (1) Supervisor apologized for Director1's comments following the dashiki incident; (2) [Complainant] left Respondent's Christmas party in part because he felt uncomfortable; and (3) Director 1 made her "disconnect" remark in front of [Complainant]'s co-workers. Facts at ¶¶ 22, 23-26, 29.

[2] Although Director1's repeated touching of [Complainant]'s beard will be later examined as possible sexual harassment, her comments on his beard here are analyzed as harassment on the basis of personal appearance.

Unwelcome. [Complainant] has testified credibly that he found Director1's conduct to be unwelcome. As but one example, [Complainant] stated that he left Respondent's Christmas Party following Director1's comments on his attire. Facts at ¶ 26.[3]

Because of Complainant's Protected Traits. Director 1's comments were made because of his personal appearance. Where, as here, the comments or actions at issue "expressly focused" on a protected trait or traits, the fourth element of the *prima facie* case is satisfied. *Peters v. District of Columbia*, 873 F. Supp. 2d 158, 189 (D.D.C. 2012). Director 1's "disconnect" remark very clearly "expressly focused" on [Complainant]'s personal appearance. Her other comments were equally directed at his personal appearance.

Complainant appears to argue that because his religion and national origin are somewhat implicated with his personal appearance, Director 1's comments and conduct also constitute harassment on these bases. *See* Compl.'s Post-Trial Brief at 19-21. To the extent [Complainant] relies on this reasoning, he is mistaken. Director 1took issue with Complainant's dreadlocks, beard, and clothing. She repeatedly expressed concern about the perception of [Complainant]'s appearance to Respondent's clientele and owner. Although Director 1 was aware that [Complainant]'s beard, dreadlocks, and clothing may have had some connection to his religion and national origin, her comments were only tangentially related to these protected traits. Accordingly, since [Complainant] has stated a meritorious *prima facie* case on the basis of personal appearance, there is no need to try to bootstrap the weaker claims of religious and national origin discrimination into this claim.[4]

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[3] It should also be noted that [Complainant] became emotional during the hearing when testifying about this incident. *See* Facts at ¶ 24.

[4] Careco is vicariously liable for Director1's harassment of [Complainant] on the basis of personal appearance. It is undisputed that Director 1was [Complainant]'s supervisor. [Complainant]'s employment with Careco was terminated when, on January 5, 2014, Director 1said "get your sh** and get the f*** out of my building." Facts at ¶ 53. Termination constitutes a tangible employment action.

2. Supervisor.

[Complainant] also claims that Supervisor subjected him to a hostile work environment on the basis of national origin, personal appearance, or religion. This claim must fail because [Complainant] cannot satisfy the fourth prong of the *prima facie* case. Specifically, [Complainant] cites two incidents as evidence of Supervisor's alleged harassment: (1) when, on July 30, 2013, Supervisor said to [Complainant] "You're f****** my hustle up" and called him a "f****** African snitch;" and (2) when Supervisor referred to [Complainant] as a "B-I-T-C-H African" and to put his prayer beads away. Facts at ¶¶ 47-49. Although Supervisor's comments are clearly distasteful, [Complainant] admitted under oath that Supervisor made these comments because of [Complainant]'s refusal to participate in the latter's alleged illegal activities. Facts at ¶ 50. Accordingly, [Complainant] cannot demonstrate that the harassment occurred because of a protected trait and thus is not actionable under the DCHRA.

B. Sexual Harassment.

[Complainant] has sufficiently established a meritorious claim for hostile work environment on the basis of sex under the DCHRA. As noted above, in order for harassment to be actionable, the complainant must demonstrate that it is: (1) severe or pervasive; (2) abusive and hostile; (3) unwelcome; and (4) because of the protected trait. *Cf. Daka, Inc. v. Breiner*, 711 A.2d 86, 92 (D.C. 1998); *see supra* at 9.

[Complainant] recounts five discrete incidents in which Director 1made sexually explicit comments directed at him:

(1) When Director 1said to [Complainant], "if we were in bed together, you wouldn't even be able to lift me up lift me up . . . . You have such a petite body." Facts at ¶ 35.

Accordingly, no affirmative defense is available to Respondent, and Careco is vicariously liable for the actions of Director McCargo. *See* Discussion *supra* at 10-11.

(2) When Director 1said to Witness 1: "I'll take him [[Complainant]] on Mondays or Wednesdays, and you can have him on Fridays." *Id.* at ¶ 36.

(3) When Nurse and Director 1made comments such as "I like 'em black [referring to the type of men to which they are attracted]." *Id.* at ¶ 38.

(4) When Director 1said to "take your clothes off" in response to [Complainant]'s comment that he was hot. *Id.* at ¶ 39.

(5) When [Complainant] met with Director 1 to request leave, and she responded that she would "not . . . let you get away with things just because people think I think you're cute" and told him, after he started crying, to "get your sh** and get the f*** out of my building." *Id.* at ¶¶ 52-53.

[Complainant] also said that "almost every week" Director 1 would stroke his beard, saying that "we will get rid of all of this [referring to his facial hair]."[5] Facts at ¶ 30.

Severe or Pervasive. Director 1's conduct, although not severe, was pervasive. The five isolated incidents mentioned above about which [Complainant] testified, standing alone, may not be sufficiently severe or pervasive to themselves be actionable because they were infrequent. *Cf. Akonji*, 527 F. Supp. 2d at 97-98 (holding that five acts by a supervisor, including one buttocks touch, two kiss attempts, one thigh touch, and several comments on complainant's appearance, were not serve or pervasive). However, when coupled with [Complainant]'s allegation that "almost every week" Director 1would "stroke his beard," Director 1's conduct was sufficient to give rise to a pervasive sexual harassment claim. *Cf. White v. New York City Dep't of Educ.*, 2014 U.S. Dist. LEXIS 45419, at *48 (S.D.N.Y. Mar. 28, 2014) (suggesting that "daily" or "weekly" conduct would generally be pervasive under Title VII).

Abusive and Hostile. [Complainant] demonstrated that Director 1's comments and conduct were both subjectively and objectively abusive and hostile. With respect to subjective abuse and hostility, [Complainant] testified that he found Director 1's behavior abusive and sexual

[5] Director1's repeated touching of an intimate part of his person, [Complainant]'s beard, is here examined as possible sexual harassment.

in nature. Facts at ¶¶ 40-41. He also believed that this conduct impacted his ability to work in that environment. *Id.* In determining objective abuse and hostility, the frequency of the discriminatory conduct and whether it is physically threatening or humiliating are relevant inquires. *See Akonji v. Unity Healthcare, Inc.*, 517 F. Supp. 2d 83, 93 (D.D.C. 2007 (citing *Harris*, 510 U.S. at 23). Director 1's comments and conduct occurred "almost weekly." Moreover, Director 1 was much larger than [Complainant], making her conduct at least humiliating, if not physically threatening. Facts at ¶¶ 32, 35.

Unwelcome. [Complainant] expressly testified that he found Director 1's behavior unwelcome. Facts at ¶ 41. Further, he alleges that he found Director 1 to be "intimidating," thus showing that her conduct was not welcome. *Id.* at ¶ 32.

Because of the Complainant's Sex. [Complainant] has also established that the harassment occurred because of a protected trait. Because the alleged harassment occurred between [Complainant], a man, and Director 1, a woman, and involved frequent touching with allusions to sexual behavior, the court can reasonably infer that the harassment occurred because of [Complainant]'s sex, a protected trait. *See Akonji v. Unity Healthcare, Inc.*, 517 F. Supp. 2d 83, 97 (D.D.C. 2007) (citing *Davis v. Coastal Internat'l Security, Inc*., 275 F.3d 1119, 1123 (D.C. Cir. 2002)). Accordingly, [Complainant] has stated a *prima facie* case for sexual harassment by Director 1.[6]

C. Articulation of a Legitimate, Nondiscriminatory Reason and Proof of Pretext

In the litigation of a contested case under the DCHRA, after the complainant has presented a *prima facie* case of discrimination, the respondent comes forward to articulate some legitimate, nondiscriminatory reason for the alleged illicit conduct. *Atlantic Richfield Co. v. D.C. Comm'n*

[6] For the same reasons stated in footnote 3, *supra*, Careco is vicariously liable for Director1's harassment of [Complainant] on the basis of sex.

on Human Rights, 515 A.2d 1095, 1099-1100 (D.C. 1986) (citing *Texas Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 254 (1981)). In the instant case, since Careco did not appear at the hearing to defend itself, there was no such evidence introduced. Order for Post-Hearing Brief at 1 (April 6, 2017); Compl.'s Post-Trial Brief at 7.

Further, in the litigation of a contested case, after the respondent has articulated a legitimate, nondiscriminatory reason for its action, the burden of persuasion is upon the complainant to establish that the respondent's proffered legitimate, nondiscriminatory reason is a pretext for intentional discrimination either because a discriminatory reason more likely motivated the employer, or the employer's explanation is unworthy of credence. *Burdine*, 450 U.S. at 256. However, since Careco did not offer a legitimate, nondiscriminatory reason for its actions, there is no need for [Complainant] to provide that the reason is a pretext for intentional discrimination. Accordingly, the undersigned concludes that Careco has defaulted by failing to appear and defend in this matter and that [Complainant] has established that Careco intentionally discriminated against him. *See* D.C. MUN. REGS., tit. 4, §§ 427.1 through 427.2.

D. Damages.

A party's default in an action is a concession of liability, but it is not a concession of damages. *Cappetta v. Lippman*, 913 F. Supp. 302, 304 (S.D.N.Y. 1996). Damages must be established by the complainant in a post-default inquest. *Id.*; *see also* D.C. MUN. REGS. tit. 4, §§ 214.1 through 214.4. Complainant was put on notice of this burden in the Order for a Post-Hearing Brief. *See* Order for a Post-Hearing Brief at 6 ("Complainant is to identify, by citation to the time stamp of the audio recording of the hearing, the testimony that establishes the amount of damages to which [Complainant] is entitled, or provide the evidentiary basis for a claim of a specific amount of damages.").

The DCHRA provides that where an employer unlawfully discriminated against an employee in violation of the DCHRA, the employee is entitled to "[t]he payment of compensatory damages . . . ." D.C. CODE § 2-1403.13(a)(1)(D). Compensatory damages may include back pay, D.C. MUN. REGS. tit. 4, § 201.1, and damages for embarrassment, humiliation, indignity, and pain and suffering, *see Doe v. D.C. Comm'n on Human Rights*, 624 A.2d 440, 447 (D.C. 1993); D.C. MUN REGS. tit. 4, § 211.1.

1. Back Pay.

Complainant argues that he is entitled to a back pay award of $75,213.00, dating from the date of his discharge to the date of judgment. Compl.'s Post-Trial Brief at 34-36. In calculating this figure, [Complainant] extrapolates from his yearly salary from 2013 ($30,734.79) and includes "an additional amount for the difference in what Complainant was paid [$15/hour] and what he should have been paid [$16/hour]" ($3,500). *Id.* at 36.

Complainant is mistaken in his contention. He is not entitled to back pay because (1) he failed to submit the appropriate documentary evidence to substantiate his back pay award; (2) he failed to mitigate his damages; and (3) he failed to dispel the uncertainty surrounding whether Respondent is still in business, thereby resulting in a potential for overcompensation.

Lack of Evidence. Where, as here, the complainant is entitled to a default judgment, he must produce evidence relevant to his damage award. *Cappetta*, 913 F. Supp. at 304. [Complainant] alleged during the hearing that, while he was employed as a Case Manager at Careco, he received a lesser salary than that received by other case managers at Respondent. Tr. at 23:4-12. However, the only evidence Complainant submitted for this allegation was a W-2 form for 2012-2013. Compl.'s Post-Trial Brief at Ex. 2. Although this exhibit is evidence of

Complainant's salary for the year prior to his termination, it is silent on the salary of his alleged comparators. Accordingly, this evidence is insufficient to justify a back pay award.

Failure to Mitigate. A discrimination victim who fails to mitigate his damages "may forfeit their entire entitlement to an award of front pay." *Barbour v. Medlantic Mgmt. Corp.*, 952 F. Supp. 857, 863 (D.D.C. 1997); *see also Wis. Ave. Nursing Home v. D.C. Comm'n on Human Rights*, 527 A.2d 282, 292 (D.C. 1987) (citing *Sangster v. United Air Lines, Inc.*, 633 F.2d 864, 868 (9th Cir. 1980)). The U.S. Supreme Court has held that discrimination victims, like [Complainant], must use "reasonable diligence" to obtain "substantially equivalent employment." *Ford Motor Co. v. Equal Employment Opportunity Comm'n*, 458 U.S. 219, 231-32 (1982). [Complainant] was terminated in January 2014. At the time of the hearing in this case, more than three years later, [Complainant] had only applied to three paid positions. This does not constitute "reasonable diligence" to obtain alternative employment. Accordingly, it is concluded that he failed to mitigate his damages and payment from the time of his termination is not appropriate.

Potential for Overcompensation. Because Respondent has failed to appear and defend this matter, *see supra* at 2-3, 9, it is unclear whether Careco is still in business. If [Complainant] were awarded back pay through the date this Order is entered and Careco is no longer in business, [Complainant] would be paid for work that he could never have performed, regardless of whether he was a victim of unlawful discrimination. *Cf. Washington Convention Ctr. Auth. v. Johnson*, 953 A.2d 1064, 1081 (D.C. Cir. 2008) (finding that the trial court did not abuse its discretion in refusing to award back pay for the period after the job at issue had been eliminated). Because the purpose of a back pay award is to return the complainant to the position he would have been absent the unlawful discrimination, awarding [Complainant] back pay could result in overcompensation. As such, there is not an adequate basis upon which to accurately calculate the amount of any back

pay properly awardable. For the foregoing reasons, [Complainant] is not entitled to a back pay award.

2. Pain and Suffering.

Embarrassment, humiliation, indignity, and pain and suffering are the natural and unavoidable consequences of unlawful discrimination. *See Doe*, 624 A.2d at 447-48; D.C. MUN REGS. tit. 4, § 211.1. [Complainant] has established that he suffered harassment from Careco and that he is entitled to recover monetary damages for this harassment. The question remaining is how much [Complainant] should be awarded for such humiliation, pain, and suffering. [Complainant] worked at Careco for a period of almost two years, from March 2012 until January 2014. Director 1's harassment of [Complainant] on the basis of personal appearance began during his interview with Respondent in March 2012 and continued throughout his employment. Although it is unclear when Director 1's sexual harassment of [Complainant] began, [Complainant] testified that it occurred "almost weekly." Facts at ¶ 30. Because Director 1's harassment occurred frequently for nearly a two-year period, it is determined that [Complainant] is entitled a compensatory damage award equal to one-half of his annual salary for each year that he worked for Careco. This total amounts to $30,734.65. *See* Compl.'s Post-Trial Brief at Ex. 2.

3. Medical Expenses.

[Complainant] is not entitled to recover the costs of his medical expenses. A complainant is entitled to recover medical expenses incurred as a result of the respondent's unlawful discrimination only if such evidence is admitted. *Doe v. D.C. Com. on Human Rights*, 624 A.2d 440, 447 (D.C. 1993). [Complainant] testified that, following his termination, he experienced flare-ups of his sickle cell disease caused by stress and that he had medical bills. Tr. at 72:14-22.

73:1-11. However, they were never moved into evidence. Accordingly, he is not entitled to recover these expenses.

4. Attorney's Fees.

To be entitled to an award of attorney's fees under the DCHRA, the complainant must prevail. *See* D.C. CODE § 2-1403.13(a)(1)(E). A complainant prevails if he "succeed[s] on any significant issue in litigation which achieves some of the benefit the [complainant] sought in bringing suit." *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1993). Because [Complainant] has prevailed in this matter, the undersigned concludes that he that is entitled to an award of attorney's fees for the time reasonably expended upon the matters on which he prevailed. Counsel for [Complainant] is directed to submit a petition for attorney's fees no later than thirty (30) calendar days from signature of the Final Decision and Order in this case as authorized by 4 D.C. MUN. REGS. tit. 4, § 213.

CONCLUSIONS OF LAW

1. Given the undisputed material facts established by a preponderance of the evidence and considered in the light most favorable to Careco, [Complainant] is entitled to a default judgment on the claim that Respondent subjected him to a hostile work environment on the basis of personal appearance.
2. Given the undisputed material facts established by a preponderance of the evidence and considered in the light most favorable to Careco, [Complainant] is entitled to a default judgment on the claim that Respondent subjected him to a hostile work environment on the basis of sex.

/s/ *David C. Simmons*
David C. Simmons
Chief Administrative Law Judge
D.C. Commission on Human Rights

Dated: May 7, 2018.