IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

MONICA CISNEROS, Plaintiff, v. UTC PROVIDERS-AUSTIN, INC., *d/b/a* UTC HEALTH & REHAB-AUSTIN, Defendant.	§ § § § § § § § § §	1:17-CV-593-RP

ORDER

Before the Court is Plaintiff Monica Cisneros's ("Cisneros") Motion for Default Judgment. (Dkt. 49). Having considered Cisneros's motion, the record, and the relevant law, the Court finds that the motion should be granted.

I. BACKGROUND

This is an employment discrimination case. Cisneros worked as a massage therapist for Defendant UTC Providers – Austin, Inc. ("UTC") from July 2010 until her termination in 2016. (3d Am. Compl., Dkt. 43, ¶ 8). Cisneros is a Latina from Mexico, and her first language is Spanish. (*Id.* ¶ 9). On May 31, 2016, Cisneros was placed on a Performance Improvement Plan ("PIP"). Her PIP indicated that she needed to have "respect for others" and that she needed to be "mindful of those around you who cannot understand the languages you speak." (*Id.*). The PIP also stated that patients and employees "must feel comfortable in a medical environment and must never feel excluded. Please do not use other languages in front of patients or employees that you are unsure of their language capability." (*Id.*). Although Cisneros frequently spoke Spanish at work, she did not speak it with people who did not also speak Spanish. (*Id.*). Nevertheless, Cisneros was issued a verbal warning stating: "Monica Cisneros continue [sic] to violate the Rehab policy on speaking Spanish on the Rehab floor." (*Id.* ¶ 10). Cisneros was fired on August 4, 2016, because she "continued to violate

the requirement" prohibiting Spanish around patients and coworkers who did not speak Spanish. (*Id.* ¶ 11).

Cisneros sued UTC alleging (1) discrimination on the basis of national origin in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* ("Title VII") (2) a violation of 42 U.S.C. § 1981 by denying her "equal rights and benefits" by discriminating against her on the basis of race and national origin; and (3) discrimination on the basis of gender and race in violation of the Texas Commission on Human Rights Act ("TCHRA"). (Compl., Dkt. 1, ¶¶ 13–21). Cisneros seeks damages caused by UTC's unlawful conduct, including back and front pay, lost benefits, and damages for mental anguish, as well as attorney's fees and costs. (*Id.* ¶¶ 22–25). Cisneros properly served UTC on June 30, 2017, (Dkt. 4), and UTC initially responded by filing an answer, (Dkt. 7), and moved to dismiss UTC's Section 1981 claim, (Dkt. 20), which the Court denied, (Dkt. 35). On May 1, 2018, UTC's attorney, Mr. James W. Henges, moved to withdraw from representing UTC. (Dkt. 29). After holding a telephone conference on Mr. Henges's motion to withdraw, the Court allowed Mr. Henges to withdraw on May 23, 2018, and warned UTC that because it is a corporation, it is unable to represent itself *pro se* and it must seek alternate counsel "as soon as possible." (Order, Dkt. 34). UTC's last appearance in this case was at the May 2018 conference. On July 19, 2018, the Clerk of the Court entered default against UTC, (Dkt. 39), and Cisneros now moves for default judgment, (Dkt. 49). Cisneros's motion is unopposed.

II. DISCUSSION

Under Rule 55 of the Federal Rules of Civil Procedure, federal courts have the authority to enter a default judgment against a defendant that has failed to plead or otherwise defend itself. Fed. R. Civ. P. 55(a)–(b). That said, "[d]efault judgments are a drastic remedy, not favored by the Federal Rules and resorted to by courts only in extreme situations." *Sun Bank of Ocala v. Pelican Homestead & Sav. Ass'n*, 874 F.2d 274, 276 (5th Cir. 1989). A party is not entitled to a default judgment simply

because the defendant is in default. *Ganther v. Ingle*, 75 F.3d 207, 212 (5th Cir. 1996). Rather, a default judgment is generally committed to the discretion of the district court. *Mason v. Lister*, 562 F.2d 343, 345 (5th Cir. 1977).

In considering Cisneros's motion, the Court must determine: (1) whether default judgment is procedurally warranted, (2) whether Cisneros's complaint sets forth facts sufficient to establish that it is entitled to relief, and (3) what form of relief, if any, Cisneros should receive. *United States v. 1998 Freightliner Vin #: 1FUYCZYB3WP886986*, 548 F. Supp. 2d 381, 384 (W.D. Tex. 2008); *see also J & J Sports Prods., Inc. v. Morelia Mexican Rest., Inc.*, 126 F. Supp. 3d 809, 813 (N.D. Tex. 2015).

A. Procedural Requirements

To determine whether entry of a default judgment is procedurally warranted, district courts in the Fifth Circuit consider six factors: "[1] whether material issues of fact are at issue, [2] whether there has been substantial prejudice, [3] whether the grounds for default are clearly established, [4] whether the default was caused by a good faith mistake or excusable neglect, [5] the harshness of a default judgment, and [6] whether the court would think itself obliged to set aside the default on the defendant's motion." *Lindsey v. Prive Corp.*, 161 F.3d 886, 893 (5th Cir. 1998).

On balance, the *Lindsey* factors weigh in favor of entering a default judgment against UTC. UTC initially appeared and filed an answer to Cisneros's complaint, denying many of Cisneros's allegations. (*See* Answer, Dkt. 7). But Cisneros has since amended her complaint twice, (Dkts. 23, 43), and UTC has not responded to either amended pleading. Although UTC placed material facts at issue by filing an answer and denying Cisneros's claims, the remainder of the *Lindsey* factors weigh in favor of entering default judgment. *See Melendrez v. Alpha Nursing & Therapy, LLC*, No. 5:15-CV-519-RP, 2018 WL 507079, at *2 (W.D. Tex. Jan. 22, 2018). It has been over a year since UTC's last appearance. UTC's failure to retain counsel for over fourteen months has ground the adversary process to a halt, prejudicing Cisneros's interest in pursuing her claim for relief. *See J & J Sports*, 126

F. Supp. 3d at 814 ("Defendants' failure to respond threatens to bring the adversary process to a halt, effectively prejudicing Cisneros's interests.") (citation and quotation marks omitted).

The grounds for default are established: UTC was properly served on July 13, 2017, (Dkt. 4), and signed a waiver of service when Cisneros moved to substitute the party defendant, (Dkt. 16). This Court's orders have been sent to and received by UTC and its registered agent, (*see, e.g.*, Dkts. 37, 40, 41, 42), yet UTC has failed to find counsel and appear in this action. There is no indication that the default was caused by a good faith mistake or excusable neglect. In fact, at a hearing, the Court specifically warned UTC's president that as a corporation, it could not represent itself and that it must seek alternate counsel as soon as possible. (*See* Dkt. 34). UTC has not done so. Although a default judgment in this case is not insignificant— Cisneros seeks $246,000 in damages and $19,175.75 in attorney's fees and litigation costs—the Court is not aware of any facts that would obligate it to set aside the default if challenged by UTC. The Court therefore finds that default judgment is procedurally warranted.

B. Sufficiency of Cisneros's Complaint

Default judgment is proper only if the well-pleaded factual allegations in Cisneros's complaint establish a valid cause of action. *Nishimatsu Constr. Co., Ltd. v. Hous. Nat'l Bank*, 515 F.2d 1200, 1206 (5th Cir. 1975). By defaulting, a defendant "admits the plaintiff's well-pleaded allegations of fact." *Id.* In determining whether factual allegations are sufficient to support a default judgment, the Fifth Circuit employs the same analysis used to determine sufficiency under Rule 8. *Wooten v. McDonald Transit Assocs., Inc.*, 788 F.3d 490, 498 (5th Cir. 2015). A complaint must contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). The factual allegations in the complaint need only "be enough to raise a right to relief above the speculative level, on the assumption that all the allegations in the complaint are true (even if doubtful in fact)." *Wooten*, 788 F.3d at 498 (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555

(2007)). While "detailed factual allegations" are not required, the pleading must present "more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Id.* (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)).

Cisneros alleges that UTC discriminated against her in violation of Title VII because of her national origin (Mexican) by requiring her to speak only English at work and terminating Cisneros for violating that rule. (3d Am. Compl., Dkt. 43, ¶ 17). Cisneros also alleges that UTC discriminated against her on the basis of gender, race, and national origin in violation of the TCHRA by imposing the English-only rule and terminating her employment because she violated that rule. (*Id.* ¶ 20). And Cisneros alleges that UTC discriminated against her in violation of 42 U.S.C. § 1981 by discharging her because of her race. (*Id.* ¶ 19). The analysis of discrimination claims under § 1981 and the Texas Labor Code is identical to the analysis of Title VII claims, so the Court analyzes each of Cisneros's claims under Title VII. *See, e.g.*, *Body by Cook, Inc. v. State Farm Mut. Auto. Ins.*, 869 F.3d 381, 386 (5th Cir. 2017); *Shackelford v. Deloitte & Touche, LLP*, 190 F.3d 398, 403 n.2 (5th Cir. 1999).

Title VII prohibits discrimination against an employee on the basis of race, color, religion, sex, or national origin. 42 U.S.C. § 2000e-2(a)(1). Title VII prohibits both intentional discrimination—disparate treatment claims—as well as facially neutral practices that disproportionately affect protected individuals—disparate impact claims. *Ricci v. DeStefano*, 557 U.S. 557, 577–78 (2009). Here, Cisneros alleges that UTC's English-only policy is intentionally discriminatory based on her Mexican national origin. An employee can establish a prima facie case of discrimination under Title VII through either direct or circumstantial evidence. *Grimes v. Tex. Dep't of Mental Health & Mental Retardation*, 102 F.3d 137, 140 (5th Cir. 1996). If "the plaintiff presents direct evidence of discrimination, 'the burden of proof shifts to the employer to establish by a preponderance of the evidence that the same decision would have been made regardless of the

forbidden factor." *Etienne v. Spanish Lake Truck & Casino Plaza, L.L.C.*, 778 F.3d 473, 475 (5th Cir. 2015).

EEOC regulations provide that:

> A rule requiring employees to speak only English at all times in the workplace is a burdensome term and condition of employment. The primary language of an individual is often an essential national origin characteristic. Prohibiting employees at all times, in the workplace, from speaking their primary language or the language they speak most comfortably, disadvantages an individual's employment opportunities on the basis of national origin. It may also create an atmosphere of inferiority, isolation and intimidation based on national origin which could result in a discriminatory working environment.

29 C.F.R. § 1606.7(a). Employer rules that broadly prohibit the speaking of languages other than English have been found to violate Title VII. *See EEOC v. Premier Operator Servs., Inc.*, 113 F. Supp. 2d 1066, 1073–76 (N.D. Tex. 2000) (finding that a blanket prohibition against speaking Spanish constituted disparate impact and disparate treatment under Title VII); *Saucedo v. Brothers Well Serv., Inc.*, 464 F. Supp. 919, 922 (S.D. Tex. 1979) ("A rule that Spanish cannot be spoken on the job obviously has a disparate impact upon Mexican-American employees."). On the other hand, "[a]n employer may have a rule requiring that employees speak only in English at certain times where the employer can show that the rule is justified by business necessity." 29 C.F.R. § 1606.7(b); *see also Garcia v. Gloor*, 618 F.2d 264, 268 (5th Cir. 1980), *cert. denied*, 449 U.S. 113 (1981) (finding that an English-only rule did not violate Title VII where a plaintiff could speak his preferred language during breaks). Thus, the question often boils down to whether the employer has sufficiently limited its English-only rule to certain circumstances and whether that rule is justified by business necessity.

Here, Cisneros alleges that her first language is Spanish. (3d Am. Compl., Dkt. 43, ¶ 8). Cisneros was placed on a PIP asking her to "not use other languages in front of patients or employees that you are unsure of their language capability." (*Id.* ¶ 9). She was then warned after she spoke Spanish at work, and UTC fired her because she continued to violate the requirement that she refrain from speaking Spanish around patients and coworkers who could not speak the language. (*Id.*

¶¶ 10–11). By defaulting, UTC has effectively conceded that its English-only policy is unrelated to Cisneros's job performance. An employer may defend against liability by showing that the employment practice is related to the job in question and consistent with business necessity. *Ricci*, 557 U.S. at 578. UTC has made no attempt to show how its English-only policy is limited to certain times and justified by business necessity. Cisneros's allegations are enough to raise her right to relief above a speculative level. *Wooten*, 788 F.3d at 498. Default judgment is substantively warranted for Cisneros's Title VII and TCHRA national-origin-discrimination claims.

Cisneros also alleges that UTC discriminated against her because of her race. (3d Am. Compl., Dkt. 43, ¶¶ 18–20). Here too, Cisneros's factual allegations are sufficient to support a default judgment.[1] Cisneros is a Latina from Mexico. (3d Am. Compl., Dkt. 43, ¶ 8). Cisneros alleges that UTC "intentionally discriminated against [her] because of her race in violation of 42 U.S.C. § 1981 by unlawfully discharging her." (*Id.* ¶ 19). She alleges that she was terminated for speaking Spanish at work and that the "decision to terminate her was motivated by her race." (*Id.*). By defaulting, UTC "admits the plaintiff's well-pleaded allegations of fact." *Nishimatsu Constr. Co.*, 515 F.2d at 1206. Accordingly, Cisneros's allegations establish a valid cause of action for her racial-discrimination claims under Section 1981 and the TCHRA.

Cisneros's complaint, however, contains no allegations to support a reasonable inference that she was discriminated against because of her gender. The complaint alleges that her employer imposed a rule that prohibited Cisneros from speaking Spanish, and that she was terminated for violating that rule. There are no allegations that suggest her gender was a factor in imposing or enforcing that rule, or in firing her. As a result, Cisneros has not stated a claim for discrimination based on gender under the TCHRA.

[1] Indeed, the Court already addressed the sufficiency of Cisneros's Section 1981 claims in denying UTC's motion to dismiss those claims. (*See* R. & R., Dkt. 27; Order, Dkt. 35 (adopting report and recommendation)).

C. Relief

Federal Rule of Civil Procedure 54(c) states that "[a] default judgment must not differ in kind from, or exceed in amount, what is demanded in the pleadings." Fed. R. Civ. P. 54(c). In other words, the relief prayed for in a complaint defines the scope of relief available on default judgment. *Id.* Cisneros seeks monetary damages, costs, and reasonable attorney's fees.

1. Damages

Cisneros seeks to recover $246,000.00 in monetary damages: $96,000.00 in lost back pay and $150,000 in mental anguish. (Mot. Def. J., Dkt. 49, at 10, 11, 13). Both Title VII and Section 1981 allow for the recovery of compensatory damages for actual pecuniary and intangible losses. *See* 42 U.S.C. § 2000(g)(1); 42 U.S.C. § 1981a; *Farpella–Crosby v. Horizon Health Care*, 97 F.3d 803, 808 n.6 (5th Cir. 1996). For an intentional violation of Title VII, a court may order back pay, compensatory damages, and attorney's fees where appropriate. *See* 42 U.S.C. § 1981a (providing for compensatory and punitive damages);

a. Lost Back Pay and Prejudgment Interest

Once a plaintiff establishes that unlawful discrimination is the cause of her losses, she is entitled to back pay. *Albermarle Paper Co. v. Moody*, 422 U.S. 405, 417–18 (1975). Back pay compensates an employee for the amount that she would have earned but for the Title VII violation. *Palasota v. Haggar Clothing Co.*, 499 F.3d 474, 482 (5th Cir. 2007). Back pay is calculated using the average rate of pay the employee received before the employer's unlawful conduct. *Id.* at 486. It accrues "from the date of the commencement of the discriminatory course of conduct causing financial loss until the date damages are 'settled.'" *Id.* at 482. To be entitled to back pay, a plaintiff must make a reasonable good faith effort to find comparable employment. *Id.* at 486–87. As an affirmative defense, it is the defendant's burden to show that "substantially equivalent work was available and that the former employee did not exercise reasonable diligence to obtain it." *West v.*

Nabors Drilling USA, Inc., 330 F.3d 379, 393 (5th Cir. 2003). Although an award of prejudgment interest on back pay is discretionary, *Gloria v. Valley Grain Prods., Inc.*, 72 F.3d 497, 500 (5th Cir. 1996), interest "'*should be* included in back pay' to make a victim whole." *Pegues v. Miss. State Emp't Serv.*, 899 F.2d 1449, 1453 (5th Cir. 1990) (quoting *Pettway v. Am. Cast Iron Pipe Co.*, 494 F.2d 211, 263 (5th Cir. 1974)) (emphasis in *Pegues*).

Because of its default, UTC has admitted Cisneros's factual allegations that she was fired because of her national origin and that her damages were caused by UTC's adverse discriminatory act. UTC has similarly failed to present any evidence that Cisneros failed to mitigate her damages. Thus, Cisneros has shown that UTC's discrimination is the cause of her losses; she is entitled to back pay.

Cisneros asserts that she suffered lost back pay in the amount of $96,000, which represents the amount she would have earned absent her termination minus the income she has since earned after her discharge. (Mot. Def. J., Dkt. 45, at 3; *see also* Cisneros Decl., Dkt. 49-1, ¶ 7). Cisneros states that she earned $50,000.00 per year working for UTC. (Cisneros Decl., Dkt. 49-1, ¶ 7). Cisneros was discharged on August 4, 2016, and she says that she was unemployed for two years. (*Id.* ¶¶ 6–7). Accordingly, Cisneros would have earned $100,000 during that two-year period. But Cisneros notes that she made $4,000 in 2017 and 2018, reducing her damages. (*Id.* ¶ 7). As a result, Cisneros is entitled to a back pay award of $96,000 plus interest.

Because there is no federal law setting the prejudgment interest rate, the Court looks to Texas law for guidance. *See Perez v. Bruister*, 823 F.3d 250, 274 (5th Cir. 2016). "The Texas Supreme Court has held that prejudgment interest accrues at the rate for post-judgment interest and is computed as simple interest." *Johnson v. Sw. Res. Inst.*, No. 5:15-CV-00297-RCL, 2019 WL 2234791, at *1 (W.D. Tex. May 23, 2019) (citing *Johnson & Higgins of Tex., Inc. v. Kenneco Energy, Inc.*, 962 S.W.2d 507, 532 (Tex. 1998)). Under Texas law, the post-judgment interest rate is "the prime rate as

published by the Board of Governors of the Federal Reserve on the date of computation," unless that rate is less than five percent or greater than fifteen percent. Tex. Fin. Code Ann. § 304.003(c)(1); *See* Selected Interest Rates (Daily), Board of Governors of the Federal Reserve System (August 1, 2019), https://www.federalreserve.gov/releases/h15/. Accordingly, the Court will calculate interest owed to plaintiff at a rate of 5.50% per annum as of August 4, 2016, the date of the adverse action.

b. Mental Anguish

Mental anguish is also recoverable under both Section 1981 and Title VII. *See Patterson v. P.H.P. Healthcare Corp.*, 90 F.3d 927, 937 (5th Cir. 1996); *Farpella–Crosby*, 97 F.3d at 808 n.6 (citations omitted); *see also* 42 U.S.C. § 1981a(b)(3). In the Fifth Circuit, the same standard is applied to find an award of mental anguish damages under Title VII and Section 1981.[2] *Farpella–Crosby*, 97 F.3d at 809 n.8. For intangible harms like mental anguish, "an award of damages must be supported by competent evidence concerning the injury." *Patterson*, 90 F.3d at 938 (citing *Carey v. Piphus*, 435 U.S. 247, 264 (1978)). Competent evidence includes the plaintiff's own testimony, the testimony of a medical professional, or evidence of treatment by a medical professional. *Id.* Additionally, damages cannot be recovered unless the specificity requirement set out in *Carey v. Piphus*, 435 U.S. 247 (1978), is satisfied. *Gordon v. JKP Enters. Inc.*, 35 F. App'x 386, 2002 WL 753496, at *4 (5th Cir. Apr. 9, 2002) (citing *Patterson*, 90 F.3d at 940). To meet this requirement, the claimant must show "some specific discernable injury to the claimant's emotional state." *Id.* (quoting *Patterson*, 90 F.3d at 940). Examples of emotional harm made manifest include "sleeplessness, anxiety, stress, depression, marital strain, humiliation, emotional distress, loss of self esteem, excessive fatigue, or a nervous breakdown." *Patterson*, 90 F.3d at 939.

[2] Recovery under Title VII, however, is more limited by statute. The amount of compensatory damages recoverable for mental anguish under Title VII is limited by a statutory cap determined by the size of the employer. *See* 42 U.S.C. § 1981a(b)(3). Cisneros has not alleged how many employees UTC has. Title VII only allows for recovery of compensatory damages if a plaintiff is the victim of unlawful intentional discrimination and cannot recover under Section 1981. *Id.* § 1981a(a)(1). Accordingly, the Court first analyzes Cisneros's mental anguish damages under Section 1981.

And the court must "scrupulously analyze an award of compensatory damages for a claim of emotional distress predicated exclusively on the plaintiff's testimony" to determine the nature and extent of Cisneros's injury. *Brady v. Fort Bend Cty.*, 145 F.3d 691, 719 (5th Cir. 1988). Indeed, a claimant's testimony alone "may not be sufficient to support anything more than a nominal damage award." *Patterson*, 90 F.3d at 938. At the same time, the Fifth Circuit has "not required corroborating testimony and medical evidence in every case involving nonpecuniary compensatory damages." *Oden v. Oktibbeha Cty., Miss.*, 246 F.3d 458, 470 (5th Cir. 2001). Here, the only evidence of Cisneros's mental anguish damages is her own testimony. (*See* Cisneros Decl., Dkt. 49-1).

In some cases, a plaintiff's testimony is sufficiently detailed to establish damages for mental anguish and suffering. *See, e.g.*, *Gordon*, 2002 WL 753496, at *5 (upholding a $5,000 award for emotional distress based on plaintiff's testimony of emotional distress, humiliation, and loss of self-esteem). For example, the Fifth Circuit upheld a $5,000 compensatory damages award where the plaintiff testified that her termination was a "major inconvenience," lowered her self-esteem, and caused anxiety, sleeplessness, stress, and marital hardship. *Migis v. Pearle Vision, Inc.*, 135 F.3d 1041, 1046 (5th Cir. 1998). The Fifth Circuit has also found that a plaintiff's testimony concerning stress, sleeplessness, betrayal, and shame was sufficient to support a $20,000 mental anguish award. *Oden*, 246 F.3d at 470. In *Farpella–Crosby*, the court upheld a $7,500 jury award of compensatory damages based on a plaintiff's testimony that she felt "very embarrassed," "very belittled," "very disgusted," and "hopeless." 97 F.3d at 809. Thus, the Court will examine whether Cisneros's declaration here sufficiently alleges some specific discernable injury to the claimant's emotional state.

The Court finds that Cisneros's declaration is sufficient to show evidence of mental anguish damages. Cisneros states that after she was terminated, she had trouble sleeping: at first she would stay up all night for a period of six months, then her sleep gradually increased first to 3–4 hours per night, and now she sleeps six hours per night. (Cisneros Decl., Dkt. 49-1, ¶ 8). She has also had

anxiety about how to pay her bills. (*Id.* ¶ 9). Cisneros says that she cried a lot after she was fired, and it was emotionally difficult for her to be fired after working for UTC for so long. (*Id.*). Cisneros had trouble getting out of bed and leaving her house. (*Id.* ¶ 10). Instead, she obsessively cleaned her house for 40–60 hours per work. (*Id.*). She also experienced irregular eating habits, only eating once per day, and she experienced marital difficulties. (*Id.* ¶ 11–12). Cisneros began taking medication for her anxiety about six months after she was fired, which helped curtail her other symptoms. (*Id.* ¶ 13). And she attributes the cause of her mental anguish to her termination and experience working for UTC. (Cisneros Decl., Dkt. 49-1, ¶¶ 7–10, 13). Because of its default, UTC does not contest Cisneros's mental anguish damages or their causation.

It is difficult to calculate Cisneros's exact amount of compensatory damages. Cisneros estimates that she has suffered $150,000 in mental anguish damages. (Mot. Def. J., Dkt. 49, at 11). Compensatory damages awards based on uncorroborated testimony have often been limited to less than $100,000. *See Thomas v. Tex. Dep't of Criminal Justice*, 297 F.3d 361, 369–70 (5th Cir. 2002) (collecting cases); *see supra* at 11. Such is the case where complaints include vague statements of frustration, emotional scarring, and having taken "many pills." *Id.* Most cases have awarded between $5,000 and $25,000. *See supra* at 11. In *Breazell v. Permian Trucking & Hot Shot, LLC*, the plaintiff testified that he suffered nightmares, difficulty sleeping, denial of medical treatment, and heightened mistreatment in the workplace during the two years after he suffered an accident on the job. 2017 WL 3037432, at *6. He had also seen a psychiatrist and was going through a divorce. *Id.* The court found that the plaintiff's mental anguish was "severe" and awarded $25,000 in compensatory damages. *Id.* In this case, plaintiff's mental injuries seem severe and have resulted in discernible injuries, but her injury is based solely on her testimony and vague allegations of lost sleep, obsessive habits, and taking medication. Although the Court finds that Cisneros has demonstrated that she is entitled to compensatory damages for her mental anguish, the Court finds $150,000 to be excessive

in light of similar awards granted to plaintiffs experiencing similar injuries. Accordingly, the Court finds that an award of $20,000 is appropriate.

2. Attorney's Fees and Costs

District courts may award fees and costs to prevailing parties in civil rights actions. 42 U.S.C. § 1988(b); 42 U.S.C. § 2000e-5(k). Attorney's fees are routinely awarded to prevailing civil rights plaintiffs. *White v. S. Park Indep. Sch. Dist.*, 693 F.2d 1163, 1169 (5th Cir. 1982). Here, Cisneros is entitled to an award of attorney's fees as the prevailing plaintiff in a civil rights action.

Courts in the Fifth Circuit apply a two-step analysis to determine a reasonable fee award. *Combs v. City of Huntington, Tex.*, 829 F.3d 388, 391 (5th Cir. 2016). First, the court must "calculate the lodestar, 'which is equal to the number of hours reasonably expended multiplied by the prevailing hourly rate in the community for similar work.'" *Id.* at 392 (quoting *Jimenez v. Wood Cty.*, 621 F.3d 372, 379 (5th Cir. 2010). When making this calculation, "the court should exclude all time that is excessive, duplicative, or inadequately documented." *Id.* (quoting *Jimenez*, 621 F.3d at 379–80) (cleaned up). The lodestar amount is presumed to be reasonable. *Perdue v. Kenny A. ex rel. Winn*, 559 U.S. 542, 553–54 (2010). Next, "the court may enhance or decrease" the lodestar amount based on the twelve factors provided in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717–19 (5th Cir. 1974), *abrogated on other grounds by Blanchard v. Bergeron*, 489 U.S. 87 (1989). *Combs*, 829 F.3d at 392. "The court must provide a reasonably specific explanation for all aspects of a fee determination." *Id.* (quoting *Jimenez*, 621 F.3d at 380) (quotation marks omitted).

According to Cisneros's counsel, Mr. Kell A. Simon, he spent 49.45 hours prosecuting this case at a rate of $375.00 per hour resulting in a lodestar fee award of $18,543.75. (Simon Decl., Dkt. 49-2, at 4). Mr. Simon has also submitted a log of his time entries in this case. (*See* Description of Hours, Dkt. 49-2, at 12–14). And he has included a list of attorney's fee awards for employment cases in San Antonio and Austin ranging from $225 to $750 per hour, with the majority falling

between $300 and $350. (*See* Attorney's Fee Rate Awards, Dkt. 49-2, at 6–10). By defaulting, UTC does not contest either the reported time spent on this case, Mr. Simon's time entries, or the reasonableness of his rates.

The Court has reviewed Mr. Simon's billing record and concludes that the number of hours billed by Mr. Simon for the work he performed is reasonable. Mr. Simon also represents that he has exercised billing judgment by excluding hours that he would not have charged his client: Mr. Simon eliminated all mileage charges, copy costs, and time spent calendaring and performing routine administrate tasks. (Mot. Def. J., Dkt. 49, at 12). The Court thus finds that 49.45 hours billed for this case, which has lasted more than two years, is reasonable.

Next, the Court considers Mr. Simon's requested rate. Sister courts in the Western District of Texas have approved hourly rates for experienced attorneys above $300 per hour. *See Rodriguez v. Mech. Tech. Servs., Inc.*, 1:12-cv-00710-DAE, 2015 WL 8362931, at *6 (W.D. Tex. Dec. 8, 2015) (finding $350 to be a reasonable hourly rate for an attorney in Austin, Texas, with FLSA expertise and more than twenty years of experience); *Clark v. Centene Corp.*, No. A–12–CA–174–SS, 2015 WL 6962894, at *8 (W.D. Tex. Nov. 10, 2015) (approving a rate of $425 to a lawyer with eleven years of experience in an employment action); *Structural Metals, Inc. v. S & C Elec. Co.*, SA–09–CV–984–XR, 2013 WL 3790307, at *9 (W.D. Tex. July 19, 2013), *aff'd*, 590 F. App'x 298 (5th Cir. 2014) (approving hourly rates ranging from $296 per hour to over $450 per hour, depending on the experience of the specific attorney). Mr. Simon requests a lodestar rate of $375 per hour. (Mot. Def. J., Dkt. 49, at 13). The median hourly rate for a Labor and Employment attorney in Austin was $300 in 2015. *See* State Bar of Texas Department of Research and Analysis, 2015 Hourly Fact Sheet 10 (2015), https://www.texasbar.com/AM/Template.cfm?Section=Archives&Template=/CM/ContentDisplay.cfm&ContentID=34182. And the median hourly rate for an attorney with between 21 and 25 years

of experience in Austin was $350. *Id.* at 12. Mr. Simon has over twenty years of experience in labor, employment, and civil rights matters. (Simon Decl., Dkt. 49-2, ¶ 2). He was Board Certified in Labor and Employment Law by the Texas Board of Legal Specialization in 2010. (*Id.* ¶ 5). He has served as lead counsel on several employment and civil rights cases in state and federal courts both at the trial and appellate level. (*Id.* ¶ 6). In light of Mr. Simon's experience, the Court finds that Mr. Simon's requested rate is reasonable, and thus awards Mr. Simon $18,543.75 in attorney's fees.

Next, the Court considers the twelve *Johnson* factors: (1) the time and labor required, (2) the novelty and difficulty of the questions, (3) the skill requisite to perform the legal service properly, (4) the preclusion of other employment by the attorney due to acceptance of the case, (5) the customary fee, (6) whether the fee is fixed or contingent, (7) the time limitations imposed by the client or the circumstances, (8) the amount involved and the results obtained, (9) the experience, reputation and ability of the attorneys, (10) the desirability of the case, (11) the nature and length of the professional relationship with the client, and (12) awards in similar cases. *Johnson v. Ga. Highway Express, Inc.*, 488 F.2d 714, 717–19 (5th Cir. 1974). "[O]f the Johnson factors, the court should give special heed to the time and labor involved, the customary fee, the amount involved and the result obtained, and the experience, reputation and ability of counsel." *Saizan v. Delta Concrete Prods Co., Inc.*, 448 F.3d 795, 800 (5th Cir. 2006) (quoting *Migis*, 135 F.3d at 1047).

Cisneros does not seek any enhancement of the lodestar amount, and UTC has not challenged the reasonableness of Cisneros's fee request. Nevertheless, after independently reviewing the *Johnson* factors, the Court finds that none of them support departing from the lodestar amount in this case. The rates charged by Cisneros's counsel are reasonable and consistent with the nature of this case and are appropriate given Mr. Simon's skill and experience.

Federal Rule of Civil Procedure 54(d) authorizes an award of costs to the "prevailing party." Under 28 U.S.C. § 1920(2), a court may tax fees of the clerk and marshal as costs as well as fees for

printed or electronic recorded transcripts necessarily obtained for use in the case. And in Title VII cases, an award of a "reasonable attorney's fee" includes "'reasonable out-of-pocket expenses incurred by the attorney which are normally charged to a fee-paying client, in the course of providing legal services,' such as postage, photocopying, paralegal services, long distance telephone charges, and travel costs." *Mota v. Univ. of Tex. Hous. Health Sci. Str.*, 261 F.3d 512, 529 (5th Cir. 2001) (quoting *Mennor v. Fort Hood Nat'l Bank*, 829 F.2d 553, 557 (5th Cir. 1987)); *see* 42 U.S.C. § 2000e-5(k).

Cisneros seeks a cost award that covers her filing fee, $400; the cost of serving process on two defendants, $147.30; and the cost of obtaining records related to Cisneros's case from the Texas Workforce Commission, $84.70. (Mot. Def. J., Dkt. 49, at 13; TWC Records Invoice, Dkt. 49-2, at 17; Private Process Server, Dkt. 49-2, at 18; Filing Fee Receipt, Dkt. 49-2, at 19). The Court finds that Cisneros is entitled to recover her filing fee and the cost of obtaining records related to her case from the Texas Workforce Commission because such records would necessarily be used in this case. *See Anderson v. Mem. Hermann Healthcare Sys.*, No. H-16-1647, 2018 WL 6606254, at *1 (S.D. Tex. July 30, 2018) ("When a party to be taxed does not object to a specific cost, the Court presumes the cost was necessarily incurred for use in the case."). And Cisneros's fees incurred by using a private process server are roughly comparable to the fees charged by the United States Marshall. *See J&J Sports Prods., Inc. v. Molina & Reyes Enters., LLC*, No. SA-17-CV-278-XR, 2017 WL 10841353, at *1–2 (W.D. Tex. Nov. 29, 2017) (limiting recovery of private process server fees to the amount charged by the U.S. Marshal); 28 C.F.R. § 0.114 (setting a fee of $65 per person per hour for service by the United States Marshal). The Court finds these costs reasonable, and awards costs for Cisneros in the amount of $632.00.

III. CONCLUSION

For the reasons give above, **IT IS ORDERED** that Cisneros's Amended Motion for Default Judgment, (Dkt. 49), is **GRANTED**. The Court will enter the appropriate relief in a final judgment to be filed separately.

SIGNED on August 7, 2019.

ROBERT PITMAN
UNITED STATES DISTRICT JUDGE