Comm'n on Human Rights ex rel. Brehshiek Marquez v. Fresh & Co.

OATH Index No. 434/22 (Aug. 9, 2022)

Respondent engaged in employment discrimination in violation of the Human Rights Law, where complainant made her manager aware that she was being sexually harassed by a supervisor and the manager failed to act, creating a hostile work environment. Petitioner did not establish that complainant left her job because of the sexual harassment. ALJ recommends $30,000 in mental anguish damages, and a civil penalty of $60,000, plus affirmative relief.

NEW YORK CITY OFFICE OF ADMINISTRATIVE TRIALS AND HEARINGS

In the Matter of
COMMISSION ON HUMAN RIGHTS EX REL. BREHSHIEK MARQUEZ
Petitioner
- against -
FRESH & CO.
Respondents

REPORT AND RECOMMENDATION

INGRID M. ADDISON, *Administrative Law Judge*

This proceeding was referred by the New York City Commission on Human Rights ("Commission" or "Petitioner") on behalf of complainant Brehshiek Marquez ("complainant" or "Ms. Marquez"), alleging that respondent Fresh & Co. ("Fresh") violated the New York City Human Rights Law ("Human Rights Law" or "HRL") by sexually harassing the complainant, ignoring her complaints and subjecting her to a hostile work environment, which resulted in her constructive discharge from her job. Specifically, the verified complaint alleged that respondent's kitchen manager regularly made sexual and inappropriate comments to the complainant, which were encouraged or condoned by the general manager, in violation of section 8-107 of the Human Rights Law. Petitioner sought emotional distress and compensatory damages for complainant as well as civil penalties (ALJ Ex. 1; Pet. Ex. 1).

In its verified answer, respondent denied the allegations in the complaint and asserted that the "employment actions and decisions attributed to [it] in the complaint, to the extent such actions

truly occurred, were undertaken … for lawful, legitimate and non-discriminatory business reasons" (ALJ Ex. 2; Pet. Ex. 2).

After a trial which was held remotely due to ongoing concerns surrounding the COVID-19 pandemic, I find that respondent notified her manager that she was being sexually harassed by a supervisor, which the manager failed to address, thereby fostering a hostile work environment. However, petitioner did not prove its claim for constructive discharge as it did not establish that complainant left her job because of the sexual harassment.

For the proven sexual harassment, I recommend $30,000 in mental anguish damages, and a civil penalty of $60,000. I also recommend that respondent take the following steps to avoid future occurrences of discrimination: anti-discrimination training, the creation and implementation of a new and effective anti-discrimination and anti-sexual harassment policy, monitoring of oral and written reports of harassment, and posting notices informing employees and customers of their rights.

PROCEDURAL BACKGROUND

On November 3, 2016, petitioner served respondent with a verified complaint (Pet. Ex. 1). On December 20, 2016, respondent filed its verified answer (Pet. Ex. 2). On December 16, 2019, petitioner issued a Notice of Probable Cause Determination, in which it advised respondent of its intention to proceed to trial if the matter was not resolved by a Conciliation Agreement (ALJ Ex. 3). The matter was docketed at this tribunal on September 7, 2021, for trial. On November 4, 2021, in advance of a conference before this tribunal, complainant, by her independent counsel and on notice to all parties, moved to intervene in the proceedings. Pursuant to section 2-25(b)[1] of this tribunal's Rules of Practice, I granted complainant's motion.

Following multiple conferences before another member of this tribunal, the matter was set for trial on April 18 and 19, 2022, but was adjourned without objection to May 25 and 26, upon an emergency request from respondent's counsel. At the trial, petitioner presented the testimony

[1] Section 2-25(b) of OATH's Rules of Practice:

> A complainant may be permitted to intervene as of right, upon notice to all parties and the administrative law judge at or before the first conference in the case, or, if no conference is held, before commencement of trial. The Commission's Law Enforcement Bureau will prosecute the complaint. Complainants and respondents may be represented by attorneys or other duly authorized representatives, who must file notices of appearance pursuant to the Commission's rules . . . . (48 RCNY § 2-25(b) (Lexis 2022)).

of complainant, Dynasia Mackins, a former Fresh employee, and Ray Warren, complainant's partner. Petitioner also presented documentary evidence. Respondent presented the testimony of Panayiotis Boyiakis (aka "Peter"), the senior operations supervisor at Fresh, Tensin Tsering ("Tensin" or "Mr. Tsering") and Rehana Haque ("Rehana" or "Ms. Haque"), the alleged perpetrators of offensive behavior against complainant, Ocean Sari ("Ocean" or "Ms. Sari"), a former manager at the store where complainant worked, and Lisa Grant, Fresh's Human Resources ("HR") Director. Respondent also presented documentary evidence.

THE TRIAL EVIDENCE

Complainant, Brehshiek Marquez (aka "Sasha"), resides in Brooklyn with her teenage daughter and her partner of eight years. Currently, she is a mail processor for the United States Postal Service ("USPS"), where she worked on a temporary basis from 2019, and became permanent in April 2022 (Tr. 32-34, 36-38). Ms. Marquez testified that she started working as a cashier at Fresh's 1211 Sixth Avenue store/café ("store" or "subject store") in Manhattan, in May 2016. She learned about the job from Dynasia Mackins, who worked at the store and whom Ms. Marquez has known from childhood, having been raised by Dynasia's aunt, Marsha Mackins. She does not know how Ms. Mackins learned about the job, but she, nevertheless, went to the store and met with the store's general manager, Ocean (later identified in full as Ocean Sari). She testified that following their meeting, Ocean gave her paperwork to complete at the store, offered her a job and gave her two T-shirts and an apron for work (Tr. 41-45, 97, 141). She denied that she visited the store's corporate office to sign the on-boarding papers, as they are called (Tr. 101).

On May 13, 2016, Ms. Marquez signed a number of forms related to her employment with Fresh. She testified that even though her biological mother was alive at the time, for personal reasons, she listed Marsha Mackins as her aunt and emergency contact on the Employee Status Form, but maintained that they are not blood relatives (Tr. 43, 98-100; Pet. Ex. 6; Resp. Ex. A at R-5). Ms. Marquez signed another form acknowledging that she had received the company's Team Member Handbook (Pet. Ex. 5; Resp. Ex. A at R-1). She could not recall signing the form or receiving the handbook and said that she never asked for it. She opined that if respondent wanted her to have it, they would have given it to her (Tr. 46-48, 102-03). Ms. Marquez also signed a form letter, which congratulated her on her new "Counter person" position, outlined the tasks for which she would be responsible, advised her of some of the benefits, and informed her

that the HR team is at the corporate office, the address for which it provided. It further declared that " . . . we are here to answer any questions, listen to any complaints or provide support if needed. ***All conversations are confidential***" (Resp. Ex. A at R-13) (emphasis in original). The same letter provided the HR office hours of operation and offered a confidential voicemail number. Finally, Ms. Marquez signed a "Notice and Acknowledgement of Pay Rate . . ." on the same day (05/13/16), which was co-signed by Grisel Romero of HR. Ms. Marquez denied knowing Ms. Romero or ever meeting her, and she could not recall if the document was already signed when it was presented to her for her signature (Tr. 103-06).

When she started, the store opened at 6:00 a.m. and Ms. Marquez worked a 6:00 a.m. to 3:00 p.m. shift, Monday to Friday (Tr. 48-49). Ms. Marquez worked at the front of the store, near other cashiers and the grill, where Tensin worked as the kitchen manager. Petitioner presented two photographs which showed the layout of the store and Ms. Marquez's workspace. She testified that the photos were taken from the front of the store. One photo displayed a long counter with two cashier posts (Pet. Ex. 3). It was perpendicular to but separated from the back counter by a large space. Ms. Marquez identified the back counter as the cold food storage area, also known as the cage. To the left rear of the photo, near the cage area, was what appeared to be a door. The second photo displayed the cage area exclusively (Pet. Ex. 4). Two cashiers were at registers – one at the right of the photo had an espresso machine to her rear, and the other, closer to the cold foods, had two countertop ovens to the rear (Pet. Ex. 4). Ms. Marquez worked at both registers. She testified that the salad bar was to the left of the photo near to the grill and was on the other side of a ceiling to floor wall which could be seen in both photos. She noted that Ocean, and then Rehana (later identified in full as Rehana Haque), who became the store's general manager after Ocean left, sat near the door (Tr. 51).

Ms. Marquez would use the door at the rear of the counter area when she needed to refill ingredients or speak with a manager (Tr. 55). She disliked working with Tensin, because he was "perverted and sneaky," in that he pretended to be one way but would make remarks, such as, "It's big back there," a reference to her butt, when he wanted to use the oven. She stated that on one occasion, he touched her rear with a pan and accused the pan of touching her. He told her that it made his day when she smiled, he looked at her thighs, and he acted as if he was going to spank her with a spatula, at which she threatened to slap him in the face. Ms. Marquez asserted that while Rehana and the male food preparers were present, Tensin remarked that he would cheat on

his wife with her, and Rehana laughed. She and a co-worker complained to Rehana, who promised to have a meeting but did nothing. She claimed that when she told Rehana that Tensin was staring at her booty, Rehana replied, "My mans ain't looking at you," and added that if she were a male, she, too, would look at Ms. Marquez's thighs. On two to three occasions, she asked Rehana for guidance on filing a formal complaint but was always brushed off with promises of a meeting, which never occurred. She maintained that she had not read the congratulatory letter which she signed upon her hiring and which directed workers to Fresh's HR team at the corporate office if they had complaints. When Ms. Marquez threatened to sue, Rehana again agreed to have a meeting but never did. On the day following her threat to sue, Tensin threw his hand up and said to Ms. Marquez, "Don't sue me," which suggested that Rehana had told him of her threat to sue. Ms. Marquez opined that talking to Rehana was like talking to a wall. She remarked that Rehana and Tensin spoke and laughed with each other in a different language, and she speculated that they were speaking about her (Tr. 52, 57-65, 129, 147-48).

During cross-examination, Ms. Marquez added that Tensin would wink at her, and when he commented that "It's big back there," he said that he would take her home to his wife, statements he made in the presence of Yari and Manuela, two other workers. The same two workers were present when Tensin acted as if he would spank her with the spatula and she threatened to slap him. She maintained that Tensin was never inappropriate with her during Ocean's tenure as general manager, and she had the following to say about Ocean: "She was cool. She was okay. She never rubbed me any way. She was firm. She always had them in check, the floor in check." But she was reluctant to provide a direct answer when asked whether she considered Ocean to be honest, offering only that, "Ocean never had a reason to have to lie when I ever was around her . . ." (Tr. 107-13).

Ms. Marquez testified that Fresh began to reduce her hours but did not specify when a reduction in her hours began. Nor did she offer proof that her hours were indeed cut.

Ms. Marquez recalled that she began to call out at least once per week, but she did not pinpoint when she first started to do so. She also testified that she started "to call out here and there." She claimed that she continued to work at Fresh until just before her daughter's birthday in September because she wanted to have funds to celebrate the birthday. She described her feelings as "disgusted, betrayed, annoyed, angry, depressed," which she attributed to the harassment. She maintained that she also experienced anxiety, and that she cried about four to

five days per week, and she still does. The same month, she decided to leave the job because of a lack of support, and she made no further attempts to stop the harassment (Tr. 64-66, 134-37).

One morning in September 2016, Ms. Marquez called the store. When no one answered, she texted Rehana. Documentation of that text showed that at 6:50 a.m. on September 28, 2016, Ms. Marquez informed Rehana that she had called the store and there was no answer, and that she would not be coming in that day. Rehana replied that she could take the remainder of the week off, to which Ms. Marquez wrote, "No I just won't come back," at which Rehana instructed her to pick up her check from the main office (Pet. Ex. 16). Ms. Marquez equivocated by insisting on the one hand, that she quit because Rehana told her to take the rest of the week off, and on the other, that she had already decided to leave the job when she texted Rehana. She claimed that when she texted Rehana, she was "just going to take the day off. Maybe [she] needed to, [her] mental health at the moment." She could not recall the starting time of her shift that day, in relation to the timing of her text to Rehana, but she insisted that sending Rehana the text was appropriate. Ms. Marquez stated, "I wasn't understanding why I have to take the rest of the week off because I was making a complaint," suggesting that Ms. Haque's instruction to her was based on her complaint and not on her own decision to call out ten minutes before her shift began (Tr. 64-69, 125-29).

In her verified complaint, Ms. Marquez averred that she inquired about filing a complaint above Rehana's head, but she testified she did not know anyone senior to Rehana and there were no posters at the store. She denied seeing Rehana's boss, Panayiotis Boyiakis (a.k.a. Peter), at the store on a daily basis. Asked about reviewing her paystub for the address of the corporate office, Ms. Marquez claimed that she received her pay through direct deposit. When it was pointed out to her that the company did not have direct deposit capabilities in 2016, she became combative and challenged the relevance of the question to her complaint of sexual harassment (Tr. 117-22; Pet. Ex. 1).

Ms. Marquez testified that she went to the corporate office and collected her final paycheck and a letter dated September 29, 2016, which noted, among other things, her start and end dates with Fresh. She could not recall to whom she spoke at the corporate office, but she did not disclose a reason for quitting because she did not think that anyone cared about her since she "was the little black girl in the business" (Tr. 119, 130-34; Pet. Ex. 7; Resp. Exs. D, E).

Ms. Marquez denied that she ever had child-care problems and stated that she had a great support system with family and friends who took her daughter to school (Tr. 50).

Ms. Marquez testified that she was 22 years old[2] when she faced harassment at Fresh. She told friends and co-workers about it, and kept in touch with co-workers Yari and Manuela, after leaving Fresh (Tr. 69-71). Petitioner presented the following printout of a text exchange on October 24, 2016, between Ms. Marquez and "Y$," whom Ms. Marquez identified as Yari:

> **Complainant**: Good afternoon darling
>
> Y: Hey love
>
> **Complainant**: How are you? I miss 😢 You
>
> Y: I miss you too much
>
> **Complainant**: I miss us working together just not the nasty stuff Tencent use to say smh[3]
>
> Y: Who you telling I'm just here w: all new girls and it's just not the same I don't even bother getting close w/them
>
> **Complainant**: I hope they don't be harassing them new girls
>
> Y: Na they said they too ugly yes flirt lml[4] I can't stand them you know the ones in the back be thirsty
>
> **Complainant**: Exactly they nasty old asses lol looking for toys I guess because everybody so called married
>
> Y: Lml right I can't with them but how's everything
>
> **Complainant**: Prefect (sic) just been working my Lil[5] job it's getting cold girl

(Tr. 69-76; Pet. Ex. 9). The text ended with Yari suggesting that they go out and complainant responding, "Yesssss girlie we do." Ms. Marquez disclosed that she also texted Yari and Manuela before and after she filed her complaint with the Commission. She never asked them about testifying, and she subsequently lost touch with them (Tr. 113-17).

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[2] In paperwork which she submitted when she was offered the job, Ms. Marquez wrote that she was born in November 1991, which made her 24 years old at the time that she was hired (Resp. Ex. A at R-4, R-5, R-6, R-7).
[3] Ms. Marquez testified that "smh" meant "shaking my head" (Tr. 75).
[4] Ms. Marquez testified that "lml" meant "laughing mad loud" (Tr. 75).
[5] Ms. Marquez testified that "Lil" meant "little" (Tr. 76).

Ms. Marquez has been living with her boyfriend for five years. She told him about the harassment when she was on the verge of leaving Fresh. She did not tell him earlier because she was afraid that he would assault Tensin (Tr. 84-86, 149-50).

Ms. Marquez testified that immediately after leaving Fresh, she began to look for another job. She was offered one as an usher at Radio City Music Hall for during the holiday season. After initially accepting the job, she declined it when she learned that she would have to be fitted by a tailor, which made her uncomfortable (Tr. 76-78). She applied for a position as a New York Police Department School Crossing Guard in August 2017 and started that job in September 2017. She preferred that job because it avoided her being in close contact with others and hearing perverted things. Also in 2017, she worked as a cashier at Whole Foods at night. But that job lasted only a couple months. She asserted that it was because she began to be stalked by a former store employee whom she did not know, but who would come to the store looking for her or come to her corner where she worked as a crossing guard. This incident precipitated Ms. Marquez's discussion of harassment with her daughter, when her daughter was around 11 years old. It was an effort to explain to her daughter why she could not walk to school by herself. Ms. Marquez stopped working as a crossing guard and started working for the USPS in 2019 (Tr. 78-80, 82-83, 86-91, 140-41, 151). She summarized that the disrespect that she faced at Fresh left her less outgoing (Tr. 153).

Ms. Marquez's friend, Dynasia Mackins, went away to Howard University ("Howard") in Washington, D.C. ("D.C."), but they kept in phone contact for a while. Ms. Marquez did not tell Ms. Mackins about the harassment while it was occurring because, according to her, what was happening in Ms. Mackins' life was more important. She only divulged the harassment to Ms. Mackins about one year in advance of the trial (Tr. 141-43, 151-52).

Ms. Mackins corroborated that Ms. Marquez has been a close family friend from childhood and that they are not biologically related (Tr. 157-58). She testified that at the beginning of 2016, a friend who was working at Fresh referred her for a job at the subject store. She went to the store and met with Ocean, the store's manager, who inquired about her experience and availability. She then completed paperwork which included an application and tax forms, while seated in the dining area of the café. She remembered being given two work shirts but could not recall if she received the personnel handbook. She started working at the store the following day (Tr. 159-62). Ocean was her direct supervisor for her entire time at Fresh. But Yari and Tensin were also managers.

Ms. Mackins could not recall other managers coming to the store. She described Ocean as someone who was blunt, loud and funny, but who took no nonsense (Tr. 163-64).

Ms. Mackins worked as a cashier at the front of the store. Workers from the front and back of the store interacted as needed. Yari, who was also a cashier at the front of the store, handled money and management. Tensin worked at the back and reported to Ocean. Ms. Mackins testified that almost every other day, Tensin would flirt with her, wink at her and blow kisses her way. According to her, "[i]t wasn't really, it wasn't really a hostile environment, but it was just kind of that, him flirting with me, me ignoring him type thing." He would also call her beautiful and tell her that she looked pretty (Tr. 164-67). Winston, another worker, would also wink and blow kisses at her and say that he wanted her to have his little chocolate babies. She would tell Winston "No" and would make faces. When Ocean overheard the men, she would yell at them, and instruct them to stop bothering the ladies and get back to work. On the occasions that Ocean did not hear them, Ms. Mackins did not report it. She recounted that, at that time, she was 20 years old and timid and did not know how to speak up for herself (Tr. 167, 170-73). She also considered their behavior to be flirtatious and did not recognize it as sexual harassment. Nevertheless, she did not appreciate the gestures and was "disgusted" at the way Winston and Tensin treated her (Tr. 199, 201).

Ms. Mackins does not know if other workers heard Winston's and Tensin's remarks to her, or if they spoke about it amongst themselves because they spoke "Spanish or whatever language" (Tr. 169). She asserted that Winston and Tensin behaved the same way with other employees, whose names she could not recall (Tr. 187). However, respondent introduced its deposition of Ms. Mackins during the week preceding this trial. In it, she was repeatedly asked questions of whether she ever saw Winston or Tensin act inappropriately, blow kisses and wink at, or make sexual comments to other female employees in the store, to which she consistently replied, "I don't remember" (Resp. Ex. S at 35-36). When asked to explain her sudden recollection, Ms. Mackins claimed that she "didn't want to say yes and have a definite answer if [she] didn't remember at the moment . . . and [she] thought about it" (Tr. 192-93).

Ms. Mackins was offered an internship at Howard, commencing in May 2016. Before leaving Fresh, Ocean asked if she knew of anyone to replace her. She immediately thought of Ms. Marquez, whom she felt, could use the extra money. She reached out to Ms. Marquez, who came to the store and met with Ocean. Ms. Mackins testified that Ocean interviewed Ms. Marquez, and she saw Ms. Marquez completing paperwork in the dining area. She does not know what the

documents were, but Ms. Marquez was hired that Friday and started working for Fresh the following Monday. Ms. Mackins never forewarned Ms. Marquez about Tensin's and Winston's behavior when inviting her to apply for the job. She claimed that she did not know how to tell anyone about it. She testified that when she moved away, they lost contact for a while. (Tr. 175-79, 198, 200-05).

Ms. Mackins did not indicate how she and Ms. Marquez reconnected. She still resides in D.C. and visits New York occasionally, but since the end of 2017, she and Ms. Marquez have spoken every few months. About one year ago and for the first time, they shared their experiences at the store when Ms. Marquez told her about the harassment, about the comments made about her butt, that Rehana had done nothing about it, and that she was suing Tensin and Fresh for sexual harassment. Ms. Mackins was "happy" that Ms. Marquez was suing for sexual harassment. She revealed that about a month or so after they shared their experiences at the store, Ms. Marquez asked her to be a witness in this case, but Ms. Marquez never told her about any stalking incident while working at Whole Foods (Tr. 179-81, 196-98, 206). She described Ms. Marquez as "sweet," "doesn't take any nonsense," "speaks up for herself," yet she "internaliz[ed] a lot of things." Ms. Mackins admitted that she does not see Ms. Marquez very often, but when asked on direct, whether she had "noticed" any changes in complainant over the last year, she replied that she noticed Ms. Marquez becoming more reserved, more of a homebody, and staying to herself. She also noticed that Ms. Marquez had become closer to her daughter, and with men, "she shuts everything down. Like even if there's a guy genuinely trying to talk to her or flirt with her, like she just shuts it down completely." On cross, Ms. Mackins claimed that she began to notice the changes in complainant about three years ago, thus contradicting her direct testimony (Tr. 183-86, 201-02).

Ray Warren has been the complainant's boyfriend since 2014 and has been a City employee for seven and a half years (Tr. 209-10). He described Ms. Marquez as "loving, kind, affectionate, outgoing, a great mom," who helps people a lot. He added that theirs is a healthy, romantic relationship, and claimed that they are on the phone with each other for most of the day (Tr. 210-11).

Mr. Warren testified that for about a month or two in 2016, Ms. Marquez became moody, she did not laugh much and was not forthcoming. He posited that at some point in June, she began to distance herself, but he was also certain that when he began to observe the changes in her, Ocean was not the manager. He related that Ms. Marquez would be up all night, displayed less affection,

and would not stay in the same room with him. He wondered if he was the problem and whether he was working too late, but she assured him that everything was okay. She became isolated and no friends would visit. Also Ms. Marquez was no longer "chummy" with her daughter, and she became overprotective. Mr. Warren testified that around the end of July, Ms. Marquez told him that a supervisor at work, named Tensin, was harassing her by being sexually explicit, saying sexual things to her, describing the way she looked and the way she dressed. She felt ashamed that she may have called the attention to herself. She asked Tensin to stop but he did not. Mr. Warren and Ms. Marquez decided that she should report Tensin to the manager. But she told him that she got no help from Rehana and felt defeated. They discussed going above Rehana's head to speak with her boss, but Rehana never provided Ms. Marquez with the necessary information. Mr. Warren maintained that as a result, in August 2016**,** Ms. Marquez told him that she was going to file a complaint. He asserted that Ms. Marquez no longer felt safe at work. He echoed Ms. Marquez's testimony about her reason for rejecting a job at Radio City Music Hall and accepting a job at Whole Foods (Tr. 211-23, 226-30, 232-36, 239-42, 246-47). According to him, up until August 2017, Ms. Marquez had good and bad days. But after her job at Whole Foods, she seemed to regress (Tr. 243-46).

During cross-examination, Mr. Warren admitted that he moved in permanently with Ms. Marquez in 2017. Before that, he spent "more than five days out of the week there," and would shuttle between his mother's home and Ms. Marquez's. Yet he also stated that he was at Ms. Marquez's "24/7" (Tr. 238). Mr. Warren denied that he prepped for his testimony or that he and Ms. Marquez discussed in detail what had happened at Fresh. Instead, he touted that he has a good memory (Tr. 239-41). He insisted that Ms. Marquez never went to Fresh's corporate office because he had asked her about going there and she denied knowing about a corporate office. He was also adamant that she never received her final paycheck, because she told him that she had not (Tr. 247-51).

Panayiotis Boyiakis worked at Fresh from September 2005 to March 2020 but was laid off due to the COVID-19 pandemic. Since August 2021, he has been a manager of the Grill Café & Deli in Long Island. As senior operations supervisor of Fresh, he oversaw the operations of particular stores, including the subject store. The subject store opened in 2008, and Mr. Boyiakis was its operations supervisor until he left Fresh (Tr. 263-66).

Mr. Boyiakis described "onboarding" as the process of inputting a potential job candidate's information into the company's computer system for purposes of timekeeping and paychecks. Paperwork for onboarding is completed at HR because the stores' managers do not have access to the necessary paperwork, which is never delivered to the stores. Mr. Boyiakis testified that since he started working at Fresh, the company's policy was to have a prospective hire go to the corporate office to meet with HR staff to complete the paperwork. HR then provides the new hire with uniforms, which are not kept at stores. He added that the only form that is kept at the stores is a wage-rate sheet, which is used for incumbents to get wage increases. New employees sign a wage-rate form at HR (Tr. 265-70, 283-84, 286).

Tensin was already a Fresh employee when Mr. Boyiakis joined the company, and Tensin worked at the same Fresh store as complainant, for about three to four years. Mr. Boyiakis, who was responsible for a cluster of seven stores, visited the subject store about four times weekly, to support Rehana, who had been promoted from a telephone operator's position to a first-time general manager of the store. Mr. Boyiakis often spent about four to six hours daily at the store, and conducted quality control, conversed with employees, and made observations. He would introduce himself by title to new employees and would invite them to raise questions with him. Mr. Boyiakis also relayed his observations to Rehana, whom he described as a very serious person, who was professional, fair and honest, and came from a conservative background. He stated that he had never received complaints about Rehana treating employees inappropriately. Nor did he observe employees engage in frivolous behavior (Tr. 270-72, 276, 291, 298).

Mr. Boyiakis described Tensin as quiet, timid and professional. Tensin operated the grill and was very busy in the morning because the store, which opened at 6:00 a.m., was one of the higher-volume stores. Tensin's grill work would normally be completed by 2:30 p.m. Mr. Boyiakis never observed Tensin act inappropriately towards an employee and he never received related complaints. According to him, the company had a written policy in its manual, and sexual harassment was not tolerated. The company also held trainings which were initially conducted by respondent's counsel. When it became proficient in doing so, HR conducted trainings with employees in each of its stores. Mr. Boyiakis recalled one complaint of discrimination which was filed by someone alleging that the company did not hire him because of his race, and which was dismissed. He also related that employees had filed complaints with HR about inappropriate treatment. He did not quantify the complaints or disclose the nature of the inappropriate treatment

complained of but disclosed only that they were investigated and resolved. Mr. Boyiakis stated that if a manager was found to have engaged in inappropriate behavior, the manager would be terminated (Tr. 272-75, 288).

Mr. Boyiakis first met Ms. Marquez just before Ocean hired her in 2016. He had a two or three-minute talk with her about her work experience, then she went to the office to complete paperwork, show proper identification and pick up her uniform and the policies of the organization, which was part of Fresh's long-time hiring policy. When shown complainant's wage rate form, Mr. Boyiakis asserted that it was completed at HR because Ms. Romero of HR, had prepared and signed it. Mr. Boyiakis stated that during Ms. Marquez's tenure at the store, he spoke with her once or twice after Ocean or Rehana notified him that she had been tardy on occasion. During his conversations with her, she disclosed that she had childcare problems. She was given a verbal warning because of the impact of her tardiness on the store and its workers. According to Mr. Boyiakis, Ms. Marquez never told him that she was being treated improperly by Tensin or Rehana. Nor did she ever indicate that she wanted to file a formal complaint of harassment. However, when he learned of her complaint, he went to the store, told Rehana and Tensin about it, and directed them to report to the corporate office to be interviewed by HR (Tr. 265, 276-80, 283-84, 295-96, 300; Resp. Ex. A at R-8).

Both Tensin and Rehana denied the conduct of which they are accused.

Tensin Tsering testified that he worked for Fresh for 20 years and for the subject store, from 2014 to 2017. He was an assistant manager, who worked at the grill in the morning and on the floor in the afternoon, helping customers. He oversaw about 15 to 20 employees, which included kitchen workers. He said that he voluntarily left Fresh in 2017, to become an Uber driver. He and his family moved to Minneapolis, but he plans on returning permanently to New York City, and is currently looking for an apartment (Tr. 303-05, 315-18).

Mr. Tsering knew Mr. Boyiakis as a store supervisor. He corroborated that Mr. Boyiakis visited the store about four to five times weekly and would spend a couple of hours on each visit. Mr. Tsering also testified that he knew Ms. Marquez from the subject store. He disavowed her testimony that he winked or blew kisses at her, commented on her posterior, or threatened to smack her with a spatula. He also denied suggesting that he would cheat on his wife with Ms. Marquez or that he would take her home to his wife. Mr. Tsering described his interaction with Ms. Marquez as professional and decent, but he recalled one conversation during which she asked about his

plans for the weekend. When he told her that his wife and kids were away on a vacation and he would be staying home, Ms. Marquez inquired whether Mr. Tsering was asking her out, to which he replied in the negative. He also claimed that Ms. Marquez sought relationship advice from him because she found him to be "very mature, very respectful," and he emphatically denied that she ever told him that she was offended by anything he said to her (Tr. 305-09, 323-25, 335-36).

Mr. Tsering learned about Ms. Marquez's complaint against him after Lisa Grant from HR, called and summoned him to her office. At their meeting, Ms. Grant told him about the complaint and elicited a statement from him which she commemorated in her own handwriting. Upon reading it, Mr. Tsering signed the one-page statement, which was dated November 9, 2016. He maintained that this was the first time that anyone had ever filed a complaint against him. The statement appeared to be a blueprint for Mr. Tsering's testimony, in that it reflected that on one occasion, after he mentioned to Ms. Marquez that his family was going away for the weekend, she asked if he wanted her to come over. It also indicated that Ms. Marquez sought advice from him regarding her boyfriend. While he denied threatening to smack her with a spatula, the statement noted that he would hold a spatula in his hand while speaking to staff members. The statement further indicated that on several occasions, Ms. Marquez mentioned that Mr. Tsering was "the kind of guy that would not cheat on his wife." In the statement, he also declared that, "[a]ll of [his] actions were innocent without any sexual intent." During cross-examination, Mr. Tsering disclosed that he had read the statement on the morning of the trial to refresh his recollection (Tr. 305-06, 309-12, 319-22, 325-27; Resp. Ex. L).

Mr. Tsering denied that Ms. Grant had shared with him, Ms. Marquez's allegation about his use of the spatula towards her, but he claimed that he made reference to a spatula in his statement because "when Lisa told me like anything about sexual harassment and do you harass or anything like that, that's the only thing I'm doing." He added that sometimes, when cashiers come to him at the grill and it is very busy, he gets stressed and would react by hitting the spatula on the grill (Tr. 344). Finally, he testified that he had never heard his co-workers utter crude, offensive, or sexual language. Nor did he hear them make remarks about women's bodies (Tr. 331).

Mr. Tsering acknowledged that Fresh's employee handbook prohibits sexual harassment. The only copy presented was one for which he signed on November 9, 2016, the same date that he met with Ms. Grant regarding Ms. Marquez's complaint. By that time, complainant had already

quit her job at the subject store. But Mr. Tsering testified that he had previously received a handbook which, he conceded, gets updated periodically (Tr. 348-51; Pet. Ex. 17).

Rehana Haque has worked for Fresh for approximately 14 years. For the first 10 years, she was a phone operator. She was promoted to shift leader, then assistant manager at Fresh's Seventh Avenue store, before becoming general manager at the subject store in July 2016 (Tr. 354-56).

Ms. Haque testified that new employees were generally interviewed by the supervisor or Ms. Grant in HR, which is where they complete paperwork. She asserted that paperwork for the on-boarding process is not kept at the store, and she had never seen anyone complete paperwork there. Instead, new hires go to HR where they receive a pamphlet and a sexual harassment paper which, in addition to their paychecks, display the corporate office address (Tr. 359-60). Ms. Haque acknowledged that the Fresh Handbook provided an e-mail address and phone number for George Buono, to whom instances of sexual harassment should be reported (Tr. 385; Pet. Ex. 19). Respondent produced a copy of its handbook (Resp. Ex. I). The handbook provided a stepping procedure for resolving complaints by directing that the employee speak first with his/her manager, then supervisor, then senior management (Resp. Ex. I at LEB00046). It also identified what constitutes sexual harassment and directed workers who experienced or witnessed harassment to call or e-mail George Buono at a number and e-mail address which was also provided (Resp. Ex. I at LEB00050).

Ms. Haque recalled that both Tensin, who was an assistant manager,[6] and Ms. Marquez, were working at the subject store when she became general manager and that complainant worked under her for about two months in 2016. She had seen Tensin at other Fresh stores where she had worked but he was not a friend. At the subject store, he worked at the grill in the morning and helped with customers in the afternoon. All the workers had access to the kitchen, and Tensin's job took him there about three or four times per day. Ms. Haque described Tensin as soft-spoken and shy, and a person of few words. She stated that she had never seen him act inappropriately towards, engage in jokes, and fool around or act in a flirtatious manner with store employees, including Ms. Marquez. And she never received complaints about him, from complainant or anyone else. Ms. Haque denied that she herself made inappropriate comments about Ms. Marquez's appearance or her body, and she acknowledged that she could get in trouble if she refused to provide an employee with information on how to file a sexual harassment claim (Tr.

[6] Ms. Haque conceded that assistant managers may assist in the hiring and termination of staff (Tr. 388; Pet. Ex.15).

354-59, 365-68, 375, 385-87). Ms. Haque understands a little Hindi and stated that Tensin would occasionally say something in Hindi which she understood (Tr. 391).

Ms. Haque also described Ms. Marquez as "soft-spoken" and assessed her as an "okay" employee, who did not generally interact with the kitchen staff or have problems with them, except for one occasion when she had an issue with Winston regarding a bagel. She identified attendance issues, such as when Ms. Marquez would not report for work or would arrive late. Also, she had received a customer complaint against Ms. Marquez, which she had to verbally address. Ms. Haque claimed that she twice wrote up complainant and reported the attendance issues to Mr. Boyiakis, who, almost daily, spent about three to four hours at the store, and whom staff knew to be a member of senior management. Ms. Haque testified that she would handwrite or generate on her computer, disciplinary notices, which she kept in her office, and which she would forward to HR after a worker leaves the company. Her office is accessible by all workers as it has no door. Ms. Haque asserted that following Ms. Marquez's departure from Fresh, she was unable to find paperwork related to Ms. Marquez's disciplinary write-ups (Tr. 360-65, 367, 379-80, 383, 392-93, 406-07).

When presented with Ms. Marquez's text message to her at 6:50 a.m. on September 28, 2016, Ms. Haque noted that an employee is required to give an hour or two advance notice, if unable to report for work, and that Ms. Marquez's start time was 7:00 a.m. Ms. Haque did not think it right to bring someone to replace Ms. Marquez for one day, which is the reason she told her to take the rest of the week off. Upon Ms. Marquez's decision to quit, her instruction to Ms. Marquez to go to the main office for her paycheck was, in effect, a directive for Ms. Marquez to go to HR. Ms. Haque then informed Ms. Grant that Ms. Marquez was no longer working for Fresh, and that her final paycheck should be readied for pickup (Tr. 368-71; Pet. Ex. 16).

At some point, Ms. Grant summoned Ms. Haque to HR. Ms. Haque told Mr. Boyiakis, who was at the store at the time, that she had to go to HR. Tensin had left the store before her and was not at HR by the time she arrived. At HR, Ms. Grant told her about the complaint. Like Tensin, Ms. Haque gave a statement, which Ms. Grant wrote, and Ms. Haque signed. She denied that she and Ms. Grant spoke regarding the contents of her statement. She claimed that Ms. Grant wrote the statement because her own handwriting was not very legible and there was no computer in the room. Ms. Haque's statement indicated that she had had several counseling sessions with Ms. Marquez, who had displayed poor attendance and conduct and had had "several outbursts" in

the presence of customers. The statement further noted that complainant had to be instructed to refrain from "speaking loudly & unprofessionally while guests were present." This directly contradicted her earlier testimony that complainant was soft-spoken. She also wrote that Ms. Marquez once articulated that she should fall down on the floor and sue the company. At trial, Ms. Haque conceded that attendance issues and misconduct were unrelated to a claim of sexual harassment (Tr. 372-74, 395-400; Resp. Ex. N; Pet. Ex. 11).

Ocean Sari was hired by Fresh in 2001 and worked at the subject store from 2008 to 2016, at which time, she was the store's manager (Tr. 411). Ms. Sari testified that to become hired, individuals had to complete paperwork at the HR office. It was never done at the store. She denied that she was ever involved in hiring individuals to work at the subject store (Tr. 412, 416). Ms. Sari recalled working with Tensin for a couple of years. She found him to be "hardworking" and "quiet" and she never saw him engage in inappropriate behavior such as blowing kisses to employees, joking around in a sexual way with women in the store, making comments about a woman's body or proposing sex with women in the store (Tr. 413). Ms. Sari testified that she did not remember Ms. Mackins or Ms. Marquez. But she remembered Mr. Boyiakis, her supervisor, who came to the store daily. In the morning, he made sure that there were adequate supplies and that employees had shown up for work, and he would assist if they were short-handed. He returned before lunch and left just before dinner. He also interacted with employees (Tr. 413-15). Ms. Sari testified that she expected her employees to work as a team and to respect each other. She never permitted employees to fool around or engage in horseplay and she never permitted crude or inappropriate comments to be made, nor did she ever witness such behavior (Tr. 419-20).

For 16 years, Lisa Grant has worked for Fresh, where she has been its HR Director for more than 10 years. She began as the personal assistant to the owner of the company, and George Buono was her supervisor until he left the company in 2020 (Tr. 424, 453). As HR Director, Ms. Grant processes payroll, speaks with employees, ensures that the company is complaint with labor laws, has sexual harassment meetings and processes garnishments. Her description of the on-boarding process was consistent with Mr. Boyiakis's, Ms. Haque's and Ms. Sari's, that is, that paperwork is completed at the corporate office and the new hire is given the company handbook and uniform. Ms. Grant stated that in 2016, the on-boarding process could not be accomplished at the store because the store managers did not have access to the system or to all of the documents.

Also, as of today, direct deposit is still not a company option for paying employees (Tr. 425-26, 454).

Ms. Grant testified that the company has a zero-tolerance policy against sexual harassment. To that end, it provides annual trainings, there are posters in the stores, employees receive a sexual harassment fact sheet during the on-boarding process, and it is mentioned in the handbook. She added that area supervisors who visit the stores speak to all employees and are available to employees if there are issues. There is also a confidential hotline for the reporting of sexual harassment (Tr. 426-27).

Ms. Grant recalled that Tensin worked for the company and that he had resigned a few years ago. She denied that she had ever received complaints about his or Ms. Haque's behavior in the workplace (Tr. 427-28). She testified that she first met Ms. Marquez at the corporate office during Ms. Marquez's on-boarding. She provided documents for Ms. Marquez to complete, accepted a valid photo ID and social security card from Ms. Marquez, and also provided her with the handbook, the sexual harassment handout and the store uniforms, which are kept at the corporate office and not at the stores. Ms. Grant testified that Ms. Marquez signed the wage notice form in her presence and she briefly described the policies and procedures of the company and advised Ms. Marquez to read the handbook. She recalled that Ms. Romero, whose signature is on the form, assisted her with Ms. Marquez's on-boarding (Tr. 430-35, 452; Resp. Ex. A).

Ms. Grant stated that she spoke with Mr. Boyiakis, Ms. Haque and Ms. Sari regarding Ms. Marquez. Ms. Sari reported to her that Ms. Marquez had been late a few times. Ms. Grant advised Ms. Sari to speak with Ms. Marquez to try and ascertain the reason and to see if they could help. Then Ms. Haque reported that Ms. Marquez had attendance issues, which involved a child. Ms. Grant advised Ms. Haque to issue a disciplinary action form. Ms. Haque also reported an issue with Ms. Marquez's conduct for which Ms. Grant could not recall the details. But she remembered that she had asked Mr. Boyiakis to visit the store to observe Ms. Marquez's conduct and to speak with her regarding her attendance. Mr. Boyiakis relayed to Ms. Grant that he had had spoken with Ms. Marquez, and again, a child was mentioned (Tr. 435-37).

Ms. Grant was telephonically informed by Ms. Haque that Ms. Marquez no longer worked for the company. She directed that complainant come in for her final paycheck and for an exit interview. Ms. Grant testified that during the exit interview, she inquired of Ms. Marquez whether there were any issues or problems during her employment, but Ms. Marquez did not disclose that

she had experienced any mistreatment (Tr. 437-40, 453). At the exit interview, Ms. Grant gave Ms. Marquez a termination letter which was prepared and signed by Ms. Romero, as well as her last paycheck, which was accompanied by a form containing Ms. Marquez's name, address of the store at which she had worked, and her date of separation. It also displayed the check number and net amount of the check, and included lines for signatures of the employee, the manager (in this case, Ms. Grant), and a witness. It was signed by Ms. Grant who noted in her own handwriting that Ms. Marquez "decided not to sign." The final section of the form reflected that Ms. Marquez had abandoned her job. The paycheck displayed the address of the subject store and the address of the corporate office on Madison Avenue, which were also replicated on the attached Earnings Statement. Ms. Grant testified that that was the typical format of the company checks (Tr. 441-44; Resp. Exs. D, E).

Respondent submitted a Disciplinary Action Form which Ms. Marquez signed on June 8, 2016. Ms. Grant testified that she had received the form from Ms. Sari following her resignation. But the form displayed Ms. Haque's name as manager, which Ms. Grant inserted because Rehana was the manager by the time she received it (Tr. 445-46; Resp. Ex. C).

Ms. Grant testified that she learned about Ms. Marquez's complaint after it had been mailed to the company in 2016. Upon receipt, she immediately summoned Rehana and Tensin to her office to get their statements.[7] They arrived separately, and she met with them individually. She stated that she did not show them the complaint but relayed the gist of it to each. Tensin asked Ms. Grant to write his statement, which she did, after which, he read and signed it. She conceded that he signed for a copy of the handbook at the same time and claimed that it was given to him at his request for him "to go home and make sure he reviewed it so he understood." Likewise, Ms. Haque asked Ms. Grant to write her statement because "her spelling is not the greatest. Neither his her handwriting." Ms. Haque then read and signed the statement. After receiving Tensin's and Rehana's statements, Ms. Grant contacted respondent's counsel (Tr. 430, 447-50, 466-67, 470-71; Resp. Exs. L, N). She recalled that Mr. Boyiakis had also spoken with Tensin and Rehana and relayed to her that neither of them was aware of any harassment or felt uncomfortable working at the location, nor did they witness harassment (Tr. 464-65).

[7] During cross-examination, Ms. Grant asserted that neither Rehana nor Tensin was required to make a statement but that they volunteered to do so (Tr. 465, 468).

Ms. Grant acknowledged that the company had previously been sued for discrimination, but the case was dismissed. The company had also received an unquantified number of complaints about harassment or discrimination. They were investigated and resulted either in a finding that the complaint was unfounded or resulted in someone's termination (Tr. 450-51).

ANALYSIS

Petitioner and Ms. Marquez seek redress for violations of the City Human Rights Law, which prohibits discrimination in the terms, conditions, or privileges of employment based upon gender. Admin. Code § 8-107(1)(a) (Lexis 2022).

To prevail with gender discrimination and hostile work environment claims, petitioner must demonstrate by a preponderance of the evidence that Tensin and Rehana treated Ms. Marquez worse than other employees because of her gender. *Williams v. New York City Hous. Auth*., 61 A.D.3d 62, 78 (1st Dep't 2009); *see also Mihalik v. Credit Agricole Cheuvreux North America Inc.*, 715 F.3d 102, 110 (2d Cir. 2013) (*Williams* standard applied in HRL disparate treatment cases brought in federal court). The First Department has noted that any conduct that "objectifies women . . . [may] be actionable." *Williams*, 61 A.D.3d at 80, n. 30; *see Hernandez v. Kaisman*, 103 A.D.3d 106, 115 (1st Dep't 2012) ("comments and emails objectifying women's bodies and exposing them to sexual ridicule, even if considered 'isolated,' clearly signaled that defendant considered it appropriate to foster an office environment that degraded women."). So long as the conduct complained of is shown to be more than "petty slights and trivial inconveniences," *Williams*, 61 A.D.3d at 80, the severity and pervasiveness of the harassing conduct are relevant only to the issue of damages, not to the question of liability. *Id.* at 76.

The United States Supreme Court has stated that "whether an environment is 'hostile' or 'abusive' can be determined only by looking at all the circumstances." *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 23 (1993); *Faragher v. Boca Raton*, 524 U.S. 775, 787-88 (1998).

As an initial matter, this case was problematic because there were issues of credibility on both sides. In assessing credibility, this tribunal has considered factors such as: "witness demeanor, consistency of a witness' testimony, supporting or corroborating evidence, witness motivation, bias or prejudice, and the degree to which a witness' testimony comports with common sense and human experience." *Dep't of Sanitation v. Menzies*, OATH Index No. 678/98 at 2 (Feb. 5, 1998), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD 98-101-A (Sept. 9, 1998).

First, Ms. Mackins' testimony that she did not disclose to her childhood friend, the "disgusting" behavior to which she was exposed when she encouraged her to apply for a job at the store, was not surprising. Her explanation that she thought that the behavior was flirtatious and did not recognize it as sexual harassment, was credible, especially given her age at the time of her own experience. But I found it inexplicable that she noticed changes in Ms. Marquez and observed her reaction to other men, while residing in D.C.

Next, there were several inconsistencies in Mr. Warren's testimony which made him appear to be coached and made his testimony unreliable. For instance, he claimed that Ms. Marquez began to distance herself in June 2016, while at the same time expressing certainty that Ocean was not the manager when he noticed changes in Ms. Marquez. In June 2016, Ocean was still Ms. Marquez's manager. Therefore, if Mr. Warren began to observe changes in Ms. Marquez in June 2016, this would be at odds with her testimony that there was no inappropriate behavior during Ocean's tenure. This led me to conclude that his identification of June 2016, as the month that she purportedly began to display changes, was intended to convey that whatever happened, had a protracted effect on Ms. Marquez. Further, Mr. Warren's testimony that Ms. Marquez would be up all night and would not stay in the same room with him causing him to wonder if he was working too late, did not make sense because they were not living together at the time. When called out on it, he self-corrected, stating that he spent more than five days per week at her place. He also stated that he was there "24/7." Finally, his claim that she never received a final paycheck because she told him so was in direct contradiction of the hard evidence and Ms. Marquez's testimony.

Turning to respondent's witnesses, I found it remarkable that almost identical talking points were used to describe Tensin by Mr. Boyiakis, Ms. Haque, and Ms. Sari, to a lesser extent. Even though I was persuaded that Mr. Boyiakis visited the store often to support Ms. Haque, who had been promoted from a phone operator to the store's general manager, his testimony that he spent four to six hours daily at the store was exaggerated given that he supervised several other stores and this would have left little or no time for the supervision of the others. In addition, his testimony that upon learning about Ms. Marquez's complaint, he instructed Tensin and Rehana to report to HR, conflicted with their testimony and Ms. Grant's, that she was the one who summoned them to HR. Also, I am not convinced by any of respondent's witnesses, including Ms. Sari, that the Fresh store managers lacked the capability of on-the-spot hiring because the requisite paperwork and

uniforms were not kept at the store. In any event, I found the testimony regarding where Ms. Marquez's on-boarding process took place, to be a smoke screen to detract from the real issue of whether or not harassment occurred.

Further, while it was possible that Tensin requested Ms. Grant's assistance in the commemoration of his statements, I did not believe that Ms. Haque, as the store's general manager, would have made a similar request. Moreover, the statements which were purportedly those of Mr. Tsering and Ms. Haque, were couched in terms that were designed to defend and protect the company, rather than present a clear and accurate recounting of what actually occurred. Because Ms. Grant, admittedly, had a vested interest in protecting the company, I found it more likely than not, that the statements were guided by her. I note that even though Mr. Tsering claimed that Ms. Grant had not shared details of the complaint against him, his statement oddly included information from Ms. Marquez's complaint, such as his reference to a spatula. In addition, I found Mr. Tsering's testimony and his written statement that Ms. Marquez seemed to be inviting herself over to his place while his family was away, were intended to convey that she made sexual advances towards him. And his claim that Ms. Marquez sought relationship advice from him was bizarre.

I found it oddly coincidental that Mr. Tsering left Fresh in 2017 to drive for Uber, after approximately 20 years with the company. His testimony that he left on his own accord was therefore suspect. While there was no proof of it, I am more inclined to believe that his departure was precipitated by Ms. Marquez's complaint which was filed towards the end of 2016. Also, I did not believe Mr. Tsering's denial that Ms. Marquez expressed her displeasure with what he was saying and asked him to stop.

While there was no documentation to support Ms. Haque's and Mr. Boyiakis' testimony that Ms. Marquez had been disciplined previously for the time and attendance issues, Ms. Marquez's own testimony that she had started to call out "here and there" (even though she did not specify when she started to do so), supported their testimony that there were indeed time and attendance issues with Ms. Marquez. Moreover, their testimony was bolstered by Ms. Marquez's text to Ms. Haque on September 28, 2016, just ten minutes before her shift began, to inform Ms. Haque that she would not be in. No doubt, Ms. Haque found the timing of this text to be outrageous. But I did not believe her denial that Ms. Marquez complained to her about Mr. Tsering. I found it more likely than not, that as an inexperienced manager, she did not confront and address it.

This brings me to complainant's testimony and the evidence presented in support of her complaint.

I found credible, Ms. Marquez's testimony that Tensin made indiscriminate and inappropriate remarks that were sexist and offensive. And I base that finding primarily on Ms. Marquez's text exchange with former co-worker Yari (Pet. Ex. 9) in October 2016, the month following her departure from Fresh, in which Ms. Marquez expressed that she did not miss the "nasty stuff" that "Tencent" (sic) would say, and Yari appeared to endorse her statement by responding, "Who you telling . . . ." Even though the exchange occurred about one week before Ms. Marquez filed her verified complaint on November 3, 2016, it appeared to be a spontaneous and authentic discourse in which Tensin's behavior (which they clearly did not appreciate) was raised, as well as their concern about whether the "new girls" were being harassed. Therefore, I have no doubt that Tensin made remarks that were derogatory and offensive to Ms. Marquez and the other female employees.

I found Ms. Marquez's testimony that Ms. Haque laughed at her and told her that "my mans ain't looking at you," and that if she (Ms. Haque) were a man, she would look at Ms. Marquez's thighs, to be incredible and contrived. To be certain, Ms. Haque's performance as a manager, demonstrated by her failure to address Ms. Marquez's complaint, was inadequate. But it was clear from the manner in which she presented at trial that she would not have responded in either the style or with the substance attributed to her by Ms. Marquez. Further, Ms. Marquez's injection that somehow her race factored into Ms. Haque's lack of action was not credible. There was nothing to support that other workers of a different race were treated differently.

I did not believe that Ms. Marquez was not given a copy of the handbook when she was first hired. Her claim that respondent would have given it to her if they wanted to, suggested that respondent is selective in which new hire is given the handbook, which is a preposterous notion. And at the very least, the congratulatory letter which she received when she was hired, provided her with information on the location of HR at the corporate office and how to file a complaint, as well as a confidential voicemail number. Her denial as to the location of the corporate office was defeated by her appearance at that office to collect her final paycheck, the day following her announcement that she would not return.

Also, petitioner presented no evidence to support Ms. Marquez's testimony that Ms. Haque began to cut her hours, or that she received payment through direct deposit and not by company

check which reflected the address of the corporate office. As previously noted, Ms. Marquez became quite combative when respondent was pointed out to her that the company did not have direct deposit capabilities in 2016.

Finally, while Ms. Marquez testified that she rejected a job offer to work at Radio City Music Hall and became a school crossing guard almost one year later, her text exchange with Yari in October 2016, indicated that she was already employed at the time of the text when, unprompted, she informed Yari that she "just been working [her] Lil job" (Pet. Ex. 9). Notably, no one probed into this disclosure at the trial.

Negative Inference

Respondent asked that I draw a negative inference from petitioner's failure to call Ms. Marquez's former co-workers, Yari and Manuela, who, Ms. Marquez posited, witnessed Tensin's behavior and were present for his comments. Resp. Br. at 11-12. Specifically, respondent asked that I infer that had these witnesses been called, their testimony would have debunked petitioner's case. Even though respondent's request was made in its closing brief, it should have come as no surprise to petitioner since, during his cross-examination of Ms. Marquez, counsel repeatedly probed into the whereabouts of the two witnesses and whether they would be testifying at the trial.

Respondent also seeks dismissal based on many of the inconsistencies in petitioner's case.

An adverse/negative inference based on a missing witness may be appropriate where the moving party has laid a foundation that the witness has knowledge about a material issue, that he would naturally be expected to give testimony favorable to the party who failed to call him, and that the witness is available to that party. *People v. Gonzalez*, 68 N.Y.2d 424, 427 (1986); *see, e.g., Police Dep't v. Smith*, OATH Index Nos. 345/01 & 346/01 at 22 (May 23, 2001); *Transit Auth. v. Davila*, OATH Index No. 383/92 at 4-5 (Mar. 23, 1992). To defeat the "missing witness" charge, the opposing party must:

> account for the witness' absence or otherwise demonstrate that the charge would not be appropriate . . . by demonstrating that the witness is not knowledgeable about the issue, that the issue is not material or relevant, that although the issue is material or relevant, the testimony would be cumulative to other evidence, that the witness is not "available," or that the witness is not under the party's "control" such that he would not be expected to testify in his or her favor.

Gonzalez, 68 N.Y.2d at 428-29. The "availability" of a witness "refers to the party's ability to produce such witness." Control is a "relative concept" that "although not susceptible of precise definition, does not concern physical availability but rather the relationship between the witness and the parties." *Id.*

Here, based on Ms. Marquez's testimony, Yari and Manuela were material witnesses to Tensin's remarks specifically targeting her person and his proposition to take her home to his wife. Thus, their testimony would naturally have been favorable to and bolstered petitioner's case. Moreover, it would not have been cumulative. Yet, petitioner failed to call either. While neither witness was under petitioner's control, petitioner did not explain what steps it took to reach out to them and whether or not they were available. In fact, in its closing brief, petitioner made no mention of either witness. Because of petitioner's odd silence, I find it appropriate to draw a negative inference, but only to the extent that Ms. Marquez's testimony regarding Mr. Tsering's sexual overtures about her physique and his promise to take her home, would not have been corroborated by them.

However, that does not minimize petitioner's evidence, which I found sufficient to support that Mr. Tsering sexually harassed Ms. Marquez and the store's other female workers, by making offensive remarks which Ms. Marquez and Yari described as "nasty." Such conduct violated section 8-107(1) of the Human Rights Law. I also find that Ms. Marquez told Ms. Haque about the harassment, but Ms. Haque failed to act, thereby fostering a hostile work environment. Such failure also violated section 8-107(1) of the Human Rights Law.

Constructive Discharge Claim

Petitioner asserts that complainant was constructively discharged.

Constructive discharge occurs "when [the] employer, rather than discharging the [employee] directly, deliberately created working conditions so intolerable that a reasonable person in the [employee's] position would have felt compelled to resign." *Golston-Green v. City of New York*, 184 A.D.3d 24, 44 (2d Dep't 2020) (probationary sergeant's transfer to a midnight shift which she could not fulfill because of her own personal circumstances was not adverse employment action as the plaintiff was not treated differently from other similarly situated employees. Nor was it a constructive discharge since all sergeants were expected to fulfill various shifts in accordance with the needs of the job); *see also Crookendale v. NYC Health & Hospitals*

Corp., 175 A.D.3d 1132, 1132 (1st Dep't 2019) (even though plaintiff's description of being touched and complimented inappropriately was sufficient "to permit a jury reasonably to find that she was treated 'less well' than her male colleagues because of her gender," the constructive discharge claim was dismissed because she failed to submit evidence that defendant "deliberately created working conditions so intolerable, difficult or unpleasant that a reasonable person would have felt compelled to resign." *Id.*

"Deliberate" is more than "a lack of concern"; "something beyond mere negligence or ineffectiveness" *see Polidori v. Societe Generale Groupe*, 39 A.D.3d 404, 405 (1st Dep't 2007); *see also Albunio v. City of New York*, 67 A.D.3d 407, 408 (1st Dep't 2009) (finding that an NYPD captain and an NYPD officer were constructively discharged, where the captain was stripped of her command and forced to transfer to a position viewed as a demotion after she opposed her supervisor's discrimination against the co-plaintiff officer, who was barred from a position for which he was extremely qualified and also transferred to a position viewed as a demotion, because he was perceived as gay and stereotyped as a child molester, which perception caused him to experience anxiety and panic attacks, depression and suicidal ideation).

"[C]ourts . . . generally have refused to find a constructive discharge where an employee had an avenue through which [she] could seek redress for the allegedly 'intolerable' work atmosphere leading up to [her] resignation but failed to take advantage thereof." *see Murphy v. Dep't of Education*,[8] 155 A.D.3d 637, 640 (2d Dep't 2017), citing *Silverman v. City of New York*, 216 F.Supp.2d 108, 115 (E.D.N.Y 2002), *aff'd*, 64 Fed. Appx. 799 (2d Cir. 2003) ("threats of termination may be sufficient to establish constructive discharge" but plaintiff was not constructively discharged where he failed to take advantage of his avenue for redress by seeking a hearing before his resignation, to address the allegedly "intolerable" work atmosphere).[9]

More recently, at least one other jurisdiction has recognized the difficulty of proving constructive discharge. The Seventh Circuit has viewed such claims as high hurdles which require a showing of "working conditions even more egregious than that required for a hostile work environment claim." *Stamey v. Forest River, Inc.*, 2022 App. LEXIS 16883 at *10 (7th Cir. 2022) (the court nevertheless remanded the case to the lower court which had granted employer's

[8] Plaintiff's claim was brought under the federal Age Discrimination in Employment Act. *Id.* at 637.
[9] Silverman's asserted violations of the Fourteenth Amendment to the United States Constitution, the New York State Constitution, and the New York State and City Human Rights Laws. *Id* at 112.

summary judgement motion and dismissed the plaintiff's suit for constructive discharge following ten months of unrelenting and derogatory remarks by co-workers based on the employee's age, which he had repeatedly brought to his employer's attention)[10]; *see also Chapin v. Fort-Rohr Motors, Inc.*, 621 F.3d 673, 679 (7th Cir. 2010). The *Stamey* court identified that serious threats to an employee's physical safety would meet the burden. *Id*. It also opined that to prevail on a constructive discharge claim, an employee would need to show that "seeking redress from the employer would be futile" *Id* at *11.

Here, when Ms. Marquez was hired, she was given a copy of the company handbook for which she signed. The handbook provided a stepping procedure for resolving complaints by directing that the employee speak first with his/her manager, then supervisor, then senior management (Resp. Ex. I at LEB00046). It also identified what constitutes sexual harassment and directed workers who experienced or witnessed harassment to call or e-mail George Buono at a phone number and e-mail address which were also provided (Resp. Ex. I at LEB00050). In addition, Ms. Marquez signed for a congratulatory letter which provided the address of the corporate office and invited complaints at a confidential voicemail number which it provided. Thus, even though I find that she told Ms. Haque about Mr. Tsering's sexual harassment, Ms. Marquez did not avail herself of the direction provided in the handbook. Nor did she use the confidential voicemail number which was provided in the congratulatory letter which she had received.

Moreover, there was no proof that Mr. Tsering posed any kind of threat to Ms. Marquez's physical safety. Also, I was not convinced that Ms. Marquez left the job when she did because of harassment. In fact, when asked about her reason for doing so, Ms. Marquez equivocated. First, she stated that she left because of the sexual harassment as she was uncomfortable and that she had texted Ms. Haque to inform her that she would not be returning, which was not true because in her text, she actually stated that she was not coming in on that particular day (Tr. 65-66). But she also said that she was just going to take the day off to look after her mental health (Tr. 69). Evidently, there were other stressors at play which, undoubtedly, included her time and attendance issues.

New York courts have recognized that Local Law 85 of 2005 ("Restoration Act"), codified in section 8-130 of the Administrative Code, must be liberally construed " . . . in order to

[10] Plaintiff's claim was brought under the federal Age Discrimination in Employment Act. *Id.* at *10.

accomplish the broad purposes of the [Law] to maximize deterrence of discriminatory conduct." *Golston-Green v. City of New York*, 184 A.D.3d at 37; *Albunio v. City of New York*, 16 N.Y.3d 472, 477 (2011); *Bennett v. Health Management Systems, Inc*., 92 A.D.3d 29, 34 (1st Dep't 2011), *lv. denied*, 18 N.Y.3d 811 (2012); *Williams v. NYC Housing Auth*., 61 A.D.3d 62, 65-69 (1st Dep't 2009). But both the First Department (in *Simmons-Grant*, 116 A.D.3d at 138, n.1), and more recently, the Second Department (in *Golston-Green*, 184 A.D.3d at 44, n. 4), have noted that, "the contours of a constructive discharge claim using the enhanced liberal construction analysis of the City Human Rights Law," has not yet been explored or ruled upon.

The First Department articulated that the requirements for this type of analysis are set out in *Williams*, 61 A.D.3d 62 (1st Dep't 2009], and that "it should not be assumed that the standards for establishing constructive discharge under the City HRL are the same as have been set forth for title VII, either in respect to the degree of difficulty or unpleasantness of working conditions required to make out the claim or otherwise." *Simmons-Grant*, 116 A.D.3d at 138, n. 1. In *Williams*, the court noted that the City Council did not confine a liberal construction to only "some" provisions of the law but made it applicable to all provisions. *Williams*, 61 A.D.3d at 67, n. 4. 7. It summarized that "the text and legislative history [of the Restoration Act] represent a desire that the City HRL 'meld the broadest vision of social justice with the strongest law enforcement deterrent'" and that "[w]hether or not that desire is wise as a matter of legislative policy, our judicial function is to give force to legislative decisions." *Id.* at 68-69.

Nevertheless, a broad vision of social justice as envisioned by the Restoration Act cannot mean that a finding of sexual harassment in the workplace automatically translates to a finding of constructive discharge where the sexual harassment was not established as the impetus for the victim's decision to leave her job.

Here, where there were clearly other motivating factors that led to Ms. Marquez's departure, not the least of which were her time and attendance issues, petitioner has not established that Ms. Marquez left the job because of sexual harassment. Thus, its claim of constructive discharge is not sustained.

FINDINGS AND CONCLUSIONS

1. Respondent's female employees, including Ms. Marquez, were regularly exposed to sexual harassment in the workplace, in violation of Administrative Code section 8-107(1)(a).

2. Respondent's store manager was made aware of the sexual harassment and failed to act, in violation of Administrative Code section 8-107(1).

3. Ms. Marquez did not avail herself of the procedures in respondent's handbook to obtain redress, before leaving the job.

4. Petitioner did not prove that Ms. Marquez was constructively discharged from her job.

RECOMMENDATION

Under Section 8-120(a) of the HRL, remedies for violations include payment of compensatory damages to the person aggrieved. Compensatory relief may include mental anguish damages. *Comm'n on Human Rights ex rel. Latif v. New Master Nails, Inc.*, OATH Index Nos. 1576/10 & 1577/10 at 9 (Aug. 10, 2010), *adopted*, Comm'n Dec. & Order (Nov. 16, 2010); *Comm'n on Human Rights ex rel. De La Rosa v. Manhattan & Bronx Surface Transportation Operating Auth.*, OATH Index No. 1141/04 at 10 (Dec. 30, 2004), *adopted*, Comm'n Dec. & Order (Mar. 11, 2005). The relief should be commensurate with the wrongdoing by the employer and fully supported by the evidence. *Anagnostakos d/b/a Rolando's Diner v. NYS Division of Human Rights*, 46 A.D.3d 992, 994 (3d Dep't 2007).

For the discrimination proven here, petitioner seeks compensatory damages in the form of back pay and emotional distress damages, and a civil penalty, for a total sum of $152,305.75.

Back Pay

Petitioner requests that Ms. Marquez be awarded back pay in the sum of $17,305.75, for the 48-week period from September 27, 2016 through September 8, 2017, representing her date of departure from Fresh, to the date that she started a job as a school crossing guard. Petitioner calculated the back pay at $360 per week, which was what Ms. Marquez earned at Fresh. Pet. Br. at 10-11. Petitioner's request is predicated on its claim that Ms. Marquez was constructively

discharged. Because petitioner did not establish this claim, an award of back pay is not appropriate.

Emotional Distress

Petitioner seeks a recommendation of $60,000 in emotional distress damages. Pet. Br. at 12.

A complainant in a discrimination action is entitled to additional damages where there is credible evidence of emotional distress stemming from the unlawful discrimination. Admin. Code § 8-120(a)(8); *see NYC Transit Auth. v. NYS Div. of Human Rights*, 78 N.Y.2d 207, 216 (1991) (mental anguish may be shown by complainant's testimony and circumstances of discriminatory conduct). The relevant standard in awarding emotional distress is whether "a reasonable person of average sensibilities could fairly be expected to suffer mental anguish from the incident." *See Batavia Lodge No. 196 v. NYS Div. of Human Rights*, 35 N.Y.2d 143 (1974), *rev'g and adopting diss. opinion reported at* 43 A.D.2d 807, 810 (4th Dep't 1973).

The record here demonstrates that Ms. Marquez was offended by Tensin's barrage of inappropriate remarks for a period of two months after Ms. Sari left and when Ms. Haque became the store's general manager. And she was clearly disturbed and frustrated by Ms. Haque's inaction, which frustration was evident in her text to Yari.

I therefore find that Tensin's sexually-tinged remarks were sufficient to cause distress to a person of ordinary sensibilities, and that Ms. Marquez is entitled to emotional distress damages.

Emotional distress claims fall into different categories: "Garden variety"; "significant" or "substantial"; or "egregious" emotional distress.

In "garden variety" emotional distress claims, "the evidence of mental suffering is generally limited to the testimony of the plaintiff, who describes his or her injury in vague or conclusory terms, without relating either the severity or consequences of the injury." *Khan v. HIP Centralized Lab. Servs., Inc.*, 2008 U.S. Dist. LEXIS 76721 at *30-31 (E.D.N.Y. Sept. 17, 2008). Such claims merit awards of $30,000 to $125,000. *See Mugavero v. Arms Acres, Inc.*, 680 F. Supp. 2d 544, 578 (S.D.N.Y. Jan. 15, 2010).

"Significant" or "substantial" emotional distress claims "are based on more substantial harm or more offensive conduct, are sometimes supported by medical testimony or evidence, evidence of treatment by a healthcare professional and/or medication, and testimony from other,

corroborating witnesses" and merit awards at least as high as $100,000. *Khan*, No. CV-03-2411, 2008 U.S. Dist. LEXIS 76721 at *32.

"Egregious" emotional distress claims "generally involve either 'outrageous or shocking' discriminatory conduct or a significant impact on the physical health of the plaintiff," and generally garner substantially higher awards. *Khan*, 2008 U.S. Dist. LEXIS 76721 at *34. *See also, Comm'n on Human Rights ex rel. Cardenas v. Automatic Meter Reading Corp.*, OATH Index No. 1240/13 (Mar. 14, 2014), *modified on penalty*, Comm'r Dec. & Order at 26 (Oct. 28, 2015), *aff'd*, 63 Misc.3d 1211(A) (Sup. Ct. N. Y. Co. Feb. 28, 2019)

In assessing emotional distress, the factors to be considered are the extent of the discriminatory behavior, the level of anguish caused, and prior awards for comparable discrimination. *Comm'n on Human Rights ex rel. Fernandez v. Gil's Collision Services Inc.*, OATH Index No. 1245/19 at 15 (Apr. 30, 2020); *Comm'n on Human Rights ex rel. Campbell v. Personal Employment Services*, OATH Index No. 1579/07 at 6 (Aug. 20, 2007), *adopted*, Comm'n Dec. & Order (Dec. 14, 2007); *Comm'n on Human Rights ex rel. Cherry v. Stars Model Management*, OATH Index No. 1464/05 at 15 (Mar. 7, 2006), *adopted*, Comm'n Dec. & Order (Apr. 13, 2006), *aff'd sub nom., Secor v. NYC Comm'n on Human Rights*, 13 Misc. 3d 1220A (Sup. Ct. N.Y. Co. Oct. 3, 2006).

Even though petitioner's claim is for "garden variety" emotional distress, it appears to rely on the awards in *Cardenas* and *Fernandez*, as the bases for its claim. Pet. Br. at 12-13.

In *Cardenas*, ALJ Alessandra Zorgniotti recommended emotional distress damages of $200,000 (which the Commission upheld), based upon three years of unrelenting sexual harassment by the complainant's supervisor, which included slapping the complainant on the buttocks, posting a lewd cartoon with the complainant's name written on it, commenting on the complainant's breasts and figure, licking the complainant's neck and inserting a rolled-up newspaper in her pants, commenting to a client that the complainant was likely "good in the sack," and firing complainant after she complained about the supervisor's actions. *Cardenas*, OATH 1240/13 at 29. So traumatized was the complainant in *Cardenas*, that following her termination, she required over one year of treatment for depression, and described feelings of failure, fear, and anger, causing her to cry constantly and fight with her family.

In *Fernandez*, ALJ John Spooner recommended emotional distress damages of $150,000, after the complainant had endured ten months of sexual harassment that was so egregious, that it

caused her substantial pain and distress. Judge Spooner found that the respondent engaged in demeaning and sexually aggressive behavior which humiliated the complainant in front of her co-workers and even her mother. The respondent's sexual harassment of the complainant was so traumatizing that it supported a diagnosis of post-traumatic stress disorder and resulted in months of psychiatric therapy. *Fernandez*, OATH 1245/19 at 15-16.

This case in no way parallels the type of outrageous behavior that the complainants in *Cardenas* or *Fernandez* had to endure. Nor is it comparable to the duration of time that those complainants were exposed to the harassment. I therefore find that an award of $30,000 is more appropriate for Ms. Marquez's two-month duration of Tensin's inappropriate and sexist comments.

Civil Penalties and Affirmative Relief

Under the HRL, appropriate civil penalties may be imposed in order to vindicate the public interest. Where unlawful conduct is willful, wanton, or malicious, a maximum of $250,000 in civil penalties may be imposed. Admin. Code § 8-126(a). Relevant factors include 1) the egregiousness of the discrimination; 2) respondent's financial situation; 3) the length of time respondents committed the discrimination; and 4) respondent's failure to cooperate with the Commission. *Cardenas*, OATH 1240/13 at 29. In this case, petitioner has requested a civil penalty of $75,000 for respondent's perpetuation of a sexually hostile work environment and Ms. Marquez's constructive discharge. Pet. Br. at 14.

The evidence supports a finding that Mr. Tsering's remarks were wanton and inappropriate. Ms. Marquez asked him to stop making his remarks, but he persisted. At some point, Ms. Marquez made her manager aware of Mr. Tsering's remarks, the manager did nothing about it, and his remarks persisted. While the record is not clear as to when exactly Ms. Haque was made aware of the harassment, she became the store's general manager in July 2016. Therefore, even assuming that Ms. Marquez reported Mr. Tsering's behavior to Ms. Haque at the beginning of her tenure, at the most, Ms. Haque did nothing for the two months during which she supervised Ms. Marquez.

Regarding finances, respondent made no request that their financial situation should be considered as mitigation of civil penalties. The evidence presented at trial establishes that respondent operates eight stores in New York City and one in Yonkers (Pet. Ex. 18). In seeking a civil penalty on par with Judge Spooner's recommendation in *Fernandez*, the Commission asserted that respondent has more assets than the respondent in *Fernandez*, where the respondent was

unrepresented. As an initial matter, a respondent's business decision to retain counsel to defend against a complaint should not be used against it to garner a larger civil penalty. And while the size of the business should factor into the award, the egregiousness of the harassment and the length of time that it was permitted to fester are also relevant considerations. Finally, another relevant consideration is whether or not respondent had clear policies in place which were not only disseminated to its employees, but were posted in plain sight, as a constant reminder of what is unacceptable behavior, and how infractions of the Human Rights Law should be reported. With that in mind, I find that a civil penalty of $60,000 is appropriate in this case.

In sum, in light of the discrimination proven here, Ms. Marquez should be awarded $30,000 in emotional distress damages. Respondent should be assessed a civil penalty of $60,000.

The Commission further requests an Order that respondent attend anti-discrimination training, create and implement a new and effective anti-discrimination and anti-sexual harassment policy, monitoring of oral and written reports of harassment, and post notices informing employees and customers of their rights, in order to deter future discrimination. I find that to be wholly appropriate and I so recommend.

Ingrid M. Addison
Administrative Law Judge

August 9, 2022

SUBMITTED TO:

ANNABEL PALMA
Commissioner

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