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SUZANNE A. BEDDOE
COMMISSIONER / CHIEF JUDGE

ALESSANDRA F. ZORGNIOTTI
ADMINISTRATIVE LAW JUDGE
212-933-3017

March 14, 2014

Patricia L. Gatling, Esq.
Commissioner
Commission on Human Rights
40 Rector Street - 9th Floor
New York, New York 10006

Re: *Comm'n on Human Rights ex rel. Monica Cardenas v. Automatic Meter Reading Corp. and Jerry Fund,*
OATH Index No. 1240/13

Dear Commissioner Gatling:

The above-referenced discrimination complaint was referred to me to hear and report. The record of the proceeding, including my report and recommendation, is enclosed for your review and final decision.

Please be advised that all parties have been provided with a copy of my report and recommendation. By copy of this letter, I am instructing respondent's attorney, should he wish to comment on the report and recommendation prior to the Commission's final determination, he may do so in accordance with the time frame set forth in section 1-76 of the Commission's rules (47 RCNY §1-76).

Upon taking final action in this matter, please have your office send a copy of your decision to the Office of Administrative Trials and Hearings so that we may complete our files.

Very truly yours,

Alessandra F. Zorgniotti
Administrative Law Judge

AFZ:mw

c: Carlos Velez, Esq.
Amy Hong, Esq.
Jonathan Honig, Esq.

Comm'n on Human Rights ex rel. Cardenas v. Automatic Meter Reading Corp.

OATH Index No. 1240/13 (Mar. 14, 2014)

Respondents created a hostile work environment, discriminated against complainant because of her gender, and constructively discharged her from her employment. Because the discrimination was pervasive and severe, complainant should receive $82,170 in back pay plus interest, $12,636, and emotional distress damages in the amount of $200,000. The Commission should also be awarded a civil penalty of $75,000.

NEW YORK CITY OFFICE OF ADMINISTRATIVE TRIALS AND HEARINGS

In the Matter of
COMMISSION ON HUMAN RIGHTS, EX REL. MONICA CARDENAS
Petitioner
- against -
AUTOMATIC METER READING CORP. & JERRY FUND
Respondents

REPORT AND RECOMMENDATION

ALESSANDRA F. ZORGNIOTTI, *Administrative Law Judge*

This proceeding was referred by the City of New York Commission on Human Rights ("Commission" or "petitioner") on behalf of complainant, Monica Cardenas. The verified complaint (ALJ Ex. 1) alleges that respondents, Automatic Meter Reading Corp. ("AMRC") and the owner of AMRC, Jerry Fund, discriminated against Ms. Cardenas in violation of section 8-107(1)(a) of the Administrative Code of the City of New York ("Human Rights Law" or "HRL"). Specifically, petitioner alleges that from when Ms. Cardenas was promoted to office manager in May 2008 until she was constructively discharged from her job on March 4, 2011, Mr. Fund physically touched Ms. Cardenas inappropriately, made sexual gestures and comments towards her, and posted an offensive cartoon with her name on it.

Respondents deny engaging in discrimination and argue that: the charges are time-barred; the allegations are untrue or, at best, they amount to petty slights; the matter must be

considered in context *i.e.* they had a father/daughter relationship and she did not object to his actions; Mr. Fund, who is 88 years old, is too old to engage in sexual activity; and Ms. Cardenas quit her job because Mr. Fund yelled at her for poor work performance (ALJ Exs. 3, 4).

A six-day hearing was held between September 12, and December 6, 2013. The record was held open until February 11, 2014, for the filing of post-hearing briefs.

Petitioner presented documentary evidence and the testimony of Ms. Cardenas and three former co-workers, Ms. Romero, Mr. Alfano, and Ms. Rivera, as well as an outside payroll specialist, Ms. Matos. The Legal Aid Society ("Legal Aid") appeared on behalf of Ms. Cardenas.[1] Respondents presented documentary evidence, the testimony of Mr. Fund, Ms. Li a current AMRC employee, and Ms. Begum, a former employee.

For the reasons below, petitioner demonstrated that respondents created a hostile work environment and discriminated against Ms. Cardenas because of her gender in violation of section 8-107(1)(a) of the Human Rights Law. Moreover, respondents constructively discharged Ms. Cardenas. Because the discrimination was severe and pervasive, Ms. Cardenas should be awarded $82,170 in back pay plus interest, $12,636 in front pay discounted to its present value by 2%, and emotional distress damages in the amount of $200,000. The Commission should be awarded a civil penalty of $75,000. In addition, respondents should institute a written anti-discrimination policy and train their staff on the Human Rights Law.

ANALYSIS

Mr. Fund is the sole owner of AMRC which is a water and electrical meter reading company. It was undisputed that AMRC has more than four employees and that it is located in the City of New York (Tr. 20, 630).

Ms. Cardenas was hired in 1995 by AMRC (formerly Computer Meter Reading Corp.) as a billing clerk. She was 28 years old at the time (Tr. 17-20). Ms. Cardenas testified that prior to 2008 she had no interaction with Mr. Fund (Tr. 21, 159). In May 2008, she became office

[1] Legal Aid's motion, on behalf of Ms. Cardenas, to intervene pursuant to section 2-25(a) of OATH's Rules of Practice was granted because Ms. Cardenas has a substantial interest in the outcome of this matter, the application was made prior to the hearing, her intervention would not unduly broaden the issues, and respondents failed to show prejudice from the grant of the application. 48 RCNY § 2-25(a) (Lexis 2013). *See* ALJ Exhibit 6.

manager and Mr. Fund was her immediate supervisor. As office manager, Ms. Cardenas met with Mr. Fund alone every morning in his office for 15 to 60 minutes to discuss what was going on (Tr. 21-22, 284, 440, 533, 581, 589). Mr. Fund denied meeting with Ms. Cardenas daily (Tr. 762) but admitted that he would sometimes meet with her alone in his office (Tr. 765).

Ms. Cardenas characterized Mr. Fund as a "horrible" boss who would yell, pound his desk, and intimidate people. For example, Mr. Fund would yell over the paging system "God has spoken" (Tr. 24-25). Ms. Rivera and Mr. Alfano testified that Mr. Fund was "very difficult" and would yell and "get heated up" several times a week (Tr. 421, 441-42). Respondents acknowledge that Mr. Fund "is not an angel and the yelling was a generic matter to the office" but argue that his actions had nothing to do with any gender-based issue (Tr. 11). Mr. Fund also admits that he has a "booming voice" and "is not a shy person" (Tr. 807-08, 829).

Ms. Cardenas, who was the first female in the job (Tr. 45), further alleges that Mr. Fund repeatedly singled her out for sexually explicit comments and unwanted physical contact after she became office manager. She asserts that she quit her job, not because of Mr. Fund's constant yelling, but because she could no longer allow herself to be subjected to Mr. Fund's on-going harassment (Tr. 22-24, 90-91, 161, 397-98, 813).

Mr. Fund asserts that he treated Ms. Cardenas better than other employees by allowing her to arrive late and leave early to deal with childcare issues (Tr. 174-75, 219-21, 635, 638-39; Resp. Reply Br. at 14). Mr. Fund claims that he was Ms. Cardenas's boss and "confidant" that he spoke to her like a daughter about personal matters including her getting citizenship, her personal relationships, and her children, including a son who was born in 2005 (Tr. 633-34, 636, 639-40, 489-90, 763, 821, 831). Ms. Cardenas denies sharing personal details about her life with Mr. Fund and testified that she informed him about her need to be off from work like any other employee (Tr. 172-74, 215, 220-23).

The Complaint is Timely

Ms. Cardenas filed a verified complaint with the Commission dated May 4, 2011 (ALJ Ex. 1) alleging that from May 2008 until her constructive discharge on March 4, 2011, she was subjected to a hostile work environment and sexually harassed by Jerry Fund.

The Commission does not have jurisdiction over any complaint that has been filed more than one year after the alleged discriminatory practice. Admin. Code § 8-109(e) (Lexis 2013). The commencement of the limitations period for hostile work environment claims is delayed until the last discriminatory act occurs. *Clauberg v. State of New York*, 19 Misc.3d 942, 949 (N.Y. Ct. Cl. 2008). Moreover, the statute of limitations is tolled where the discrimination alleged constitutes a continuing wrong or continuous violation. *Comm'n on Human Rights ex rel. Cerullo v. Fricione*, OATH Index Nos. 1865/10 & 1866/10, mem. dec. at 2 (June 2, 2010).

Allegations after May 4, 2010, are within the one-year period. The allegations dating back to May 2008 are also timely.

In *National Railroad Passenger Corp. v. Morgan*, 536 U.S. 101, 105 (2002) the Supreme Court held that consideration of the entire scope of a hostile work environment claim, including behavior alleged outside the statutory time period, is permissible for assessing liability. Such claims by "[t]heir very nature involve[ ] repeated conduct" and "are based on the cumulative [e]ffect of individual acts." *Id.* at 115 (internal citations omitted). "The 'unlawful employment practice' therefore cannot be said to occur on any particular day" but "occurs over a series of days or perhaps years." *Id.*

Moreover, the continuing violation doctrine applies to cases brought under the HRL when pre-limitation discriminatory acts are joined to actionable conduct within the limitations period. *Williams v. New York City Housing Auth.*, 61 A.D.3d 62, 72-73, 80 (1st Dep't 2009). A continuing violation may be found where "there is proof of specific ongoing discriminatory policies or practices, or where specific and related instances of discrimination are permitted by the employer to continue unremedied for so long as to amount to a discriminatory policy or practice." *Clark v. State of New York*, 302 A.D.2d 942, 945 (4th Dep't 2003) (quoting *Cornwell v. Robinson*, 23 F.3d 694, 704 (2d Cir. 1994)); *see also Sier v. Jacobs Persinger & Parker*, 276 A.D.2d 401, 402 (1st Dep't 2000) (acts within statute of limitations were similar enough to the earlier acts that they "justify the conclusion that both were part of a single discriminatory practice"); *Walsh v. Covenant House*, 244 A.D.2d 214, 215 (1st Dep't 1997) (allegations, if true, show conduct within the limitations period similar to the alleged conduct outside the limitations period to justify the conclusion that both were part of a single discriminatory practice).

As discussed below, the verified complaint describes a continuous violation which created a hostile work environment from May 2008 to March 2011. The complaint alleges similar instances of discrimination based on gender and hostile work environment within and beyond the relevant limitations period, continuing unremedied for a period of three years. To the extent petitioner presented evidence concerning discriminatory conduct prior to 2008, it will not be considered except as background. *National Railroad Passenger Corp.*, 536 U.S. at 108.

Respondents Violated Human Rights Law Section 8-107(1)(a)

Petitioner alleges that Mr. Fund: (1) hit Ms. Cardenas twice on the buttock with an umbrella; (2) posted a sexually explicit cartoon with Ms. Cardenas's name on it; (3) compared Ms. Cardenas to a *Sports Illustrated* swimsuit model; (4) licked Ms. Cardenas's neck and rammed a rolled-up newspaper down the back of her pants; (5) made sexually explicit comments about Ms. Cardenas to an AMRC client; and (6) made on-going inappropriate comments to Ms. Cardenas and other employees. Petitioner further alleges that Ms. Cardenas told Mr. Fund repeatedly to cease his unwelcome actions but that he would laugh and continue.

Mr. Fund admits the first three allegations but claims that they were merely petty slights, that he had no intention of harassing Ms. Cardenas, and that his conduct must be considered in the context of their special relationship. Mr. Fund denied the remaining claims with the exception of one comment made to Ms. Cardenas. The allegations should be sustained.

Human Rights Law section 8-107(1)(a) prohibits discrimination in the terms, conditions, or privileges of employment based upon gender. This section of the law does not differentiate between hostile work environment claims and discrimination claims. *Williams*, 61 A.D.3d 75 (discussing no separate harassment provision under the HRL). Under the Local Civil Rights Restoration Act of 2005, the law is to be "construed liberally for the accomplishment of the uniquely broad and remedial purposes thereof." Admin. Code § 8-130 (Lexis 2013); *Albunio v. City of New York*, 16 N.Y.3d 472, 477 (2011); *see also Williams*, 61 A.D.3d 68 ("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.'").

To prevail on a gender discrimination or hostile work environment claim under the HRL, petitioner must demonstrate by a preponderance of the evidence that Ms. Cardenas was "treated

less well than other employees because of her gender." *Williams*, 61 A.D.3d 78; *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). As the First Department noted, even "a single comment that objectifies women . . . made in circumstances where that comment would, for example, signal views about the role of women in the workplace [may] be actionable." *Williams,* 61 A.D.3d 80, n. 30; *see also 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.").

Under this standard, the conduct's severity and pervasiveness are relevant only to the issue of damages. *Williams*, 61 A.D.3d at 76. Indeed, the challenged conduct need not be tangible like a hiring or firing. *Id.* at 79. However, the broader purposes of the HRL "do not connote an intention that the law operate as a 'general civility code.'" *Id.* (citation omitted); *see also Mihalik*, 715 F.3d at 111 ("[I]t is not enough that a plaintiff has an overbearing or obnoxious boss"). Respondents can avoid liability if they prove that the conduct complained of consists of nothing more than what a reasonable victim of discrimination would consider "petty slights and trivial inconveniences." *Williams, 61 A.D.3d* at 80.

As discussed below, there is ample evidence to conclude that Mr. Fund treated Ms. Cardenas less well than other employees because of her gender in that he repeatedly singled her out for sexually explicit comments and unwanted physical touching. Courts have found that verbal comments and/or physical conduct provide sufficient evidence to state a claim of a hostile work environment on the basis of gender under the HRL. *See, e.g.*, *Guzman v. News Corp.*, 2013 U.S. Dist. LEXIS 155026 at 41-42 (S.D.N.Y. 2013) (defendant leered at plaintiff in a suggestive manner, commented on her appearance, made an inappropriate request for a sexual favor, showed pictures of naked men, discussed sexual exploits of a colleague, referred to women as "old bitches" and inappropriately touched a female colleague and made lewd remarks to her at an office party); *Mihalik*, 715 F.3d 102 (office ran like a 'boys' club,' supervisor made sexually suggestive comments, twice propositioning plaintiff for sex); *Caravantes v. 53rd Street Partners, LLC*, 2012 U.S. Dist. LEXIS 120182 at *47 (S.D.N.Y. Aug. 23, 2012) (sexually explicit comments and unwanted touching); *Bermudez v. City of New York,* 783 F.Supp.2d 560, 582

(S.D.N.Y. 2011) (defendant engaged in sexually explicit act in front of plaintiff and made inappropriate sexual comments); *Hernandez*, 103 A.D.3d 106 (defendant made sexual comments, touched plaintiff's behind, and sent mildly offensive sexual emails); *Davis v. Phoenix Ancient Art,* 39 Misc.3d 1214(A) (Sup.Ct. N.Y. Co. 2013) (defendant went to plaintiff's hotel room, grabbed her, kissed her, and demanded that she sleep with him, and joined in when clients openly questioned plaintiff about her sex life).

Contrary to respondents' assertions, Mr. Fund's actions went beyond "petty slights and trivial inconveniences." Here, Mr. Fund's comments and actions were highly offensive and degrading. Except for Mr. Fund's self-serving statements, there was no support for his assertion that he had a special relationship with Ms. Cardenas that made his actions acceptable. Moreover, despite numerous requests from Ms. Cardenas, Mr. Fund, her direct supervisor, would laugh and continue with his unwelcome conduct.

To the extent resolution of these charges rest on witness credibility, this tribunal has looked to witness demeanor, consistency of a witness's testimony, corroborating evidence, witness motivation, bias or prejudice, and the degree to which a witness's testimony comports with common sense and human experience in determining credibility. *Dep't of Sanitation v. Menzies*, OATH Index No. 678/98 at 2-3 (Feb. 4, 1998), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD 98-101-A (Sept. 9, 1998). Ms. Cardenas's testimony was more credible than Mr. Fund's.

Although Ms. Cardenas had a motive to lie for financial gain, her testimony comported with common sense and much of it was corroborated by other witnesses (including Mr. Fund), documentary evidence, and contemporaneous writings. The fact that other employees did not hear or observe all of the alleged discriminatory acts does not mean that they did not occur. Petitioner alleges that many of the events occurred when Ms. Cardenas was alone in Mr. Fund's office or when no one else was around. Given the nature of the allegations this is not surprising.

To the extent Mr. Fund denied or minimized his actions, he was not credible. Like Ms. Cardenas, Mr. Fund had a financial motive to lie: to avoid a finding of discrimination with monetary fines. Mr. Fund's claims that he did not engage in specific acts of sexual harassment were inconsistent with other evidence in the record including his own testimony, the testimony

of other witnesses, and other similar, admitted discriminatory acts. Moreover, his explanations for the conduct he admitted were unconvincing and, even if true, do not excuse his actions.

1. *Mr. Fund hit Ms. Cardenas's buttock with an umbrella, she told him to stop, and he laughed and hit her buttock again.*

It was undisputed that Mr. Fund hit Ms. Cardenas's buttock with an umbrella. Ms. Cardenas testified that on March 2, 2011, she was filing something overhead. Mr. Fund was leaving and said "good night." She responded by saying "good night." When Mr. Fund walked by she felt something "slap" her on her "ass" and she literally "jumped out of" her shoes. When she turned around Mr. Fund was standing there with his umbrella aimed at her. Ms. Cardenas testified she told him to "not to do that" and that Mr. Fund "whacked her one more time." He laughed and walked out of the office. Ms. Cardenas said she was shocked and humiliated, and that she started yelling. Nick, a co-worker, came out of his office and asked what was wrong. She told him that Mr. Fund hit her twice on the buttock with an umbrella. Nick shook his head in disbelief (Tr. 80-83). Ms. Cardenas marked this on her calendar (Tr. 146; Pet. Ex. 12).

Ms. Cardenas also told her co-workers Ms. Rivera, Ms. Li, and Ms. Huang that Mr. Fund had hit her rear with an umbrella and that she was upset (Tr. 464-65, 538, 607, 890-91).

Mr. Fund testified that Ms. Cardenas was blocking the aisle so that he could not leave. Because he had a bag of groceries in one hand, he tapped her behind with his umbrella to get her to move. Mr. Fund said "excuse me" but Ms. Cardenas did not move fast enough so he used the umbrella to get her attention (Tr. 657, 799, 807-08). Mr. Fund admitted that Ms. Cardenas told him to stop, that he ignored her, and hit her again with the umbrella (Tr. 801-03, 808-09, 827). He did not consider touching somebody on the buttock with an umbrella as a "personal touching" or sexual harassment (Tr. 804, 809, 825-26).

At a subsequent unemployment hearing, Mr. Fund admitted touching Ms. Cardenas's buttock with an umbrella, that she told him to stop, that he laughed because he thought it was funny, and that he tapped her bottom again. He also stated that after 15 years of being Ms. Cardenas's "father/confessor" he "ha[d] the right to have a little fun" with her (Pet. Ex. 6 at 44).

Ms. Cardenas credibly testified that the hallway was wide enough for two people to pass without touching (Tr. 232-33). It was undisputed that Mr. Fund intentionally touched Ms.

Cardenas's buttock with an umbrella, she told him to stop, he laughed, and tapped her buttock again. There can be no doubt that this was an unwelcome touching. Mr. Fund's comment that he had the right to have a little fun with Ms. Cardenas further demonstrates that he felt he could treat her differently from other employees and that he found her objections meaningless.

2. *Mr. Fund posted a cartoon about Ms. Cardenas*

It was undisputed that in August 2010, Mr. Fund posted a cartoon from the Daily News by the office copier and wrote on top of it, "OUR OWN MONICA!" The cartoon was still posted when Ms. Cardenas left AMRC in March 2011 (Tr. 34-37, 39-40, 649-50; Pet. Exs. 1, 2).

The cartoon (Pet. Ex. 1) depicts a woman wearing a tight skirt, a low-cut shirt, and high-heeled shoes. She has a large bosom, a pronounced buttock, and big hair. The woman has a smile on her face, her hands are on the sides of her head, and she is bending forward so that her buttock and bosom jut out in opposite directions. The bubble above her head says, "Can't A Girl Walk Down The Street Peacefully" (Tr. 38). A large number of men are staring with large eyes at the woman including two men who are crawling on the ground with their tongues hanging out, two who have crashed their cars, and another who is taking her photograph. Around the edges of the cartoon are three billboards and a coin-operated newspaper vending machine showing pictures of the woman in a variety of provocative poses with captions saying, "TOO SEXY FOR THE OFFICE" and "I WAS FIRED 'CAUSE I'M HOT!"

Mr. Fund testified that the cartoon depicted a "very well-dressed young lady" who was fired for coming to work well dressed. He explained that at the time there had been articles in the newspaper about a sexy woman who had been in this situation and she was suing. Mr. Fund thought labeling the cartoon with Ms. Cardenas's name on it was a compliment. He asserted that no one ever commented about the cartoon and that Ms. Cardenas never expressed any objections to it. If she had, he would have taken it down (Tr. 649-50, 777).

Ms. Cardenas testified that she spoke to Mr. Fund about the cartoon on numerous occasions and begged him to take it down because people were making comments and laughing. One day Mr. Fund got so angry that he punched his desk and said, "Leave it alone, my office, don't touch it" (Tr. 40-41). Ms. Cardenas thought the woman looked like a prostitute and was

embarrassed that Mr. Fund said she looked like her. Ms. Cardenas was afraid that if she took the cartoon down she would be fired. She found the situation humiliating (Tr. 41-42, 307, 851).

Ms. Rivera testified that Ms. Cardenas was "compromised," made a "nervous laugh" about the cartoon, and tried to project that she did not care. Ms. Rivera was offended by the cartoon but did not say anything (Tr. 479-80). Ms. Li testified that she did not pay much attention to the cartoon, that it was just fun, and not of a sexual nature. Ms. Li testified that Ms. Cardenas spoke about the cartoon but did not joke about it, and Ms. Li could not recall if anyone else spoke about it (Tr. 597, 612). Ms. Begum testified that Ms. Cardenas never said anything about the cartoon (Tr. 578).

The cartoon depicts a sexually provocative woman who is the object of desire of men. There is no dispute that Mr. Fund compared this woman to Ms. Cardenas and that he never posted cartoons about other employees (Tr. 447-49, 457). I fully credit Ms. Cardenas's testimony that she asked Mr. Fund to take down the cartoon because people were talking, that as in the case of the umbrella, he ignored her objections, and that she was afraid if she took it down she would be fired. This cartoon signaled that Mr. Fund fostered an office environment that degraded women in general and Ms. Cardenas in particular as sexual objects.

3. *Mr. Fund compared Ms. Cardenas to a swimsuit model*

It was undisputed that Mr. Fund compared Ms. Cardenas to the cover model of the swimsuit edition of *Sports Illustrated* and that he showed the magazine to Ms. Cardenas's co-workers. The cover of the magazine is a photograph of a voluptuous model in a tiny bikini kneeling with her legs slightly apart and her hands on the ground (Pet. Ex. 3).

Ms. Cardenas testified that in February 2011, Mr. Fund received a copy of the swimsuit edition of *Sports Illustrated* and called her into the office while he was flipping through the magazine. Mr. Fund stated, "Wow, these broads are hot." Ms. Cardenas advised Mr. Fund that she would come back when he was ready. Mr. Fund said no that it would not take long and continued to look at the magazine. When he got to the centerfold photograph of the model, Mr. Fund stated, "Wow, you used to have boobs like that." Ms. Cardenas was shocked and asked, "What did you say to me?" Before Mr. Fund could answer she said, "Don't say those things to me. That is very disrespectful." Ms. Cardenas told him that she was leaving and asked him to

call when he was ready to discuss work. Mr. Fund said he "was going to the bathroom and was taking the magazine with him." On his way to the bathroom, Mr. Fund pointed to the magazine and told a co-worker, "Monica used to have a body like that" (Tr. 59-62; Pet. Ex. 3).

Ms. Cardenas testified that she was "shocked," "humiliated, and "disgusted" by Mr. Fund's comments. Moreover, she was embarrassed that he said this to her co-workers because she was the office manager and this undermined her in their eyes (Tr. 68-69). Ms. Cardenas testified that when Mr. Fund returned from the bathroom he slapped Lizette, who started at AMRC the day before, on the buttock with the magazine. Lizette "yelped" and Mr. Fund told her to "shut up." Ms. Cardenas asked Lizette whether Mr. Fund had hit her on the buttock and Lizette replied "Oh my God, yes, that has never happened to me before" (Tr. 66-67).

Ms. Rivera testified that Mr. Fund had a subscription to *Sports Illustrated* which included the swimsuit edition. When she handed him the magazine, Mr. Fund said that the woman on the cover had Ms. Cardenas's body when she was younger and that her legs were exactly the same (Tr. 443-45, 482-83). Later that day, Mr. Fund came to the area where the billing clerks and Ms. Cardenas were talking. Mr. Fund held-up the magazine and repeated that the model looked like Ms. Cardenas when she was younger and that she had the same legs.

Mr. Fund denied having a subscription to *Sports Illustrated* or buying one. He testified that he received the magazine as a promotion because *Sports Illustrated* wanted AMRC to become an advertiser (Tr. 652-53). When he got the magazine he thought the woman on the cover was "an excellent depiction of a lovely looking young lady" (Tr. 655-56). He held it up to four or five people and said "this is what Monica used to look like." Everyone jumped up to see and he passed the magazine around. Everyone laughed and said, "Wow, that's a good-looking lady." Mr. Fund said this to "compliment the prettiest lady in the office without question" and that if his daughter looked like that, he would be very proud (Tr. 656, 793-95). He denied telling Ms. Cardenas that she "had boobs" like the model (Tr. 790), taking the magazine to the bathroom, or slapping Lizette's buttock with it (Tr. 794-95).

It was undisputed that Mr. Fund showed the *Sports Illustrated* swimsuit edition to Ms. Cardenas and to her co-workers, compared her to a swimsuit model, and that he never did anything similar to another employee (Tr. 68, 455-56). I credit Ms. Cardenas's testimony that Mr. Fund told her privately she used to have "boobs" like the centerfold model when she was

younger. Ms. Rivera testified that when he showed the magazine to co-workers, Mr. Fund stated that Ms. Cardenas used to have a body like that. It seems plausible that Mr. Fund used "boobs" when speaking to Ms. Cardenas privately and that he toned it down to "body" when speaking to the group. I further credit Ms. Cardenas that she told him not to compare her to the model and that he ignored her request, much as he had done with the cartoon and umbrella, and repeated this comment to Ms. Cardenas's co-workers.

Mr. Fund's testimony that he did not have a subscription to *Sports Illustrated* and that he received a complimentary copy because the magazine wanted AMRC to become an advertiser was completely incredible. Ms. Rivera, who paid the bills (Tr. 482), testified that Mr. Fund had a subscription. Indeed, the magazine cover bears a label showing that Mr. Fund's subscription ended in August 2011. Contrary to Mr. Fund's assertion, his comparison of Ms. Cardenas to a photograph of a swimsuit model, was degrading to women and to Ms. Cardenas in particular. Given that Mr. Fund did not think it inappropriate to swat Ms. Cardenas on the buttock with an umbrella, it seems likely that he similarly swatted Lizette on the buttock with a magazine.

4. *Mr. Fund licked Ms. Cardenas's neck and inserted a rolled-up newspaper in her pants*

Petitioner alleges that Mr. Fund licked Ms. Cardenas's neck and that on another occasion he inserted a rolled up newspaper in her pants. Mr. Fund denied the charges. These allegations should be sustained.

Ms. Cardenas testified that in March 2012 [sic][2] she was standing at Mr. Fund's desk, he was seated, and they were alone. He was talking about his wife's ailments and she tried to offer words of encouragement. Mr. Fund said, "What I really need right now is a hug" and Ms. Cardenas replied, "No, thank you." Before she realized what was happening, Mr. Fund stood in front of her so she could not move. She knew he was coming for a hug and she turned her body sideways. According to Ms. Cardenas, Mr. Fund grabbed her, held her, and licked the right side of her neck. Ms. Cardenas pushed Mr. Fund, stated "Don't do that," and ran to the bathroom to wash off (Tr. 26-27). Ms. Cardenas testified that she felt disgusted, dirty, and violated. She was too embarrassed to tell anyone at work what happened and never mentioned it to Mr. Fund

[2] Ms. Cardenas was no longer employed by respondents in March 2012. The pleadings allege that this incident occurred in March 2010 (ALJ Exs. 1, 2).

because she was afraid that she would be fired (Tr. 27-28, 285-87). Mr. Fund testified that he may have given Ms. Cardenas a hug (Tr. 764) but denied licking her neck (Tr. 648).

Ms. Cardenas testified that in April 2010 she was squatting down to file some things by the exit. She saw Mr. Fund come out of his office with a newspaper rolled under his arm. He said good night and she responded in kind and continued filing. As Mr. Fund passed her, she felt something get "rammed" down the back of her pants, inside her panties and in between her buttock. Ms. Cardenas screamed. As she jumped up, Mr. Fund pulled the newspaper out of her pants. Ms. Cardenas said, "What's wrong with you? Don't do that." Mr. Fund looked at her, laughed, and walked out of the office. When Ms. Cardenas screamed, a number of co-workers came out of their work spaces and asked what happened. She told them that Mr. Fund had taken his newspaper and rammed it down her pants (Tr. 28-30, 253-60). Ms. Cardenas testified that she was angry, upset, and disgusted. She thought it was "sick" and "vile" (Tr. 29-30). Mr. Fund denied the newspaper incident (Tr. 648, 765-66).

I credit Ms. Cardenas's testimony that Mr. Fund licked her neck when he tried to hug her. A portion of Ms. Cardenas's testimony was corroborated by Mr. Fund who admitted that he "may" have hugged her. I also credit Ms. Cardenas's testimony that Mr. Fund inserted a rolled-up newspaper in her pants while she was crouching down. Mr. Fund's conduct was consistent with his view that touching Ms. Cardenas on the buttock with an umbrella is not harassment.

The fact that no one else witnessed these acts does not render these allegations unsustainable. Since Mr. Fund has been found to be untruthful, his denial of both these incidents should be rejected. *Dep't of Education v. Brust*, OATH Index No. 2280/07 at 10 (Sept. 29, 2008), *adopted*, Chancellor's Dec. (Oct. 22, 2008) (if a witness is found to have been false in one instance, the trier-of-fact may reject all of the witness's testimony); *see also People v. Barrett*, 14 A.D.3d 369, 369 (1st Dep't 2005) (the maxim false in one thing, false in everything may be applied to witness testimony).

5. Mr. Fund made sexually explicit remarks about Ms. Cardenas

Petitioner alleges that Mr. Fund made a sexually explicit comment about Ms. Cardenas to an AMRC client. Mr. Fund denied the allegation. The claim should be sustained.

Ms. Cardenas testified that in May 2010, she was called into Mr. Fund's office to speak to Mr. Leibel, who was on speakerphone, about a billing question. When Ms. Cardenas arrived, Mr. Fund said "I have my [ ] office manager here, she'll take care of you, but just keep it work related okay. I'm not saying she's not good in the sack." Ms. Cardenas testified that her "jaw dropped" because Mr. Leibel was a client that she had never met. Mr. Leibel asked Mr. Fund if Ms. Cardenas was there and whether she had heard what was said. Mr. Fund responded, "Yeah, but it's okay she knows I'm just kidding, but you got to see her she's a pretty good looking woman, a hot Latina" Tr. (31). Ms. Cardenas testified that Mr. Leibel told Mr. Fund that he should not say such things. Mr. Fund laughed and told Ms. Cardenas to take the call in her cubicle. When Ms. Cardenas spoke to Mr. Leibel alone, he said he was sorry that she worked under such conditions and that if she ever needed a job to call him. Ms. Cardenas was able to resolve Mr. Leibel's issue and the call ended (Tr. 31-33).

Ms. Cardenas testified that she was so upset and angry that she "stormed" into Mr. Fund's office and told him "how dare" he speak to people about her in that manner. She asked Mr. Fund how people could respect her if he did not show her any respect. According to Ms. Cardenas, Mr. Fund said, "I'm done with you" and swiveled his chair to face the window. She was angry and left his office without saying anything else (Tr. 33).

Deposition testimony from Mr. Leibel was stipulated into evidence (Pet. Ex. 16). Mr. Leibel testified that in the middle of 2010 he was on speaker phone with Mr. Fund and Ms. Cardenas about a billing issue. Mr. Leibel stated that Mr. Fund used to point out that Ms. Cardenas "was a good looking woman." While he could not recall the specific words Mr. Fund used during the call, Mr. Leibel remembered that it was something "pretty bad" and "of a sexual nature." Mr. Leibel told Mr. Fund, "You can't say that. It's not professional. It's not proper." Ms. Cardenas did not say anything (Pet. Ex. 16 at 25-26).

Mr. Fund acknowledged that he called Ms. Cardenas into his office to speak to Mr. Leibel but denied making sexual comments about her or that Mr. Leibel reprimanded him for such comments. He asserted that Ms. Cardenas and Mr. Leibel were liars (Tr. 667-77, 772).

I credit Ms. Cardenas's testimony that Mr. Fund told Mr. Leibel, "I'm not saying [Ms. Cardenas is] not good in the sack." I further credit Ms. Cardenas that her "jaw dropped" because she was so upset and angry, that Mr. Leibel reacted by telling Mr. Fund he should not say such

things, and that Mr. Fund laughed and continued by saying that she is "a pretty good looking woman, a hot Latina." Mr. Leibel, who had no apparent to motive lie, corroborated Ms. Cardenas's allegation. In addition to saying Mr. Fund often said Ms. Cardenas was a good looking woman, during the call, Mr. Leibel stated Mr. Fund said something "pretty bad" and "of a sexual nature" and he told Mr. Fund that his words were improper. Since Mr. Fund readily admitted that he was not shy, he thought Ms. Cardenas was extremely attractive, and he regularly made comments about her appearance, his denial was not credible.

6. *Mr. Fund made on-going comments of an inappropriate nature*

Petitioner alleges that between 2008 and 2011 Mr. Fund made numerous inappropriate comments to and about Ms. Cardenas and to and about other females. With the exception of one comment, Mr. Fund denied the allegations. These claims should be sustained.

Ms. Cardenas testified that in December 2010 Mr. Fund was angry because he thought she had not sent Christmas cards to AMRC clients and that she was not planning the Christmas party. She told Mr. Fund that she sent the cards and that no one wanted a party but would rather go home early. Mr. Fund got angry and stated, "Why did I put a woman in charge?" Ms. Cardenas was "baffle[d]" and thought the comment was inappropriate (Tr. 44, 308). She further testified that he made this comment weekly and that it started after she became office manager. The prior office managers had been men. On the other hand he also told Ms. Cardenas that he "wanted to hire Asian women because they were submissive and fresh off the boat" and that he was going to hire women only "because men wouldn't take orders from" Ms. Cardenas (Tr. 45-46). Mr. Fund denied asking "Why did I put a woman in charge?" (Tr. 647).

Ms. Cardenas testified that in January 2011, she was coughing uncontrollably in Mr. Fund's office and he offered to rub her chest, saying that it was good for a cough. She said "No, thank you" and he said "No, no, no, [I] could really do that." Mr. Fund put his hand on his chest and started rubbing his breast area saying, "I'll rub you like this." Similarly, when she had a headache Mr. Fund would say "sex helps" and he "could help [ ] with that." Ms. Cardenas testified that he started making these comments in 2008 while they were alone in his office and that he repeated each of them about six times over the course of the next few years. She would respond by saying, "No, thank you" and "Please don't say those things to me, it's disrespectful"

and Mr. Fund would laugh or say "I'm going to do what I am going to do." (Tr. 44-49, 71-73). Ms. Cardenas marked her calendar on January 25 and February 24, 2011, two days that such comments were made (Tr. 144-46; Pet. Ex. 12).

Mr. Fund denied the allegations but admitted that he talked about his mother rubbing Vicks Vaporub on his chest as a child (Tr. 780-81).

Ms. Cardenas testified that one day she had been rushing to work and Mr. Fund said she looked stressed and that, "We should run away together, pick any place you want to go. I'll remember to bring the Cialis and Viagra." Ms. Cardenas responded, "No, thank you. Please don't say those things to me." Mr. Fund thought this was "hilarious" and laughed. Ms. Cardenas asserted that Mr. Fund made this statement to her on a monthly basis starting in May 2008 (Tr. 49-50). Mr. Cardenas marked one of these comments on her calendar on February 3, 2011, the day it occurred (Tr. 145; Pet. Ex. 12).

Mr. Fund denied asking Ms. Cardenas to run away with him and saying he would bring Cialis and Viagra (Tr. 648, 782). He stated that he has "a well-developed sense of humor" and if he ever said such a thing it was in the course of conversation to add some levity (Tr. 787-88).

Mr. Alfano, an AMRC employee from 1992 until 2006, testified that he heard Mr. Fund say that he had a stiff neck because he took Viagra (Tr. 427). He also heard Mr. Fund tell people who had a cold that he could take care of it by giving them a chest rub (Tr. 423-24). Ms. Rivera also heard Mr. Fund say on a weekly basis that he felt great because he drank Cialis and Viagra and that even though he was old he was still "sexually functional" (Tr. 465-67).

Ms. Cardenas also testified that in 2010 she heard Mr. Fund say on speakerphone to Ms. Matos: "You sound stressed. We should run away together, you pick the place you want to go. . . I'll remember to bring the Cialis and Viagra" (Tr. 52-53). Ms. Cardenas testified that she was disgusted he made such a comment to someone outside the office (Tr. 54-55).

Ms. Matos testified that the first time she spoke to Mr. Fund by telephone in 2010 he asked if she was married. When she said yes, Mr. Fund asked her to run away with him (Tr. 509-10). Mr. Fund testified that when Ms. Matos was first introduced to him she seemed "quite young and unattached" so he said, "Why don't we run away together" as a joke (Tr. 786-87).

Ms. Cardenas testified that in 2008, Mr. Fund gave her a book about how to apply make-up and told her that she needed help with that. Also in 2008, Mr. Fund threw $20.00 at her and

told her to fix her hair because she looked like a lion. She said "No thank you." A few days later, Mr. Fund gave her a flyer for a salon that had opened in the building and again told her to fix her hair. Ms. Cardenas testified that she was embarrassed that he was criticizing her for a non-work related matter. Mr. Fund admitted that he threw $20.00 at Ms. Cardenas to get her hair fixed and that he never did this with any male employees. He denied putting a flyer on Ms. Cardenas's desk and testified that there was only a male barber in the building (Tr. 798-99, 811).

Ms. Cardenas testified that Mr. Fund routinely called Ms. Burgos, a co-worker, "Legs." Whenever Mr. Fund paged Ms. Burgos, he would say "Legs, get into my office." He never used her name. Moreover, there was a female co-worker whose last name was "Colon" which, when pronounced correctly, sounded like "Cologne." Mr. Fund would call her colon and laugh in a perverted way. Ms. Cardenas told him repeatedly how to pronounce the employee's name and he refused to do it (Tr. 70-71, 315).

Ms. Rivera also recalled when Mr. Fund commented that another female employee was not wearing a bra even though she had one on. The employee was "appalled" that Mr. Fund would make such a comment and was looking at her chest (Tr. 452, 458). Ms. Rivera thought that the comment was inappropriate. She further testified that the same employee was upset when Mr. Fund made a sexual comment about her and her husband (Tr. 459-60). Ms. Rivera stated that while Mr. Fund never made any sexual comments towards her, he would give her unwanted advice about how to raise her children (Tr. 461-63).

Ms. Rivera also testified that when Ms. Cardenas was the office manager, Mr. Fund made comments that Ms. Cardenas was stunning, she had "the best pair of legs," and that when she walked through the lobby everyone would stop and stare at her (Tr. 443). After this action was commenced, Mr. Fund started speaking about Ms. Cardenas's personal life (Tr. 451) and made unflattering comments about her children and their father (Tr. 463).

It was undisputed that Mr. Fund threw $20.00 at Ms. Cardenas and told her to fix her hair -- which he never did with a male employee. Given that he felt it was his place to criticize her grooming, it also seems likely that Mr. Fund gave Ms. Cardenas a book about make-up and told her she needed help with that.

I credit Ms. Cardenas's testimony that Mr. Fund routinely asked her to run away with him. He essentially admitted to asking her and Ms. Matos to do so. Moreover, I credit Ms.

Cardenas's statement that he would say that he would bring Viagra and Cialis. According to Ms. Rivera and Mr. Alfano, Mr. Fund often talked about taking these well-known potency drugs and Mr. Fund admitted he may have said this to add some levity to the conversation. It also seems more likely than not that Mr. Fund told Ms. Cardenas that he would rub her chest if she had a cough and that he could have sex with her to help with a headache. Mr. Fund's assertion that he only mentioned his mother rubbing his chest as a child with Vaporub was not credible. In addition to Ms. Cardenas concurrently documenting two of these incidents, Mr. Alfano heard Mr. Fund offer people chest rubs when they had a cough. Finally, I credit Ms. Cardenas and Ms. Rivera that Mr. Fund often made inappropriate, unsolicited comments to and about other women, their bodies, and their personal relationships.

Respondents Constructively Discharged Ms. Cardenas

Petitioner alleges that respondents constructively discharged Ms. Cardenas from her job. Respondents allege that Ms. Cardenas quit because Mr. Fund yelled at her for poor work performance.[3] The evidence supports a claim of constructive discharge.

Constructive discharge occurs "when the employer, rather than acting directly, deliberately makes an employee's working conditions so intolerable that the employee is forced into an involuntary resignation." *Morris v. Schroder Capital Management International*, 7 N.Y.3d 616, 621-22 (2006) (citations omitted). In order to meet this threshold, "the trier of fact must be satisfied that the . . . working conditions [were] so difficult or unpleasant that a reasonable person in the employee's shoes would have felt compelled to resign." *Id. See also Albunio v. City of New York*, 67 A.D.3d 407, 408 (1st Dep't 2009) (plaintiffs established constructive discharge by producing evidence that their working environments had been made so intolerable that a reasonable person in their positions would have felt compelled to leave.).

Courts have held that a single act in the workplace, such as an unwelcome touching or other demeaning conduct, can state a claim for a constructive discharge. *See, e.g., Copantitla v.*

[3] After discovery closed, respondents sought documents regarding Ms. Cardenas's housing subsidies arguing that they would show she quit her job to avoid exceeding her income threshold and, thereby, lose her housing subsidy. The request was denied. However, respondents were given the opportunity to question Ms. Cardenas at the hearing about this, to renew their document request in the event something relevant could be identified, and to present their own evidence on this question (ALJ Ex. 7). Respondents failed to provide any relevant evidence on this subject and they appear to have abandoned this argument in their post-hearing submission.

Fiskardo Estiatorio, Inc., 788 F. Supp.2d 253 (S.D.N.Y. 2011) (denying employer's summary judgment motion regarding plaintiff's claim that a single instance of supervisor closing in on him and rubbing his genitals against plaintiff constituted constructive discharge); *Sawicka v. Catena*, 79 A.D.3d 848, 850 (2d Dep't 2010) (upholding jury verdict finding constructive discharge where employer installed video camera in restroom used by plaintiffs).

A claim for constructive discharge may also occur when the harassment was ongoing for a period of time. *See D'Angelo v. World Wrestling Entertainment, Inc.*, 2010 U.S. Dist. LEXIS 110324 at *16, 20 (D. Conn. Oct. 5, 2010) (denying summary judgment where plaintiff alleged she resigned after two years of being subjected to a "constant stream of sexual comments" and physical molestations by her direct supervisor even after explicitly requesting that he stop); *Ribis v. Mike Barnard Chevrolet-Cadillac, Inc.*, 468 F.Supp.2d 489, 505-06 (W.D.N.Y. 2007) (denying summary judgment where plaintiff alleged she was subjected to frequent offensive comments and unwanted sexual touching over a period of years, and where supervisors not only ignored her complaints but participated in the offensive activity).

In addition, courts have noted that humiliating an employee in front of colleagues and failing to remedy the situation after a complaint could compel a reasonable person to resign. *Thomas v. Tam Equities Inc.*, 6 Misc.3d 1021(A) (Sup. Ct. Queens Co. 2005) (denying motion to dismiss plaintiff's claim of constructive discharge where she was "referred to pejoratively in the presence of co-workers," including by being called a "Black Bitch," and the harassment continued even after she complained). However, actions by an employer to investigate a complaint and the taking of prompt action to ameliorate the situation can bar a constructive discharge claim. *Polidori v. Societe Generale Groupe* 39 A.D.3d 404, 405 (1st Dept. 2007).

Ms. Cardenas testified that the morning after the incident with the umbrella (March 2, 2011), Mr. Fund asked how she was feeling because she had been "pretty upset" the night before. Ms. Cardenas told him that he needed to realize what he was doing was wrong and to stop. Ms. Fund told her, "I'm done with you" and walked into his office. He left her alone for the rest of the day (Tr. 84).

Ms. Cardenas testified that on Friday, March 4, an AMRC client called during the daily meeting to say that he had not received the monthly package of bills. The procedure had been that once a check was received from the client their package would be sent by Ms. Cardenas. In

this case the check had been received but the bookkeeper had failed to tell Ms. Cardenas and the package was still on her desk. Mr. Fund got angry and started screaming at her and the bookkeeper and pounding his desk. Ms. Cardenas stated that she was still in shock about the umbrella incident and realized that she could not stay in this situation any longer. As a result she said she was leaving and walked out of the office. She came back the following Monday to return her company cell phone and to hand in her resignation letter (Tr. 86-88, 176, 181, 324-325, 327-28, 471-73, 645).

In her resignation letter dated March 5, 2011 (Pet. Ex. 4), Ms. Cardenas stated that Mr. Fund's screaming over the past week and the incident where he slapped her buttock twice with an umbrella and laughed in her face "was the breaking point." Moreover, his inappropriate behavior including the posting of the cartoon had left her "feeling defensive" and without "respect" from her co-workers. She asserted Mr. Fund had created a "stressful environment" and a "demeaning and humiliating situation" that left her "an emotional nervous wreck."

Ms. Cardenas testified that she enjoyed her job and but for the sexual harassment she would have stayed at AMRC even though Mr. Fund yelled at her often. She had dedicated 16 years to AMRC, had never looked for another job, and was hoping to retire from there (Tr. 22-24, 90-91, 161, 397-98, 813).

Mr. Fund testified that the circumstances surrounding Ms. Cardenas's departure from AMRC had to do with her sending bills to the wrong address. When he found out about this he was "very disturbed." A number of meetings were held and when things came to "a head," Ms. Cardenas "threw up her hands" and walked out (Tr. 642-45, 472-73, 487-88). After Ms. Cardenas left, Mr. Fund appointed another woman to be office manager (Tr. 660).

Ms. Cardenas applied for unemployment benefits and Mr. Fund opposed the application (Tr. 90-94). In her application (Pet. Ex. 5), Ms. Cardenas alleged that she quit AMRC because Mr. Fund had sexually harassed her by slapping her buttock with an umbrella, comparing her "boobs" to those of a *Sports Illustrated* swimsuit model, telling a client that she "was good in the sack," offering to run away with her and bring Viagra, and that he had ignored her requests to stop such conduct. The New York State Department of Labor found Ms. Cardenas established good cause to quit her job and allowed unemployment benefits (Tr. 97; Pet. Ex. 5).

Here, the record supports a finding that Mr. Fund created working conditions so intolerable that Ms. Cardenas was forced to resign. After Ms. Cardenas became office manager in May 2008 and through February 2011, she was subjected to on-going, degrading verbal harassment which included offensive comments and offers to have sex. She also endured unwelcome physical contact from Mr. Fund, namely, licking her neck and ramming a newspaper down her pants. In addition, Ms. Cardenas's work environment included a provocative cartoon with her name on it posted by the copier for everyone to see. Ms. Cardenas's testimony that the incident on March 2, 2011, where Mr. Fund intentionally touched her buttock with an umbrella, she told him to stop, he laughed, and tapped her buttock again was the proverbial straw that broke the camel's back was credible.

The fact that Ms. Cardenas returned to work the following day does not negate the hostile work environment created by Mr. Fund. Walking out of the office on March 4, 2011, after Mr. Fund started screaming because a package had been misplaced was reasonable. I credit Ms. Cardenas's testimony that she was still numb from being "slapped on my ass" and it was not until that morning that she "came to the realization [ ] this was the culminating point" where she "took [herself] out of that office" (Tr. 87). Ms. Cardenas's resignation letter, written the next day, credibly asserted that Mr. Fund had created a "stressful environment" and that the events of the past week were "the breaking point."

The record also supports a finding that prior to her resignation, Ms. Cardenas repeatedly asked Mr. Fund to refrain from his unwelcome actions and that he refused. It was undisputed that AMRC has no anti-discrimination policy (Tr. 751-52, 816-18) and that Mr. Fund, the perpetrator of the sexual harassment, was the only person to talk to about an employee issue (Tr. 467-68, 807). Indeed, Mr. Fund agreed that he was the "court of last resort" (Tr. 803). Under the circumstances, Ms. Cardenas had little choice but to resign.

FINDINGS AND CONCLUSIONS

1. The verified complaint is timely.

2. Respondents created a hostile work environment and discriminated against Ms. Cardenas in violation of Administrative Code section 8-107(1)(a).

3. Respondents constructively discharged Ms. Cardenas from her employment.

RECOMMENDATION

Under Section 8-120(a) of the HRL the Commission may fashion legal and equitable remedies, which 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'r Dec. (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 must be commensurate with the wrongdoing and supported by the evidence. *Anagnostakos d/b/a Rolando's Diner v. NYS Division on Human Rights*, 46 A.D.3d 992, 994 (3d Dep't 2007).

For the discrimination proven, petitioner seeks compensatory damages in the amount of $96,956.72, in back pay and $44,360.16 in front pay plus interest, and mental anguish damages in the amount of $250,000.

1. Lost Wages

The purpose of awarding lost wages is to make the complainant whole. *NYS Office of Mental Health v. NYS Division on Human Rights,* 53 A.D.3d 887, 890 (3d Dep't 2008); *see also Becerril v. E. Bronx NAACP Child Development Ctr.*, 2009 U.S. Dist. LEXIS 76376 (S.D.N.Y 2009) (awarding front and back pay under HRL). We have found it appropriate to award lost wages up until the complainant is able to find a job with a comparable or higher salary. *Comm'n on Human Rights ex rel. Canty v. Magnamart Cleaners & Launderers,* OATH Index No. 2659/08 at 8-9 (Aug. 7, 2008), *adopted*, Comm'n Dec. & Order (Feb. 19, 2009).

In order to recover lost wages, the Commission must prove the damages and demonstrate that the complainant made an effort to mitigate the loss of income by seeking other employment. *Comm'n on Human Rights ex rel. Rhodes v. Apollo Theatre Investor Group,* OATH Index No.

676/91 at 59-60 (June 14, 1991), *adopted in part, modified in part,* Comm'n Dec. & Order (Mar. 11, 1992), *modified*, Sup. Ct. N.Y. Co. Index No. 10056/92 (Apr. 20, 1993).

The obligation to minimize wage losses "is not onerous and does not require [complainant] to be successful [in seeking a new job]." *Hawkins v. 1115 Legal Service Care*, 163 F.3d 684, 695 (2d Cir. 1998). The "question is whether the plaintiff acted reasonably in attempting to gain other employment or in rejecting proffered employment." *Pierce v. F.R. Tripler & Co.*, 955 F.2d 820, 830 (2d Cir. 1992); *see also Ford Motor Co. v. EEOC*, 458 U.S. 219, 231 (1982) (complainant's recovery is subject to the statutory duty to minimize damages that requires her to use "reasonable diligence in finding other suitable employment."). A complainant "need not go into another line of work, accept a demotion, or take a demeaning position." *Becerril*, 2009 U.S. Dist. Lexis 76736 at *8 (*citing Ford Motor Co.*, *supra* at 231). Respondents have the burden of showing that Ms. Cardenas failed to fulfill the duty to mitigate. *Shannon v. Fireman's Fund Insurance Co.*, 136 F. Supp.2d 225, 228 (S.D.N.Y. 2001).

At the time of her discharge, Ms. Cardenas was earning $20.75 per hour and was not receiving any benefits. She worked 40 hours per week and earned $830 per week or approximately $42,000 per year (Tr. 113-15; Pet. Exs. 10, 11). After leaving AMRC, she received $405 per week in unemployment benefits. The benefits were retroactive to March 11, 2011, and were paid until mid-December 2012, in an amount of $23,490 (Tr. 97; Pet. Ex. 5).

Ms. Cardenas testified that as a condition of receiving unemployment, she actively looked for a new job. She started looking immediately and continued until she found a job. Ms. Cardenas testified that she went to the local library to use a computer for the allotted 45 minutes each day but that it was very difficult to work there. Once she started receiving unemployment she was able to get internet service at home. She also spoke to friends, family, and acquaintances about work possibilities. Ms. Cardenas kept a log of all possible jobs and leads to demonstrate her efforts to find employment (Tr. 96-104; Pet. Ex. 7).

Ms. Cardenas also testified that she contacted Mr. Leibel in October 2011 and that she interviewed with his employer in November for an administrative position but that she did not get the job. In December 2011 she received an offer to work for an investment company as an administrative assistant for $12.00 per hour and no benefits (Tr. 105-07, 337-39). Ms. Cardenas declined the job because during the interview the man that she would have been working for

gave her a "really weird vibe" and was "undressing her with his eyes" (Tr. 106). Moreover, she thought the pay was too low and she would have to work overtime on Saturdays and during the week (Tr. 389-90).

Ms. Cardenas testified that in May 2012 she interviewed for the postal service to be a mail carrier but that she did not get the job because she had not driven a car for the last five years. She also interviewed to be a toll collector with the MTA. While she was going through that process the postal service offered her a temporary position as a mail processing clerk (Tr. 106-09; Pet. Ex. 8). Ms. Cardenas started this job on January 28, 2013, and she currently works 40 hours per week without benefits. She receives $14.89 per hour for daytime hours. In late May 2013, she started working evening hours and receives $16.01 per hour from 6:00 p.m. until 12:30 a.m. She has a one-year contract and does not know if it will be renewed at the end of the year; other temporary workers have been renewed (Tr. 109-11; Pet. Ex. 9).

Ms. Cardenas is entitled to full back pay. Respondents failed to demonstrate that her mitigation efforts were unreasonable. Ms. Cardenas's testimony, as supported by her log, shows that she immediately started looking for work and that she continued with her diligent efforts until she received her job offer at the postal service in January 2013.

The fact that Ms. Cardenas did not accept the job offered to her in October 2011 does not warrant limiting her back pay award. Ms. Cardenas credibly testified that she felt uncomfortable with the supervisor and, after her prior experience, was concerned about being sexually harassed. More importantly, this job paid considerably less money and required mandatory overtime on weekends and evenings while she was a single mother with a young child. *Shannon*, 136 F.Supp.2d at 229 (plaintiff met duty to mitigate even though he refused to follow-up on a potential job where the company had fired him 20 years earlier and he continued to hear negative things about it).

Ms. Cardenas is entitled to back pay from March 7, 2011, the first day she lost her wages, until she started her job at the postal service on January 28, 2013, in the amount of $82,170 (99 weeks times $830). She is also entitled to back pay plus interest at 9%. *See* C.P.L.R. 5004 (Lexis 2014) ("Interest shall be at the rate of nine per centum per annum, except where otherwise provided by statute"). The interest should be calculated from March 7, 2011, until the

Commission issues its final order. *Aurecchione v. NYS Division on Human Rights*, 98 N.Y.2d 21, 27 (2002).

Since respondents terminated Ms. Cardenas wrongfully and objected to her application for unemployment benefits, they should not receive the benefit of having Ms. Cardenas's unemployment compensation deducted from her back pay award. *Becerril*, 2009 U.S. Dist. LEXIS 76376 at *10; *see also Siracuse v. Program for the Dev. of Human Potential*, 2012 U.S. Dist. LEXIS 73456 (E.D.N.Y. 2012) (declining to offset damage award under HRL noting that to do so would "impose an offset that would merely reduce the amount that the employer is required to pay for its unlawful conduct, resulting in a windfall for the very party found responsible for plaintiff's damages."); *Shannon*, 136 F. Supp. 2d at 232 (noting that, while "collateral source payments do represent an additional benefit to the plaintiff . . . "'as between the employer, whose action caused the discharge, and the employee, who may have experienced other noncompensable losses, it is fitting that the burden be placed on the employer.'") (internal citations omitted).

Petitioner seeks three years of front pay in the amount of $284.36 per week which represents the difference between Ms. Cardenas's AMRC salary and her current salary and that the award be discounted to its present value by 2%, the projected rate of inflation.

Front pay is an equitable remedy and is discretionary. *Shannon*, 136 F. Supp. 2d at 233. In deciding whether front pay is appropriate, a court should consider if: (1) reinstatement is either impossible or impracticable; (2) plaintiff has a reasonable prospect of obtaining comparable employment; and (3) the calculation of front pay would involve undue speculation. *See id.* A plaintiff must mitigate damages by seeking alternative employment. *Becerril*, 2009 U.S. Dist. LEXIS 76376 at *13 *citing Ford Motor Co.*, 458 U.S. at 231.

Here, reinstatement is not practicable because Ms. Cardenas is currently employed and the employment relationship between her and Mr. Fund is so damaged that even if reinstatement were offered it seems unlikely that such an arrangement would be tenable.

It was undisputed by respondents that Ms. Cardenas is earning $243 per week less at the postal service than she did at AMRC. This amount is considerable. She also worked at AMRC for 16 years. There is no reason to doubt her testimony that but for her constructive termination she would have remained at AMRC. As noted above, Ms. Cardenas made diligent efforts to find

comparable employment and was unable to do so. Not only does the post office job pay less and require her to work evenings, there is no job security as she has only a one-year contract.

Moreover, an award of front pay will not involve undue speculation. The recent trend has been to approve such awards since "[t]he problem is more imaginary than real. Courts and juries are not without experience in assessing damages for future loss of earnings in breach of employment contract and personal injury cases." *Koyen v. Consolidated Edison Co.*, 560 F. Supp. 1161, 1168 (S.D.N.Y. 1983). "Each can readily be decided upon its individual facts." *Id.*; *see also Francoeur v. Corroon & Black Co.*, 552 F. Supp. 403 (S.D.N.Y. 1982). The "elementary conceptions of justice and public policy require that the wrongdoer shall bear the risk of the uncertainty which his own wrong has created." *Koyen*, 560 F. Supp. at 1169.

Ms. Cardenas should be awarded front pay. However, since there is no evidence that she continued to look for comparable employment after starting at the post office the award should be limited to one year. *See Becerril*, 2009 U.S. Dist. LEXIS 76376 at *13; *see also Thomas v. iStar Financial, Inc.*, 508 F. Supp.2d. 252, 260 (S.D.N.Y. 2007) ("If front pay is appropriate, a year or two is the most this Court would deem reasonable."); *Hill v. Airborne Freight Corp.*, 2003 U.S. Dist. LEXIS 2379 (E.D.N.Y. 2003) (awarding front pay in the amount of a one year differential between former and current salary because plaintiff was unable to secure comparable employment). Therefore, she should receive $12,636 in front pay (52 weeks times $243). The award should be discounted to its present value to account for inflation, generally at a rate of 2%. *Molina v. J.F.K. Tailor Corp.*, 2004 U.S. Dist. LEXIS 7872, at *18-19 (S.D.N.Y 2004) (*citing Doca v. Marina Mercante Nicaraguense, S.A.*, 634 F.2d 30, 40 (2d. Cir. 1980)).

2. Emotional Distress Damages

A complainant is entitled to compensatory damages where there is credible evidence of emotional distress. Admin. Code § 8-120(a)(8) (Lexis 2013); *see NYC Transit Auth. v. NYS Div. on Human Rights*, 78 N.Y.2d 207, 216 (1991) (mental anguish may be shown by complainant's testimony and circumstances of discriminatory conduct). Such an award must be based on a demonstration that "a reasonable person of average sensibilities could fairly be expected to suffer mental anguish from the incident." *See Batavia Lodge v. NYS Division on Human Rights*, 35 N.Y.2d 143 (1974), *rev'g and adopting diss. opin. reported at* 43 A.D.2d 807, 810 (4th Dep't

1973). Further, there must be "some evidence of the magnitude of the injury" to assure that the award is neither punitive nor arbitrary. *NYC Transit Auth.*, 78 N.Y.2d at 217.

The record supports a finding that Ms. Cardenas suffered emotional distress resulting from a hostile work environment, discrimination by Mr. Fund, and her constructive termination and is entitled to recover damages pursuant to HRL section 8-120(a)(8). In setting mental anguish damages, the factors to be considered are the number of instances of discrimination, the level of anguish caused by the misconduct, and prior awards for comparable discrimination. *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).

In employment cases, there is a broad spectrum of awards for emotional distress which generally fall into three categories: "typical" or "garden variety" based upon plaintiff's "vague or conclusory" testimony of distress; "significant" or "substantial" which consist of more substantial harm, usually evidenced through medical testimony or documentation; and "egregious" which "have only been warranted where the discriminatory conduct was outrageous and shocking or where the physical health of the plaintiff was significantly affected." *Becerril*, 2009 U.S. Dist. LEXIS 76376 at *16-17 (internal citations omitted).

Garden variety emotional distress claims, generally merit $30,000 to $125,000 awards. *See e.g. Lore v. City of Syracuse*, 670 F.3d 127, 177 (2d Cir. 2012) ($125,000 for emotional distress resulting from discrimination where the evidence consisted only of "testimony establishing shock, nightmares, sleeplessness, humiliation, and other subjective distress."); *Patterson v. Balsamico,* 440 F.3d 104, 120 (2d Cir 2006) ($100,000 compensatory damages award where "plaintiff offered testimony of his humiliation, embarrassment and loss of self-confidence, as well as his sleeplessness, headaches and stomach pains"); *Meacham v. Knolls Atomic Power Laboratory*, 381 F.3d 56 (2d Cir. 2004) ($125,000 for "subjective distress"); *DeCurtis v. Upward Bound International, Inc.*, 2011 U.S. Dist. LEXIS 114001 at *14 (S.D.N.Y. 2011) ($100,000 for garden-variety emotional distress).

Substantial claims of emotional distress merit higher awards. *See e.g. Olsen v. County of Nassau*, 615 F. Supp.2d 35 (E.D.N.Y. 2009) ($400,000 award upheld to plaintiff who had

emotional and physical manifestations); *Sier*, 276 A.D.2d 401 ($200,000 in compensatory damages where supervisor physically and verbally harassed plaintiff, thereby creating a hostile work environment, and where respondents had no policy regarding filing complaints about sexual harassment in the work place); *NYS Dep't of Correctional Services v. NYS Div. on Human Rights*, 53 A.D.3d 823 (3d Dep't 2008) ($200,000 where plaintiff suffered physically and emotionally for verbal harassment by supervisor for over a year, including referring to her with sexual language and posting sexually explicit graffiti referencing plaintiff but where plaintiff attended four counseling sessions and was not prescribed any medication).

Ms. Cardenas testified that she used to wear dresses and skirts to work. After Mr. Fund started harassing her and commenting about her appearance she wore pants and shirts that covered her completely so that he would stop (Tr. 73-77, 314, 321-22).

Ms. Cardenas also testified that after she left AMRC she went to see her doctor for a check-up. While she was there the doctor asked how she was. She explained that she was very sad not to be working and felt like a failure. The doctor gave her a questionnaire for depression and concluded that she was depressed. The doctor referred her to Bellevue (Pet. Ex. 15). She went there in May 2011 and after being screened by six doctors she was referred to a registered nurse. Ms. Cardenas saw the nurse weekly and eventually on a monthly basis (Tr. 117-18; 130-37). According to her medical records her last visit to Bellevue was in October 2011 (Pet. Ex. 12). Ms. Cardenas was prescribed medication for her depression (Tr. 137-38). The prescription was last filled in November 2012 (Pet. Ex. 14).

Ms. Cardenas spoke to these medical professionals about her feelings of failure, her inability to support her family, her fear about the future, and her anger that she had not left AMRC earlier. She testified that she was "crying all the time," was "sad" and "angry," was fighting with her older child for no good reason, and had hit "rock bottom." She felt alone and afraid if she did not find a job during the recession that she would become homeless. She felt she was having a breakdown (Tr. 119-20, 399-401).

Ms. Cardenas's emotional distress claim is more than garden variety. Mr. Fund's offensive conduct was continuous, egregious, and long-term. It involved unwelcome physical touching such as licking Ms. Cardenas's neck, ramming a rolled-up newspaper down her pants, and hitting her buttock twice with an umbrella. Moreover, Mr. Fund engaged in on-going verbal

harassment of an explicit sexual nature and posted an offensive cartoon by the office copier. I credit Ms. Cardenas's testimony that she changed her appearance to make herself less desirable to Mr. Fund. I further credit her assertion that when she left her job she was an emotional wreck. Her testimony that, after her constructive discharge, she suffered from depression and experienced the loss of self-worth, sought professional attention, and was prescribed medication, was corroborated by documentary evidence. However, there was no evidence that Ms. Cardenas suffered any physical consequences or that her treatment was long-term. Based on the totality of the circumstances, Ms. Cardenas should be awarded $200,000 in emotional distress damages.

3. Civil Penalty and Affirmative Relief

When unlawful discrimination is proven, the HRL permits the Commission to impose a civil penalty of up to $125,000 but, where the court finds that this "unlawful discriminatory practice was the result of the respondent's willful, wanton or malicious act," a civil penalty of not more than two hundred and fifty thousand dollars may be imposed. Admin. Code § 8-126(a) (Lexis 2013). The imposition of civil penalties is meant to "punish the violator" and "strengthen and expand the enforcement mechanisms of the law so the Commission could prevent discrimination from playing any role in actions related to employment, public accommodations, housing and other real estate." *119-121 East 97th St. Holding Corp. v. NYC Comm'n on Human Rights*, 220 A.D.2d 79, 88 (1st Dep't 1996).

In this case, petitioner seeks a civil penalty of $75,000 arguing that AMRC did not have an anti-discrimination policy and that Mr. Fund, the perpetrator of the ongoing sexual harassment and the only person with authority to discipline staff, willfully and wantonly discriminated against Ms. Cardenas and gave her no option but to resign from her position.

In determining the amount, relevant considerations include the egregiousness of the discrimination, respondent's financial situation, the length of time respondents committed the discrimination, and the respondent's failure to cooperate with the Commission. *See, e.g., Comm'n on Human Rights v. Tanillo*, OATH Index Nos. 105/11, 106/11 & 107/11 at 7-8 (Feb. 24, 2011), *modified on penalty*, Comm'n Dec. & Order (May 23, 2011); *Comm'n on Human Rights v. Rent The Bronx, Inc.,* OATH Index No. 1619/11, (July 27, 2011), *adopted,* Dec. & Order (Oct. 27, 2011). Other factors include whether the violation was willful and whether there

have been prior findings of discrimination against the same party. *Comm'n on Human Rights ex rel. Martin v. Hudson Overlook, LLC*, OATH Index No. 137/06 at 15 (Aug. 30, 2006), *adopted*, Comm'n Dec. & Order (Dec. 5, 2006).

In recent years, the Commission has awarded civil penalties in amounts ranging from $40,000 to $125,000 when the discrimination is egregious. *See, e.g., Marine Holding LLC v. NYCCHR*, 10951/2012 (Queens Sup. Ct. Mar. 14, 2013) ($125,000 for landlord who would not provide the accommodation of converting a disabled tenant's window into a door with a ramp to allow her independent access to her apartment); *Comm'n on Human Rights ex rel. L.D. v. Riverbay Corp.*, OATH Index No. 1300/11 (Aug. 26, 2011), *adopted*, Comm'n Dec. & Order (Jan. 9, 2012) ($40,000 for landlord who denied disabled tenant reasonable accommodation of companion animal); *Comm'n on Human Rights ex rel. Russell v. Chae Choe*, OATH Index 2617/09 (Sept., 25, 2009), *aff'd*, Comm'n Dec. & Order (Dec. 10, 2009) ($50,000 for landlord who discriminated against disabled tenant by refusing to replace her bathtub with a walk-in shower at no extra expense).

The record supports a finding that Mr. Fund's discriminatory actions were egregious, willful, and wanton in that he ignored Ms. Cardenas's repeated pleas to cease his unwelcome and degrading behavior. The discriminatory conduct was verbal and physical in nature and lasted almost three years. Moreover, there was no evidence that Mr. Fund has any remorse for or appreciation of his actions. To the contrary, he minimized his conduct and thought Ms. Cardenas's reactions were humorous. There was also sufficient evidence to conclude that Mr. Fund's discrimination affected other employees and clients of AMRC who were offended by the cartoon and his sexually explicit comments. Petitioner's request for a $75,000 civil penalty is reasonable and supported by the record.

No credible mitigating circumstances were presented by respondents. While there was no evidence of prior findings of discrimination against respondents, Mr. Fund's self-serving assertion that AMRC has been operating at a loss is highly speculative.

As part of discovery, respondents were asked to produce "documents sufficient to establish the net worth of respondents." Specifically, they were asked for the following for 2008 through 2013: bank statements for every account maintained by respondents (in his deposition Mr. Fund stated he had eight bank accounts), "Quick Book Summaries" of AMRC's net profits;

and corporate and individual tax returns for respondents. Prior to and during the hearing, respondents were repeatedly ordered to produce these records (ALJ Ex. 7; Tr. 735-37). They refused to provide a complete set of reliable documents and instead produced selected bank statements, an uncertified tax return from 2012, and profit and loss statements for 2011, 2012, and 2013 that were created specifically for this litigation (Resp. Ex. J, L; Pet. Ex. 18). According to Mr. Fund, the profit and loss statements were created by Ms. Huang, AMRC's bookkeeper, who input the numbers, "pressed a button," and produced the statements (Tr. 682, 688). Neither Mr. Fund nor Ms. Huang could verify whether the numbers were accurate (Tr. 689, 862-67, 882-84). Accordingly, these self-serving documents are unreliable.

Finally, the Administrative Code authorizes the imposition of affirmative measures to prevent further discrimination. Admin. Code § 8-120(a)(4) (Lexis 2013). Petitioner has requested that respondents institute a written anti-discrimination policy and train all staff on the HRL. Considering that the purpose of the law is to eliminate and prevent discrimination, Admin. Code § 8-101, this request is appropriate. *See, e.g., Star Models Management*, OATH 1464/05 at 17-18 (owner of employment service directed to attend sensitivity training classes and institute a policy against discrimination).

In sum for respondents' severe and pervasive discrimination, Ms. Cardenas should be awarded $82,170 in back pay plus 9% interest, $12,636 in front pay discounted to its present value by 2%, and emotional distress damages in the amount of $200,000. The Commission should be awarded a civil penalty of $75,000. In addition, respondents should institute a written anti-discrimination policy and train their staff on the Human Rights Law.

Alessandra F. Zorgniotti
Administrative Law Judge

March 14, 2014

SUBMITTED TO:

PATRICIA L. GATLING
Commissioner

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