BEFORE THE MONTGOMERY COUNTY COMMISSION
ON HUMAN RIGHTS

Office of Zoning and Administrative Hearings
Stella B. Werner Council Office Building
100 Maryland Avenue
Rockville, Maryland 20850
(240) 777-6660

GISELLE PAUTRAT,	*	
Complainant,	*	
v.	*	**OZAH No. HR 19-01**
	*	(OHR No. E-06021)
FOUNDATION FOR FINANCIAL EDUCATION (F3E),	*	
JONATHAN LEE,	*	
CAPITAL FINANCIAL PARTNERS,	*	
Respondents.	*	

* *

HEARING EXAMINER REPORT AND RECOMMENDATION

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Giselle Pautrat's complaint to the Office of Human Rights alleged she was a victim of violations of the County's Human Rights Law, M.C. Code chap. 27, because she was sexually harassed while employed by the Foundation for Financial Education (F3E) and Capital Financial Partners and because she was fired in retaliation for filing an internal complaint about the harassment.

Based on evidence presented during a two-day hearing I conclude that Ms. Pautrat's factual allegations are amply supported. The testimony she presented is believable and sufficient to find that Jonathan Lee, chief executive officer of the Foundation, sexually harassed her. Mr. Lee was not at all credible in light of written evidence that contradicted substantial portions of his testimony and testimony that was quite implausible.

Mr. Lee's actions were sufficiently serious to meet the sex discrimination standards of the Law, § 27-19(a)(1)(A), and governing Maryland judicial decisions.

I also conclude that it is reasonable to infer that Ms. Pautrat was the victim of retaliation because the firing occurred just four workdays after she filed her complaint. The excuses offered for her firing are not supported by respondents' contemporary employment records. Retaliation violates the Law's § 27-19(c)(A).

All three respondents can be held accountable for violations of the Law. Both corporate respondents were Ms. Pautrat's employers within the meaning of § 27-6 of the Law. Both had an employment contract with Ms. Pautrat, directed her activities, and benefited financially from the work she did for them.

Mr. Lee should also be held accountable. He was the harasser and, by committing a prohibited discriminatory practice, should be held responsible under § 27-19(c)(2) and (4).

If the Commission agrees with my findings and conclusions, Ms. Pautrat is entitled to damages, interest, and attorneys' fees under § 27-8 of the Law. Ms. Pautrat waived an award of back pay.

If the Commission disagrees with my conclusions on the merits, Ms. Pautrat is nevertheless entitled to attorneys' fees caused by respondents' unjustifiable failures

to meet deadlines or to appear in this case for several months, causing Ms. Pautrat to incur counsel fees and otherwise unnecessary expenses.

I. STATEMENT OF THE CASE.

Ms. Pautrat filed her complaint with the Office of Human Rights (the Office or OHR) on June 23, 2015, alleging she was victim of sex discrimination and retaliation in violation of the County's Human Rights Law, M.C. Code 27-1 *et seq.* HE ex. 1. The complaint's heading named two respondents, the Foundation and Capital Financial. The body of the complaint accused Mr. Lee, the chief executive officer of the Foundation, of sexual harassment.

The Office certified the case to the Commission well over three years later, on January 25, 2019, after finding that it was reasonable to believe violations of the Law had occurred and the Office's efforts to conciliate failed. HE ex. 2.

Four days later, this Commission's Case Review Board referred the case to the Office of Zoning and Administrative Hearings (OZAH) to conduct a hearing and to file findings and recommendations. HE ex. 3.

During the next several months of 2019, Ms. Pautrat's counsel met deadlines set in a series of Orders but respondents failed to participate in these proceedings. Orders requiring respondents to show cause why default should not be declared against them were issued and went unanswered. See, e.g., docket nos. 14, 29.

On May 22, 2019, following entry of appearance of their counsel, I removed the threat of default against the Foundation and Mr. Lee and extended the time for Capital Financial to appear until June 11. Docket no. 43. After Capital Financial failed to meet the June 11 deadline, I ordered that it would be barred from contesting liability but would remain subject to discovery. Docket no. 48.

When counsel for the Foundation and Mr. Lee precipitously retired, they were given until July 18 to find new counsel. Docket no. 53. The Foundation failed to meet that deadline so an Order was issued prohibiting it from contesting liability. Docket no. 56. No default was entered against Mr. Lee because he could choose to defend himself *pro se*.

The Foundation, having hired new counsel, moved to vacate the Order of default on August 7. Docket no. 61. Ms. Pautrat opposed the motion. Docket no. 68. On August 26, counsel for Capital Financial finally entered his appearance and moved to vacate the default Order. Docket no. 72. The motion was accompanied by an affidavit from Nicholas Herman, who described himself as the sole shareholder of Herman, Inc., a corporation operating under the Capital Financial trade-name. Ms. Pautrat opposed. Docket no. 71.

On September 9, I entered an Order vacating both defaults but requiring the Foundation and Capital Financial/Herman, Inc.,[1] to reimburse Ms. Pautrat's attorneys' fees and related costs caused by respondents' failure to meet deadlines. Docket no. 75. The Order noted that I would recommend they should be held responsible for those fees and costs irrespective of the outcome of this case on the merits. *Id.* at 9.

Capital Financial and Mr. Lee, on November 6, separately moved to dismiss the complaint against them. Capital Financial contended that Ms. Pautrat had been an employee of the Foundation alone despite conceding that Capital Financial alone had paid her salary. Docket no. 84. The Lee motion contended he was not an "employer" of Ms. Pautrat within the meaning of M.C. Code § 27-6. Docket no. 85. His motion argued Capital Financial had been her sole employer. Ms. Pautrat opposed both motions. Docket nos. 88, 89.

I denied both motions to dismiss because relevant facts about who had been Ms. Pautrat's employer needed further exploration. Docket no. 91. In addition, no party had briefed the relevance of M.C. § 27-19(2), (4), to possible liability in this case.

After consultations with the parties, the hearing was scheduled for three days starting on March 4, 2020. Docket no. 98.

The hearing occurred as scheduled but lasted only two days. The parties were given time until April 24 to file post-hearing briefs. The record was closed on May 20 except that complainant was given time to apply for attorneys' fees and respondents

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[1] As will be explained later, Herman, Inc. uses "Capital Financial Partners" as its trade-name.

were given time to reply. Docket no 139. Complainant and Capital Financial filed their fee-related submissions on time; the Foundation and Mr. Lee did not. Because the Foundation's and Lee's failure was very brief and didn't interfere with issuance of this Report, their motion to file out of time was granted.

II. SUMMARY OF TESTIMONY AND OTHER EVIDENCE.

Three witnesses testified during the two-day hearing in addition to Ms. Pautrat. One was a co-worker, Lauren Byers, who testified first. Counsel for Ms. Pautrat examined Mr. Lee as a hostile witness; he was not recalled as a witness by either of respondents' counsel. The Foundation called no witnesses on its own. The only witness presented by Capital Financial was Elizabeth de Los Santos, who had been Ms. Pautrat's principal supervisor. Ms. de Los Santos testified by Skype from New Braunfeld, Texas. She filed a timely affidavit, notarized in New Braunfeld, swearing her testimony had been truthful. (Docket no. 135).

A. EVIDENCE OF "EMPLOYER" AND "EMPLOYEE" STATUS WITHIN THE MEANING OF THE HUMAN RIGHTS LAW.

I begin this discussion of the evidence with this topic, rather than with the chronology of events, because the relationships among the respondents are complicated and because issues concerning which respondent was responsible for relevant employment decisions permeate much of the hearing record.

An *employer* is defined in M.C. Code § 27-6 as "any person who employs one or more individuals in the County, either for compensation or as a volunteer." A *person* is "an individual [or] a legal entity * * *." An *employee* is "any individual employed by an employer, either for compensation or as a volunteer. * * *" The term *volunteer* is not defined.

The Pautrat complaint, by naming both the Foundation and Capital Financial as respondents, implicitly considered them both to be her employers and ultimately responsible for violating her rights under the Law. Much evidence presented during the hearing turned on the question of which entity bears legal responsibility if Ms. Pautrat proves her rights were violated.

This opening section of the Report is limited to summarizing the evidence. My findings of fact and conclusions of law on this topic appear in section II C, after my findings and conclusions on whether Ms. Pautrat proved that she was a victim of sex discrimination and retaliation.

1. *Pautrat testimony and related exhibits*.

Ms. Pautrat testified that, when she filed her complaint with the Office of Human Rights, she considered all three respondents responsible for the harm she suffered because their relationship was "always unclear" and although she worked for the Foundation, it seemed it was under the "umbrella of CFP." T.II 107.[2] The relationship was "flip-floppy"; "[t]hey were related." *Id.*

Ms. Pautrat began work in March 2015.[3] T.I 207. At the time she began work, she believed she was working for the Foundation, not Capital Financial. T.II 108. A friend, the owner of an employment agency (and the same person who had counseled Ms. Byers), had recommended she apply. T.I 196.

Mr. Lee interviewed her for the job in February 2015. T.I 199, 201. He told her the position entailed making financial presentations to organizations once she learned the briefing material she would be given. T.I 200, 201. At the time, Ms. Pautrat had no relevant financial background for the work Mr. Lee promised. T.I 201. At no time during interview did Mr. Lee characterize her position as that of being a volunteer. T.I 201. While employed, she was never given the material or asked to do briefings.

Mr. Lee explained the relationship between the Foundation and Capital Financial. T.I 204. Based on what she was told, "my understanding was that CFP was * * * the for-profit umbrella and that F3E [the Foundation] was underneath that as a nonprofit. And that essentially that was the relationship that F3E [used to] get the clients into the door under the nonprofit presentations and then have them speak to a financial advisor from CFP." T.I 204; see T.II 45-46.

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[2] The page numbering in this Report is based on the condensed transcript that depicts four verbatim pages on a single standard letter-size page.

[3] All dates in this Summary of Evidence refer to events in 2015.

Ms. Pautrat received a job offer on February 14 by email from "Nick Herman" using a Capital Financial address. Ex. C25. The offer was a "base salary" of $35,000 annually and $13,000 in commissions; she was also promised that her health insurance premiums would be reimbursed. *Id.* The signature line of the email read: "Nicholas Herman, ChFEBC,[4] Capital Financial Partners." *Id.* (An undisputed exhibit in the record reveals that Mr. Herman wore two hats; in addition to being the owner/CEO of Herman, Inc., he was listed as acting chief financial officer of the Foundation. Ex. C5).

The emailed job offer did not describe Ms. Pautrat's duties. T.II 56. Although the email that stated her start date would be nine days later, February 23, Ms. Pautrat testified her employment actually began on March 9. T.I 207.

On the day she began work, Ms. Pautrat signed an "*Employee* Confidentiality, Noncompetition and Non-Solicitation Agreement." Ex. C15; italics added. The agreement stated that it was between "the Employee" and "Capital Financial Partners and the Foundation for Financial Education" as well as their subsidiaries and other affiliated entities, collectively referred to as "the Company." *Id.* Ms. Pautrat's name has been written above a printed blank line in the document. *Id.*

The first substantive paragraph of the document provides that as consideration for signing it "you shall hold the position of '_____' as an at-will employee of the Company * * *." *Id.* The blank was not filled in. *Id.* In addition to Ms. Pautrat's signature, Webster Sewell is a signatory, with the title "Community Relations Coordinator." *Id.* His signature appears underneath the names of Capital Financial and the Foundation, who in addition to Ms. Pautrat, are "the parties hereto [who] have executed this agreement." *Id.* (Mr. Sewell is identified in an undisputed exhibit as the Foundation's director of operations. Ex. C5).

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[4] *I.e,* "Chartered Federal Employee Benefits Consultant." See https://www.finra.org/investors/professional-designations/chfebc.

Later during her employment, after Ms. Pautrat complained about sexual harassment, she received an excerpt from a jointly issued Foundation/Capital Financial Employment Manual. Ex. C6; T.I. 103. The manual included the following:

> 4.3. HARASSMENT, INCLUDING SEXUAL HARASSMENT.
>
> CFP/F3E is committed to providing a work environment that is free of discrimination and unlawful harassment. Actions, words, jokes or comments based on an individual's sex, race, ethnicity, age, religion or other legally protected class will not be tolerated.
>
> If you believe you have been the victim of harassment and or know of another employee who has, report it immediately. Employees can raise concerns or make reports without fear of reprisal.
>
> Any supervisor who becomes aware of possible harassment should promptly advise their manager who will handle the mater in a timely and confidential manner.

Although Ms. Pautrat thought initially she would be paid by the Foundation (T. II 43), all salary checks during her tenure were issued by Capital Financial/Herman, Inc. T.I 209; T.II 99-100. When she received her 2015 IRS tax form W-2, it had been issued by Herman, Inc. *Id.* At no time did she think that she, or her co-workers, had been working as mere "volunteers" (a title Mr. Lee had used repeatedly in his testimony). T.II 97, 100.

When Ms. Pautrat started work, she was assigned four Gmail addresses but used only the one for the Foundation, Giselle@F3Eonline.org. T.I 213-214. Her telephone answering message was "You have reached Giselle at the Foundation for Financial Education." T.II 102.

Mr. Lee set Ms. Pautrat's working hours but her work was supervised by Mr. Sewell or Ms. de Los Santos. T.II 96. (Ms. de Los Santos was the Foundation's national marketing director in 2015. *See* ex. C5)

2. *Byers testimony.*

Ms. Byers worked at the joint headquarters of the Foundation and Capital Financial for about three months early in 2015. T.I 18. Ms. Pautrat began work there a few weeks later. T.I 33.

At various points in her testimony, Ms. Byers testified she never knew which entity she was working for, the Foundation or Capital Financial. See, *e.g.*, T.I 20, 52. She testified (T.I 51):

> I didn't really know who – it was either Capital Financial Partners or F3E. I mean, we had an email that said F3E, but a signature that said Capital Financial Partners. So it was very – it was just very – it was very strange.

Later, during cross-examination, she added (T.I 54-55):

> MS. BYERS: I don't know what I was really an employee of. I don't know if it was F3E [the Foundation] or if it was Capital Financial Partners.
>
> MR. ABRAMSON [counsel for Capital Financial)/Herman, Inc.]: My question was, did you consider yourself an employee of F3E?
>
> MS. BYERS: I considered myself as an employee of Capital Financial Partners and F3E because I both had the email of F3E and I had a signature of Capital Financial Partners.

Ms. Byers had answered the telephone as "Capital Financial Partners" but when she sent emails using the Foundation's address: "It said, like, Lauren at LaurenF3E@gmail.com or something like that. Then we would have a signature that said Capital Financial Partners at the bottom." T.I 53-54.

The checks Ms. Byers received during her tenure were issued by Herman, Inc., she believed. T.I 64.

Ms. Byers considered Mr. Lee to be her supervisor but she also reported to Mr. Sewell. T.I 36, 50-51. If she had problems or needed time-off, she would consult either Lee or Sewell. T.I 36. While they were her daily supervisors, if neither of the two men was in the office, she would report to Mr. Herman. T.I 57, 60. When preparing a calendar for potential client appointments, she would be supervised by Mr. Herman and a man whose name she had forgotten. T.I 51. Ms. Byers said she was never supervised by Elizabeth de Los Santos, who lived in Texas. T.I 37, 50.

3. *Lee testimony and related exhibits*.

Mr. Lee acknowledged he was the chief executive officer of the Foundation (T.I 80, 102, ex. C5). As CEO, he raised money for the Foundation, wrote its training programs, and travelled around the country advising Foundation members and

advisors. T. 159. The Foundation's work was to provide financial education by holding workshops, primarily at places of employment. T.I 160. Mr. Lee established it in about 2012 to be a 501(c)(3) organization so "we could accept donations and give people tax deductions." T.I 175. Mr. Lee raised most of the money for the Foundation, primarily to cover travel and reimbursements, but not for salaries. T.I 178.

Mr. Lee, the Foundation's CEO, said didn't know the names of the Foundation's directors, other than Mr. Herman and himself. T.I 175. The two men had agreed that Mr. Herman would be both president and treasurer of the Foundation. T.I 176.

The Foundation's funds were not used to pay rent for the space it shared with Capital Financial Partners; instead, Capital Financial paid all expenses. T.I 179. Mr. Lee claimed that the Foundation received no financial contributions from Capital Financial, or from Herman, Inc., and that the Foundation provided no funds to them. T.I 180.

Mr. Lee said his income in 2015 came from seven or eight sources, possibly including salaries from Herman, Inc, but initially he couldn't recall. T.I 164. Later, he claimed he was a salaried employee of Herman, Inc. T.I 184. He received no salary from the Foundation. T.I 80.

Initially, Mr. Lee testified he had hired Ms. Pautrat for the Foundation (T.I 82, 168) but subsequently he said she was "hired by Herman, Inc, and then also to do some work for the Foundation." T.I 184. "I definitely wanted to hire her" but Mr. Herman could say no: "he could veto anything he wants." T.I 169. Mr. Lee said he didn't know if Mr. Herman played a role in hiring Ms. Pautrat. T.I. 170.

On several occasions during his testimony, Mr. Lee denied Ms. Pautrat had been a Foundation employee; rather, she had worked for the Foundation simply as a "volunteer." T.I 80. He wasn't sure if the word "volunteer" appears in the companies' personnel files: "in the personnel files they might have had a job description that said volunteer. But I couldn't say that for sure." T.I 184. Still, Mr. Lee acknowledged that Ms. Pautrat had received a salary when employed (T.I 128); "she was salaried,

yes." T.I 188.[5] She also received commissions, "[p]robably revenue generated through Herman, Inc." T. 188.

Mr. Lee denied he had supervised Ms. Pautrat or exercised managerial control over her. T I 15, 159, 164. For the "most part" he was a hands-off manager. "I had very little managerial oversight over anybody" because he was involved in education, fund-raising, and travel." T. I 86. Ms. de Los Santos had primarily been responsible for supervising Ms. Pautrat but there also may have been others. T.I 159. They included Simon Clayton, who was office manager in 2015, and a dual employee of Herman, Inc., and of the Foundation, "as a volunteer." T.I 171-172. Another was Mr. Sewell. *Id.*

As president and treasurer of the Foundation, Mr. Herman could also have had oversight because he had "the ability to hire and fire anybody he wanted." T.I 165. Mr. Herman, like Lee, was a dual employee of both Capital Financial and the Foundation. T.I 166. Mr. Lee didn't know when Herman acted in a supervisory role whether he was doing so for one entity or the other. T.I 166. Mr. Lee couldn't recall if Mr. Herman had asked Ms. Pautrat to work on Capital Financial matters but he was sure he had done so. T.I 165-166. As Mr. Lee explained it (T.I 166-167),

> Everybody that was in the office that was an employee of CFP had CFP responsibilities, *i.e.*, scheduling appointments for CFP clients, *i.e.* answering phones, *i.e.* doing paperwork, sending emails, clerical stuff, handing files off, case support. Anything they would be asked they would definitely be responsibilities of an employee of CFP.
>
> MR. ABRAMSON: But is that a general statement that appl[ies] to every person who worked in that office?
>
> MR. LEE: Every employee of CFP had duties for CFP. I would say yes.
>
> MR. ABRAMSON: Even if they were working for the Foundation for Financial Education?
>
> MR. LEE: There wasn't [*sic*] any employees that were only working for the Foundation. Everybody was at least a CFP employee, and then some may be considered dual as volunteers.

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[5] A 2016 tax form filed by the Foundation claims that "salaries, compensation, and other employee benefits" in 2016 amounted to $96,742, of which $89, 000 were for salaries and wages and $7000 were payroll tax payments. Ex. CFP 2, line 15; *id.* p. 10 lns. 7, 10; T.I 151.

MR. ABRAMSON: You mean they were being paid by CFP?

MR. LEE: They were being paid by CFP, and employees of CFP.

Mr. Lee said he couldn't recall whether the Foundation had employees who worked for it alone. T.I 168.

During cross-examination, counsel for Ms. Pautrat introduced a motion for summary judgment that had been filed on behalf of Mr. Lee in a suit brought against him by Mr. Herman, after the two men had a falling out in 2018. Ex. C22, *Herman v. Lee*, Md. Cir. Ct. (M.C.), no. 461371V. The motion was filed by David Shiller, Mr. Lee's counsel in the present case.

According to the motion, the two men had an agreement that "parties would split the commissions from clients referred by the Foundation with Plaintiff Herman retaining 40% and Defendant Lee 60%." *Id.* at GP-0118. As part of the motion, Mr. Lee claimed that Mr. Herman had not timely responded to his request for admissions and that they were therefore all admitted, citing Md. Rule 2-424(b).

Among the matters Mr. Lee argued had been admitted were the following (here paraphrased):

> #14 Mr. Herman had been a volunteer for the Foundation for five years;
> #15, the two men had been and continued to be "business partners";
> #16, Mr. Herman had hired Mr. Lee to work for Herman, Inc.
> #17 the two men had agreed to the 40%/60% split of commissions generated through the Foundation
> #18 Mr. Lee was a W2 employee of Capital Financial Partners.

Ms. Pautrat's counsel on cross-examination also introduced an affidavit signed by Mr. Lee in the *Herman v. Lee* case that also contended the two men had agreed that Mr. Lee "was to receive 60% of commissions from monies paid to Herman, Inc., and 100% of commissions from direct referrals to Herman, Inc [b]y Defendant Lee." Ex. C23 at GP-0127. In the current case, Mr. Lee affirmed that the commission agreement existed. T.I 95.

Mr. Lee provided an affidavit in a 2015 case, in which Herman, Inc., and the Foundation had sued a former employee who, they claimed, had gone in competition with them. *Herman, Inc. v. McLain*, Md. Cir. Ct. (M.C.), no. 4074477V; ex. C21. The

affidavit describes the former employee's duties while employed and how the two firms interacted:

> 3. In 2009 F3E hired Sharon McClain to make cold calls to federal government agencies and others in order to schedule financial education workshops that F3E would conduct.
>
> 4. At the workshops, F3E would gather information from the attendees, and if they wanted further information, F3E would refer them to Capital Financial Partners, Inc., a company in which I am also a principal, in order to deliver financial instruments, insurance policies, and other instruments in order to effectuate the retirement planning that was taught at the workshops.
>
> 5. In addition to providing retirement education, F3E also conducted the workshops in order to assist Capital Financial Partners in developing streams of revenue from the delivery of its financial products.

In his testimony in the *Pautrat* case, Mr. Lee denied that signature on the document was his: "No that's not my signature. It's a stamp." T. 88. Asked if he had read the affidavit and had allowed someone else to sign it for him under penalty of perjury, Mr. Lee replied: "No, this is not my handwriting. * * * I don't remember reading it. I don't remember signing it. * * *." T.I 89. (During the *McLain* proceedings, Mr. Lee's counsel declared he had no doubt the signature was Mr. Lee's and the Court accepted that declaration as a stipulation).

According to the docket of the *McLain* case,[6] Mr. Lee appeared in court at least once in person (docket entry 101) and was represented by counsel throughout. No docket entry contains a motion to strike the affidavit.

4. *De Los Santos testimony*.

Ms. de Los Santos, called to testify only by one respondent, Capital Financial, said that in 2015 she was employed by, and received her salary from, the Foundation starting sometime in 2014 and was responsible for "both the DC chapter and also the national program." T.II. 127, 135, 136. She had left employment by the Foundation in July 2017. T.II 184.

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[6] See http://casesearch.courts.state.md.us/casesearch/inquiryByCaseNum.jis.

While employed, her title was "national program director." T.II 182. As such, she had supervisory responsibility over the Foundation's "dozens" of "employees." *Id.* Even so, she had no HR (human relations) responsibilities. T. 145. Later in her testimony she testified she had directly supervised four to five employees. T.II 189.

She reported to Mr. Lee and was "90 percent sure" that her salary came from the Foundation. T.II 186. She never did for-profit work for Mr. Herman's organizations. T.II 187. Mr. Herman was one of the "big dogs" because he "controlled the purse strings" but she "didn't do any for profit where Nick would supervise me. T.II 187.

She was uncertain which entity paid employee salaries (T.II 185):

> But I know that there were employees that were paid through the -- they received their check on the for profit side because they did a lot of the for profit work. But part of the kind of commitment that was given to our DC chapter was a portion of their time was allocated towards the non-profit services. So even though they might have received a check from Herman, Inc. they might have still continued on with the non-profit side of helping. And we had employees ranging from me that all I did was 100 percent of the job of non-profit, and then we had employees that did 50/50 of their time, and then we had other employees of that work purely on the for-profit side. And so it was kind of – it was kind of intertwined.

B. EVIDENCE ABOUT SEXUAL HARASSMENT.

1. *Ms. Pautrat.*

Ms. Pautrat testified her job interview with Mr. Lee in February 2015 lasted about an hour. T.I 199, 201. After discussing her role at the Foundation and related matters, Mr. Lee commented that Ms. Pautrat would create problems for other women in the office, because she was "'attractive.'" T.I 203.

When she began work in March 2015 Ms. Pautrat asked to meet with Mr. Lee again because she was concerned about personal financial issues; he invited her to do so over lunch. T.I 219-220.

Shortly after that luncheon Ms. Pautrat began receiving telephone calls and non-work-related text messages from him. T.I 221; T.II 32. One early message asked her to go to a basketball game with him. T.I 222. She declined to answer. T.I 221-

222; T.II 66. She testified she didn't enjoy basketball and thought the invitation "inappropriate." T.II 30. There had been no hint that the basketball game was work-related. T.II 68.

She never responded to Mr. Lee's calls or messages to tell him she didn't want personal messages because "I didn't want to sit [t]here and be put in an awkward position of possibly losing my job * * *." T.II 66. In fact, she had never responded to any after-hours text. T.II 66-67. She no longer had the texts from 2015 because she had replaced the telephone she had used five years earlier. T.II 64, 104.

In mid-April, while Ms. Pautrat was in a co-worker's office wearing a sleeveless, knee-length dress, with her legs crossed, Mr. Lee entered and said, "look at those legs." T.II 4. She hadn't replied because "[h]e's my boss," but didn't appreciate the comment or consider it appropriate. T.II. 4-5. She felt she was being "objectified" and resolved never to be alone with him again. T.I 34. This hadn't been the first time Mr. Lee commented on a woman's appearance. Once, when a co-worker passed by while Mr. Lee was conversing with Ms. Pautrat, he stopped mid-sentence and said "'damn, we have attractive women in the office." T.II 5-6.

One morning, while Ms. Pautrat was in the kitchen at work at 8:30, preparing her breakfast, she turned around and discovered Mr. Lee watching her. T.I 230. When she asked why he hadn't announced himself he stared at her "with just a smirk, like whatever," but didn't say a word. T.I 230-231. At the time, only she had been directed by Mr. Lee to arrive at 8:30,[7] so no one else was in the office. T.I 231.

The kitchen incident made her uncomfortable because she didn't know how long he had been there watching. T.II 31. When asked on cross-examination why she was making an issue of this if, hypothetically, Mr. Lee had been there for just a second before she noticed him, Ms. Pautrat replied: "* * * when you're a woman and you think that you are alone and you turn around and there is a man behind you that did not announce himself, that is kind of scary and startling, sir." T.II 73.

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[7] On cross-examination, Ms. Pautrat said she always came in early and worked beyond eight hours. When she'd complained to Mr. Lee, he had been curt and had accused her of not wanting to work. T.II 53.

On April 17, Ms. Pautrat accompanied Mr. Lee to the Pentagon where he was to give a financial presentation. T.II 6. She had lost her voice and couldn't make telephone calls that day. *Id.* After the presentation at the Pentagon, while they were standing about three feet apart waiting to be escorted out, Mr. Lee told her there was hair on her stomach and reached to take it off. T.II 7, 79. She backed away but there was a "slight contact." T.II 8, 91.

She felt "[c]ompletely uncomfortable by the encounter because," unlike the comments and texts, "he had gone from basically like saying stuff * * * to now, like you're in my bubble. And I didn't ask you into my space * * *." T.II 35.

In her testimony, Ms. Pautrat said she hadn't vocally protested, explaining "[y]ou can tell when you don't want someone to touch it. * * * [C]ommunication is 90 percent body language." T.II 93. Earlier, in an internal complaint she submitted to respondents in May 2015, she had written, "Specifically, on April 17, 2015, I told him not to touch me when he reached for my stomach to remove a hair * * *." Ex. C29.

After the Pentagon presentation, Mr. Lee suggested stopping for ice-cream. T.II 9-10. She had assented because she couldn't do her job without a voice. T.II 10. At some point during the ride, Mr. Lee said he could read her because she didn't have a poker face. T.II 8, 11. On cross-examination, she testified that she didn't believe that the remark had had a sexual connotation, only that he was "just really being passionate about how he thinks he knows me." T.II 84

Ms. Pautrat was wearing a sleeveless dress that day. Mr. Lee had not touched her in the car (T.II 79) but once inside the shop, as she leaned against the counter, he reached for and touched the inside of her arm; when she backed away, he did so again. T.II 11, 82. She had not protested. T.II 11, 83.

Also, in about mid-April, Mr. Lee called her from where he was vacationing: "He was basically saying how he was checking on me, how he missed me and he was sending me pictures of his vacation." T.I 224.

At other times he would invite her to travel with him. T.I 225. She was aware that Mr. Lee traveled frequently on business (T.II 46-48) and some of his requests were business related, others were not: "some would just be generic, like, do you want

to travel? Would you like to travel with me?" T.I 225. She hadn't responded because she knew his girlfriend worked in the Foundation/Capital Financial office and because others in the office with much longer tenure hadn't been given an opportunity to travel outside the local area. T.I 225-226; T.II 33. She felt co-workers would consider it favoritism in light of Mr. Lee's comments that she was attractive. T.II 34.

In addition, there was no reason to be travelling if she wasn't doing presentations. T.II 60. She had never been told she her job would involve travelling out of the Washington area and "there's a difference between traveling within the DMV [the Washington Metropolitan area] to actually give the presentations and traveling on vacations like, and/or other places out of state." T.II 61-62. In reality, all of her assignments involved making make appointments limited to the local area. T.II 205-206.

Because she was scared, Ms. Pautrat never confronted Mr. Lee verbally: "Because he was my boss. And I knew that if you say something you could potentially get fired * * *." T.II 111. She did, however, tell coworkers Simon Clayton and Ingrid Palencia about Mr. Lee's behavior. T.II 19-20, 90.[8] She acknowledged that Mr. Lee had never directly asked for sexual favors. T.II 113.

When asked why she thought Mr. Lee's actions were hostile or abusive, Ms. Pautrat replied (T.II 114):

> I found it to be hostile, sir, * * * because every day, like, I was anxious because I didn't know what was going to happen. He already told me that I was attractive and that the other women weren't going to like me. He had given me special attention by stopping by my office. He's sitting here and he's texting[.] [H]is girlfriend could get upset, find out. I was stressed about if she found out then maybe there would be an opportunity for me to lose my job, which I needed. * * * So it was just so tense and stressful that I just didn't know what was going to happen, if I said something wrong, if I did something wrong, was my job in jeopardy[?]

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[8] Ms. Pautrat's attorney, Dennis Chong, responding to a question from me, said he had been unable to get in touch with Mr. Simon or to locate Ms. Palencia. T.II 112.

Asked what she thought Mr. Lee wanted, she replied "I think he wanted to be alone with me. I don't know. I just know that I just didn't feel comfortable. * * * and I know it wasn't right." T.II 115.

2. *Ms. Byers.*

Ms. Byers testified she had observed Mr. Lee's interactions with the female staff and found them "not appropriate." T.I 26. She cited an instance when a former colleague, Ingrid Palencia, walked past her and Mr. Lee wearing a black dress: "His eyes followed her" and "[h]e gave like a smirk." T.I 27. Asked about how she interpreted the smirk, Ms. Byers said she interpreted it to mean "he liked the way she looked in the dress." *Id.*

Ms. Palencia had telephoned Ms. Byers complaining about late night "'drunk'" text messages that she had been receiving from Mr. Lee. T.I 28. Although Ms. Byers did not know the contents of the messages, "I know she was very disturbed and uncomfortable." T.I 77-78. Another former colleague, Alexa Kazavoka, also told Ms. Byers that Mr. Lee had been sending her "drunk" text messages. T.I 59, 65. Again, Ms. Byers had not seen the messages and didn't know their contents. T.I 28.

Ms. Byers had, however, seen the text message from Mr. Lee to Ms. Pautrat while he was vacationing at the seashore telling Ms. Pautrat, in Ms. Byers' recounting, "that he missed her and wishes he was there." T.I 29.

At work, Mr. Lee would come to Ms. Pautrat's office "pretty frequently," three or four times per day. T.I 30-31. No others employees received as many visits from Mr. Lee even though others in the office were doing the same assignments as Ms. Pautrat. T.I 31-32. Ms. Byers acknowledged that she hadn't been able to see into the room where Ms. Pautrat worked and Ms. Pautrat did share an office with another female colleague, "Olivia." T.I 46, 49, 68. (Ms. Byers did not know Olivia's last name). Olivia was sometimes absent, leaving Ms. Pautrat as the sole occupant of the office. T.I 68-69.

Ms. Byers had not seen Mr. Lee touch either Ms. Pautrat or other women in the office. T.I 57. He had made no advances to Ms. Byers herself and had not sent her text messages. T.I 43, 65. He had commented to her, though, on other female

employees' dress. She was confused about how to interpret his comments: "It was just an uncomfortable environment." T.I 76.

When asked if Mr. Lee's comments and texts created an intimidating, hostile or offensive work environment, Ms. Byers replied, "Offensive work environment, yes." T.I 78.

3. *Mr. Lee.*

Mr. Lee denied all of Ms. Pautrat's sexual harassment claims during his testimony.

He hadn't spent time with Ms. Pautrat socially, "even together during our work hours." T.I 101-102. He denied having told Ms. Pautrat during his interview that she was attractive, at least "[n]ot in that context. T.I 106-107. He admitted that he texted her during non-office hours about matters having no business context. T.I 109-110; ex. CR at GP0006. He had done so, because the person who had referred Ms. Pautrat to him, Toby Studley, owner of SPS Staffing, had urged him to make sure Ms. Pautrat was comfortable. T.I 110. (No party called Mr. Studley to testify).

The texts he had sent to Ms. Pautrat had not been "social and flirty." T.I 111. He denied that he had spent time with Ms. Pautrat socially. He had not texted Ms. Pautrat while was on vacation in Florida with his girlfriend to say that he missed her. T.I 115-116.

He acknowledged that Ms. Pautrat had accompanied him to the Pentagon in 2015 but did not remember when. T.I 123-124. He didn't remember if he had made a comment about her legs that morning. T.I 124. He hadn't reached over and taken a hair from her stomach. *Id.*

He did remember taking her to an ice-cream shop that day but denied Ms. Pautrat's claim that he touched her there: "That is absolutely fabricated. There is no chance of that happening." T.I 126.

Mr. Lee was examined about a two-page document that had been sent to with the Office of Human Rights in response to OHR questions about allegations in the Pautrat complaint. Ex. C3. The response had been sent to OHR by Mr. Sewell, with

copies to Mr. Lee and Mr. Herman. Ex. C2. There is nothing the record suggesting that any portion of the submission was corrected or withdrawn.

The document appended to the Sewell email states (ex. C4)[9]:

> 7. I [Mr. Lee] did tell her she was attractive in the interview only as it related to what she and my friend Toby (who referred her to me) had told me about her having jealous co-workers at her current job.
>
> 8. I did text her during non-office hours as well as spend time working out with her socially during non-business hours.
>
> 9. My texts were social and flirty and I considered her a social friend as she confided in me about her husband cheating on her and how badly she wanted to be in a relationship.
>
> 10. I never touched her other than a hug in greeting or goodbye. I did tell her that I liked her perfume and I always complimented her scarves which she wore a different one every day that matched her outfit.

In response to Ms. Pautrat's allegation that Mr. Lee had become curt and began criticizing her work after she resisted his advances, ¶ 11 of the document sent to OHR states simply "Not true."

When questioned during the hearing about the answer to question 7, Mr. Lee testified "Yeah, but I didn't write that." T.I 100. About the answer to question 8, "I didn't write it. Same thing." *Id.* If Mr. Sewell wrote the answers on behalf of respondents, "I'm a sure he was writing in the third person for me but he put 'I' instead in the first person." T.I 101. Mr. Lee expanded his denial when questioned further about ¶ 9 (T.I 101-102):

> MR. LEE: I mean, I didn't write that. That's not what I said. * * *.
>
> MR. CHONG [Ms. Pautrat's counsel]: Okay. But you – Mr. Sewell wrote that upon your behalf, didn't he?
>
> MR. LEE: He is paraphrasing from his own perspective. I don't – I never said those things to him. We had a very short cell phone conversation about this matter and he asked me some questions, but I didn't write either one of those responses saying those things.

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[9] Exhibit C4 appears not to have been formally moved for admission. It is contained in the OHR record so I take judicial notice of its authenticity as respondents' reply to the OHR's questions in ex. C3 and that it is the attachment mentioned in the Sewell email, ex. C2.

> MR. CHONG: Did you tell him in words or in substance what paragraph seven says?
>
> MR. LEE: No, it's completely out of context.
>
> MR. CHONG: But he represented this to OHR?
>
> MR. LEE: He may have, yeah.
>
> MR. CHONG: And did you tell him in words or in substance what paragraph eight says?
>
> MR. LEE: I did tell him that in one portion of that sentence, but not the others. So I believe we might have worked out together once. But we didn't spend time socially, ever together during our work hours. So I didn't – I never said that.

C. EVIDENCE ABOUT RETALIATION.

1. *Ms. Pautrat.*

On May 6, Ms. Pautrat filed an internal written complaint (C ex. 9) in accordance with the joint CFP/F3E employee handbook provision reproduced above on page 7.

Previously, in April, Ms. Pautrat had at least twice orally complained to Ms. de Los Santos about Mr. Lee's behavior. T.I 210-211. An email from Ms. de Los Angeles referred to two conversations the two women had about Mr. Lee's behavior on May 1 (a Friday) and May 4 (Monday). Ex. C10. During those conversations, Ms. Pautrat said his behavior had been affecting her work. *Id.*

Ms. Pautrat acknowledged that, although she told Ms. de Los Santos about the Lee text messages, she hadn't forwarded any to her. T.II 105. (She had never complained to Mr. Herman because she had had only two interactions with him during her employment. T.II 98, 103, 204).

During their telephone conversations, Ms. de Los Santos advised Ms. Pautrat to treat Mr. Lee as a mentor and to compliment him and his managerial style. T.II 13-14. Ms. Pautrat perceived Ms. de Los Santos's reaction as "basically defend[ing] him." T.II 14.

On May 4, Ms. de Los Santos, responded in writing, saying " Giselle, if you're feeling like you're being sexually harassed then it needs to be addressed." Ex. C10. She understood from Ms. Pautrat that it was affecting her productivity "which isn't

good since you haven't hit your weekly goal since you've started." *Id.* She also understood that Ms. Pautrat had voiced her concerns to colleagues, but cautioned her to be "conscious of possible defamation." *Id.* She suggested that she talk to Mr. Sewell if she was "uncomfortable speaking with Jon" so that "he can understand the severity of the matter as an unbiased third party." *Id.* [10] Ms. Santos attached the page from the employee handbook discussing sexual harassment (ex. C6, ¶ 4.3). According to the May 4 email, Ms. de Los Santos had "already" informed Mr. Sewell of Ms. Pautrat's harassment concerns. Ex. C10. (No email to Mr. Sewell was produced and no party called Mr. Sewell to testify).

The reference in the de Los Santos email to Ms. Pautrat's "weekly goal" presumably referred to the number of telephone calls she made to organizations and participants that yielded positive results.

Ms. Pautrat described her daily duties as (T.I 214),

> * * * my role was to make phone calls. So as the financial presentations were given from F3E at the end of those they would give the attendees surveys and the attendees would indicate what topics they wanted to meet with a financial advisor about it could have been retirement, taxes, whatever the case may be. So when the presenters came back they would give the callers – me – they would give me, Simon, and Lauren, like, the stack[;] then we would call and ask, you know, this is Giselle calling from the Foundation for Financial Education. You attended one of our workshops. It's indicated here that you are interested in having a consultation with one of our financial advisors, and then I would schedule it and put it in the calendar.

Ms. Pautrat was expected to be able to attract at least twenty appointments per week. T.I 216. If the people she called accepted appointments, they would meet with financial advisors "on the for-profit side," Capital Financial, because the Foundation had no financial advisors on its staff. T.I 215. In redirect testimony, Ms. Pautrat explained (T.II 206):

> My specific job responsibilities were to make calls from the surveys that we would get back from all of the workshops, and to go ahead and get

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[10] Exhibit C6 contains a handwritten entry; "Note to file: Giselle asked Elizabeth to keep her concerns private, did not contact Web [Sewell] as requested." T. II 15-16. Ms. Pautrat did not know who wrote the note. *Id.* When Ms. de los Santos testified, she was not asked about the notation.

> them scheduled with the financial advisors, and to go ahead and schedule at least 20 appointments a week. We would filter through the current surveys, old surveys, and if there was nothing else to do, then try to cold call and book a face-to-face.

Ms. Pautrat's co-worker, Simon Clayton, had the same weekly goal; her other co-worker had a different goal, one that Ms. Pautrat didn't know. T.I 217. Ms. Pautrat never reached the twenty-appointment goal but averaged between thirteen and seventeen, she said. T.I 218; T.II 89-90, 94. Mr. Clayton may have reached the twenty-appointment goal once. *Id.* Ms. Pautrat acknowledged that Ms. de los Santos (and Mr. Sewell) had expressed concern that she was not meeting the twenty-appointment goal. T.II 98-99.

On April 27, Ms. Pautrat wrote Ms. de Los Santos admitting that she had double booked two clients. Ex. C32. Ms. de Los Santos replied a couple of hours later, "No worries. It happens to all of us." *Id.*

Another part of Ms. Pautrat's daily work was to try to persuade organizations she telephoned to agree to receive presentations from Foundation representatives. She would be given a list of possible contacts or would try to find them through a Google search. T.II 208. Then she would call them and offer the Foundation's services. *Id.* There was no script (T.II 207):

> It was just basically saying that we were calling from the Foundation for Financial Education to give * * * financial seminar/workshops to employees so that they can have, like, a better financial stability. I don't remember the exact words * * *.

Ms. Pautrat testified she had no power to receive a positive answer (T.II 208-209):

> I don't have any power. I'm going through [their] HR, I'm going through secretaries that are screening – or, excuse me, admins that are screening phone calls that won't let me get to the higher up who would make that decision on whether or not they thought it was beneficial for their employees.

On May 6, Ms. Pautrat, replying to a de Los Santos inquiry, wrote that certain materials had been mailed out that morning. Ex. C31. Ms. de Los Santos wrote back shortly after, "You = Awesome." *Id.*

That day, May 6, in another email, Ms. Pautrat put her grievances about Mr. Lee's behavior in writing: "As I stated to you, I do believe I am being sexually harassed and also retaliated against for pushing back against Jon's advances." Ex. C9. Ms. Pautrat wrote she was turning to Ms. de Los Santos because the two firms had no human resources professional on its staff. *Id.*

In addition to giving examples of harassment, the Pautrat email charged that Mr. Lee had become curt after she resisted his advances and had started criticizing her work: "For example, my meeting the weekly goal was not raised as an issue with me until AFTER I made it clear to him that I was not comfortable with his advances." *Id.* She charged that other employees had also failed to meet "a nearly impossible goal" but that she was the only one being criticized. *Id.*

Ms. de los Santos forwarded Ms. Pautrat's May 6 email, sent at 6:23 p.m., to Mr. Lee five hours later, at 11:26 p.m. Ex. C29.

Ms. Pautrat testified that she received no written response to her May 6 email and never learned of action taken to investigate her accusations. T.II 21, 28-29.

According to her, Mr. Clayton and Ms. Palencia had shortly thereafter been quizzed about her work in the days after she submitted her complaint, including "how many times I left the office including bathroom breaks." T.II 26. She testified both told her that Mr. Lee had asked them why her attitude had changed. T.II 116.

Four business days after her written harassment and retaliation allegations to Ms. de Los Santos, Ms. Pautrat was fired. T.II 21. That day, May 11, she had been called into Mr. Herman's office; Mr. Sewell was present and Ms. de los Santos was connected by telephone. T.II 27. She was informed she was being discharged "because I mis-scheduled a few appointments." T.II 28. No other reasons had been given. *Id.* She did not know who made the decision to fire her but Mr. Herman took the lead in informing her. T.II 101, 117; T.II 125. Mr. Sewell had been silent. T.II 118.

Ms. Pautrat said had not previously been warned that she might be fired. T.II 123. And, although Mr. Sewell told her she would receive written reasons for the termination, she received none. T.II 101.

2. *Ms. Byers.*

One of Ms. Byers' functions also was to solicit appointments from people who had attended one of the firm's marketing meetings or seminars to come to the office to meet staff members. T.I 2. She had been trained for about a week but her work involved primarily using a script. T.I 42.

The work she did while employed was the same as the work assigned to Ms. Pautrat. T.I 49-50, 70. Mr. Lee would "partner us up to try to get clients to make appointments. So if we weren't doing the same job, then I don't know why he would partner either her or I up to get the job done." T.I 49-50.

She had a quota for the number of calls and appointments calls she was expected to make but never met it throughout her employment. T.I 21. No one counseled or reprimanded her for failing to meet it. *Id.* Although she took off a "significant" number days of work toward the end of her employment no one chastised her for absences. T.I 21-24, 44.

During her employment she had been supervised by Mr. Lee and Mr. Sewell but not Ms. de Los Santos. T.I 50-51.

3. *Ms. de Los Santos.*[11]

Ms. Pautrat was among the staff Ms. de Los Angeles supervised. T.II 134. She described Ms. Pautrat's duties as telephoning organizations to arrange for Foundation staff to meet with them to set up seminars with staff members. T.II 129. The initial purpose was to set up a 15-minute appointment (T.II 192),

> just introducing our non-profit. Letting them know that we have resources available to them because they are in our community, and just asking hey, you know, I would love to have someone stop by for about 15

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[11] Counsel for Ms. Pautrat has consistently objected to allowing Ms. de Los Santos to testify on the reasons for firing Ms. Pautrat because Capital Financial's prehearing statement limited her testimony to evidence that Ms. Pautrat's work was performed exclusively for the Foundation. T.II 129. I overruled the objection because considerable testimony at the hearing had already been introduced about the women's work relationship. T.II 130.

Although I now believe the objection has merit, it's also moot. This Report finds and concludes that the de Los Santos testimony does not undermine the Pautrat claim that she was the victim of retaliation; in some respects, gaps and inconsistencies in the testimony support that claim.

> minutes just to share with you a little bit more information about what we are doing over here.

Ms. Pautrat and others she supervised were not given a script but she trained them by giving them guidelines by having them listen to calls Ms. de Los Santos herself made. T.II 193.

After the seminars, her staff was expected to follow up by telephone to arrange for participants to come in and do what for financial advice. T.II. 196-197. That meant there were two different types of calls (T.II 197): "* * * one was community outreach, and that was face-to-face. And then the other one was scheduling follow-up appointments to see if we might be able to help them," *i.e.*, presumably those who had attended the seminars.

In addition, Ms. Pautrat was responsible for proof-reading material soliciting organization participation. T.II 129.

Her interactions with Ms. Pautrat were "[m]ultiple times a day" throughout her employment. T. 134. She had counseled Ms. Pautrat several times because Ms. Pautrat wasn't producing as much as Ms. de Los Santos needed and her work sometimes contained errors. T.II 131. Some of her discussions with Ms. Pautrat were oral, some were through emails. T.II 132.

Other employees also had performance issues but as long as their good days outweighed their bad days, "I was okay with that." T.II 137. That wasn't the case with Ms. Pautrat. *Id.* Ms. Pautrat had not been successful in attracting organizational clients throughout her tenure: "And so I don't ever remember an organization that Giselle brought on board and introduced to us during her time." T.II 175. This was in contrast to a high-school intern who had been successful in booking organizations. *Id.* Later in her testimony, Ms de Los Santos said the other three or four employees she supervised met her standards. T.II 189. In Ms. Pautrat's case (T.II 190),

> of those areas that I needed help with was community outreach. And that's where I had trouble with because although she had the personality and she was the right person for that with the personality that she had I couldn't, for whatever reason, get her to bring anything in the door. And that was -- that's half the battle. Because I'm a 501(c)(3)

> I don't have the money. I can't just throw money at marketing. It takes -- it's activity of the person picking up the phone and creating the connections and relationships and that's where I really needed Ms. Pautrat * * *. * * * And so I wasn't getting any of that from her and it was struggling because I needed help in growing that DC chapter * * *.

Asked why she had cautioned Ms. Pautrat that she risked being liable for defamation, Ms. de Los Santos responded:

> * * * The reason I had said that to her was she had initially asked me to keep this in confidence between her and I, and from what I understood me being her supervisor and keeping this in confidence would put me at jeopardy so I initially I was considering it because she had asked me to keep it private, but then, when she started -- or I found out that she had told other employees, well then that put me in jeopardy because she had asked me to keep it secret for her. Yet she was telling other people without telling me.
>
> MR. CHONG: But your concern as articulated in this email isn't about putting you in jeopardy, at least for that purpose. It's about defamation; isn't it?
>
> MS. DE LOS SANTOS: Well, it's a mixture. It was definitely that but I also, because of this is uncharted territory I -- it's a serious allegation. And I don't -- my goal was to have her follow the proper protocol so that she can make sure that she was putting herself in a position that was the right path which was she needed to contact * * * Web, and start the protocol from there.

Ms. de Los Santos had not told Ms. Pautrat that her job was in jeopardy: T.II 146. As of April 13, "I wouldn't say at that point I was considering letting her go." T.II 153. On April 21, after Ms. de Los Santos had objected to having Ms. Pautrat call her "sweetie," for which Ms. Pautrat apologized, Ms. de Los Santos responded: "I never want anyone to think I'm giving you preferential treatment because of our friendship. * * * Everything you receive is because you're the right person for the job." *Id.* On April 27, after Ms. Pautrat explained that she had double-booked two potential clients on the Google calendar, Ms. de Los Santos responded, "No worries. It happens to all of us." C32.

On cross-examination, she explained (T.II 166):

> * * * during the work, employees are going to make mistakes. But a lot of the times when I would give constructive criticism or talk to them about when they're poorly performing I didn't feel it appropriate to email

> them my concerns because the problem is anything you write something tone isn't relayed * * *. And so a lot of the times when I was giving feedback to Giselle about her performance and the need for improvement it wasn't over email because I realized that that - me conveying it wasn't going to come across the way I need it to. So a lot of it was verbally over the phone of me critiquing her.
>
> The double-booking itself wasn't a major mistake but it was "a pebble in a mountain of the major issues I had with her."

In a May 6 email, Ms. de Los Santos responded to Ms. Pautrat's notification that brochures and packets had been sent out the day before with "You=awesome." C31.

Ms. de Los Santos testified (T.II 143) she hadn't notified Mr. Lee when she received Ms. Pautrat's May 6 email complaint, despite the notation on the email to the contrary. Instead, she claimed she had sent the Pautrat email to Mr. Sewell, asking for guidance. T.II 144, 172-173.

She couldn't remember if she talked to Mr. Lee before Ms. Pautrat was fired. T.II 144. According to her, Mr. Lee "had a very hands-off approach with the non-profit. He let me lead it in the way that I wanted to." T.II 144.

On May 11, Ms. de Los Santos reduced the number appointments to be scheduled from 20 to 15 for Ms. Pautrat and two coworkers. Ex. C28. She had learned the higher goal had been difficult to attain but the 15 goal was attainable because it "has been surpassed multiple times." *Id.* The coworkers had additional duties, in contrast to Ms. Pautrat (T.II 180):

> [S]he had a lot less workload than the other two people that were telling me that they couldn't attain that goal. And for me it was overall satisfaction of the team. And if two of the employees, actually one of them -- of one of the employees is telling me this wasn't an attainable goal and he didn't have as much time to allocate towards it, I lowered the bar for all of them even though Ms. Pautrat [didn't] have as much of a workload as they did.

Ms. Pautrat was fired that day, May 11. Ms. de Los Santos told Ms. Pautrat she had decided to terminate her employment because of the quality and amount of her work. T.II 133. Ms. Pautrat failed properly to proofread slated material to be sent to organizations whose participation the Foundation was soliciting. T.II 138.

She also had booked potential clients at the "wrong time" or had double booked them. T.II 140. Ms. de Los Santos also had orally told Ms. Pautrat about spelling and grammar errors "a couple of times," but then decided "it was just going to be easier just for me to do it myself * * *." T.II 139.

Ms. de Los Santos had invited Mr. Herman to attend the meeting at which she informed Ms. Pautrat she was being let go. T.II 195. She did so because she herself worked remotely and "that is the type of conversation you don't want to have over the phone" so she wanted someone to be there in person. T.II 195.

When asked whether she herself had made the decision to discharge Ms. Pautrat, she replied (T.II 195):

> MR. SCHILLER [counsel for Mr. Lee and the Foundation]: Could you fire someone on your own?
>
> MS. DE LOS SANTOS: I never requested to. I don't -- I couldn't answer that because I never tried to.
>
> * * *
>
> MR. SCHILLER: Okay. And did you make the decision to terminate Ms. Pautrat?
>
> MS. DE LOS SANTOS: Did I make the -- you know, I never said I make the decision to terminate her. I asked -- I said I need help, I need someone else. And when I said well, all of our money is going towards her salary I did request well, I need someone else in. And I think that might have been leading to getting rid of her because they told me only have so many dollars to make this work and it wasn't working with her. So I think I did, in a very gentle manner, but I didn't say I moved to terminate her immediately. It was more this isn't working out, I need someone else immediately.
>
> MR. SCHILLER: Okay. Who did you contact to set up the termination meeting?
>
> MS. DE LOS SANTOS: That part I don't remember.

According to Ms. de los Santos, Ms. Pautrat's oral and written complaints played no role in the decision to fire her. T.II 138. Her testimony did not clarify whether she had discussed the Pautrat firing with Mr. Lee (T.II 188):

> You see that's the hard part because that's a part where I'm fuzzy because a lot of times when we would talk about the non-profit and Mr. Lee, Mr. Herman, and even Web Sewell to a certain extent, were people

> that I would communicate frequently about the day-to-day operations about our non-profit. And even though I wasn't directly working underneath them they all were involved in some manner.

4. *Mr. Lee*.

Mr. Lee initially testified that, although he understood Ms. Pautrat had complained to Ms. de Los Santos about his behavior, he hadn't seen her written complaint until after she had been fired. T.I 128-129.

After further questioning, Mr. Lee testified he eventually heard of the complaint, but not "right away," because Ms. Pautrat had asked Ms. de los Santos to keep it confidential. T.I 185. "[L]ater on, I'm not sure how much time went by," he became informed. *Id.* He was certain, however, that Mr. Herman had been informed and believed Mr. Sewell also had been. *Id.*

He had not told Ms. de los Santos to fire Ms. Pautrat but had told her she could if she wasn't meeting expectations. T.I 170. Mr. Lee said he didn't remember what the job expectations were: "I couldn't tell you. I don't recall." T.I 170. He did not know if people such as Ms. Pautrat were given a script to use when calling agencies to set up workshops. *Id.* They probably had been but he couldn't recall if he wrote the script. *Id.*

He had no recollection of asking anyone in the Foundation office to monitor Ms. Pautrat: "No, I wasn't her supervisor. T.I 126. There would be no reason for me to need that information." *Id.* He knew, however, that Ms. Pautrat "wasn't doing her job because people were reporting to me that she wasn't doing her job." T.I 127. Mr. Lee did not identify the "people" from whom he learned this, except Ms. de Los Santos. *Id.*

A response to a discovery request directed to Mr. Lee to produce performance evaluations for Ms. Pautrat, Mr. Lee's response was that he had none. Ex. C18 ¶ 4. Furthermore, the Lee response said, "[t]he Complainant volunteered for the Foundation and worked for Herman, Inc. Herman, Inc. no longer is located where I work now and I do not have access to any of their files." *Id.* As for documents relating to Ms. Pautrat's termination, the Lee response was that he had none other than the May 6 email. *Id.*, ¶ 6; *see also*, ¶ 5.

Discovery requests to the Foundation elicited comparable answers: Ms. Pautrat "never worked" for the Foundation; the Foundation had no performance evaluations; it had no documents relating to Ms. Pautrat's employment or termination. Ex. C19, ¶¶ 4-6. More comprehensively, the Foundation claimed it had no employee file of any sort for Ms. Pautrat, including reasons for her termination. *Id.*, ¶¶ 1, 6.

Both Mr. Lee and the Foundation also replied they had no documents that would support any of their affirmative defenses. Ex. C18, ¶ 11; ex C19 ¶ 11.

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW.

A. SEXUAL HARASSMENT.

1. *Governing Law.*

Section 27-19(a) of the Montgomery County Code prohibits discrimination on the basis of sex in employment:

> (a) A person must not because of the * * * sex, marital status, sexual orientation, gender identity, family responsibilities, * * * or because of any reason that would not have been asserted but for the * * * sex, [or] marital status * * *:
>
> (1) For an employer:
>
> (A) fail or refuse to hire, fail to accept the services of, discharge any individual, or otherwise discriminate against any individual with respect to compensation, terms, conditions, or privileges of employment * * *.

Section 27-1 of the Code recognizes that its provisions often – but not always – parallel those of similar State or federal human rights and civil laws: "The prohibitions in this article are similar but not necessarily identical, to prohibitions in federal and state law." Because of the close similarity in some respects, the Maryland Court of Special Appeals has found court decisions interpreting State and federal employment discrimination laws "persuasive, even if not absolutely determinative" of interpretations of chapter 27 of the Code. *Belfiore v. Merchant Link, Inc.*, 236 Md. App. 32, 45 n. 3, 180 A.3d 230 (2018) (collecting cases).

Guidelines issued by the Equal Employment Opportunity Commission describe sexual harassment as (29 CFR § 1604.11(a)):

> Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or (3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.

The Guidelines recognize that circumstances vary enough that the Guidelines shouldn't be considered a straitjacket (29 CFR § 1604.11(b)):

> In determining whether alleged conduct constitutes sexual harassment, the Commission will look at the record as a whole and at the totality of the circumstances, such as the nature of the sexual advances and the context in which the alleged incidents occurred. The determination of the legality of a particular action will be made from the facts, on a case by case basis

The U.S. Supreme Court relied on the EEOC Guidelines in its initial consideration of sexual harassment as a form of sex discrimination that, if proved, violates § 703(a)(1) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2(a)(1).[12] *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 64 (1979). The Court held that "without question," a supervisor discriminates on the basis of sex when he sexually harasses a subordinate. Just as the Guidelines urge, though, the Court agreed that not all harassment violates Title VII. To be "actionable, it must be sufficiently severe or pervasive 'to alter the conditions of [the victim's] employment and create an abusive working environment.'" *Id.* at 67, quoting *Henson v. Dundee,* 682 F.2d 897, 904 (11th Cir. 1982) (brackets, the Court's).

In *Meritor* the plaintiff presented evidence that during her employment, her boss, a bank vice president, made repeated demands for sexual favors. She had

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[12] The section reads:

> (a) Employer practices
> It shall be an unlawful employment practice for an employer --
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's * * * sex * * * [.]

initially refused but, fearing she might lose her job, she eventually agreed and had intercourse with him 40 or more times during the four years of employment. The Court held that her acquiescence did not conclusively determine whether she had been sexually harassed. Rather, harassment is determined by whether the sexual advances were "unwelcome." *Id.* at 68, citing the opening wording of the Guidelines.

In another Title VII case, *Harris v. Forklift Systems, Inc.*, 510 U.S. 17 (1993), the fact-finder, a magistrate, found that the plaintiff's supervisor had insulted her and other females employees and had used sexual innuendos. The supervisor had suggested negotiating raises at a Holiday Inn, sometimes asked women to pick up objects he had tossed on the ground, and occasionally asked them to take coins out of his pants pockets. The lower court had held that, while the supervisor's conduct was offensive, his conduct hadn't been so unreasonable as to violate Title VII. See *id.* at 20.

The Supreme Court reversed, saying the lower court had used the wrong standard. Harassment is actionable whenever discriminatory conduct "is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment * * *." *Id.* at 21, quoting the *Meritor* decision, 477 at 67. Under that standard, only actions that a "reasonable person" would not "find hostile or abusive [are] beyond Title VII's purview." *Harris*, 510 U.S. at 22 (brackets added).

On the other hand, Title VII is violated "[s]o long as the environment would reasonably be perceived, and is perceived, as hostile or abusive." *Id.* The Court recognized it was not establishing "a mathematically precise test" and that "whether an environment is 'hostile' or "abusive" can be determined only by looking at all the circumstances. *Id.* at 22-23. Among the factors to be considered are the "frequency of the discriminatory conduct, its severity, whether it is physically threatening or humiliating, or a mere offensive utterance, and whether it unreasonably interferes with an employees work performance." *Id.* at 23. Psychological harm is a factor that may be considered "but no single factor is required." *Id.*

Two other Supreme Court decisions are helpful in deciding when conduct rises to the level of sexual harassment that violates the law although, in both, the principal issue with which the Court was grappling was whether the employer can be held responsible for the actions of its lower level supervisors.

In *Faragher v. City of Boca Raton*, 524 U.S. 445, 783, 810 (1998), the Court affirmed a district court verdict that the conduct of two lifeguard supervisors had been sufficiently demeaning to create an abusive working environment that violated Title VII. One man had repeatedly touched female women lifeguards' bodies and made what the Court described as "crudely demeaning references to women generally." The other man also had made vulgar references to women; told subordinates that he would or would not like to have sex with them; and once had tackled one of the plaintiffs. *Id.* at 782. The Court held that Meritor *Savings Bank* and *Harris* standards applied but cautioned that conduct must be reasonably deemed "extreme" to be a violation of Title VII. *Id.* Implicitly, in *Faragher*, by affirming the trial court decision, the Court held that it had been.

Burlington Industries v. Ellerth, 524 U.S. 742 (1998), had been brought by a female employee complaining that a supervisor had violated Title VII, when he consistently had made boorish comments, including about her breasts and clothing, warned her he could make life difficult for her, and cautioned she needed to "loosen" up. Once, during an interview, he had reached over and rubbed her knee. On a motion for summary judgment, a district court had found that the supervisor's conduct was severe and pervasive enough to create a hostile work environment but that the employer, Burlington, could not be held accountable because it had not been told of the misconduct and could not reasonably have known about it. *Id.*, 524 at 747-749. The Supreme Court reversed, holding that an employer is subject to vicarious liability for "an actionable hostile environment" even when no tangible employment action has been taken unless the employer can demonstrate by a preponderance of the evidence that the employer had taken reasonable care to prevent or correct harassing behavior or that the employee had unreasonably neglected to use the employer's grievance mechanism. *Id.* at 765.

The Maryland Court of Appeals, in *Manikhi v. Mass Transit Administration,* 360 Md. 333, 758 A.2d 95 (2000), partly a Title VII case, adopted the *Meritor Bank/Harris* analysis during its review of dismissal of the complaint. See *id.* 360 Md. at 348-349. In *Manikhi* the complaint alleged that the plaintiff had been harassed by a fellow employee numerous times and that the plaintiff had filed an internal complaint about his actions. Those actions allegedly included exposing himself, grabbing her breast, importuning her to have sex with him, and threatening rape. *Id.* at 345-346. The Court held that all elements of a hostile environment violation of Title VII had been alleged and the cause of action should not have been dismissed. *Id.* at 349.

The Maryland Court of Special Appeals came to the same conclusion when it reversed summary judgment for the employer in *Magee v. Dansources Technical Services*, 137 Md. App. 527, 769 A.2d 231 (2001). Unlike the other precedent cited so far, *Magee* involved the County Human Rights Law. *Id.* 548-549. The Court held that frequent sexual comments and jokes, fondling of a nude painting in plaintiff's presence, unwanted touching of plaintiffs' leg by the employer's knee, telling plaintiff her breasts were "real solid" was enough to permit a jury to conclude "not only that there was a 'connotation of sex' in such behavior" but that it was directed at the plaintiff "with a discriminatory animus." *Id.* at 559. Citing Faragher and Harris, a jury could conclude that the alleged behavior substantially adversely affected plaintiff's conditions of employment. *Id.* Relying on *Harris* and *Manikhi*, the Court stressed that "there is no 'magic formula' for determining when sexual harassment is sufficiently severe or pervasive to be actionable." *Id.* at 561.

2. *Findings of Fact.*

Sexual harassment cases usually present a "she says/he says" dilemma for a fact-finder. Frequently, harassment is furtive, happening only when the victim is around, but no witnesses are. That is so for some of the alleged incidents in this case. Nevertheless, because several important Pautrat claims have corroboration and Mr. Lee's testimony throughout the hearing is demonstrably false in so many relevant

respects, I find that the Lee sexual harassment of a new employee occurred substantially as Ms. Pautrat alleged.

Ms. Byers provided third-party testimony to support some Pautrat allegations. By contrast, respondents chose not to call any witnesses to testify about the Lee/Pautrat relationship. Mr. Lee himself testified only when called for hostile examination by Ms. Pautrat counsel; he was not recalled for testimony. Ms. de Los Santos, respondents' only witness, testified only about Ms. Pautrat's work performance, not about Mr. Lee's behavior.

Ms. Byers testified that Mr. Lee's interactions with Ms. Pautrat, as well as other women employed by respondents, was inappropriate. She had read an email sent by Mr. Lee to Ms. Pautrat while he was vacationing in which he yearned for Ms. Pautrat's presence. She saw Mr. Lee visit the office to which Ms. Pautrat was assigned, visits that occurred with a frequency far exceeding that of his visits to other offices.

Ms. Byers testified that, in addition to the Lee text she had read, Ms. Pautrat told her of other non-business related texts she had received. She believed Ms. Pautrat because two other employees, Ingrid Palencia and an unnamed colleague, also complained to her about Mr. Lee's nighttime "drunk messages."

Ms. Byers' testimony was less about the messages themselves than why she credited Ms. Pautrat's confidences about Mr. Lee's behavior. Although Ms. Byers' testimony about these messages has a hearsay element, hearsay is admissible in administrative proceedings if it "observes the basic rules of fairness." *Para v. 1691 Limited Partnership*, 211 Md. App. 335, 379, 65 A.3d 221 (2013); *see also*, Md. Code, State Government §10-213(c) (in State administrative proceedings "[e]vidence may not be excluded solely on the basis that it is hearsay"). If the hearsay is sufficiently reliable and probative, it may be admitted so long as "the relaxed rules are not misapplied in an arbitrary or oppressive manner, depriving the party of his or her right to a fair hearing." *Para*, 211 Md. App. at 382.

Here, respondents cross-examined Ms. Byers and, because Ms. Byers had been listed as a witness, had time to prepare for her testimony. Ms. Byers had no known

stake in the outcome of the case, so I credit it as verifying that Ms. Pautrat and other female employees were often the recipients of sexually-tinged messages from Mr. Lee. In short, the Byers testimony had "probative value, reliability" and is fairly applied. *Id.* at 378, 382.

There was other evidence corroborating Ms. Pautrat's allegations, most notably exhibit C4, sent to the Office of Human Rights on behalf of all three respondents in response to OHR's questions about Mr. Lee's behavior. In the five years the case was pending before the Office, none of the respondents attempted to withdraw or amend it.

Mr. Lee attributed its authorship to Mr. Sewell, the Foundation's internal legal counsel, but presented no independent evidence that the document was unauthorized. Since Mr. Lee was Mr. Sewell's direct supervisor and the only person accused in the Pautrat complaint, it's highly implausible that he had not reviewed the document before it was submitted. As noted previously, no respondent called Mr. Sewell to testify even though authorization had been given to Capital Financial to have him subpoenaed. Mr. Lee's testimony that he, the Foundation CEO, had no knowledge of the answers submitted to OHR on his and the Foundation's behalf is implausible.

Exhibit C4 admits that Mr. Lee sent Ms. Pautrat "social and flirty texts." It admits Mr. Lee told Ms. Pautrat she was physically attractive, evidence that her looks were important to him. He also complimented her on her choice of clothing, another indication of sexual attraction.

Mr. Lee's denial that the answers in exhibit C4 were not his is not the only instance in which Mr. Lee testified falsely. He denied that the affidavit filed on his behalf in the *McLain* case was his. He testified he had neither authorized nor signed it. Yet, it too was not withdrawn despite Mr. Lee's personal presence during at least one hearing of the *McLain* case. When it suited his purposes, he permitted the affidavit to support litigation brought on his behalf. Since the *McLain* case has no bearing on the sexual harassment issue in this case, a discussion of its import is deferred to the next section of this Report. At this point it serves as another example

of testimony that undermines Mr. Lee's credibility. (Equally unbelievable is Mr. Lee's testimony that he did not know who served on the board of directors of the Foundation of which he's the CEO).

There is no independent evidence to corroborate Ms. Pautrat's testimony about the events that occurred the day she accompanied Mr. Lee to the Pentagon. The two were alone that day so there were no witnesses. If Ms. Pautrat's allegations of what happened that day existed in isolation, there would be no reason to credit her testimony. Mr. Lee does acknowledge, though, that both went to the Pentagon and that both stopped for ice-cream on the way back to the office.

The events of that day, though, do not exist in isolation. His other behavior – his unsolicited personal texts, his remarks about "attractive women," his frequent visits to Ms. Pautrat in her office, his texted lament that he missed her on vacation – makes it very plausible that he took the opportunity that day to invade Ms. Pautrat's personal space by reaching for her middle to remove a hair and by fingering her arms. His alleged conduct the day is sufficiently consistent with Mr. Lee's behavior that I find Ms. Pautrat's testimony to be credible. The same is so with respect to Mr. Lee's surreptitious observation of Ms. Pautrat in the kitchen. There, too, Ms. Pautrat was the only witness but, given evidence of Mr. Lee's stated fascination with the bodies of his female employees, her testimony has credence.

3. *Conclusions of law.*

As the courts have noted, the standard for deciding whether an employee has been subjected to unlawful harassment has a degree of flexibility. While a fact-finder must determine whether the behavior to which the employee was subjected is sufficient for a "reasonable person" to conclude it was "objectively hostile or abusive," whether that standard is met in any given case "can be determined only by looking at all the circumstances." *Harris v. Forklift Systems, Inc.*, 510 U.S. at 22; see *Faragher v. City of Boca Raton*, 524 U.S. at 787-788. In other words, there is no magic formula and one size does not fit all.

In the present case, Ms. Pautrat was a new employee. Starting shortly after she began work, Mr. Lee began paying her very close attention. Mr. Lee, as he himself

testified, was not Ms. Pautrat's immediate supervisor. He was, however, the chief executive of the organization Ms. Pautrat had every reason to believe she was working for. He had hired her and his title as CEO gave every indication that he had the power to fire her, someone the document she signed identified as an "at-will employee."

Very soon after Ms. Pautrat began work, she began receiving unsolicited texts and calls after work, texts unrelated to her duties. They urged a close personal relationship, a dating relationship. There was a request for a date to go to a basketball game. There were several requests to be a sole companion on trips that seem to have had nothing to do with work assignments that were focused only on meetings in the Washington metropolitan area. There was an urgent lament – (one that Ms. Byers had read) that Mr. Lee missed her while he was vacationing. There were unusually frequent office visits by someone who was not her boss.

There were also frequent comments about Ms. Pautrat's (and other females') looks. There was one instance when she was ogled in the kitchen unaware that she was being watched until she turned around.

On a single day, only five weeks after Ms. Pautrat began work, her body was touched twice without her permission. First, it was her stomach, to remove a hair that she easily could have dealt with by herself. Then an hour or so later, her arms were rubbed, again without consent. To be sure, these two instances are minor intrusions compared to graphic descriptions that appear in some sexual harassment cases. Still, the touching was not only uninvited, it was unwanted.

All this happened in less than two months of employment and began almost immediately. It happened to someone who reasonably believed it would continue to permeate her employment for the foreseeable future. Yes, she could complain and perhaps the sexually laced conduct would end.

But there was also the fear that her employment and income – on which her parents also apparently depended (T.II 29, 55) – would end if Ms. Pautrat protested about the chief executive officer's persistent conduct. As all fears are, her fear was

largely subjective. Until it wasn't. When Ms. Pautrat had had enough and chose to file her internal complaint, her fears were realized. She was fired.

Given the frequency and pervasiveness of Mr. Lee's conduct, the compressed time in which it occurred, the employment authority of the man who carried it out, and the psychological harm it engendered, I conclude that a "reasonable person" could conclude it was objectively abusive enough to constitute sexual harassment that violated the County code standards. In the EEOC's words, it amounted to "[u]nwelcome sexual advances * * * and other verbal or physical conduct of a sexual nature" submission to which was "either explicitly or implicitly a term or condition of" Ms. Pautrat's employment.

B. RETALIATION.

1. *Governing Law*.

The County Human Rights Law prohibits retaliation: "A person must not: (1) retaliate against any person for: (A) lawfully opposing any discriminatory practice prohibited under this [employment practices] division * * *." M.C. § 28-19(c).

In *Belfiore v. Merchant Link*, LLC, 236 Md. App. 32, 180 A.3d 230 (2018), the Court of Special Appeals outlined the steps a plaintiff must take to show that she was a victim of a violation of § 28-19(c).

Initially, as a *prima facie* matter, the employee needs to show she engaged in protected activity and that "'the adverse action was causally connected to the [employee's] protected activity.'" *Id.* at 51, quoting *Edgewood Management Corp. v. Jackson*, 2132 Md. App, 177, 199-200, 66 A.3d 1152 (20113) (brackets, the Court's). To rebut that showing, the employer must proffer a non-retaliatory justification for its actions. *Id.*

Realistically, litigants will almost always meet these *pro forma* steps. It is what comes next that determines the outcome: the employee must prove that the employer's justification is "a mere pretext" and that her opposition to unlawful conduct "'played a *motivating* part in the employer's decision.'" *Id.* at 52, quoting *Ruffin Hotel Corp. of Maryland, Inc. v. Gasper*, 418 Md. 594, 612, 17 A.3d 676 (2011) (emphasis in Ruffin). If the there is sufficient evidence of likely motivation, the

employee will have established a violation of § 27-19(c). *See Ruffin Hotel Corp.*, 418 Md. at 612.

2. *Findings of Fact.*

In this case, it's beyond dispute that Ms. Pautrat's internal May 6 complaint was protected activity. *Cf. Mankhi v. Mass Transit Administration*, 360 Md. 333, 349, 758 A.2d 95 (2000) (internal complaint is protected activity under federal employment discrimination law). It's also unquestionable that respondents, through Ms. de Los Santos's testimony, articulated seeming justifications for firing Ms. Pautrat: not meeting the 20-call standard; errors in proofreading; double booking clients.

While Ms. de Los Santos may have had legitimate concerns about Ms. Pautrat's performance, the evidence as a whole strongly suggests in context they are "a mere pretext" for ending Ms. Pautrat's employment.

To begin with, Ms. de los Santos reduced the 20-call standard to fifteen calls the very day Ms. Pautrat was let go, strong evidence to show that even she thought the standard to be too high. Ms. Byers, a credible witness with nothing at stake in this litigation, testified that she had never met her goals, yet had never even been reprimanded, much less punished.

The discharge occurred a mere four workdays after Ms. Pautrat sent her complaint. As the *Belfiore* Court noted "close temporal proximity * * * can support a presumption that the protected activity caused the firing." *Id.* 236 Md. App. at 53, citing *Edgewood Management Corp.*, 212 Md. App. at 205; see also *Strothers v. City of Laurel*, 895 F.3d 317 (4th Cir. 2018) (a Title VII case: "the lapse of one or even nine days is well-within what this Court has found to be a causally significant window of time * * *").

Other evidence undermines respondents' proffered justification. Ms. de Los Santos acknowledged that, a month before the firing, she was not "considering letting her go." There is written contemporaneous evidence by Ms. de Los Santos that the Ms. Pautrat was "awesome." Ex. C 31. As for the single double-booking incident Ms. de Los Santos seems to have understood mistakes of that sort were not uncommon.

Ms. Pautrat was assured on April 27, that "No worries. It happens to all of us." Ex. C32. That assurance was sent seven work days before Ms. Pautrat was fired. There was no description of a major deterioration of Ms. Pautrat's work products to explain the sudden firing four days after Ms. Pautrat submitted her complaint.

Ms de Los Santos testified she hadn't made the actual decision to fire Ms. Pautrat. When asked who did, Ms de los Santos, who seemed to know everything else about what happened in 2015, said she couldn't remember that far back who – in respondents' small hierarchy – made the actual decision. Mr. Lee, the Foundation's CEO and the person who hired Ms. Pautrat, testified he hadn't. His denial is highly questionable in light of his false denial that he had not known of the complaint before the firing, even though the written evidence is clear that the complaint had been forwarded to him the day it was submitted. The Capital Financial post-hearing brief (at 7) denies that Mr. Herman had any "substantive role * * * in terminating Ms. Pautrat's employment * * *" even though he was the most senior official present when Ms. Pautrat was told she was losing her job. It is hard to believe he gave Ms. Pautrat the bad news as a mere figure head.

In other words, whoever made the decision and who could officially explain why Ms. Pautrat was fired refused to do. In addition, both the Foundation and Mr. Lee separately denied in response to discovery that they had performance evaluations, communications, or other employment records bearing on Ms. Pautrat's termination.

In other words, no contemporary records or testimony by the actual decision-maker confirms Ms. de Los Santos's testimony.

3. *Conclusions of Law.*

A combination of the propinquity of the Ms. Pautrat's discharge to the submission of her complaint, the change of standards the day she was let go, the absence of an explanation by the actual decision maker, inconsistencies in Ms. de Los Santos conduct and testimony all lead to the conclusion that retaliation was the principal motivation for the abrupt firing. Respondents' stated reasons, though having a facade of credibility, in fact were all pretext.

C. RESPONSIBILITY FOR VIOLATIONS OF THE HUMAN RIGHTS LAW.

1. *Governing Law.*

The Code's definitions of "employer," "employee" and "person" appear in section II A of this Report (above at 5) and need not be repeated.

2. *Findings of Fact as to the Corporate Respondents.*

There is overwhelming evidence that Ms. Pautrat was an "employee" of both the Foundation and Capital Financial and that both were her employers. The Foundation's CEO hired her; the CEO of Capital Financial made the formal employment offer; her day-to-day supervisor was a Foundation officer; her salary was paid directly by Capital Financial/Herman, Inc. As Ms. de Los Santos candidly admitted, "it was kind of intertwined."

Exhibit C15, alone, sufficiently establishes the relevant employment relationships. The contract between and Ms. Pautrat expressly states that Ms. Pautrat is an at-will "employee" of the "Company" comprised of both of the corporate respondents, as well as their subsidiaries and affiliates. Both respondents were stated signatories to the contract.

Aside from this written acknowledgement of the unity of the two organizations as a single employer, employees such as Ms. Pautrat were assigned duties designed to benefit both components of the "Company." Ms. Pautrat work was intended to bring profits to both Mr. Lee and Mr. Herman through their corporate disguises. That's revealed in relevant filings in the *McLain* and *Herman v. Lee* cases. As with Ms. McLain, Ms. Pautrat's responsibilities were bifurcated. Part of the time, she was to make "cold calls" under the Foundation's non-profit guise to schedule "financial education workshops." Then, after each workshop when attendees expressed an interest in learning more, they were siphoned through Ms. Pautrat' scheduling to meet with representatives of the Capital Financial, the for-profit wing. Revenue would then be generated through the sale by Capital Financial of financial products. As a final step, that revenue would be distributed to the principals of the "non-profit" and "for profit" entities, Mr. Lee and Mr. Herman.

Ms. Pautrat's work reaped rewards for Mr. Lee, who received 60% of the income indirectly generated through the workshop mechanism, and for Mr. Herman, who received the other 40%. Because the Foundation in theory received little income, Capital Financial paid Ms. Pautrat's salary and, as a corollary, could deduct that expense from its corporate income.[13]

In short, both the Foundation and Capital plainly used Ms. Pautrat's labor to generate income for them and their principals, either directly or indirectly.

Capital Financial, though, strenuously argues that it was not Ms. Pautrat's employer, relying on *Great Atlantic Tea v. Imbraguglio*, 346 Md. 573, 697 A.2d 885 (1997) ("*A&P* "), a worker's compensation case. Without going into the complex details of that case, the Court decision does not foreclose a finding in this employment discrimination case that Capital Financial was one of Ms. Pautrat's employers. As the Court noted, "[o]rdinarily the existence of the employer/employee relationship is a question reserved to the fact finder." *Id.* at 590. Equally important for the present case, "[t]hat an employee can concurrently serve two employers is not a novel concept in Maryland law." *Id.* at 591.

The *A&P* decision lists five factors that a fact-finder should use in assessing whether an employer-employee relationship exists: "(1) the power to select and hire the employee, (2) the payment of wages, (3) the power to discharge, (4) the power to control the employee's conduct, and (5) whether the work is part of the regular business of the employer." No one factor is controlling.

The evidence in this case shows that Mr. Herman formally offered the position to Ms. Pautrat. Herman, Inc., paid her wages. The work Ms. Pautrat performed

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[13] The 2015 W-2 tax form issued to Ms. Pautrat as an "Employee" lists the following in the printed section for "Employer's name, address, and ZIP code" (docket no. 88, ex. 4):

Herman, Inc.
Capital Financial Partners
30 W. Gude Drive, Suite 380
Rockville, Md 20850-4379

The 2015 IRS instructions for W-2s provided: "Every *employer* engaged in a trade or business who pays remuneration, including noncash payments, of $600 or more for the year * * * for services performed by an employee must file a Form W-2 for each employee * * *." Italics added.

channeled clients to financial advisers working for Capital Financial, part of the firm's regular business. It is not clear who made the decision to discharge Ms. Pautrat but Mr. Herman was the person who told her that the employment relationship had ended. To be sure, Ms. Pautrat's day-to-day duties were directed by Ms. de Los Santos, who identified herself as a Foundation employee. Despite that one factor, the preponderance of the evidence in this case leads to a finding that Ms. Pautrat concurrently served two employers, one of which was Capital Financial/Herman, Inc.

3. *Conclusions as to the Corporate Respondents' responsibility for violations of the Law.*

Both entities, the Foundation and Capital Financial, were Ms. Pautrat's employers within the meaning of the County Code. They directed her functions and used her labor for their purposes. They are therefore jointly and severally responsible for the sex discrimination and retaliation she suffered while in their employ. Mr. Lee's misguided insistence that Ms. Pautrat was a volunteer is unsupported by a scintilla of evidence; even if it were true, it's irrelevant to the issue of whether the Foundation is partially responsible for violations of the County Code because the Code definitions of "employer" and "employee" expressly encompass individuals who serve as a "volunteer."

4. *Conclusions as to Mr. Lee's responsibility for violations of the Law.*

That brings me to Mr. Lee's liability. He hired Ms. Pautrat and was the Foundation's chief executive. Despite that, there is insufficient evidence that he had the role of Ms. Pautrat's "employer."

Although the County Code applies to an employer who has only one employee, unlike State and federal employment discrimination laws statutes, the definitions of all three statutes require that the "employer" be a person or entity that uses someone to work for them for pay or to perform voluntary services – *i.e.,* who has one or more "employees."[14] Under the Code's definition an employer therefore cannot be someone

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[14] See Maryland Code, Md. Code State Government § 20-601 (d)(i) ("employer" means "a person that: 1. is engaged in an industry or business; and 2. has 15 or more *employees* * * *"); Title VII of the 1964

who is a fellow employee, even one with supervisory role. Only if the employing enterprise is simply the alter ego of the owner would it be reasonable to conclude that the individual falls within the statutory definition.

In the present case, Mr. Lee was the chief executive officer of the Foundation. There is reason to suspect that the Foundation was simply his corporate disguise but no conclusive proof. There is no evidence in the record disclosing the structure of the Foundation. If Mr. Lee was merely an employee of the Foundation, even someone with ultimate decision-making powers, he would not have been Ms. Pautrat's "employer" within the definition of the County Code. Absent more substantial proof of the actual make-up of the Foundation, I hesitate to conclude that he is liable to Ms. Pautrat as her "employer" under M.C. Code 27-19(a)(1).

Nevertheless, Mr. Lee can be held accountable for violations of the Human Rights Law. Subsections 27-19(c)(2) and (4) make it unlawful for a "*person*" to

> (2) assist in, compel, or coerce any discriminatory practice prohibited under this division;
> * * *
> (4) attempt directly or indirectly to commit any discriminatory practice prohibited under this division.

That language appears to be intentionally broad and designed to make those who exercise substantial power in the work place legally responsible for the misuse of that power when they discriminate on the basis of race, sex, national origin, or otherwise impermissible considerations.[15]

The current case presents the sort of behavior that subsections (c)(2) and (4) appear designed to remedy. Mr. Lee actions with respect to female employees were primarily designed to provide him with some sort of gratification. In particular, they were unrelated to Ms. Pautrat's duties and responsibilities at work. They were

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Civil Rights Act, 42 U.S.C. § 2000e(b) ("The term 'employer' means a person engaged in an industry affecting commerce who has fifteen or more *employees* * * *." Italics added

[15] A search of for prior administrative or judicial interpretations of the subsections reveal only a single unpublished case, one that was vacated and is not helpful. See *Jordan v. Alternative Res. Corp.*, 447 F.3d 324 (4th Cir. 2006) (because plaintiff has not stated a claim of retaliation, he could not state a claim under subsections (c)(2) or (4)); *vacated*, 2006 U.S. App. LEXIS 16794 (4th Cir., 2006).

performed by the ultimate authority at the Foundation, one who had power to make life at work very uncomfortable and to end the employment relationship. And they were all sexual in nature.

There is no need to restate all of the behavior in which Mr. Lee engaged that qualifies as sexual harassment. His conduct with Ms. Pautrat assisted in, compelled, and committed discriminatory practices – sexual harassment—prohibited by the Human Rights Law. He can therefore be held individually liable to Ms. Pautrat for his unlawful actions.

However, because there is insufficient evidence in the record of his personal role in the decision to fire Ms. Pautrat, he should not individually be held responsible for the retaliation she suffered.

IV. REMEDIES.

The Human Rights Law permits the Commission to award damages and other relief to complainants for violations of its provisions. M.C. Code § 27-8. Ms. Pautrat has neither requested nor presented evidence to support compensation for consequential damages, such as lost wages. Sec. 27-8 (a)(2); see T.II 120 (when asked if she was asking for back pay, Ms. Pautrat replied, "No, sir").

There remain three provisions entitling her to compensation: damages for humiliation and embarrassment; interest, and attorneys' fees. Each will be discussed in turn.

A. DAMAGES FOR HUMILIATION AND EMBARRASSMENT.

Until the County circuit court partially invalidated it, § 27-8(a)(1)(E) of the Human Rights Law would have permitted the recovery of "damages not exceeding $500,000 for humiliation and embarrassment, based on the nature of the humiliation and embarrassment, including its severity, duration, frequency, and breadth of observation by others." In *American Financial Services Ass'n v. Montgomery Coun*ty, Cir. Ct. (M.C.), civ. no. 269105 (2006), the court held that the County Council had exceeded its authority when it raised the potential damages award from $5000 to as much as half a million dollars. The decision was not appealed and the Council has made no further effort to amend the subsection. The *American Financial* decision

therefore limits the Commission's authority to award damages for humiliation and embarrassment.

What's left of § 27-8(a)(1)(E) permits the award of only nominal damages when there's been a credible showing of humiliation and embarrassment. The wording does not prohibit a remedy whenever a victim suffers only one of those conditions.

The record clearly demonstrates that Ms. Pautrat was acutely embarrassed and uncomfortable the entire time Mr. Lee made his sexual advances. See T.II 31 (the kitchen incident "made me uncomfortable, creeped out" and was "unsettling"); T.II 33 (his requests to go travelling, same); T.II 35 (reaching for her torso, same). She feared she'd lose her job if Mr. Lee's girlfriend learned of his advances. T.II 33; 114 ("I needed my job, so I was constantly worried about losing it"). In sum, "I wasn't sure what was going to happen. I was just on high alert all the time and stressed out and anxious." T.II 115.

After Ms. Pautrat complained in writing about Mr. Lee's behavior, "I was really stressed out and really anxious like waiting for the other shoe to drop * * *." T.II 26-27. Her physical and emotional tension was so severe she had to consult a chiropractor the next day. T.II 27. The shoe did indeed drop a week later and her fears were realized: she suffered the humiliation and embarrassment of being involuntarily unemployed. Worse, she was saddled with the humiliating (but false) accusation that she had been an incompetent employee.

I conclude that Ms. Pautrat is entitled to nominal damages for the humiliation and embarrassment suffered during her employment and for losing her employment as a result of unlawful retaliation. I credit Ms. Pautrat's testimony and find her suffering understandable.

Because all respondents unlawfully caused Ms. Pautrat's suffering, each should be required to pay one third of the statutory damages of $5000.

B. INTEREST.

Section 27-8(a)(1)(G) permits the award of "interest on any damages from the date of the discriminatory act or violation, as provided in subsection [27-8](c)." That latter subsection specifies,

> The [case review] board may order the respondent to pay to the complainant interest on a damage award at 6 percent per year of any money that was unavailable to the complainant as a result of the act of discrimination, from the date of the discriminatory act to the later of the date of the Commission or judicial order.

In this case, the actions for which Ms. Pautrat is entitled to nominal damages began sometime in mid-March 2015. She has not yet been reimbursed for those damages. To simplify calculation, because the dates of the cumulative harassment are uncertain and the retaliation unmistakably occurred on May 11, 2015, interest on the $5000 award should run cumulatively from that May 2015 date and continue until the award is paid.

C. ATTORNEYS' FEES.

1. *Fees due on the merits.*

After finding violations of the Human Rights Act, the Commission may order "compensation for reasonable attorney's fees." M.C. Code § 28-8(a)(1)(A).

Ms. Pautrat's counsel have requested $325,143 in compensation. Docket no. 141. Accompanying their request was a 20-page exhibit listing time spent on this case in tenths-of-an-hour from May 28, 2015, through the filing of the fee request, a total of 568.6 hours. Using initials, the exhibit lists the attorneys who performed the work and the hourly rate at which they should be compensated. The hourly rates for Tina Maiolo (TM), a law firm partner, and Dennis Chong (DC), a "senior counsel" at the firm, were uniformly listed as deserving $650 throughout the four years this case has been pending. Both attorneys claimed they had well over twenty years of legal experience. Relatively few hours were spent by two junior firm lawyers (SA and PB) and by a paralegal (JW). Their hourly fees in the exhibit are listed at $450 and $175, respectively.

The request contains a "voluntary" 10% reduction as a matter of "billing discretion." *Id.* at 14. Without the 10% reduction, counsel for Ms. Pautrat claim, they would have been entitled to $361,270.

All respondents oppose the request. The Foundation and Mr. Lee assert that the "billing is, to be nice, exaggerated and not accompanied by oath or affirmation."

Docket no. 143 at (unn.) 2. Their opposition contends that the hourly rates are "excessive and not supported by expert testimony." *See id.* at (unn.) 3, 5. If there were to be an award of fees, the two respondents argue, it should be *de minimis* or correlate to the relief ordered on behalf of Ms. Pautrat. *Id.* at 1.

Capital Financial Partners, after again deflecting all blame for whatever happened to Ms. Pautrat, contends that the hourly fees claimed are "excessive." Docket no 142 at (unn.) 5. Counsel should be required to submit fee invoices they sent to clients in 2019, including Ms. Pautrat, and provide evidence that those invoices had been paid in full. As for the hours claimed by complainant, Capital Financial's opposition takes no position on "whether the times allegedly devoted to this matter were appropriate." *Id.*

a. *Standards for Fee Awards.*

The County Code does not mention standards for determining the reasonableness of a fee award but Maryland court decisions and, more recently, provisions of the Maryland Rules provide guidance for determining what qualifies as "reasonable" when fee awards are authorized by fee-shifting statutes. That guidance logically applies to fee awards by agencies enforcing such statutes, here the Commission.

In *Friolo v. Frankel*, 373 Md. 501, 529 (2003) (*Friolo I*), the Court adopted the "lodestar approach" in cases involving Maryland fee-shifting statutes. (In *Fiola*, the law at issues involved sections of the Labor and Employment Article of the Maryland Code). After a lengthy assessment of case law, the Court determined that the lodestar approach, with appropriate adjustments, already the "predominant rule" in the federal court system and other courts throughout the country, is also presumptively the appropriate methodology for similar fee-shifting statutes in Maryland. *Id.*

Under the lodestar approach, to determine a reasonable fee in a given case, "'the most useful starting point'" is to multiply the hours reasonably spent on the litigation by a reasonable hourly rate. *Id.* at 523, quoting *Hensely v. Eckerhart,* 461 U.S. 424, 433 (1983) (a civil rights case involving fee-shifting provisions of 42 U.S.C. § 1988).

When the underlying statute is remedial – as the County's Human Rights Law unquestionably is – courts and agencies are expected to "exercise their discretion liberally in favor of awarding a reasonable fee * * *." *Id.* at 518. A purpose of fee-shifting statutes is to enable a plaintiff to obtain a lawyer to enforce their legal rights through "'the statutory assurance that he [or she] will be paid a reasonable fee.'" *Id.* at 526, quoting *Pennsylvania v. Del Valley Citizens' Council*, 478 U.S. 546, 565 (1986).

While the lodestar approach is a useful starting point for assessing what a reasonable fee award in a case should be, adjustments may need to be made because "other considerations * * * might lead to an upward or downward adjustment," including the "'important factor of the results obtained.'" *Id.* at 524, quoting *Hensley*, 464 at 434.

Since 2016, Md. Rule 2-703(f)(3) has provided twelve standards to be considered by Maryland courts in gauging the reasonableness of hours and rates (standards originally formulated in a federal employment discrimination case, *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 414, 717-719 (5th Cir. 1974)):

(A) the time and labor required;
(B) the novelty and difficulty of the questions;
(C) the skill required to perform the legal service properly;
(D) whether acceptance of the case precluded other employment by the attorney;
(E) the customary fee for similar legal services;
(F) whether the fee is fixed or contingent;
(G) any time limitations imposed by the client or the circumstances;
(H) the amount involved and the results obtained;
(I) the experience, reputation, and ability of the attorneys;
(J) the undesirability of the case;
(K) the nature and length of the professional relationship with the client; and
(L) awards in similar cases.[16]

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[16] The Rule also applies in cases adjudicated in district courts. See Md. Rule 341(e)(2)(A).

b. *Standards Applied.*

Most of the standards in Rule 2-703(f)(3) do not require either upward or downward adjustments to the fee request under consideration in this case. Counsel for Ms. Pautrat did not request adjustments.

This case did present novel and difficult questions of law as to whether there had been violations of the County Code and, if so, by which respondents (B). The litigation required substantial skill to present facts and law so that they favored the complainant (C). While counsel's fee request presents no evidence the client or circumstances imposed time limitations, there is no rational basis for believing that the substantial time spent by counsel in this case didn't interfere with their employment on other cases (D). The fee was contingent in that it depended on whether violations of the Code were proven (F). There is no basis in the record for believing that time limitations were placed on counsel by Ms. Pautrat (G). Complainant's counsel's more than two decades of experience is substantial and their ability, as shown in this case, was of a high level (I). The case was not particularly desirable because the issues were difficult and the rewards to the client likely to be modest (J). The exhibit to the application for fees establishes that the relationship between client and attorney began in May 2015 and persisted until the present (K).

The remaining standards require more extended consideration, starting with customary fees for legal services and awards in similar cases (E), (L). In this case all three respondents protest that the request rates are excessive and that counsel had not corroborated that they had ever recovered hourly fees of similar magnitude.

The absence of corroboration weakens counsel's request for a high hourly rate. The fee request does include, as an exhibit, a 2015 decision by Montgomery County Circuit Court Judge Ronald Rubin in *Balderama v. Lockheed Martin*, 2015 Md. Cir. Ct. LEXIS 5 (2015). *Balderama* involved claims of violations of the County's Human Rights Law through national origin discrimination and retaliation. After Judge Rubin granted summary judgment for the defendant on the discrimination claim, a jury awarded plaintiff $830,000 for retaliation. *Id.* at *4.

Following the jury verdict, Judge Rubin awarded hourly fees of $520 for lead counsel, $420 for two senior counsel, and $255 for associates (*id.* at *20), a total of about $330,400.[17] *Id.* at *1. Judge Rubin noted the hourly rates he approved were lower than rates he had found reasonable in two earlier contractual fee-shifting cases. *Id.* at *20. As part of his reasonableness discussion, Judge Rubin cited cases in federal district court in Virginia that approved rates over $625, although one decision he cited held that $475 was a reasonable hourly rate for partners. *Id.* at *21.

While the *Balderama* discussion illustrates existence of a range of rates that can be considered reasonable, there is direct evidence in this case of rates that are reasonable. In an earlier submission asking for reimbursement for fees for responding to respondents' repeated failures to comply with Orders issued in this case, both principal counsel asked to be reimbursed $595 per hour. Docket no. 119(a), ¶¶ 20-21. Even though that hourly rate is on the high side, it's well within the range that courts in the metropolitan area consider reasonable. Lead counsel's most recent request for $650 per hour, by contrast, is inflated and should be denied.

Finally, in assessing the reasonableness of the *total* fee request, it's necessary to examine the amount requested and the results obtained in the litigation (H).

Insofar as declaratory relief is concerned in this case, counsel proved that 100% of alleged violations of the Human Right Act occurred and that all three respondents were responsible for them. They also presented sufficient evidence that Ms. Pautrat should receive damages to the full extent permitted by the Human Rights Law.

As a general matter, when counsel have achieved "'excellent results'" in fee-shifting cases, they should receive "'a fully compensatory fee.'" *Friolo* (I), 373 Md. at 524-525, quoting *Hensley*, 464 U.S. at 435. A small monetary award for a client should not necessarily prevent successful lawyers from being fully compensated for their work. As the Court noted in *Friola v. Frankel* (*Friola IV*), 438 Md. 304, 322 (2014), when a plaintiff "achieves other form of significant relief — or even voluntary behavior modification on the part of the defendant as a result of the lawsuit – the

[17] The total requested minus costs.

court must look beyond the correlation between time spent on the case as a whole and monetary relief."

Still, a significant disparity between the monetary relief available to the client and the amount requested by counsel warrants close scrutiny. Fee-shifting laws "were not designed as a form of economic relief to improve the economic lot of attorneys * * *." *Pennsylvania v. Del Valley Citizens' Council*, 478 U.S. at 565.

In the present case, the $5000 damages award is a minute 1.5% of $325,143 fee request. Part of that disparity is the result of the number of hours counsel's submission discloses they spent on this case. The 568.6 hours listed are the equivalent of slightly over *71* 8-hour days. Some of that time, especially in the early years was necessary because respondents refused to cooperate in conciliation and mediation. Other time, though, appears to have been spent on needless duplication, such as repeated damage research and duplicative witness preparation material. Thus, although I doubt that counsel deliberately inflated the time necessary to prepare to litigate this case, it also seems that they were somewhat lavish in the time spent. None of this is to denigrate the results obtained, results that should deter the three respondents from ever again unlawfully mistreating female employees and employees who protest discriminatory mistreatment.

C. *Conclusion.*

Considering all factors, there is sufficient evidence to conclude that counsel for Ms. Pautrat are entitled to generous reimbursement for their work. That said, the hourly rates they requested in their latest fee submission are not reasonable and the total number of hours spent on this litigation cannot fully be justified.

A reasonable award under all relevant circumstances should be 12.5% less than the $325,143 requested (computed using the $595 per hour fee, 8.5% less than the $650 in the fee request, and deducting 24 hours of time, 4.2%). That translates to a total award of $284,830, rounded to $285,000, for which respondents should jointly and severally be held liable

2. *Fees for expenses incurred for failure to appear and meet deadlines.*

A "hearing authority may impose sanctions against parties and witnesses * * * for unexcused delays or obstructions to the prehearing and hearing process." Sanctions "may include * * * denial of admission of documents and exhibits and admissions of matters as adverse to a defaulting party." M.C. Code § 2A-8(j). In other words, a defaulting party may be prevented from introducing evidence. By authorizing extreme sanctions, the Code section does not foreclose a hearing authority from imposing lesser sanctions such as attorneys' fees intended to compensate the opposing party for extra work.

In this case, should the Board disagree with my findings and conclusions on the merits, Ms. Pautrat should nevertheless be awarded compensation for legal work by her counsel necessitated by corporate respondents' several months of "unexcused delays or obstructions to the prehearing and hearing process."

As the September 6, 2019, Order (docket no. 74) explains, neither corporate respondent provided credible excuses for its repeated failures to comply with Orders. (The September 6 Order is attached to this report). Rather than prohibiting respondents from defending themselves on the merits, their unjustifiable disregard of their obligations warrant sanctions because their failures required Ms. Pautrat to produce numerous submissions, incurring extra counsel fees and expenses. To mitigate the financial harm they caused, attorneys' fees should be assessed against the Foundation and Capital Financial to compensate Ms. Pautrat irrespective of her success on the merits.

Counsel for Ms. Pautrat have requested $26,834.50 for the extra work. Docket no. 119(a). At $595 per hour that works out to 45 hours of added work. Both the time spent and the reimbursement requested seems reasonable.

V. RECOMMENDATIONS TO THE COMMISSION'S CASE REVIEW BOARD.

I recommend that the following elements be included in the Board's decision in this case, based on evidence, findings, and conclusions in this Report:

1. The Commission has jurisdiction to hear this case because the complaint was timely, the Office of Human Rights found probable cause, and conciliation failed. M.C. Code § 27-7.

2. The corporate respondents, the Foundation for Financial Education and Herman, Inc., doing business as Capital Financial Partners, were complainant Giselle Pautrat's employers within the meaning of that term in the Human Rights Law, M.C. Code § 27-6(g).

3. During Ms. Pautrat's employment, she was discriminated against because of her sex, by being subject to frequent sexual harassment in violation of M.C. Code § 27-19(a)(1).

4. Ms. Pautrat was discharged for complaining about her unlawful mistreatment, an act of retaliation that violated M.C. Code § 27-19(c)(1).

5. Respondent Jonathan Lee, by being the harasser, directly participated in unlawful conduct and therefore personally violated M.C. Code § 27-19(c)(2),(4).

6. Ms. Pautrat is entitled to $5,000 in damages for humiliation and embarrassment under M.C. Code § 27-8(a)(1)(E), one third of which should be paid by each respondent.

7. Each respondent is responsible for paying interest to Ms. Pautrat at the statutory rate on their share of the damages award beginning on May 11, 2015, until the award is fully paid, in accordance with the provisions of M.C. Code §§ 27-8(1)(G) and 27-(8)(c).

8. Respondents are jointly and severally liable to complainant for $285,000 in attorneys' fees, in accordance with M.C. Code § 28-8(a)(1)(A).

9. Should the Commission disagree with my findings and conclusions on the merits, the Foundation for Financial Education and Capital Financial Partners nevertheless should jointly and severally be assessed attorneys' fees in the amount of $ 26,835 to compensate counsel for Ms. Pautrat for work necessitated by their unexcused delays and obstructions to the prehearing and hearing process.

Respectfully submitted.

LUTZ ALEXANDER PRAGER
Hearing Examiner

Issued: July 15, 2020

BEFORE THE MONTGOMERY COUNTY COMMISSION ON HUMAN RIGHTS

Office of Zoning and Administrative Hearings
Stella B. Werner Council Office Building
100 Maryland Avenue
Rockville, Maryland 20850
(240) 777-6660

GISELLE PAUTRAT,	*	
	*	
Complainant,	*	
v.	*	OZAH No. HR-19-01
	*	(OHR No. E-06021)
FOUNDATION FOR FINANCIAL EDUCATION (F3E),	*	
JONATHAN LEE,	*	
CAPITAL FINANCIAL PARTNERS,	*	
	*	
Respondents.	*	

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ORDER IMPOSING SANCTIONS ON RESPONDENTS, LIFTING DEFAULTS

Respondents, Foundation for Financial Education and Capital Financial Partners, moved to vacate Orders separately declaring them to be in default and precluding each from contesting liability in this case. (Docket entries 48 and 56). The Order directed at the Foundation was entered after the Foundation failed for over a month to designate new counsel after its previous counsel announced her retirement. See docket nos. 52, 53. Capital Financial was held in default when it failed to appear and to respond to Orders for more than *six* months. See docket nos. 11, 27, 29, 34, 43.

Counsel for complainant, Giselle Pautrat, filed oppositions to both respondents' motions. Neither respondent filed a reply.

I conclude that neither respondent has provided credible excuses for its failures. Nevertheless, because this case should be decided on its merits and because those failures have so far not delayed its resolution, the sanctions imposed will be modified to the extent that both respondents will be allowed to present their defenses to the Pautrat claims that they discriminated against her on the basis of sex and retaliated against her for filing her complaint.

Still, respondents' unjustifiable failures to appear and to meet deadlines undoubtedly required Ms. Pautrat to incur counsel fees and otherwise unnecessary expenses in this case. To mitigate the financial harm they have caused, respondents will each be assessed attorneys' fees for their inaction. Those fees will be awarded to Ms. Pautrat irrespective of her success on the merits of her Human Rights Law claims.

In addition to the requirement that respondents reimburse Ms. Pautrat's expense, they are hereby cautioned they will not be granted additional delays in this case except in extreme circumstances.

1. *Foundation for Financial Education.*

A May 22 Order denied Ms. Pautrat's motion to enter default even though the all but one of the excuses given for not meeting deadlines were flimsy. Its counsel at the time was coping with serious medical conditions in her family so that there was a plausible reason at the time why her clients, the Foundation and Mr. Jonathan Lee, should not be penalized.

After that counsel announced her retirement on June 25, a new Order on July 1 gave the Foundation until July 18 to provide the names and contact information of its new counsel. The Order anticipated that new counsel might need additional time to become familiar with the case so it included a provision that the new counsel could move to delay discovery.

The July 18 deadline passed without the naming of new counsel or a request for additional time. The Foundation filed nothing. Neither did its chief executive officer, Mr. Lee, who had been allowed to proceed *pro se*. Their silence was startling in light of a July 12 email to OZAH from their former counsel that her "clients have engaged excellent new counsel."

On August 1, a month after warning the Foundation that it risked being defaulted, I entered the Order precluding the Foundation from contesting liability. That Order finally triggered a response. On August 7, the Foundation's new counsel, David Schiller, moved to have the default vacated. (On the same day, Mr. Schiller filed a notice of appearance stating that he was representing Mr. Lee but

making no reference to the Foundation. Whatever the reason for that omission, the motion did unambiguously name the Foundation as the movant).

The reasons given in the motion range from weak to implausible. The motion acknowledges that Mr. Schiller had been contacted by the Foundation "shortly" after June 21; that would have been three or four weeks before the Foundation was to name its new counsel or to request additional time. According to the motion, Mr. Schiller unsuccessfully attempted to obtain case documents from the previous counsel but was told she had none. The motion asserts that additional time was also needed to negotiate a retainer fee; in addition, the motion claims Mr. Schiller had not been given the July 1 Order. Otherwise, he would have filed a statement that "counsel had been contacted and that representation was being considered."

Previous counsel was not the only possible source of case files. As Ms. Pautrat's opposition points out, Mr. Lee, the Foundation's chief executive officer and Mr. Schiller's other client, had been served with all Orders and other documents in this case. In addition, the Office of Zoning and Administrative Hearings (OZAH) has the complete case file and is open every weekday for file inspection. According to a Google Maps search, the Schiller office is 0.2 of a mile from OZAH's location.

Considering the ready availability of the files, including the July 1 Order, either in the hands of the Mr. Schiller's clients or at OZAH, the excuses for not filing counsel's appearance by July 18 or for asking for additional time are not persuasive or even credible. Similarly, the excuse that time was necessary to negotiate a retainer fee fails because the month between July 1 and August 1 Orders was more than ample time for the Foundation to arrive at a fee agreement or, if negotiations failed, to broaden its search for counsel.

2. *Capital Financial Partners.*

Capital Financial's August 26 motion to vacate the Order precluding it from contesting liability was filed two months after that Order was entered. The motion was Capital Financial's first response of any sort in the more than six months since it had first been notified that the litigation against was pending. The motion was accompanied by an affidavit from Nicholas Herman, who described himself as

Capital Financial's chief executive officer and sole shareholder of Herman, Inc., an entity using Capital Financial Partners as its trade name.

The motion's sole explanation for its failure to appear earlier was that it had moved offices in August 2018 to an address in Gaithersburg and had not received mail sent to it about this case at its previous addresses in Rockville. Neither the motion nor the Herman affidavit claims that Capital Financial had informed OZAH or, previously, the Office of Human Rights (OHR) of an address change.

The initial Order in this case (docket no. 11) was mailed by first-class mail to an address at West Gude Drive in Rockville. The February Show Cause Order (docket no. 14) was sent to the same address, but this time by certified mail. Nothing in the OZAH files suggests that either mailing was returned as undelivered or not forwarded to Capital Financial.

The West Gude Drive address had been listed in OHR's "reasonable cause" determination in this case issued in March 2017. The Herman affidavit acknowledges that Capital Financial had been located on West Gude Drive address (together with the Foundation) until its August 2018 relocation. The same address was listed in OHR's certification of the case to the Commission of Human Rights and the Commission order referring the case to OZAH for hearing, both issued in January 2019. Docket nos. 2, 3. Both documents list "Webster Sewell, Esq., Capital Financial Partners, 30 West Gude Drive" in their headings.

As the Pautrat opposition to the Capital Financial motion points out, the West Gude Drive address remains listed on the Maryland Department of Assessments and Taxation website for both Herman, Inc. and Capital Financial Partners a year after their move. Docket nos. 47(a), exhibit 4, and 71, exhibit A.

When OZAH learned that the Foundation had moved from West Gude Drive to an address on Research Boulevard in Rockville, subsequent orders were sent to Capital Financial at that address by certified mail, return receipt requested. See docket no. 48. A Google search, repeated by counsel for Ms. Pautrat, has Capital Financial Partners located at the Research Boulevard address.

The Herman affidavit asserts that Mr. Herman never received certified mail

from OZAH or any party to this action although OZAH twice received signed certified mail returned receipts for mailings to the Research Boulevard address. The affidavit (at 2) asserts "[n]o person at 2273 Research Boulevard was or is authorized to sign anything on behalf of Capital Financial Partners." The affidavit is silent about first-class mail sent to Capital Financial that was not returned to OZAH.

The record reveals that Mr. Herman had been directly involved in this case when it was before OHR. See, *e. g.* emails in the OHR file from "Nick Herman" to Esther Greene, OHR investigator, Aug. 21, 2015, and Jan. 28, 2016; see also Feb 15, 2016, email from Webster Sewell, Esq., about the case, copying Mr. Herman. Nothing in the record suggests that Mr. Herman would not have been aware that the case remained open when Capital Financial moved offices in 2018. Nonetheless, as noted, neither he nor anyone else at Capital Financial notified OHR, the Human Rights Commission, or OZAH of the new address.

3. *Discussion.*

The County's Administrative Procedures Act governing proceedings before administrative agencies empowers hearing authorities to take actions "authorized by this article or necessary to a fair disposition of the case". County Code, § 2A-8(h)(10). Some actions are expressly mentioned. They include the power to impose sanctions "for unexcused delays or obstructions to the prehearing and hearing process." § 2A(8)(j).

In general, cases should be heard on the merits. The issue raised by the Foundation and Capital Financial is whether their delays and obstructions were so egregious that they warrant the ultimate penalty – default – or whether lesser sanctions might still meet the Code's "necessary to a fair disposition" standard. As already expressed in the introduction to this order, lesser sanctions seem permissible because they will not be harm Ms. Pautrat's ability to present her case on the merits.

a. The answer as to what is fair is easier when considering the Foundation's delay. Even though I do not find its several excuses justified or, in some respects

credible, the delays came against a backdrop of the retirement of the Foundation's initial counsel and the hiring of new counsel. Some delay was therefore anticipated by the July 1 Order which explicitly provided that the Foundation could request additional time if it did so by July 18. Had the Foundation met that deadline, the default Order would never have been issued.

The purpose of the July 1 Order, as well as the August 1 Order of default, was to assure that this four-year-old case would proceed promptly. Despite the Foundation's failures, counsel has now been hired. Since the Ms. Pautrat's initial discovery requests were issued two and six days *after* the Foundation's new counsel filed the Foundation's motion to vacate the default, it is plausible to infer that the failure to meet the July 18 deadline has not delayed Ms. Pautrat's discovery or, more generally, the case's ultimate resolution.

Although Maryland Rule 2-613 does not govern these administrative proceedings, it does offer guidance on what "a fair disposition" could be when an order of default has been entered. Under the Rule, defendants are given thirty days to move to vacate the order. If the defendant files such a motion within the thirty days, the court may vacate its order if it "finds that there is a substantial and sufficient basis for an actual controversy and that it is equitable" to do so. Here, the Foundation filed its motion well within thirty days of the default order. The Pautrat allegations as to what happened in her interactions with Mr. Lee during her employment suggest that there could be a substantial controversy about whether Mr. Lee's actions were severe enough or frequent enough to amount to sexual harassment sufficient to meet the Human Rights Law's standard for discrimination on the basis of sex. The circumstances and timing of her discharge also provide substantial issues as to whether retaliation was involved. Ms. Pautrat may well prove her case but fairness requires that the Foundation (and Mr. Lee) be given the opportunity to defend on the merits so long as the Foundation's behavior does not delay final resolution of this case.

For these reasons, entry of default will be withdrawn.

There can be no question, however, that Ms. Pautrat has suffered economic

loss as a direct result of the Foundation's inexcusable delays. Had the Foundation met the July 18 deadline, Ms. Pautrat would not have incurred costs and fees for preparing and filing her motion to vacate the default Order; there wouldn't have been such an Order. A "fair disposition" therefore requires the Foundation to pay for its delinquency by reimbursing Ms. Pautrat for the costs inflicted.

b. Capital Financial's posture presents a more difficult question. As an initial matter, Capital Financial did not file its motion within thirty days of entry of the Order precluding it from contesting liability. It waited over two months before it acted. Such a delay prevents it from pointing to the principles underlying Maryland Rule 2-613 as a basis for equitable relief. Indeed, were the Rule applicable in this case, Capital Financial would be foreclosed from challenging default because the Rule's thirty-day time limit had expired.

Unlike the Foundation, Capital Financial cannot take refuge in a counsel's announced retirement, requiring a search for someone to take over its representation; rather, Capital Financial's sole argument for relief is that it hadn't received notice of the various orders issued in this case.

That argument is partially undercut by a telephone call from Mr. Abramson to OZAH on June 13 stating, according to a contemporaneous internal OZAH email, in which he had recently received the May 22nd Order threatening default from his client. When asked who his client was, he identified Capital Financial Partners. Faced with likely default, about which it was aware by June 13, Capital Financial nevertheless waited over two months to file its motion challenging default.

In addition, the failure of the first-class and certified mailings to be returned imply that the mail was forwarded from the West Gude Drive address to all relevant addressees, including Capital Financial. And the certified mail receipts were signed, leaving the fair inference that the mail was delivered to the correct addressee. (Mr. Herman contends that no one at the West Gude address had authority to sign but, without knowing who the signatories are, it's impossible to determine whether they had such authority).

Most importantly, Capital Financial's failures to receive earlier Orders (if

true) were solely the result of its own failure to keep OHR, the Commission, and OZAH informed of its whereabouts. It kept the move of its offices hidden from the agencies despite Mr. Herman's awareness that the Pautrat claims against Capital Financial and the Foundation had been filed and had not been settled. In addition, it failed to correct the information on the Maryland Department of Assessment and Taxation web site, leaving the inevitable inference that its address on West Gude Drive remains current. (It's less clear to what extent Capital Financial was responsible for posting the Research Boulevard address on Google; there is no evidence, however, that it attempted to ask for a correction).

Preventing service by failures to keep addresses current in ongoing litigation can warrant severe consequences. In *Maryland State Board of Nursing v. Sesay*, 224 Md. App. 434, 447, 121 A.3d 140 (2015), the Court upheld the revocation of a nursing license when the licensee failed to appear for a hearing after notice was sent to her address of record by first-class and certified mail. The licensee had failed to provide a new address, so both mailings were returned to the Nursing Board. In response to the licensee's claim that she had been denied due process because she hadn't received notice of the hearing, the Court held that the State was "not required to provide *actual* notice; rather it must show that its notice was reasonably calculated to provide notice." *Id.* at 150 (italics in original), citing *Griffin v. Bierman*, 403 Md. 186, 197, 941 A.2d 475 (2008). In *Griffin,* a real estate foreclosure, the Court had held that the defendant had received due process when notice of the sale was sent by certified and first class mail to the address of record even if the certified letter had been returned unclaimed.

Yet, I'm reluctant to prevent Capital Financial from defending itself despite its manifold failures. Capital Financial's role in the possible mistreatment of Ms. Pautrat remains murky and deserves clarity. In addition, as with the Foundation, Capital Financial's actions, while deplorable, have not yet delayed discovery in this case or the dispute's ultimate resolution.

So, just as with the Foundation, entry of default is lifted but Capital Financial will be assessed costs that Ms. Pautrat incurred in order to oppose its

motion to vacate default. Those costs would never have been necessary except for Capital Financial's manifold failures.

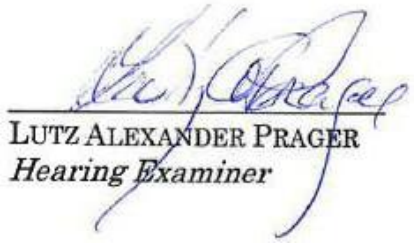
It is therefore Ordered:

1. The entries of default by the Foundation and Capital Financial are hereby vacated.

2. The Foundation and Capital Financial are hereby assessed attorneys' fees and other expenses incurred by Ms. Pautrat in responding to their motions. These assessments will be unaffected by the outcome of this case on the merits.

3. Ms. Pautrat is directed to file requests for reimbursement by respondents of attorneys' fees and associated expenses for the cost of preparing her oppositions to the motions to vacate the Orders of default. The requests should be supported by bills or other evidence of costs incurred and paid.

4. Neither respondent will be granted additional delays in this case except in extreme circumstances.



LUTZ ALEXANDER PRAGER
Hearing Examiner

September 9, 2019

Serve:

Tina M Maiolo, Esquire
Dennis Chong, Esquire
Carr Maloney P.C.
2020 K Street NW, Suite 800
Washington, DC 20006
Counsel for complainant

David A. Schiller, Esquire
17 West Jefferson St. 106
Rockville, Maryland 20850
Counsel for Respondents Lee and Foundation for Financial Education

Frederic D. Abramson, Esq.
21155 Woodfield Road
Gaithersburg, Maryland 20882
Counsel for Respondent Capital Financial Partners