

BEFORE THE MONTGOMERY COUNTY
COMMISSION ON HUMAN RIGHTS

Office of Zoning and Administrative Hearings
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PETRONILA VASQUEZ, *

*

Complainant, *

*

v.

OZAH No. HR 13-02

*(OHR Case No. E-04984)

ATLAS CLEANERS, INC.,

*

(DBA WESTWOOD CLEANERS)

*

*

Respondent. *

*

* * * * *

HEARING EXAMINER REPORT AND RECOMMENDED DECISION
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I. INTRODUCTION.

This is a case about sexual harassment at the workplace. The complainant, Petronila Vasquez, presented evidence that her boss at Atlas Cleaners, Aris Cubuk, demanded sexual favors, chased her, tried to grab her, and rubbed himself against her for about a six-week period beginning on October 14, 2009. That behavior, if proven, would violate the employment discrimination provisions of the County's Human Rights and Civil Liberties Law, M.C. Code chap. 27.

I find that the evidence in the record is inadequate to establish that the harassment took place. That does not mean it didn't occur, only that Ms. Vasquez has not met her burden of proof that it did by a preponderance of the evidence. As a result, I recommend that the Commission hold that a violation of the Human Rights Law has not sufficiently been proven.

II. APPLICABLE LAW.

A. MERITS

The Human Rights Law (in somewhat awkward phrasing) prohibits an employer from discriminating against an employee because of the employee's sex:

A person must not because of the * * * sex of any individual * * * or because of any reason that would not have been asserted but for the * * * sex: (1) For an employer: (A) * * * to discriminate against any individual with respect to compensation, terms, conditions, or privileges of employment[.]

M.C. Code § 27-19(a). The Law defines employer as "any person who employs one or more individuals in the County, either for compensation or as a volunteer." An employee is "any individual employed by an employer, either for compensation or as a volunteer." Secs. 27-19(g), (e).

The Human Rights Law's prohibition against sex discrimination in employment is substantially similar to prohibitions in federal and state law. See

Title VII, Civil Rights Act of 1964, 42 U.S.C. § 2000-2(a)¹ and Md. Code State Government § 20-606(a)(1).² Under § 27-7(j)(4) of the Human Rights Law this Commission “must apply relevant federal, State, County and case law to the facts” to the extent that the federal and State laws are substantively similar.

Neither the Human Rights Law or its State and federal counterparts expressly define “sexual harassment” but there is ample case-law defining it and discussing its elements.

The Commission has previously affirmed hearing examiners’ conclusions that persistent unwelcome sexual advances by the employer or its surrogates constitute sexual harassment and thereby violate the Human Rights Law. *See, Cochran v. Clenan, Inc.*, HRC No. E-01655, (2004) (affirming hearing examiner’s findings and conclusions based on persistent episodes of unwelcome sexual advances); *In the Matter of Bates*, HRC No. E-02012, (2001) (same, two physical sexual molestations); *but see, Fox v. CPC, Inc.*, HRC No. E-02618, (2007) (reversing hearing examiner findings of harassment based on single episode). In each case the Commission and hearing examiner analyses relied heavily on federal and State case-law construing not only the County’s law but also the federal Title VII.

In *Magee v. Dan Resources*, 137 Md. App. 527, 548-549, 769 A.2d 231, 243-244 (2001), a sexual harassment case, the Court of Special Appeals expressly held that the County Law is “substantively similar” to corresponding federal and state employment discrimination laws. *Cf. Taylor v. Giant of Maryland, LLC*, 423 Md. 628, 652, 33 A.3d 445 (Md. 2011) (“In addressing the issue of appropriate comparator evidence, we recognize the dearth of our own jurisprudence on this issue, as well as our history of consulting federal precedent in the equal employment area”).

¹ Title VII of the Civil Rights Act of 1964 (“Title VII”), 42 U.S.C. § 2000e, forbids an employer from “discriminating against any individual with respect to [her] * * * terms, conditions, or privileges of employment, because of such individual’s * * * sex[.]”

² Sec. 20-606(a) states in part: “An employer may not: (1) fail or refuse to hire, discharge, or otherwise discriminate against any individual with respect to the individual’s compensation, terms, conditions, or privileges of employment because of: (i) the individual’s * * * sex[.]” Sec. 20-606(a) was formerly codified as Md. Code Art. 49B, § 16(a).

In *Magee*, the employee alleged that the company president and controlling shareholder had, among other things, run his knee up and down her leg, commented on her breasts after reaching across her, and fondled a nude painting while looking at her. The Court reversed summary judgment for the employer and held that a jury could find that such behavior attributable to the president's reaction to the employee's sex. Such conduct violates the Human Rights Law, if proved, because it creates an abusive work environment that alters the conditions of employment because of the employee's gender. *Id.* at 137 Md. App. at 561.

Magee cautioned that not all sexual advances violate anti-discrimination laws. The discriminatory conduct must be so "objectively" severe or pervasive that it has a substantial effect on the terms or conditions of the employment." *Id.* at 550. In order to determine whether the threshold has been met under the Human Rights Law, *Magee* adopted the analysis of an earlier Court of Appeals decision, in which that Court held that sexual harassment is unlawful if the employee can show "(1) the subject conduct was unwelcome; (2) it was based on the sex of the plaintiff; (3) it was sufficiently severe or pervasive to alter the plaintiff's conditions of employment and to create an abusive work environment; and (4) it was imputable on some factual basis to the employer." *Magee*, 137 Md. App. at 550, quoting *Manikhi v. Mass Transit Administration*, 360 Md. 333, 348-349, 758 A.2d 95, 103 (2000) (other citations omitted).

Magee held that the employee's claim that the president had threatened her with loss of benefits and of her job if she did not go out with him would be a separate violation of the Human Rights Law, if proved. *Id.* at 562-563. A threat of adverse employment action if an employee doesn't consent to sexual advances constitutes "*quid pro quo*" discrimination. The Court explained the difference between the two types of violation: a *quid pro quo* claim is one in which the employer threatens adverse action and carries out the threat; by contrast, a hostile environment claim is actionable even if no threat is made or the threat is not carried out. *Id.*, citing *Burlington Industries v. Ellerth*, 524 U.S. 742, 753-754 (1998).

A fact-finder must determine from the totality of the circumstance whether the Human Rights Law proscription against sex discrimination has been violated, but there is “no ‘magic formula’ for determining when sexual harassment is sufficiently severe or pervasive to be actionable.” *Magee*, 137 Md. App. at 561, 769 A.2d at 251.

Manikhi, which *Magee* applied to the Human Rights Law, involved a federal rather than County claim. The complaining employee in that case alleged that the harasser, a fellow employee, “exposed himself, grabbed [her] breasts, thrust his pelvic area against her in close quarters, importuned her to have sex with him, and threatened to follow her home and have forced sex with her.” *Id.* 360 Md. at 345-346, 758 A.2d at 102. The Court held that such allegations of “persistent and unwelcome sexual harassment” by a fellow employee created a hostile work environment that would violate Title VII. *Id.* 360 Md. at 345, 349, 758 A.2d 102, 103. To the extent that *Manikhi* involved a fellow employee rather than a supervisor with the power to discipline and fire, its holding that the employer was responsible for such conduct under Title VII is now suspect because of an intervening Supreme Court decision discussed below, *Vance v. Ball State University*, __U.S. __, 133 S. Ct. 2434, 2443; 186 L. Ed. 2d 565 (2013). *Manikhi’s* analysis of what constitutes a hostile employment environment, however, remains valid.

Supreme Court decisions similarly hold employers liable for sexual harassment by their executives and other supervisors. None undermine *Magee’s* analysis of the Human Rights Law.

In *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57 (1986), a bank teller presented evidence at trial that her supervisor, a bank vice president and branch manager, repeatedly demanded sexual favors during and after business hours, fondled her in front of other employees, followed her into the women's restroom when she went there alone, exposed himself to her, and raped her on several occasions. *Id.*

The Court held that sexual harassment is actionable when severe or pervasive enough “to alter the conditions of [the employee’s] employment and create an abusive working environment.” *Id.* at 67. The conduct that the employee had been subjected to was “plainly sufficient to state a claim for ‘hostile environment’” sexual discrimination. It “alter[ed] the conditions of [the employee’s] employment and create[d] an abusive working environment” that violated Title VII. *Id.*

In *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 21-22 (1993), the Court explained that a sexually harassing environment must be “objectively” offensive, in the sense that a reasonable person would find it hostile or abusive. The complaining employee’s supervisor was also the president of the company. The trial court found the president had ridiculed her in front of other employees because she was a woman. He had suggested that the two go to a motel to negotiate her raise. He asked female employees to get coins from his front pants pocket, asked them to pick up objects he’d tossed on the ground, and made sexual innuendos about his female employees’ clothing. *Id.* at 19.

Whether a hostile or abusive environment exists depends on “all the circumstances” including “the frequency of the discriminatory conduct, its severity, whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee’s work performance.” *Id.* at 23.

But Title VII comes into play before the harassing conduct leads to a nervous breakdown. A discriminatorily abusive work environment, even one that does not seriously affect employees’ psychological well-being, can and often will detract from employees’ job performance, discourage employees from remaining on the job, or keep them from advancing in their careers. Moreover, even without regard to these tangible effects, the very fact that the discriminatory conduct was so severe or pervasive that it created a work environment abusive to employees because of their race, gender, religion, or national origin offends Title VII’s broad rule of workplace equality.

Id.

In *Harris*, the person generating the hostile environment was the corporate employer’s president. He was “indisputably within the class of an employer

organization's officials who may be treated as the organization's proxy," as the Court noted in a later decision, *Faragher v. City of Boca Raton*, 524 U.S. 775, 789 (1998).

In 1998, the Court held that an employer is vicariously liable for harassment at the workplace when the harasser is a supervisor who has been empowered by the employer to take tangible employment actions against the victim. *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998). The Court noted that "a supervisor's power and authority invests his or her harassing conduct with a particularly threatening character and in this sense, a supervisor always is aided by the agency relation" with the employer. *Ellerth*, 524 U.S. at 763. When the harassing supervisor has used his power to make a significant change in an employee's employment status, the employer is strictly liable. But the employer is also presumptively liable when a supervisor's harassment abuse is sufficiently severe to create a hostile work environment even if "no tangible employment action is taken." To avoid liability in the latter circumstance the employer must affirmatively prove the existence of two mitigating factors:

(a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise. * * * No affirmative defense is available, however, when the supervisor's harassment culminates in a tangible employment action, such as discharge, demotion, or undesirable reassignment."

Id. at 765; see *Faragher*, 524 U.S. at 807,

In *Ellerth*, the female employee was subject to several rounds of sexual harassment by a supervisor. 524 U.S. at 747-748. The harasser was a company vice president with power to make employment decisions affecting the employee's status and pay but was not the employee's immediate supervisor. Once, while they were on a business trip, he commented on the employee's breasts, told her to "loosen up" and threatened to make her life very hard at work. Another time, during a promotion interview, he reached over to rub her knee and then expressed reservations about giving her a promotion because she was not "loose enough." At

another time during a telephone call he asked if she was wearing shorter skirts yet “because it would make your job a whole heck of a lot easier.” Although the vice-president’s statements were “unfulfilled threats,” they were sufficiently pervasive and severe to create a hostile work environment. *Id.* at 754.

In *Faragher*, decided the same day as *Ellerth*, the Court found the employer liable even though the supervisors had taken no tangible employment action. Two supervisors had repeatedly subjected the complaining employee and other female lifeguards to “uninvited and offensive touching,” made lewd remarks, and spoke of women in offensive terms. 524 U.S. at 780, 782. Although the employer, the City of Boca Raton, could theoretically try to establish its two affirmative defenses, it had forfeited them:

* * * it appears from the record that any such avenue is closed. The District Court found that the City had entirely failed to disseminate its policy against sexual harassment among the beach employees and that its officials made no attempt to keep track of the conduct of supervisors like Terry and Silverman. The record also makes clear that the City’s policy did not include any assurance that the harassing supervisors could be bypassed in registering complaints. Under such circumstances, we hold as a matter of law that the City could not be found to have exercised reasonable care to prevent the supervisors’ harassing conduct.

Id. at 808.

Last year, in *Vance v. Ball State University*, the Court reiterated the *Ellerth* and *Faragher* standards but added a qualification. It shifted to the complainant the burden of proof to establish employer liability when the harassing conduct emanates from a fellow employee who has no authority to impose tangible employment actions, even if the fellow employee has been entrusted with some supervisory responsibilities. *Id.*, 133 S. Ct. at 2453. Under those circumstances, the complaining victim bears the burden of proving that the employer was negligent in failing to prevent harassment: “Evidence that an employer did not monitor the workplace, failed to respond to complaints, failed to provide a system for registering complaints, or effectively discouraged complaints from being filed would be relevant.” *Id.*

The Fourth Circuit recently has examined sexual harassment claims. See, e.g., *Okoli v. City of Baltimore*, 648 F.3d 216, 217, 220 (4th Cir. 2011) (evidence that the director of a city commission “forcibly kissed her, fondled her leg, propositioned her, asked sexually explicit questions, [and] described sexual activities he wished to perform”; the evidence was sufficient to create triable issues of hostile work environment and *quid pro quo* harassment); *Whitten v. Fred’s, Inc.*, 601 F.3d 231, 243 (4th Cir. 2010) (finding two-day period of verbal abuse and two incidents of supervisor pressing his genitals against plaintiff’s body to be sufficiently severe to be triable issue).³

B. RELIEF AND PENALTIES.

Section 27-8 of the Human Rights Law authorizes the Commission to award monetary and injunctive relief if it finds that an employer has discriminated in violation of § 27-19(a). Compensation can include reasonable attorney’s fees; unreimbursed travel or other reasonable expenses; damages for humiliation and embarrassment, and interest on any damages awarded. The Commission may award two years’ of back pay for loss of income, offset by earnings during that time. It may also enter equitable relief and “any other relief that furthers the purposes” of the Human Rights Law or that may be “necessary to eliminate the effects” of unlawful discrimination.

³ The Equal Employment Opportunity Commission (“EEOC”) regulations on sexual harassment, 29 CFR §1604.11, state:

(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.

(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.

When the discrimination is particularly severe or willful, the Commission may impose a civil penalty of up to to \$5000

III. PROCEDURAL BACKGROUND

Ms. Vasquez filed her complaint on November 11, 2009, alleging that she was “being discriminated against and subject to physical/verbal harassment due to my sex * * *” while employed at Westwood Cleaners. (H.E. ex. 1).⁴ In particular, she claimed that Westwood’s owner, whom she knew only by his first name, Ari, “has repeatedly harassed me physically and verbally, * * * including asking me to sit on his lap, hugging and kissing me, saying I should wear revealing clothes and adding other similar comments.” *Id.* The complaint stated that she unsuccessfully asked him to stop. Other employees, the complaint stated, were not similarly harassed. *Id.*

In addition to the allegations about “Ari,” the complaint alleged that two female coworkers had threatened her with bodily harm. *Id.*

After an investigation, the Office of Human Rights concluded that reasonable grounds exist that Aris Cubuk had harassed Ms. Vasquez because of her sex in violation of the Human Rights Law. The Office’s attempt to conciliate the matter failed and it certified the case to this Commission. (H.E. ex. 2).

On December 20, 2012, the Commission’s Case Review Board referred the case to the Office of Zoning and Administrative Hearings (OZAH) for a public hearing. (H.E. 3).

Discovery began on March 27, 2013, and was scheduled to last until July 24, 2013; the discovery period was later extended to September 15, 2013. See docket entries 9, 12. Discovery was again extended to October 15 at the request of both parties. Docket entry 29. During discovery, I issued orders resolving various discovery issues. Docket entries 23, 25, 29. I also denied as moot respondent’s motion to consolidate this case with a retaliation claim Ms. Vasquez had filed because OHR had dismissed that claim. Docket entry 22.

⁴ “H.E. ex.” refers to exhibits that I introduced as hearing exhibits without objection. T. 1/7/14 68.

On October 4, I scheduled the hearing in this case for January 7 and 8, 2014. Docket entry 30. I later issued an administrative subpoena for a potential witness, Maribel Castro, but denied Ms. Vasquez's application for an order and certification to subpoena Ms. Castro to appear in the County for the hearing from the District of Columbia unless Ms. Vasquez could show that District law authorizes the issuance of subpoenas to compel a witness to appear in a foreign jurisdiction. Docket entry 36. Ms. Vasquez did not renew her request.

The hearing began on January 7, 2014. OZAH engaged a Spanish-speaking interpreter, Rodrigo Guajardo, for the hearing because of Ms. Vasquez's limited ability to speak and understand English. As it turned out, five of the defense witnesses also preferred to testify in Spanish. Mr. Guajardo interpreted their testimony as well. My analysis of the evidence is based on his English version of the testimony. At the end, neither party challenged the accuracy of Mr. Guajardo's work although he corrected himself a few times after counsel for Ms. Vasquez questioned certain English phraseology.

It became evident during the hearing that "Westwood Cleaners" was a trade name and that Atlas Cleaners, Inc., is currently the real the owner of the cleaning plant in Gaithersburg where Ms. Vasquez worked. Atlas, in turn, is completely owned by Mr. Cubuk and his brother. Mr. Cubuk serves as president, his brother as secretary; there are no independent directors. At the time Ms. Vasquez worked in Gaithersburg, the corporate owner was 8517 Oakmont LLC, also wholly owned and managed by the Cubuk brothers. The transformation into Atlas Cleaners occurred in 2011 after Ms. Vasquez's employment had ended.

Throughout the time Ms. Vasquez was employed in Gaithersburg the plant was identified by a sign reading "Westwood Cleaners." T. 1/8 at 158. The sign still exists. The Cubuk brothers also own a dry cleaning company in Bethesda that was separately incorporated before 2011 as Westwood Valet, Inc. T. 1/8 at 143. (Ms. Vasquez worked briefly in Bethesda but transferred when the Gaithersburg plant opened in 2008). The Bethesda plant is now also owned by Atlas. *Id.* at 158.

In April 2014, I issued an order directing the parties to show cause why the caption of this case should not be changed to *Vasquez v. Atlas Cleaners, Inc., dba Westwood Cleaners*. Docket entry 52. Both parties agreed to the change. Docket entries 53 (Atlas) & 55 at 15 (Vasquez).

Ms. Vasquez was the only witness to testify on her behalf at the hearing. Without objection, she introduced some of her medical records and a letter she had sent to the Office of Human Rights in April 2010. CX 3, 4.

After Ms. Vasquez had testified, her counsel moved to admit an affidavit executed by Maribel Castro in 2012. I tentatively excluded the Castro affidavit (T. 1/7 at 161-162) but asked the parties to brief the issue of admissibility following close of live testimony. T 1/8 at 165-167, 171.

In its case in chief, Atlas called Mr. Cubuk and five of Ms. Vasquez's former co-workers. All Atlas witnesses other than Mr. Cubuk were excluded from the hearing room until they testified. At the end of their testimony, they were instructed not to discuss their testimony with witnesses who were still waiting to testify.

Atlas tried to introduce photographs of the cleaning plant but I excluded them. Even though both sides had been given almost two and a half months to exchange trial exhibits, the photographs were submitted a few days before Christmas and well after the time hearing exhibits were to be exchanged and filed. Atlas had not filed a motion to allow a late filing. I concluded that Atlas had presented no justification for its untimely submissions. See T. 1/7 at 168-184.⁵

I admitted one untimely exhibit over Ms. Vasquez's counsel's objections, an Atlas rendering of the Gaithersburg plant's floor plan. RX 3. I considered the floor plan valuable because it gave some idea of where the witnesses worked given the absence of other graphic evidence. See T. 1/7 at 179-184; T 1/8/14 161-162. The Atlas witnesses testified using copies of the plan marked RX 3A through RX 3E.

Counsel for Ms. Vasquez presented no rebuttal witness.

⁵ The excluded exhibits appear in the record in a separate envelope marked RX 8(a-q), Excluded Exhibits.

The record was kept open at the close of the hearing so that the parties could brief the issue of the Castro affidavit's admissibility. T. 1/18/ 14 165-171- I announced that the parties would have an opportunity to file final briefs on the merits after that issue had been decided. T. 1/8/14 at 171-172.

After briefing by both parties, I issued an order admitting the Castro affidavit. Docket entry 49.⁶ The order relied on § 8(e) of the County's Administrative Procedure Act. That section permits – but does not require – admission of evidence of “probative value” including hearsay that appears to be “reliable” so long as it is given “appropriate weight”:

Evidence. The hearing authority may admit and give appropriate weight to evidence which possesses probative value commonly accepted by reasonable and prudent persons in the conduct of their affairs, including hearsay evidence which appears to be reliable in nature. * *

In support of my ruling I referred to case-law interpreting a similar provision in Maryland Code, State Government Article. § 10-213(b)-(c). If the Castro affidavit were excluded, I wrote, Ms. Vasquez would be denied evidence from the only witness prepared to corroborate her testimony. In a she-says/he-says case, such corroborating evidence could be vital.

I concluded that Ms. Castro's sworn affidavit had some indicia of reliability, because it was executed shortly after Ms. Castro was interviewed by staff of the Office of Human Rights. In its determination of reasonable cause OHR found it consistent with statements Ms. Castro made during an interview. H.E. ex. 2 at 6, 8-9.

In fairness, I permitted Atlas to request that the hearing be reconvened to present testimony challenging the assertions in Ms. Castro's affidavit. Atlas declined the opportunity on the ground that its witnesses could not spend additional time from work. Docket entry 50.

⁶ The complete order is attached to this Report as Appendix 2.

The parties were given until May 9, 2014, to file their briefs on the merits. The brief for Ms. Vasquez was filed that day. Docket entry 55. Atlas chose not to substitute or amend a brief it had filed prematurely in February. Docket entry 48.

The Vasquez post-hearing brief revealed for the first time that counsel for Ms. Vasquez had drafted the Castro affidavit.

The record closed on May 9. In accordance with County Administrative Procedure Act (“APA”) § 2A-10, I extended the time for filing this Recommended Decision from June 23 until July 30, 2014. Docket entry 56.

IV. EVIDENCE.

A. INTRODUCTION.

This case turns entirely on credibility. Ms. Vasquez testified that Mr. Cubuk, co-owner of the Atlas dry cleaning plant in Gaithersburg persistently harassed her for about six weeks in 2009, starting on October 14 and ending sometime in November after she filed her complaint with the Office of Human Rights.

Atlas’s Gaithersburg plant employed eleven workers in 2009, seven women and four men, according to Mr. Cubuk. Ms. Vasquez began working for Atlas in the summer of 2008 in Bethesda and moved to Gaithersburg when that plant opened a few months later. She worked as a pants presser.

The harassment Ms. Vasquez described consisted of three related but differentiable aspects. First, on October 14, Mr. Cubuk allegedly demanded she kiss him and sit on his lap as she was standing near his desk; he then chased her in a rolling desk chair and tried to grab her until she found refuge in a nearby bathroom. Second, each day thereafter, Mr. Cubuk importuned her to kiss him when she came to work. Third, during the same period, he would sometimes rub his “bottom” against her back when he passed her as she stood facing her pants pressing machine. Ms. Vasquez also claimed that Mr. Cubuk came to work during summers in very skimpy shorts that, at least once, revealed his genitalia to her and other employees while he lay on the ground to repair machinery. She did not claim

that this was part of the harassing behavior. During the hearing, she did not renew the allegation in her complaint that Mr. Cubuk urged her to wear revealing clothes.

Ms. Vasquez called no witnesses other than herself but did introduce three exhibits: the Castro affidavit, which paralleled her own testimony; health records that showed she had complained to attending health-care workers in early November 2009 about being harassed by her boss; and an April 2010 letter to OHR intended to refute Atlas's statements to OHR investigators.

Atlas's witnesses directly contradicted virtually all of Ms. Vasquez's testimony. Each co-worker who testified was present on October 14. Four were working near Mr. Cubuk's desk and said they had unobstructed views; another was farther away but had an unhindered view of most of the area where the harassment purportedly took place. All testified they saw no chase or attempts to grab. They also heard no demands by Mr. Cubuk despite Ms. Vasquez's testimony that he had spoken loudly. They testified they neither heard nor saw Mr. Cubuk demand kisses or sexual favors from Ms. Vasquez at any time before or after October 14. The two witnesses who were questioned about it said they'd never seen Mr. Cubuk come to work in skimpy shorts and denied they'd been present when he allegedly exposed himself.

Four of the witnesses did not directly address the allegation that Mr. Cubuk had rubbed up against Ms. Vasquez while she was working at her pants pressing machine. The fifth witness worked near both Ms. Vasquez and Ms. Castro. He insisted the rubbing never happened.

What follows is a synopsis of the relevant evidence. A detailed summary, with complete record citations, is appended to this Report as Appendix 1. My assessment of the evidence appears in a later section of this Report.

B. MS. VASQUEZ'S EVIDENCE

Ms. Vasquez testified that Mr. Cubuk began harassing her on October 14, 2009. By that time, she had been working for Atlas for over a year.

Ms. Vasquez, who emigrated from El Salvador to the United States about twenty years ago, testified she speaks no English but says she understands English “just a bit.” She is illiterate. Her Spanish testimony was filtered through the interpreter.

Mr. Cubuk's harassment began on October 14 and lasted until she filed her Human Rights Law complaint on November 20, 2009, more than five weeks later. The harassment was sudden and unusual. She acknowledged she had had no problems with Mr. Cubuk before October 14. None of the other women at work had warned her of possible harassment.

According to Ms. Vasquez, Mr. Cubuk's harassment started when she approached his desk after lunch on the 14th to ask him to admonish two co-workers, Claudia Arevelo and Guisela Lopez. Ms. Vasquez was upset because Ms. Arevelo had interfered with her use of the company microwave oven. Mr. Cubuk's desk is located against the wall of an open area that all those testifying called the “kitchen.” The kitchen has a lunch table, a microwave oven, and a refrigerator. A bathroom is to the left of the kitchen; the Cubuk desk is to the right.

When Ms. Vasquez approached Mr. Cubuk on the 14th, he was sitting at his desk facing outward, toward her. She told him “*Claudia mucho problema*” and she believed he understood what she was saying. During her deposition, she acknowledged she had asked him for protection from both women. Despite not speaking English, Ms. Vasquez did not elicit help from multi-lingual co-workers to explain exactly what Ms. Arevelo had done or what action she wanted from Mr. Cubuk.

Rather than responding to her complaint about Ms. Arevelo, Ms. Vasquez testified, Mr. Cubuk demanded that she kiss him and sit on his lap. Some of Mr. Cubuk's demands were verbal – asking for a kiss – and others were conveyed by

gestures, such as motioning her to sit on his lap as he wheeled his desk chair toward her with his legs spread out.

As Ms. Vasquez backed up, she testified, Mr. Cubuk grabbed at her. Ms. Vasquez testified several times that Mr. Cubuk reached for her hand, but once she said he was trying to reach for her legs. Her testimony is unclear whether he succeeded in touching her in his wheeled pursuit. In addition to using his hands, Mr. Cubuk, still in his chair, tried to use his legs to snare her towards him.

Ms. Vasquez backed towards the bathroom in her attempt to escape Mr. Cubuk's advances, a path that took her past the "tagging" table where coworkers Maria Salvador, Silvia Reyes, and Jenny Reyes were working. Ms. Vasquez said she was crying at the time. She eventually reached the bathroom to wash her face. She stayed there only briefly before returning to work for the rest of the day.

She told no coworker about what had happened (other than Ms. Castro) and did not enlist their advice, either on the 14th or later. She didn't do so, she explained, because Atlas had no human relations department or employee handbook so she believed there was no one to turn to at Atlas other than Mr. Cubuk. (In his testimony, Mr. Cubuk admitted that Atlas had no written or oral employment policies – including anti-harassment policies – then or now. It also had posted no information in October 2009 that would have informed employees of applicable anti-discrimination laws and how to file complaints with County, State, or federal agencies).

Ms. Vasquez gave conflicting versions about whether Mr. Cubuk's voice would likely have been heard and his actions seen by other employees. At her deposition she had testified that, "Yes, others must have heard. He didn't say it low. He said it loud." At the hearing, she initially testified that Mr. Cubuk had not spoken loud enough to be heard by others: "No, because the other people was far away in their workplaces and there is machines, there was noise." Later, she testified that other employees "saw the faces he make at me and [heard] what he said to me."

Throughout this somewhat inconsistent account, Ms. Vasquez clearly believed that Mr. Cubuk's pursuit and her reactions to it were seen by nearby workers even if Mr. Cubuk's words – "loud" or muffled – were not heard.

Following that day, Mr. Cubuk continued his pursuit of her every day until she filed her OHR complaint. Every day he would importune her for a kiss when she arrived at work. She always refused. Ms. Vasquez did not testify about where Mr. Cubuk made the demands or how loudly he spoke. Again, she told no one at work about Mr. Cubuk's demands.

Mr. Cubuk did not limit himself to demanding kisses, according to Ms. Vasquez. She and Ms. Castro worked back-to-back at separate pants pressing machines. Mr. Cubuk would sometimes pass between them. When he did so, he would rub against "my butt, her bottom." T. 1/7 at 25. He did nothing of the sort with Ms. Castro, "only with me, only with me." T. 1/7 at 114. Ms. Vasquez did not testify how often this conduct occurred but it was often enough, in her view, not to have been accidental.

Ms. Vasquez also testified about seeing Mr. Cubuk's extremely skimpy shorts ride up to expose his genitals while he lay on the floor working on machinery. In her deposition, she stated she had not seen his penis. At the hearing, however, she testified "I saw it." During her deposition she testified other employees also had seen it, including Doris León. Employees were "laughing at that right at that time that Mister [Cubuk] got up here and even Doris laughed because she had seen it." At the hearing, she repeated that other employees had seen Mr. Cubuk's genitalia: "I said, if they're close, how they couldn't see that?" She especially mentioned Carlos Lopez as one of the laughing employees but made no mention of Ms. León.⁷ Ms. Vasquez said the incident had not troubled her; she just continued working.

Ms. Vasquez introduced part of her medical records into the record, one page of which shows that she complained to her doctors in November 2009 about problems at work, including harassment by her (there unidentified) boss. CX. 3 at

⁷ Carlos Lopez and Giusela Lopez appear not to be related although there is nothing explicit to that effect in the record.

PV000039. Ms. Vasquez had been treated for anxiety, depression, and related physical ailments since at least September 2008, a year before the October 14th events. Her doctors prescribed a number of anti-depressants during that time. (Atlas called attention to the therapies but it presented no medical testimony concerning their possible effects on Ms. Vasquez’s mental state. Their effect, if any, on Ms. Vasquez’s version of events is therefore entirely a matter of speculation).

The November 13, 2009, hand-written medical note states in part (words I could not decipher are marked [?]):

Pt [patient] here for f/u [follow-up] of anxiety – Being harassed @ work – She is being threatened by other female co-workers – “they will kill me.” Went to Office of Human Rights in Montgomery County Md – they investigated. Women @ work that are threatening her are part of gang tell her “anytime you will die – we will kill you.”

Her Boss @ work grabbed her wrist, pulled her close, hugged her cheek – asked her to get on his lap – Subsequently he began asking her for a kiss – Usually [?] eating OK – [?] = [?] –Medications helping her. * * *

(1) Pt w/ harassment by coworkers and boss as described above. – female coworkers part of “Spanish gang” threatening to kill her -- harassed by boss –. Pt working w/ police and Office of Human Rights. Pt encouraged to estab.[?] protective order & check in w/ victims’ assistance.

Id. (The “women at work” who threatened to kill her presumably refer to Ms. Arevelo and Ms. Lopez).

The principal supporting evidence that Ms. Vasquez presented was the Castro affidavit, an affidavit prepared by Ms. Vasquez’s counsel. Docket entry 55 at 2 n. 1.⁸ As already noted, counsel acknowledged authorship for the first time in his

⁸ Counsel’s failure to acknowledge authorship earlier is troubling. The issue of the provenance of the Castro affidavit was first raised during the hearing. T. 1/8 at 160-162; At the time, counsel made no mention of his participation in drafting it. After I tentatively excluded the affidavit and asked the parties to brief the issue of its admission, he was similarly silent in his brief. As a result, the order admitting the affidavit stated: “There is no indication in the record of who prepared the affidavit for Ms. Castro’s signature.” Docket entry 49 at 2. Counsel failed to correct that impression until several months later, in a footnote in his brief on the merits. The fair inference is that counsel for Ms. Vasquez was trying to hide authorship but had a very last-minute change of heart.

post-trial brief although the question of authorship had arisen during the hearing and again in my Order admitting the affidavit.

The parties apparently could not locate Ms. Castro, although counsel for Ms. Vasquez had two of Ms. Castro's previous addresses. That not only prevented her from being summoned to appear for the hearing but also thwarted Atlas's plan to take her deposition.

The Castro affidavit states that while working the same shift as Ms. Vasquez between April 2009 and 2010, Ms. Castro "observed" Mr. Cubuk making "suggestive remarks," such as "telling Ms. Vasquez that her significant other was too old for her." Aff. at 2. The affidavit does not disclose whether Mr. Cubuk said this in English (which Ms. Vasquez does not understand) or Spanish (which Mr. Cubuk testified he does not speak). Ms. Vasquez's testimony makes no reference to such remarks.

The affidavit states that "on numerous occasions during this period (April 2009 to April 2010)," Ms. Castro had seen Mr. Cubuk open his arms and ask Ms. Vasquez to give him a hug. Aff. at 3. At times Mr. Cubuk stood next to Ms. Vasquez while she was ironing and "pointed to his cheek, saying in Spanish '*Aquí, aquí*' ('Right here, right here')." Ms. Vasquez had always refused the demands for hugs and kisses.

The Castro affidavit also states that Mr. Cubuk would walk through what Ms. Castro characterized as the "the cramped spaces" between Ms. Vasquez and Ms. Castro and "brush[] his crotch up against Ms. Vasquez's buttocks"; he "remained in that position for a few seconds." *Id.* Ms. Vasquez reacted by "freez[ing] in place." *Id.* The affidavit states (somewhat confusingly), this happened "[t]hroughout the workday, at least on a weekly basis." *Id.* Although Ms. Castro was "very uncomfortable" each time, she said nothing.

With respect to October 14, Ms. Castro said she had watched Ms. Vasquez approach Mr. Cubuk's desk to complain about Ms. Arevalo. She had an unimpeded view. Mr. Cubuk

“turned his chair so he was facing Ms. Vasquez, opened his legs and arms and motioned for her to come to him. He was laughing, and he rolled his chair toward Ms. Vasquez. She recoiled and started to move away from him. He kept moving toward her with his chair and ultimately pinned her between his legs against his desk while he was still seated. This incident lasted at least five minutes. Finally, Ms. Vasquez pushed her way out from Aristides [*sic*] legs and returned to work.”

Id. at 3-4.

Aside from describing Mr. Cubuk’s conduct towards Ms. Vasquez, the Castro affidavit accuses him of mistreating pregnant employees. When she worked at the Cubuk-owned Bethesda plant between 1994 and 2004, she believed that Mr. Cubuk was having an affair with one of the employees. After Ms. Castro left in 2004, the employee was discharged. In 2008 the employee came to the plant to reapply. In response to Ms. Castro’s inquiry, the employee told her she had been fired because Mr. Cubuk had learned she was pregnant. According to Ms. Castro, Mr. Cubuk became incensed when he learned Ms. Arevalo was pregnant. He complained to Ms. Castro that Ms. Arevalo already had enough offspring and wouldn’t be able to work when pregnant. He angrily warned Ms. Castro, “Don’t you get pregnant.” *Id.* Both Ms. Arevalo and Ms. Lopez were “separated from employment” a few days after Ms. Arevalo revealed her pregnancy. (Ms. Lopez was also pregnant at the time, but the affidavit does not disclose whether Mr. Cubuk was aware of the pregnancy; Ms. Castro does not claim he spoke to her about it).

Ms. Vasquez also introduced a letter she had written to OHR in April 2010 to refute what the letter calls Mr. Cubuk’s “erroneous assertions.” CX 4. The letter adds nothing to Ms Vasquez’s sworn testimony. It does show that at the time Ms. Vasquez seemed primarily focused on the October 14 events. She expected Ms. Castro to tell OHR “she saw Mr. Cubuk corner me and attempt to kiss and hug me. She would tell you that she saw and chase me around, make me sit on his lap, and blow me kisses. She would tell you that all the while I was crying and asking him to leave me alone.” *Id.* at 1. The letter does not claim Ms. Castro witnessed Mr.

Cubuk repeatedly brushing up against Ms. Vasquez's rear while she was pressing pants.

C. ATLAS'S EVIDENCE.

Atlas presented five witnesses in addition to Mr. Cubuk. Four were women: Maria Salvador, Jenny (Younis) Reyes, Silvia Reyes, and Doris León. Both Jenny and Silvia Reyes, witnesses, are Ms. Salvador's daughters. The sole male employee to testify was Carlos Lopez.

1. *Floor plan.* Although Atlas was denied the opportunity to introduce photographs of its Gaithersburg facility, it was permitted to file a floor plan over Ms. Vasquez's objections. I permitted Atlas to introduce the floor plan even though it was served and filed late. I concluded that it would make it somewhat easier for the Commission (and me) to obtain a reasonable understanding of where the witnesses were located and where the harassment allegedly occurred. The exhibit was served two weeks before the hearing, and counsel for Ms. Vasquez had opportunities to cross-examine the witnesses and to present rebuttal testimony. Under the circumstance, I concluded the utility of the exhibit outweighed whatever prejudice the late service may have caused.

The original plan was prepared by Atlas and submitted to the County in 2008, according to Mr. Cubuk. RX 3D.⁹ The version filed in this case shows the linen press sideways, as actually installed in 2008, because it would not fit the original configuration. A small tablecloth machine was put in sideways rather than angled. T. 1/8 at 140-141. Otherwise, Mr. Cubuk testified, all machinery placements are the same as in the version filed with the County. *Id.*

Mr. Cubuk testified that the floor plan accurately reflected the location of objects in 2009. T. 1/8 at 98-99, 141. The floor-plan version filed during the hearing was prepared by Mr. Cubuk's brother-in-law, an architect, for this case. The furniture was drawn in at Mr. Cubuk's direction to reflect conditions in 2009. T. 1/8

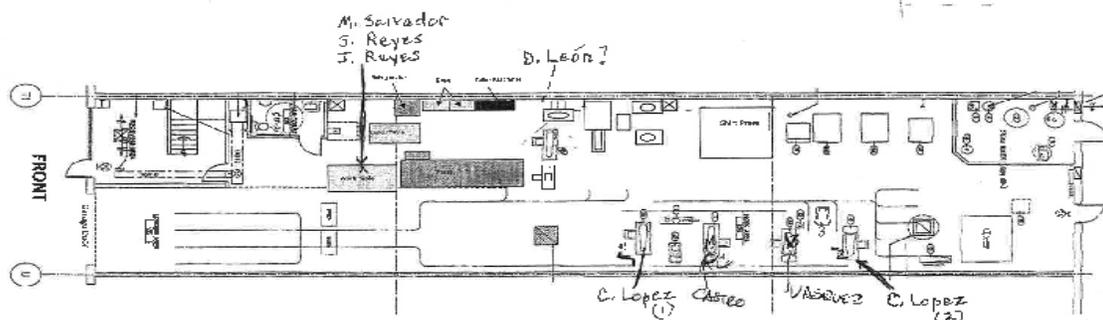
⁹ Atlas filed a certified copy of the original floor plan following the hearing, as requested. RX 3E.

at 154-155. It includes objects such as the Cubuk desk, lunch table, refrigerator, and other furniture.

While it is not clear from the testimony that the drawings of the objects shown are precisely to scale, the floor plan provides a rough idea of where the 2009 events purportedly occurred and where the witnesses worked for Atlas. Neither Ms. Vasquez nor the other witnesses challenged its accuracy.

Using copies of the Atlas-prepared floor plan, each Atlas witness was asked to mark where she or he normally worked. Those markings appear on copies of the original exhibit and were marked RX 3A, 3B, 3C. When I offered Ms. Vasquez an opportunity to challenge the markings, her counsel declined to do so because of his client's illiteracy and her "probable" inability to understand a map. T. 1/8 at 161.¹⁰

A composite version of the marked exhibits appears below.



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¹⁰ Certain numbers on the left of some of the exhibits were inserted by Mr. Cubuk and by Atlas's counsel to show where the photographs Atlas attempted unsuccessfully to introduce were taken. T. 1/8 at 139-140. The numbers have no bearing here because the photographs were rejected as evidence.

2. *Coworker testimony.* Ms. Salvador and her daughters worked at the tagging table near Mr. Cubuk's desk, the lunch table, and the bathroom door. They were responsible for placing name tags on clothes and assembling them. Ms. Jenny Reyes estimated that their workstation was about 15 feet from Mr. Cubuk's desk. Ms. León worked in the same general vicinity but could not locate her workstation on the plat because "I don't understand maps." T. 1/8 at 66. She testified however she had unobstructed views of Mr. Cubuk's desk, the kitchen area, and the bathroom wall from where she worked.

All four women testified they had never seen or heard Mr. Cubuk harass or pursue Ms. Vasquez or other employees. Silvia Reyes testified that she had never seen Mr. Cubuk chase Ms. Vasquez in his chair and never heard him say anything sexually-tinged to her, "absolutely no." T. 1/8 31-32. No other employee had complained to Silvia Reyes about sexual harassment by Mr. Cubuk. Ms. Salvador said she had never heard Mr. Cubuk ask an employee for a kiss or to sit on his lap. She had not seen Mr. Cubuk chase an employee in his desk chair. Ms. León said she had not seen Mr. Cubuk attempt to kiss, touch, or rub up against Ms. Vasquez or any other employee, "no never."

Ms. Jenny Reyes testified she had a "good relationship" with Ms. Vasquez, and Ms. León testified that her relationship with Ms. Vasquez was that of a working peer. Ms. Salvador said she had not been friends with Ms. Vasquez but the two were work peers. According to the women, Ms. Vasquez never mentioned Mr. Cubuk's alleged harassment to them. Ms. Silvia Reyes said she would not have expected Ms. Vasquez to confide in her.

Ms. Salvador said she had come to testify because Mr. Cubuk had asked her but Mr. Cubuk had made no promises or threats. He had asked the witnesses to come "because we are there and we can see and we can come and tell the truth." Ms. Silvia Reyes also testified that she had neither been threatened nor offered rewards for her testimony. She came to testify "[b]ecause Aris has always been a good boss, respectful to us, and I have to." None of the other witnesses were asked

the same questions. Ms. Salvador and Jenny Reyes both said they would quit if Mr. Cubuk attempted to molest them.

Both of the Reyes sisters contradicted Ms. Vasquez's testimony about Mr. Cubuk's attire. Neither had ever seen Mr. Cubuk in short shorts or other clothing that exposed his genitalia. Neither of them had ever heard anyone else at work mention such an incident. Ms. León was not asked about the incident.

Two witnesses spoke about Mr. Vasquez's credibility and behavior. Ms. Salvador testified that Ms. Vasquez had once told her that her mother was dead. One day a man and a woman arrived by car to pick Ms. Vasquez up at the cleaning plant. The man told Ms. Salvador that the woman in the car was Ms. Vasquez's mother. Ms. León testified that Ms. Vasquez once told her that Atlas had installed a camera in the bathroom. Ms. León investigated but "I didn't see anything" and "I went to her and told her there's nothing in the bathroom." T. 1/8 at 71-72. Ms. León also testified about an occasion when she asked about a little red light blinking in Ms. Vasquez's cleavage. When Ms. León asked her if it was a camera, she said no and refused to explain or reveal what was blinking.

Mr. Lopez, the other witness for Atlas, occasionally had acted as an interpreter when Ms. Vasquez needed to talk to Mr. Cubuk about work. He had never refused her request. She had not talked to him about sexual harassment; neither had any other employee. Ms. Castro had never spoken to him about Ms. Vasquez's allegations but he didn't know Ms. Castro "a lot." He considered Ms. Vasquez a "good person" and a "good peer." T. 1/8 at 39.

Mr. Lopez said he had never witnessed Mr. Cubuk harassing employees during the eighteen years he worked for Atlas. He had also never seen Mr. Cubuk brush up against Ms. Vasquez's back: "Never. No, no, no. Never." T. 1/8 at 40.

From the two work stations he occupied (marked L-1 and L-2 on RX 3C) he had unobstructed views of Mr. Cubuk's desk. The view from L-1 was generally open but sometimes would be obscured by hanging clothes. From that position, he could see the refrigerator but not the lunch table or bathroom wall. He could also not see the lunch table or bathroom from position L-2.

Each of the two positions where Mr. Lopez worked was situated on one side or another from the pants pressing machines where Ms. Castro and Ms. Vasquez worked. The two women worked back-to-back. The record does not disclose whether Mr. Lopez faced the women at one or both of his machines.

Mr. Lopez, the only witness for Atlas who testified about the aisle between Ms. Vasquez and Ms. Castro workstations, answered “no” to my question whether the aisle was narrow. T. 1/8 at 54. (On redirect testimony, however, he stated that the distance between the two women when they were both at their machines “would be a very small space.” T. 1/8 at 58). Asked if it would have been deliberate if someone passing through the aisle brushed up against the women working there, he replied: “It depends on how the people is positioned in the place and somebody wants to go through, you can touch it and brush it but depends.” *Id.*

If bodily contact occurred repeatedly, Mr. Lopez acknowledged, that would not be accidental. He insisted, however, “That never happened. I say that never happened. I never saw that happen.” T. 1/8 at 55.

Mr. Lopez had never seen Mr. Cubuk wear very short pants. He denied he’d seen Mr. Cubuk’s genitalia in Ms. Vasquez’s presence: “that never happened. That’s not true.” T. 1/8 at 46.

3. *Aris Cubuk.* Mr. Cubuk, as expected, denied that he had ever demanded kisses from Ms. Vasquez or asked her to sit on his lap. He denied he had rubbed up against Ms. Vasquez intentionally or had grabbed at her. Ms. Vasquez had never complained to him about his actions. So far as he knew, she had also not complained to other employees at Gaithersburg or at Bethesda.

To counter the Castro affidavit’s allegation that he had tried to trap Ms. Vasquez between his legs, Mr. Cubuk testified that he was a polio victim and could not raise his legs when seated. (Mr. Cubuk walked with a pronounced limp during the two-day hearing).

Mr. Cubuk stated that Ms. Castro would not be able to see his desk from where she was working because the clothes she had pressed would have obstructed her view, “there’s no way.” T. 1/8 at 103. Even if there were no clothes blocking

sight, Ms. Castro would have had a limited view of his desk from her position because of large machinery such as the linen press, in the way. If he moved to the left towards the kitchen and bathroom, she would not have been able to see him at all. Ms. Castro had never complained to him about his alleged harassment of Ms. Vasquez.

Mr. Cubuk said he had been in business for 23 years without having a complaint filed against him other than Ms. Vasquez's. He denied ever kissing any employee during that time. He acknowledged hugging employees "socially" when he handed out Christmas bonuses but "[t]here's no kissing. Only hug, say bye." T. 1/8 at 118. He was certain that he had hugged Ms. Vasquez at such a time.

After the Vasquez OHR complaint was served on Atlas, Mr. Cubuk asked Mr. Lopez and Ms. Jenny Reyes to speak to Ms. Vasquez but she declined to speak to them. Mr. Cubuk claims to speak no Spanish. He and Atlas's Spanish-speaking employees frequently use Mr. Lopez as an interpreter to communicate because he was the only Atlas employee who spoke both English and Spanish fluently enough to interpret.

At an unspecified time after October 14, Mr. Cubuk learned that Ms. Vasquez had petitioned for a peace order against Ms. Arevalo and Ms. Lopez when a sheriff's deputy arrived to serve the petition. A court dismissed the application three or four days later. Shortly thereafter, Mr. Cubuk fired the two women because he concluded the tense atmosphere at work had affected production.

Ms. Vasquez continued to work for Atlas until she left voluntarily after a car accident in September 2011. Mr. Cubuk testified he had made a point of not getting too close to Ms. Vasquez while she was still employed. During his deposition, however, he answered "yes" when asked "So you didn't specifically stay away from her or anything. You just carried on as usual." T. 1/8 at 121. Atlas kept Ms. Vasquez's position open for two months after the car accident but had no further contact with her.

Atlas had no employment discrimination posters at the time of the Vasquez complaint. It first posted them in English and Spanish after the complaint was filed. The posters explain how to file discrimination complaints. *Id.* at 153.

As of the hearing, four years after the fact, Atlas still has no written guidelines about harassment although Mr. Cubuk testified he believes it's important to have a policy statement. Atlas's attorneys drafted guidelines after the Vasquez complaint but the draft was never completed because "I lost contact with my attorney." *Id.* at 124, 128.

V. FINDINGS OF FACT.

The record as a whole compels me to find that Ms. Vasquez did not prove that Atlas violated the Human Rights Law by the necessary preponderance of the evidence.

The Vasquez evidence has elements of plausibility and reliability. The most persuasive one is that she told medical personnel about her problems with her boss (and with the two co-workers who allegedly threatened her) before she filed her OHR complaint. A fair inference is that she filed only at their suggestion. Raising the issue with attending medical personnel permits the fair inference that Ms. Vasquez was genuinely upset and was seeking medical relief for problems at work. To be sure, Ms. Vasquez's medical records show she had many persistent emotional problems, but she first complained to doctors about her boss's harassment and other tribulations at work after she had been in treatment for well over a year. That suggests a sudden onset, real or imagined.

Ms. Vasquez's evidence, however, also presents problems, especially with respect to what occurred on October 14. Although her testimony was somewhat inconsistent, she ultimately testified that Mr. Cubuk had spoken loudly and that he had chased her toward the bathroom. According to her, Mr. Cubuk had also gestured repeatedly for her to sit on his lap and had made attempts to grab her. That meant that both were near the kitchen and tagging tables on the way to the bathroom with Mr. Cubuk in pursuit. Sexual harassment can sometimes be furtive,

intentionally hidden from third parties. This was anything but. Yet *no* fellow worker other than Ms. Castro saw or heard Mr. Cubuk rolling along behind her gesticulating and asking for kisses.

Ms. Vasquez's evidence that Mr. Cubuk's extremely short shorts at least once revealed his genitalia to a number of chortling employees has the same weakness. Although the testimony has nothing to do with her harassment claims, Mr. Cubuk's behavior was purportedly visible to several employees. Yet those who testified about the matter denied it and some like Ms. León, who was named as being present, were not questioned about it. No one corroborated the incident despite its purportedly public manifestation. (The Castro affidavit does not mention it).

The one person who claims to have witnessed the October 14 events was Ms. Castro, the witness who could not be questioned and whose credibility and motives could not accurately be assessed. Several statements in her affidavit affect her credibility. The affidavit mentions incidents that Ms. Vasquez never mentioned during her appearance, such as that Mr. Cubuk would tell Ms. Vasquez her boyfriend was too old for her. The affidavit states that Mr. Cubuk had pinned Ms. Vasquez between his legs and against the desk on October 14; it implies she was pinned for some time, perhaps as long as five minutes. Ms. Vasquez made no such allegations during her testimony. She asserted only that Mr. Cubuk had tried to grab her hands and arms, and failed. The affidavit, although ambiguous, also implies that Mr. Cubuk's harassment began earlier than Ms. Vasquez claims and lasted longer: "On numerous occasions during the period (April 2009 to April 2010), I observed Aristide open his arms and tell Ms. Vasquez 'Give me a hug.'" When wording in an affidavit is ambiguous and cannot be clarified, it should in fairness be construed against the party offering it.

I also give less weight to the Castro affidavit than I do to live testimony because there was no opportunity to observe demeanor or to examine or cross-examine the deponent. For example, there is no explanation for why Ms. Castro never mentioned Mr. Cubuk's harassment to any other employee at the Gaithersburg plant. While Ms. Vasquez herself may have been reticent to talk

because of feelings of shame or humiliation, there is no comparable explanation for why Ms. Castro remained silent. Indeed, a reasonable expectation would have been that Ms. Castro would alert other women at work to warn them that they might be next or to plan jointly how to avoid being victimized.

By contrast, I find the testimony of the Atlas employees who testified to be credible and consistent. Their testimony did not sound rehearsed. They spoke with evident conviction. All asserted that they had seen nothing amiss on or after October 14. On the 14th, all of the female witnesses were in close enough positions to see the Cubuk desk, lunch table, and bathroom. (Ms. Castro was situated considerably farther way) None of the witnesses heard Mr. Cubuk's loud demands or saw the wheeled chase. Similarly, no employee corroborated Ms. Vasquez's testimony about Mr. Cubuk's summer shorts and the "exposure" incident. Those who were asked about it denied having seen anything, including that Mr. Cubuk had worn short shorts to work. More broadly, all of the witnesses denied ever seeing or hearing Mr. Cubuk stalk Ms. Vasquez or any female employee.

Neither Ms. Vasquez's testimony nor her counsel's arguments provide grounds for believing that the five co-workers were biased against Ms. Vasquez or for Mr. Cubuk, fearful for their jobs, or had other reasons to lie. The Vasquez side presented no rebuttal testimony and counsel inexplicably did not mention their testimony in his post-hearing brief at all. When questioned, two of the witnesses said that they had not been threatened or rewarded by Atlas; they had come of their own volition. I find their statements credible. (The other witnesses were not asked).

Conceivably the four women might have been away from their workstations at lunchtime on October 14 or Mr. Cubuk harassed Ms. Vasquez only when they were not present, but there is nothing in the record to support those theories. On the contrary, Ms. Vasquez insisted in her testimony that all four women had seen or heard the exchanges, especially on the 14th. T. 1/7 at 100-101. It is also possible that the whirl of machinery drowned out Mr. Cubuk's demands but, again, Ms. Vasquez's own testimony undermines such a conjecture.

In short, Ms. Vasquez has not established by a preponderance of the evidence that the events on October 14 happened as she claimed they did or that Mr. Cubuk made daily demands she kiss him and sit on his lap.

Ms. Vasquez's testimony that Mr. Cubuk rubbed up against her is the strongest aspect of her case. Atlas presented no evidence that the women at the tagging table, or Ms. León, were situated well enough to see what was happening at Ms. Vasquez's workstation. Mr. Cubuk testified that clothes often obscured views from that area. It is reasonably likely that the views *towards* the tagging area were similarly obscured.

In any event, none of the four women were asked specifically about what they saw near Ms. Vasquez's workstation. By contrast, the Castro affidavit does address Mr. Cubuk's alleged unwelcomed rubbing against Ms. Vasquez. Ms. Castro was positioned nearest Ms. Vasquez although she would normally have been turned away from Ms. Vasquez when both were pressing pants.

Mr. Lopez was the only live witness (other than the principals, Ms. Vasquez and Mr. Cubuk) near enough to observe. Counsel for Ms. Vasquez did not cross-examine Mr. Lopez either after his direct or (after my questioning) redirect testimony. I have no basis for inferring bias or lack of candor. I consider him a believable witness.

Mr. Lopez worked at times on one side or another of Ms. Vasquez's and Ms. Castro's pants presses. He insisted strenuously that no such rubbing incidents had ever occurred. Still, it is less than certain that he would always have been aware of physical contacts when Mr. Cubuk passed through what all of the witnesses characterized as a relatively narrow aisle.

While the rubbing incident theoretically might be viewed in isolation, that's not how Ms. Vasquez saw it or presented it. All of the behavior she alleged was part of a composite campaign to harass, of which the rubbing was *not* an isolated element. For a time, she seems to have considered it a less significant element. She did not expressly mention the rubbing in her complaint (though it might possibly be encompassed in "hugging"). Her September 10 letter to OHR outlining which of her

contentions Ms. Castro would be likely to substantiate focuses on the October 14 events; it does not mention being rubbed against repeatedly. If the rubbing actually occurred over a six-week period it would not, of course, be incidental harassment. An employee is entitled to be free from every form of pestering and particularly from prolonged harassment. But Ms. Vasquez presented the rubbing not an isolated event but part of a prolonged pattern of behavior.

Given, however, that each of the other aspects of Ms. Vasquez's account is inadequately supported, I am not convinced that the rubbing – part of an unproven pattern – uniquely took place. It's a close question, but Ms. Vasquez has not established her allegation about the unwelcome physical contact in the pants pressing area by a preponderance of the evidence.

VI. CONCLUSIONS OF LAW.

1. The Commission has jurisdiction over the Vasquez complaint. Atlas Cleaners, Inc. and its corporate predecessor, 8517 Oakmont, LLC, both owned by the Cubuk brothers, are each entities constituting an "employer" within the meaning of the County Human Rights Law § 27-6 because they employed "one or more individuals in the County." Both operated the Gaithersburg plant under the name Westwood Cleaners and one is the corporate successor of the other, distinguishable only by a change in name, not substance. Ms. Vasquez was an Oakmont "employee" within the meaning of § 27-6 at the time she worked at "Westwood Cleaners" in Gaithersburg.

The Vasquez complaint naming Westwood, filed less than two months after the alleged harassment began, was well within the one-year time limit specified by § 27-7(d).¹¹ Naming Westwood rather than Oakmont has no bearing on the complaint's validity. As the court noted in *Alvarado v. Board of Trustees of Montgomery Community College*, 848 F.2d 457, 460 (4th Cir.1988), when it held

¹¹ :Sec. 27-7(d) provides in relevant part: "Any complaint must be filed with the director [of OHR] or the Commission within one year after the alleged discriminatory act or practice. If those acts or practices are continuing in nature, the complaint must be filed within one year after the most recent act or practice."

that the employee could maintain a Title VII action against a college board of trustees even though he named the community college in his administrative charge: “Title VII does not require procedural exactness from lay complainants: ‘EEOC charges must be construed with utmost liberality since they are made by those unschooled in the technicalities of formal pleading.’” (quoting *Kaplan v. Int’l Alliance of Theatrical & Stage Employees*, 525 F.2d 1354, 1359 (9th Cir.1975)). The naming requirement is designed to provide notice to the employer to permit administrative attempts to obtain voluntary conciliation. *Id.* Here, 8517 Oakmont, LLC (and Atlas Cleaners, Inc.), operated publicly as Westwood Cleaners. It and its president received timely notice of the complaint and were offered an opportunity for conciliation. Atlas has not argued to the contrary.

The Office of Human Rights investigated the complaint as required by § 27-7(e).¹² In accordance with § 27-7(f) it found that there was reasonable cause to believe that respondent had violated the act.¹³ Its attempt to conciliate under § 27-7(g) failed and the case was certified to the Commission for hearing.¹⁴

The hearing record is now complete and all jurisdictional prerequisites for a decision have been satisfied.

2. The evidence presented by Ms. Vasquez, if accepted as sufficiently proven, would demonstrate a violation of the Human Rights Act on the basis of the sex of the victim. If her testimony is believed, Mr. Cubuk’s actions qualify as persistent and severe sexual harassment violating the Human Rights law. Ms. Vasquez has not claimed that Mr. Cubuk threatened her with discharge or other disciplinary

¹² Sec. 27-7(e) provides in relevant part: “After receiving a complaint, the director must investigate as necessary to ascertain appropriate facts and issues.”

¹³ Sec. 27-7(f) provides in relevant part: “The director must determine, based on the investigation, whether reasonable grounds exist to believe that a violation of this Article * * * occurred and promptly send the determination to the complainant and the respondent.”

¹⁴ Sec. 27-7(g) provides in relevant part: “If conciliation has not occurred within 90 days after the director found reasonable grounds to believe a violation occurred, or the director decides at any time that conciliation would be fruitless, the director promptly must certify the complaint to the Commission, which must appoint a case review board to consider and decide the complaint.”

action if she did not yield to his demands. This is therefore not a case of *quid pro quo* discrimination.

But a prolonged public pursuit, followed by over a six-week-long series of daily demands that an employee kiss and sit on her supervisor's lap, is ample enough sexually-related pestering to create a hostile work environment even if there are no accompanying threats. When the demands are unwelcome, such conduct is so objectively severe, pervasive, and distasteful as to alter an employee's terms or conditions of employment detrimentally solely because of her sex. See the facts in *Magee*, *Manikhi*, *Meritor Savings*, *Faragher*, *Okoli*, *Whitten*, all discussed above in part II.A.

The same would be true of frequent deliberate unwelcomed rubbing against her lower back for over a month. Again, Atlas has not argued to the contrary. Such actions are not equivalent to mere offensive utterances, one-time sexual requests, good-natured occasional teasing, or other conduct that can reasonably be characterized as the ordinary tribulations of the workplace.

If the events occurred as Ms. Vasquez described them, Atlas would be directly responsible for violating the Human Rights Law. Mr. Cubuk is Atlas's president with full authority over all employment decisions; he acknowledged he was Ms. Vasquez's sole supervisor and made all employment decisions at the Gaithersburg plant. T 1/8 at 124, 144. As such, he is unquestionably Oakmont/Atlas's alter ego and the corporate employer therefore becomes fully responsible for his actions. See *Harris*, also discussed above in part II.A. Atlas has not argued to the contrary.

The victim's female gender would have been the primary motivating factor for subjecting the employee to such disadvantageous terms and conditions of employment. No other reason is plausible.

3. For the reasons stated in the previous subsection, however, the complainant has not established by a preponderance of the evidence that a violation of the Human Rights Law occurred.

VII. RECOMMENDATIONS AND CONCLUSIONS.

The Commission should hold that a violation of the Human Rights Law has not sufficiently been proven.

The complaint was not frivolous and each side should bear its own costs and attorneys' fees.

Respectfully submitted.



Lutz Alexander Prager
Hearing Examiner

Dated: July 30, 2014

Serve:

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APPENDIX 1: SUMMARY OF EVIDENCE

A. COMPLAINANT'S CASE.

1. COMPLAINANT'S TESTIMONY

Ms. Vasquez was the only witness testifying on her behalf in person. She was not recalled for rebuttal. All of her quoted testimony was filtered through the interpreter assigned to the hearing.

Ms Vasquez came to the United States twenty years ago from El Salvador. T. 1/7 at 17. She is illiterate. *Id.* She speaks no English. *Id.* at 80, 82, 140.

Her employment by Cubuk-owned cleaners began in the summer of 2008, first in Bethesda and a few months later in Gaithersburg; she was a pants presser at both plants. *Id.* at 18-19; 68. Ms. Vasquez described the Gaithersburg facility as long and skinny. *Id.* at 21. Mr. Cubuk was her sole supervisor at Gaithersburg. *Id.* at 21. Anthony Kansil, an Atlas employee, never supervised her work. *Id.* at 64.

Ms. Vasquez said Cubuk's harassment began on October 14, 2009, at lunchtime shortly after a fellow employee, Claudia Arevalo, told her she couldn't use a microwave oven. *Id.* at 74-75. Mr. Cubuk was not in the building at the time. *Id.* at 76. When he returned after lunch Ms. Vasquez complained she had been threatened by Ms. Arevalo and by Giusela Lopez, another coworker. *Id.* at 22-23, 24. She wanted Cubuk to make it clear that that the microwave was available for everyone's use. *Id.* at 77, 78, 79-80.

"What I told him, that Claudia was a lot of problems." *Id.* at 80; 154-155 ("*Claudio mucho problema*"). Cubuk, she said, "understood like that." *Id.* at 80, see *id.* 155. She spoke to him in Spanish: "No. I can't speak English." *Id.* at 82; see, similarly, *id.* at 140.

When she complained to Mr. Cubuk, he responded by demanding Ms. Vasquez "to give him a kiss and sit in his lap." *Id.* at 22, 23; see, similarly, *id.* at 78, 97 ("give me one kiss and sit in my lap"), 141 ("one kiss, one kiss."). Cubuk did not ask her in Spanish but she understands English "just a little bit." *Id.* at 141.

Mr. Cubuk was sitting in a wheeled desk chair facing away from his computer when she approached him. *Id.* at 86. He spread his legs apart and made a motion to sit on his lap. *Id.* at 95. She “tried to avoid him touching me, but he was following me in his chair, finding the way to touch me and giving me a kiss.” *Id.* at 86, 103. As he pursued, Ms. Vasquez kept backing up to avoid him and to reach the bathroom. *Id.* at 24, 97. Cubuk never left his chair, rolling forward while she backed up. *Id.* at 95.

Mr. Cubuk tried to grab her hand as she moved backward. *Id.* at 87, 95, 96, 103; but see *id.* at 24 (he was “trying to grab my leg”). Ms. Vasquez initially testified that his attempt to grab her hand was unsuccessful (*id.* at 87-88) but on further questioning she said he touched her hand, “but I pull away.” *Id.* at 88. (That was consistent with an excerpt from her deposition “he just brushed my hand * * *”. See *id.* at 92). At some point, he unsuccessfully tried to “grab me with his legs.” *Id.* at 103.

As she backed up toward the bathroom, she reached the “tagging table,” where Maria Salvador, Silvia Reyes, and Jenny Reyes were working. *Id.* at 104. She then went into the bathroom to wash her face because she had been crying. *Id.* at 105. She felt “terrible and I start crying.” *Id.* at 24. She remained in the bathroom briefly – “seconds” – before returning to her machine. *Id.* at 106. She stayed at work the rest of the afternoon, leaving several hours later, at about 3:30 or 4:00. *Id.* at 108.

At first, Ms. Vasquez testified that Mr. Cubuk hadn’t spoken loudly enough to be heard by others over the noise of machinery. *Id.* at 97, 98. At her deposition, however, she had said: “He didn’t say it low. He said it loud.” *Id.* at 99. On further cross-examination, she said the several employees – “Carlos,” “Maria,” Silvia,” “Jenny,” and “Doris” had seen or heard the chase and Cubuk’s words. *Id.* at 100-101. The coworkers “saw the faces that he make [*sic*] at me and what he said to me.” *Id.* at 101. At the time she was close to the tagging table. *Id.* at 106. None of the employees intervened to complain to Cubuk about her treatment and none discussed it with her. *Id.* at 101

After that that day, Mr. Cubuk asked her to kiss him every time Ms. Vasquez arrived at work; she always refused. *Id.* at 24, 25, 142, 143. Cubuk would respond by asking “why not, why you don’t give me a kiss” (*id.* at 25) or “Nila, one kiss.” *Id.* at 144.

When she was working at her pants press, Mr. Cubuk came and “put his parts against my * * * bottom.” (*id.* at 25) as he went through a passageway between where she and Ms. Castro were working. *Id.* at 148-149. This happened “frequently.” *Id.* at 104.

Ms. Vasquez described the passageway as small: “*La máquina* was a little close. There was a space between us; it’s a small space, and he was passing through that little space in between but closer to me, not to the other person.” *Id.* at 148. He never brushed against Ms. Castro who was working behind her in the same passage. *Id.* No one else brushed against her when she was working. *Id.*

Mr. Cubuk never touched her with his hands: “He made the motion of touching me and I said stop”; he stopped “because I put my hands like this, saying stop.” *Id.* at 142. According to Ms. Vasquez, at those times Mr. Cubuk would ask Ms. Castro why Ms. Vasquez was unwilling to kiss him. *Id.* at 147.

Normally, Ms. Vasquez testified, she is not nervous but Cubuk’s importuning made her very nervous. *Id.* at 27. She would come home, sweating and shaking, falling and passing out. *Id.* at 28. She had never been sexually harassed by other employers but she had experienced sexual harassment as a child. *Id.* at 29. Cubuk’s demands recalled those childhood experiences. *Id.* at 29-31. She had also been beaten by a boyfriend when she was pregnant; she lost her child. *Id.*

Before October 14, 2009, she had had no problems with Mr. Cubuk. *Id.* at 23, 79. She had no prior intimations from anyone that Mr. Cubuk had ever sexually harassed an employee. *Id.* at 79. He never rubbed up against anyone else, “only with me.” *Id.* at 114, 144. Ms. Castro never complained to Ms. Vasquez that Mr. Cubuk had done so against herself. *Id.* at 149.

Although Mr. Cubuk had not harassed her before October 2009, she testified at her deposition, and confirmed at the hearing, that he had worn very short shorts at work that exposed his genitalia when he lay on the floor to repair laundry machinery; “Yes, with everything”; “I saw it.” *Id.* at 129-130. (At her deposition she had answered “no” when asked if she had seen his penis). *Id.* at 130. At the hearing she testified others could also have seen it but did not know if they had. *Id.* at 133-134; but see *id.* at 158 (“They saw it”). In her deposition, she testified that other employees had laughed: “they were laughing at that right at the time that Mister had got up here.” *Id.* at 134-135 (quoting deposition at 130). The exposure had not caused her emotional distress; she just looked away. *Id.* at 136. Although Mr. Cubuk often wore the short shorts and lay on the ground, Ms. Vasquez saw his exposed genitals only once. *Id.* at 158.

After Ms. Vasquez filed her sexual harassment claim with the Office of Human Rights, Cubuk stopped the harassment and kept his distance thereafter. *Id.* at 34, 114, 143, 144, 149-150. Immediately after he learned of the filing, however, Mr. Cubuk came to Ms. Vasquez’s work station, “very aggressive, very enraged,” demanding to know why she had complained. *Id.* at 32-33. She denied that Mr. Cubuk had used the occasion to assure her she wouldn’t be fired because of her complaint. *Id.* at 109. On this occasion, Mr. Cubuk brought along Carlos Lopez to interpret for him. *Id.* at 109.

Usually, when she had a problem to discuss, Ms. Vasquez went to Mr. Lopez for help. *Id.* She testified, however, that there was no one at Atlas to whom she could complain about Mr. Cubuk. *Id.* at 31-32. Cubuk was the owner and Atlas had no human resources department and issued no employee handbook. *Id.* At her deposition she had testified that she knew Atlas had a policy against discrimination and harassment but at the hearing she denied she had testified to that effect. *Id.* at 113-114.

She had not asked Ms. Castro, who speaks English “a little bit better than” she does, to interpret for her. *Id.* Although she had informed Ms. Castro

beforehand that she would complain to Mr. Cubuk on October 14 about Ms. Arevelo, she hadn't asked her to come along because Castro was working. *Id.* at 93. According to Ms. Vasquez, "[s]he was looking at me when I went to talk to [Cubuk]." *Id.* at 93; see *id.* at 26, 115. The view was unobstructed. *Id.* at 93-94. She did not discuss the incident with Ms. Castro thereafter. *Id.* at 115. She also hadn't asked Mr. Lopez who had helped her once before to help intercede with Mr. Cubuk. *Id.* at 82-83

Asked about her relationship with Ms. Castro, Ms. Vasquez testified that she has run into Ms. Castro from time to time in the street but denied she had ever invited her to her house. *Id.* at 116-117. At her deposition, though, she testified "Every now and then we see each other or she would come home. * * * Sometimes she would come where I live." *Id.* at 118.

After October 14, Ms. Vasquez sought medical treatment at the Holy Cross Hospital ("HCH") Health Center in Gaithersburg and was prescribed medicine for anxiety and depression. *Id.* at 27. She told the attending physician about what she perceived to be the cause – Mr. Cubuk's demands for kisses. *Id.* at 49-50. On cross-examination she testified that some of the stress was also related to her relationship with Ms. Arevalo and Ms. Lopez. *Id.* at 119. Seven months before Mr. Cubuk began to ask for sexual favors, Ms Vasquez began to have anxiety attacks because the two women "threatened me that they were going to kill me, because they are from a gang." *Id.* at 126. She had gone to County police who took no action but advised her to apply for a protective order. *Id.* at 128

In September 2008, Ms. Vasquez had consulted the HCH clinic, and had received a prescription for Prilosec. *Id.* at 44, 46. (Medical records from HCH appear in the record as exhibit CX 3; a reference to the Prilosec prescription appears at PV000029 of the exhibit). Even earlier, Ms. Vasquez had been treated at the Montgomery County Behavioral Health (MCBH). *Id.* at 123-124; CX 3 at PV000034. She denied that the staff had recommended she obtain therapy or had given her a diagnosis of severe depression or anxiety; she also denied she had been prescribed medication that she hadn't taken.. T. 125

In September 2008, Ms. Vasquez suffered from stomach pains, sleep deprivation, and anxiety. *Id.* at 125. At the time her home was in foreclosure but she denied that was the source of her anxiety. *Id.*

Ms. Vasquez remains on the Prilosec regimen “because I cannot stop taking it.” T. 1/7 at 51, 57-58. She also continues to attend the HCH clinic every week or two. *Id.* at 56-57. Her visits cost \$25 each; her three-month supply of medicine costs \$45 or \$180 annually.

In November 2009, a therapist at the HCH clinic referred her to the Sexual Assault Legal Institute which prepared a letter to the Office of Human Rights for her. *Id.* at 61-64. She initially testified she had consulted no one else about filing a complaint. *Id.* at 143. She had, however talked to Ms. Castro “several times” before filing the complaint about what was happening to her. *Id.* at 144. She had not spoken to any other coworker. *Id.* at 145.

Ms. Vasquez denied that she had applied for food stamps in the District of Columbia in 2008 even though, at one point, she had answered “yes, I did” at her deposition. *Id.* at 70. At another point in her deposition she clarified her answer: “Well, I live in Montgomery County. If I requested some stamps, I did it from Montgomery.” *Id.* at 152; see *id.* at 153. At the hearing, she repeated those words: “Well, I live in Montgomery County. If I requested some stamps, I did it from Montgomery.” *Id.* at 75; She applied for food stamps because she was unemployed at the time. *Id.* at 71. She denied that Ms. Castro had suggested she apply for food stamps in the District. *Id.* at 71, 75.

Ms. Vasquez said she worked at Atlas until September 25, 2011, the day she had a car accident. *Id.* at 137. If she had not had the accident, she would have continued working for Atlas: “Well, yes, I needed the job.” *Id.* at 138-139.

2. MURIEL CASTRO'S AFFIDAVIT

The Castro affidavit was executed on September 6, 2012, just shy of three years from the time Ms. Vasquez claims Mr. Cubuk first pursued her demanding she kiss him and sit on his lap.¹⁵ Ms. Castro signed it as “Maribal C.”

The provenance of the affidavit was murky until counsel for Ms. Vasquez filed a post-hearing memorandum. In it, he states that he prepared it for Ms. Castro's signature and submitted it to the Office of Human Rights. Docket no. 55 at 2, n. 1. According to counsel, Ms. Castro later appeared before the OHR investigator (in counsel's presence) to give a sworn statement along the lines of the affidavit. *Id.*

Ms. Castro's affidavit states she “witnessed a pattern of harassment and intimidation by Aristide [Cubuk] against Ms. Vasquez * * *.” CX 1 at 1. (The affidavit states that Ms. Castro did not know Aristide's last name).

Ms. Castro worked intermittently for Mr. Cubuk's firms and began to work with Ms. Vasquez only in April 2009. She had begun at the Bethesda plant in 1994, left in 2004, and returned in 2008. *Id.* at 2. She had little interaction with Ms. Vasquez at the Bethesda plant because they worked different shifts. *Id.* In 2008, she again left her employment to take care of her sick father. *Id.*

In April 2009, Ms. Castro returned, this time to the Gaithersburg plant. *Id.* There, for the first time, the two women worked the same shift, from 8 a.m. to 4.30 p.m. *Id.*

As soon as she started in April 2009 she overheard Mr. Cubuk “making suggestive remarks to Ms. Vasquez, such as telling her that her significant other was too old for her and that she was very beautiful.” *Id.* She also heard him demanding that Ms. Vasquez “[g]ive me a kiss” on “numerous occasions.” *Id.* Ms. Vasquez refused each time. *Id.* Mr. Cubuk used Spanish to convey his demands: “*Aqui, aqui* [here, here].” He complained to Ms. Castro in Spanish as well: “Maribel, Maribel, *mira a Nila. No quiere.* [Maribel, Maribel, look at Nila. She doesn't want it/to].” *Id.* at 3

¹⁵ The date-line on the affidavit states it was executed “9/6/212 [*sic*]” CX 1 at 5.

This pattern of behavior persisted from April 2009 to April 2010. *Id.* On “numerous” mornings Mr. Cubuk would open his arms and command Ms Vasquez to give him a hug. *Id.* Ms. Vasquez always refused. *Id.*

During that time, Mr. Cubuk would also walk through the “cramped spaces” between Ms. Vasquez and Ms. Castro at least weekly; each time, “he brushed his crotch against Ms. Vasquez’s buttocks” for a few seconds before leaving. *Id.* Ms. Vasquez reacted by “freez[ing] in place.” *Id.*

In October 2009, Ms. Castro observed Ms. Vasquez approach Mr. Cubuk at his desk after Ms. Arevalo and Ms. Lopez had harassed her during the lunch break. *Id.*

I was ironing at the time, but I could see everything that was happening with Aristide and Ms. Vasquez. Aristide turned his chair so he was facing Ms. Vasquez, opened his legs and arms and motioned for her to come to him. He was laughing, and he rolled his chair toward Ms. Vasquez. She recoiled and started to move away from him. He kept moving toward her with his chair and ultimately pinned her between his legs against his desk while he was still seated. This incident lasted at least five minutes. Finally, Ms. Vasquez pushed her way out from Aristides [*sic*] legs and returned to work.

Id. at 3-4.

Although Ms. Castro was disturbed by what she saw and heard during her time at the Gaithersburg plant, she said nothing and continued to work. *Id.*

Aside from describing Mr. Cubuk’s conduct towards Ms. Vasquez, the Castro affidavit also accuses him of mistreating pregnant employees. While working at the Bethesda plant between 1994 and 2004, she believed that he was having sexual relations with an employee. *Id.* at 2. After Ms. Castro left in 2004, the employee was discharged. *Id.* In 2008 the employee came to the plant to reapply for a job. *Id.* When Ms. Castro asked her why she had been discharged, the employee told her it was because Mr. Cubuk had learned she was pregnant. *Id.* The employee was briefly rehired in 2008 but discharged a few weeks later. *Id.*

According to Ms. Castro, Mr. Cubuk was incensed when he learned Ms. Arevalo was pregnant. *Id.* at 4. He complained to Ms. Castro that Ms. Arevalo already had enough offspring. *Id.* He wagged his finger and, with a raised voice,

told Ms. Castro, “Don’t you get pregnant.” *Id.* He sounded “very aggressive.” *Id.* Over the next two days he aggressively repeated the warning. *Id.* He also complained that Ms. Arevalo wouldn’t be able to work when pregnant and already wasn’t working hard enough. *Id.* About the same time, Ms. Lopez became pregnant. *Id.* (The affidavit does not disclose whether Mr. Cubuk was aware of the pregnancy; Ms. Castro does not claim he spoke to her about it). Both Ms. Arevalo and Ms. Lopez were “separated from employment” a few days after Ms. Arevalo revealed her pregnancy. *Id.*

Ms. Castro quit her employment in April 2010. *Id.* at 5. She denied what she said were claims by Atlas that she had been interviewed as part of its investigation of sexual harassment. *Id.* No one from the company had talked to her and she was unaware of any internal investigation. *Id.*

3. MS. VASQUEZ’S MEDICAL RECORDS

Ms. Vasquez submitted extracts from her medical records for treatment at the HCH Health Center. CX 3.

The excerpts, which begin with an entry for September 4, 2008, repeatedly state that Ms. Vasquez suffered from anxiety and depression, as well as assorted physical ailments the clinicians surmised were related to her emotional problems. Many of the excerpts precede the October 2009 events. See *id.* PV00029-PV00048 (entries for 9/4/08, 1/8/09, 2/5/09, 3/11/09, 4/9-4/23/09, 5/29/09, 7/9/09, 7/30/09, 8/6-8/13/09). The attending doctors prescribed a number of anti-depressants during that time, including Citalopram; Cymbalta; Klonopin, and Prozac. See *id.* None of these excerpts refer to Ms. Vasquez’s employment.

The first medical excerpt dated after October 2009 (that of November 13, 2009) does refer to Ms. Vasquez’s workplace experiences. PV000039. It’s handwritten; some of the entries are indecipherable:

Pt here for f/u of anxiety – Being harassed @ work – She is being threatened by other female co-workers – “they will kill me.” Went to Office of Human Rights in Montgomery County Md – they investigated. Women @ work that are threatening her are part of __ gang tell her “ anytime you will die – we will kill you.”

“Her Boss @ work grabbed her wrist, pulled her close, hugged her cheek – asked her to get on his lap – Subsequently he began asking her for a kiss – Usually [?] OK – [?] = [?] –Medications helping her. * * *

(1) Pt w/ harassment by coworkers and boss as described above. – female coworkers part of “Spanish gang threatening to kill her -- harassed by boss –. Pt working w/ police and Office of Human Rights. Pt encouraged to [obtain?] protective order & check in w/ victim’s assistance. Refer to Tony for additional eval.

Encouraged pt to leave position for self-protection – pt connected w/ police & w/ lawyer.

(2) ct scan = pt to f/u to schedule.

(3) Anxiety – ct___ – ___ health.

Orders

“Ct scan = Pt to schedule.

Social work referral: workplace harassment. Please check w/social worker in hospital for additional services

Pt. Needs to leave to keep appoint in Office of Human Rights.

There are several later entries, all of which show that Ms. Vasquez continued to be treated for anxiety, depression, weight gain, insomnia, and pain. She was prescribed other drugs. See PV00026-PV00046, entries for 2/25/10, 1/6/11, 3/3/11, 7/28/11, 10/21/11, 11/17/11, 2/20/12. The January 6, 2011, entry evaluates her anxiety and depression as severe. PV00040.

4. VASQUEZ LETTER TO OHR.

Ms. Vasquez submitted a two-page letter from her to OHR dated April 2, 2010. CX 4. The letter, written in English, is a translation prepared by a member of the Sexual Assault Legal Institute. The letter was intended to counter four of “Mr. Cubuck’s inaccurate assertions” that OHR had transmitted to her. *Id.* at 1.

First, it was not true there were no witnesses. Ms. Vasquez believed Ms. Castro (*id*)

would tell you she saw Mr. Cubuk corner me and attempt to kiss and hug me. She would tell you that she saw and chase me around, make me sit on his lap, and blow me kisses. She would tell you that all the while I was crying and asking him to leave me alone.

Second, Ms. Vasquez could not complain to management at Westwood Cleaners because Mr. Cubuk was the only supervisor. *Id.* at 2. Anthony Kansill was not a supervisor and did not speak Spanish. *Id.*

Third, none of Mr. Cubuk's conduct in October 2009 could be characterized as "innocent, mutual hugs." Mr. Cubuk had never hugged her "social[ly]" and she had not seen him hugging others. *Id.*

Finally, Mr. Cubuk had threatened to fire her on February 26, 2010: "He told me that because of my complaint against him that 'I had to go' and he would be firing me." *Id.* He had also threatened to have her work permit revoked. *Id.* [None of these threats were repeated in Ms. Vasquez's hearing testimony. Presumably they were raised in Ms. Vasquez's dismissed OHR retaliation claim].

B. RESPONDENT'S CASE

The testimony of respondent's witnesses, except Mr. Cubuk, was either entirely or predominantly in Spanish and is rendered here as filtered through the interpreter.

A discussion of the exhibits showing the Gaithersburg layout and witness workstations (RX 3A-3D) appears in the Report proper and is not repeated here.

1. JENNY REYES

Ms. Reyes (who also goes by the name of Yunis) worked for Atlas since sometime in 2008. *Id.* at 165. Her mother, Maria Salvador, and sister, Silvia Reyes, are also employed at Atlas. She is El Salvadoran by nationality. *Id.* at 166. Her job is to place tags on clothes to identify them. *Id.* at 167; 186.

Her work station is located close to Mr. Cubuk's desk. *Id.* at 185-186. Ms. Reyes marked RX 3A to show where the kitchen, bathroom, and Cubuk's desk are located. *Id.* at 190, 192. She estimated that the tagging table is located about 15 feet from the desk. *Id.* at 188. Her mother and sister worked with her at the table. *Id.* at 186.

Ms. Reyes replied "no" when asked whether she had ever seen inappropriate conduct by Mr. Cubuk towards Ms. Vasquez. *Id.* at 194-195. She had never seen

Mr. Cubuk in short shorts or in clothing that exposed his genitalia. *Id.* at 195. She had never heard anyone at work complain that Mr. Cubuk had exposed his penis. *Id.* Ms. Castro, with whom she interacted only in passing, had not told her about Mr. Cubuk's attempts to kiss Ms. Vasquez. *Id.* at 201.

Ms. Reyes had never heard Mr. Cubuk ask Ms. Vasquez to kiss him. *Id.* at 197. Mr. Cubuk was always respectful and friendly toward women at the workplace and "always treated us well." *Id.* at 197. He had never attempted to make physical advances to Ms. Reyes. *Id.* at 201. If he had, she would have talked about it with her coworkers and would probably have quit. *Id.* at 198.

Ms. Reyes said she had a good relationship with Ms. Vasquez; "We always talk." *Id.* at 199. The two women had no problems together. *Id.*

Ms. Reyes could not assess Ms. Vasquez's credibility "because I didn't see all that and every time I hear something about this case it's something different." *Id.*

2. MARIA A. SALVADOR

Ms. Salvador, Jenny and Silvia Reyes's mother, began work at Atlas in July 2008. T. 1/8 at 5, 6. She described her working relationship with Ms. Vasquez as normal. *Id.* at 7.

Mr. Cubuk had never harassed her or made inappropriate sexual advances. *Id.* at 7. Her relationship with Cubuk was that of employee and boss. *Id.* She had not seen anyone else being harassed or heard of such harassment. *Id.* at 7, 8. She had not heard of Cubuk demanding kisses and had not seen him chasing an employee with his desk chair. *Id.* at 8. If, hypothetically, Cubuk had acted inappropriately to her or others, she would have quit her job and not let her daughters work at Atlas. *Id.* at 14. She would also have protested to Mr. Cubuk, using Carlos Lopez to translate into English. *Id.* at 15.

She identified where she worked on RX 3B. *Id.* at 11. She was able to see Mr. Cubuk's desk, the bathroom, and the kitchen table from the tagging table where she worked. *Id.* at 11, 24, 26.

Asked about Ms. Vasquez's reputation for truthfulness, Ms. Salvador replied: "I don't know because she says something sometimes and then she changed direction, so I don't know." *Id.* at 11. For example, Ms. Vasquez once told her that her mother was dead. *Id.* 18, 21. Sometime later, a man came to pick Ms. Vasquez up and identified the woman with him as Ms. Vasquez's mother. *Id.* at 18, 20. She knew no other examples of possible deceit. *Id.* at 22. Ms. Vasquez had never complained to her about Mr. Cubuk's conduct. *Id.* at 8.

3. SILVIA P. REYES

Ms. Reyes is Ms. Salvador's daughter and Jenny Reyes's sister. *Id.* at 28-29. She works with them at the tagging station near the lunch table and Cubuk's desk. *Id.* at 31.

Asked whether Ms. Vasquez or any other employee had ever complained to her about Mr. Cubuk's conduct, Ms. Reyes replied "No." *Id.* at 29. Asked if she had heard Mr. Cubuk say anything harassing or sexually-tinged to Ms. Vasquez, she answered "Absolutely no." *Id.* at 30. She also replied "no" when asked if she had ever seen Mr. Cubuk wear short pants that exposed his genitalia, heard Ms. Vasquez complain about his attire, or seen Mr. Cubuk pursue Ms. Vasquez in his chair. *Id.* at 30. Ms. Reyes said she believed she was aware that both Ms. Vasquez and Ms. Castro had applied for protective orders against Ms. Arevalo and Ms. Lopez. *Id.* at 30.

While she denied having disagreements or problems with Ms. Vasquez, she was not Ms. Vasquez's friend; neither was her mother. *Id.* at 32. If Ms. Vasquez had a problem with Mr. Cubuk, she would not likely have told Ms. Reyes about it. *Id.* at 34.

Ms. Reyes denied that Mr. Cubuk promised rewards if she testified on his behalf or threatened her if she did not. *Id.* at 35. She was testifying because Mr. Cubuk "has been a good boss, respectful to us, and I have to." *Id.* She had met with counsel for Atlas two days earlier and had been asked "what could have

happened and have I seen anything or not.” *Id.* at 37. Mr. Cubuk was not present at the interview and counsel did not ask her to come to the hearing. *Id.* at 35.

4. CARLOS LOPEZ

Mr. Lopez has worked for Atlas since 2008 but has known Mr. Cubuk since 1996. *Id.* at 38. He works at various places at the Gaithersburg plant, wherever he is needed. *Id.* at 40.

He placed his initials on exhibit RX 3C to designate two workstations where he worked in 2009 but testified he worked elsewhere in the plant as well. *Id.* at 52. From both vantage points he could see Mr. Cubuk’s desk. *Id.* at 52-53. Mr. Lopez testified there were no obstructions to his line of sight from either spot. *Id.* at 54. The line of sight from position L-1 was rarely obstructed but was at an angle from the desk. *Id.* at 59. Occasionally, however, the view might be obstructed when something was hung in front of it. *Id.* From L-1 he could normally see the refrigerator but not the lunch table. *Id.* at 60. From L-2 he could see neither the bathroom nor the lunch table. *Id.* at 60-61.

Mr. Lopez would sometimes assist in translating for the Spanish-speaking workers at the Gaithersburg plant. *Id.* at 39. He had occasionally interpreted for Ms. Vasquez and had never refused her request to interpret. *Id.* He characterized Ms. Vasquez as a “good person.” *Id.*

Mr. Lopez testified he had never observed Mr. Cubuk harassing anyone. *Id.* He would have talked to Cubuk had he seen such behavior. *Id.* at 40. He had never seen Mr. Cubuk wearing very short pants. *Id.* at 45. He denied both that he had been present when Mr. Cubuk had exposed his genitalia and that he had left after seeing the incident. *Id.* at 45-46. It had not happened. *Id.*

. He also had never witnessed Mr. Cubuk rubbing up against Ms. Vasquez, “Never. No, no, no. Never.” *Id.* at 40; see *id.* at 62. At one point, he testified that the passageway behind Ms. Castro was not very narrow. *Id.* at 54. If someone wanted to pass, they might rub against Ms. Vasquez; depending “on how the people is positioned and somebody wants to go through, you can touch it and brush it, but

depends. * * * I think it's normal. It's not an abuse. It's an accident." *Id.* at 55. Later, on redirect testimony, he characterized the distance between two employees working there as "very small" if they were standing back to back at the pants pressing machine." *Id.* at 58.

When asked if he still would believe brushing against Ms. Vasquez was accidental if it happened repeatedly, Mr. Lopez responded: "that never happened. I say that never happened. I never saw that happen." *Id.* Had it happened repeatedly, it would have been an abuse. *Id.* at 56.

None of the women at work had ever complained to Mr. Lopez of harassment by Mr. Cubuk. *Id.* Ms. Castro had not mentioned that Mr. Cubuk had been harassing Ms. Vasquez but he did not know Ms. Castro "a lot." *Id.* at 51.

Testifying from RX 3C, Mr. Lopez placed a V to locate Ms. Vasquez's pants pressing machine and a C for Ms. Castro's machine. *Id.* at 41-42. (For legibility, Atlas's counsel substituted the women's names on the exhibit. *Id.* at 43).

Mr. Lopez recounted a conversation Ms. Vasquez had initiated after a car accident. She asked him if she could come back to work and nonetheless claim disability insurance.¹⁶ *Id.* at 46. He told her that to do both would be "illegal." *Id.* at 47. She did not come back to work after that conversation. *Id.* at 51.

5. DORIS LEÓN

Ms. León worked for Atlas in Gaithersburg in 2008 and 2009. *Id.* at 65. She did not remember what month in 2009 she left Gaithersburg. *Id.* at 76. She now works for Mr. Cubuk's brother in Bethesda. *Id.* She worked at the shirt pressing machine at the Gaithersburg facility. *Id.* at 67.

Ms. León testified she didn't understand "maps" (the floor plans) but was apparently able to locate the front and back doors of the Atlas Gaithersburg plant, Mr. Cubuk's desk, and the kitchen table. *Id.* at 66-67. She eventually circled an area where she thought she had worked. *Id.* at 69.

¹⁶ The phrase "disability insurance" was not used in the questioning or testimony, just the term "insurance." The context leads to the inference that subject of the conversation with Ms. Castro was about disability claims.

Ms. León testified she could view Mr. Cubuk's desk, the kitchen area, and the bathroom wall. *Id.* at 69. Her view was unobstructed. *Id.* at 70.

Ms. León had never seen Mr. Cubuk attempt to kiss, touch, or rub up against Ms. Vasquez or any other woman at work. *Id.* at 70; 74. Ms. Vasquez had not mentioned Mr. Cubuk's conduct to her. *Id.* at 71. Although she and Ms. Vasquez had conversations with her "[l]ike a working peer," Ms. Vasquez did not express concerns about working conditions. *Id.* Once, though, Ms. Vasquez claimed that a camera had been installed in the bathroom; Ms. León had inspected the bathroom and hadn't seen anything amiss. *Id.* at 72.

Ms. León said she had once seen a small red light blinking in Ms. Vasquez's cleavage. *Id.* at 72. When Ms. León asked if the light was part of a camera, Ms. Vasquez replied "no," turned around, and didn't want to show it to Ms. León. *Id.* at 73.

6. ARIS CUBUK

Mr. Cubuk is Atlas's owner and manager. He had been in the cleaning business for 23 years. *Id.* at 79. Atlas was originally incorporated as 8517 Oakmont, LLC; in 2011 the corporate name changed to Atlas Cleaners, Inc. *Id.* at 133, 159. The Gaithersburg plant, where Ms. Vasquez worked in 2009, was then owned by 8517 Oakmont LLC but operated as "Westwood Cleaners." *Id.* at 142, 158-159. It still operates as Westwood Cleaners although the corporate owner is now Atlas Cleaners, Inc. *Id.* at 159. Mr. Cubuk and his brother have been the co-owners and only officers of these entities throughout their permutations. *Id.* at 142, 144, 160. Mr. Cubuk serves as president, his brother as secretary; they have no board of directors. *Id.* at 144, 160.

Mr. Cubuk was Ms. Vasquez's supervisor during her employment. *Id.* at 124. At Gaithersburg, Mr. Cubuk makes all of the hiring and firing decisions. *Id.* at 144. He had hired both Ms. Vasquez and Ms. Castro. *Id.* at 145.

Ms. Vasquez began work at Gaithersburg at the time it opened in 2008 as a pants presser, standing at a pressing machine. *Id.* at 80. Before October 2009 they

had a purely business relationship. *Id.* at 80. They would greet each other with a hello in the morning and when passing each other. *Id.* at 81.

Mr. Cubuk denied that he had ever brushed against Ms. Vasquez intentionally, asked her for a kiss, or directed her to sit on his lap. *Id.* at 109,

He denied kissing any other employee. *Id.* at 118. At vacation times, he would hug employees but “[t]here’s no kissing. Only hug, say bye.” He explained: “I give them their check or bonuses so they just thank me, socially hug and bye.” *Id.* at 119. He was sure he had hugged Ms. Vasquez at such times. *Id.*

Mr. Cubuk testified he had had polio as a child; when seated, he cannot raise his leg. *Id.* [He walked with a pronounced limp at all times at the hearing].

No one had filed a complaint against him except Ms. Vasquez. *Id.* at 79. Most of his employees have been women. *Id.* In 2009 seven women and four men worked for him in Gaithersburg. *Id.* He had never had a problem “like this” at any of the cleaning plants. *Id.* at 111.

Mr. Cubuk speaks no Spanish. *Id.* at 81. When he needs an interpreter, he calls upon someone at work, usually Carlos Lopez. When he is away from the shop, Anthony Kansil is in charge. *Id.* at 82. Kansil speaks no Spanish. *Id.* at 151. Other than Messrs. Cubuk and Kansil, all of the employees at the Gaithersburg plant are Spanish speakers; a few have limited competence in English. *Id.* at 151-152.

When employees have complaints, they usually bring them through Mr. Lopez. *Id.* at 82. When Ms. Vasquez first complained at work she used her friend, Victor; Victor spoke no English but Mr. Cubuk understood him to say that Ms. Vasquez was having problems with coworkers Arevalo and Lopez. *Id.* at 84. He had not known of problems between the women earlier. *Id.* It seemed to Mr. Cubuk that Victor was asking him to fire Ms. Arevalo and Lopez. *Id.* Neither Ms Vasquez nor Ms. Castro followed up Victor’s message. *Id.* at 84-85. Mr. Cubuk kept an eye on the women thereafter but noticed nothing amiss. *Id.* at 85.

At one some point, a sheriff’s deputy came to the Gaithersburg plant and Mr. Cubuk learned that Ms. Vasquez had applied for a peace order against the two

women. *Id.* at 86. A court dismissed the application. *Id.* With Carlos Lopez interpreting, Mr. Cubuk convened the staff and told them he wanted them to “be friendly. We have work to do.” *Id.* at 87-88. Ms. Vasquez was at the meeting and expressed no concerns. *Id.* at 88. Shortly after the day of the meeting, Mr. Cubuk fired Ms. Arevalo and Ms. Lopez because of the tense work atmosphere which caused work to slow down. *Id.* at 106.

After Ms. Vasquez filed the complaint in this case, Mr. Cubuk interviewed Ms. Vasquez, using Mr. Lopez as his interpreter. *Id.* at 92. He denied he used the interview to threaten Ms. Vasquez with discharge, or with loss of her work permit. *Id.* at 82-83. Mr. Cubuk also delegated Mr. Lopez and Jenny Reyes to speak to Ms. Vasquez but she refused to talk to them. *Id.* at 91.

Mr. Cubuk interviewed other employees to ask them if they knew anything about her claims. *Id.* at 123. (Mr. Cubuk was not asked what they told him). At another time Atlas’s counsel interviewed the employees. *Id.* at 89. Mr. Cubuk was present for the interviews. *Id.* Mr. Lopez did the interpreting. *Id.* at 121.

In the months following receipt of the complaint, Mr. Cubuk remained distant from Ms. Vasquez and the pressing area. *Id.* at 119. During deposition testimony, however, he testified he had not changed anything at work, he carried on as usual. *Id.* at 121.

In testimony designed to establish who could see what at work, Mr. Cubuk testified that when Ms. Vasquez was at her pants pressing machine, Mr. Lopez or other employees would work behind her. *Id.* at 103. When Ms. Castro was working, she would have had to turn around to see Mr. Cubuk’s desk; most of the time her view would have been obstructed by hanging laundry. *Id.* at 103. If he moved to the left towards the kitchen and bathroom, she would not have been able to see him at all. *Id.* at 104.

Ms. Vasquez continued to work at Atlas for two years after October 2009 when she had the automobile accident. After Ms. Vasquez had not returned to work for two months, he hired a replacement. *Id.* at 112. He had no further contact with

her but her brother once called him to ask whether she could have her job back. *Id.* at 152.

Ms. Castro has not worked for Atlas since sometime in 2010. *Id.* at 145-146. She telephoned him in early 2011 asking for tax form 1099 for tax year 2010. *Id.* at 147. She said her address had changed. *Id.* When he offered to send the form to her new address she said she'd prefer to collect it in person. *Id.* The last time he saw her is when she came in for the form. *Id.*

Mr. Cubuk once asked Ms. Castro why Ms. Vasquez had made her allegations. *Id.* At the time, Castro, Cubuk, and Carlos Lopez were at the lunch table together. *Id.* Ms. Castro shook her head and "made a comment she doesn't know anything." *Id.* at 147-148.

Atlas has no written or oral employment policies or employee handbook. *Id.* at 124, 129. Atlas's attorneys began drafting a policy after Ms. Vasquez filed her complaint but it has not been completed and Mr. Cubuk has never reviewed it because "I lost contact with my attorney." *Id.* at 124, 128. The draft contains a section on sexual harassment. *Id.* at 126. Mr. Cubuk never reviewed it. *Id.* at 128. Although Mr. Cubuk believes it's important to have a policy, none has ever been circulated among Atlas's employees. *Id.* at 129, 130-131, 154.

As of the hearing, four years after the fact, Atlas still has not given its employees guidelines about harassment, written or oral. *Id.* at 132.

Atlas had posted no posters about employment discrimination at the time the Vasquez complaint was filed. It posted them in Spanish and English in 2009 at the suggestion of its lawyers. *Id.* at 132, 153. The posters explain how to file discrimination complaints. *Id.* at 153. They're still posted. *Id.* at 132.