NEW YORK STATE
DIVISION OF HUMAN RIGHTS
ONE FORDHAM PLAZA
FOURTH FLOOR
BRONX, NEW YORK 10458

(718) 741-8400
Fax: (718) 741-3214
www.dhr.ny.gov

ANDREW M. CUOMO
GOVERNOR

HELEN DIANE FOSTER
COMMISSIONER

July 23, 2014

Re: Beatrice Lozada v. Elmont Fire Department Truck Company #1
Case No. 10146997 & 10147297

To the Parties Listed Below:

Enclosed please find a copy of my proposed Recommended Findings of Fact, Opinion and Decision, and Order. Please be advised that you have twenty-one (21) days from the date of this letter to file Objections.

Your Objections may be in letter form, should not reargue material in the Record, and should be as concise as possible. Objections provide the parties with an opportunity to be heard on the issues in the case before the issuance of a final Order of the Commissioner. *See* Rules of Practice of the Division of Human Rights, 9 NYCRR § 465.17(c).

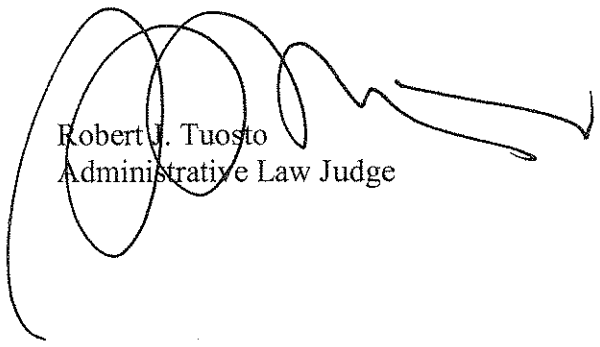
Please address your Objections to Peter G. Buchenholz, Adjudication Counsel, at the address below. Mail copies to all parties and their attorneys, including all of the following where applicable: complainant(s), complainant counsel, respondent(s), respondent counsel, and Division counsel, at the addresses in the list below. A copy must also be mailed to Robert Goldstein, Director of Prosecutions, Division of Human Rights, who is also listed below. Any documents not copied to the aforementioned individuals may not be considered. The Objections must be filed by **August 13, 2014**, at the following address.

NYS Division of Human Rights
Order Preparation Unit
Attn: Peter G. Buchenholz, Adjudication Counsel
One Fordham Plaza, 4th Floor
Bronx, New York 10458

No extensions of time to file Objections will be granted, except for good cause shown, by written request to the Order Preparation Unit. If the Objections are not received by the Order Preparation Unit by the deadline noted above, the Division will assume that you do not object to the proposed Order and will proceed to issue the final Order under that assumption.

Please contact Peter G. Buchenholz, Adjudication Counsel, at (718) 741-8342 if you have any questions regarding the filing of Objections.

Very truly yours,



Robert J. Tuosto
Administrative Law Judge

TO:

Complainant
Beatrice Lozada
155 Fallon Avenue
Elmont, NY 11003

Complainant Attorney
Steven A. Morelli, Esq.
The Law Office of Steven A. Morelli, P.C.
1461 Franklin Avenue
Garden City, NY 11530

Complainant Attorney
Anabia Hasan
The Law Office of Steven A. Morelli
1461 Franklin Avenue
Garden City, NY 11530

Respondent
Elmont Fire Department Truck Company #1
100 School Road
Elmont, NY 11003

Respondent Attorney
Jeffrey B. Siler, Esq.
Siler & Ingber, LLP
301 Mineola Blvd.
Mineola, NY 11501

State Division of Human Rights
Robert Goldstein, Director of Prosecutions
One Fordham Plaza, 4th Floor
Bronx, New York 10458

Lilliana Estrella-Castillo, Chief Administrative Law Judge
Robert J. Tuosto, Administrative Law Judge
Michael Swirsky, Litigation and Appeals
Caroline J. Downey, General Counsel
Elaine A. Smith, Associate Attorney, Legal Advisory
Peter G. Buchenholz, Adjudication Counsel
Matthew Menes, Adjudication Counsel

ANDREW M. CUOMO
GOVERNOR

NEW YORK STATE
DIVISION OF HUMAN RIGHTS

NEW YORK STATE DIVISION OF HUMAN RIGHTS
on the Complaint of

BEATRICE LOZADA,
Complainant,

v.

ELMONT FIRE DEPARTMENT TRUCK COMPANY #1, ELMONT HOOK AND LADDER COMPANY NUMBER 1,
Respondents.

RECOMMENDED FINDINGS OF FACT, OPINION AND DECISION, AND ORDER

Case Nos. **10146997, 10147297**

SUMMARY

Complainant, a former volunteer firefighter for Respondent, alleged that she was unlawfully discriminated against by her former employer on the basis of her Hispanic ethnicity, her sex, her marital status, and that she suffered retaliation. Complainant has proven her claims and is awarded damages for emotional distress. Additionally, a civil fine is assessed by the State of New York.

PROCEEDINGS IN THE CASE

On January 21, 2011 and February 23, 2011, Complainant filed verified complaints with the New York State Division of Human Rights ("Division"), charging Respondent with unlawful

discriminatory practices relating to volunteer firefighters in violation of N.Y. Exec. Law, art. 15 ("Human Rights Law").

After investigation, the Division found that it had jurisdiction over the complaints and that probable cause existed to believe that Respondent had engaged in unlawful discriminatory practices. The Division thereupon referred the case to public hearing.

After due notice, the case came on for hearing before Robert J. Tuosto, an Administrative Law Judge ("ALJ") of the Division. A public hearing session was held on April 16, 2014.

Complainant and Respondent appeared at the hearing. Complainant was represented by The Law Office of Steven A. Morelli, Garden City, New York, by Steven A. Morelli and Anabia Hasan, Esqs. Respondent was represented by Siler & Ingber, Mineola, New York, by Jeffrey B. Siler, Esq.

During the public hearing there was persuasive testimony that "Elmont Hook and Ladder Company Number 1" is Respondent's correct name. (Tr. 238, 263) Therefore, the caption is hereby amended to add Elmont Hook and Ladder Company Number 1 as a Respondent. 9 N.Y.C.R.R. § 465.4(c).

FINDINGS OF FACT

1. Complainant, a former volunteer firefighter, alleged that she suffered unlawful discrimination on the basis of her Hispanic ethnicity, her sex, her marital status, and that she suffered retaliation. (ALJ Exhs. 1, 4)

2. Respondent Hook and Ladder Company Number 1 (hereinafter "Respondent") denied unlawful discrimination in its verified Answers. (Respondent's Exhs. 3, 6)

3. Four of the seven firehouses which make up part of the Elmont Fire Department ("EFD") own their respective firehouses. Respondent, as a separate legal entity from the EFD, owns the firehouse where it is located. (Tr. 265)

Background

4. In 2006, Complainant joined Respondent as a probationary volunteer firefighter. (Tr. 11, 48-49, 85, 126, 261, 265, 291-92)

5. Complainant joined Respondent because she was used to volunteering and wanted to serve her community. (Tr. 49)

6. At the relevant time period Respondent had approximately 30-35 members of which two were female. Neither of the female firefighters held officer positions. (Tr. 30, 37, 159, 252, 302)

7. Complainant described the environment at Respondent's firehouse as a "boys' club" or a "fraternity." (Tr. 49)

8. It was not unusual to walk into the backroom at Respondent's firehouse and see pornographic images displayed on the television. (Tr. 49-50)

2007--Interactions with 2nd Lieutenant Anthony Rizzo

9. Starting in 2007, Complainant had various unwelcome interactions with 2nd Lieutenant Anthony Rizzo. (Tr. 50-60, 135)

10. Rizzo used to refer to Complainant as *"Badonkadonk" (phonetic)*[1] in a direct reference to her posterior. (Tr. 159-60, 178, 184)

11. Rizzo would come up behind Complainant and put his arms around her. (Tr. 53)

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[1] This term is a colloquial expression for an extremely curvaceous female buttocks. See: http://www.urbandictionary.com/define.php?term=badonkadonk.

12. Rizzo would slap Complainant's posterior so often that she got to the point that she was afraid to walk in front of him. (Tr. 53)

13. Sometime during 2007 Rizzo called Complainant at home at one o'clock in the morning and asked her to come to the firehouse without specifying the reason why he wanted her to do so. (Tr. 54-55, 126-27)

14. Upon arriving at the firehouse, Complainant noticed that only Rizzo was present. (Tr. 55, 57)

15. Rizzo proceeded to tell Complainant that she was attractive and beautiful. Complainant responded that she had a boyfriend. (Tr. 53)

16. Rizzo then asked Complainant to retrieve ice cubes from the freezer and Complainant did so. (Tr. 57)

17. Rizzo then grabbed hold of Complainant and forcibly inserted the ice cubes into her vagina. (Tr. 58-59)

18. Rizzo then prevented Complainant from leaving until she agreed to "jerk [him] off", that is, manually caused him to ejaculate. (Tr. 59)

19. Complainant then went home and cried herself to sleep. (Tr. 59)

Complainant's Interactions with Her Fellow Firefighters

20. Complainant's fellow firefighters would occasionally play a joke in which seven or eight of them would put their hands down their pants and touched their genitalia and then tackle a firefighter and touch them all over their body. (Tr. 60-61)

21. Complainant was tackled and treated in this way on at least one occasion after a Tuesday night meeting at the firehouse. (Tr. 60-61)

22. After all of these interactions, Complainant chose to protect herself when in the firehouse by wearing the most unflattering clothing and walking in a "hunched' fashion so that no one would bother her. Complainant did this as a "defense mechanism to scare people off." (Tr. 60-61, 143)

23. Complainant conceded that she never made a complaint, either verbally or in writing, to anyone in the firehouse regarding these interactions. (Tr. 26, 40, 59, 61, 130, 139-40, 147, 282)

February, 2008--Complainant Takes a One Year Maternity Leave

24. From February, 2008 to February, 2009 Complainant was on maternity leave. (Tr. 126, 133-34)

25. Complainant was still a probationary firefighter when she returned from maternity leave. (Tr. 136)

2009-10--Complainant Attempts to Become an Officer

26. In summer 2009, Complainant began officer training despite having repeatedly requested same since 2007. (Tr. 16, 21)

27. In November, 2009 Complainant completed officer training. (Tr. 18, 262)

28. In early 2010, Complainant sought election as an officer. (Tr. 262)

29. Complainant was defeated in her attempt to be elected an officer when she lost by four votes. (Tr. 31, 168)

2009-10--Complainant Receives an Unwelcome Text Message From a Fellow Firefighter

30. In 2009-10 Complainant was at a meeting at the firehouse when she received an unsolicited text message from a random firefighter also present there. (Tr. 62)

31. The text message read "I want to eat your pussy." (Tr. 62, 110, 160, 179)

32. There was laughter by Complainant's fellow firefighters after the text message was received. (Tr. 148)

33. Complainant showed the text message to a colleague who also at the meeting. (Tr. 117, 148)

34. The individual sending the text message was eventually identified as a fellow firefighter who was later suspended for having done this. (Tr. 119, 253-54, 306)

February, 2010--The Meeting After the 'El Diario' Article

35. Complainant's brother, Frank Lozada, was also a volunteer firefighter with Respondent from 2009 to 2010 and again from 2011 to 2013. (Tr. 157-58, 169-70, 180)

36. In late 2009 Frank Lozada nominated Complainant when she sought election as an officer. (Tr. 30)

37. In 2010, Complainant and her brother were subjects of several news stories, including an interview in the Spanish language newspaper *El Diario*, alleging unlawful discrimination by Respondent. Frank Lozada was included in these stories concerning his being "illegally dismissed" by Respondent as a firefighter only to be reinstated in 2011. (Tr. 70-71, 77,169, 176)

38. The *El Diario* article accused Respondent of being racist and allowing unlawfully discriminatory acts against certain individuals. Specifically, the article stated that Complainant was denied officer training on account of her sex, that Frank Lozada was retaliated against after having nominated Complainant when she sought election as an officer, and that another of Respondent's members was repeatedly bullied and taunted because he was Hispanic and didn't fluently speak English. (Tr. 15-20, 71-72, 242)

39. In February, 2010 an emergency meeting was held at the firehouse with the officers and membership present. The meeting was held in order to deal with the reaction to the *El Diario* article. (Tr. 70-74, 174, 204, 215, 242-43, 294-95)

40. Copies of the article were made available to the membership and it contained the names of those alleged to have engaged in unlawful discrimination. (Tr. 73)

41. Complainant was ordered by her superiors to attend the meeting. (Tr. 70)

42. At the meeting several of the firefighters cursed at Complainant. James Prince, Complainant's then-chief, chased her down, pointed his finger at her, and threatened her not to disclose what went on in the firehouse to anyone outside of the membership. (Tr. 69, 71, 73-74)

43. Respondent's former chief, Michael Capoziello, conceded that the meeting "got a little heated." (Tr. 297)

44. Capoziello also conceded that the allegations in the El Diario article were not subsequently investigated nor corrected by anyone associated with Respondent. (Tr. 246, 248, 283, 297-98)

January, 2011--Complainant Files Her First Division Complainant

45. On January 21, 2011, Complainant filed her first Division complaint under case number 10146997. (ALJ Exh. 4; Tr. 36)

46. Just before filing her Division complaint, Complainant applied for training to operate Respondent's fire trucks known as "chauffeur training." (Tr. 136, 274)

47. Complainant, after filing her Division complaint, did not receive chauffeur training but did receive different training for the operation of Respondent's smaller trucks upon her transfer to EMS. (Tr. 272-73, 308)

48. After filing her Division complaint Complainant had service credit wrongfully taken

from her by her Captain. (Tr. 79-81, 86-87)

49. The loss of Complainant's service credit could have potentially caused the termination of her service with Respondent. (Tr. 80)

50. Complainant conceded that her lost service credit was eventually reinstated after she brought the issue to the attention of Respondent's personnel. (Tr. 87)

February, 2011--Complainant Transfers to Emergency Medical Services ("EMS") and Files Her Second Division Complaint

51. On February 6, 2011 Complainant transferred to EMS as an Emergency Medical Technician. Complainant transferred to EMS because it had a mostly female workforce. (Tr. 65, 67-68, 95, 266, 269)

52. On February 23, 2011, Complainant filed her second Division complaint under case number 10147297. (ALJ Exh. 1; Tr. 36)

53. In November, 2013, Complainant left EMS. (Tr. 13, 94, 130, 255)

54. While at Respondent's firehouse Complainant constantly felt as if she had to "watch her back" and was "very uncomfortable." (Tr. 86)

55. Complainant, since approximately the beginning of her tenure with Respondent, describes herself as fearful of men and hesitant to engage in intimate relationships. (Tr. 143)

OPINION AND DECISION

Statute of Limitation

The Human Rights Law provides that, "[a]ny complaint filed pursuant to this section must be so filed within one year after the alleged unlawful discriminatory practice." Human Rights Law § 297.5. This provision acts as a mandatory statute of limitation in these

proceedings. *Queensborough Cmty. College v. State Human Rights App. Bd.,* 41 N.Y.2d 926, 394 N.Y.S.2d 625 (1977).

Any claim which had its origin prior to one year before the filing of the earliest of these complaints, *i.e.,* prior to January 21, 2010, is presumptively time-barred unless Complainant can show a continuing violation. *Clark v. State of New York,* 302 A.D.942, 754 N.Y.S.2d 814 (4th Dep't. 2003) (a continuing violation is found where there is "...proof of specific ongoing discriminatory practices, or where specific and related instances of discrimination are permitted by the employer to continue unremedied for so long as to amount to a discriminatory practice.)

Two specific types of continuing violations are well-established: one is hostile environment harassment, which typically is based on a continuing series of actions that create unlawful discrimination in their cumulative effect. *National Railroad Passenger Corp. v. Morgan,* 536 U.S. 101 (2002) (since the very nature of hostile environment claims involve repeated conduct, the discrimination therefore cannot be said to occur on any particular day). The other is pay discrimination, which continues through the recurrent action of the issuance of each paycheck. Despite the U.S. Supreme Court's ruling in *Ledbetter v. Goodyear Tire & Rubber Co., Inc.,* 550 U.S. 618 (2007), New York law continues to hold to this doctrine. *Siri v. Princeton Club of New York,* 59 A.D.3d 309, 874 N.Y.S.2d 408 (1st Dept. 2009); *Martinez v. MBL Construction Corp.*, SDHR Complaint No. 4608010 (May 8, 2009); *Spencer v. Nassau County Police Dept.*, SDHR Complaint No. 3507576 (December 22, 2008).

Unless forming part of a campaign of retaliation, such actions as hiring, firing, promotions, transfers, discipline, job evaluations, work assignments, or failure to reasonably accommodate are all considered discrete actions and generally do not form part of a continuing

violation. *Haberle v. Verizon New York, Inc.*, SDHR Case No. 10125611 (February 23, 2011) (denial of reasonable accommodation and failure to promote were discrete acts, not continuing violations); *O'Brien v. Swiss Re Life & Health America, Inc.*, SDHR Case No. 10118368 (March 25, 2010) (each failure to promote is a discrete act).

To establish a continuing violation outside the context of harassment, retaliation or unequal pay, a complainant must establish a "policy or practice" of discrimination. Thus, an identifiable discriminatory policy or practice (e.g. women work the cash registers, men stock the shelves), is actionable at any time so long as it continues. For more subtle allegations of discriminatory treatment, a complainant must show that specific and related instances of discrimination were permitted to continue unremedied for so long as to amount to a discriminatory policy or practice. *Kimmel v. State of New York,* 49 A.D.3d 1210, 853 N.Y.S.2d 779 (4th Dept. 2008) (plaintiff successfully alleged a continuing violation based on specific and related instances of discrimination that were permitted by defendants to continue unremedied over an extended period of time).

Here, the record shows that at least two unlawfully discriminatory acts attributable to Respondent occurred within the operative time frame: 1) Respondent's failure to investigate or correct the racist and unlawfully discriminatory conduct taken against Respondent's members, including Complainant, which was alleged by her and her brother in the *El Diario* article; and 2) threats made directly to Complainant by Prince and her fellow firefighters at the time of the February, 2010 meeting. Overall, Complainant presented proof that: 1) one superior sexually assaulted her and another physically threatened her; 2) co-workers committed various unwelcome acts including some which were physical in nature; and 3) superiors failed to investigate or correct allegations of unlawful discrimination when made aware of them. In sum,

the acts occurring before and after the statutory time period concerned the same type of employment actions (exposing Complainant to a hostile work environment), involved superiors (Rizzo and Prince) as well as co-workers, and occurred relatively frequently (starting in 2007 and continuing unabated into 2010 other than for Complainant's one year maternity leave). *National Railroad Passenger Corp. v. Morgan,* at 120. Thus, although many of the acts Complainant depends on were outside of the statutory time period, under these circumstances they are nonetheless part of the same actionable hostile work environment.

Therefore, Complainant has established a continuing violation.

The Pertinent Provisions of the Human Rights Law

N.Y. Executive Law, art. 15 ("Human Rights Law"), in pertinent part, makes it an unlawful discriminatory practice for "...any fire department or fire company...to discriminate against any volunteer member...because of the...race...sex or marital status of such individual." Human Rights Law § 296.9(a). It is also a violation of the Human Rights Law to "...retaliate or discriminate against any person because he or she has opposed any practices forbidden [under the Human Rights Law] or...filed a complaint, testified or assisted in any proceeding [under the Human Rights Law]." Human Rights Law § 296.7.

In discrimination cases a complainant has the burden of proof and must initially establish a prima facie case of unlawful discrimination. Once a complainant establishes a prima facie case of unlawful discrimination, a respondent must produce evidence showing that its action was legitimate and nondiscriminatory. Should a respondent articulate a legitimate and nondiscriminatory reason for its action, a complainant must then show that the proffered reason is pretextual. *St. Mary's Honor Ctr. v. Hicks,* 509 U.S. 502 (1993). The burden of proof always remains with a complainant and conclusory allegations of discrimination are insufficient to meet

this burden. *Pace v. Ogden Services Corp.*, 257 A.D.2d 101, 692 N.Y.S.2d 220 (3d Dep't., 1999).

Discrimination Based on Being a Female Hispanic

In order to establish a prima facie case of employment discrimination based on protected class membership, a complainant must show: 1) membership in a protected class; 2) that she was qualified for the position; 3) an adverse employment action; and 4) that the adverse employment action occurred under circumstances giving rise to an inference of discrimination. *Forrest v. Jewish Guild for the Blind,* 3 N.Y.3d 295, 786 N.Y.S.2d 382 (2004).

Here, Complainant did not establish a prima facie case. Complainant met the first two prongs of the test. First, Complainant, due to being female and of Hispanic ethnicity, was a member of several protected classes. Second, Complainant's extended tenure with Respondent showed her to be qualified for the volunteer firefighter position. However, Complainant failed to show the required adverse employment action. For prima facie case purposes, an adverse employment action must be something which constitutes a materially adverse change in the terms and conditions of employment. *See Messinger v. Girl Scouts of the U.S.A.,* 16 A.D.3d 314, 792 N.Y.S.2d 56 (1st Dept. 2005) (adverse employment action found to be a materially adverse change in circumstances such as termination, decrease in wage or salary, a less distinguished title, a material loss of benefits, significantly diminished responsibilities, or other indices...unique to a particular situation.). The record shows that Complainant failed to experience any of the aforementioned changes circumstances.

Therefore, this claim has not been proven.

Discrimination Based on Marital Status

Complainant mistakenly alleges that she suffered discrimination by way of her marital

status. In fact, Complainant alleged that it was her *familial* status which formed the basis of her claim when she averred that her firefighter brother also suffered retaliation by Respondent. However, the pertinent provision of the Human Rights Law does not protect against discrimination based on familial status but on marital status. Human Rights Law § 269.9 ("It shall be an unlawfully discriminatory practice for any fire department or fore company...to...discriminate against any volunteer member...because of the...marital status of such individual."). Complainant's brother may, should he wish to do so, make his own claim of retaliation against Respondent. However, that charge cannot form the basis of a claim which Complainant is entitled to pursue.

Therefore, this claim must be dismissed.

Hostile Work Environment

In order to establish a prima facie case of hostile work environment, a complainant must show that the workplace is permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe and pervasive to alter the conditions of the victim's employment and create an abusive work environment. *Forrest,* 3 N.Y.3d 295, 786 N.Y.S.2d 382 (2004), *quoting Harris v. Forklift Sys., Inc.* 510 U.S. 17 (1993). Whether an environment is hostile or abusive can be determined only by looking at all of 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. The effect of the employee's psychological well-being is, of course, relevant to determining whether the plaintiff actually found the environment abusive." *Harris*, at 23. Moreover, the conduct must both have altered the conditions of the victim's employment by being subjectively perceived as abusive by the complainant, and have created an objectively

hostile or abusive environment--one that a reasonable person would find to be so. *See id* at 21.

The record shows that Complainant established a prima facie case of a sexually hostile work environment which went unrebutted: the multiple, unwelcome acts of Rizzo, her superior, were textbook examples of this type of sexual harassment. Complainant was repeatedly exposed to words and actions by Rizzo which so deeply affected her that she felt forced to change her behavior in both her dress and manner so as not to be preyed upon by him. Rizzo's offensive conduct included his use of a vulgarism to describe a part of her body to actions such as placing his hands on her, repeatedly slapping her posterior, and forcibly inserting ice cubes into her vagina. Further, the acts of Complainant's fellow firefighters exacerbated this environment. For instance, Complainant was helpless when other firefighters tackled her and placed their soiled hands on her body. Worse yet was Complainant's having received an unsolicited text message from a firefighter in the firehouse suggesting a sex act which other firefighters knew about given their laughter at the time she received it. In sum, even making allowances for the overly male, "frat house" atmosphere at the firehouse, the aforementioned conduct was so abusive that it rises to the level of being an actionable sexually hostile environment given the dramatic impact to Complainant's psychological well-being.

Therefore, this claim has been proven.

Retaliation

In order to make out a prima facie case of retaliation, a complainant must show that: 1) she engaged in protected activity; 2) that respondent was aware that she engaged in protected activity; 3) she suffered an adverse employment action; and 4) a causal connection between the protected activity and the adverse employment action. *Pace,* 257 A.D.2d at 104.

Complainant alleges that she was retaliated against in two instances: when she was

denied chauffeur training and when temporarily deprived of service credit. Here, these two events, occurred at or about the time of the filing of her Division complaints. Further, assuming the broader definition of an adverse employment action in retaliation cases, Complainant made out all of the elements of the prima facie test as to both claims. "[I]n a retaliation context, an adverse employment action is one in which might have dissuaded a reasonable worker from making or supporting a charge of discrimination." *Woodward v. Chautaugua County, Office of Probation,* DHR Case No. 10136831 (February 17, 2012) (citations and internal quotation marks omitted).

However, Respondent showed legitimate, nondiscriminatory reasons for its employment actions which were not proven by Complainant to be pretexts for unlawful discrimination. The record shows that Respondent's denial of chauffeur training was reasonably related to the fact that Complainant became eligible for different training upon her transfer to EMS. In addition, Respondent's denial of service credit was shown, and conceded by Complainant, to be an oversight which was immediately remedied.

Therefore, these claims have not been proven.

Respondent Liable for the Acts of its Officers and Volunteer Firefighters

The Human Rights Law does not impose a theory of respondeat superior or strict liability against a principal for the unlawfully discriminatory acts of its agent. Instead, a principal cannot be held liable for an agent's discriminatory act unless it "became a party to it by encouraging, condoning, or approving it." *Totem Taxi v. N.Y. State Human Rights Appeal Bd.,* 65 N.Y.2d 300, 304-305, 491 N.Y.S.2d 293 (1985).

Here, Respondent did not have notice of the allegations concerning various acts of unlawful discrimination occurring before the February, 2010 meeting. However, Respondent

neither investigated the allegations nor engaged in corrective action after it was on notice of their existence. This critical fact suggested that Respondent tacitly condoned the conduct in question. As the Court of Appeals has stated, "Condonation...contemplates a knowing, after-the-fact forgiveness or acceptance of an offense. [A principal's] calculated inaction in response to discriminatory conduct may, as readily as affirmative conduct, indicate condonation." *State Division of Human Rights (Greene) v. St. Elizabeth's Hospital,* 66 N.Y.2d 684, 687, 496 N.Y.S.2d 411 (1985). The opposite is also true, i.e., a prompt investigation and corrective action as to a complaint of unlawful discrimination will negate proof of condonation. *Community Action Organization of Erie County, Inc. v. Mercado,* 261 A.D.2d 935, 689 N.Y.S.2d 807 (4th Dept. 1999), *citing Matter of Father Belle Community Ctr. v. New York State Div. of Human Rights,* 221 A.D.2d 44, 53-54, 642 N.Y.S.2d 739 (4th Dept. 1996), *lv. denied* 89 N.Y.2d 809, 655 N.Y.S.2d 889 (1997).

Therefore, Respondent, due to a lack of an investigation and corrective action by its officers after being put on notice of the allegations in February, 2010, is liable to Complainant for having condoned the unlawfully discriminatory actions of those working in its firehouse.

Damages

The "make whole" provisions of the Human Rights Law provide various remedies to restore victims of unlawful discrimination to the economic position that they would have held had their employers not subjected them to unlawful conduct. *See* Human Rights Law § 297.4.c (i)-(iv); *Ford Motor Co. v. E.E.O.C.,* 458 U.S. 219 (1982). Awards of back pay compensate a complainant for any loss of earnings and benefits sustained from the date of the adverse employment action until the date of the verdict. *Iannnone v. Frederic R. Harris, Inc.,*941 F. Supp. 403 (S.D.N.Y. 1996). Besides back pay, "an award of...damages to a person aggrieved by

an illegal discriminatory practice may include compensation for mental anguish." *Cosmos Forms, Ltd. v. New York State Div. of Human Rights,* 150 A.D.2d 442, 541 N.Y.S.2d 50 (2d Dep't. 1989). That award may be based solely on a complainant's testimony. *Id.* An award of pre-determination interest of nine percent per annum, accruing from a reasonable intermediate date, complements the back pay award and is appropriate. *Aurecchione v. New York State Division of Human Rights,* 98 N.Y.2d 21, 744 N.Y.S.2d 349 (2002); *see also* N.Y. Civil Practice Law and Rules § 5001(b).

Here, Complainant cannot be awarded back pay as she worked for Respondent in a volunteer capacity. However, an award of emotional distress damages is entirely appropriate. The record shows that, over the course of years, Complainant was repeatedly exposed in the workplace to sexually hostile statements and acts by both her superior and coworkers, including having been sexually assaulted by Rizzo. The effect of the aforementioned was to make Complainant adopt a new appearance by wearing unflattering clothes, as well as causing her to walk in a "hunched" fashion as a defense mechanism. Complainant described working at Respondent as if she had to "watch her back," and that she felt "very uncomfortable." Additionally, Complainant is fearful of men and hesitant to engage in intimate relationships. As a result, Complainant is awarded $60,000 as damages for emotional distress. *See Thoreson v. Penthouse Intern., Ltd.,* 179 A.D.2d 29, 583 N.Y.S.2d 213 (1st Dept. 1992), *lv. to appeal granted,* 183 A.D.2d 1111, 584 N.Y.S.2d 506, *affirmed,* 80 N.Y.2d 490, 591 N.Y.S.2d 978, *re-argument denied,* 81 N.Y.2d 835, 595 N.Y.S.2d 397 ($60,000 damages for emotional distress awarded to employee found to have been forced to engage in sexual activity); *Matter of Father Belle Community Ctr. v. New York State Div. of Human Rights,* 221 A.D.2d 44, 57-58, 642 N.Y.S.2d 739 (4th Dept. 1996), *lv. denied* 89 N.Y.2d 809, 655 N.Y.S.2d 889 (1997) ($60,000

damages for emotional distress awarded to employee who suffered sexual harassment based on its duration, severity, consequences and physical manifestations irrespective of a lack of psychiatric or other medical evidence.).

Civil Fine and Penalty

Human Rights Law § 297(4)(e) requires that "any civil penalty imposed pursuant to this subdivision shall be separately stated, and shall be in addition to and not reduce or offset any other damages or payment imposed upon a respondent pursuant to this article." The additional factors that determine the appropriate amount of a civil fine and penalty are the goal of deterrence; the nature and circumstances of the violation; the degree of respondent's culpability; any relevant history of respondent's actions; respondent's financial resources; and other matters as justice may require. *See, Gostomski v. Sherwood Terr. Apts.*, SDHR Case Nos. 10107538 and 10107540, November 15, 2007, *aff'd, Sherwood Terrace Apartments v. N.Y. State Div. of Human Rights (Gostomski)*, 61 A.D.3d 1333, 877 N.Y.S.2d 595 (4th Dept. 2009); *119-121 East 97th Street Corp, et. al., v. New York City Commission on Human Rights, et. al.*, 220 A.D.2d 79; 642 N.Y.S.2d 638 (1st Dept.1996).

Pursuant to Human Rights Law § 297.4(e), "[i]n cases of employment discrimination where the employer has fewer than fifty employees, [a] civil fine or penalty may be paid in reasonable installments, in accordance with regulations promulgated by the division. Such regulations shall require the payment of reasonable interest resulting from the delay, and in no case shall installments be permitted to be made over a period longer than three years."

Human Rights Law §297 (4)(c)(vi) directs the Division to assess civil fines and penalties, "in an amount not to exceed fifty thousand dollars, to be paid to the state by a respondent found to have committed an unlawful discriminatory act, or not to exceed one hundred thousand dollars

to be paid to the state by a respondent found to have committed an unlawful discriminatory act which is found to be willful, wanton or malicious." Statutory directives require a civil fine and penalty of greater than $50,000.00 for cases in which a respondent's actions were willful, wanton, and malicious.

First, the goal of deterring Respondent warrants a penalty. Respondent's personnel, both officers and volunteer members alike, acted more like members of a college fraternity rather than those sworn to protect the public against fire emergencies. As the record repeatedly shows, the conduct in question evinced a blatant contempt for the seriousness of the allegations.

Additionally, the nature and circumstances of Respondent's violation warrants a penalty. Here, Respondent's personnel pursued a campaign--whether intentional or otherwise--of intimidation and harassment designed to demean Complainant because she was a woman. That design was clearly realized given the subsequent impact upon Complainant's mental well-being. As a result of their actions, Complainant, an individual who joined Respondent because she had been used to volunteering and was intent on rendering service to her community, was left fearful of men and hesitant to engage in intimate relationships.

Finally, the degree of Respondent's culpability warrants a penalty. Respondent's conduct in the wake of the *El Diario* article was quite telling. Respondent, despite having knowledge of allegations of unlawful discrimination in its firehouse, was content to turn a blind eye towards what it must have known was happening there. The result was "business as usual." However, the impact upon Complainant, as stated above, was so great that she eventually transferred to EMS because, unlike the makeup of the personnel in the firehouse, it had a mostly female workforce.

It should be noted that the record does not furnish any evidence of Respondent's relevant history, financial resources (other than that it is a separate legal entity), or other matters as justice may require that might also be considered in assessing a penalty.

Accordingly, a civil fine of $25,000, payable to the State of New York in two (2) equal payments, will effectuate the purposes of the Human Rights Law and is consistent with similar cases. *New York State Div. of Human Rights v. Stennett,* 98 A.D.3d 512, 949 N.Y.S.2d 459 (2d Dept. 2012) ($25,000 civil fine awarded by the Division affirmed by the Appellate Division). Payment in installments is appropriate where, as here, Respondent has fewer than 50 employees.

ORDER

On the basis of the foregoing Findings of Fact, Opinion and Decision, and pursuant to the provisions of the Human Rights Law and the Division's Rules of Practice, it is hereby

ORDERED, that Respondent, and its agents, representatives, employees, successors, and assigns, shall cease and desist from discriminatory practices in employment; and

IT IS FURTHER ORDERED, that Respondent shall take the following action to effectuate the purposes of the Human Rights Law, and the findings and conclusions of this Order:

1. Within sixty (60) days of the date of the Commissioner's Order, shall pay Complainant, Beatrice Lozada, an award of compensatory damages for mental pain and suffering in the amount of $60,000. Respondent shall pay interest on said award at the rate of nine (9) percent per annum from a reasonable intermediate date, as per N.Y. Civil Practice Law & Rules §5001(b).

2. Within sixty (60) days of the date of the Commissioner's Order, Respondent shall pay a civil fine and penalty to the State of New York in the amount of $25,000 for having violated

the Human Rights Law. On the condition that all other payments directed in the Recommended Order are timely made, the remaining payment of $12,500 to be made by Respondent as part of the total $25,000 civil fine and penalty shall be made within 180 days of the date of this Final Order. Interest shall accrue at a rate of nine (9) percent per annum on any amount paid after sixty days from the date of this Final Order until payment is made. *See* 9 N.Y.C.R.R. § 466.12(e). Payments of the civil fine and penalty shall be made in the form of certified checks, made payable to the order of the State of New York and delivered by certified mail, return receipt requested, to N.Y.S. Division of Human Rights, Caroline Downey, Esq., General Counsel, One Fordham Plaza, 4th Floor, Bronx, New York 10458. In the event that Respondent fails to make timely payment of any of the aforementioned damages, all amounts shall be due within sixty (60) days of the date of this Order;.

3. Respondent shall pay post-judgment interest;

4. The aforesaid payment to Complainant, Beatrice Lozada, shall be made by Respondent in the form of a certified check made payable to her order and delivered by certified mail, return receipt requested, to her attorneys, Steven A. Morelli and Anabia Hasan, Esqs., The Law Office of Steven A. Morelli, 1461 Franklin Ave., Garden City, New York 11530. Respondent shall furnish written proof to the N.Y.S. Division of Human Rights, Caroline Downey, Esq., General Counsel, One Fordham Plaza, 4th Fl., Bronx, New York 10458, of its compliance with the directives contained in this Order;

5. Within sixty days of the date of the Final Order of the Commissioner, Respondent shall prominently post in the firehouse where all members are likely to view it a copy of the Division's poster (available at the Division's website at www.dhr.ny.gov under the homepage heading, "News and Information");

6. Respondent shall establish in its workplace both anti-discrimination training and procedures. Respondent shall provide proof of the aforementioned to the Division upon written demand; and

7. Respondent shall cooperate with the representatives of the Division during any investigation into compliance with the directives contained within this Order.

DATED: July 22, 2014
Bronx, New York

Robert J. Tuosto
Administrative Law Judge