

TATIANA SPOTTISWOODE,)
)
Claimant/Counter-Respondent,)
)
v.) Case No. 01-17-0007-4093
)
ZIA CHISHTI and SATMAP INC. d/b/a AFINITI,)
)
Respondents/Counter-Claimants.)
)

I, Ronald G. Birch, the undersigned arbitrator, having been designated in accordance with the employment agreement entered into by the above-named parties and dated April, 2016, and having been duly sworn, and having duly heard the proofs and allegations of the parties, and Claimant, Tatianna Spottiswoode being represented by Michael Zweig, Esq., et.al. from the law firm of Loeb & Loeb, LLP, and Respondents, Zia Chishti and Afinity U.S., jointly represented by William Taylor, Esq., et. al. from the law firm of Zuckerman Spaeder LLP, hereby FIND AND AWARD as follows:

This matter is properly before this Arbitrator pursuant to the arbitration clause in Claimant's employment agreement and the agreement of the parties.

This case involves claims under Title VII of the Civil Rights Act and the DC Human Rights Act, including gender discrimination, sexual harassment, and hostile work environment, lodged by Ms. Spottiswoode against Afiniti, her former employer, and Zia Chishti, Afiniti's CEO and

Chairman of the Board, plus common law claims alleging assault and battery and infliction of emotional distress against Mr. Chishti alone, and a claim of negligent supervision on the part of Afiniti. Ms. Spottiswoode bases her claims against Mr. Chishti upon a 17-month course of sexual advances by him, culminating in an assault and battery during sex in Brazil on the night of September 15-16, 2017, and the failure of Mr. Chishti or anyone else at Afiniti to take any meaningful measures to implement a sexual harassment policy or otherwise put protective measures in place to guard against harassment of Ms. Spottiswoode or other Afiniti employees.

III. CREDIBILITY

Before summarizing the key background facts underlying the allegations, the descriptions offered by Mr. Chishti and Ms. Spottiswoode of nearly every meeting or conversation they had differ, sometimes a little, but often substantially. When critical testimony is in conflict, the trier of fact needs to assess the credibility of respective witnesses, particularly when they are the principals in the matter. This task is uniquely within the province of the arbitrator, acting as factfinder, who observes the testimony unfold in real time, and relying on common sense, experience, the demeanor of the witnesses, and the factors that we all use in our day-to-day decision making, ultimately reaches a conclusion as to the truth of the matter.

In this case, I found that the testimony of Ms. Spottiswoode was for the most part credible. Conversely, I found that the testimony offered by Mr. Chishti was often tailored to meet the needs of his defense and divorced from reality.

For example, addressing a severe bruise on Ms. Spottiswoode's arm, Mr. Chishti testified that she had bitten herself while they were having intercourse. Dr. Karl Williams, a forensic witness testified that the bruise was not a bite mark. In further example, in August of 2017 the parties met in a park and had a protracted and meaningful discussion about their relationship, its

boundaries, and their respective expectations. Subsequently, Mr. Chishti sent two emails to Ms. Spottiswoode, explicit and lurid in nature, setting out his very different perceptions of the meeting which to him were the real subtext of what she was thinking. It was my impression that Mr. Chishti often created such alternative narratives, and may have come to believe them.

He repeatedly expressed his "love" for Ms. Spottiswoode during the course of their relationship, in a letter for her sent to her attorney, and at the hearing.. Yet, this is belied by the fact that during the entire course of his pursuit of Ms. Spottiswoode, he had a long-standing girlfriend to whom he frequently demeaned Ms. Spottiswoode. When his love letter to Ms. Spottiswoode was discovered by his girlfriend on his computer, he told her that Ms. Spottiswoode was a liar trying to extort money from him. Further, his conduct throughout her employment with Afiniti appears characterized not by love, but by a need for conquest and domination over her. The veracity of his love is also put in doubt by the fact that Mr. Chishti was accused by another young female co-worker during the same time period he was making sexual advances toward Ms. Spottiswoode, of behavior remarkably similar to some of the sexual advances aimed at Ms. Spottiswoode. These are only a few of numerous examples leading me to find that he was less than truthful on big matters, small matters, and facts that did not fit his narrative.

IV. PRE-EMPLOYMENT RELATIONSHIP

Mr. Chishti was a business associate of Ms. Spottiswoode's father and had become a close friend of her family by the time she was twelve. He acted as a family friend and mentor to her, but has conceded that he became sexually interested in her as soon as they met when she was twelve or thirteen. Indeed, he determined to pursue that interest when she was of legal age, a course of conduct that has brought us to this proceeding.

When Ms. Spottiswoode was finishing college and applying to graduate schools, he invited her on an all-expenses paid ski trip, an invitation she accepted based, in part, upon the false pretense that a handsome young relative who was about her age, would be included in the group. After graduation, he took her to Ibiza, Spain with friends and Afiniti employees. That trip was the start of a short-lived romance, where rough sex was typically accompanied by heavy drinking and drug use. The evidence indicates Ms. Spottiswoode was attracted to him, voluntarily participated in sex, including the use of a riding crop and choker produced by Mr. Chishti, and enjoyed the relationship for a time, but that she had a quick change of heart and terminated it only ten weeks after it started. Mr. Chishti knew, at that time, that she did not feel the same love that he professed to feel for her, and that indulging in alcohol and drugs was a necessary accompaniment if the sex he desired was to be had.

They continued to meet as friends, each flirting somewhat with the other, but with her generally responding to his alcohol-induced attempts to introduce sex back into the relationship by telling him that was not what she wanted. They eventually came to discuss her working instead of going to graduate school. To attract her to his company, Afiniti, Mr. Chishti let her know the company was planning to go public, and that it would make her a "million bucks" if she was there at the time an IPO was issued. Ms. Spottiswoode accepted a position as a data analyst in the New York office. At the time, Chishti was a wealthy, charismatic, successful, powerful 44-year old business man, the CEO of Afiniti, the company he founded after building and selling another substantial company; Spottiswoode was a 22-year old college graduate starting her first full-time job. She accepted a position at Afiniti US, the latest iteration in a series of companies owned, operated or controlled by Chishti. It is headquartered in Washington, DC and Ms. Spottiswoode joined the small New York office.

V. EMPLOYMENT RELATIONSHIP

I find that during the course of her tenure with Afiniti US, Ms. Spottiswoode was subjected to an unrelenting onslaught of sexual overtures from Mr. Chishti, her CEO. When she was too firm in saying no, which she consistently did, she would be punished by long periods of noncommunication. The very person who controlled her future with the company had the unique ability to punish her.

Mr. Chishti was not Ms. Spottiswoode's direct supervisor at Afiniti. However, I find that as CEO of the company he was able and did provide her with helpful assistance during her early months at the company. For example, he got her involved in a project in which she had expressed an interest, helped her learn a computer program used at Afiniti, checked with her superiors on her progress and went back to her with favorable reports, and claimed to have suggested a raise.

This assistance was accompanied by almost immediate resumption of his sexual overtures. Ms. Spottiswoode tried to draw boundaries. She refused his attempts to discuss her sex life. She rejected his offer to buy her some expensive work outfits as inappropriate. Although she for some time considered going with him on a vacation to Cuba where he would certainly expect sexual relations, she ultimately cancelled shortly before the departure date. Mr. Chishti was furious about the cancellation, and abruptly stopped talking to Ms. Spottiswoode.

She initiated the next contact several months later. The two next saw each other at a December 2016 conference in Dubai, about 5 months later. Prior to the conference she became apprehensive about seeing Mr. Chishti again, knowing from his continued silence that he was still angry with her. While the testimony regarding Mr. Chishti and Ms. Spottiswoode's complete interaction at the outset of the conference is muddled, I find two facts to be clear: (1) during an after-work social event on the first evening of the conference, Mr. Chishti, who was drunk, put his

hand inside Ms. Chishti's pants on her rear in front of some of their colleagues, and (2) at the same conference he engaged in similar sexual misconduct directed at another young female Afiniti employee, [REDACTED] who was sent home early after complaining to him the next day. Neither the incident with Ms. Spottiswoode nor [REDACTED] was reported by Mr. Chishti or any of the eyewitnesses through proper channels. However, [REDACTED] later resigned and filed a demand against Chishti that Afiniti ultimately settled. Accordingly, I find Afiniti had actual knowledge of Mr. Chishti's sexual misconduct, yet did nothing to prevent a future recurrence.

Only a month later, during a Mexico City client meeting, an undeterred Mr. Chishti texted Ms. Spottiswoode, telling her to be prepared for "serious debauchery – Degenerate evil." Later, in front of colleagues on this work-sponsored trip, he dug his nails into her hand and called her "a total bitch" when she rejected his attempt at hand holding.

Upon returning from Mexico City, on Jan. 29, 2017, Ms. Spottiswoode sent Mr. Chishti an e-mail laying out her thoughts about the name-calling incident and several prior instances of inappropriate, non-consensual actions. In same message, she advised that

I like my job but I don't think that these interactions are good for either of us. They certainly are not good for me, despite the overwhelmingly positive nature of this week's experiences. So I'm not sure where you stand this morning, and I'll leave Afiniti if you want me to. But I definitely shouldn't go on any more of these trips if they make you uncomfortable and if they continue to put me in the position of either being groped by or called names by my boss. I hope you understand that, because that has to be first before our friendship.

Mr. Chishti challenged her descriptions of those accounts, but acknowledged that it increased his anger at her, and said the decision to stay or leave was entirely her own. Then, he again cut off communications with her for several months. When Mr. Chishti renewed contact in July 2017, after agreeing to a "truce," he insisted that she "speak the truth," acknowledge that he has never

assaulted her, fix her behavior, and apologize. She clearly told him that she would not apologize, she told him she meant what she said, and that he needed to show respect for her and her feelings.

In early August 2017, Mr. Chishti arrived to New York. After she rejected his suggestion that she come to his hotel room to do cocaine, expressing her anxiety and concerns about sleeping with him and the power dynamics, they had dinner and walked in Central Park. Ms. Spottiswoode explained that she didn't want sex with him as he did with her, and she thought he got the message. Nevertheless, between that time and the trip to Brazil, he began sending her sexually-charged e-mails and texts. He retold the story of the dinner and park meeting with his "perceptions" of her true intent in a fictionalized form, including that she felt a need "for his cock in her loins" and "craved his fingers in her pussy and ass." In a later e-mail, he expressed his feelings, that "he was thinking of grabbing her throat, pushing her to the ground" and forcing her to have sex.

While Ms. Spottiswoode was conflicted and expressed some ambivalence, she nevertheless repeatedly expressed her substantial anxiety and concerns about any resumption of a sexual relationship, and her fear of his wrath if she rejected him. He simply dismissed those concerns, responding to her panic attack with the assurance that "two drinks and a rail [of cocaine] will likely fix" her anxiety.

VI. BRAZIL TRIP

The trip to Brazil was, to Ms. Spottiswoode, the most important event during her tenure at Afiniti.

As a data analyst, she was working closely with the Brazil team on some troubled accounts. A meeting was scheduled, to be conducted by Mr. Chishti, with the entire Brazil team.

The meetings went well, but the aftermath did not. The first night in Brazil, Ms. Spottiswoode told him she did not want to have sex with him, "I have never wanted sex less than

rite now. I just don't want 2 be ur like employee slut person...". He acceded to her wishes, but also let her know that he did not see any relationship between them as feasible if they did not have sex soon.

Ultimately, after much drinking and cocaine use, and Mr. Chishti's dismissal of her text asking him to just let her sleep, she gave in to his demands for sex. Photos of the injuries inflicted show numerous bruises and scratches on her arms, buttocks, thigh, shoulder bone, neck, and face, consistent with repeated, forceful hits and choking. While Ms. Spottiswoode and Mr. Chishti provided differing accounts of the number of times he hit her on the face, whether he did it with a flat hand or a fist, and the possibility that some of those injuries were self-inflicted, I find from the testimony that this beating was far more serious than any of the prior rough sex. Mr. Chishti himself admitted he had never before hit her in the face, or inflicted the number of severe bruises and cuts as he did that night, explaining "there's a first time for everything". Further, although she told him repeatedly he was hurting her, he continued until she saw stars. I find the number of times he hit her in the face and whether he did it with a flat hand or fist are irrelevant. What is important is that this beating was the straw that broke the camel's back, after a 17-month campaign in which he consistently made light of all her attempts to say no.

Ms. Spottiswoode's roommate examined her upon her return the following day, and her testimony confirms that there was a beating. Additionally, the day after returning home, Ms. Spottiswoode went to an emergency room. I find from the photos, emergency room records, the roommate's examination, and a review by Dr. Karl Williams, a specialist in forensic pathology, that a serious beating evidenced by blunt force trauma, involving "a great deal of force and aggression, with apparent anger" took place.

With her physical injuries, and fear of Mr. Chishti, Mr. Spottiswoode determined that she could not return to work at Afiniti. She promptly notified Afiniti that she required indefinite medical leave and was unable to return to work.

VII. POST-EMPLOYMENT

Since the incident in Brazil, Ms. Spottiswoode has suffered emotionally from a range of symptoms evidencing post-traumatic stress disorder (PTSD) tied to her interactions with Mr. Chishti. Symptoms identified by Ms. Spottiswoode and confirmed by her roommate at the time included uncontrollable crying, recurrent nightmares related to Mr. Chishti, and anxiety about her safety. Her therapist at the time, Dr. Ann Sellew, diagnosed her with PTSD that waxed and waned but did not go away.

Dr. Louise Fitzgerald, the forensic psychologist who evaluated Ms. Spottiswoode in connection with this proceeding a little more than a year after the Brazil incident, similarly found that Ms. Spottiswoode continued to suffer from severe PTSD resulting from Mr. Chishti's assault, and that she was still traumatized, depressed, and unable to get through a normal work day. She found the severity was not only due to the nature of Mr. Chishti's actions, but due to the fact that Spottiswoode was very vulnerable, having had a long history of depression that was also exacerbated by his actions. I do not find that Ms. Spottiswoode's prior mental illness raises doubts about the source of her PTSD as the Afiniti parties suggest. To the contrary, I find that her prior mental illness left her more fragile and, accordingly, more likely than others to experience an extreme adverse response to Mr. Chishti's conduct.

Dr. Fitzgerald also determined, based upon several tests, that Ms. Spottiswoode was not malingering. Her review of results of tests performed by Dr. Neil Blumberg, a forensic psychologist retained by Afiniti, but not called as a witness at the hearing, showed that he had

similarly found severe PTSD. Dr. Fitzgerald further found, applying her substantial experience in the field to the totality of the circumstances, that the PTSD was likely to take 5-10 years to resolve itself, meaning it would take that amount of time for her to return to a normal level of psychological functioning.

I find Dr. Fitzgerald's report and testimony in connection with Ms. Spottiswoode's PTSD to be reliable, flowing logically from the results of the tests she administered, her interviews with Ms. Spottiswoode, and her consideration of Ms. Sellew's notes and records.

Afiniti's knowledge and actions.

A number of Afiniti employees knew of the relationship that Mr. Chishti and Ms. Spottiswoode had before she became an employee, and some of them knew of his continuing feelings for her. Plus, supervisory Afiniti employees had observed the incidents where Mr. Chishti put his hand in Ms. Spottiswoode's pants and where he called her a bitch. Yet no one reported any of this to HR, the Legal Department, or another responsible party at Afiniti. Nor did Mr. Chishti himself report any of Ms. Spottiswoode's expressed concerns or protestations to HR. To the contrary, he himself determined that because there was no sexual harassment, there was nothing to report.

Additionally, before the incident in Brazil, but during the course of Ms. Spottiswoode's employment at Afiniti, a sexual harassment complaint was lodged against Mr. Chishti by another young female Afiniti employee, [REDACTED]. While the company settled those claims, which involved some conduct similar to that alleged by Ms. Spottiswoode, it took no steps after that incident to prevent a recurrence of similar conduct in the future. It did not reprimand Mr. Chishti or provide him with any sexual harassment training or coaching of any sort.

Nor did anyone suggest that Ms. Spottiswoode report her concerns of harassment to HR, the Legal Department, or any other proper authority. To the contrary, after the Mexico City incident, Ms. Spottiswoode sought advice about the situation from Michel Portenier, the Afiniti Vice President in charge of the New York office where she worked. Although Portenier was deposed, Afiniti did not call him as a witness at the hearing. However, Portenier set out three options – leave the company, ask a third party to talk with Chishti, or avoid Chishti, especially when he's drunk. Of these, he thought that avoidance was the best option.

Afiniti has pointed to written anti-harassment policies in its Code of Conduct which briefly states only that sexual harassment in any form will not be tolerated, other policy documents setting out various generally-applicable employee complaint procedures, and in a specific and detailed Anti-Harassment Policy instituted on July 27, 2017. Although Afiniti did not call Betsy Koch, its Global Head of HR, as a witness at the hearing, it emphasizes that Ms. Spottiswoode did not reach out to Ms. Koch with her complaints about Mr. Chishti, which might have allowed the company to respond to the offensive conduct. However, the record does not show any written anti-harassment policy being distributed to Afiniti's employees at any time and the specific Anti-Harassment Policy, was not adopted until July of 2017, or uploaded to the Afiniti intranet until mid-August 2017. Equally important, it was not until August 30, 2017, two weeks before the Brazil incident, that employees were even notified generally in one section of the Afiniti newsletter about the availability of revised company policies. The anti-harassment policy was not among those specifically mentioned. No training on preventing or reporting harassment was ever provided for supervisors or other employees at any time. Thus, I find that Ms. Spottiswoode, like others at Afiniti, lacked any real awareness of the existence of policies and procedures for reporting

harassment, and certainly had no obligation whatsoever to report it to HR or others given the advice she received when she did report the harassment to Mr. Portenier.

VIII. DISCUSSION OF CAUSES OF ACTION

The various claims turn on the following issues:

1. Whether Mr. Chishti's sexual advances were unwelcome?
2. Whether Mr. Chishti's sexual advances were either pervasive or severe in nature?
3. Whether acceptance of the sexual conduct was a condition that affected a term, condition, or privilege of Ms. Spottiswoode's employment (*quid pro quo*), or unreasonably interfered with her work performance (hostile work environment)?
4. Whether Ms. Spottiswoode suffered a constructive discharge from Afiniti?
5. Whether Afiniti is liable for Mr. Chishti's actions?
6. Whether Mr. Chishti's actions on the night of September 15-16, 2017, in Brazil involved an intentional attempt to cause a harmful or offensive contact, and apprehension of such a contact (assault) and offensive contact directly or indirectly resulted in battery?
7. Whether Mr. Chishti's conduct was so extreme and outrageous that it intentionally or recklessly caused her severe emotional distress, or negligently caused her serious and verifiable distress?

1-4. Whether Mr. Chishti's sexual advances constitute sexual harassment under Title VII or the DC Human Rights Act.

To prove a discrimination claim based on sexual harassment under either Title VII of the Civil Rights Act against Afiniti or under the DC Human Rights Act against either Mr. Chishti or Afiniti, Ms. Spottiswoode must prove that (1) she was a member of a protected class; (2) she was subjected to unwelcome sexual harassment; (3) the harassment complained of was based upon sex; (4) the harassment affects a term, condition, or privilege of her employment. *Brokenborough v. Dist. Of Columbia*, 236 F. Supp.3d 41, 51 (D.D.C. 2017), citing *Richardson v. Petasis*, 160 F.Supp.3d 88, 123 (D.D.C. 2015). The dispute here surrounds the second and fourth elements –

whether Mr. Chishti's advances were unwelcome or consensual, and whether those actions affected her employment. If the alleged harassment was linked to a tangible *quid pro quo*, then Afiniti would have strict liability for Mr. Chishti's actions. *Faragher v. Boca Raton*, 524 U.S. 775, 790-91 (1998), citing *Meritor Sav. Bank v. Vinson*, 477 U.S. 57 (1986); *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 752-753 (1998), citing *Meritor*, *supra*; *Lutkewitte v. Gonzales*, 436 F.3d 248, 258 (D.C. Cir. 2006). If, on the other hand, the harassment did not have a tangible economic work-related effect, then the offensive conduct must be sufficiently severe or pervasive to alter the working conditions and create a hostile work environment evidenced by the totality of the circumstances. *Ellerth*, *supra*, 524 U.S. at 752; *Brooks v. Grundmann*, 748 F.3d 1273, 1276 (D.C. Cir. 2014); *Jones v. Dist. Of Columbia*, 314 F.Supp.3d 36, 61 (D.D.C. 2018). Finally, while either type of sexual harassment is deemed to be a form of gender (sex) discrimination, which requires only disparate treatment on the basis of sex, *Leach v. Amtrak*, 128 F.Supp.3d 146, 156 (D.D.C. 2015), sexual harassment fits less neatly into that category and it adds nothing to the case to identify gender discrimination as a separate cause of action.

Welcomeness. In determining whether Mr. Chishti's advances were welcomed by Ms. Spottiswoode, I did not look at single lines of text, some of which can be read to suggest consent and others to suggest a lack of consent when viewed out of context. Rather, I considered the various conversations and meetings in their entirety, as well as the entire timeline of Mr. Chishti and Ms. Spottiswoode's relationship, to get a full picture of what happened here. While Ms. Spottiswoode was like a moth attracted to a flame, at times drawn to Mr. Chishti, looking at the overall course of conduct, I find that Mr. Chishti's sexual advances were not welcomed by Ms. Spottiswoode. Indeed, she told him on numerous occasions that she wanted a professional not a

sexual relationship. As a mature man, twice her age and the CEO, he should have respected those wishes, not preyed on any underlying attraction to him that she had until he broke her will to resist.

Mr. Chishti and Afiniti steadfastly insist otherwise, pointing to flirtatious and positive reciprocal texts, as well as her voluntary submission to rough sexual intercourse that involved some pain. First, in determining whether Mr. Chishti's sexual conduct was welcome, I must focus on whether the advances were welcome, not whether her actual participation in sexual intercourse with him was voluntary. *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57 (1986). Second, it is not essential that Ms. Spottiswoode definitively reject each and every one of Mr. Chishti's overtures to establish that his sexual overtures were unwelcome.

It is well-accepted that women respond in various ways to unwelcome harassment, especially when the conduct is evidenced by a superior at work. External reactions such as appeasement, diversion, enduring or ignoring advances, are as likely as, or even more likely than, outright rejection. See, e.g., *Morton v. Steven Ford-Mercury of Augusta*, 162 F.Supp.2d 1228, 1239 (D.Kan. 2001). Thus, I do not find the presence of some level of ambivalence or attraction on Ms. Spottiswoode's part toward Mr. Chishti, as Ms. Spottiswoode occasionally evidenced here, which caused her to temper her responses to him, to serve the overall course of conduct welcome and to override her repeated assertions that she did not want a sexual relationship.

Severe or Pervasive Actions. A single act of harassment, such as the beating that occurred in Brazil on the night of September 15-16, 2017, is sufficiently egregious that even by itself, ignoring all that preceded it, would satisfy the severity prong of the test. Alternatively, Mr. Chishti's overall unrelenting course of sexual advances was pervasive, permeating the entire relationship he had with Ms. Spottiswoode throughout her tenure at Afiniti. Nearly every time he

met or expected to meet with Ms. Spottiswoode, he made sexual overtures. Determined to assert power and dominion over her, he simply would not accept no for an answer.

Effect on employment. Afiniti and Mr. Chishti take the position that there was no adverse tangible employment action taken by them against Ms. Spottiswoode, or indeed any adverse consequences incurred, because of her refusals to submit to Mr. Chishti's demands. In other words, that she does not have an actionable claim because she wasn't fired, demoted, or had her pay and benefits adjusted. She not only kept her job, but did well in her position.

I find Ms. Spottiswoode was well aware that Mr. Chishti, even if he had not previously instructed anyone at Afiniti to fire her or take any other adverse action against her, had the absolute power as CEO to do so. Moreover, a constructive discharge or termination would suffice under her Title VII and DCHRA-based claims to establish the requisite effect on her continued employment and success at Afiniti.

Constructive discharge. A constructive discharge or termination constitutes an adverse employment action. *Samuel v. Metro. Police Dep't*, 258 F. Supp. 3d 27, 46 (D.D.C. 2017) (quoting *Aliotta v. Bair*, 614 F.3d 556, 566 (D.C. Cir. 2010)). The test is objective: a constructive discharge results from conduct that creates such intolerable work conditions that a reasonable person in the employee's position is effectively compelled to resign. *Pa. State Police v. Suders*, 542 U.S. 129, 141 (2004); *Samuel, supra*; *Veitch v. England*, 471 F.3d 124, 130 (D.C. Cir. 2006). Thus, it requires aggravating factors that would have prevented the employee from seeking remediation while still on the job. *See Veitch, supra*; *Mungin v. Katten Muchin & Zavis*, 116 F.3d 1549, 1558 (D.C. Cir. 1997).

I find that a reasonable young woman in Ms. Spottiswoode's position would have felt compelled to resign after the being beaten by her employer's CEO. Even though Mr. Chishti was

based in a different geographic location and was not her direct supervisor, his ability to continue harassing her through all the channels of communication that existed prior to the Brazil beating still existed unimpeded. Additionally, the potential existed for forced interactions when he came to the New York office or when they both attend far-flung meetings and conferences together, as happened a number of times during her tenure at Afiniti. The mere existence of the Brazil beating, shows the precariousness of her position and that she could not simply avoid him while the matter was investigated in-house. I find that a resignation was her only reasonable option.

IX. AFINITI'S LIABILITY.

Vicarious liability. Under Title VII and the DCHRA, an employer is ordinarily vicariously liable for harassment by the victim's supervisor. Even though Mr. Chishti was not Ms. Spottiswoode's direct supervisor, it goes without saying that he was a responsible higher up in the supervisory chain of command. In many ways, the testimony has shown that Mr. Chishti was Afiniti US. I find that he was a supervisor insofar as his position as Afiniti's CEO gave him authority to take tangible employment actions affecting her employment. *See Vance v. Ball State Univ.*, 570 U.S. 421 (2013).

The Afiniti parties contend that they should be able to take advantage of the *Faragher/Ellerth* affirmative defense to the Title VII and DCHRA claims. *Faragher v. Boca Raton*, 524 U.S. 775 (1998); *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998). Under this defense, in the absence of any tangible adverse employment action, an employer is not liable if "it exercised reasonable care to prevent and correct promptly any sexually harassing behavior" and the employee "unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise." *Faragher, supra*, 524 U.S. at 807; *Ellerth, supra*, 524 U.S. at 765.

I don't find this defense available to Afiniti in this case. Reasonable care means that an employer established, disseminated, and enforced an anti-harassment policy and complaint procedure and takes other reasonable steps to prevent and correct harassment. Afiniti's specific Anti-Harassment Policy did not even exist until August of 2017, nearly 16 months after Ms. Spottiswoode came to work at Afiniti. Further, Afiniti's paper policy prohibiting sexual harassment and setting out a mechanism for reporting misconduct did not rise to the level of reasonable care because personnel were never actively made aware of the policy and no training was provided with respect to the subject matter. The policy is particularly inadequate because it did not cause Afiniti to discipline or take any other specific action to correct Mr. Chishti's sexually-harassing conduct, even after Ms. [REDACTED] complaint.

Under all of these circumstances, I cannot find Ms. Spottiswoode's failure to follow the reporting procedures set forth in those policies in any way unreasonable, particularly when Mr. Portenier failed to tell her of those procedures or even of the possibility of making a complaint to HR or the Legal Department against Mr. Chishti. Nor do I find Ms. Spottiswoode's failure to respond to Ms. Koch's outreach after the Brazil incident to be unreasonable. At this juncture it was simply too late to avoid harm through a proper investigation of Mr. Chishti's actions.

Negligent supervision. While I previously dismissed the negligent supervision claims against all individual defendants, the claim is still active with respect to Afiniti. Although some courts dismiss negligent supervision claims when based upon the same conduct as the Title VII claim, that is not uniformly so. Moreover, the negligent supervision claim here is not premised upon vicarious liability, as was the Title VII claim. It could exist independent of Mr. Chishti's actions in connection with Ms. Spottiswoode, based upon the lack of any distributed and enforced sexual harassment policy or training either before or after the [REDACTED] incident. Thus, Afiniti

could be liable based upon a negligent supervision theory if it knew or should have known that any employee behaved in a dangerous or otherwise incompetent manner, yet failed to adequately supervise that employee. *Leach v. Nat'l R.R. Passenger Corp.*, 128 F.Supp.3d 146, 156 (D.D.C. 2015); *Kohler v. HP Enter. Servs., LLC*, 212 F.Supp.3d 1, 23 (D.D.C. 2016). Either actual or constructive notice would suffice, provided that the lack of proper supervision caused the harm.

Such a failure to exercise the requisite supervisory authority exists in the present case. Afiniti did not adequately monitor sexual harassment within the company generally and did not monitor Mr. Chishti's conduct after Ms. Spottiswoode reported it to Mr. Portenier, an Afiniti Vice President, or even after Mr. Chishti was charged with and settled a sexual harassment claim from another young female Afiniti employee. I find that Ms. Spottiswoode's conversation with Mr. Portenier, the incidents in Dubai and Mexico, plus the totally separate harassment claim against Mr. Chishti, provided Afiniti with constructive knowledge, and likely actual knowledge, of Mr. Chishti's offensive conduct that it should have acted to stop. In short, Afiniti negligently abdicated its duty to adequately supervise Mr. Chishti, allowing him unimpeded to place Ms. Spottiswoode in the precarious position she found herself in on the night of September 15 in Brazil.

X. ASSAULT AND BATTERY.

A civil assault and battery exists if a party makes "an intentional and unlawful attempt or threat, either by words or acts, to do physical harm to the victim" and the intentional act causes a harmful or offensive bodily contact. *Acosta Orellana v. CropLife Int'l*, 711 F. Supp. 2d 81, 92 (D.D.C. 2010); *Rogers v. Loews L'Enfant Plaza Hotel*, 526 F. Supp. 523, 529 (D.D.C. 1981); *Evans-Reid v. Dist of Columbia*, 930 A.2d 930, 937 (D.C. 2007). There is no doubt that Mr. Chishti intentionally caused physical harm to Ms. Spottiswoode in Brazil on the night of September 15, 2016, 2017 as evidenced by the numerous bruises and scratches seen on various parts

of her body after the event. The Afiniti parties contend that this was not a batter because Ms. Spottiswoode's words and conduct were reasonably understood by Mr. Chishti as consent. I find that her consent to sex, to the extent she could conceivably legally consent in her inebriated and drugged condition, is not consent to the physical beating he gave her that went far beyond any rough sex involved in prior encounters. Ms. Spottiswoode told him repeatedly that he was hurting her and she wanted him to stop. He ignored her protestations.

XI. INFLICTION OF EMOTIONAL DISTRESS

Ms. Spottiswoode alleges both the negligent and intentional infliction of emotional distress by Mr. Chishti. A claim based upon intentional acts requires extreme and outrageous conduct which intentionally or recklessly causes the plaintiff severe emotional distress. *Newmeyer v. Sidwell Friends Sch.*, 128 A.3d 1023, 1037 (D.C. 2015). The Afiniti parties emphasize that context, including the relationship between the parties, matters, citing *Ortberg v. Goldman Sachs Grp.*, 64 A.3d 158, 163 (D.C. 2013). A negligence-based claim requires that (1) the plaintiff was in the zone of physical danger, which was (2) created by the defendant's negligence, (3) the plaintiff feared for her own safety, and (4) the emotional distress so caused was serious and verifiable. *Rice v. District of Columbia*, 774 F.Supp.2d 25, 33 (D.D.C. 2011).

I find that Mr. Chishti's conduct in Brazil was sufficiently outrageous in character and extreme in degree, going beyond all possible bounds of decency, to support a claim of intentional infliction of emotional distress. Ms. Spottiswoode simply did not consent to the beating that continued notwithstanding her requests that he stop. I do not find the prior interactions between the parties, even her acquiescence to some rough sex, undermine that conclusion. The conduct on September 15-16, 2017, was of a different magnitude. Further, Mr. Chishti knew or should have known that such a beating would cause a vulnerable woman like her severe emotional distress.

Thus, I find he acted recklessly and in a way that was likely to result in the level of distress found by the mental health professionals who examined her.

XII. DAMAGES.

Ms. Spottiswoode seeks recovery for her economic losses including back pay and front pay, and out-of-pocket costs; compensatory damages for her physical and emotional injuries, and punitive damages, in an amount not less than \$50 million.¹ The Afiniti parties have noted that Ms. Spottiswoode's compensatory and punitive damages against the company under Title VII are limited by the statute to a maximum of \$300,000. However, there is no similar cap on damages under the DCHRA. Nor are the damages so limited on her tort claims for assault and battery and infliction of emotional distress against Mr. Chishti, and negligent supervision against Afiniti.

Compensatory damages both reimburse victims for their economic out-of-pocket expenses caused by the wrongful conduct and compensate them for any emotional harm suffered. These two categories are discussed below.

Economic loss. Ms. Spottiswoode retained an expert, Kristen Kucsma, to evaluate the economic losses she suffered from Mr. Chishti and Afiniti's misconduct. Ms. Kucsma looked at several scenarios, and found the present value of her losses to fall within a range of \$124,177-\$1,650,623.² This would include losses of backpay beginning February 28, 2018, the last day Afiniti paid compensation to Ms. Spottiswoode, and continuing through the date of the hearing of \$49,188.00 and frontpay, assuming regular raises, ranging from \$281,880.00 through January 31, 2023, to reflect her reduced earnings in future years, less an estimated \$15,000.00 per year that she

¹ An additional claim seeking a declaratory judgment pertaining to the enforceability of the Arbitration Agreement and Ms. Spottiswoode's Employment Agreement have been resolved. Order No. 4.

² These numbers were set forth in a revised report submitted by Ms. Kucsma on the last day of the hearing, Feb. 22, 2019.

could earn through January 31, 2023 for a total of \$271,068.00. I do not find Ms. Spottiswoode to be entitled to compensation related to the potential IPO as requested, as any amounts she might have made from that event are too speculative.

Ms. Spottiswoode has also included as recoverable out-of-pocket costs, the cost of twice-weekly therapy sessions with Dr. Sellew in an amount ranging between \$137,875 and \$275,750, depending upon the number of years such intensive therapy is needed. Since I find that the extensive therapy was necessitated in large part by the conduct underlying this proceeding, some recovery for the treatment is necessary. Due to the uncertainty in the length of time the symptoms will persist at current levels, however, I am conservatively awarding \$137,875 for 5 years of therapy. This is the low end of the time that Dr. Fitzgerald indicated the PTSD is likely to persist.

Physical injury. Mr. Chishti beat Ms. Spottiswoode in a manner that resulted in bruises, scratches, and contusions on her numerous body parts, as well as her face, injuries observed and confirmed by her roommate that were sufficient to cause her to go to the emergency room. Those injuries also caused several weeks of physical pain and suffering during the healing process, and required additional therapy. I find that \$100,000 from Mr. Chishti is appropriate compensation for those injuries.

Emotional injury. While Ms. Spottiswoode's recovery from the physical injuries caused by Mr. Chishti was relatively quick, the emotional harm caused will be far more extensive and long-lasting. As discussed above, she has and is experiencing PTSD as a result of Mr. Chishti's conduct, and that condition is projected by Dr. Fitzgerald, an expert in such matters, to last for somewhere between 5 and 10 years. I have determined that an award of \$2,000,000 against Mr. Chishti is an appropriate amount to compensate her for this life-changing emotional harm. In reaching this figure in the absence of any standard formula, I have considered the persistence of

his sexual advances and the severity of the harm caused during the incident in Brazil, her fragile constitution, her need for extensive professional treatment to work through the emotional distress caused, and the fact that both the severity and likely duration of the emotional harm was confirmed by a forensic psychologist.

Punitive damages. In order to recover punitive damages under Title VII, the DCHRA, or DC common law, Ms. Spottiswoode must prove that Mr. Chishti and/or Afinity acted with “malice” or evil intent. “Malice” means conduct which was intended by the defendant to cause injury to the plaintiff, or despicable conduct done with a willful and knowing disregard for the rights or safety of others. *Pendarvis v. Xerox Corp.*, 3 F.Supp.2d 53, 57 (D.D.C. 1998); *Martini v. Fannie Mae*, 977 F.Supp. 464, 476 (D.D.C. 1997). The requisite state of mind may be inferred from all the facts and circumstances of the case.

The Afinity parties find an absence of the requisite degree of malice for Mr. Chishti, because he allegedly reasonably believed that the conduct was consensual, the injuries were not as serious as Ms. Spottiswoode makes them out to be, and the conduct overall was consistent with past practice. As noted above, I found the sexual conduct in Brazil, culminating in the beating, to be unwelcome and not consensual, and find the protestations that he reasonably believed it to be consensual not credible. As discussed in connection with the assault and battery and intentional distress claims, Mr. Chishti intended to injure Ms. Spottiswoode and acted with a willful and knowing disregard for her rights and safety. At no time has Mr. Chishti expressed remorse, concern for the Claimant, or an acknowledgement that this form of behavior would not be repeated. Punitive damages in this matter may serve to deter future misconduct.

With respect to Afinity, Respondents seek to relieve Afinity of punitive damages, because the company allegedly made a good faith effort to prevent discrimination in the workplace. As

discussed several times above, I find that Afiniti did not take any meaningful action to prevent discrimination in the form of sexual harassment from happening. The company's conduct evidenced conscious disregard of the rights of its employees.

Afiniti showed knowledge of and indifference to federally protected rights under Title VII and PCHRA. In determining an adequate punitive damages award, I have considered the amount of compensatory damages, the reprehensibility of Mr. Chishti's misconduct and his decision not to report Ms. Spottiswoode's concerns to HR or the Legal Department so the company could deal with Ms. Spottiswoode's complaints, plus Mr. Chishti and Afiniti's total failure to put meaningful protective measures in place to prevent sexual harassment by Mr. Chishti or any other employees, as well as the amount needed to deter similar conduct in the future given Mr. Chishti's wealth and Afiniti's financial well-being. Based upon this analysis, I find that an award of \$2,000,000 in punitive damages against Mr. Chishti in connection with his misconduct is warranted and necessary to deter future misconduct. Further, I find that my award against Afiniti in the sum of \$250,000 for negligent supervision and \$750,000 as punitive damages is warranted for its failure to take necessary steps that might have prevented the misconduct and to ensure that effective procedures were in place for dealing with sexual harassment allegations.

XIII. HOLDING AND AWARD

I have carefully applied the applicable legal standards to the interactions between Mr. Chishti and Ms. Spottiswoode during the relevant time period. For the reasons discussed above, I find that Mr. Chishti is liable to Ms. Spottiswoode under the DC Human Rights Act based upon either a *quid pro quo* or hostile work environment theory, and that Afiniti is liable to Ms. Spottiswoode on the same theories under Title VII or the DC Human Rights Act. Although Ms. Spottiswoode may have been flirtatious, ambiguous, or even seemingly reciprocated Mr. Chishti's

advances on occasion, I find overall that she made it clear that his sexual conduct towards her was unwelcome. Moreover, the beating Mr. Chishti gave her on September 16, 2017, was inconsistent with and far more severe than any conduct to which she might previously have consented.

Further, while neither Mr. Chishti nor Afiniti affirmatively took any adverse tangible employment action against her, I find that Mr. Chishti's conduct on the night of September 15-16, 2017 served as a constructive discharge satisfying the tangible employment action *quid pro quo* requirement. Alternatively, his action that night was severe and his entire course of sexual advances were persistent enough to make Afiniti an intolerably hostile workplace.

I also find that Afiniti is vicariously liable for Mr. Chishti's conduct because it failed to exercise reasonable care to prevent and correct promptly his sexually harassing behavior. Afiniti's paper policies were not effectively distributed to employees, the specific Anti-Harassment Policy was not even adopted until shortly before the Brazil incident, and no sexual harassment training was provided to any employees. Under those circumstances, plus the failure of the head of Afiniti's New York office to advise her to file a complaint with HR or the Legal Department, or to advise them himself of Ms. Spottiswoode's complaints, there were no preventive or corrective opportunities of which she reasonably failed to take advantage. Separately, I find the same conduct establishes the common law tort of negligent supervision and retention by Afiniti.

I also find that the physical injuries inflicted on Ms. Spottiswoode on the evening of September 16, 2017, rose to the level of an assault and battery. Mr. Chishti intentionally caused her physical injury that was a harmful and offensive bodily contact. Additionally, I find intentional infliction of emotional distress insofar as Mr. Chishti should have known that his extreme and outrageous actions, would cause Ms. Spottiswoode, a vulnerable young woman half his age, severe emotional distress.

Based upon these findings, Ms. Spottiswoode is entitled to the following relief from either Mr. Chishti, Afiniti, or both as stated:

- \$408,943.00 consisting of \$271,068 in back pay and front pay, and \$137,875 for out-of-pocket costs for therapy from Mr. Chishti.
- \$100,000.00 for physical injury and related pain and suffering from Mr. Chishti.
- \$2,000,000.00 from Mr. Chishti for the emotional injuries caused.
- \$2,000,000.00 from Mr. Chishti for punitive damages.
- \$1,000,000.00 from Afiniti consisting of \$250,000 in actual and \$750,000 in punitive damages related to its failure to take any meaningful steps to prevent sexual harassment from happening.

XIV. APPORTIONMENT OF FEES

The agreement between the parties mandates that the arbitrator award reasonable fees and costs to the prevailing party.

I award Afiniti Fifteen Thousand Eight Hundred Forty Three Dollars and Sixty Cents (\$15,843.60) for the fees incurred in securing the dismissal of individual directors and Betsy Koch. Afiniti's request for additional sums for independent counsel retained subsequent to my order dismissing them from this matter is denied. This amount shall be an offset to the award of fees to Spottiswoode.

Afiniti advanced Forty Six Thousand One Hundred Forty Nine Dollars and Ten Cents (\$46,149.10) to provide daily transcripts to the claimant. Its claim for reimbursement is denied, since it would then be added as a cost incurred by Spottiswoode.

As the prevailing party in this matter is Ms. Spottiswoode, she is entitled to an award of reasonable fees and costs. She has asked for fees of Four Million Seventy Two Thousand Three Hundred and Eighty Six Dollars (\$4,072,386.00) and costs of (Two Hundred Twenty Seven Thousand Three Hundred Fifty-Six Dollars and Ninety-Eight Cents (\$227,356.98).

As to fees, the Spottiswoode request is unreasonable.

The Afiniti parties submitted a fee request of Eight Hundred Two Thousand Six Hundred Nineteen Dollars and Seventy Nine Cents (\$802,619.79).

Ms. Spottiswoode prayed for an award of Fifty Million Dollars (\$50,000,000.00). She is being awarded about twelve percent (12%) of that amount. Numerous motions were filed by both parties. The prevailing party on each of the motions was fairly even.

It is my determination that Ms. Spottiswoode is entitled to One Million Two Hundred and Fifty Thousand dollars (\$1,250,000) as reasonable fees, less Fifteen Thousand Eight Hundred Forty Three Dollars and Sixty Cents (\$15,843.60) awarded relative to the directors, and costs of One Hundred Ninety Seven Thousand Dollars (\$197,000.00) for a total of fees and costs of One Million Four Hundred Thirty One Thousand Two Hundred Fifty Six Dollars and Forty Cents (\$1,431,256.40).

XV. AWARD

For the reasons stated herein, and on the basis of the record and evidence in this arbitration, the Arbitrator orders and awards as follows:

1. As against Respondent, Zia Chishti, the Arbitrator awards Ms. Spottiswoode Four Million Five Hundred Eight Thousand Nine Hundred Three Dollars (\$4,508,903.00), which includes compensation for her economic losses, payment for continuing medical care, the physical harm and emotional injuries she has endured, as well as punitive damages in connection with his continued course of conduct during her tenure in Afiniti and in connection with his conduct on the evening of September 15-16, 2017 in Brazil;

2. As against Afiniti, the Arbitrator awards Ms. Spottiswoode the sum of One Million Dollars consisting of Two Hundred Fifty Thousand Dollars (\$250,000.00) in actual damages and Seven Hundred Fifty Thousand Dollars (\$750,000.00) in punitive damages for its failure to

institute proper reporting controls to prevent sexual harassment, particularly after being put on earlier notice;

3. As against Afiniti, Ms. Spottiswoode is awarded attorney Fees and costs in the amount of One Million Four Hundred Thirty One Thousand Two Hundred Fifty Six Dollars and Forty Cents (\$1,431,256.40);

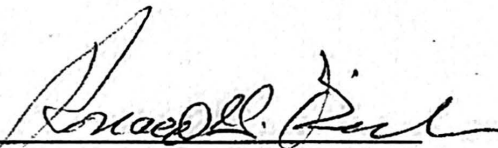
4. Each of these amounts shall bear interest at the rate of six percent (6%) per annum for any amounts unpaid after fifteen (15) days from the date of this award;

5. The fees of the American Arbitration Association totaling \$2,950.00, and the fees of the Arbitrator totaling \$158,807.50 shall be borne as incurred.

6. All claims not specifically addressed herein are denied.

I, Ronald G. Birch, do hereby affirm upon my oath as Arbitrator that I am the individual described in and who executed this instrument which is my Award.

Dated this 19 day of April, 2019.


RONALD G. BIRCH, Arbitrator