

**COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION**

MASSACHUSETTS COMMISSION
AGAINST DISCRIMINATION and
LISA VINCENTI
Complainants

v.

DOCKET NO. 18-BEM-03398

THE PLYMOUTH EXCHANGE and
PETER B. SMITH
Respondents

Appearances: Peter S. Farrell, Esq. and Matthew Stevens, Esq. for Complainants
Peter B. Smith for Respondents

DECISION OF THE HEARING OFFICER

I. INTRODUCTION

On November 29, 2018, Complainant, Lisa Vincenti, filed a complaint with the Massachusetts Commission Against Discrimination (“MCAD” or “Commission”) charging Respondents, The Plymouth Exchange and Peter B. Smith, with sexual harassment, sex discrimination and retaliation. On January 20, 2022, the Investigating Commissioner certified the following issues to public hearing: (1) Whether the Complainant was subjected to *quid pro quo* sexual harassment; (2) Whether the Complainant was retaliated against after she complained of sexually harassing conduct; (3) Whether Mr. Smith is individually liable. On March 30, 2023, I issued a Supplemental Certification Order supplementing the three certified issues to include: (4) Whether Respondents engaged in hostile work environment sexual harassment in violation of M.G.L. c. 151B, § 4(16A).¹ On April 3, 4, 10, and 12, 2023, I conducted a public hearing (“hearing”). Five (5) witnesses testified: Lisa Vincenti, Peter Smith, Susan Lawrenson, Ann

¹ The Supplemental Certification Order permitted the parties to file a request to postpone the public hearing to allow for additional discovery and/or the opportunity to propose additional witnesses or exhibits. No party filed such a request, nor was any objection made at hearing to the supplemental certified issue.

Parker and Judy Smith.² Twelve (12) exhibits were entered into evidence. The audio recording of the hearing is the official record.

On August 2, 2023, Lisa Vincenti filed a post-hearing brief. On October 10, 2023, Respondents file a post-hearing brief. Unless stated otherwise, where testimony is cited, I find the testimony credible and reliable, and where an exhibit is cited, I find it reliable to the extent it is cited. Having reviewed the record of the proceedings, I make the following Findings of Fact and Conclusions of Law.

II. FINDINGS OF FACT

1. The Complainant, Lisa Vincenti (“Ms. Vincenti”), worked for The Plymouth Exchange from August 2017 to June 25, 2018. (Vincenti II)³
2. Ms. Vincenti has an associate degree in health sciences and has worked as a full-time dental hygienist since approximately October 4, 2021. (Vincenti II: “I’ve been back to work about a year and a half now.”)
3. The Respondent, The Plymouth Exchange (“The Exchange”), is an antique and consignment shop located at 44 Main Street, Plymouth, Massachusetts. (Vincenti II; Exhibit 1)
4. The Respondent, Peter Bailey Smith (“Mr. Smith”), owned The Exchange at the time Ms. Vincenti worked at The Exchange. (Peter Smith III)
5. Throughout Ms. Vincenti’s employment at The Exchange, Mr. Smith directed Ms. Vincenti’s daily work activities at The Exchange and made hiring and firing decisions regarding employees of The Exchange. (Vincenti II)
6. At the time Ms. Vincenti worked at The Exchange, Judy Smith was married to Mr. Smith and worked as a manager of The Exchange. (Lawrenson II; Vincenti II)
7. Judy Smith (“Mrs. Smith”) was not an owner of The Exchange. Mrs. Smith’s working hours at The Exchange were not recorded on The Exchange’s work schedules. (Judy Smith III; Lawrenson II; Vincenti II; Exhibit 1)

² Judy Smith testified remotely.

³ Citations to testimony include witness’ name and the day(s) on which testimony occurred– e.g. (Vincenti II; Peter Smith III). Citations to exhibits include the exhibit number and if applicable, the associated pages in the exhibit – e.g. (Exhibit 5; Exhibit 3 at 21).

8. During Ms. Vincenti's employment at the Exchange, Mr. Smith and Mrs. Smith ("the Smiths") lived in an upstairs apartment in the same building as The Exchange, which had a deep open floor plan that included multiple smaller rooms. (Vincenti II)

EMPLOYEES AT THE EXCHANGE DURING MS. VINCENTI'S EMPLOYMENT

9. Exhibit 1 contains The Exchange's work schedules ("work schedules") from November 12, 2017 to June 23, 2018. (Exhibit 1⁴) With the exception of Judy Smith and John or Johnny I/n/u ("John"), each work schedule identifies the individuals who worked at The Exchange in a two-week time period, the dates and times each individual signed in and out to work, and the daily and biweekly total number of hours each individual worked. (Exhibit 1)
10. The work schedules (Exhibit 1) reflect that the following persons worked at the Exchange during the following two-week periods:
- a. From November 12 to November 25, 2017: (1) Susannah Murphy; (2) Michael Anania; (3) Susan Lawrenson; (4) Ms. Vincenti; and (5) Lisa DiAsi.
 - b. From November 26 to December 9, 2017: (1) Susannah Murphy; (2) DJ Kelleher; (3) Michael Anania; (4) Susan Lawrenson; (5) Ms. Vincenti; and (6) Lisa DiAsi.
 - c. From December 10 to December 23, 2017: (1) Susannah Murphy; (2) Michael Anania; (3) Susan Lawrenson; and (4) Ms. Vincenti.
 - d. From December 24, 2017 to January 6, 2018: (1) Susannah Murphy; (2) Michael Anania; and (3) Ms. Vincenti.
 - e. From January 21 to February 3, 2018: (1) Susannah Murphy; (2) Michael Anania; (3) Ms. Vincenti; and (4) Susan Lawrenson.
 - f. From February 4 to February 17, 2018: (1) Susannah Murphy; (2) Michael Anania; (3) Ms. Vincenti; (4) Susan Lawrenson; (5) Lisa DeAsi; and (6) Patrick Alfone.
 - g. From February 18 to March 3, 2018: (1) Susannah Murphy; (2) Michael Anania; (3) Ms. Vincenti; (4) Susan Lawrenson; and (5) Patrick Alfone. (Vincenti II)
 - h. From March 4 to March 17, 2018: (1) Susannah Murphy; (2) Michael Anania; (3) Ms. Vincenti; (4) Susan Lawrenson; (5) Lisa DeAsi; and (6) Patrick Alfone.
 - i. From March 18 to March 31, 2018: (1) Susannah Murphy; (2) Ms. Vincenti; (3) Susan Lawrenson; and (4) Patrick Alfone.

⁴ The January 7-January 21, 2018 work schedule was not included in Exhibit 1.

- j. From April 1 to April 14, 2018: (1) Susannah Murphy; (2) Ms. Vincenti; (3) Susan Lawrenson; (4) Maria Martell; and (5) Patrick Alfone.
 - k. From April 15 to April 28, 2018: (1) Susannah Murphy; (2) Ms. Vincenti; (3) Susan Lawrenson; and (4) Patrick Alfone.
 - l. From April 29 to May 12, 2018: (1) Susannah Murphy; (2) Ms. Vincenti; (3) Susan Lawrenson; (4) Lisa DeAsi; and (5) Patrick Alfone.
 - m. From May 13 to May 26, 2018: (1) Susannah Murphy; (2) Ms. Vincenti; (3) Susan Lawrenson; (4) Patrick Alfone; and (5) Susan Berry.
 - n. From May 27 to June 9, 2018: (1) Susannah Murphy; (2) Ms. Vincenti; (3) Susan Lawrenson; (4) Patrick Alfone; and (5) Susan Berry.
 - o. From June 10 to June 23, 2018: (1) Susannah Murphy; (2) Ms. Vincenti; (3) Susan Lawrenson; (4) Patrick Alfone; (5) Susan Berry; and (6) Maria Martell.⁵
11. Throughout Ms. Vincenti's employment, The Exchange paid John to work putting up the displays and helping the "girls" on Saturday and Sunday mornings. (Peter Smith III)
12. Although John was not on the work schedules, John was an employee of The Exchange during the time period that Ms. Vincenti worked at The Exchange. In making this finding, I rely on Mr. Smith's description of John as "staff" and an employee. I do not credit Mr. Smith's subsequent contradictory testimony that John "didn't work there." (Peter Smith III)
13. Based on the findings in paragraph 10, and testimony on this point by Mr. Smith and Susan Lawrenson that I credit, I find that throughout Ms. Vincenti's employ, Susannah Murphy, Ms. Vincenti and Susan Lawrenson were employees of The Exchange. (Peter Smith III; Lawrenson II; Exhibit 1)
14. Lisa DeAsi was an employee of The Exchange from on or before November 12, 2017, to May 6, 2018.⁶ (Exhibit 1) Susan Berry was an employee of The Exchange from May 14, 2018 to the end of Ms. Vincenti's employment. (Exhibit 1; Vincenti II) I infer from the timing reflected on the work schedules that Susan Berry replaced Lisa DeAsi as an employee at The Exchange.

⁵ Ms. Vincenti's lack of recall that Maria Martell worked at The Exchange does not alter this finding. (Vincenti II)

⁶ The work schedules reflect that (a) May 6, 2018 was Lisa DeAsi's last day and (b) Susan Berry started working the following week on May 14, 2018. (Exhibit 1)

15. Michael Anania was an employee of The Exchange from on or before November 12, 2017, to March 11, 2018. (Exhibit 1) Patrick Alfone was an employee of The Exchange from February 12, 2018 to the end of Ms. Vincenti's employment. (Exhibit 1; Peter Smith III)
16. Maria Martell was an employee of The Exchange on an occasional basis: April 14 and June 15, 2018. (Exhibit 1)

MS. VINCENTI'S EMPLOYMENT AT THE EXCHANGE

17. In August 2017, Ms. Vincenti was finalizing a divorce and was "completely depleted of all of [her financial] resources...." At that time, Ms. Vincenti was not working, did not have a car and needed to move. She had three young children and a shared custody arrangement with her ex-husband. (Vincenti II)
18. In August 2017, Ms. Vincenti contacted The Exchange to obtain an appraisal of some items in her home, and Mr. Smith came to Ms. Vincenti's home. After meeting at her home, Ms. Vincenti brought some items in to The Exchange and asked Mr. Smith if he needed help at The Exchange. Ms. Vincenti told Mr. Smith that she needed a job, a place to live and a car. Mr. Smith told Ms. Vincenti that he would help her and that he needed to speak with his wife about it. (Vincenti II)
19. Mr. Smith initially hired Ms. Vincenti to clean his apartment at The Exchange. At the end of August 2017, Ms. Vincenti began working as a salesperson on the floor at The Exchange. By November 26, 2017, Mr. Smith had assigned Ms. Vincenti managerial responsibilities including creating the work schedules. (Vincenti II; Exhibits 1 & 6)
20. Mr. Smith paid Ms. Vincenti \$15 per hour to work at The Exchange and on average, Ms. Vincenti worked 26 hours per week: \$390/week. (Exhibit 1) I base this on the actual hours Ms. Vincenti worked at The Exchange (Exhibit 1), and do not credit Ms. Vincenti's testimony that she worked 40 hours per week. (Vincenti II)
21. Mr. Smith allowed Ms. Vincenti to use the Smiths' Toyota FJ sports utility vehicle ("Toyota FJ"). (Vincenti II)
22. From August 2017 until June 24, 2018, Mr. Smith lent Ms. Vincenti money which covered the cost of Ms. Vincenti's rent, and bills for electricity, heat, telephone and groceries. Mr. Smith lent Ms. Vincenti money to cover the costs of car repairs, vehicle inspections and car

insurance. All monies referenced in this paragraph are referred to herein as “Living Expenses.” (Vincenti II; Judy Smith III)⁷

23. Mr. Smith helped Ms. Vincenti find an apartment in Pembroke, Massachusetts. (Vincenti II)
24. In December 2017, the Smiths invited Ms. Vincenti and her children to a Christmas party at the Smiths’ home and gave gifts to Ms. Vincenti’s children. (Peter Smith III)
25. Mr. Smith observed Ms. Vincenti’s work as a salesperson and manager at The Exchange and viewed Ms. Vincenti as a good employee. (Vincenti II; Exhibit 6). I do not credit Mr. Smith’s testimony that Ms. Vincenti was difficult to work with and did not get along with other employees at The Exchange because these assertions are inconsistent with Mr. Smith’s decisions to promote Ms. Vincenti to manager, and as discussed below, to commend Ms. Vincenti publicly on the radio and to jointly launch a business with Ms. Vincenti.
26. I do not credit Mr. Smith’s testimony that an employee at The Exchange, Susannah Murphy, resigned a few months after Ms. Vincenti started working at The Exchange because Ms. Vincenti “scared” Ms. Murphy and she did not like working with Ms. Vincenti. The work schedules demonstrate that Ms. Murphy worked at The Exchange throughout June 23, 2018. (Peter Smith III; Exhibit 1)
27. Mrs. Smith regarded Ms. Vincenti as a “pretty good” manager. (Judy Smith III)
28. Throughout her employment, the Smiths’ expectation was that Ms. Vincenti would start work at 9:30 a.m. Ms. Vincenti regularly arrived at The Exchange between 9:45 a.m. and 10 a.m. (Judy Smith III; Exhibit 1) Susannah Murphy, who also had managerial responsibilities, occasionally started work between 9:45 a.m. and 10 a.m. (Peter Smith III; Exhibit 1) Mrs. Smith spoke informally with Ms. Vincenti about arriving late. (Judy Smith III)
29. The Exchange never issued written discipline to Ms. Vincenti, suspended her, or took any disciplinary action against Ms. Vincenti until terminating her employment on June 25, 2018. (Vincenti II; Peter Smith III)

\$40 FROM CASH REGISTER

30. On a busy day in December 2017, forty dollars was missing from The Exchange cash register. As to the timing of this incident, I credit Ms. Vincenti’s statement in the Complaint

⁷ There was no evidence Ms. Vincenti’s acceptance of the job offer, or her continued commitment to work at The Exchange, was conditioned on the Smiths’ willingness to loan her money for Living Expenses.

of Discrimination (“Complaint”) that this incident occurred in December 2017, as opposed to her testimony regarding its timing, because I believe Ms. Vincenti’s memory as to the date of the \$40 incident was more accurate when she filed the Complaint than at the time of hearing. (Exhibit 6; Vincenti II)

31. On the day the \$40 was missing, Ms. Vincenti noticed \$40 on the counter, took the \$40 and placed the money in her pocket. (Peter Smith III; Judy Smith III; Exhibit 6)
32. The Smiths reviewed The Exchange’s surveillance tapes which showed Ms. Vincenti putting \$40 in her pocket. (Peter Smith III; Judy Smith III; Exhibit 6)
33. Several hours after Ms. Vincenti left The Exchange on the day the \$40 was missing from the cash register, Mr. Smith called Ms. Vincenti and said that he had reviewed the surveillance tapes and Ms. Vincenti had taken the \$40. Ms. Vincenti told Mr. Smith that she found the money and put it in her pocket. After receiving this phone call from Mr. Smith, Ms. Vincenti returned the \$40 to The Exchange. (Exhibit 6)
34. I do not credit Ms. Vincenti’s testimony that she “wasn’t sure exactly what had happened the day before and made sure that the drawer was calculated correctly the next morning” as it is inconsistent with the Complaint. (Vincenti II; Exhibit 6)
35. Mr. Smith and The Exchange did not issue any discipline to Ms. Vincenti, nor did Mr. Smith file a complaint with the police because of this incident. (Peter Smith III; Exhibit 6)

CLEAN OUT BUSINESS

36. During Ms. Vincenti’s employment, customers of The Exchange contacted the store to ask if The Exchange provided “cleanout services”, i.e. removing the contents of a home when a customer was selling a residence, or the resident of the home died. (Vincenti II)
37. A few months after Ms. Vincenti started working at The Exchange, Ms. Vincenti and Mr. Smith began to discuss collaborating on a business to provide cleanout services. Mr. Smith proposed the idea to Ms. Vincenti which entailed utilizing the box truck from The Exchange and “a couple of guys . . . to help lift things” to clean out homes that required cleanout services. Once the homes were cleaned out, Ms. Vincenti would store and sell the items through flea markets or online. (Vincenti II)
38. In March 2018, Mr. Smith and Ms. Vincenti started the cleanout business which they named TLC Cleanouts. (Vincenti II)

39. Mr. Smith referred customers of The Exchange who required cleanout services to TLC Cleanouts, and Ms. Vincenti used the box truck from The Exchange to complete TLC Cleanouts work. (Vincenti II; Peter Smith III)
40. Mr. Smith launched TLC Cleanouts with Ms. Vincenti because he valued her services as an employee. I do not credit Mr. Smith's testimony that he jointly created the business to get Ms. Vincenti off the floor of The Exchange. It is illogical that Mr. Smith would refer The Exchange's customers to Ms. Vincenti and TLC Cleanouts to work in their homes if he had concerns about Ms. Vincenti's work performance. (Peter Smith III)
41. Starting in April 2018, TLC Cleanouts experienced more business activity and "really took off." (Vincenti II)

RADIO SHOW

42. During Ms. Vincenti's employment at The Exchange, Mr. Smith appeared on a weekly Saturday radio program called The Antiques Airshow. (Exhibit 6)
43. Mr. Smith spoke highly of Ms. Vincenti on The Antiques Airshow. (Vincenti II)
44. In March 2018, Mr. Smith invited Ms. Vincenti as a guest on The Antiques Airshow, promoted TLC Cleanouts and stated that Ms. Vincenti was a creative manager who "brought some fresh air" to the business. (Vincenti II; Exhibit 6)

MS. VINCENTI AND MR. SMITH'S WORK RELATIONSHIP

45. From the beginning of their work relationship, Ms. Vincenti felt indebted to the Smiths, and was reliant upon Mr. Smith for a job and money for Living Expenses and tried to "appease" Mr. Smith to keep her job and continue to receive money for Living Expenses. (Vincenti II)
- Ms. Vincenti described her situation as follows:

... [M]y whole life now was in his hands, if you will. My car, my housing, my rent was being paid for by being employed at the Exchange. I was having use of the vehicle from the Exchange, being able to see my children.... All of my daily ins and outs was essentially being puppeteered by Mr. Smith. And so I would deal with him in a way that would keep him happy and keep me employed. He constantly would talk about how I was dressed and how I looked and send me inappropriate texts. And I just kept dealing with it, if you will, as to not rock the boat, to keep my job, to keep my stability, [] which I thought was stability at the time. (Vincenti II)

46. Mr. Smith described his relationship with Ms. Vincenti as one in which he was "trying to save" Ms. Vincenti. (Peter Smith III) At their first meeting, Mr. Smith perceived Ms.

Vincenti as willing to engage in sexual interactions in exchange for financial support, as evidenced by the following:

I want to speak to the beginning. Lisa called me. I visited her house once. Second time that I went, she was really needing to sell me things. And she said she needed \$125. I couldn't find anything to buy. She was very, very, I'd say friendly, and I couldn't find anything to buy. I -- I gave her \$125. I went back home and I said to Susanna, I said to Judy, I said, I think I just got an offer of sex for \$125, because that's essentially what happened.... And I never had that happen before. So I -- I brought it contemporaneously to other people's attention.... Now, she was very sweet, very kind, and I thought she was just great. And then -- (Peter Smith III)

47. There was no assertion by any party that Ms. Vincenti offered Mr. Smith sex in exchange for money, or that Ms. Vincenti and Mr. Smith engaged in consensual sexual relations or sex for money.

TOPLESS PHOTOGRAPHS

48. Mr. Smith routinely asked Ms. Vincenti to send him pornographic photographs of herself. On one occasion, Ms. Vincenti was scrolling through photographs on her phone to show Mr. Smith a photo of herself with her children when Mr. Smith noticed a topless photo that Ms. Vincenti had taken of herself. Upon seeing the photograph, Mr. Smith began to request and insist that Ms. Vincenti send him the picture. Ms. Vincenti felt she had no other alternative but to send Mr. Smith the picture to his telephone. The picture was a side view of Ms. Vincenti with her shirt above her breasts. I do not credit the following testimony by Ms. Vincenti: (a) she does not know how Mr. Smith got the photograph; (b) she believes that he may have sent it to himself; and (c) after Mr. Smith got the photograph, he showed it to her and said "I got you."⁸ (Vincenti II; Exhibits 6 & 9⁹)
49. In the Complaint, Ms. Vincenti referred to this photograph as a "topless photo." (Exhibits 6)
50. I do not credit Mr. Smith's testimony that he did not ask Ms. Vincenti for nude photographs of herself, nor do I credit Mr. Smith's testimony that Ms. Vincenti sent Mr. Smith this photograph because she wanted to "make [him] attracted to her." (Peter Smith IV) I base this finding on the credibility determinations set forth below in the following three paragraphs.

⁸ The testimony by Ms. Vincenti regarding this photograph occurred on Day 2 of the hearing.

⁹ Exhibit 9 contains the typewritten statement: "Sunday – February 11, 2018 – 10:40 PM." (Exhibit 9)

51. At hearing, Mr. Smith introduced three additional photographs marked as Exhibits 10, 11 and 12 (“three photographs”).¹⁰ Exhibits 10, 11 and 12 are topless photographs of Ms. Vincenti, with dates, respectively, of January 22, 2018, December 29, 2017 and January 17, 2018.¹¹ (Exhibits 10, 11, 12)
52. I find that Ms. Vincenti did not send to Mr. Smith the three photographs and that Mr. Smith obtained the three photographs (Exhibits 10-12) from some other source. I base this factual finding on the following: First, Mr. Smith did not have in his possession the texts from Ms. Vincenti that allegedly attached the three photographs marked as Exhibits 10-12. Mr. Smith’s unconvincing reason for why he did not have the texts attaching these three photographs raises credibility concerns. He repeatedly testified that the reason he did not have these texts was because he deleted Ms. Vincenti’s contact information from his phone. When counsel for Ms. Vincenti demonstrated that deleting a contact does not delete texts received from that contact, Mr. Smith modified his testimony to state that he now thinks the texts that attached these three photographs were “buried somewhere under her number.” (Peter Smith IV)¹² Second, Mr. Smith asserted that the photograph Ms. Vincenti was referencing in her testimony on Day 2 was Exhibit 9. (Peter Smith IV) However, there was no information available to Mr. Smith to permit him to distinguish Exhibit 9 from the three other photographs of Ms. Vincenti (Exhibits 10-12). There was no detail about the contents of the photograph Ms. Vincenti was referencing on Day 2 of the hearing other than her characterizing it in the Complaint as a “topless photo” and as a “pornographic photograph” during her testimony on Day 2. Exhibits 9-12 can all be described as “topless” and “pornographic” photographs of Ms. Vincenti. If Ms. Vincenti had sent all four topless,

¹⁰ Exhibits 9-12 have been maintained in an envelope available only to the Hearings Unit and Clerk’s office. On Day 4 of the hearing, Complainants’ counsel was instructed to file a motion for a protective order for Exhibits 9-12 if he sought further protection for these photographs beyond keeping them in a sealed envelope while the Decision was drafted. 804 CMR 1.12 (9) (2020) No motion for a protective order has been received.

¹¹ The parties have differing views of the significance of these dates: Mr. Smith believes the dates are the dates the photographs were sent, while counsel for Complainants believes the dates on the photographs are the dates the photographs were taken. (Peter Smith IV; IV) I make no factual determination on this issue.

¹² Neither Peter Smith nor The Exchange requested to submit texts attached to Exhibits 10, 11 or 12 pursuant to 804 CMR 1.12 (17).

pornographic photographs to Mr. Smith, it would have been impossible for Mr. Smith to distinguish which photograph Ms. Vincenti was referencing on Day 2. Yet, on Day 4 of the hearing, Mr. Smith testified that Exhibit 9 is the picture that Ms. Vincenti “spoke to in her testimony” on Day 2. (Peter Smith IV) When questioned as to how he knew that Exhibit 9 was the picture that Ms. Vincenti referenced in her testimony on Day 2, Mr. Smith testified that it was “the first one she sent me.” (Peter Smith IV) Exhibit 9 is dated last. (Exhibits 9-12) In contrast, if Mr. Smith received the three photographs that are Exhibits 10-12 from a source other than Ms. Vincenti, he would have had a basis to distinguish the photograph Ms. Vincenti referenced on Day 2 (Exhibit 9) from the photographs marked as Exhibits 10-12.

53. I do not credit Mr. Smith’s testimony that: (1) Ms. Vincenti sent Mr. Smith the three photographs marked as Exhibits 10, 11 and 12; and that (2) Ms. Vincenti was “trying to make [Mr. Smith] attracted to her the entire time.” (Peter Smith III)

HUGS

54. Ms. Vincenti and Mr. Smith hugged on a regular basis at The Exchange. (Vincenti II; Peter Smith III; Judy Smith III) There was insufficient evidence to conclude who initiated the hugs.
55. Ms. Vincenti’s perception was that Mr. Smith inappropriately hugged her in front of the other employees to show “like admiration, but it was like twisted.” (Vincenti II) Mr. Smith’s perception was that Ms. Vincenti hugged him in appreciation for his efforts to provide for her. (Peter Smith III)¹³

SEXUAL COMMENTS AND TEXTS

56. On one occasion, Mr. Smith called Ms. Vincenti, when she was working at the front desk of The Exchange with an employee named Susan Lawrenson, and told Ms. Vincenti to unbutton her blouse because it would increase sales. (Lawrenson II)

¹³ Mr. Smith described their interchanges as follows:

And -- and just every day, I got a big hug and, Oh, I love you from her, you know? And -- and there was this big sort of, you know, it was - it seemed like everything was going to work for a while there. And -- and there was some pride that I had established in -- in having taken her from what I thought was this horrible environment of abuse and -- and giving her some -- some safety. But then -- then for some reason, I kind of became the enemy. (Peter Smith III)

57. Mr. Smith regularly commented to Ms. Vincenti about how she was dressed and about her appearance in general, throughout her employment at The Exchange. (Vincenti II; Exhibit 6)
58. Throughout her employment at The Exchange, Mr. Smith sent Ms. Vincenti texts and made verbal comments about her body such as “You’re so beautiful. You have amazing breasts. I cherish you.” (Vincenti II; Exhibit 6)
59. During her employment at The Exchange, Mr. Smith asked Ms. Vincenti if he could “masturbate to an image of [her] in his mind” and described to Ms. Vincenti details about masturbating to her image. (Vincenti II; Exhibit 6)
60. During her employment at The Exchange, Mr. Smith sent Ms. Vincenti images of himself masturbating. (Vincenti II; Exhibit 6)
61. I base the factual determinations in the five previous paragraphs on: (a) Ms. Vincenti’s credible testimony on these points; (b) Ms. Vincenti’s subsequent documentation of these actions in the Victim Witness Statement and Complaint; (c) Mr. Smith’s admission that he commented on a female customer’s “beautiful” appearance to Ms. Vincenti; (d) Mr. Smith’s demonstrated lack of credibility regarding how he acquired the three photographs marked as Exhibits 10-12; and (e) the familiar nature of their relationship, confirmed by Mr. Smith’s admission that he went to Ms. Vincenti’s home to take showers (Exhibits 5 & 6; Peter Smith III) I do not credit Mr. Smith’s denial that he “never talked to her like that.” (Peter Smith III)

SHOWERS

62. On two occasions prior to April 2018, Mr. Smith arrived, uninvited, at Ms. Vincenti’s home in the early morning. Ms. Vincenti “didn’t know what to say” and did not “want to tell him no” because she felt that she was “at his mercy” and feared losing her job if she did so. (Vincenti II; Exhibit 6 (dating the showering in her home in March 2018 and April 2018))
63. Mr. Smith admitted that he took at least one shower at Ms. Vincenti’s home and acknowledged that it was “a bit weird.” (Peter Smith III)
64. I do not credit Mr. Smith’s testimony that Ms. Vincenti invited him to shower at her home because I do not credit the details of his narrative. Mr. Smith testified that he was on a “very early call at a barn in Duxbury that day” at 7 a.m., that it was “height of summer” and it was “really hot” and he was “filthy, sweaty, mouse poo all around”, that he was supposed to go to Ms. Vincenti’s house to help her with a “number of things that she had taken out of one of her clean outs” and she invited him to have a shower at her home which would save time.

(Peter Smith III) It is illogical that Mr. Smith would shower at Ms. Vincenti's home when he was "filthy, sweaty, mouse poo all around", and put the same set of clothes back on to assist Ms. Vincenti with cleanout services. There was no evidence Mr. Smith brought an extra pair of clothing to Ms. Vincenti's home. In addition, his explanation of the circumstances under which he took a shower at Ms. Vincenti's home is undermined by his assertion that the incident occurred in "the height of summer." It was not summer (June 21, 2018) until approximately four days before the termination of Vincenti's employment on June 25, 2018. Further, it is unlikely that Ms. Smith and Ms. Vincenti were working on cleanouts "in the height of summer" in light of my finding below, that the relationship between Ms. Vincenti and Mr. Smith was distant in late May and June 2018.

JANE DOE¹⁴

65. During Ms. Vincenti's employment, Mr. Smith described to Ms. Vincenti sexual interactions and specific sexual acts that Mr. Smith allegedly had with Jane Doe. I base this on: (a) Ms. Vincenti's credible testimony with regard to these comments; (b) Ms. Vincenti's subsequent documentation of these allegations in the Complaint, which is generally consistent with her testimony as to these comments; (c) Mr. Smith's admission that he was in an intimate relationship with Jane Doe; and (d) my findings herein related to Mr. Smith's other sexual comments, texts and conduct. I find self-serving Mr. Smith's testimony that he did not commence an intimate relationship with Jane Doe until after Ms. Vincenti's employment at The Exchange. (Peter Smith III; Vincenti II)

IMAGES OF MS. SMITH

66. During Ms. Vincenti's employment at The Exchange, an employee of The Exchange named Ann Parker ("Ms. Parker") received a text from Mr. Smith which attached a partially nude photograph of Mrs. Smith. (Parker II)

67. Ms. Parker trained Ms. Vincenti and was subsequently laid off from The Exchange. Ms. Parker filed an age discrimination action at the MCAD against Peter Smith or The Exchange which was ultimately dismissed. (Peter Smith III) Notwithstanding this, I do not find Ms.

¹⁴ The individual with whom Mr. Smith allegedly had a sexual relationship with was identified at hearing. I refer to her herein as "Jane Doe" to protect the privacy interests in this matter.

Parker's testimony regarding Mr. Smith sending her a picture of Mrs. Smith in a state of partial undress to be motivated by a personal vendetta or concocted to damage Mr. Smith. While I generally found Ms. Parker's memory of events at The Exchange to be unreliable, I found Ms. Parker's testimony as to her receipt of a partially nude photograph of Mrs. Smith from Mr. Smith to be reliable based on Ms. Parker's detailed description of the photograph, her testimony as to when it was received and my observations of Ms. Parker as she testified as to her receipt of this picture. (Parker II)

68. Early in Ms. Vincenti's employment with The Exchange, Mr. Smith sent Ms. Vincenti a video which depicted Mr. Smith asking Mrs. Smith to undress, and Mrs. Smith complying with this request by undressing and asking Mr. Smith to stop. (Vincenti II)
69. There was insufficient evidence presented at hearing to support Ms. Vincenti's allegation in the Complaint that Mr. Smith recounted a story in explicit detail to Ms. Vincenti about a trip that Mr. Smith and his wife had taken to Prince Edward Island, during which the Smiths engaged in sex acts with another couple. Ms. Vincenti did not testify to this allegation. (Exhibit 6, Paragraphs 33-34)

THE MASTURBATION INCIDENT

70. For the following reasons, I do not credit Ms. Vincenti's testimony that at the end of March or beginning of April 2018, Mr. Smith called her to his apartment where she found him masturbating ("the masturbation incident"). First, and most persuasively, I do not credit the testimony by Ms. Vincenti that when the masturbation incident occurred, she returned to the floor of The Exchange and told Susan Lawrenson that she had just gone to Mr. Smith's apartment and found him masturbating. Ms. Vincenti testified that Ms. Lawrenson told her that she did not deserve this, did not need to put up with this, and asked her what she was going to do. Ms. Vincenti testified that she responded that she did not know what she would do, but that if she said anything, she would lose everything. (Vincenti II) I do not credit this testimony because Ms. Lawrenson credibly testified that she did not think that she was at The Exchange the day that Ms. Vincenti allegedly witnessed Mr. Smith masturbating. (Lawrenson II) Had Ms. Vincenti disclosed to Ms. Lawrenson that she had just witnessed Mr. Smith masturbating in his apartment, and Ms. Lawrenson responded in the manner that Ms. Vincenti testified, it would be reasonable to expect Ms. Lawrenson to remember, at the very least, that she was present on the day of Ms. Vincenti's disclosure of this alleged

incident. Second, Ms. Vincenti's testimony that she met with Mr. Smith alone in his car the day after the masturbation incident is inconsistent with her description of the masturbation incident as "a particularly disturbing episode" leaving her feeling "beside herself." (Vincenti II; Exhibit 6) Third, when Ms. Vincenti completed a Victim Witness Statement on July 9, 2018, described below in Paragraphs 99-102, she did not reference the masturbation incident. (Exhibit 5) Fourth, Ms. Vincenti's descriptions of the masturbation incident differ in the Complaint and at hearing. In the Complaint, Ms. Vincenti states that Mr. Smith called her to his apartment and upon entering, Ms. Vincenti found him on the couch masturbating; that she left the apartment and returned to The Exchange; that upon returning to The Exchange, Mr. Smith called Ms. Vincenti and expressed regret over his actions; Mr. Smith apologized; Ms. Vincenti made clear such behavior was unacceptable; *Mr. Smith asked Ms. Vincenti to return to the upstairs apartment and that when she did, Mr. Smith was again masturbating.* (Exhibit 6) (italics added) In contrast, Ms. Vincenti testified to only one visit to Mr. Smith's apartment. (Vincenti II)

71. I do not credit the following testimony by Ms. Parker regarding the alleged masturbation incident: Ms. Vincenti "came downstairs and she was crying and told me what happened" regarding seeing Mr. Smith masturbate, that Ms. Parker was working at The Exchange at the time, and Ms. Parker "just comforted her." (Parker II). I do not credit Ms. Parker's testimony because Ms. Parker did not work at The Exchange at any time between November 12, 2017 and June 2018, and the masturbation incident allegedly occurred in March or April 2018. (Exhibit 1)

MS. VINCENTI'S PROTEST TO MR. SMITH

72. In April or May 2018, Ms. Vincenti told Mr. Smith to stop: sending her texts of him masturbating, asking Ms. Vincenti if he could masturbate to Ms. Vincenti's image, describing his masturbation to her, commenting on the way she was dressed, showering in her home and describing, in detail, sexual acts with Jane Doe. (Vincenti II) I base this conclusion on the material consistency between Ms. Vincenti's testimony, the Complaint and Victim Witness Statement. (Exhibits 5 & 6)

73. After this discussion, there was a period in which the relationship between Ms. Vincenti and Mr. Smith became strained and distant. (Vincenti II; Exhibit 5; Peter Smith III: “then, for some reason, I kind of became the enemy”)
74. On May 25, 2018, Mr. Smith had a discussion with Ms. Vincenti in which Mr. Smith apologized and Ms. Vincenti explained that she previously had a “fear of losing everything and that’s why [she] hadn’t said anything prior.” Mr. Smith told Ms. Vincenti that he would respect her. (Exhibits 5 & 6)

PHYSICAL ASSAULT

75. On or about May 26, 2018, Ms. Vincenti and Mr. Smith were in a back room at The Exchange. They were moving furniture around, and Ms. Vincenti was bent over. Mr. Smith grabbed her breast. Ms. Vincenti said, “Cut it out. What the hell are you doing?” Mr. Smith then grabbed Ms. Vincenti’s other breast. (Vincenti II; Exhibits 5 & 6) I base this finding on the following: (1) My observations of Ms. Vincenti as she testified on this topic; (2) Ms. Vincenti’s documentation of the physical assault with the Plymouth Police Department in her Victim Witness Statement; (3) Ms. Vincenti’s act of going to the police and filing a complaint despite, as detailed below, Mr. Smith threatening Ms. Vincenti with having her arrested in front of her children if he heard anything embarrassing about him or his store; (4) Ms. Vincenti’s description of the physical assault in the Victim Witness Statement, the Complaint and Ms. Vincenti’s testimony at hearing are generally consistent with each other (Vincenti II; Exhibits 5 & 6); and (5) evidence that Mr. Smith made sexual comments and had sexualized interactions with Ms. Vincenti set forth above. I have considered that Ms. Vincenti’s testimony was not consistently reliable at hearing, specifically, with regard to the missing \$40, the manner in which a topless photograph of Ms. Vincenti got to Mr. Smith, and the masturbation incident, but for the reasons stated above, as regards the physical assault, I find Ms. Vincenti’s testimony credible.
76. No witnesses were present when the physical assault occurred. Other than Ms. Vincenti’s boyfriend, Ms. Vincenti did not talk with anyone about this incident the day it occurred. (Vincenti II)
77. After this physical assault, Ms. Vincenti continued to work at The Exchange but tried to avoid Mr. Smith. (Exhibits 1 & 6)

INTERACTION BETWEEN JUDY SMITH AND MS. VINCENTI

78. Ms. Vincenti was terminated from the Exchange on June 25, 2018. (Exhibit 6)
79. On June 24, 2018, Ms. Vincenti approached Mrs. Smith and asked for her pay. Mrs. Smith gave Ms. Vincenti cash, reflecting what Ms. Vincenti had earned that pay period based on the \$15/hour compensation rate. Mrs. Smith then walked away. (Judy Smith III; Exhibit 6, Paragraphs 73 – 78¹⁵)
80. Ms. Vincenti asked Mrs. Smith for the money for Living Expenses. Mrs. Smith refused to give Ms. Vincenti money for Living Expenses because Ms. Vincenti “already owed” the Smiths “\$4,000 at that point from the monies that we had given her outside of her pay....” (Judy Smith III; Exhibit 6)
81. When Ms. Vincenti protested, Mrs. Smith said she would “need to take that up with” Mr. Smith. (Judy Smith III; Exhibit 6)
82. Ms. Vincenti then called Mr. Smith who said he “needed his money back” and the pay Ms. Vincenti was given was “all she was getting.” (Exhibit 6; Peter Smith III)
83. Ms. Vincenti again approached Mrs. Smith and told her that she needed “all of her pay” as her rent was due. (Exhibit 6) I infer that Ms. Vincenti was referring to the money for Living Expenses that had previously been loaned to her by the Smiths.
84. Mrs. Smith said there was nothing she could do and that it was Mr. Smith’s decision to not loan Ms. Vincenti more money for Living Expenses. (Exhibit 6; Judy Smith III)
85. Ms. Vincenti then told Mrs. Smith that Mr. Smith had shown up uninvited at Ms. Vincenti’s home to take showers, Mr. Smith was making sexualized comments to her including comments regarding his masturbating to her image, and Mr. Smith was engaging in inappropriate texting.¹⁶ (Vincenti II) Ms. Vincenti’s testimony regarding telling Mrs. Smith

¹⁵ Paragraph 78 of the Complaint states: “Mr. Smith, despite previously informing Complainant that she could pay him back whenever she could afford it, knowing at that time that she couldn’t afford it, and never having done this before, stated that he [Mr. Smith] needed his money back and the pay Complainant was given was ‘all she was getting.’” (Exhibit 6) This supports the finding that I make that on June 24, 2018, The Exchange paid Ms. Vincenti the \$15/hour compensation, but did not give her the money previously loaned for Living Expenses.

¹⁶ Ms. Vincenti did not tell Mrs. Smith that Mr. Smith grabbed her breasts. On Day 2, when describing what she said to Ms. Smith, Ms. Vincenti did not reference the physical assault. On Day 4, when asked specifically if she told Mrs. Smith that Mr. Smith had grabbed her breasts, she testified she was not sure she “exactly said that.” (Vincenti II & IV) This omission in the disclosure to Mrs. Smith, however, is not sufficient to alter my finding that the physical assault occurred.

about Mr. Smith's actions is corroborated by the voicemail message that Mr. Smith left on Ms. Vincenti's cell phone on June 25, 2018, the day after her interaction with Mrs. Smith. The voicemail message reflects the following: (1) on June 25, 2018, Mr. Smith was furious with Ms. Vincenti because she spoke with Mrs. Smith ("after what you did. Um, with Judy and talking to Judy and along with the other things. . . . And then that's the kind of return you give me was to say those things to Judy"); and (2) Mr. Smith knew that Ms. Vincenti had accused him of sexually inappropriate conduct that he either denied or believed was inoffensive to Ms. Vincenti ("you [Ms. Vincenti] want to throw shit back at me, like I've actually ever done something to you, which I have not. And that thing you think I did. You just fucking use that because you can use it. It's fucking nothing to you. I know that you know that, so you're full of shit"). (Exhibit 7) Despite Mr. Smith's acknowledgement that it was his voice on the voicemail message, when Mr. Smith was asked to explain what he meant when he said "and then that's the kind of return you give me was to say those things to Judy", he responded evasively and implausibly, testifying that he did not know what he was referencing when he said that. In making this finding, I do not credit Mrs. Smith's testimony that she first heard of Ms. Vincenti's sexual harassment allegations when she received a "letter from the lawyer's office", which I infer occurred after June 25, 2018. (Judy Smith III; Exhibit 7)

86. In addition, on June 24, 2018, Ms. Vincenti told Mrs. Smith that Mr. Smith was involved in an extramarital relationship with Jane Doe. (Vincenti II; Exhibit 7)
87. The communications Ms. Vincenti had with Mrs. Smith on June 24, 2018 are collectively referred to as "the Interaction with Mrs. Smith." The Interaction with Mrs. Smith occurred approximately four weeks after Mr. Smith grabbed Ms. Vincenti's breasts in the back room of The Exchange. (Exhibit 6) I credit the timing of the Interaction with Mrs. Smith set forth in the Complaint, and do not credit Ms. Vincenti's testimony that the Interaction with Mrs. Smith occurred within a day or two of the physical assault. (Vincenti II)
88. The Interaction with Mrs. Smith took place because Ms. Vincenti was upset that the Smiths had discontinued their practice of loaning her money for Living Expenses, and she felt that the discontinuation of these advances for Living Expenses was an effort by Mr. Smith to get retribution for her rejection of Mr. Smith when he grabbed her breasts. (Exhibit 6)

89. Mrs. Smith told Mr. Smith that Ms. Vincenti accused Mr. Smith of sexually inappropriate conduct toward Ms. Vincenti at The Exchange and that Mr. Smith was having an extramarital relationship. This finding is based on the voicemail message and Mr. Smith's testimony that Judy called him in a panic. (Peter Smith III; Exhibit 7) Mr. Smith was called to come to The Exchange. (Vincenti II; Peter Smith III)
90. When Mr. Smith arrived at The Exchange, there was an angry confrontation between Mr. Smith and Ms. Vincenti. I base this finding on the Complaint, Mr. Smith's subsequent actions and angry tone on the voicemail message and Mr. Smith's testimony that it was "a very tense moment." (Exhibits 6 & 7; Peter Smith III) I do not credit Ms. Vincenti's testimony that after the Interaction with Mrs. Smith, she went home without talking with Mr. Smith. (Vincenti II)
91. I find self-serving and do not credit Mr. Smith's testimony that after the Interaction with Mrs. Smith, Ms. Vincenti jumped in his car and said: "You're going to give me \$1,000 or I'm going to start telling things to Judy" and when asked what she meant, said, "Oh, I've got all sorts of stories that I can tell Judy and – and you better pay me or you're going to be in a lot of trouble." In addition, I do not credit Mr. Smith's related testimony:

I'm like, are you telling me that you're going to make up things to tell Judy unless I give you \$1,000 and you expect to still be working here? And she says, yes, that's exactly it. And you're not going to fire me because I owe you too much money. You'll never fire me. And that's when I said, you're fired. (Peter Smith III)

92. After the confrontation between Ms. Vincenti and Mr. Smith, Ms. Vincenti got into the Toyota FJ and left. (Exhibit 6)

JUNE 25, 2018 AND THE VOICEMAIL MESSAGE

93. The day after the Interaction with Mrs. Smith, Mr. Smith and another individual came to Ms. Vincenti's home, removed her personal belongings from the Toyota FJ, and took the car.
94. In addition, Mr. Smith left a voicemail message on Ms. Vincenti's cell phone ("Voicemail Message") (Exhibit 7; Day 3) which states:

"So, Lisa. I need you to listen carefully

I after what you did. Um, with Judy and talking to Judy and along with the other things. Um, There's no fucking way, you did not expect to go back to work here I hope. Um, so you, you, you you've thrown a hand grenade into your world. You also have taken away from me that that that feeling of having done well for somebody, having helped

somebody, having tried my hardest for you and financially in every way, I did my very best for you. And then that's the kind of return you give me was to say those things to Judy. Quite incredible that you thought that that was .. There's a certain code, you know, huh. Anyways. um, and, and you stole it from me. Plus I have some other things, urn, that, uh, I am aware of. Urn, so I want you to know if I hear anything disparaging about me, about my store. If I fucking hear anything I don't like, I'm going to have you arrested. I'm gonna make sure that your kids are there when it happens, because that would be a lot better, I think. And they need to learn what kind of morn they have, because you're fucking with me, man. And you are trying to fuck my life up. And it ain't gonna work, you little fucking, uh you. And, and, and I will call the police. And we'll have you arrested because you stole from me. We have it on videotape. Everybody knows. And I have three other events. All of them, chargeable offenses. Two of them. I think you might guess. The third one, you'll have no way of knowing or finding out how I know about it. But I know, I got ya. And, and, uh, so I don't know how you thought you could fuck with me like this and, and, and, and, and get away with with extorting me. Telling me to give you money or you're going to talk to my wife about fucking [Jane Doe]? As if she cares? What the hell is the matter with you? Fuck. And ever after everything I did for you, it's disgusting what you did. It's really the most low end human thing I've ever seen or experienced. You have no. Nothing. Well, gratitude, nothing. And you want to throw shit back at me, like I've actually ever done something to you, which I have not. And that thing you think I did. You just fucking use that because you can't use it. It's fucking nothing to you. I know that you know that, so you're full of shit. So, so, so just understand that I'm really sad. I tried and I tried and I tried, I even let you steel from me and kept you on. I mean, who does that? Who let somebody's steal from them and keeps them on the payroll anyways, to give them another chance. And, and, and, and this is how it ends up, but just understanding that it was all your doing. You know, you, you decided to go down this path. You you through the hand grenade into everything. I was, I was open. It was hoping it was going to right up, until yesterday. "

95. After listening to the Voicemail Message, Ms. Vincenti “was blank, like numb” and did not know how to process what was happening. (Vincenti II)

TERMINATION FROM THE EXCHANGE

96. Mr. Smith terminated Ms. Vincenti from her employment in the Voicemail Message left on June 25, 2018. (Exhibit 6 & 7)
97. I do not credit Mr. Smith’s testimony that one of the reasons he terminated Ms. Vincenti was because she took \$40 from the cash register, because the \$40 incident occurred approximately six months prior to the termination and did not result in The Exchange issuing any discipline to Ms. Vincenti. (Peter Smith III)
98. Based on the Voicemail Message, I do not credit Mr. Smith’s testimony that one of the reasons Mr. Smith terminated Ms. Vincenti was because of “the way she was treating him and asking for more money.” (Peter Smith III) While I do credit the testimony that Ms.

Vincenti was seeking from the Smiths further advances for Living Expenses, I do not credit Mr. Smith's assertion that The Exchange terminated her employment because she was asking that the Smiths continue their practice of loaning her monies for Living Expenses.

VICTIM WITNESS STATEMENT

99. On July 6, 2018, Ms. Vincenti submitted a signed Victim Witness Statement to the Plymouth Police Department ("PPD"). The Victim Witness Statement states that: (1) on May 26, 2018, Ms. Vincenti and Mr. Smith were in the back room of The Exchange and Mr. Smith grabbed Ms. Vincenti's breast; (2) Ms. Vincenti immediately said, "What the hell are you doing. Knock it off"; (3) during this assault, Mr. Smith told Ms. Vincenti that she "shouldn't hide [her] breasts because they are beautiful"; (4) Mr. Smith grabbed Ms. Vincenti's breast a second time; and (5) Ms. Vincenti told Mr. Smith to "cut the fucking shit" and walked away. (Exhibit 5)
100. The Victim Witness Statement also states that: (1) Since August 2017, Mr. Smith sent Ms. Vincenti inappropriate sexual pictures of himself and of his wife, Mrs. Smith; (2) Ms. Vincenti received multiple sexually graphic texts until the beginning of May 2018 and that "at this point", Ms. Vincenti told Mr. Smith to stop; (3) for the next few weeks Mr. Smith became very distant and that it was not until the last week in May that Mr. Smith began to talk with Ms. Vincenti; (4) Mr. Smith said he was sorry and told Ms. Vincenti he would respect her; and (5) the following day, Mr. Smith grabbed Ms. Vincenti's breasts. (Exhibit 5)
101. The Victim Witness Statement does not include: (a) a description of the Interaction with Mrs. Smith; (b) a statement regarding Ms. Vincenti's receipt of monies for Living Expenses; or (c) a reference to the Masturbation Incident. (Exhibit 5)
102. Approximately a year after Ms. Vincenti filed the Victim Witness Statement, the PPD asked Ms. Vincenti if she wished to pursue the matter involving Mr. Smith, and Ms. Vincenti decided not to pursue the criminal matter because she did not want to get another lawyer involved in a criminal trial and "didn't want to add more chaos to [her] plate." (Vincenti II)

LOST BACKPAY

103. The \$15/hour rate of compensation paid to Ms. Vincenti to work at The Exchange was consistent with the rate paid to other employees at The Exchange.¹⁷ (Exhibit 3)
104. There was no evidence presented as to whether Ms. Vincenti was unemployed or partially employed or fully employed from June 28, 2018¹⁸ to October 3, 2021.
105. The Smiths loaned the monies for Living Expenses to Ms. Vincenti and expected that Ms. Vincenti would pay them back. (Peter Smith III) I do not credit Ms. Vincenti's testimony that the monies for Living Expenses was compensation for her work at The Exchange. (Vincenti II)¹⁹
106. There was no evidence of the period of the loan of monies for Living Expenses, the interest rate applied to the loan (if any), what the market interest rate for loans was at the time the loan was made, or Ms. Vincenti's credit score. (Vincenti II)
107. The use of the Smiths' Toyota FJ was a benefit of Ms. Vincenti's employment with The Exchange.
108. There was no evidence as to the year or condition of the Toyota FJ. The use of the Smiths' car had significant emotional value to Ms. Vincenti which she described as follows:
- I couldn't put a price tag on it. I mean, it was -- it meant I was able to get my children. It meant I was able to go to the grocery store to put food in my house to have -- just have my children, the shared custody agreement that was in place with my ex-husband not be revoked or taken or any of their life being disrupted at all anymore or --or in any -- any more than it already had been with the divorce. It meant that I didn't have to -- I mean, the monetary value, I -- I couldn't put a number on it. It meant more to me than -- it just -- it was my world with my kids. I was able to see them. I was able, like I said, go to the grocery store. I was able to take them to their sports events. Again, you know, so that they didn't miss a beat in their lives. (Vincenti II)²⁰

¹⁷ The Exchange Payroll Records document a paycheck to an employee who worked 36.75 Total Hours and received Total Earnings of \$551.25: \$15/hour. (Exhibit 3 at 2) The Exchange Payroll Records document a paycheck given to an employee who worked 40.50 Total Hours and received Total Earnings of \$607.50: \$15/hour (Exhibit 3 at 3)

¹⁸ See Finding of Fact 113: Ms. Vincenti was unemployed and in the hospital until June 28, 2018.

¹⁹ Ms. Vincenti acknowledged that the monies for Living Expenses were put "on a tab." (Vincenti II)

²⁰ Complainants' Post-Hearing Brief posits that the value for the use of the Toyota FJ is \$50/day, but this does not constitute evidence nor was it filed in accordance with Commission regulations. 804 CMR 1.12 (17) It shall not be considered.

109. After June 25, 2018, Ms. Vincenti paid moving expenses, storage expenses and an outstanding utility bill, but there was no evidence as to the amount of money that Ms. Vincenti spent on expenses for moving or storage or the outstanding utility bill. (Vincenti II)

MS. VINCENTI SUFFERED EMOTIONAL DISTRESS

110. In or about April 2017, Ms. Vincenti began treating with a therapist, Julie Love. (Exhibit 6) Ms. Love has treated Ms. Vincenti for emotional distress related to what occurred during her employment at The Exchange. Ms. Vincenti continues to receive therapy from Ms. Love. (Vincenti II) There was no testimony from Ms. Love or any other mental health care provider, nor were any mental health records offered into evidence.

111. During her employment at The Exchange, Ms. Vincenti felt afraid and coerced by Mr. Smith. (Vincenti II)

112. Ms. Vincenti was upset and frightened by Mr. Smith's Voicemail Message and felt "blank", "numb" and unable to process what was happening upon hearing it. (Vincenti II)

113. On June 25, 2018, Ms. Vincenti felt depressed, fearful and worthless. Ms. Vincenti tried to kill herself by ingesting a bottle of blood pressure medication and a bottle of an old psychiatric medication. Her boyfriend, a police officer, found her and took her to the hospital where her stomach was pumped. Ms. Vincenti spent forty-eight hours in the Intensive Care Unit ("ICU") and was released from the hospital with her boyfriend after a total of three days. (Vincenti II; Exhibit 6) I infer from this testimony that Ms. Vincenti was in the hospital June 25, 26, and 27, 2018.

114. After her release from the hospital, she commenced a therapeutic Intensive Outpatient Program, which was held from 9 a.m. to 3 p.m., five days a week, and lasted "roughly five weeks." (Vincenti II; Exhibit 6) I infer from this testimony that Ms. Vincenti completed the Intensive Outpatient Program on or about August 3, 2018 and that she was temporarily incapacitated and unable to work from June 25, 2018 to August 3, 2018.

115. After Ms. Vincenti was terminated from The Exchange, she had difficulty sleeping and experienced bouts of insomnia and difficulty eating. (Vincenti II) There was no evidence as to how long these physical manifestations of stress lasted.

116. After the termination, Ms. Vincent felt anxiety-ridden and "in a constant state of fear." She had difficulty "thinking straight." She was concerned about losing her housing, how she

would see her children, and how her husband would perceive her losing her housing.

(Vincenti II) Ms. Vincenti was evicted in August 2018. (Vincenti II)

117. Based on my observations of her demeanor at hearing, Ms. Vincenti continues to be upset and distressed at the way she was treated by Mr. Smith and The Exchange.

III. CONCLUSIONS OF LAW

A. The Exchange Was an Employer Under M.G.L. c. 151B

Ms. Vincenti has the burden of proving that The Exchange was an “employer” under M.G.L. c. 151B. MCAD & Pavlov v. Happy Floors, Inc. & New Floors, Inc., 44 MDLR 9, 12 (2022); Zereski v. American Postal Workers Union, Central Mass. Local 4553, 23 MDLR 270, 277 (2001) An employer does not include an entity “with fewer than six persons in his employ.” M.G.L. c. 151B, § 1(5) In determining whether a respondent employs six or more individuals, M.G.L. c. 151B must “be construed liberally for the accomplishment of its purposes.” M.G.L. c. 151B, § 9; Gunter v. Shapley & Stern, Inc., 2021 WL 243084 at *2 (D. Mass. 2021)

An “employee” is an individual employed by an employer in a full or part time capacity. 804 CMR 3.01 (1) (1995) The “core indicium of employment” is “the commitment to provide services in exchange for remuneration.” Corn v. Brigham and Women's Hosp., 2023 WL 3382986, at *6 (Mass. Super. May 11, 2023), citing Black's Law Dictionary (11th Ed. 2019) (defining employment as “[t]he condition of having a paying job” or “[w]ork for which one has been hired and is being paid by an employer”)

In evaluating whether a person is an employee, the appropriate question is whether there is an employment relationship between the employer and that person – not whether the individual was actually performing work on a particular day or week. Simon Seeding & Sod, Inc. v. Dubuque Human Rights Commission, 895 N.W.2d 446, 464 (Iowa 2017), citing Walters v. Metropolitan Educational Enterprises, Inc., 519 U.S. 202 (1997). If an individual has an employment relationship with the employer – that is, if he or she is on the payroll – the individual is counted as an employee. Simon Seeding, 895 N.W.2d at 464; *see also* Robinson v. Fair Employment & Housing Commission 2 Cal. 4th 226 (1992) (an employer, as defined by the state anti-discrimination statute, need not have five or more employees every day throughout the year to constitute an entity which was “regularly employing” five or more persons) In addition, under Massachusetts law, there is no requisite number of weeks or days that a person must work in a given time period to be counted as an “employee” under M.G.L. c. 151B. *Compare*, M.G.L. c.

151B, §§ 1(5) & (6) *with* 42 U.S.C. §§ 2000e (b) & (f) (Title VII) (defining “employer” as a “person engaged in commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year”) *and* 42 U.S.C. §§ 12111(4) & (5)(A) (ADAAA) (25 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding year)

The relevant timeframe to analyze whether The Exchange had six or more employees is the time period Ms. Vincenti was employed: August 2017 to June 25, 2018. Pavlov, 44 MDLR at 12-13; Tunstall v. Acticell H'W Cosmetics & Weizmann, 22 MDLR 284, 287 (2000), vacated on other grounds, 25 MDLR 301 (2003). In keeping with the liberal construction of Chapter 151B, The Exchange is an employer if at any time during Ms. Vincenti’s employ, it had six or more employees. Pavlov at 12-13. As noted in Pavlov, focusing on a particular date, such as the date of termination, would run afoul of the liberal construction to be applied to Chapter 151B and incentivize an employer on the cusp of employing six persons “to discharge an employee to reduce its work force to five employees, discriminate against an employee and later, ‘when the coast was clear’ increase its work force back to six employees.” Id., citing Terespolsky v. Law Offices of Stephanie K. Meilman, P.C., 2004 WL 333606, at *3 (Mass. Super. 2004)

There were several periods of time during Ms. Vincenti’s employ when six individuals including John worked at The Exchange: from November 12, 2017 to December 9, 2017; February 4, 2018 to March 17, 2018; April 1, 2018 to April 14, 2018; and April 29, 2018 to June 23, 2018. (See Findings of Facts 10-16) This is sufficient to confer “employer” status on The Exchange.

Moreover, when The Exchange’s staffing is viewed pragmatically, it is apparent that from at least November 12, 2017 through the end of Ms. Vincenti’s employment, six individuals were employed by The Exchange. (See Findings of Fact 10 – 16) It is legally immaterial that at times, there were individuals employed by The Exchange who worked several weeks and then went weeks without being scheduled to work, because even when they were not working a particular day, week or weeks, they were in The Exchange’s employ, i.e. they remained committed to provide services to The Exchange in exchange for compensation from The Exchange.²¹ To

²¹ For example, the fact that Ms. Lawrenson and Ms. DeAsi did not work from December 24, 2017 to January 6, 2018 does not strip them of employee status. They were committed to provide services in exchange for remuneration prior to December 24, 2017 and after January 6, 2018.

conclude otherwise would apply a cramped and rigid interpretation of the 6-employee requirement, rather than a broad, remedial one. See Gunter v. Shapley & Stern, Inc., *supra* (declining to add the requirement that at least six employees be employed within Massachusetts, where Chapter 151B is silent as to whether requisite employees must all be employed in the state, and Chapter 151B must be construed liberally)

For these reasons, I conclude that The Exchange employed six or more people during Ms. Vincenti's employment and is an "employer." M.G.L. c. 151B, § 1(5).²²

B. The Exchange and Mr. Smith Sexually Harassed Ms. Vincenti

It is unlawful "for an employer, personally or through its agents, to sexually harass any employee." M.G.L. c. 151B, § 4(16A). Sexual harassment is defined as: sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature when: (a) submission to or rejection of such advances, requests or conduct is made either explicitly or implicitly a term or condition of employment or as a basis for employment decisions ("*quid pro quo*"); or (b) such advances, requests or conduct have the purpose or effect of unreasonably interfering with an individual's work performance by creating an intimidating, hostile, humiliating, or sexually offensive work environment ("hostile work environment"). M.G.L. c. 151B, § 1(18) applies "not only to hiring, firing and compensation, but also to the "terms, conditions or privileges of employment." Gyulakian v. Lexus of Watertown, Inc., 475 Mass. 290, 296 (2016), quoting College-Town Div. of Interco v. MCAD, 400 Mass. 156, 162 (1987) Ms. Vincenti's claims of hostile work environment and *quid pro quo* are addressed below.

1. The Exchange and Mr. Smith Created a Sexually Hostile Work Environment

A sexually hostile or offensive work environment is one that is "pervaded by harassment or abuse," resulting in "intimidation, humiliation, and stigmatization" that poses a "formidable barrier" to the employee's "full participation" in the workplace. Gyulakian v. Lexus of Watertown, Inc., 475 Mass. at 296; Hernandez v. Beautiful Rose Corp. d/b/a Strega Waterfront Restaurant, The Varano Group & Salvatore Firicano, 39 MDLR 127, 130 (2017) To prevail on a claim of a sexually hostile work environment, Ms. Vincenti must establish that she was subjected to verbal or physical conduct of a sexual nature which was both objectively and subjectively

²² Judy Smith self-identified as an "employee" but she was not identified on the work schedules. (Judy Smith III). As I have concluded that The Exchange employed six or more employees during Ms. Vincenti's employment, I decline to address whether Mrs. Smith meets the definition of "employee."

offensive and that had the “purpose or effect of unreasonably interfering with [Ms. Vincenti’s] work performance by creating an intimidating, hostile, humiliating or sexually offensive work environment.” M.G.L. c. 151B, § 1(18); Gyulakian, 475 Mass. at 296.

Mr. Smith targeted Ms. Vincenti with verbal and physical sexual conduct which continued throughout her employment, and included: (1) commenting on Ms. Vincenti’s appearance and her body; (2) requesting permission to fantasize about her while he masturbated; (3) describing in detail that he masturbated while fantasizing about Ms. Vincenti; (4) sending her texts with images of Mr. Smith masturbating; (5) describing in detail sexual acts with Jane Doe; (6) pressuring Ms. Vincenti to allow him to take a shower(s) in her home; (7) showering in Ms. Vincenti’s home; (8) sending Ms. Vincenti a video of Mrs. Smith taking off her clothing; and (9) grabbing Ms. Vincenti’s breasts.

Mr. Smith’s conduct occurred frequently and was demeaning and humiliating to Ms. Vincenti. Mr. Smith’s targeted behavior was particularly severe, intimidating and threatening because Ms. Vincenti was in a uniquely financially dependent relationship with the Smiths, who were paying her salary, loaning her money for Living Expenses, and providing her access to transportation. Ms. Vincenti believed that if she actively protested Mr. Smith’s conduct, she would lose her job, access to the loan of monies for Living Expenses and the use of the Smiths’ car. This fear was well-rooted in reality, as it is what ultimately came to pass. As a result, Ms. Vincenti tolerated, without comment, Mr. Smith’s offensive sexual conduct until April or May 2018. For example, when Mr. Smith came to Ms. Vincenti’s home to shower, Ms. Vincenti felt coerced to allow him to enter the residence because she was financially dependent on the Smiths and she did not feel she could say no. Having established that Mr. Smith’s conduct was subjectively offensive to Ms. Vincenti, I address whether it would interfere with a reasonable person's work performance.

By any reasonable measure, Mr. Smith’s conduct was objectively offensive and sufficiently hostile to interfere with a reasonable person’s work performance. Mr. Smith’s conduct targeted Ms. Vincenti because she is female. Mr. Smith’s conduct occurred consistently and frequently throughout her employment and it escalated into a physical assault. Mr. Smith’s conduct was highly sexually explicit including Mr. Smith’s descriptions of his own sex life and texting sexual images, along with crossing boundaries by taking showers in Ms. Vincenti’s home. Mr. Smith’s conduct would make a female employee reasonably feel threatened and deeply uncomfortable

and interfere with a reasonable person's work performance especially when efforts to stop the sexually explicit conduct and commentary not only failed, but were followed by a physical assault. This severe and humiliating conduct by Mr. Smith created a "formidable barrier" to Ms. Vincenti's full participation in the workplace and negatively altered the conditions of employment of a reasonable employee under the circumstances.

As Mr. Smith was an owner and a supervisor, The Exchange is strictly liable under c. 151B to Ms. Vincenti for Mr. Smith's creation of a sexually hostile work environment. College-Town Div. of Interco v. MCAD, 400 Mass. 156, 165-168 (1987) As an individual perpetrator of sexual harassment, Mr. Smith is individually liable for sexually harassing Ms. Vincenti. M.G.L. c. 151B, § 4(16A). Thus, I find The Exchange and Mr. Smith jointly and severally liable to Ms. Vincenti for hostile work environment sexual harassment pursuant to Section 4(16A) of M.G.L. c. 151B.

2. **The Sexual Harassment in this case is more Appropriately Characterized as Hostile Work Environment Than Quid Pro Quo Sexual Harassment**

To establish *quid pro quo* sexual harassment, Ms. Vincenti must demonstrate that (1) she was subjected to sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature; and (2) the submission to or rejection of such advances, requests or conduct was either explicitly or implicitly made a term or condition of employment or a basis for employment decisions. Ms. Vincenti has demonstrated that she was subjected to verbal and physical conduct of a sexual nature. Whether the submission to or rejection of such conduct was explicitly or implicitly made a term or condition of employment or a basis for employment decisions is the remaining question. By its terms, this element of a *quid pro quo* claim requires that the employee show that the terms or conditions of employment were adversely changed because the employee rejected the conduct. Canton v. Biga Wholesale, Inc. et al., 39 MDLR 63, 68 (2017)

If Ms. Vincenti establishes that the termination of her employment or discontinuation of her use of the Smiths' car was because she objected to Mr. Smith's conduct, she will demonstrate a *quid pro quo*. Shanley v. Pub 106, Inc., 22 MDLR 333, 335-36 (2000) If her termination and the discontinuation was for a legitimate, non-discriminatory reason, Ms. Vincenti will not establish *quid pro quo* harassment. Gilman v. Instructional Systems, Inc., 22 MDLR 237, 240 (2000)

I do not find that either the decision to terminate Ms. Vincenti's employment or to discontinue Ms. Vincenti's use of the Smiths' car was due to her unwillingness to tolerate Mr.

Smith's sexually hostile conduct. First, there was no evidence that after Ms. Vincenti communicated her protest to Mr. Smith in April or May 2018 regarding his unwelcome and offensive conduct that the terms or conditions of her employment changed or that her rejection of this conduct formed the basis of an employment decision. Ms. Vincenti continued to use the Smiths' car and receive her compensation. Second, when Mr. Smith physically assaulted Ms. Vincenti on May 26, 2018 and she vigorously rejected his advances, Ms. Vincenti remained employed and there was no evidence that the terms or conditions of her employment changed or were the basis for an employment decision. Ms. Vincenti continued to use the Smiths' car and receive her compensation. Third, it was only when Ms. Vincenti complained to Mrs. Smith on June 24, 2018 about Mr. Smith's conduct that her employment was terminated and ability to use the Smiths' car discontinued, in retaliation for her complaint, as set forth below. Given these facts, Ms. Vincenti has failed to establish a requisite element to a claim of *quid pro quo* sexual harassment and such claim is dismissed.²³

C. **The Exchange and Mr. Smith Retaliated Against Ms. Vincenti**

Under M.G.L. c. 151B, § 4(4), it is unlawful for a person or employer to “discharge, expel or otherwise discriminate” against any person because “[s]he has opposed any practices forbidden under [Chapter 151B].” Psy-Ed Corp. v. Klein, 459 Mass. 697, 707 (2011) Accordingly, both The Exchange, and Mr. Smith individually, may be liable under Section 4(4). To prove retaliation under Section 4(4), Ms. Vincenti must prove that: (a) she reasonably and in good faith believed that The Exchange or Mr. Smith were engaged in wrongful discrimination; (b) she acted reasonably in response to that belief through acts meant to protest or oppose such discrimination (protected conduct); (c) The Exchange or Mr. Smith took adverse action against Ms. Vincenti; and (d) the adverse action was in response to the protected conduct (causation). Verdrager v. Mintz, Levin, Cohn, Ferris, Glovsky & Popeo, P.C., 474 Mass. 382, 405–06 (2016); Ambroise v.

²³ I also reject and dismiss Ms. Vincenti's *quid pro quo* claim that because Ms. Vincenti objected to Mr. Smith's sexually harassing conduct, Mr. Smith discontinued the practice of loaning her monies for Living Expenses thereby denying her “a term or condition of employment.” There was no evidence that Ms. Vincenti's acceptance of the job offer, or her continued commitment to work at The Exchange, was conditioned on the Smiths' willingness to loan her money for Living Expenses. While the Smiths' loans may have contributed to a dynamic by which Ms. Vincenti was afraid to protest Mr. Smith's sexual conduct, they were not employment benefits nor were they obligations that the parties owed to one another as part of their employment relationship.

Law Office of Howard Kahalas and Howard Kahalas, 45 MDLR 67, n. 13 (2023) Respondents contend that Ms. Vincenti cannot show any of these elements of retaliation.

Ms. Vincenti's reasonable and good faith belief was that Mr. Smith's verbal and physical sexual conduct -- ranging from commenting on Ms. Vincenti's body, to coercing Ms. Vincenti to send him a topless photograph, to requesting permission to masturbate to her, to physically assaulting her -- was unlawful sexual harassment.

Ms. Vincenti protested and opposed the sexual harassment on three occasions. In April or May 2018, she raised her objections to Mr. Smith's conduct directly to Mr. Smith. On May 26, 2018, she again protested to Mr. Smith, and on June 24, 2018, she complained to Mrs. Smith. Ms. Vincenti's three attempts were designed to protest and oppose the sexual harassment to which she had been subjected, and I find that Ms. Vincenti acted reasonably in response to her belief that she was being sexually harassed by taking steps to protest and oppose the harassment. These efforts were reasonably intended to halt Mr. Smith's targeted, offensive sexual conduct.²⁴

Within 24 hours of Ms. Vincenti's complaint to Mrs. Smith -- which represented her third attempt to stop Mr. Smith from engaging in sexually hostile conduct - Ms. Vincenti's suffered adverse actions: termination of employment and discontinuation of use of the Smiths' car.

Ms. Vincenti has proven that there was a "causal connection" between her protest and complaint to Mrs. Smith and the termination of her employment and discontinuation of use of the Smiths' car. Ms. Vincenti's protest to Mrs. Smith that she did not want to work in a sexually discriminatory and harassing environment was the determinative factor in the decision to terminate her employment and discontinue her use of the Smiths' car. Abramian v. President & Fellows of Harvard College, 432 Mass. 107, 121-22 (2000); Psy-Ed Corp. v. Klein, 459 Mass. 697, 706-707 (2011); Chadwick v. Duxbury Public Schools, 97 Mass.App.Ct. 1106 (2020) (1:28) A retaliatory connection between protected conduct and adverse employment action may be inferred where "adverse action is taken against a satisfactorily performing employee in the immediate aftermath of the employer's becoming aware of the employee's protected activity."

²⁴ Describing in detail one's sex life with an employee can, in appropriate circumstances, constitute sexual harassment, Mills and Ronan v. A.E. Sales, Inc. and Prete, 35 MDLR 163 (2013), and therefore, reporting such conduct is protected activity. In contrast, reporting that Mr. Smith was engaged in an extramarital relationship is not, in itself, protected activity. Ms. Vincenti's disclosure to Mrs. Smith included that Mr. Smith was engaging in highly sexualized, explicit communications with Ms. Vincenti about his extramarital relationship and was protected activity.

Mole v. University of Mass., 442 Mass. 582, 592 (2004) Prior to June 24, 2018, Mr. Smith generally viewed Ms. Vincenti as a good employee, promoted her on his radio show, gave her managerial responsibilities, and showed that he trusted her by collaborating to launch a business. Within twenty-four (24) hours of Ms. Vincenti's June 24, 2018 complaint to Mrs. Smith about the sexually hostile work environment at The Exchange, Mr. Smith terminated Ms. Vincenti's employment and took away the car that Mr. Smith had previously allowed her to use. The immediacy with which these actions followed Ms. Vincenti's disclosure to Mrs. Smith is notable, particularly given Ms. Vincenti's competent prior work performance, and provides evidence of retaliatory animus. Further evidence of retaliatory animus is the Voicemail Message demonstrating that Mr. Smith was aware that Ms. Vincenti spoke with Mrs. Smith, that Ms. Vincenti had accused him of wrongdoing ("that thing you think I did"), that Mr. Smith was very angry about this, and that by going "down this path", Ms. Vincenti had thrown a hand grenade into everything. Mr. Smith's Voicemail Message further reflects that prior to Ms. Vincenti speaking with Mrs. Smith, Mr. Smith was hoping things would work out "right up until yesterday." The admissions in the Voicemail Message are telling, as they undeniably show that before Ms. Vincenti's protest to Mrs. Smith, she was an employee in good standing, and that after she protested Mr. Smith's sexual harassment to Mrs. Smith, she was persona non grata.

In examining whether there were any non-retaliatory reasons for Mr. Smith's termination of Ms. Vincenti's employment and taking away the car that Mr. Smith had previously allowed her to use, I have discredited Mr. Smith's testimony that he terminated Ms. Vincenti's employment because she threatened to tell his wife stories about him if he did not immediately advance her money for Living Expenses. I have also found unpersuasive the argument that Respondents terminated Ms. Vincenti because she took \$40 from the cash register based on: (1) the fact that the incident occurred six months prior to the termination decision; and (2) the fact that there was no effort to discipline Ms. Vincenti at the time of the incident, showing that at that time, the incident did not particularly concern the Smiths or The Exchange. While not raised by Mr. Smith, who denied having a sexual relationship with Jane Doe at the time Ms. Vincenti was employed at The Exchange, I have considered the possibility that Mr. Smith terminated Ms. Vincenti and took away her use of the Smiths' car because she disclosed to his wife that he was in a sexual relationship with Jane Doe. Even assuming *arguendo* that this disclosure played a role in Mr. Smith's decision to terminate Ms. Vincenti's employment and discontinue her use of

the Smiths' car, the weight of the evidence demonstrates that the determinative factor in Mr. Smith's decision to terminate Ms. Vincenti's employment and cease her use of the Smiths' car was Ms. Vincenti's protest to Mrs. Smith about Mr. Smith's sexual harassment.

Ms. Vincenti has proven all of the elements of her retaliation claim. I find that Mr. Smith, individually, and The Exchange, are jointly and severally liable to Ms. Vincenti pursuant to Section 4(4) of M.G.L. c. 151B for retaliation.

D. Individual Liability

Mr. Smith is individually liable to Ms. Vincenti pursuant to M.G.L. c. 151B, § 4(16A) and c. 151B, § 4(4), as described above. Mr. Smith is also individually liable to Ms. Vincenti under M.G.L. c. 151B, § 4(4A), which prohibits any person from interfering with an individual in the exercise of rights protected under c. 151B. Individual liability under Section 4(4A) attaches where an individual who has the authority or a duty to act on behalf of an employer has acted in deliberate disregard of an employee's rights. MCAD & Osorio v. Standhard Physical Therapy, Vincent Bulega & Tambi, 40 MDLR 49, 53 (2018), citing Woodason v. Town of Norton School Committee, 25 MDLR 62, 64 (2003); MCAD & Harper v. Z2A Enterprises, Inc., d/b/a Half Time Sports Bar & Grill and Abdullah, 38 MDLR 164, 167 (2016) Mr. Smith was the perpetrator of the acts of harassment against Ms. Vincenti, and acted in deliberate disregard of Ms. Vincenti's right to have a workplace free from sexual harassment. This is reflected by his acts of harassment, which were extreme, his refusal to stop such conduct when confronted, and his decision to terminate her employment and cease her use of the Smiths' car because she opposed his sexually harassing conduct. Mr. Smith is jointly and severally liable for his unlawful acts pursuant to Section 4(4A). Deeter v. Bravo's Pizzeria and Restaurant, 23 MDLR 167, 170 (2001) (supervisor who co-owned business and engaged in sexual harassment held individually and jointly liable with employer)

IV. REMEDIES

A. Backpay and Related Compensatory Damages

Upon a finding of discrimination, the Commission is authorized to award damages to make the victim whole. M.G.L. c. 151B, § 5. The relief awarded may or may not include lost wages. Everett Industries, Inc. v. Massachusetts Comm'n Against Discrimination, 49 Mass.App.Ct. 1116 (1:28), citing M.G.L. c. 151B, § 5; MCAD & Joyce, Jr. v. CSX Transportation, Inc., 42 MDLR 113, 118 (2020) (award of back pay not required upon a discrimination finding) The

factfinder has broad discretion to effectuate the goals of M.G.L. c. 151B. Id. In this case, Ms. Vincenti seeks four types of back pay damages: 1) Hourly Back Pay (\$31,200 per year based on Ms. Vincenti's \$15 hourly pay); 2) Monies for Living Expenses: Rent (\$13,200 per year representing \$1,100/month in rent); 3) Monies for Living Expenses: Other Expenses (\$39,000 per year representing \$750/week in "other expenses"); and 4) Use of Vehicle (\$18,275.19 per year representing a value estimation for the use of the Smiths' car). Complainants' Post-Hearing Brief, pp. 19-20. Ms. Vincenti seeks back pay for 5.16 years: from the time of termination (June 25, 2018) to the date the Post-Hearing Brief was filed (August 2, 2023) and therefore, seeks a total of \$524,643.98 in back pay damages.

Hourly Back Pay

I find that Ms. Vincenti was unable to work from June 25, 2018 to August 3, 2018, and that Ms. Vincenti's temporary incapacity to work, was a natural and probable consequence of Respondents' unlawful conduct. I base this on the fact that immediately after Mr. Smith terminated Ms. Vincenti's employment, Ms. Vincenti was hospitalized as a result of a suicide attempt from June 25 to June 28, 2018 and that she subsequently participated in an outpatient therapeutic program that lasted six hours a day from June 29, 2018 to August 3, 2018. Ms. Vincenti is entitled to back pay damages from June 25, 2018 to August 3, 2018 (5.57 weeks). During this period of time, Ms. Vincenti was incapable of seeking and holding down employment because of Respondents' unlawful acts. Her distress during this time-period was directly attributable to her termination and resulted in a temporary incapacity to work. Dauwer & MCAD v. Coca-Cola Refreshments USA, Inc. & Woodford, 41 MDLR 130, 138 (2019) At a compensation rate of \$390/week, Ms. Vincenti is entitled to \$2,172.30 in back pay damages.

I decline to award hourly back pay sought for the time period from August 4, 2018 to October 3, 2021. In support of her claim for hourly back pay from August 4, 2018 to October 3, 2021, Ms. Vincenti presented no evidence as to: (a) her employment history prior to working at The Exchange; (b) whether she was employed in any capacity between August 4, 2018 and approximately October 3, 2021;²⁵ and (c) the compensation she has received in her current

²⁵ I do not find Ms. Vincenti's testimony that she has been "back to work" for about a year and a half sufficient to infer that she did not work at any point between August 4, 2018 and October 3, 2021. Ms. Vincenti's testimony could mean that during the August 4, 2018 to October 3, 2021 time period, she was working part-time and then went "back to work" in a full-time status, working in a position other than a dental hygienist, not working at all or that she worked full-time during most of this time period and then

employment as a dental hygienist. While “[t]he calculation of back pay may necessarily involve some degree of approximation and imprecision”, Griselda Canton v. Biga Wholesale, Inc. et al., 42 MDLR 75, 77 (2020) (citations omitted), the record contains insufficient evidence to support Ms. Vincenti’s claim of hourly back pay from August 4, 2018 to October 3, 2021. At a minimum, an employee seeking lost wages for unlawful termination must offer evidence that there was in fact, a period of unemployment (or partial unemployment) and how long this period lasted. Calculating back pay under these circumstances would require me to engage in speculation.²⁶ As I am unable to make a reasonably accurate assessment of the amount due, I decline to award Ms. Vincenti hourly back pay for the time period between August 4, 2018 and October 3, 2021.²⁷ Finally, I decline to award backpay after Ms. Vincenti obtained employment as a dental hygienist on or about October 4, 2021.

returned “back to work” after a break of unspecified duration that theoretically, could be as little as a week.

²⁶ MCAD & Daye v. Rte. 2 Hyundai, 41 MDLR 111, 115 (2019) (declining to award back pay from termination to date of hearing where record was spotty and incomplete regarding subsequent jobs and income complainant earned in mitigation of damages); MCAD & Sullivan v. Jimbos South, 28 MDLR 57, 62-63 (2006) (declining to award back pay where factfinder was unable to make a reasonably accurate assessment of back pay due); MCAD & Cashman v. The Surf Club, d/b/a Zeke’s, 24 MLDR 323, 324 (2002) (too speculative to award lost wages where testimony regarding employment history and earnings too vague to determine when complainant last worked or what he earned)

²⁷ In determining that Ms. Vincenti failed to provide sufficient evidence from which to calculate hourly back pay from August 4, 2018 to October 3, 2021, I have taken into account the following testimony:

Q. As you sit here today, until when you were fired from the Exchange and when that judgment entered, do you recall if you had any income during that time?

A. No. (Vincenti II)

Even if I were to construe this question as asking Ms. Vincenti if she received any income between the time The Exchange fired her and the time that a housing judgment was entered against her, and even if I were to construe her answer to state that she had no income during that time, the testimony would still be unavailing because the record does not contain evidence of when the judgment entered. The reference in Complainant’s Post Hearing Brief to when the judgment entered in the housing action is not evidence and cannot be considered in assessing back pay. Moreover, the statement in the Complainants’ Post-Hearing Brief seeking leave to “offer additional support for her claim of damages in this regard whereas these damages are the direct and proximate result of Mr. Smith’s unlawful behavior” is procedurally deficient (804 CMR 1.12 (17)) and granting this request would be unduly prejudicial to Respondents.

Monies for Living Expenses

Ms. Vincenti takes the position that as part of her lost compensation, she is entitled to the continuation of the Monies for Living Expenses (both for “other expenses” and rent). I reject this extreme position. The Monies for Living Expenses were loaned to Ms. Vincenti. They were not a benefit or component of her compensation for working at The Exchange and could not be compensable as a natural and probable consequence of the discriminatory and retaliatory acts. In contrast, the discontinuation of Ms. Vincenti’s access to a loan of the Monies for Living Expenses was a “natural and probable consequence” of a discriminatory or retaliatory act and would be compensable if its value was established. See Quarterman v. City of Springfield, 91 Mass.App.Ct. 254, 262 (2017) (by analogy: lost profits could, if supported by the evidence, constitute compensatory damages for a violation of M.G.L. c. 151B)

In this case, however, the value of the access to the loan was not established. While proof of the value of a loan need not be presented with mathematical precision, there must be some evidence presented to support its value. Here, there was no evidence of the period of the loan of Monies for Living Expenses, no evidence of the interest rate applied to the loan (if any), no evidence of what the market interest rate was at the time the loan was made, and no evidence of Ms. Vincenti’s credit score at material times.²⁸ Evaluating the value of the access to the loan of Monies for Living Expenses to Ms. Vincenti would require guesswork. For these reasons, I decline to award damages for loss of access to the Smiths’ loan of the Monies for Living Expenses (“other expenses” and rent).

Use of Vehicle

Based on an absence of evidence proving the market value of Ms. Vincenti’s use of the Smiths’ car, I decline to award back pay damages for Ms. Vincenti’s loss of the use of the Smiths’ car. There was no fact-based estimate or statement of the economic value of the use of the car and no evidence of what it would have cost to lease a similar car. Kolb v. Goldring, Inc., 694 F.2d 869, 873-74 (1st Cir. 1982) (evidence in ADEA case did not provide basis for award of damages for loss of use of company car). As there was insufficient evidence as to the market

²⁸ Ms. Vincenti testified credibly that the abrupt cessation of access to the Smiths’ loan of Monies for Living Expenses and the use of their car had a significant emotional impact on her, which I have considered and addressed below in the emotional distress damage section.

value of the use of the Smiths' car, I decline to award back pay damages for the loss of Ms. Vincenti's Use of the Car.

B. Emotional Distress Damages

Upon a finding that the respondents have committed an unlawful act prohibited by M.G.L. c. 151B, the Commission is authorized to award damages for emotional distress resulting from respondents' unlawful conduct. Stonehill College v. MCAD, 441 Mass 549 (2004) Awards for emotional distress must "be fair and reasonable, and proportionate to the distress suffered." Id. at 576. Some of the factors to be considered are: "(1) the nature and character of the alleged harm; (2) the severity of the harm; (3) the length of time the Complainant has suffered and reasonably expects to suffer; and (4) whether the complainant has attempted to mitigate the harm...." Id. The Complainant "must show a sufficient causal connection between the respondents' unlawful act and the complainant's emotional distress." Id. Complainant's entitlement to an award of monetary damages for emotional distress does not need to be based on expert testimony; it can be based solely on complainant's testimony as to the cause of the distress. Proof of physical injury or psychiatric consultation is not necessary to sustain an award for emotional distress. Id.

From the start of her employment at The Exchange, Ms. Vincenti felt fearful, coerced and humiliated by Mr. Smith. Because of the extreme degree of financial dependence she had on the Smiths, Ms. Vincenti felt she had no alternative but to tolerate Mr. Smith's demeaning and degrading conduct. It was apparent from observing Ms. Vincenti testify that she was embarrassed and humiliated by the sexual harassment she experienced while working at The Exchange. The events that followed Ms. Vincenti's protest to Mrs. Smith had a devastating impact on Ms. Vincenti. The Voicemail Message terminating Ms. Vincenti's employment and threatening arrest in front of her children left Ms. Vincenti upset and frightened and feeling "numb", "blank" and unable to process what was happening. The use of the Smiths' Toyota FJ was the linchpin which permitted Ms. Vincenti to actively participate in her children's lives, and its abrupt removal, as part and parcel of her termination, caused Ms. Vincenti great distress. She felt depressed, fearful and worthless and tried to kill herself by ingesting two bottles of medication. She spent three days in the ICU and after her release, participated in a 5-week therapeutic Intensive Outpatient Program. The distress Ms. Vincenti experienced after her termination took a continued physical toll on her, affecting her sleep, causing insomnia and causing her difficulty eating. Ms. Vincenti had such high levels of anxiety that she described

herself as “in a constant state of fear.” Ms. Vincenti’s practical concerns included obtaining housing, how she would see her children without a vehicle, and how her ex-husband would perceive her losing her housing. Based on her demeanor at hearing, Ms. Vincenti continues to be upset and distressed at the way she was treated at The Exchange. Ms. Vincenti continues to mitigate her damages with therapy. When she started working at The Exchange, Ms. Vincenti had significant life challenges, including a protracted divorce, a complete depletion of financial resources, a need to move, and parenting responsibilities for three children. I have not compensated her for those stressors.

I find that Ms. Vincenti is entitled to an award of \$80,000.00 to compensate her for the emotional distress she suffered, and continues to suffer from, as a consequence of Respondents’ unlawful actions.

V. ORDER

For the reasons detailed above, and pursuant to the authority granted me under Section 5 of Chapter 151B, I order the following:

1. Cease and Desist: Respondents, The Plymouth Exchange and Peter Smith, shall immediately cease and desist from sexual harassment, sex discrimination and retaliation in employment.
2. Compensatory Damages: Respondents, The Plymouth Exchange and Peter Smith, are jointly and severally ordered to pay to Lisa Vincenti back pay damages in the amount of \$2,172.30 with interest thereon at the rate of 12% per annum from the date the Complaint was filed with the Commission until such time as payment is made or until this Order is reduced to a Court judgment and post-judgment interest begins to accrue.
3. Emotional Distress Damages to Ms. Vincenti: Respondents, The Plymouth Exchange and Peter Smith, are jointly and severally ordered to pay to Lisa Vincenti emotional distress damages in the amount of \$80,000 with interest thereon at the rate of 12% per annum from the date the Complaint was filed with the Commission until such time as payment is made or until this Order is reduced to a Court judgment and post-judgment interest begins to accrue.
4. Training: Within sixty (60) days of receipt of this decision, Peter Smith is ordered to contact the MCAD’s Director of Training to schedule an individualized (non-group) training on sexual harassment and retaliation which shall be held within one hundred and twenty (120) days of the receipt of this decision. The training shall take place at one of the offices of the Massachusetts Commission Against Discrimination. For purposes of enforcement, the Commission shall retain jurisdiction over training requirements. Mr. Smith and/or The Exchange shall be responsible for all training fees assessed for this training.

VI. NOTICE OF APPEAL

This decision represents the final order of the Hearing Officer. Any party aggrieved by this Order may appeal this decision to the Full Commission. To do so, a party must file a Notice of Appeal within 10 days of receipt of this decision and file a Petition for Review within 30 days of receipt of this decision. 804 CMR 1.23 (2020). If a party files a Petition for Review, the other party has the right to file a Notice of Intervention within ten days of receipt of the Petition for Review and shall file a brief in reply to the Petition for Review within 30 days of receipt of the Petition for Review. 804 CMR 1.23 (2020) All filings referenced in this paragraph shall be made with the Clerk of the Commission with a copy served on the other party.

VII. PETITION FOR ATTORNEY'S FEES AND COSTS

Any petition for attorney's fees and costs for Complainants' Counsel shall be submitted to the Clerk of the Commission within 15 days of receipt of this decision. Pursuant to 804 CMR 1.12 (19)(2020), such petition shall include detailed, contemporaneous time records, a breakdown of costs and a supporting affidavit. Respondents may file a written opposition within 15 days of receipt of said petition. All filings referenced in this paragraph shall be made with the Clerk of the Commission with a copy served on the other party.

So ordered this 28th day of February, 2024.

Simone Liebman

Simone R. Liebman
Hearing Officer