

**COOK COUNTY COMMISSION ON HUMAN RIGHTS**

69 West Washington Street, Suite 3040  
Chicago, Illinois 60602

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Katherine PORRECA, Complainant	)	
	)	
v.	)	Case No. 2014E011
	)	
Dr. Mark ANDERSON, d/b/a SOUTH	)	Entered: July 10, 2015
SUBURBAN DENTAL & SLEEP CENTER,	)	
Respondent	)	

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**ORDER OF DISMISSAL**

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On June 30, 2014, Complainant Katherine Porreca (“Porreca”) filed a complaint with the Cook County Commission on Human Rights (“Commission”) against her former employer, Respondent Dr. Mark Anderson d/b/a South Suburban Dental & Sleep Center (the “Center” or “Respondent”). Porreca alleges that Dr. Mark Anderson (“Anderson”) sexually harassed her and then terminated her employment, alternatively for refusing his advances or complaining about his conduct, potentially violating both the anti-harassment and anti-retaliation provisions of the Cook County Human Rights Ordinance (“Human Rights Ordinance”). *See* Cook County Code of Ordinances (“County Code”), §§ 42-35(e), 42-41(a).

The Commission conducted an extensive investigation of Porreca’s allegations to determine if there is sufficient evidence to support a legally actionable claim for sexual harassment under either a *quid pro quo* or hostile environment theory. *See* Compl. ¶¶ 12, 16. During the course of the Commission’s investigation, Porreca conceded that Anderson never explicitly requested sexual favors as a condition of her continued employment, and the text messages Porreca submitted cannot reasonably be interpreted as an implicit request for the same. Similarly, Anderson’s conduct towards Porreca, which included a number of unwanted touches – though undoubtedly unprofessional – was not sufficiently severe or pervasive as to be unlawful. In addition, the Commission also investigated the circumstances surrounding Porreca’s termination some four months after what Porreca characterizes as her opposition to sexual favoritism at the Center, but the evidence fails to support a causal link between Porreca’s conduct and her termination. *See id.* at ¶¶ 11, 16. For the reasons set out below, the Commission now dismisses Porreca’s complaint for a lack of substantial evidence of a violation of the Human Rights Ordinance.

**BACKGROUND**

Porreca worked for Anderson as the Office Manager of the Center from approximately July 25, 2013 to April 23, 2014. Compl. ¶¶ 3, 15; Resp. ¶¶ 3, 15.

## *The Hiring Process*

Porreca obtained the position through her mother. Porreca's mother worked at the Center as a temporary receptionist for several months beginning in May 2013, while Anderson was looking for a permanent replacement for his receptionist of twenty-five years. Pos. Stmt., p. 2.

During this period, on one occasion, Porreca spent a few hours at the Center helping her mother at the front desk with administrative work. *Id.*; Supp. Cp. Q. Resp. No. 2 (Apr. 28, 2015). At Porreca's mother's suggestion, Anderson agreed to meet with Porreca to discuss potential employment opportunities. *Id.*

Subsequently, on Thursday, July 17, 2013, Porreca went out for lunch with Anderson and her mother. Porreca Interview (Aug. 12, 2014). Anderson asked Porreca about her work experience, and Porreca's mother re-asserted her recommendation that Anderson hire her daughter. *Id.*

Anderson gave Porreca a second interview, just a few days later, on Sunday, July 21, 2013. Compl. ¶ 5; Resp. ¶5. This time they met without Porreca's mother around 6:00 p.m. at another restaurant. *Id.* The parties' recollections of this meeting differ.

As Porreca described the interview, Anderson had a drink and asked her several questions that she considered to be inappropriate in regards to Porreca's relationship with her ex-boyfriend.<sup>1</sup> Compl. ¶ 5; Porreca Interview (Aug. 12, 2014). Porreca also asserted that Anderson talked about his divorce during the interview. *Id.*

Anderson casts a different light on this pre-hire meeting. Anderson explained that Porreca had suggested the meeting location because it was her favorite restaurant and centrally located between them. Pos. Stmt., p. 2; Anderson Interview (Nov. 14, 2014). Anderson claims that Porreca offered personal information about her family and her ex-boyfriend without prompting, and had a drink as well. Anderson Interview (Nov. 14, 2014). Anderson characterized the meeting as less of a formal interview and more of a "get[ting] acquainted" or attempt to "see if [they] fit together." *Id.* Hence, Anderson recalls that they discussed his management style and the atmosphere of the office, as well as Porreca's career goals and the positions available. Pos. Stmt., p. 2.

Whatever the exact nature of the exchange at the restaurant, Porreca texted Anderson at 10:43 p.m. that night to thank him for meeting with her and for dinner. Investigation Report ("Inv. Rep."), Ex. G at 1 (July 21, 2013 text message from Porreca to Anderson). The documents provided to the Commission show Anderson as responding:

Well your [sic] very welcome. Time slipped by very quickly, was comfortable and easy conversation and I trust it would be that way working as well. Thank you for taking your personal time as well

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<sup>1</sup> Porreca believes that her mother told Anderson about Porreca's broken engagement. Porreca Interview (Aug. 12, 2014). Without getting into the specifics of what exactly he already knew, Anderson confirmed in his interview with Commission investigators that he knew about Porreca's personal life from Porreca's mother. Anderson Interview (Nov. 14, 2014).

and we'll figure out some time to sit down again tomorrow. Sleep well.

*Id.* (July 21, 2013 text message from Anderson to Porreca).

Porreca began working at the Center several days later, on July 25, 2013. Respondent asserts that Porreca was responsible for the front desk, including administrative work related to billing, insurance, and accounts receivable. Pos. Stmt., p. 2; Anderson Interview (Nov. 14, 2014). Porreca adds that she was also hired to help improve the Center's profits by generating more client flow and working with Anderson to build his sleep apnea business. Porreca Interview (Jan. 9, 2015).

#### *Porreca's Coworkers at the Center*

Anderson is the only dentist at the Center. Pos. Stmt., p. 2 (Anderson has practiced at the Center since 1986). During Porreca's time there, Anderson's staff consisted of seven other women: five clinicians who worked with Anderson on patient care and two admins who worked with Porreca at the front desk. *See* Compl. ¶ 4. The entire staff, including a former employee who had left the Center by the time Porreca filed this complaint, submitted to interviews as part of this investigation.

Of the five clinicians, three are hygienists. Lorraine Zandy ("Zandy") and Maureen Graff ("Graff"), with more than 40 years of experience between the two of them, were the most senior. Zandy Interview (Dec. 15, 2014) (25 years of experience as Anderson's hygienist at the time of the interview); Graff Interview (Dec. 16, 2014) (17 years of experience as Anderson's hygienist at the time of the interview). Anderson also hired Wendy Miller ("Miller") as a hygienist around the same time that he hired Porreca. Miller Interview (Dec. 2, 2014). Miller initially filled in for Graff while Graff was on a maternity leave, but stayed on part-time after Graff returned. *Id.*

The two remaining clinicians are (or were) dental assistants.<sup>2</sup> Mary Lou Saucedo ("Saucedo") had approximately 20 years of experience at the Center. Saucedo Interview (Dec. 16, 2014). Diane Holubecki ("Holubecki") started as a dental assistant with the Center in June 2011 and left in October 2014 for a higher-paying job with better benefits. Holubecki Interview (Nov. 20, 2014).

Aside from Porreca, the other two front office employees were Nicole Kucala ("Kucala") and Esmeralda Guzman ("Guzman"). Kucala Interview (Dec. 9, 2014) (started at the Center in 2009 or 2010; 29 years old at the time of the interview); Guzman Interview (Dec. 8, 2014) (started at the Center in April 2012; 24 years old at the time of the interview). Both served as receptionists and handled a variety of administrative tasks with Porreca. *Id.* Kucala and Porreca became "good friends" while working together and still keep in touch. Kucala Interview (Dec. 9, 2014); *see also* Zandy Interview (Dec. 15, 2014) (Zandy described Kucala as the Center employee who was closest to Porreca).

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<sup>2</sup> Hygienist is a higher level position than dental assistant. Hygienists typically have a college degree in dental hygiene and perform more advanced tasks for better pay than dental assistants. *See* All Allied Health Schools, "Difference Between Dental Assistant and Dental Hygienist," online at <http://www.allalliedhealthschools.com/health-careers/dental-assisting/difference-dental-assistant-dental-hygienist/> (last visited May 5, 2015).

### *Disagreement About Porreca's Managerial Authority and An Office Affair Revealed*

According to Porreca, Anderson hired her as the Office Manager and tasked her with supervising the clinical and administrative staff. Porreca Interview (Jan. 9, 2015); Cp. Q. Resp., Pt. 2, No. 2 (Oct. 7, 2014). Consistent with this belief, Porreca regularly directed the hygienists and dental assistants to do administrative work when not with patients. *Id.* Anderson, however, told Commission investigators that Porreca was not responsible for supervising other employees. Anderson Interview (Nov. 14, 2014).

At a minimum, the evidence from the Commission's investigation is that Porreca's authority was unclear to the staff. Kucala stated that while Porreca identified herself as Office Manager, Anderson did not.<sup>3</sup> Kucala Interview (Dec. 9, 2014). More particularly, Kucala claims that Anderson told her that Porreca was in charge of insurance, accounts receivable, and telephone calls; there was no mention of any supervisory authority. *Id.* Similarly, Holubecki claims that Porreca was not in charge of supervising the dental assistants and hygienists: Anderson had never told the staff that Porreca had any power over the clinical staff and no past front office employee (at least since June 2011) had told clinicians what to do. Holubecki Interview (Nov. 20, 2014).

Regardless of their impressions of Porreca's actual authority, all employees agreed that Porreca regularly directed each of them to make calls and do paperwork. *See, e.g.,* Guzman Interview (Dec. 8, 2014); Zandy Interview (Dec. 15, 2014). Most of the staff complied with these requests when they could. *Id.*

According to Porreca, Graff and Holubecki refused to follow her directions to assist in front office work and also directed profanity at her while being insubordinate. Porreca Interview (Aug. 12, 2014). Graff admitted that she refused to go along with Porreca's demands and asserted that Porreca was not in charge of her. Graff Interview (Dec. 16, 2014) (noting Graff's impression that Porreca did not like this lack of control over the clinical staff). Holubecki, in contrast, attested that she cooperated with Porreca's requests when she was able. Holubecki Interview (Nov. 20, 2014).

Porreca stated that she initially complained to Anderson about Graff and Holubecki's disobedience in August or September 2013. Porreca recounts that while Anderson sometimes backed her up, Graff and Holubecki continued to ignore Porreca's requests.<sup>4</sup> Porreca Interview (Jan. 9, 2015). Porreca also told Commission investigators that she learned around this time that Graff and Anderson had dated in the past and suspected that this might be the source of Anderson's leniency towards Graff. Porreca told Commission investigators that she formed this belief at a charity event in September 2013, after Holubecki allegedly told Porreca that Anderson and Graff "have a past," and to be careful because Anderson "is a creep" who will try to have an

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<sup>3</sup> This is not to say that the Commission found no evidence of Porreca's title beyond her say so. At least two coworkers were under the impression that Porreca held the title of Office Manager. *See* Guzman Interview (Nov. 20, 2014); Zandy Interview (Dec. 15, 2014).

<sup>4</sup> Porreca provided specific examples of Graff's noncompliance, claiming that Graff often refused to sit at her desk, and instead kept out of Porreca's sight, near the computer where Anderson spent his time between patients. Cp. Q. Resp., Pt. 2, No. 2 (Oct. 7, 2014).

intimate relationship with Porreca too. Porreca Interview (Aug. 12, 2014). Holubecki denied making this statement, and Graff denied having anything other than a professional relationship with Anderson. *See* Holubecki Interview (Nov. 20, 2014); Graff Interview (Dec. 16, 2014). Anderson, however, corroborated Porreca's belief that he had been intimate with Graff. Anderson told Commission investigators that he and Graff dated more than ten years ago for a short period of time. Anderson Interview (Nov. 14, 2014). According to Anderson, his relationship with Graff ended by mutual consent. *Id.*

When Porreca complained to Anderson about Graff's noncompliance and hostility about being asked to help with administrative work, Anderson supposedly told Porreca not to give instructions to Graff directly, but instead to tell him if something needed to be done and represented that he would discuss it with Graff. Cp. Q. Resp., Pt. 2, No. 2 (Oct. 7, 2014). Porreca says that she tried this indirect approach, but nothing changed. *Id.*

#### *Discomfort with Anderson and the Office*

In addition to the brewing conflict with Graff and Holubecki, Porreca told the Commission that she was generally uncomfortable working at the Center. Porreca attributed this discomfort to a number of issues, including the supposedly frequent use of alcohol at work functions, Anderson's routine of undressing in the office, his generally lax management style, and the eventual installation of a security camera system that Porreca believed Anderson was using to watch her at the front desk. Respondent, for its part, contests each of these allegations and has directed the Commission to evidence to support its characterization of the workplace.

#### *Social Meetings*

Porreca complained to the Commission about the frequency with which alcohol was present at work meetings. Porreca theorized that, "[a]ll [Anderson's] 'meetings' were an excuse to drink with staff." Inv. Rep., Ex. G at 12 (Porreca's handwritten annotation of text messages exchanged with Anderson). Porreca produced a text message from Anderson in support of this view in which Anderson describes an upcoming staff meeting as "[a] little hot choc/ schnapps combo kind of thing." *Id.* (December 1, 2013 text message from Anderson to Porreca). Porreca also stated that on at least one occasion, Anderson took Porreca out for a business meeting over lunch at a restaurant where he ordered a beer. Porreca Interview (Aug. 12, 2014). Porreca also claims that at one such lunch, Anderson reached across the table to take Porreca's hand while he was talking about his father's death and crying.<sup>5</sup> Cp. Q. Resp., Pt. 1, No. 4 (Oct. 7, 2014).

More regularly, Porreca claims that Anderson served wine to the staff of the Center and told unspecified inappropriate jokes at staff meetings.<sup>6</sup> Porreca Interview (Aug. 12, 2014). Other employees had a different recollection, stating that no wine was served at the monthly staff meetings. *See, e.g.,* Saucedo Interview (Dec. 16, 2014).

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<sup>5</sup> Porreca has not alleged that this touch was sexual in nature.

<sup>6</sup> Porreca did not provide any specific examples of inappropriate jokes that Anderson told. *See* Porreca Interview (Aug. 12, 2014). As such, the Commission is without any basis to assume that the jokes were inappropriate due to their sexual content or nature.

### *Undressing at the Office*

Porreca also expressed that she was uncomfortable with Anderson's habit of "regularly dress[ing] and undress[ing] himself upstairs in the office, with the door open." Compl. ¶ 8. Porreca claims that on one occasion she accidentally walked in on Anderson changing in his office. Cp. Q. Resp., Pt. 4, No. 2 (Oct. 7, 2014). Porreca recalls that Anderson's shirt was off and his underwear was visible. *Id.*

When asked about this by Commission investigators, Anderson explained that he arrives at the Center in street clothes and then changes into scrubs in his personal office. Pos. Stmt., p. 4. Anderson produced photographs showing that this office is far from the areas used by patients and staff: upstairs, down a hall, and around a corner, to be exact. *Id.*; Inv. Rep., Ex. E at 3-4 (photographs of the Center). According to Kucala, the only way that a staff member could see Anderson changing was if she went up the stairs, to the door to the office, entered and turned to the right. Kucala Interview (Dec. 9, 2014). In other words, Kucala's view was that Anderson would not have been visible from the doorway. *Id.*

In interviewing each of Porreca's coworkers, no other employee claimed to have ever walked in on Anderson changing. Gancarski Interview (Dec. 8, 2014); Graff Interview (Dec. 16, 2014); Guzman Interview (Dec. 8, 2014); Holubecki Interview (Nov. 20, 2014); Kucala Interview (Dec. 9, 2014); Miller Interview (Dec. 2, 2014); Saucedo Interview (Dec. 16, 2014); Zandy Interview (Dec. 15, 2014). All stated that they were aware that Anderson changes into and out of scrubs in his upstairs office. *Id.* Several employees explained that if they needed Anderson while he was upstairs in his office, they stayed on the stairs and called out his name. *See, e.g.,* Guzman Interview (Dec. 8, 2014).

### *Anderson's Lax Management Style*

Porreca also expressed a more general frustration with what she perceived as Anderson's unprofessional management style. As evidence of this, Porreca produced a number of text message exchanges with Anderson with after-the-fact explanatory annotations for the benefit of Commission investigators.<sup>7</sup> For example, Porreca directed the Commission's attention to an undated text message sent by Anderson to Porreca sometime between November 21, 2013 and November 25, 2013 stating: "What you sought as a style of practice does not have to be wrong. . . . Simply need to get back to basics and professionalism amongst one another." Inv. Rep., Ex. G at 8 (undated text message from Anderson to Porreca). Porreca urges an interpretation of this text as Anderson "acknowledging [that] h[e] and the majority of his staff need to get back to being professional." *Id.* at ii (Porreca's typed annotation of text messages exchanged with Anderson). In explaining this text message to Commission investigators, Porreca offered that:

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<sup>7</sup> Porreca submitted to the Commission a number of text messages that she exchanged with Anderson. *See* Inv. Rep., Ex. G (twenty-five pages of "screenshots" showing parts of text message conversations between Porreca and Anderson). The meaning of these text messages was not clear to Commission investigators, as the screenshots themselves were produced out of order, appeared to be only parts of conversations, and included a number of undated threads. Commission staff asked Porreca, as part of this investigation, to provide written clarification. Porreca responded by putting the texts in chronological order, adding page numbers to each screen shot and adding additional annotations to the text message conversations in the form of handwritten notes on the screenshots and an explanatory typed email dated November 25, 2014, which her attorney provided to the Commission.

I voiced my frustration with [Anderson] and how he doesn't hold each employee or himself accountable for work requirements, performance, responsibilities, there's a lot of sitting around, not following "policy" etc. He texted me telling me he understood why I would be frustrated, that he knows I did things completely different at my previous job.

*Id.* at i-ii. Porreca's handwritten note on the produced copy of this text message says: "I wasn't use [sic] to things running the way they did at his office. Very uncomfortable & frustrating." *Id.* at 8 (Porreca's handwritten annotation of text messages exchanged with Anderson).

Similarly, on November 25, 2013, Anderson sent Porreca a text message asking: "was most if not all your frustration based on my action or in actions [sic] this morning around the front desk or during the huddle"? *Id.* at 11 (November 25, 2013 text message from Anderson to Porreca). Porreca responded to Anderson at the time by saying, "It was a multitude of things. Primarily due to the fact that I function at a multi tasking [sic] fast pace and I expect everyone else to do the same." *Id.* (November 25, 2013 text message from Porreca to Anderson). But she added, in an annotation for Commission investigators reviewing these text messages, that:

I was frustrated because that morning at work [Anderson] was making jokes, being loud, and talking about things not related to work. He was having these conversations with Maureen [Graff] at the front desk, where I sit and was trying to check patients in. It was so frustrating because he would promise that he would ensure that the staff was professional and followed the office policies that I set and talking about personal matters at the front in front of patients was not following that policy.

*Id.* at ii (Porreca's typed annotation of text messages exchanged with Anderson).

#### *Watching Porreca with a Video Camera*

As a final point of discomfort, Porreca alleges that midway through her tenure at the Center, Anderson began watching her at work. Specifically, she asserts that Anderson had a video camera pointed at her individually, recording her at all times during the day.<sup>8</sup> Compl. ¶ 9.

Anderson readily admitted to Commission investigators that he installed security cameras in December 2013 after several burglaries nearby. Resp. ¶ 9; Pos. Stmt., p. 5. Anderson explained that one camera points toward the front entrance of the Center and the other focuses on the rear. Resp. ¶ 9. The Commission obtained photographs showing that any person standing or sitting in the reception area, including Center staff working at the front desk, would be in the video feed of the camera facing the front door. Inv. Rep., Ex. E at 1 (photographs of the Center); *see also* Pos. Stmt., p. 5; Anderson Interview (Nov. 14, 2014). Respondent flatly denies that the

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<sup>8</sup> Porreca's belief that the cameras were installed to monitor her is not manufactured for this litigation. Kucala told Commission investigators that Porreca shared this belief with her when the cameras were installed back in December 2013. Kucala Interview (Dec. 9, 2014).

security camera was installed to watch Porreca. Resp. ¶ 9. Respondent notes that, in addition to Porreca, Guzman was regularly recorded by that camera when she was working at the front desk. Pos. Stmt., p. 5.

Perhaps unsurprisingly then, none of Porreca's other coworkers told Commission investigators that they shared Porreca's belief that the camera was specifically focused on her or even that the purpose of the camera was to record any member of the staff. Gancarski Interview (Dec. 8, 2014); Graff Interview (Dec. 16, 2014); Guzman Interview (Dec. 8, 2014); Holubecki Interview (Nov. 20, 2014); Kucala Interview (Dec. 9, 2014); Miller Interview (Dec. 2, 2014); Saucedo Interview (Dec. 16, 2014); Zandy Interview (Dec. 15, 2014). Graff, Zandy, and Guzman specifically told Commission investigators that they understood the cameras were installed for security purposes. Graff Interview (Dec. 16, 2014); Zandy Interview (Dec. 15, 2014); Guzman Interview (Dec. 8, 2014).

### *Sexual Conduct Directed at Porreca and Favoritism*

Based on Porreca's allegations, during this same time period, Anderson was moving from being a passive, poor manager to an active harasser. Over the months she worked for him, Porreca claims, Anderson's flirtatiousness with her developed into unwelcome touching on a number of occasions. In addition, Porreca asserts that Anderson showed favoritism to two other Center employees with whom he had had prior affairs, and sent Porreca text messages indicating his desire for an intimate relationship with her.

### *Touching and Flirting at the Office and Over Text Messages*

Porreca generally alleges that Anderson was "touchy feely," flirtatious, and engaged in unspecified sexual banter at work with her. See Porreca Interview (Aug. 12, 2014). Her specific claim is that while she was at her computer, Anderson would, on occasion, rub her back and tell her not to stress. *Id.* Porreca contends that this happened to her three or four times during the course of her 8-month employment at the Center. Cp. Q. Resp., Pt. 1, No. 3 (Oct. 7, 2014). Porreca said that Anderson would similarly rub Holubecki's back from time to time while she was at her computer. Porreca Interview (Aug. 12, 2014).

In addition, Porreca also described to Commission investigators that Anderson would ask her if she had lost weight and tell her that she looked good. *Id.* Porreca did not say how frequently Anderson would give her these sorts of compliments or whether he also gave these sorts of compliments to her coworkers.

When Commission investigators asked Porreca's former coworkers about Anderson's behavior at the Center, Holubecki specifically denied that Anderson ever touched her in the workplace. Holubecki Interview (Nov. 20, 2014). Similarly, not one of Porreca's other coworkers corroborated that Anderson engaged in this kind of conduct with Porreca (or anyone else) at work. The Commission interviewed each of these employees, and all denied experiencing or witnessing any touching or sexual banter by Anderson in the office. *Id.*; Miller Interview (Dec. 2, 2014); Guzman Interview (Dec. 8, 2014); Kucala Interview (Dec. 9, 2014); Zandy Interview (Dec. 15, 2014); Graff Interview (Dec. 16, 2014); Saucedo Interview (Dec. 16, 2014).



Nonetheless, Porreca produced a number of text messages to the Commission from Anderson that she believes document his flirtations with her. Some of these text messages are innocuous. For example, Porreca texted Anderson that she was stuck in traffic and would be late to a meeting with him, to which Anderson replied, “You coming by to pick me up!” Inv. Rep., Ex. G at 3 (October 9, 2013 text message from Anderson to Porreca); *see id.* at i (Porreca’s typed annotation of text messages exchanged with Anderson). Others are a bit more ambiguous. For example, Anderson texted Porreca on November 21, 2013, “I don’t often share that stuff but it seemed right . . . [j]ust some philosophical ideas that maybe can help my relations in and out of work,” after he allegedly described his philosophical ideas about life to Porreca when they were both at the office. *See id.* at 7 (November 21, 2013 text message from Anderson to Porreca); *see also id.* at i (Porreca’s typed annotation of text messages exchanged with Anderson). But there are certainly a handful – that read in the light most favorable to Porreca – convey a degree of romantic interest. To illustrate, in a late 2013 exchange after Anderson had told Porreca that his cousin had died suddenly and she expressed sympathy, Anderson texted, “I’m really glad your [sic] around,” and later “Your [sic] in my head all the time.” *Id.* at 13-14 (December 7, 2013 text messages from Anderson to Porreca).

Most of these texts were sent from mid-November through December 23, 2013.<sup>9</sup> *See id.* When asked about the timing and frequency of Anderson’s texts to her, Porreca was unable to be specific, stating only that Anderson texted her “*periodically* during the week (outside the office)” with non-work-related messages, and recalling one text sent as late as 9:00 p.m.<sup>10</sup> Supp. Cp. Q. Resp. No. 1 (Apr. 28, 2015) (emphasis supplied).

#### *The November 2013 Kiss at the Office*

Porreca alleges that Anderson accelerated matters on November 18, 2013, when she and Anderson were alone at the office. Porreca Interview (Aug. 12, 2014). Porreca recalls that she was telling Anderson that she was looking for work in Nashville because she was having difficulty making ends meet. *Id.* Anderson then supposedly asked Porreca to give him a hug, which Porreca says became a prolonged hug. When she stepped back, Anderson kissed her. *Id.*; *see also* Compl. ¶ 7. The kiss was unwelcome; Porreca says that she responded by exclaiming, “What the fuck?” Porreca Interview (Aug. 12, 2014). Porreca concedes that Anderson did not continue to kiss her after that interjection. *Id.* Porreca claims that Anderson apologized for the kiss and said that he was trying to console her. *Id.*

Anderson, for his part, recalls a day in November 2013 when he was alone in the office with Porreca. Anderson Interview (Nov. 14, 2014). Anderson says that he was changing light bulbs while she worked on insurance. *Id.* Anderson, however, contests the assertion that he kissed – or made any kind of sexual advance towards – Porreca at any time, including in the office on that November day. Pos. Stmt., p. 5.

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<sup>9</sup> Of the 25 pages of screenshots showing parts of text message conversations with Anderson that Porreca submitted to support her allegations, only three were sent before November 2013 and only one (dealing with a request for time off for a funeral) was sent after December 2013.

<sup>10</sup> In her interview with Commission staff, Kucala claimed that Porreca once told her that Anderson had texted Porreca even later, at 3:00 a.m. Kucala Interview (Dec. 9, 2014).

### *Kiss at a November 2013 Social Event*

Although Porreca cannot recall whether it occurred before or after the November 18, 2013 kiss in the office, Porreca also claims that Anderson kissed her on another occasion that same month.<sup>11</sup> Porreca Interview (Feb. 5, 2015). Per Porreca, this second incident occurred while she and Anderson were out together socially after a work event. *Id.*

According to Porreca, Anderson had taken the office staff out for drinks at the Azteca Restaurant.<sup>12</sup> *Id.* Afterwards, Anderson and Porreca went to the Capri Restaurant to get dinner and meet up with Miller, who was a part-time waitress in addition to a hygienist. *Id.*

They left quickly, though, after Porreca says she was accused of stealing a decorative candlestick. Porreca recalled accidentally breaking a decorative candlestick in the restroom and, not knowing what to do, throwing it out.<sup>13</sup> *Id.*

In the parking lot of the restaurant, Porreca was telling Anderson about the candlestick situation and how embarrassed she felt, when Anderson allegedly kissed her. *Id.* Porreca says that Anderson immediately pulled back. *Id.* Again, according to Porreca, Anderson said that he should not have kissed her but allegedly said that he did it because she had seemed upset about the candlestick episode. *Id.*

Like the alleged kiss before (or after) it, Anderson denied kissing Porreca then or at any other time. Anderson Interview (Nov. 14, 2014). Anderson did, however, tell Commission investigators that he recalled going to Capri Restaurant with Porreca after the group event and that she was accused of stealing a candlestick. *Id.*

### *A Desire for More?*

Following one or both of the November kisses, Anderson sent Porreca text messages which Porreca believed communicated his desire to sleep with her. Porreca explained that Anderson's words in the following undated text messages, which were sent sometime between

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<sup>11</sup> The complaint that Porreca filed with the Commission alleges that Anderson kissed her "on one occasion." Compl. ¶ 7. In fact, Porreca did not mention an additional kiss in her first interview with Commission investigators. *See* Porreca Interview (Aug. 12, 2014). Porreca, however, did mention the second kiss in a later interview, although she remained at a loss for recalling whether it occurred before the November 18, 2013 from the complaint or after. *See* Porreca Interview (Feb. 5, 2015). Because the Commission investigated the claim and because Respondent has had ample opportunity to present its evidence in response to allegations, such as this one, that were not contained in the original complaint, the Commission overlooks any defect in the original pleading.

<sup>12</sup> One of Porreca's former coworkers claimed that Porreca drank more at this meeting than any other employee of the Center. Zandy Interview (Dec. 15, 2014).

<sup>13</sup> At least one witness calls into question Porreca's memory of that evening. When Miller was interviewed about the incident, she told the Commission that Porreca was kicked out of the restaurant for attempting to steal the candlestick and for being "wasted" and "all over a random guy at the bar." Miller Interview (Dec. 2, 2014). The Commission, for the purpose of this decision, assumes that when the only evidence is competing testimony, the facts are as Porreca lays them out. Here, in addition, the Commission's position is bolstered by testimony from another of Porreca's coworkers who told investigators that Porreca told her about kissing Anderson in the parking lot of Capri Restaurant the very same night that it allegedly happened. Kucala Interview (Dec. 9, 2014).

November 21, 2013 and November 25, 2013, refer to kissing Porreca in November (which of the two kisses alleged is not clear):

As for you and I, although desire and temptation was obviously intense for us both, it was out of respect and desire to have a better and longer relationship with you that i [sic] was able to walk away at all.

Inv. Rep., Ex. G at 8 (undated text message from Anderson to Porreca). Similarly, Anderson continued:

It was not easy to walk away as we both could have gone down that road. Ironic that wanting to do the right thing and not fall prey to the past is still haunting.

*Id.* at 9.

When explaining the meaning of these text messages to Commission investigators a year later, Porreca asserted that Anderson's mention of "the past" in these text messages should be understood as a reference to his past affairs with Center employees. *Id.* at ii (Porreca's typed annotation of text messages exchanged with Anderson). As noted above, although Holubecki herself denies it, Porreca alleges that in September 2013, Holubecki told Porreca that Anderson and Graff had dated. *See* Porreca Interview (Aug. 12, 2014). Porreca interpreted Anderson's reference to a past affair with an employee as a desire to have the same sort of intimate relationship with her. *See* Inv. Rep., Ex. G at ii.

#### *The 2013 Office Christmas Party*

Porreca alleges that the final unwelcome touch occurred at the office Christmas party on December 13, 2013. Porreca claims that Anderson placed his hand on her leg. Porreca Interview (Aug. 12, 2014). Porreca says that she told Anderson, "Don't touch me," and he removed his hand. *Id.* Anderson denies that he put his hand on Porreca's leg at the office Christmas party and counters instead that it was Porreca who put her hand on his leg. Anderson Interview (Nov. 14, 2014).

Unlike, the prior two kissing incidents and the several unsolicited backrubs, Porreca has a witness who can confirm that this touch occurred. Kucala told Commission investigators that she saw Anderson put his hand on Porreca's knee at the Christmas party. Kucala Interview (Dec. 9, 2014). In Kucala's opinion, however, this touch appeared to be non-sexual in nature. *Id.* Kucala says that she observed Porreca crying and upset following an argument with another employee (more on this below), and recalls that Anderson placed his hand on Porreca's knee, asked Porreca if she was okay, and told her to calm down. *Id.* From Kucala's vantage point, she assumed that Anderson was trying to console Porreca.<sup>14</sup> *Id.*

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<sup>14</sup> Kucala also told the Commission investigators that everyone at the party (including Porreca and Anderson, but excluding herself) was drinking excessively. Kucala Interview (Dec. 9, 2014).

Porreca confirmed that she was upset at the Christmas party because Graff and Holubecki were particularly hostile towards her. Porreca Interview (Aug. 12, 2014). This hostility supposedly manifested itself in criticizing Porreca's dress (because they were jealous, according to Porreca) and blaming Porreca for causing two other Center employees (who had been following Porreca to the party in another vehicle) to miss the party. *Id.* Porreca further claims that Holubecki confessed her own affair with Anderson to Porreca. Porreca represented that an intoxicated Holubecki cornered her at the Christmas party and told Porreca, "don't do anything with [Anderson;] . . . we have history." Inv. Rep., Ex. G at ii (Porreca's typed annotation of text messages exchanged with Anderson).

Porreca also recounted that Graff and Holubecki had their own emotional exchange at some point in the evening. Porreca told Commission investigators that during dinner, Anderson touched and kissed Holubecki causing Graff to yell at Holubecki and start crying. Porreca Interview (Aug. 12, 2014).

Once again, Graff and Holubecki completely deny Porreca's version of the events.<sup>15</sup> Graff Interview (Dec. 16, 2014); Holubecki Interview (Nov. 20, 2014). Other coworkers called into question the accuracy of Porreca's recollections from that evening and described Porreca as behaving erratically. Miller, for example, observed Porreca grab and walk off with a waiter. Miller Interview (Dec. 2, 2014) (Miller claims that Porreca later told her that she had kissed the waiter). Miller also told Commission investigators that Porreca asked Anderson if it was okay if she left with one of Anderson's friends who was at the party and then supposedly cried when Anderson said yes. *Id.* Porreca, herself, told Commission investigators that she had so much to drink that night that she slept overnight in her car while parked at a gas station. Porreca Interview (Aug. 12, 2014).

#### *The Aftermath of the Christmas Party*

On December 14, 2013 – the day after the office Christmas party – Porreca sent Anderson the following text message:

Last night was miserable for me. From Mo [Graff] and Diane [Holubecki] treating me like shit to feeling embarrassed about finding out about you and Diane. I never understood why Mo and Diane treated me the way they did and now I do.

Inv. Rep., Ex. G at 17 (December 14, 2013 text message from Porreca to Anderson). Porreca blamed Anderson for her treatment at Graff and Holubecki's hands, continuing in her text to Anderson, "You allow them to treat me that way." *Id.* at 18. And ending with:

I'm there to do a job. I'm done fighting battles with Mo and Diane. They're your employees. Not mine. I won't be mistreated. The

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<sup>15</sup> Holubecki also denies both telling Porreca that she had a sexual history with Anderson and having such a history. Holubecki Interview (Nov. 20, 2014). Anderson, however, acknowledged in his interview with Commission investigators that he slept with Holubecki at a conference on one occasion about a year prior to Porreca being hired. Anderson Interview (Nov. 14, 2014).

way the[y] treated me last night was terrible and the fact you did nothing was eye opening.

*Id.* at 20.

The Monday following the Friday night Christmas party, Porreca claims that Graff and Holubecki “ganged up” on her in the office and berated her. Porreca Interview (Aug. 12, 2014). Porreca claims that during this altercation, Graff was swearing at her, and Porreca was hyperventilating and crying. *Id.* But after some heated exchanges, Porreca says that Holubecki apologized for calling her names. *Id.* (also claiming that Holubecki again admitted to sleeping with Anderson on one occasion in the past).

This is not the way that Graff, Holubecki, or Anderson remember it. Graff told Commission investigators that the atmosphere in the office that day was “horrible.” Graff Interview (Dec. 16, 2014). Graff says that Holubecki was trying to talk to Porreca, and Porreca was not responding. *Id.* Graff got pulled into the conversation but denies swearing at Porreca. *Id.* Graff did recall that she told Porreca that she was “too old for this,” and that she wanted to limit all future conversation with Porreca to strictly work-related matters. *Id.*

Holubecki, on the other hand, could not recall any sort of conflict whatsoever with Porreca after the Christmas party. Holubecki Interview (Nov. 20, 2014). Instead, Holubecki said that after the Christmas party, she “felt nervous” around Porreca and “avoided her.” *Id.*

Anderson recalled a post-Christmas party conflict between Porreca and Holubecki. Anderson Interview (Nov. 14, 2014) (noting that Graff walked into the tail end of the conversation). Anderson says that he sat down with Porreca and Holubecki and, after talking, both said they were fine with each other. *Id.*

Regardless of whose version of this Monday at the office is most accurate, Porreca told Commission investigators that her relationship with both Graff and Holubecki began to improve after this. Porreca Interview (Aug. 12, 2014) (re: Graff); Cp. Q. Resp., Pt. 2, No. 3 (Oct. 7, 2014) (re: Holubecki). Her relationship with Anderson, however, changed for the worse. After the Christmas party (and her text messages the next day complaining about Graff and Holubecki), Porreca says that Anderson no longer even said hello to her. *Id.* Porreca, for her part, said that she no longer “hung out” with Anderson at work or outside of the office. *Id.* She also told Commission investigators that from that point forward, she stopped laughing at his jokes and generally did not speak with him either. *Id.* In a nutshell, Porreca no longer had any respect for Anderson and did not think he was “funny” or “cool.” *Id.*

#### *Porreca’s Discharge and Alleged Work Performance Problems*

On April 23, 2014 – approximately four months after the office Christmas party and its immediate fallout – Porreca was fired from her job at the Center. Anderson asserts that he discharged Porreca for poor work performance, citing a serious accounts receivable problem. Anderson Interview (Jan. 16, 2015). Anderson was also reportedly concerned by Porreca’s seeming inability to work constructively with the other staff members. Pos. Stmt., p. 5.

As Respondent uses the term, “accounts receivable” (“AR”) refers to the total amount owed to a dental practice at any given time. It measures the outstanding dollar amounts on bills sent to patients and submitted insurance claims. Anderson Interview (Jan. 17, 2015). Like most businesses, Respondent would like to collect fees owed quickly because the longer a balance remains unpaid, the less its value is as a result of lost interest and the increasing possibility of non-collection. *Id.* “AR Rate” or “collection ratio” is a related measure that the Center uses to compares monthly production (*i.e.* the total amount charged for services) to the total amount collected that month. *See* Ltr. from T. Luetkemeyer to A. Cahn, p. 1, Ex. A (Nov. 25, 2014).

Respondent claims that Porreca performed worse on these two measures than both her predecessor (Denorah Villarreal (“Villarreal”)) and her successor at the Center (Harriet Gancarski (“Gancarski”)). *Id.* at p. 1. According to Respondent, while Porreca was at the Center, the AR Rate dropped to as low as 50 percent. *Id.* In comparison, Villarreal, based on then available data, maintained an AR Rate above 96 percent from January 2013 until she left in April 2013. *Id.* After succeeding Porreca, Gancarski’s AR Rate never dropped below 92 percent (based on data from August 2014 through October 2014). *Id.* The Commission reviewed Respondent’s submitted business records and confirmed this comparative information.<sup>16</sup>

During the months when Porreca was responsible for AR at the Center, the figure rose from \$264,000 to \$322,000. *See* Inv. Rep., Ex. A. But collections declined so precipitously that sometime in the first quarter of 2014, Anderson had to deposit his own personal funds into the dental practice’s account to pay the Center’s bills. Anderson Interview (Jan. 16, 2015).

Respondent also claims that Porreca left the billing and insurance files in disarray. *Id.* at Ex. B (Gancarski handwritten notes of November 20, 2014); Gancarski Interview (Dec. 8, 2014). In support of this position, the Center directs the Commission to the fact that when Porreca was discharged in April 2014, there were 315 outstanding, un-submitted insurance claims, 47 patient accounts missing information because insurance checks were placed in the wrong patient file, and 16 accounts where insurance claims had to be written off because Porreca missed the filing deadline. Inv. Rep., Ex. B. Respondent also claims that 20 families left the practice after complaining that Porreca made mistakes on evaluating and communicating to them regarding the extent of their insurance coverage. Ltr. T. Luetkemeyer to A. Cahn, p. 2 (Nov. 25, 2014).

Porreca retorts that Anderson never had any issues with her work performance until she complained to him about Graff and Holubecki after the Christmas party. Porreca Interview (Jan. 9, 2015). Porreca denies the criticism of her accounts receivable (and related) work. *Id.* Porreca asserts that she submitted all insurance claims on a timely basis. *Id.* She dismisses the rising AR

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<sup>16</sup> Respondent produced two types of computer-generated business reports which support the above claims. *See* Inv. Rep., Ex. A. First, month-end “Day Sheets” provide the dollar figure for “Ending AR” on the last day of the month. Second, monthly “Provider Productivity” reports for Anderson and clinical staff provide the underlying data supporting Respondent’s worksheet calculations of the employees’ comparative AR Rates (also in Exhibit A). Based on staff review of these records, it appears that Porreca’s performance on AR was consistently below the norm. Removing one month that was an extreme outlier, for the time period covered, Villarreal’s average AR Rate was 108 percent, Gancarski’s was 112 percent, and Porreca’s was 81 percent. (The outlier was a month where production was approximately 25 percent of the average month, and 50 percent less than the closest low-earning month, so that the month’s AR Rate was extremely high (319 percent) even though collections for that month were only approximately 15 percent higher than average.)

numbers under her watch as a positive indicator of her efforts to increase production during her tenure. Email from M. Baiocchi to A. Cahn (Feb. 12, 2015) (email from Porreca’s counsel to Commission investigator disputing facts related to Porreca’s termination). Through her counsel, Porreca claims that under her supervision the office became more efficient in filling up the schedule with patients. *See id.* More claims were being submitted resulting in more revenue being outstanding.” *See id.*

In addition, Porreca maintains that at no time prior to her April 2014 termination did Anderson ever talk to her about these alleged deficiencies in maintaining the AR Rate, submitting insurance claims, and processing billing. Porreca Interview (Jan. 9, 2015). Porreca told Commission investigators that she had her first and only performance review by Anderson, at her request, on March 27, 2014. *Id.* Porreca claims that at this meeting Anderson praised her for implementing a new discount program to incentivize patients to pay more quickly, but never mentioned a word about the alleged accounts receivable problems.<sup>17</sup>

Porreca’s representation is contradicted by contemporaneous documentation produced by the Respondent. Anderson provided the Commission with a detailed explanation of his growing awareness of this problem. Anderson recalled that sometime in December 2013, he began reviewing the year-end financials for the Center, including various reports generated by Eaglesoft – the practice management computer software used at the Center. Ltr. T. Luetkemeyer to A. Cahn, pp. 1-2 (Feb. 10, 2015). In doing so, Anderson claims to have discovered significant discrepancies and problems with the submission of insurance claims and accounts receivable. *Id.* Anderson claims that he told Porreca in January that she should devote all of her time to addressing the accounts receivable/insurance problems and that Porreca replied she would work on it. Anderson Interview (Jan. 16, 2015). Anderson also claims that they talked about the need to solve this problem in February. *Id.* Concern about high accounts receivable and a low collection rate are also noted on Anderson’s documentation of the March review, but there is some dispute as to whether Porreca saw this completed form.<sup>18</sup> *See Inv. Rep., Ex. D* (completed Employee Review Form).

Nonetheless, Anderson became so concerned with the loss of cash flow that he spoke with Leigha Hecht (“Hecht”), an Eaglesoft specialist, a number of times about reporting inconsistencies and the possibility of embezzlement. *Inv. Rep., Ex. F* (print-out of call records from Patterson Companies documenting six Anderson-Hecht calls from February 26, 2014 through March 4, 2014). On February 26, 2014, Hecht notified Anderson that someone had remote access to the Center’s Eaglesoft account. *Id.* And on March 4, 2014, Hecht informed Anderson that someone at the Center had been submitting insurance claims into the software, re-opening old claims, and revising and resubmitting them. Ltr. T. Luetkemeyer to A. Cahn, p. 2 (Feb. 10, 2015). If this was the case, Anderson feared, the number of outstanding claims could actually be much greater than it appeared on the Eaglesoft reports. *Id.*

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<sup>17</sup> Porreca said that she tape recorded this March meeting, Porreca Interview (Jan. 9, 2015), but she never submitted the recording or a transcript as evidence in this investigation.

<sup>18</sup> Porreca claims that she never saw this written evaluation until after she was discharged. Porreca Interview (Aug. 12, 2014). The Commission assumes this to be true but also concludes that there is evidence that Porreca knew what the AR numbers for the Center were based on her March 12, 2014 contact with the Patterson Company to obtain these figures. *See Inv. Rep., Ex. F.*

Shortly thereafter, Anderson says that he learned that on March 12, 2014, Porreca had contacted Patterson Companies to request a report of the Center's AR numbers for the past year.<sup>19</sup> *Id.*; Inv. Rep., Ex. F. Anderson documented that he discussed the AR numbers with Porreca at length during their March 27, 2014 meeting. Anderson Interview (Jan. 16, 2015); Inv. Rep., Ex. D (Employee Review Form). At that meeting, Porreca failed to provide any explanation for the low AR numbers and displayed what Anderson characterizes as a bad attitude. Ltr. T. Luetkemeyer to A. Cahn, pp. 2-3 (Feb. 10, 2015). In addition, Anderson told Commission investigators that while Porreca raised the idea that accounts receivable were rising because of increased billing, she did not have any numbers to show that her marketing ideas had generated increased patient flow. Anderson Interview (Jan. 16, 2015).

When Porreca and Anderson met again on April 23, 2014, Anderson could not identify any improvement in the AR-related issues and again felt that Porreca was failing to accept any responsibility. *Id.*; Ltr. T. Luetkemeyer to A. Cahn, p. 3 (Feb. 10, 2015). According to Anderson, Porreca acknowledged that the position was not a good fit for her, after which Anderson terminated her employment. Ltr. T. Luetkemeyer to A. Cahn, pp. 2-3 (Feb. 10, 2015). Porreca's recollection of that meeting is that Anderson told her that he could see that she was not happy and neither was he, so when he said that he was done, she did not argue. Porreca Interview (Aug. 12, 2015).

## DISCUSSION

### **I. Sexual Harassment Claims**

The Human Rights Ordinance expressly prohibits employers from engaging in sexual harassment. County Code, § 42-35(e). There are two variations of unlawful sexual harassment. In the first, commonly termed "*quid pro quo*" sex harassment, the Human Rights Ordinance prohibits any "any unwelcome sexual advance, request for sexual favors, or conduct of a sexual nature" when submission to such conduct "is an explicit or implicit term or condition" of employment or "is used as the basis for any employment decision." *Id.* at § 42-35(e)(2)(a)-(b). The second variation is commonly termed "hostile environment" sex harassment, and is defined as when unwelcome sexual advances, requests for sexual favors, or conduct of a sexual nature has "the purpose or effect of substantially interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment." *Id.* at § 42-35(e)(2)(c). This matter presents issues related to both types of claims.

#### **A. Quid Pro Quo**

"*Quid pro quo* harassment occurs in situations where submission to sexual demands is made a condition of tangible employment benefits." *Bryson v. Chicago State Univ.*, 96 F.3d 912, 915 (7th Cir. 1996). Proving such a claim requires showing, first, unwelcome sexual advances by an employer or supervisor and, second, that the employee's reaction negatively affected a

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<sup>19</sup> Anderson says that Porreca did not tell him about this inquiry to Patterson Companies and did not give him any information as to the type of report and/or data she received in response. See Ltr. T. Luetkemeyer to A. Cahn, p. 2 (Feb. 10, 2015).



tangible aspect of her employment. *See id.* at 916; *Farfaras v. Citizens Bank & Trust*, 433 F.3d 558, 564 (7th Cir. 2006) (citing *Bryson* for standard).

Porreca’s complaint alleges that her employment at the Center was terminated because she “would not sleep with” Anderson.<sup>20</sup> *See* Compl. ¶¶ 6, 16. Porreca, however, does not contend that Anderson made sex with him an explicit condition of her continued employment at the Center. To the contrary, in response to written interrogatories, Porreca states that Anderson never directly asked her to sleep with him.<sup>21</sup> Cp. Q. Resp., Pt. 4, No. 1 (Oct. 7, 2014).

Instead, Porreca argues that Anderson’s intention to have sex with her was implicit in several text messages that he sent to her with the same theme. Porreca points to two text messages from Anderson that she produced to the Commission, which state, in relevant part:

As for you and I, although desire and temptation was obviously intense for us both, it was out of respect and desire to have a better and longer relationship with you that i [sic] was able to walk away at all.

Inv. Rep., Ex. G at 8, and:

It was not easy to walk away as we both could have gone down that road. Ironic that wanting to do the right thing and not fall prey to the past is still haunting.

*Id.* at 9. Porreca represents that these text messages sent in late November 2013, read in the context of Anderson kissing her earlier in the month and his previous affairs with employees, amount to a confession by Anderson that he also wanted to have a sexual relationship with Porreca. *See id.* at ii.<sup>22</sup>

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<sup>20</sup> Porreca styles her allegation that she was terminated for refusing Anderson’s request for sex as one for unlawful retaliation in her complaint. *See* Compl. ¶ 16. This is not technically correct. If any ill consequences that followed from an employee’s refusal to submit to discriminatory or harassing conduct was retaliation, the secondary anti-retaliation provisions of the Human Rights Ordinance would swallow the primary antidiscrimination and anti-harassment protections. The fact pattern alleged in Porreca’s complaint – boss makes sexual advances on employee and fires her when she refuses to submit to the conduct – is not retaliation, but rather the *sine qua non* of *quid pro quo* sex harassment. Notwithstanding the defect in her complaint, the Commission will analyze this claim under the correct legal theory. The Commission can discern no grounds on which Respondent, who has had a full and fair opportunity to respond to every factual allegation without regard to Porreca’s particular legal theories, can claim prejudice.

<sup>21</sup> To the extent that Porreca’s response to the Commission’s questionnaire contradicts her complaint, the Commission will credit the later discovery response ahead of her initial pleading. *See Robertson v. Allstate-Louis Dodd Agency*, 2013E030, \*5 (CCHRC Nov. 20, 2014) (“Where a complainant’s testimony during an investigatory interview contradicts the complainant’s pleadings in the complaint, the Commission credits the complainant’s live testimony over the complaint.”).

<sup>22</sup> Similarly in an annotation to a description of text messages produced to the Commission, Porreca describes a conversation she allegedly had with Anderson after the office Christmas party in which she confronted him after learning of his affair with Holubecki, and, according to Porreca, Anderson said that he was trying not to make the same mistakes he made with Holubecki. *See* Inv. Rep., Ex. G at ii.

Although these text messages are somewhat cryptic, Porreca’s interpretation of them – that they communicate Anderson’s *desire* for some sort of an intimate relationship with her – is reasonable, and the Commission accepts it as true for the purpose of rendering this decision.<sup>23</sup>

But to advance on a claim of *quid pro quo* sexual harassment, Porreca’s burden is to show substantial evidence of more than Anderson’s desire to engage in sexual conduct with her. To prevail on a *quid pro quo* sexual harassment claim that desire must be a request, implicit or explicit. Even when reviewing the evidence before the Commission in the light most favorable to Porreca, the Commission cannot reasonably construe Anderson’s expressions of desire for Porreca as an implicit request for sex. To the contrary, the texts on which Porreca relies all emphasize Anderson’s intention *not* to have sex with Porreca. Nothing in any these texts – or anywhere in the extensive investigative record<sup>24</sup> – even hints that Porreca was at risk of losing her job if she did not have sex with Anderson.

### **B. Hostile Environment**

Substantial evidence of a *quid pro quo* proposal or arrangement, however, is not the only way that Porreca can advance a sexual harassment claim against the Center. There is still a possibility to proceed to a hearing on Porreca’s sexual harassment claim under a hostile environment theory if there is substantial evidence that the sexual conduct to which Anderson subjected her was sufficiently “severe or pervasive” as to alter the conditions of her employment and to create a hostile or abusive work environment. *See Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 67 (1986); *Desparte v. Arlington Heights Kirby*, 2002E020 (CCHRC June 26, 2006). By definition, the harassment must be related to sex, and not just generally offensive conduct. *See* County Code, § 42-35(e).

To determine whether this case meets that standard, the Commission considers various criteria including: “the frequency of the [harassing] conduct; its severity; whether it is physically threatening or humiliating; or a mere offensive utterance; and whether it unreasonably

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<sup>23</sup> Anderson’s explanatory annotations with respect to these text messages are somewhat problematic. In reviewing these text messages with Commission investigators a year after they were sent, Porreca concluded that Anderson “had sex with Diane [Holubecki] who was his employee and he found himself trying to do the same thing with me.” *See* Inv. Rep., Ex. G at ii. This interpretation of a text message sent in late November 2013 is inconsistent with Porreca’s assertion that she only learned that Anderson had sex with Holubecki at the office Christmas party on December 13, 2013. *Id.*

<sup>24</sup> In addition to the text messages to which Porreca directed the Commission’s attention, the Commission also considered whether Porreca’s allegations of favoritism could provide a legally defensible basis for not dismissing Porreca’s *quid pro quo* claim of sexual harassment for a lack of substantial evidence. Generally speaking, courts do not consider an employer’s preferential treatment of his paramour-employee to be *quid pro quo* sexual harassment. *See, e.g., Schobert v. Illinois Dep’t of Transp.*, 304 F.3d 725, 733 (7th Cir. 2002); *Miller v. Regents of the Univ. of Colo.*, 1999 U.S. App. LEXIS 16712, \*18-21 (10th Cir. 1999). But theoretically, sexual favoritism in a workplace could be so widespread as to send the message that an employee must grant sexual favors to succeed in that workplace. *See, e.g., Piech v. Arthur Andersen & Co.*, 841 F. Supp. 825, 828-830 (N.D. Ill. 1994); EEOC Policy Guidance on Employer Liability under Title VII for Sexual Favoritism, EEOC Notice No. 915-048 (Jan. 12, 1990).

That is not the case here. As discussed above in greater detail, there is little evidence that the employees who engaged in sexual conduct with Anderson received any employment-related benefits as a result. Even if they did, the evidence before the Commission shows two brief relationships with Anderson over the course of a ten-year period. As a matter of law, the Commission cannot characterize this level of sexual favoritism as “widespread.”

interferes with an employee's work performance.” *Boyd v. Crittendon*, 2006E056 \*5 (CCHRC Feb. 16, 2010) (quoting *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 23 (1993)), *rev'd in part on other grounds, sub nom Crittendon v. Cook Cnty. Comm'n on Human Rights*, 990 N.E.2d 1161 (Ill. 2013) (reversing an award of punitive damages); *Iverson v. Horwitz*, 1994E021 (CCHRC Feb. 8, 1996) (same). The test has “both an objective component – would a reasonable person find the conduct sufficient to create a hostile environment – and a subjective component – did this particular person perceive the conduct as creating a hostile environment. Both components must be met.” *Desparte*, 2002E020 at \*6 (quoting *Gluszek v. Stadium Sports Bar & Grill*, 1993E052 \*10 (CCHRC Mar. 16, 1995) (citing *Harris v. Forklift*, 510 U.S. at 371)).

The offending conduct must be sufficiently severe *or* pervasive, and there is an inverse relationship between the frequency and severity of incidents alleged. As such, a constant stream of relatively minor events may create a hostile environment by virtue of their pervasiveness, but even a single incident, by virtue of its severity, may rise to the level of actionable sexual harassment if it is sufficiently extreme. *Boyd*, 2006E056 at \*5-6 (in one night, a bar owner made questionable sexual comments, repeatedly propositioned a waitress using crude language, and then physically attacked her, including removing her blouse). Timing also matters: “isolated incidents,” especially if spread out over time, usually are insufficient, but relentless minor harassment may create a hostile environment. *See, e.g., Walker v. Cook Cty. Sheriff's Office*, 2008E017 (CCHRC May 15, 2012), *aff'd, sub nom Sheriff's Office v. Cook Cnty. Comm'n on Human Rights*, No. 13 CH 17663 (Ill. Cir. Ct. Feb. 11, 2015) (Commission found hostile environment age-based harassment where supervisor harangued 54-year-old by repeatedly commenting that she was the oldest “ass” walking around the office, she was “older than God” or “older than dirt,” asking where she got her “old ass” clothes, and singing “Old Fogey from Mus(Skokie)” in front of coworkers).

Porreca's hostile environment harassment claim is based on the cumulative impact of a number of incidents. For the purpose of this analysis, the Commission divides the evidence adduced through its investigation into three broad categories: (1) the general office atmosphere; (2) Anderson's favoritism towards former sex partners; and (3) Anderson's treatment of Porreca, including attempted touches, kisses, and intimate text messages.

### 1. The General Office Atmosphere

Porreca claims that Anderson's many inappropriate actions created an overall hostile work environment. She describes a “touchy-feely” office atmosphere, pervaded by Anderson's touching, flirting, and sexual banter, and which included drinking parties, casual undressing, and videotaping of staff. Upon investigation, however, these allegations and the evidence produced in support of them are insufficient to support a hostile environment claim.

As an initial matter, the Commission's investigation suggests that Porreca might have interpreted relatively innocuous behavior as predatory. For instance, Porreca alleges that Anderson regularly undressed in a workplace full of women with the door open. While she can testify to walking in on him in bare chest and underpants on one occasion in an 8-month period, there is not enough evidence before the Commission to reasonably infer that Anderson was behaving as an exhibitionist. Instead, the evidence before the Commission is that this undressing was a well-known routine for Anderson to get into his work uniform each day. Photographic

evidence shows that it is highly unlikely that Anderson could be seen by either patients or staff during this daily task. Additionally, Porreca's coworkers, none of whom said they had had a similar experience of walking in on Anderson in a state of undress, used a reasonable sounding precaution for avoiding the potential embarrassment of doing so.

Similarly, Porreca claims (and apparently thought at the time) that Anderson had a camera specifically focused on recording her. Anderson claims that the cameras were installed for security purposes, with one focused on each entrance, front and back. Without more, the Commission might at least look to a hearing to determine which party's claim is more credible, but such a hearing would be pointless in this case. The Commission's investigation includes more evidence than the bare testimony of the parties. It shows that Porreca is alone in believing that the cameras were set up to tape her. Every other employee testified that the cameras were set up for security purposes and were not designed to monitor any particular employee. And, once again, photographic evidence shows that the front-door camera recorded everyone in the reception area, including at least one other employee who worked at the front desk, which fatally undermines Porreca's unsupported allegation.

Similarly, not a single employee agreed with Porreca's claim that Anderson frequently touched his employees or engaged in sexual banter at the office. All seven former coworkers told Commission investigators that they never saw or were subjected to such conduct. Likewise, no one agreed with Porreca's claim that Anderson's staff meetings regularly involved drinking at the office.

With respect to these latter two allegations, there is no photographic or other non-testimonial evidence upon which the Commission can rely. In most (if not all) cases, at this stage of the process, the Commission will accept the complainant's version of an event as true when it is contradicted only by interested witnesses. This is because a hearing can assist the Commission in making credibility determinations between conflicting testimonial evidence.

In a hostile environment sexual harassment case, however, the consensus of all of the other employees in a work setting, especially where all of the other employees are women, is uniquely relevant. There is no question that Porreca found the experience of working at the Center with Anderson subjectively hostile; if Anderson, in fact, was overly demonstrative, told off-color jokes, and gave the occasional back rub, then Porreca's two interviews with Commission investigators are sufficient to show substantial evidence that she found that experience uncomfortable. But unless there is also evidence that Porreca's subjective offense was objectively reasonable, her injury is not legally cognizable. The "reasonableness" component of a hostile environment claim means that evidence of what six other women thought about Anderson's words and actions at the office uniquely matters. Whatever Anderson was generally saying or doing with respect to the staff of the Center, there is not substantial evidence that rises to the level of a hostile work environment here because there is no evidence that any other female employee was bothered by it. Anderson employed seven other women, including two other women in their 20s like Porreca (Kucala and Guzman) and two older women who had worked with Anderson for over twenty years (Zandy and Saucedo). None complained about the general atmosphere of the office, either to Anderson or, more importantly, to the Commission investigators during this lengthy investigation. In the absence of such evidence, Porreca's

allegation that the general atmosphere of the dental office was hostile fails the “reasonable person” test.

## 2. Favoritism

The second broad category of evidence that Porreca can point to in support of her hostile work environment claim arises from the allegation in her complaint that Anderson extended special privileges to those employees with whom he had sexual relations. *See* Compl. ¶¶ 6, 11. During the investigation, she alleged that Graff and Holubecki enjoyed both financial rewards and greater workplace freedom. Porreca Interview (Aug. 12, 2014). For the purpose of rendering this decision, the Commission assumes that Anderson did, in fact, have a sexual relationship with Graff and Holubecki.<sup>25</sup> The Commission cannot make the same assumption as to whether those prior relationships resulted in any actual additional workplace benefits.

The Commission investigated Porreca’s allegation that Graff received higher pay and additional vacation days because of her prior affair with Anderson<sup>26</sup> but did not find reliable evidence to support this claim. According to Porreca and Anderson, Graff is the highest paid employee at the Center. *Id.*; Anderson Interview (Nov. 14, 2014). However, she is also one of the most senior employees and has received licensures and training to perform certain work that the most senior hygienist (*i.e.* Zandy) declined to receive. Anderson Interview (Nov. 14, 2014).

As to Graff’s alleged extra vacation time, there is simply not enough evidence from which the Commission could find a triable issue as to favoritism. The policy at the Center appears to be that each employee accrues one week of paid vacation (5 days) after one year of full-time employment and two weeks of paid vacation (10 days) after two years. *Id.*; Cp. Q. Resp., Pt. 2, No. 1 (Oct. 7, 2014) (part-time employees received fewer vacation days than full-time employees). Anderson represented that Center employees could individually negotiate more vacation. Anderson Interview (Nov. 14, 2014). And Graff told Commission investigators that in 2009 or 2010, she negotiated with Anderson for an increase in her number of paid vacation days from 10 to 14 per year. Graff Interview (Dec. 16, 2014).

Still, there is no evidence of any connection between additional vacation days and prior sexual conduct. Instead, the evidence is that employees with no sexual history with Anderson also negotiated for and received additional vacation days, including the Center’s other senior hygienist, Zandy. *See* Anderson Interview (Nov. 14, 2014); Zandy Interview (Dec. 15, 2014). Porreca herself received two paid vacation days as an extra benefit that she had not yet earned under the policy. Porreca Interview (Jan. 9, 2015); Anderson Interview (Jan. 16, 2015) (granted additional vacation days to attend a funeral in March 2014).

In the absence of tangible work benefits associated with submitting to sex with Anderson, the Commission considers Anderson’s alleged failure to make Graff and Holubecki follow

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<sup>25</sup> Both parties (*i.e.* Porreca and Anderson) agree on this point, so Graff and Holubecki’s denial does not affect the analysis here.

<sup>26</sup> Porreca also noted that Holubecki (who started in 2011) received a raise while Porreca worked at the Center. Porreca Interview (Aug. 12, 2014). But without any comparative or other contextual information, that assertion is not substantial evidence and has no probative value.

Porreca's work instructions.<sup>27</sup> Again, there is no evidence that if Graff and Holubecki were allowed to be insubordinate or hostile to Porreca, it was a privilege that they had earned by sleeping with Anderson. The most notable material weakness in Porreca's theory is the fact that, for both Graff and Holubecki, the alleged affairs were respectively remote in time and very brief. Neither was Anderson's lover at the time of Porreca's employment at the Center. Further, the Commission's investigation found that confusion about the scope of Porreca's managerial authority was endemic at the Center and extended to employees, such as Kucala, who had no sexual history with Anderson.

In the absence of evidence that Graff and Holubecki were allowed to ignore Porreca's requests for administrative assistance *because* they had slept with Anderson (as opposed to because of a lack of clarity in Porreca's role at the office or because Anderson was a non-confrontational manager), the Commission is left to rely on its precedent that preferential treatment of employees based on personal friendships (or some other basis unrelated to membership in a protected class) does not violate the Human Rights Ordinance. *Blackmond v. Cook County Assessor's Office*, 2010E026, \*6 (CCHRC Aug. 26, 2014). *See also Schobert v. Illinois Dep't of Transp.*, 304 F.3d 725, 733 (7th Cir. 2002) ("Whether the employer grants employment perks to an employee because she is a protégé, an old friend, a close relative or a love interest, that special treatment is permissible as long as it is not based on an impermissible classification," *e.g.*, sex). Even if Porreca had been able to produce evidence of (what is often referred to as) a "paramour preference," simply allowing one employee to not follow the directive of another is not enough sufficiently hostile to form the basis of a legal recovery.

Notably, in rejecting Porreca's sexual favoritism claim on its specific facts (or lack thereof), this order should not be read as a categorical statement that favoritism of an employee based on a consensual romantic relationship can never support a sex-based hostile work environment claim. Instead, the Commission is inclined towards the view of its federal counterpart, the U.S. Equal Employment Opportunity Commission ("EEOC"), that widespread sexual favoritism can give rise to a hostile work environment claim where, "a message is implicitly conveyed that the managers view women as 'sexual playthings,' thereby creating an atmosphere that is demeaning to women." EEOC, "EEOC Policy Guidance on Employer Liability under Title VII for Sexual Favoritism," N-915.048, § C (Jan. 12, 1990), online at <http://www.eeoc.gov/policy/docs/sexualfavor.html> ("EEOC Sexual Favoritism Guidance") (visited June 26, 2015).

Where Porreca comes up short is in providing sufficient evidence that the degree of sexual favoritism at the Center was so widespread as to be demeaning to all of the women who worked there. Prior to this litigation, knowledge of Anderson's affairs with his employees was not widespread at the Center. Aside from Porreca and Anderson, only Kucala told Commission investigators that she knew about Anderson's sexual history with Graff and Holubecki, and Kucala said that she learned this information from Porreca. Kucala Interview (Dec. 9, 2014).

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<sup>27</sup> Porreca also suggests that Anderson's failure to discipline Graff or Holubecki for their treatment of her after the office Christmas party was another example of sexual favoritism. While the witness's accounts of the Christmas party and the following Monday in the office vary regarding Anderson's effort to mediate, Porreca herself told Commission investigators that her relationship with her coworkers improved after this emotional confrontation. As such, the story adds little to support this aspect of her hostile work environment claim.

No one else had heard any rumors or suggestions that Anderson had slept with any coworker. *See, e.g.*, Saucedo Interview (Dec. 16, 2014); Zandy Interview (Dec. 15, 2014). Porreca is without a basis for arguing that the level of sexual favoritism was so widespread as to be generally demeaning to women when no other employee even agreed that Anderson treated Graff or Holubecki better than other staff, let alone because of their alleged past relations with Anderson.

In fact, Porreca’s core allegations of favoritism – that Anderson let Graff and Holubecki ignore her directives and do less work because of past affairs – are virtually identical to those rejected in a recent persuasive decision by a federal district court dismissing an almost identical sexual harassment claim. In *Kelly v. Howard I. Shapiro & Assocs.*, the plaintiff claimed that her boss’s sexual alliance with her subordinate interfered with her ability to do her job of supervising and disciplining other employees. *See* 2012 U.S. Dist. LEXIS 110935, \*22 (E.D.N.Y. Aug. 3, 2012). The preferential treatment alleged in *Kelly* closely resembles Porreca’s allegations: the boss allowed his lover to violate company policy and to berate and “act in an insubordinate manner towards [the plaintiff] without any repercussions.” *Id.* The *Kelly* court held that a single affair was insufficient to create a hostile work environment. *Id.* at \*23-24 (plaintiff also failed to allege that she was treated badly based on her sex, *i.e.* because she was a woman). The Commission is without a basis to find that two affairs are sufficient where, as here, one was distant in time occurring more than a decade prior to Porreca’s employment and the other lasted no more than a day or two.

### 3. Anderson’s Treatment of Porreca

Porreca’s allegations of periodic unwanted physical contact and inappropriate comments come closer to the mark but remain insufficiently severe or pervasive to support a viable hostile environment sexual harassment claim. Bearing in mind that it is not always easy to draw “the line between a merely unpleasant working environment on the one hand and a hostile or deeply repugnant one on the other,” *Hostetler v. Quality Dining, Inc.*, 218 F. 3d 798, 807 (7th Cir. 2000) (citations omitted), the Commission relies on the widely accepted guidelines for this analysis, including consideration of such factors as the frequency of sexual conduct, whether the was physically threatening or humiliating, and how much the conduct interfered with the complainant’s ability to work. The test is both objective and subjective: the conduct relied on must be highly offensive to both the reasonable person and the complainant. *See supra* Discussion at I.B. (citing cases).

#### *Words*

While involuntary physical contact is weighed more heavily, offensive words matter too. Although sexual harassment cannot be based on “occasional vulgar banter, tinged with sexual innuendo,” under some circumstances, “intimidating words [and] obscene language” may create a hostile working environment.<sup>28</sup> *Hostetler*, 218 F. 3d at 807. The Commission looks to the

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<sup>28</sup> In several cases, the Commission has also found a hostile environment based on words alone. *See, e.g.*, *McClellan v. Cook County Law Library*, 1996E026 (CCHRC June 7, 1999) (finding sexual harassment where male coworker repeatedly made offensive, sexually-charged remarks to female complainant, clearly intending to harass and offend, despite requests to stop and complaints to supervisor); *Gluszek v. Stadium Sports Bar & Grill*, 1993E052 (CCHRC March 16, 1995) (finding sexual harassment where bar manager constantly used sexualized profanity

frequency of the offensive words, examines whether they were physically threatening or humiliating, and considers their impact on the person at whom they are directed. Infrequent remarks, which are neither physically threatening nor humiliating, are insufficient evidence to support a hostile environment claim. See *Iverson v. Horwitz*, 1994E021 (CCHRC Feb. 8, 1996).

Here, the first category of harassing words that Porreca alleges are stray comments by Anderson like “you look good” and “have you lost weight?” See Porreca Interview (Aug. 12, 2014). There is nothing overtly sexual about these comments. Objectively, the comments as Porreca recounted them to Commission investigators were both innocuous and fairly ubiquitous in a pleasant workplace. Similarly, the text messages that Porreca submitted as evidence of Anderson’s harassing messages do not use crude language or make sexual propositions. As noted above, they seem to contemplate just the opposite – that a sexual relationship would be inappropriate given the past difficulties it has caused for Anderson.<sup>29</sup> Even the text messages that Porreca labels as “flirtatious” are neither physically threatening nor humiliating. There is no question that the text messages are overly personal for a boss-employee relationship, but language that is unprofessional is not, as here, necessarily unlawful.

### *Unwanted Touching*

Throughout the course of this investigation, Porreca claimed to have been subjected to a variety of unwanted touching by Anderson: backrubs while working at the computer, placing his hand on her leg at the office Christmas party, and two kisses. Again, while frequent unwanted touching could be sufficient to advance a claim of hostile environment sexual harassment, the Commission’s investigation shows that the specific conduct that Anderson directed at Porreca, even if it occurred exactly as Porreca told Commission investigators that it did, is not sufficiently severe or pervasive to create a hostile work environment in this case.

“Physical harassment lies along a continuum just as verbal harassment does.” *Hostetler*, 218 F. 3d at 808. At one end are relatively minor forms of physical contact, such as a “hand on the shoulder, a brief hug, or a peck on the cheek.” *Id.* Even if uncomfortable for the receiver, these actions support finding a hostile environment only if “[c]umulatively or in conjunction with other harassment” they are sufficiently pervasive. *Id.* At the other end of the spectrum, “[e]ven more intimate or more crude physical acts – a hand on the thigh, a kiss on the lips, a pinch of the buttocks – may be considered insufficiently abusive to be described as ‘severe’ when they occur in isolation.” *Id.*

With this test in mind, the Commission finds that there is insufficient evidence that the minor physical contact between Anderson and Porreca was sexual in nature. For example,

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when communicating with the complainant, a female bartender, for many months, despite repeated requests that he stop).

<sup>29</sup> The texts that Porreca says relate to sexual conduct are veiled references, not decipherable as such without her interpretative assistance. Assuming that Porreca is correct that some of Anderson texts refer to when he kissed her and his past affairs with other employees, the wording is respectful, not vulgar or erotic. See Inv. Rep., Ex. G at 8-9 (undated text messages from Anderson to Porreca). Anderson seems to be explaining his behavior and expressing his intent not to repeat past mistakes with her. Rather than threatening or intimidating, the objective reading of these texts is that Anderson is attempting to assure Porreca that he will not have another sexual relationship with an employee of the Center. See *id.*



Porreca testified that on three or four occasions, Anderson rubbed her shoulders while she was working at her computer and told her not to stress. *See* Porreca Interview (Aug. 12, 2014). Porreca did not describe the touching as sexually suggestive and she did not tell Commission investigators that she told Anderson to stop (as she did with the other unwanted touches discussed below). Again, the Commission does not have a reasonable basis from the facts gathered in its investigation to conclude that this type of physical contact between Anderson and his employees was sexual in nature (rather than merely part of the touchy-feely atmosphere of the workplace generally). This conclusion is strengthened by Porreca's statement to Commission investigators that she was not alone in receiving Anderson's unsolicited backrubs while working at her desk. *See id.* (stating that Anderson also rubbed Holubecki's back at work).

Similarly, the unwanted hand on the knee at the office Christmas party is legally insignificant. Porreca claims that Anderson placed his hand on her leg and she told him "don't touch me." Porreca Interview (Aug. 12, 2014). For the purpose of rendering this order, the Commission disregards Anderson's testimony denying this touch. Nonetheless, Porreca told Commission investigators that Anderson removed his hand at Porreca's request, and did not provide any other testimony to suggest that this touch had erotic overtones or was anything more than a casual gesture. *Id.* The Commission cannot infer more, particularly in light of Porreca's own description of the emotionally turbulent office party that allegedly included Graff crying, Anderson kissing Holubecki, and Porreca drinking so much that she had to sleep in her car. *Id.* Adding to the objective evidence mitigating against a reasonable conclusion that this touch was sexual in nature is Kucala's statement that Porreca was crying and Anderson appeared to be trying to console her.<sup>30</sup> Kucala Interview (Dec. 9, 2014).

As a result, Porreca's hostile environment claim rests almost entirely on two unwelcome kisses in November 2013. Porreca claims that Anderson kissed her on two occasions: once when they were alone together in the office and once in the parking lot of a restaurant after a staff social outing.<sup>31</sup>

Unlike much of the other evidence the Commission found in its investigation of Porreca's claim, kissing is clearly sexual in nature. Nonetheless, even sexual conduct must be severe or

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<sup>30</sup> Porreca does not make much of Anderson touching her hand during a business lunch, Cp. Q. Resp., Pt. 1, No. 4 (Oct. 7, 2014) (alleging that Anderson reached out to hold Porreca's hand while he was crying about the death of his father), but the Commission's analysis of this touch would be the same. Porreca did not describe this unwanted touch as sexual or indicate that she pulled back from it. Again, while few Management 101 books will encourage managers to cry on an employee's shoulder, the Commission is without evidence to conclude that this touch was part of a severe or pervasive sexually hostile workplace.

<sup>31</sup> While Anderson denies both kisses, there is substantial evidence of at least one such incident. Anderson's text messages confirm that there was some sort of sexually-charged incident between he and Porreca in November 2013. *See* Inv. Rep., Ex. G at 8 (undated text message from Anderson to Porreca) ("desire and temptation was obviously intense for us both . . . out of respect . . . [he] was able to walk away"). Porreca's own contradictory statements suggest that there was only one kiss. Porreca's complaint to the Commission alleges only one kiss. *See* Compl. ¶ 7. Porreca also never mentioned the kiss in the restaurant parking lot in her initial interview with Commission investigators or in any written statements. The first time that Porreca mentioned a second kiss at all was in her most recent interview with Commission investigators and, then too, she could not recall whether this kiss occurred before or after the kiss alleged in her complaint. Porreca Interview (Jan. 9, 2015). Nonetheless, for the purpose of rendering this order, the Commission assumes that the facts are as Porreca now represents them to be: two unwanted kisses.

pervasive to be legally actionable. None of the Commission's prior precedent specifically analyzes at what point unwanted kisses create an actionable hostile work environment, but several cases provide examples of unwelcome touching that was sufficiently "severe" or "pervasive." See, e.g., *Desparte v. Arlington Heights Kirby*, 2002E020 (CCHRC June 26, 2006) (sufficiently severe where, over 12-day period, the supervisor asked a teenage employee for oral sex, groped her chest, and rubbed her leg up to her vagina); *Tsimogiannis v. United Buying Service*, 1995E074 (CCHRC Oct. 12, 1999) (sufficiently pervasive where the supervisor inappropriately touched complainant several times a week, despite her protests, frequently stared at her and made inappropriate remarks about her body, repeatedly asked her out for dinner and drinks, despite prior refusals, and asked for an "exotic dance"). In Porreca's case, two unwanted sexual advances during eight months of employment cannot be deemed pervasive, and so the Commission's analysis will focus on their severity.

In two federal cases that specifically analyzed unwanted kisses, the key factors in drawing the line were the nature of the kiss and the supervisor's response to a clear refusal. In *Hostetler v. Quality Dining, Inc.*, the Seventh Circuit concluded that two incidents were sufficiently severe based on their "physical, intimate, and forcible character." 218 F.3d at 810. In *Hostetler*, the plaintiff's coworker "did not simply steal a quick kiss on the lips": he gripped the plaintiff's face in his hands and then forced his tongue into her mouth when he kissing her. *Id.* at 809. The next day, he came up from behind and grabbed her face again; when she bent over to escape another "kiss," he began to unfasten her bra, and stopped only when another employee entered the room. *Id.*

By way of contrast, the Seventh Circuit pointed to a case where two less forceful sexual advances were deemed merely "inappropriate," so the sexual harassment claim failed. *Id.* (citing *Saxton v. American Tel. & Tel. Co.*, 10 F.3d 526 (7th Cir. 1993)). In *Saxton*, the plaintiff and her supervisor met for drinks after work at his invitation; later that evening, at a jazz club, he placed his hand on her thigh several times and, each time, she removed it and told him to stop. 10 F.3d at 528. When they left the club, he kissed her "for two or three seconds until she pushed him away." *Id.* She told him not to do that again; he agreed, and the next morning, he apologized and told her it would not happen again. Three weeks later, he asked her to lunch to discuss business and then detoured to the Morton Arboretum for a walk. She walked off on her own, then "he 'lurched' at her from behind some bushes, as if to grab her," and she dashed away. *Id.* at 529. She again told him his conduct was inappropriate; this time he became sullen, but stopped. There were no further touches or other sexual advances. *Id.*

Turning back to Porreca's case, the Commission concludes that the two kisses she described, while close to the line, did not cross over to create a hostile work environment. In Porreca's own words, the alleged office kiss on November 18, 2013 happened after Porreca told Anderson about her financial troubles; he said she needed some consoling and asked her to give him a hug. According to Porreca, it turned into a prolonged hug and, when she stepped back, Anderson kissed her. Porreca reacted by saying "what the fuck?" There is no evidence before the Commission that Anderson forced the kiss to continue after Porreca clearly indicated that she was not interested. Instead, Porreca says that the kiss stopped. The alleged parking lot kiss, also in November 2013, occurred after Anderson and Porreca left the restaurant abruptly because Porreca was accused of stealing a decorative candlestick. Porreca told Commission investigators that she was telling Anderson about the incident and how embarrassed she felt when Anderson

kissed her. Again, according to Porreca, before she could protest, Anderson pulled back on his own. Porreca says that Anderson said immediately that he should not have kissed her. Porreca does not describe either kiss as prolonged or forceful. In both cases, they ended quickly, either at Porreca's insistence or Anderson's.

Based on both the nature of the kisses and Anderson's response to Porreca's disinterest as described by Porreca, the two unwanted kisses are not sufficiently severe to create a hostile work environment. Unlike the actionable kisses in *Hostetler*, neither of Anderson's kisses was "forcible" or physically intrusive. Instead, Porreca's descriptions resemble the brief kiss in *Saxton*, where the sexual harassment claim failed.

Also, like in *Saxton*, Anderson was quick to stop his sexual advances – both right after the kiss and then permanently. Based on Porreca's account, at the office he stopped as soon as she objected and, in the parking lot, he pulled back without prompting and immediately told her he should not have done that. Additionally, the Commission cannot ignore that Anderson followed up these incidents with text messages expressing his intent not to have sexual contact with Porreca again. Based on the Commission's investigation, there were no further kisses (or other sexual advances made) by Anderson from November 2013 until Porreca left the Center some five months later.

## **II. Retaliation Claim**

The Human Rights Ordinance prohibits retaliation against any person because, *inter alia*, that person "in good faith has opposed that which the person reasonably believed to be . . . sexual harassment." County Code, § 42-41(a) (the "opposition clause").<sup>32</sup>

To establish a claim for unlawful retaliation, a complainant must show that (1) she sought to exercise a right protected by the Human Rights Ordinance; (2) she suffered adverse treatment that is reasonably likely to deter the complainant or others from engaging in protected activity; and (3) there is a causal connection between the protected activity and the adverse treatment. *Robinson v. CEDA*, 2012E015, \*4-5 (CCHRC July 25, 2014); *Washington v. Cook County*, 2005E065, \*4 (CCHRC Sept. 26, 2013).

Porreca's discharge easily meets the second element. But the first and third elements, which require more analysis, are not satisfied here.

### **A. First Element: Opposition to Sexual Harassment**

Porreca's complaint alleges that she was fired because she "complained about the inappropriate touching, kissing and harassment" at the Center.<sup>33</sup> Compl. ¶ 16. After an initial interview of Porreca, however, it became clear that Porreca never actually complained to

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<sup>32</sup> The Human Rights Ordinance also prohibits retaliation for filing a complaint at the Commission or otherwise participating in the Commission process. County Code, § 42-41(a) (the "participation clause").

<sup>33</sup> The complaint also alleges that Porreca was fired in retaliation for refusing to sleep with Anderson. Compl. ¶ 16. As explained above, *see supra* Discussion at p. 17 n. 20, this is a claim of *quid pro quo* sexual harassment, not retaliation, and was analyzed by the Commission as such.

Anderson about the unwanted kissing or touching (beyond refusing his advances in the moment as discussed above). Instead, Porreca directed the Commission to focus on her complaint to Anderson regarding his potential harassment in the form of his favoritism towards past sexual partners at the Center. Porreca Interview (Aug. 12, 2014).

Specifically, Porreca points to the underscored line in a December 14, 2013 text message to Anderson, the day after the tumultuous office Christmas party:

Last night was miserable for me. From Mo and Diane treating me like shit to feeling embarrassed about finding out about you and Diane. I never understood why Mo and Diane treated me the way they did and now I do.

Inv. Rep., Ex. G at 16 (emphasis supplied).

On its face, this message is a complaint about Graff and Holubecki, not Anderson. But Porreca asks the Commission to consider it in the context of her testimony that Graff and Holubecki were jealous of her and that Anderson allowed these employees to be rude to Porreca and ignore her requests for assistance with administrative work because of their past sexual affairs with Anderson. Other text messages that Porreca submitted to the Commission arguably do somewhat more to convey a complaint about sexual favoritism in the workplace. *See, e.g., id.* at 17 (“You allow them to treat me that way.”); *id.* at 20 (“The way they treated me last night was terrible and the fact that you did nothing was eye opening.”). But these text messages are, in essence, what Porreca describes as her opposition to a form of sexual harassment at the Center.

To meet the first element in a retaliation claim based on opposition, a complaint must have been made in “good faith” to oppose conduct that the complainant “reasonably believed” was sexual harassment prohibited by the Human Rights Ordinance. *See* County Code, § 42-41(a). Porreca’s complaint contained in her December 2013 text messages fails this test.

This is not because, as discussed above, Anderson’s alleged sexual favoritism was not sufficiently widespread as to be actionable as sexual harassment under the Human Rights Ordinance. As the Commission has noted in prior decisions, a complaint of sexual harassment can be made in good faith, even if the claim ultimately fails on the merits or is insufficiently supported by the evidence. For example, the Commission found substantial evidence of retaliation where a woman was discharged after complaining to management that her supervisor regularly called her and a female coworker “bitch,” even after she asked him to stop. *Washington, 2005E065* at \*4-5. While deciding that this use of sexual profanity fell short of the line for a hostile environment claim, it was deemed reasonable for the complainant to believe this was sexual harassment. *Id.* This forgiving legal standard is especially important when the underlying claim is hostile environment sexual harassment: it is often hard to predict at what point one’s list of grievances regarding workplace conduct over time will be judged as “severe or pervasive.”

Rather, as the more developed guidance of the Seventh Circuit provides, the concept of good faith opposition has both an objective and subjective component:

A plaintiff must establish that he not only had a subjective (sincere, good faith) belief that he opposed an unlawful employment practice; his belief must also be objectively reasonable, which means that the complaint must involve discrimination that is prohibited by [law].

*Hamner v. St. Vincent Hosp. & Health Care Ctr., Inc.*, 224 F.3d 701, 707 (7th Cir. 2000) (internal quotation marks and citations omitted).

Putting aside the question of whether Porreca had an objective reason to believe that the level of sexual favoritism in workplace was unlawful, it does not actually appear that Porreca had a sincere, good faith belief when she sent Anderson the text message the day after the office Christmas party that she was complaining to Anderson about sexual favoritism or opposing any violation of the Human Rights Ordinance. *See Tate v. Exec. Mgmt. Servs., Inc.*, 546 F.3d 528, 532-33 (7th Cir. 2008) (plaintiff failed to show “opposition” where no evidence indicated that, at the time he rejected sexual relationship, he had a good faith belief that he was being sexually harassed or that defendant’s behavior was unlawful). Framing these text messages (and her related complaints about Graff and Holubecki to Anderson in the August/September 2013 timeframe) as her protected “opposition” is a fallback position for Porreca after the Commission’s initial investigation demonstrated that there was no evidence that she ever complained to Anderson about the words and touches that make up the bulk of her sexual harassment claim. Read in the context in which those text messages were sent, they appear to be part of a personal falling out with Anderson. The text messages adequately foreshadowed that Porreca would not go out of her way to hang out with Anderson after the office Christmas party, *see* Porreca Interview (Jan. 9, 2015), but they were insufficient communication to put Anderson on notice that Porreca believed that he was violating the local anti-harassment ordinance. Porreca’s complaints about Anderson’s failure to discipline Graff and Holubecki (both early in Porreca’s tenure and after the falling out at the Christmas party) are indistinguishable from her general complaints about Anderson’s unprofessional way of running the Center. It is only in hindsight – and with considerable assistance from Porreca and her counsel – that these text messages could ever be read as a complaint about unlawful sexual favoritism.

### **B. Third Element: Causal Link**

Even if Porreca had met the first element, however, her retaliation claim still fails because the evidence remains insufficient to infer a causal link between Porreca’s complaints and her discharge. The Commission uses a “totality of circumstances” analysis for this element. *Andersen v. CD2000, Inc.*, 2004E022 (CCHRC Nov. 18, 2008). Temporal proximity is the primary factor: the more time that passes between a complainant’s protected act and the adverse treatment, the less likely a causal link. When the alleged retaliation occurs within hours or days, that alone may be sufficient evidence to proceed with a retaliation claim; once more than a year has passed, a retaliation claim is highly unlikely to succeed. *Id.* To prove a causal link, a complainant must also be able to show that her employer was aware of her protected activity. *Id.* If she fails to do so, the Commission need not analyze whether the respondent’s reason for adverse treatment was pretextual. *Id.* (complainant failed to show causal link between her deposition testimony in an EEOC sexual harassment class action case filed against prior employer and her termination for embezzlement in light of a 2-month gap between the events

and a lack of evidence that the supervisor at respondent-employer or supervisor's friend, the accused harasser, knew the substance of her testimony). *Compare Conway v. Trans-Action Database Marketing*, 1999E010 (CCHRC Mar. 13, 2003) (*prima face* case of retaliation where complainant fired the day after filing a complaint with the Commission, and respondent-employer made reference to receiving a call from the Commission before terminating him).

Turning to the timing of Porreca's alleged protected opposition, she claims that she started complaining to Anderson about favoritism towards Graff and Holubecki in August or September 2013 and that her complaints culminated in her December 14, 2013 post-Christmas-party text. Respondent fired her more than four months later, on April 23, 2014. This four-month time lag cautions against a causal link, but it does not compel that result.

Anderson asserts that Porreca was fired for poor work performance, and he provided extensive objective documentation in support of that claim. According to Anderson, he began focusing on the accounts receivable issues in December 2013 while reviewing his year-end numbers. After identifying serious collections problems, he embarked on a multi-step inquiry with the company the Center used for tech support on its practice management software. These exchanges are verified by vendor business records produced to the Commission. These records also show that Porreca was specifically aware of the accounts receivable problem before her March 2014 review meeting with Anderson and subsequent termination: computer-generated call records show that on March 14, 2014, Porreca called Hecht's employer and requested a copy of Respondent's accounts receivable numbers for the past year.

The gravity of this problem is shown by Anderson's deposit of his own personal funds into the dental office account to relieve cash flow problems, and the reasonableness of Respondent's belief that Porreca was performing poorly is shown by reliable comparative evidence. Both Porreca's predecessor and her replacement maintained the Center's accounts receivable at a markedly higher level, not just in terms of the total amount of billing outstanding (which can be misleading because increases may reflect increased revenue), but also by comparing the AR Rate, which shows the ratio of monthly production (revenue) to monthly collections.

Porreca essentially argues that these alleged performance problems are a pretext for retaliation. She defends her work and claims that Anderson never criticized her performance until after her December 14, 2014 text message complaints. It was only then, she asserts, that Anderson started looking for problems and assembling evidence of reasons to fire her. In assessing pretext, the critical inquiry is not the accuracy of the employer's assessment of the employee's poor work performance, but whether the employer in good faith believed that the employee had the work performance problems given as the reason for discharge.<sup>34</sup> *See, e.g., Fatemi v. White*, 775 F.3d 1022, 1045 (8th Cir. 2015); *Jordan v. Summers*, 205 F.3d 337, 343 (7th Cir. 2000). Given the information and documents submitted by Anderson, which provide

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<sup>34</sup> Porreca also makes a technical accounting argument regarding the most accurate method for measuring AR collection performance. Email from M. Baiocchi to A. Cahn (Feb. 12, 2015) (proposing that the better way of measuring collection function is by looking at the "total overdue balance in proportion of the total accounts receivable balance"). So long as a respondent uses a reasonable, reliable method to show a complainant's performance problems, as was done here, the Commission need not analyze or make findings on the "best" accounting practice in order to make a substantial evidence determination.

ample evidence of her work performance problems, her point on the timing of his initial inquiry does not show pretext.

There is no substantial evidence of a causal link between Porreca's complaints and her discharge four months later. Thus, her retaliation claim fails to meet the third element as well.

### **CONCLUSION**

For the foregoing reasons, the Commission orders that Complaint No. 2014E011 pending before this Commission be **DISMISSED** for **LACK OF SUBSTANTIAL EVIDENCE** of a violation of the Human Rights Ordinance. In accordance with CCHR Pro. R. 480.100(A), either party may file a request for reconsideration with the Commission within 30 days of the date of this order.

July 10, 2015

By delegation:

A handwritten signature in black ink, appearing to read 'Ranjit Hakim', with a horizontal line extending to the right.

Ranjit Hakim  
Executive Director of the Cook County  
Commission on Human Rights