Dep't of Consumer Affairs v. AQP General Services Corp.

OATH Index No. 236/19 (May 10, 2019)

Respondents violated the Earned Sick and Safe Time Act by failing to provide an employee with paid sick leave, firing the employee in retaliation for taking sick time, failing to distribute written notice of employee rights, and failing to distribute or post written sick leave policies. Respondents are ordered to pay $3,500 in fines to petitioner and $6,855 in relief to the employee.

NEW YORK CITY OFFICE OF ADMINISTRATIVE TRIALS AND HEARINGS

In the Matter of
DEPARTMENT OF CONSUMER AFFAIRS
Petitioner
-against-
AQP GENERAL SERVICES CORP.
Respondent

MEMORANDUM DECISION

FAYE LEWIS, *Administrative Law Judge*

Petitioner, the New York City Department of Consumer Affairs ("DCA" or "Department"), brought this proceeding under sections 2203(e), (f), and (h) of the New York City Charter and section 20-924(a) of the Administrative Code. *See also* 6 RCNY § 6-01(a) (Lexis 2019). Petitioner alleges that respondents, AQP General Services Corp. ("AQP") and Angel F. Cardenas, have violated the Earned Safe and Sick Time Act ("the Act") and rules promulgated thereunder, 6 RCNY § 7-201 *et seq.*, by: (1) failing to provide sick time on four days to an employee, Ana Rodriguez;[1] (2) firing Ms. Rodriguez in retaliation for taking sick time; (3) failing to provide written notice to employees of their rights under the Act; and (4) failing to distribute or post written sick leave policies in compliance with the Act (ALJ Ex. 1).

At a two-day trial, petitioner presented the testimony of the complainant, Ms. Rodriguez,

[1] The petition (ALJ Ex. 1) alleged that respondent had failed to pay Ms. Rodriguez for sick time taken on five days. At trial, petitioner withdrew count two, relating to November 26, 2015, because it was Thanksgiving and employees were not scheduled to work (Pet. Post-Trial Br. at 2). As amended, the petition alleges that respondent failed to pay Ms. Rodriguez for sick time taken on four days: November 25, 27, and 30, 2015, and December 3, 2015 (ALJ Ex. 1, counts 1, 3-5).

and of Katherine Harrington and Tat Chun Law, two employees in DCA's Office of Labor Policy and Standards ("OLPS") who investigated the complaint that Ms. Rodriguez filed with DCA. Respondent Cardenas testified in his own behalf and presented four other witnesses: Maribel Bracho, AQP's bookkeeper; Cleopatra Cardenas, the complainant's sister; Carlos Rodriguez, the complainant's father; and Luz Elena Verdesoto, a supervisor employed by AQP. Both parties also presented documentary evidence. The record closed upon the parties' submission of post-trial briefs. For the reasons below, the petition is granted, except for count two, which was withdrawn. Respondents are ordered to pay $3,500 in fines to petitioner and $6,855 in relief to the employee.

ANALYSIS

Under the Act, an employer with five or more employees must provide qualifying employees with paid sick time, give all employees written notice of their rights under the law, and retain records for three years demonstrating compliance with the law. Admin. Code §§ 20-913(a)(1), 20-919(a), 20-920 (Lexis 2019). In addition, under the implementing rules, an employer must maintain and distribute a written sick time policy that meets or exceeds the requirements of the Act and rules. 6 RCNY §§ 7-211(a),(b),(c)(Lexis 2019).[2] An employer is prohibited from retaliating or threatening retaliation against employees who exercise or attempt to exercise their rights under the law. Protected activity includes asking for or using sick time, and prohibited retaliation includes termination of employment. Admin Code § 20-918; 6 RCNY § 7- 108.

Respondents admitted violating section 20-919(a) of the Act and section 7-12(a) of the rules, requiring the distribution of a notice of employee rights and the posting or distribution of written sick leave policies (Tr. 17, 18, 22). These violations were charged in counts seven and eight of the petition (ALJ Ex. 1). Respondents deny the remaining allegations, charged in counts one and counts three through five (failure to pay sick leave), and count six (retaliation for the use of sick leave).

As discussed below, the weight of the evidence, including Ms. Rodriguez's credible testimony and AQP's own payroll records, establishes that Ms. Rodriguez was not paid for four days of sick leave that she took on November 24, 27, and 30, and December 3, 2015.

[2] The petition cites to rule 7-12(a), which has been renumbered.

Respondents do not deny that Ms. Rodriguez was terminated from her employment, but assert that the termination was not retaliatory, but was rather intended as an opportunity for her to collect unemployment while her father temporarily filled her position (Resp. Post-Tr. Brief at 4). However, the circumstances underlying the termination, including its timing, together with Ms. Rodriguez's testimony and portions of Mr. Cardenas's testimony, establish that Ms. Rodriguez was terminated from employment because of her use of sick leave.

The parties stipulated to the following. Ms. Rodriguez was employed by respondents (AQP General Services Corp. and Angel Cardenas)[3] from approximately April 2012 to December 2015. Respondents' business was providing janitorial services to facilities including schools, universities, and airports. During her first four months of employment, Ms. Rodriguez was assigned to clean at St. John's University ("St. John's") in Queens. From approximately mid-to-late 2012 until June 2013, she was assigned to KIPP NYC College Prep High School ("KIPP School"), at 201 East 144th Street in the Bronx. From approximately June 2013 to December 2015, she was assigned by respondents to the Bronx Charter School for Children ("Bronx Charter School"), at 388 Willis Avenue in the Bronx. Ms. Rodriguez underwent a scheduled surgery on November 25, 2015. She did not work for respondents on November 25, 26, 27, and 30, 2015. She went to the emergency room on December 3, 2015, because of complications from the surgery, and thus did not perform work for respondents on that date. Ms. Rodriguez received a direct deposit payment from respondents dated December 3, 2015, in the amount of $199.48 (Pet. Ex. 1).

It was not disputed that Mr. Cardenas hired Ms. Rodriguez to work at St. John's (Rodriguez: Tr. 29; Cardenas: Tr. 267). Ms. Rodriguez explained that she met Mr. Cardenas through her sister. He told her that he owned AQP, which was recruiting summer staff to work at St. John's (Tr. 29). Mr. Cardenas later decided to transfer Ms. Rodriguez from the KIPP School to the Bronx Charter School (Rodriguez: Tr. 111-12; Cardenas: Tr. 269).

Ms. Rodriguez's job duties and hours at the Bronx Charter School were not disputed. She testified that she worked Monday through Thursday, from 11:30 a.m. to 5:00 p.m., and on

[3] Mr. Lau, currently an investigator for OLPS, testified that Mr. Cardenas used to own AQP Cleaning and Maintenance, which dissolved in June 2015 and became AQP General Services (Tr. 180).

Friday from 10:00 a.m. to 3:00 p.m. (Tr. 31). This came to about 27 hours per week (Tr. 31)[4]. She cleaned the bathrooms and hallways, took out the garbage, lifted tables, and cleared the snow. Mr. Cardenas provided her with cleaning materials. She worked by herself on the day shift, but four or five other employees of AQP worked the night shift (Tr. 32). She reported to Candy Manzano, who worked for the Bronx Charter School (Tr. 33). Mr. Cardenas did not recall the precise hours that Ms. Rodriguez worked, but believed it was 5½ hours per day, consistent with her testimony about her schedule from Monday through Thursday (Tr. 278).

Also uncontested was that Ms. Rodriguez notified Mr. Cardenas of the date of her surgery in advance (Rodriguez: Tr. 42; Cardenas: Tr. 272). As noted above, the parties further agreed that Ms. Rodriguez did not work on November 25, November 27, November 30, and December 3.

The parties differ on most other material facts, including whether Ms. Rodriguez worked on other dates between November 30 and December 3, whether she was paid for sick time, and whether she was terminated because of her use of sick time. Ms. Rodriguez, who testified through a translator, provided the following account. She worked Monday and Tuesday, November 23 and 24 (Tr. 59). She did not work on November 25, the day of the surgery, nor on November 26, which was Thanksgiving. Ms. Rodriguez also missed scheduled days of work on Friday, November 27 and Monday, November 30. On Tuesday, December 1, and Wednesday, December 2, she worked her usual shifts. On Thursday, December 3, she went to work as scheduled, even though her wound had opened and was bleeding. Ms. Manzano, her supervisor at the Bronx Charter School, told her to go to the hospital. Ms. Rodriguez called Mr. Cardenas and said that she could not work and went to the emergency department at Lincoln Medical and Mental Health Center in the Bronx (Tr. 42-46). After being seen in the emergency room, Ms. Rodriguez called Mr. Cardenas again and told him that she could not go to work that day (Tr. 46). A patient discharge report from the hospital, dated December 3, 2015, corroborated her testimony about the emergency room visit (Pet. Ex. 7 at 10).

According to Ms. Rodriguez, at a follow-up appointment with her primary care physician on December 7, 2015, the doctor told her that she could not return to work until her wound had

[4] Respondents' payroll for Ms. Rodriguez, showing timesheet details for a portion of 2015, shows that she was usually credited for working 5.4 hours every day, Monday through Friday (Pet. Ex. 14 at 256). Petitioner's exhibits were all Bates-stamped, which are noted throughout this decision, except when other references are used.

healed (Tr. 50; Pet. Ex. 7 at ¶ 23).[5] While at the doctor's office, Ms. Rodriguez telephoned AQP's office and spoke to Mr. Cardenas, saying that she was unable to work and "needed the disability papers" (Tr. 51). Mr. Cardenas said they had mailed her the papers and then hung up the phone (Tr. 52). At the suggestion of the doctor's office, Ms. Rodriguez called AQP's office again to ask if the paperwork could be faxed to the doctor's office (Tr. 52).[6] She spoke to Mr. Llican, AQP's accountant, who clarified that AQP had not mailed a disability application to her. Instead, AQP had mailed her a letter of termination. Mr. Llican also told Ms. Rodriguez that her work shift was no longer available because the company no longer needed anyone to fill it (Tr. 40, 52). He said that Mr. Cardenas and the school had made the decision to terminate her employment (Tr. 53).

Ms. Rodriguez received a letter of termination in the mail, dated December 3, 2015, the same date that she went to the emergency room (Pet. Ex. 3). The termination was effective December 4, 2015. The letter stated that the termination decision "in no way" represented the quality of her work and that the company would "be happy" to provide a recommendation letter. The letter also advised that she could apply for unemployment insurance benefits (Pet. Ex. 3). Ms. Rodriguez denied agreeing to be terminated from employment at AQP so she could collect unemployment benefits (Tr. 65, 99). She also denied that Mr. Cardenas told her that he would have her father temporarily fill her position but that she could return once she recovered from her injuries (Tr. 65-66, 99).

According to Ms. Rodriguez, she saw Mr. Cardenas at a charity event/holiday party within a week of getting the termination letter. She told Mr. Cardenas that she wanted to speak with him but he said that he could not talk to her (Tr. 98). She did not feel well enough to work until mid-January 2016. The first job she found was in February 2016, working events (Tr. 70). In her DCA complaint, which she filed on November 2, 2016, Ms. Rodriguez described herself as "devastated" to have lost her job right before the holidays. This left her without money to buy Christmas gifts for her children or to go out with friends. She felt "humiliated," "anxious," "depressed," and "alone" (Pet. Ex. 7 at ¶ 29).

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[5] Petitioner's Exhibit 7 is the complaint that Ms. Rodriguez filed with DCA ("DCA complaint") on November 2, 2016.

[6] In her DCA complaint, Ms. Rodriguez asserted that the doctor's office suggested that AQP e-mail the paperwork. She also stated that she had initially requested disability paperwork from AQP in mid-November 2015 (Pet. Ex. 7).

Mr. Cardenas asserted that he paid Ms. Rodriguez for the four days she took for sick leave in November and December 2015 (Tr. 271). According to Mr. Cardenas, Ms. Rodriguez told him that she had surgery scheduled for November 25 and could return to work on December 3 (Tr. 272). Mr. Cardenas testified that Ms. Manzano told him on December 3 that Ms. Rodriguez was in pain, after which he telephoned Ms. Rodriguez and told her to go to the hospital and find out whether or not she could "come back to work" (Tr. 274). He called Ms. Rodriguez again while she was still in the emergency room. During this call, Ms. Rodriguez told him that she was going to take two or three weeks off (Tr. 274). Mr. Cardenas provided a detailed account of the conversation:

> I suggest to her to go to her primary and find out exactly when she going to come back to work and she say, I don't know. So, what does that mean? You going to be able to come back to work? And she say, no. Is why I told her, listen, I cannot, I already pay your sick leave, sick days, I cannot be able to keep paying if you going to take more days off, but because you're my sister-in-law, I'm going to . . . give you the opportunity . . . to collect unemployment. . . I'm going to give you a letter. You can go to [un]employment and collect money. When you get recovery, you more than welcome to come back to work for me.

(Tr. 275). According to Mr. Cardenas, Ms. Rodriguez agreed (Tr. 275). Mr. Cardenas then instructed his staff to issue a letter of termination (Tr. 275).

Notwithstanding the letter of termination dated December 3, 2015, Mr. Cardenas asserted that Ms. Rodriguez was able to come back to work whenever she wanted. He testified that he saw Ms. Rodriguez at the holiday party, which he said was on December 6, and reminded her that as soon as she recovered, she could come back to work (Tr. 276, 281). He has never heard from her since (Tr. 276, 281).

Carlos Rodriguez, Ms. Rodriguez's father, confirmed, consistent with Mr. Cardenas's testimony, that Mr. Cardenas told him that he would be transferred from his position at St. John's, where he worked since 2013, to the Bronx Charter School "to fill in" for his daughter (Tr. 238, 244). He also testified, albeit in response to a leading question, that Mr. Cardenas told him that his daughter would at some point return to her position at the Bronx Charter School (Tr. 238). But he was unclear as to when he first started working at the Charter School, variously testifying that it was two, three, or two and a half years ago (Tr. 243).

As noted, respondents have admitted liability on counts 7 and 8. The remaining issues as to liability are whether Ms. Rodriguez was terminated in retaliation for her use of sick leave and whether Mr. Cardenas and AQP are jointly and severally liable for violations of the Act.

Employers with at least five employees are required to pay sick leave to qualifying covered employees. Respondents do not contend that they have fewer than five employees and indeed assert that they paid Ms. Rodriguez for the sick leave hours which she accrued (Resp. Post-Trial Br. at 4). Further, the evidence establishes that respondents employed at least five employees in 2015. Ms. Harrigan, who investigated Ms. Rodriguez's DCA complaint, testified that respondents submitted a list of employees to her in response to a notice of investigation (Tr. 158). The list contained six employees, excluding Mr. Cardenas, but including Ms. Verdesoto, who testified that she worked for respondents in 2015 (Pet. Ex. 12; Verdesoto: Tr. 251). Ms. Rodriguez was not on this list, although the parties stipulated that she worked for respondents. Her father, Carlos Rodriguez, also was not on the list despite evidence that he worked for respondents in late 2015 (C. Rodriguez: Tr. 237, 243; Verdesoto: Tr. 251). The addition of Ms. Rodriguez and her father brings the total number of employees to eight. Moreover, Ms. Harrigan did not believe the list to be complete because Ms. Rodriguez said there were more employees in her complaint and because, other than Ms. Verdesoto, the "end dates" shown for the employees were not current (Pet. Ex. 12).

In addition, petitioner submitted a copy of respondents' work log and/or sign-in sheet for Kipp School for the period November 20, 2015, through December 3, 2015 (Pet. Ex. 13). This record lists 19 different people (Pet. Ex. 13). Respondent's counsel asserted that some of these people were independent contractors (Tr. 171), but did not submit any proof in support.

The evidence also establishes that Ms. Rodriguez was entitled to paid sick leave and that her sick leave balance was sufficient to cover the four sick days in question. Under the Act, an employee is able to use paid sick time on the 120th calendar day following their commencement of employment, so long as they are employed more than 80 hours within New York City. Admin. Code §§ 20-913(d)(1), 20-912. Employers are required to provide a minimum of one hour of sick leave for every 30 hours worked. Admin. Code § 20-913(b). Ms. Rodriguez has been employed by AQP since April 2012. She testified that her regular schedule at the Bronx Charter School was about 27 hours per week, which is consistent with respondents' payrolls. Further, respondents' payroll records, specifically the employee statement of earnings for Ms.

Rodriguez for March 20, 2014 through May 31, 2015, show that she worked at least 1100 hours during that time (Pet. Ex. 14 at 255).[7] From June 5, 2015, through September 10, 2015, she worked an additional 427 hours (Pet. Ex. 14 at 256). Ms. Rodriguez continued to accrue sick leave through December 3, 2015, based on her hours worked, but the record does not clearly delineate how many hours she worked in this time period. But considering only the limited payroll records showing hours worked between March 20, 2014 and September 10, 2015, Ms. Rodriguez worked a total of 1527 hours, accruing 50.9 hours of sick leave. Respondent's payroll records show that she used eight hours of sick leave, for which she was paid, on September 10, 2015 (Pet. Ex. 14 at 256). This leaves 42.9 hours, which exceeds the 21.6 hours of sick leave that she used in November and December 2015.

Respondents argue that Ms. Rodriguez was not believable and her claims that she was denied paid sick leave and terminated because of her use of sick leave should not be credited. According to respondents, documentary evidence establishes that Ms. Rodriguez was paid for the four days of sick leave she used in November and December. As to general credibility, respondents make three related arguments. Respondents contend that Mr. Cardenas had a close familial bond with Ms. Rodriguez and would not have denied her sick leave or fired her because she took sick leave. Respondents also assert that Ms. Rodriguez never complained to her family about the sick leave issue or her termination, despite being at a social occasion with Mr. Cardenas a week later, and that she did not appear to be "devastated" by the termination, as she claimed in her sick leave complaint. Finally, respondents assert that Ms. Rodriguez's subsequent filing of a complaint was motivated by some sort of "interfamily rift" (Resp. Post-Tr. Brief at 6).

I did not find any of these contentions to be persuasive.

When a witness's credibility is called into question, the existence of supporting documentary evidence can be critical. *See Dep't of Sanitation v. Menzies*, OATH Index No. 678/98 at 2 (Feb. 5, 1998), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD 98-101-A (Sept. 9, 1998) (relevant factors in assessing credibility include demeanor, consistency of a witness's testimony, supporting evidence, witness motivation, bias or prejudice, and the degree to which a witness's testimony comports with common sense and human experience).

[7] This payroll report appears to be incomplete. It shows that from March 30, 2014 through August 7, 2014, respondents paid Ms. Rodriguez $6,294.85, including two large payments (one for almost $ 4,000), but does not indicate that she worked any hours.

Contrary to respondents' contention, their own payroll records establish that Ms. Rodriguez was not paid for sick leave taken on November 25, 27, 30, and December 3, 2015. Rather, the direct deposit payment of $199.48 into her account on December 3, 2015, was Ms. Rodriguez's salary for four days of work, consistent with her testimony that she worked on November 23, and 24, and December 1, and 2, 2015. AQP's payroll document for the period ending December 3, 2015, shows earnings of $216.00 (minus taxes) for 21.60 "regular hours" at ten dollars an hour (Resp. Ex. A). Under the line for "regular hours" is a line for "sick leave." The space for "current" sick leave, for the period ending December 3, is blank. The portion for "year to date" sick leave shows earnings of $80 (Resp. Ex. A), consistent with the payroll document showing that Ms. Rodriguez was paid for sick leave on September 10, 2015 (Pet. Ex. 24 at 256). According to Mr. Lau, an OLPS investigator, the investigative file did not contain any other payroll documents showing payment of sick leave to Ms. Rodriguez (Tr. 184).

Ms. Bracho, AQP's timekeeper, testified that the payroll document (Resp. Ex. A), together with a Chase Bank account statement showing the outgoing payment to Ms. Rodriguez (Resp. Ex. B), showed that Ms. Rodriguez was paid for "four days" (Tr. 216). Only when shown a copy of another document, captioned, "Charter School: 338 Willis Avenue" ("Bronx Charter School document") (Resp. Ex. C), did she testify that Ms. Rodriguez did not work during this time period (Tr. 217).

The Bronx Charter School document is in the form of two charts, showing employee names, location, and days worked during November 16 through November 30, 2015, and December 1 through December 15, 2015 (Resp. Ex. C). Ms. Bracho did not prepare the document and did not work at AQP in November and December 2015 (Resp. Ex. C). She testified that the document was found in AQP's files and that AQP generally gets documents from job site supervisors which indicate the hours that each employee works (Tr. 217, 221).

Ms. Rodriguez's name does not appear on the charts on the Bronx Charter School document. But the charts contain a line for employee Kevin de La Cruz, next to which (in the box for "location") is written, "Por Ana" (for Ana). The numeral "1" appears on this line in the boxes for November 23, November 25, November 30, and December 4, as well as on December 7-11 and December 14-15 (Resp. Ex. C). Based on this document, Ms. Bracho testified that Ms. Rodriguez did not work during these two weeks and that Mr. De La Cruz worked for her on the dates where the numeral "1" appears (Tr. 218).

When asked about the conflict between the Bronx Charter School document and the payroll document showing that Ms. Rodriguez worked 21.60 "regular hours" in the pay period ending December 3 (Resp. Ex. A), Ms. Bracho testified, "It's possible this could have been classified incorrectly" (Tr. 219). When asked if it was "possible" that the 21.6 hours represented payment for sick leave, Ms. Bracho answered, "yes" (Tr. 219).

There are multiple reasons why the Bronx Charter School document is unreliable (Resp. Ex. C). The document is not dated, nor is there any indication as to who prepared it or how (Tr. 221). There is also unexplained gray shading in some of the boxes on the chart, including four boxes on the line for Mr. De la Cruz, "Por Ana." The boxes with the gray shading are the wage subtotal boxes for both time periods, and the boxes for December 1, 2, and 3, which, apart from the gray shading, are blank.

Additionally, the charts are blank for three of the four dates on which Ms. Rodriguez testified that she worked – November 24, December 1, and December 2 (Resp. Ex. C). Only on the fourth date – November 23 – is Mr. De la Cruz shown as substituting for Ms. Rodriguez ("Por Ana") (Resp. Ex. C). Ms. Bracho testified that during the weeks reflected by the charts, the boxes left blank reflected days when no one was filling in for Ms. Rodriguez (Tr. 223). No explanation was provided as to why Mr. De la Cruz purportedly substituted in on only some of the days on which they claim Ms. Rodriguez did not work.

Apart from the inconsistency with the Bronx Charter School document, respondents could assert no reason to doubt the reliability of their own payroll document, which shows that Ms. Rodriguez was paid for 21.60 "regular hours" and did not receive any payment for sick leave used during the period ending December 3, 2015 (Resp. Ex. A). Nothing on the face of the payroll document looked irregular and respondents did not allege that there was a particular problem or issue which arose during the course of generating the document that could have resulted in a "possible" error. Additionally, Ms. Bracho did not question the validity of the payroll document in her initial testimony. Only when she was shown the document purportedly prepared by the Bronx Charter School did she change that testimony to indicate that it was "possible" that the notation of 21.60 "regular hours" "could have been" a mistake.

This is hardly a declarative renunciation of AQP's payroll document by AQP's timekeeper. Ms. Bracho's one-word reply, "correct," to respondents' counsel's question whether it was "possible" that the 21.60 hours was payment for sick leave is also worthy of very little

weight, particularly given the leading nature of the question. Moreover, although Ms. Bracho testified that it was "possible" that the "regular hours" notation was an error, she confirmed that the payroll document accurately reflected that Ms. Rodriguez earned $80 in paid sick leave "Year to Date," because Ms. Rodriguez had received $80 in paid sick leave on September 10, 2015 (Tr. 226; Pet. Ex. 4 at DCA 256). Her affirmation of the accuracy of a portion of the payroll document undercuts any argument that its notation that Ms. Rodriguez was paid for "regular hours" was incorrect.

In sum, AQP's own payroll document is sufficient to establish that Ms. Rodriguez did not receive paid sick leave during this pay period, but was instead paid for 21.6 "regular hours." But other evidence also supports this conclusion, including the testimony of Ms. Rodriguez that she worked on four days – November 23 and 24, the two days before the surgery, and December 1 and December 2, the Tuesday and Wednesday after the surgery. Respondents' contention that Ms. Rodriguez did not work on any of these days does not make sense. Ms. Rodriguez did not request sick leave for any of these days, even though November 23 and 24 immediately preceded her surgery and December 1 was the day after November 30, for which she requested sick leave. It is unlikely that someone would have surgery on a Wednesday (November 25), request sick leave for that date and the two work days immediately following it (Friday, November 27, and Monday, November 30), and then, choose not to work on the next two days (December 1 and December 2) without requesting sick leave to cover these days. Ms. Rodriguez's testimony, that she had surgery, took the remainder of the workweek and the following Monday as sick days and returned to work on Tuesday, December 1, makes far more sense.

Mr. Cardenas's testimony about when Ms. Rodriguez worked during this time period was not compelling, for several reasons. First, when asked about "the circumstances around [Ms. Rodriguez's] surgery," Mr. Cardenas testified that Ms. Rodriguez said that she was having surgery on November 25 and would come back on December 3, and that she returned to work on December 3 (Tr. 272). He made no mention at all about November 23 and 24, two days on which Ms. Rodriguez testified that she worked. Moreover, although Mr. Cardenas testified that Ms. Rodriguez took four days of sick leave between November 25 and December 3 (Tr. 278), there are five work days in this period – November 25, November 27, November 30, December 1, and December 2. There are six days if December 3 is counted. It was unclear to which days Mr. Cardenas was referring. Further, Mr. Cardenas's testimony only makes sense if Ms.

Rodriguez missed work right after her surgery but did not request sick leave for it. As discussed, this is inconsistent with "common sense and human experience." *See Menzies*, 678/98 at 2.

Mr. Cardenas's testimony that Ms. Rodriguez returned to work on December 3 was further undermined by Ms. Verdesoto's testimony. Asked when Ms. Rodriguez returned to work after her surgery, Ms. Verdesoto testified, "[t]he first and the second, she returns" (Tr. 255). Ms. Verdesoto later changed her testimony to indicate that Ms. Rodriguez returned to work on December 3. But that was only after respondents' counsel showed her a calendar and attempted to ask her if her recollection was "refreshe[d]" about Ms. Rodriguez's return date (Tr. 258). Although counsel withdrew the question, Ms. Verdesoto later testified, when asked by petitioner's counsel if AQP offered Ms. Rodriguez her job back, that "[s]he came back to work on the third, at no moment was she not given her job back" (Tr. 259). Ms. Verdesoto's initial testimony was more reliable than her amended testimony. Her initial testimony was unequivocal and directly responsive to a question. By contrast, her amended testimony appeared responsive to counsel's attempt to "refresh" her recollection, suggesting implicitly that her previous testimony was inaccurate.

In sum, AQP's own payroll record, supported by Ms. Rodriguez's testimony, establishes that respondents did not pay her for four sick days that she took in late November and early December 2015, in violation of the provisions of the Act which require employers to pay sick leave to qualifying employees. Respondents' general attacks on Ms. Rodriguez's credibility do not alter this conclusion. Although respondents' counsel asserted that an "interfamily rift" drove Ms. Rodriguez to fabricate her testimony, he acknowledged that "[o]ne could only speculate" about such a "rift" (Resp. Post-Trial Br. at 6). Ms. Rodriguez and her sister acknowledge not speaking to each other for four or five years (Rodriguez: Tr. 68, C. Cardenas: Tr. 233). But this dates to when Ms. Rodriguez's employment was terminated, suggesting that the circumstances of the termination played a significant role.

Counsel's argument that Mr. Cardenas treated Ms. Rodriguez preferentially because of their family connection was not persuasive. Although it was undisputed that Ms. Rodriguez had previously accompanied Angel and Cleo Cardenas on two vacations, Ms. Rodriguez disputed their contention that Mr. Cardenas had paid for everything but her airfare, and asserted that on the first trip, while they stayed in a "luxurious condominium," she slept on a mattress on the floor (Rodriguez: Tr. 82, 83; C. Cardenas: Tr. 231; A. Cardenas: Tr. 272). And notwithstanding

the family connection, Ms. Rodriguez asserted that at work, Mr. Cardenas treated her like any other employee and did not give her preferential treatment, as he asserted (Tr. 80). Indeed, Ms. Rodriguez felt that Mr. Cardenas had treated her unfairly in transferring her from the KIPP School in 2013. Although Mr. Cardenas and Ms. Verdesoto asserted the transfer was because Ms. Rodriguez had dated someone from the school (Verdesoto: Tr. 252; A. Cardenas: Tr. 269), Ms. Rodriguez denied these allegations, claiming that she had started to complain about problems at the school and Mr. Cardenas would not support her (Tr. 111-12).

Counsel also asserts that Ms. Rodriguez's credibility was undercut by her failure to complain to family members that she was not paid for sick leave, despite seeing them at a social occasion. Typically one might expected to confide in one's close family members. But here the situation was more complicated. Ms. Rodriguez testified that she did not complain to her sister or father that she had not been paid for four days because, "Anything regarding work, I do not have to address it to my family" (Tr. 92). And once she filed the sick leave complaint with DCA in November 2016, she felt that she could not call Mr. Cardenas because he "took it upon himself" to notify "people," presumably family members, that she "was doing this suit" (Tr. 91). It was clear from her testimony that she felt uncomfortable complaining about Mr. Cardenas to her sister, who is married to him, or to her father, Carlos, who Mr. Rodriguez employs.

Finally, counsel contends that Ms. Rodriguez's assertion that she was devastated because she lost her job was not believable in light of photographs which she posted on her Instagram account following her termination, showing her at various social events. As petitioner is not seeking emotional distress damages on behalf of Ms. Rodriguez, this is not a particularly relevant argument. In any event, Ms. Rodriguez testified that after having been fired, she was looking for work in the event field – finding a part-time job in February 2016 – and needed to post photos on social media to attract potential employers (Tr. 116-18). This testimony was plausible.

The record also establishes that Mr. Cardenas fired Ms. Rodriguez because of her use of sick leave days. By Mr. Cardenas's own account, he came to this decision during his telephone conversation with Ms. Rodriguez while she was in the emergency room on December 3, 2015. After she told him that she was going to take two or three weeks off from work because of complications from her surgery, he told her, "[I] cannot be able to keep paying if you're going to take more days off" (Tr. 275). After this, Mr. Cardenas testified, he told Ms. Rodriguez that

because she was his sister-in-law, he would give her "a letter" so she could collect unemployment (Tr. 275).

Mr. Cardenas's assertion that he told Ms. Rodriguez that he would leave her job open while she collected unemployment was not credible. It was undisputed that she never asked for her job back, even though she testified that she felt well enough to work in mid-January 2016, but did not secure employment until February 2016. Even then she earned less than she did at AQP (Tr. 70, 73). Not asking for her job back does not make sense if Ms. Rodriguez was indeed told that she could return to work at AQP whenever she was ready. The more likely scenario is that Mr. Cardenas never made that representation.

Mr. Rodriguez's testimony partially corroborated Mr. Cardenas's, but viewed in context, is of limited value. Mr. Rodriguez testified that Mr. Cardenas told him he would be assigned to the Bronx Charter School to fill in for his daughter until she returned to work (Tr. 238). But he gave this testimony in response to a leading question, lessening the reliability of his answer, and he acknowledged that Mr. Cardenas had been good to his family, taken him on trips, and provides housing to his wife (Tr. 245-56). Although Mr. Rodriquez said that he was testifying because he wanted "everything to be cleared up" and did not feel any obligation to testify in favor of Mr. Cardenas (Tr. 248), he did not appear to be an entirely dispassionate witness, for reasons related to his economic security and that of his family.

But even if Mr. Cardenas's testimony that he told Ms. Rodriguez that he would leave her job open for her was credited, there is no question that he fired her after learning that she was planning to take two or three weeks off from work. He testified that he decided to issue the termination letter so he would not have to pay her for sick leave when she was absent because of the need to recover from her surgery. Thus, he explicitly linked her termination to her use of sick days. *See Dep't of Consumer Affairs v. Excel Interior Contracting, Inc.*, OATH Index No. 174/18, mem. dec. at 16 (Aug. 2, 2018) (retaliation claim proven where respondents admitted in their written submission that the number of days which employee took off from work, which included sick days, was one of several factors considered in deciding who to lay off from employment).

Moreover, the termination letter is dated December 3, 2015, the same date that Ms. Rodriguez left work to go to the emergency room after her surgery, and the last of four days which she took as sick leave. The "temporal proximity" between Ms. Rodriguez's use of sick

leave and the termination of her employment is strong evidence of a causal connection between the two. *See Krebaum v. Capitol One, N.A.*, 138 A.D.3d 528, 528-29 (1st Dep't 2016) (retaliation claim should not have been dismissed where "[t] temporal proximity of plaintiff's complaint and the termination of his employment one month later indirectly shows the requisite causal connection"); *Cole v. Sears, Roebuck & Co.*, 120 A.D.3d 1159, 1160 (lst Dep't 2014) (retaliation claim should not have been dismissed where less than two months elapsed between employee's last formal complaint to his employer and his termination from employment); *Dep't of Consumer Affairs v. Smoke BBQ Pit Restaurant & Merrick Blvd. BBQ Restaurant & Catering Inc.*, OATH Index No. 944/18, mem. dec. at 14 (June 27, 2018) ("proximity in time" between when employee was told to clock out and when he questioned owner about payment for sick time supports inference that employee was terminated because of his persistence in asserting his right to paid sick time). Respondents' termination of Ms. Rodriguez constituted an unlawful retaliatory action under the Act and implementing rules.

In sum, counts one, three, four, and five, alleging failure to pay Ms. Rodriguez for sick time taken on November 25, November 27, November 30, and December 3, 2015, are sustained. Count six, alleging unlawful retaliation, is also sustained.

The remaining issue as to liability is whether Mr. Cardenas is personally liable for the proven charges. The Act imposes obligations upon employers, with liability for the failure to comply with those obligations. Both Mr. Cardenas and AQP are employers within the meaning of the Act. Respondents stipulated that they employed Ms. Rodriguez (Pet. Ex. 1). Moreover, Mr. Cardenas meets the definition of "employer" in the Act, which incorporates the New York State Labor Law definition of "any person . . . employing any individual in any occupation, industry, trade, business or service." Admin. Code § 20-912; Labor Law § 190(3) (Lexis 2019). Generally, a person is considered an "employer" within the meaning of the Labor Law if he or she has the power to control an employee. Factors to consider in making this assessment include whether the person had the power to hire and fire employees, supervised and controlled work schedules or conditions of employment, determined the rate and method of pay, and maintained employment records. No single factor is determinative. *Gonzalez v. Masters Health Food Serv.*, 2017 U.S. Dist. LEXIS 139174, *38-39 (S.D.N.Y. 2017); *Ramirez v. RiverBay Corp.*, 35 F. Supp. 3d 513, 520-21 (S.D.N.Y. 2014). Here, Mr. Cardenas is the sole owner of AQP. He hired Ms. Rodriguez, and ultimately he fired her. No one else made these decisions. He also set Ms.

Rodriguez's rate of pay, told her where she would be working and what her work schedule would be, and provided her with cleaning supplies. If Ms. Rodriguez needed to miss a shift and the office was closed, she contacted him at home (A. Rodriguez: Tr. 30, 32, 34). In sum, Mr. Cardenas had "control" over Ms. Rodriguez as an employee. He is jointly liable with AQP for violations of the Act. *See Dep't of Consumer Affairs v. Excel Interior Contracting, Inc.*, OATH Index No. 174/18, mem. dec. at 17-18 (Aug. 2, 2018) (president and sole owner of company jointly liable for violations of Act); *Dep't of Consumer Affairs v. PCC Cleaning Services, Inc.*, OATH Index No. 88/18, mem. dec. at 17 (June 26, 2018) (senior manager jointly liable for violating the Act).

FINDINGS AND CONCLUSIONS

1. Respondents failed to pay Ms. Rodriguez for 5.4 hours of sick time on each of the following days – November 25, November 27, November 30, and December 3, 2015 – in violation of Administrative Code section 20-913(a)(1), as alleged in counts one, three, four, and five.

2. Petitioner withdrew count two of the petition.

3. Respondents retaliated against Ms. Rodriguez for taking sick time, in violation of Administrative Code section 20-918, as alleged in count six.

4. Respondents failed to distribute the notice of employee rights, in violation of Administrative Code section 20-919(a), as alleged in count seven.

5. Respondents failed to post or distribute written sick leave policies that meet or exceed the requirements of the law and rules, in violation of section 6 RCNY sections 7-211(b),(c), as alleged in count eight.

ORDER

Petitioner seeks an order directing respondents to pay the following civil penalties.

For counts one, three, four, and five, failure to pay sick leave on four dates in violation of Administrative Code section 20-913(a)(1), petitioner seeks a $500 fine for each count, or a total fine of $2,000, as authorized by Administrative Code section 20-924(e). For count six,

retaliation against Ms. Rodriguez for her use of sick leave in violation of Administrative Code section 20-918, petitioner seeks a $500 fine, as authorized by Administrative Code § 20- 924(e). For count seven, failure to distribute the notice of employee rights, in violation of Administrative Code section 20-919(a), as well as count eight, failure to post or distribute written sick leave policies in violation of 6 RCNY sections 7-211(b),(c), petitioner seeks a $500 fine per count, as authorized by Charter section 2203(h)(1). These penalties are appropriate and I so order.

Petitioner also seeks damages and equitable relief for Ms. Rodriguez: $1,000 for the failure to pay her for sick time taken and $5,855 for the retaliatory termination. Under Administrative Code section 20-924(d)(i), Ms. Rodriguez is entitled to payment of the greater of $250 or three times her lost wages for each day on which she took and was not paid for sick time. Ms. Rodriguez's earnings per day were $54 dollars (ten dollars per hour, 5.4 hours per day) (Pet. Ex. 14 at 255, 258; Resp. Ex. A). Thus, she is entitled to $250 for each day of unpaid sick leave, or a total of $1,000 in equitable relief for unpaid sick leave.

Petitioner's request for equitable relief of $5,855 is based upon respondents' termination of Ms. Rodriguez's employment because of her use of sick time. For each instance of retaliation which includes termination, the Act authorizes "full compensation including wages and benefits lost, two thousand five hundred dollars and equitable relief, including reinstatement, as appropriate." Admin. Code § 20-924(d)(iv). Petitioner seeks equitable relief of $2,500 as well as wages and benefits lost in the amount of $3,355. This request is warranted.

Ms. Rodriguez testified that she did not feel well enough to work again until the second or third week in January, 2016 (Tr. 65). She first found another job in February 2016, which she began the first Sunday in February 2016 (Tr. 65). Generally, she worked Friday through Sunday, three hours each day, or nine hours total, and made about $25 per hour, or $225 for the week (Tr. 70, 73). She looked for, but could not find, a full-time job until April or May of 2017. At that time her salary exceeded what she was paid at AQP (Tr. 72-74).

In its post-trial brief petitioner calculated that the amount of back wages totaled $3,960, but acknowledged that it was limited to the $3,355 in lost wages requested in the petition. Petitioner also contends that interest is warranted to make the complainant whole.

For the following reasons, although I disagree with certain assumptions made by petitioner in its calculation of lost wages, I find that petitioner satisfied its burden of establishing that Ms. Rodriguez is due $3,355 in lost wages. But an award of interest is not justified because

petitioner did not request interest in the petition. Rather, it sought "a *total* amount of relief of $5,855" (ALJ 1, ¶ 80) (emphasis added). By its own reasoning, petitioner may not for the first time request interest in a post-trial brief. *See Dep't of Consumer Affairs v. Riverdale Towing Associates, Inc.*, OATH Index No. 1848/17, mem. dec. at 8 (Aug. 3, 2017) (denying petitioner's motion to add a second violation of the Administrative Code that was not included in the petition); *Business Integrity Comm'n v. Freire*, OATH Index No. 1600/13 at 2-3 (Apr. 10, 2013) (denying petitioner's motion to amend charges after trial to allege a violation of the Administrative Code different from that charged in the petition).

Petitioner contends that Ms. Rodriguez was unemployed but willing and able to work for a period for four weeks in January and February 2016, during which she would have made $270 per week if employed by respondents, and that, for the following 64 weeks, she made less than her wage at AQP (Pet. Post-Trial Br. at 10 n. 72). I disagree with petitioner's computation of the time periods. Ms. Rodriguez could not state with any certainty whether it was during the second week of January or the third week of January when she felt well enough to work. Thus, her lost wages should be calculated beginning the third week of January. Three weeks elapsed from the third week in January until the first Sunday in February, when she started her part-time events job. Based on her weekly salary of $270 per week, her lost wages for this three-week period total $810.

Further, 60 weeks elapsed between February 7, 2016, when Ms. Rodriguez started her part-time job, and the beginning of April 2017. Although petitioner computes the time period at 64 weeks, that is predicated upon the assumption that Ms. Rodriguez began full-time employment in May 2017 (Pet. Post-Trial Br. at 10). But, because petitioner has the burden of proof and Ms. Rodriguez could not say whether she started her full-time job in April 2017 or May 2017, her lost wages due to a difference in salary between her part-time job ($225 per week) and her job at AQP ($270 a week) should be calculated from the first week in February 2016 through the end of the last week in March 2017. Lost wages for this 60-week period total $2,700 ($45 per week times 60). Thus, the total amount of lost wages reasonably attributable to Ms. Rodriguez's loss of her job at AQP is $3,510. As petitioner acknowledged, it is limited to seeking the amount of $3,355 requested in the petition.

In sum, respondents are ordered to pay the following:

l. Civil penalties of $500 for each count proven (counts one, three, four, five, six, seven, and eight), or a total civil penalty of $3,500.

2. Equitable relief to Ms. Rodriguez of $6,855. This includes equitable relief of $250 for each count involving failure to pay sick leave (counts one, three, four, and five), or a total of $1,000 for the sick leave counts. It also includes equitable relief of $5,855 for the retaliation count (count six), consisting of $2,500, plus lost wages of $3,355.

Faye Lewis
Administrative Law Judge

May 10, 2019

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