STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. **SUPERIOR COURT**

[Filed: September 15, 2015]

MELISSA B. KORSAK,	:	
Plaintiff,	:	
	:	
v.	:	**C.A. No. PC 13-0105**
	:	
HONEY DEW ASSOCIATES, INC., and	:	
BOWEN INVESTMENT, INC.	:	
Defendants.	:	

DECISION

TAFT-CARTER, J. Before the Court for decision is Defendant Honey Dew Associates, Inc.'s (HDA) Motion to Dismiss for Lack of Personal Jurisdiction, pursuant to Super R. Civ. P. 12(b)(6) (Rule 12(b)(6)) and HDA and Bowen Investment, Inc.'s (BII) joint motion for summary judgment, pursuant to Super. R. Civ. P. 56 (Rule 56).

I

Facts and Travel

This litigation stems from allegations of workplace harassment and discrimination, alleged to have transpired by Melissa Korsak (Ms. Korsak), against HDA and BII. Ms. Korsak was employed at the Honey Dew Donut shop in North Providence, Rhode Island (Centerdale store) from July 1, 2007 until January 13, 2010. Am. Compl. ¶ 56. Plaintiff contends that John Frigault (Mr. Frigault), as agent of HDA and BII, mistreated, sexually harassed, and discriminated against her while she was employed at the Centerdale store.[1] Id. at ¶ 64. Mr.

[1] Plaintiff has brought three claims under the Rhode Island Civil Rights Act (RICRA), codified G.L. 1956 §§ 42-112-1 et seq. Count I alleges *quid pro quo* sexual harassment, Count II alleges hostile work environment sexual harassment, and Count III alleges sex discrimination.

Frigault is the President and owner of Applied Security Technologies (AST).[2] Mr. Frigault provided various security services for the Centerdale store.

There are four entities involved in the lawsuit: HDA, BII, R.B Donuts, and Centerdale Donuts, Inc. (CDI). HDA and BII are the only named parties in the instant suit. Notably, HDA, BII, and R.B. Donuts are owned by either Richard Bowen, his brother Robert Bowen, or some combination of the two.[3]

A

HDA

HDA is the sole and exclusive owner of the Honey Dew Donuts trademark as well as the associated proprietary marks, trade secrets, and methods of operation. Richard Bowen Aff. ¶ 1. HDA licenses the use of the Honey Dew name and on occasion enters into franchise agreements with local franchisees.[4] Id. at ¶ 2. Here, HDA entered into a "license agreement with [BII.]" Id. at ¶ 3. The license agreement gave BII "the right to . . . grant franchisees approval to operate Honey Dew Donut shops in Rhode Island." Id. (citing License Agreement).

[2] Robert Bowen's deposition indicates that Applied Security Technologies is not an incorporated entity. Robert Bowen Dep. 75:22-76:6; 81:11-24.

[3] Richard Bowen is the President and sole shareholder of HDA. Richard Bowen Dep. 7:7-24, Mar. 10, 2015. Richard Bowen is also a fifty percent shareholder of BII. Robert Bowen, Richard's brother, owns the other half of BII. Robert Bowen Dep. 7:6-11. Robert is also the President of BII. Furthermore, Robert owns R.B. Donuts. Id. at 7:24-8:7.

[4] HDA has a direct franchise agreement with two stores in Cumberland and Lincoln, Rhode Island. Bowen Aff. ¶ 12. The royalties from these two franchises "account for . . . three percent (3%) of HDA's total royalty stream." Id. More generally, HDA has direct franchise relationships with approximately 118 franchises throughout New England. Id. ¶ 11.

B

BII and R.B. Donuts

Pursuant to the License Agreement, BII is the subfranchisor for HDA in Rhode Island. Robert Bowen Dep. 8:14-15. As such, BII is entrusted with establishing and managing the Honey Dew franchises in Rhode Island. BII does not have employees. Id. at 10:23-11:1. Rather, BII owns a management company, R.B. Donuts,[5] "that manages the Honey Due [Sic] Donut shops . . . in Rhode Island for . . . BII." Richard Bowen Dep. at 8:8-11. BII's role in the management of each store depends upon whether the store is owned by BII or by an independent third party. If a store is owned by BII, i.e., a company store, then R.B. Donuts "manage[s] the franchise[] on a day-to-day basis[.]" Robert Bowen Dep. 8:21-24. However, if a store is independently owned, like the Centerdale store, R.B. Donuts merely provides logistical "support" and conducts biannual "full" inspections as well as monthly visitations. Id. at 9:21-10:6. Regardless of whether the store is company owned or independently operated, BII ensures that each franchise "maintain[s] Honey Dew's uniformity and high standards[.]" Richard Bowen Dep. 18:20-23.

Patricia Beale[6] (Ms. Beale) is an employee of R.B. Donuts. Id. at 10:14-16. Ms. Beale is responsible for "help[ing] run the company stores" and conducting "shop visitations" in Rhode Island. Beale Dep. 13:1-5; 14:7-9, May 28, 2015. Such visitations are designed to "investigat[e] [BII's] franchisees' compliance with HDA standards[.]" Robert Bowen Dep. 19:10-13. In

[5] Both BII and R.B. Donuts are located at 237 Wayland Ave., Providence, RI. Id. at 10:7-10.

[6] In her amended complaint, Plaintiff refers to Patricia Beale as "P.J.," "P.J. Spencer," or "Ms. Spencer." Patricia Beale Dep. 86:24-87:8, May 28, 2015. However, since that time, Ms. Beale has changed her name back to her maiden name. Id. Accordingly, this Court shall refer to her as Ms. Beale.

addition, "[Ms. Beale] attends weekly or bimonthly meetings at HDA, [where she] gets all the information" regarding HDA's standards." Robert Bowen Dep. 19:14-21.

C

CDI

The Honey Dew Donut shop in Centerdale is independently owned by CDI. CDI is co-owned by Charles Tsoumakas (Mr. Tsoumakas). CDI obtained the right to operate a Honey Dew Donut franchise by entering into a Franchise Agreement with BII. As part of the Franchise Agreement, CDI pays royalty fees of seven percent of their gross sales to BII.[7] See Franchise Agreement 4; Richard Bowen Aff. ¶ 11. The Franchise Agreement describes the relationship between HDA, BII, and CDI as that of independent contractors, and expressly denies any agency relationship. Franchise Agreement 19. Furthermore, the Agreement characterizes HDA's role in the Franchise Agreement as that of a third party beneficiary. Notably, however, HDA and BII reserve the right to inspect and test the premises.[8] Id.

[7] CDI does not pay a percentage of these royalties directly to HDA. However, BII collects the advertising money from the franchisees and gives it to HDA. Robert Bowen Aff. 29:4-9.

[8] Regarding the right to inspect the premises, the Franchise Agreement provides, in relevant part:

> "A. In order to preserve the validity and integrity of the Proprietary Marks licensed herein and to assure that [CDI] [is] properly employing the same and [is] operating in compliance with this Agreement and to allow [BII] to insure that [CDI] [is] conducting [its] business in keeping with [BII's] reputation and quality standards, [CDI] *shall allow representatives of [BII] and/or HDA upon the Premises during regular business hours, without prior notice, for the purposes of inspection*.
>
> "B. [CDI] shall give such representatives complete and unrestricted access to all portions of the Premises. Said representatives shall be permitted to inspect and/or test the equipment and fixtures, Premises, goods, products, services, supplies and merchandising methods utilized, in such a manner as HDA or [BII], in our sole discretion, shall deem appropriate,

D

Parties' Relationship with Mr. Frigault

Mr. Frigault's relationship with HDA, BII, R.B. Donuts, and CDI is both complex and multifaceted. HDA previously retained Mr. Frigault to perform "secret shopper"[9] operations at all of its stores, and it recommended Mr. Frigault's services to all of the Rhode Island franchises. Richard Bowen Dep. 28:2-17; 33:8-18. Similarly, R.B. Donuts, on behalf of BII, hired Mr. Frigault to perform "secret shopper" operations at all of its stores, including the Centerdale store. Robert Bowen 16:3-4; 58:6-13; 65:10-17; 108:23-25. Furthermore, he was given the authority to conduct "mini visitations"[10] and "tape reviews"[11] at all of BII's company stores. Id. at 98:16-25; 104:12-22; 105:18-22; Beale Dep. 36:3-37:15; 38:18-23. Finally, CDI hired Mr. Frigault to perform "tape reviews," Rhode Island Commission for Human Rights (RICHR) Hr'g Tr. 21:4-7; 24:11-17; 44:1-13, Mar. 16, 2012, and "mini reviews," id. at 44:18-24; 58:2-4, of the Centerdale store.

> including, without limitation, the right to confer with [CDI's] employees and customers, and to select any product, supply, or item of equipment or fixture for testing.
>
> "C. At reasonable times and within 24 hours of written request, we shall be given complete and unrestricted access to [CDI's] financial books and records, including without limitation, all books of account. Without notice, we shall be provided with the originals of all registered tapes. We shall be allowed to inspect and copy such documents as we deem appropriate." (Emphasis added.)

[9] A secret shopper operation involves someone from AST walking into a store, posing as a regular customer, and purchasing something. That person will then fill out a report and grade the service that he or she received. Robert Bowen Dep. 58:14-21; Richard Bowen Dep. 28:18-29:1.

[10] During a "mini visitation" someone would "walk in, check the time on the coffee, [and] make sure the place [was] clean[.]" Robert Bowen Dep. 98:19-22.

[11] A tape review involved Mr. Frigault looking at security footage of various stores to determine if the employees were providing adequate service. If an employee failed to provide proper service or otherwise committed an infraction of company policy, Mr. Frigault would make a note on a tape review form, and it would be forwarded to Ms. Spencer. Robert Bowen Dep. 69:8-23; Patricia Beale Dep. 44:1-22.

II

Parties' Arguments

A

Personal Jurisdiction

Defendant HDA argues that the case should be dismissed because the minimum contacts necessary to establish personal jurisdiction are lacking. In support, Defendant argues that Plaintiff cannot establish general personal jurisdiction because HDA is a Massachusetts corporation with a principal place of business at 2 Taunton Street in Plainville, Massachusetts. Furthermore, as to specific personal jurisdiction, HDA attacks the credibility of the Plaintiff's assertion that Mr. Frigault was an agent of HDA and that HDA exerted control over the day-to-day business and employment matters at CDI's Centerdale store. Thereby, HDA argues that its contacts with the forum are insufficient to establish specific personal jurisdiction.

In response, Plaintiff argues that the exercise of specific personal jurisdiction over HDA is appropriate because HDA, through BII and R.B. Donuts, had an agency relationship with Mr. Frigault. In addition, Plaintiff contends that the Court can exercise general personal jurisdiction over the Defendant because 1) HDA has a direct franchise relationship with the two stores in Cumberland and Lincoln; 2) HDA licenses the right to franchise additional Honey Dew Donuts stores in Rhode Island to BII; and 3) HDA buys advertising in Rhode Island with the proceeds of royalties collected from Rhode Island franchises.

B

Summary Judgment

Defendants HDA and BII have brought a joint motion for summary judgment. Defendants contend that this Court should grant summary judgment in their favor because: 1) the

RICRA only reaches "intentional discrimination," and thus all of Plaintiff's claims that are premised on the Defendants' vicarious liability for Mr. Frigault's alleged acts must be dismissed; 2) Plaintiff cannot demonstrate the Defendants' are vicariously liable under RICRA for the alleged actions of Mr. Frigault because no agency relationship existed between him and the Defendants; 3) when Plaintiff signed the Workers' Compensation Release, she signed a binding release and waiver of claims that precludes her from bringing the present action; and 4) Plaintiff cannot establish a *prima facie* case of *quid pro quo* harassment, hostile work environment sexual harassment, or sex discrimination.

In response, Plaintiff contends that Mr. Frigault was the apparent agent of HDA and BII when he sexually harassed her. Moreover, Plaintiff argues that despite the fact that Honey Dew Donuts cuts its business into multiple corporate entities, there is only one Honey Dew Donuts. As such, the Plaintiff contends that during the time when she was allegedly sexually harassed, she believed that Mr. Frigault was either an agent or employee of Honey Dew Donuts. Furthermore, Plaintiff posits that she can establish a *prima facie* case as to each of her causes of action**.**

III

Standard of Review

A

Personal Jurisdiction

"It is well established that to withstand a defendant's Rule 12(b)(2) motion to dismiss a complaint for lack of *in personam* jurisdiction, a plaintiff must allege sufficient facts to make out a *prima facie* case of jurisdiction." Cerberus Partners, L.P. v. Gadsby & Hannah, LLP, 836 A.2d 1113, 1118 (R.I. 2003) (citing Ben's Marine Sales v. Sleek Craft Boats, 502 A.2d 808, 809 (R.I.

1985)). "To establish a *prima facie* showing of personal jurisdiction in Rhode Island, a plaintiff's allegations must satisfy the demands of Rhode Island's long-arm statute, [G.L. 1956] § 9-5-33"[12] and comport with the requirements of constitutional due process. Cassidy v. Lonquist Mgmt. Co., LLC, 920 A.2d 228, 232 (R.I. 2007) (citing Rose v. Firstar Bank, 819 A.2d 1247, 1249 (R.I. 2003)).

Rhode Island's "long-arm" statute provides in pertinent part that "[e]very foreign corporation . . . that shall have the necessary minimum contacts with the state of Rhode Island, shall be subject to the jurisdiction of the state of Rhode Island . . . in every case not contrary to the provisions of the constitution or laws of the United States."[13] Sec. 9-5-33(a). "This language has been interpreted to mean that Rhode Island courts may exercise jurisdiction over foreign defendants within the parameters set forth by the United States Constitution." McKenney v. Kenyon Piece Dye Works, Inc., 582 A.2d 107, 108 (R.I. 1990). As such, "the statutory inquiry necessarily merges with the constitutional inquiry, and the two inquiries essentially become

[12] Section 9-5-33(a) provides:

> "Every foreign corporation, every individual not a resident of this state or his or her executor or administrator, and every partnership or association, composed of any person or persons not such residents, that shall have the necessary *minimum contacts* with the state of Rhode Island, shall be subject to the jurisdiction of the state of Rhode Island, and the courts of this state shall hold such foreign corporations and such nonresident individuals or their executors or administrators, and such partnerships or associations amenable to suit in Rhode Island in every case not contrary to the provisions of the constitution or laws of the United States." Sec. 9-5-33(a) (emphasis added).

[13] "The minimum contacts test cannot be formularized. Rather, as Judge Learned Hand noted, the test leaves a court to 'step from tuft to tuft across the morass.'" Oddi v. Mariner-Denver, Inc., 461 F. Supp. 306, 308 (S.D. Ind. 1978) (citing Hutchinson v. Chase & Gilbert, 45 F.2d 139, 142 (2d Cir. 1930)).

one.'" Nucor Corp. v. Bell, 482 F. Supp. 2d 714, 721 (D.S.C. 2007) (quoting ESAB Group, Inc. v. Centricut, Inc., 126 F.3d 617, 623 (4th Cir. 1997)).

"The Due Process clause of the United States Constitution limits the exercise of personal jurisdiction over nonresident defendants to those who 'have certain minimum contacts with [the forum] such that maintenance of the suit does not offend traditional notions of fair play and substantial justice.'" Rose, 819 A.2d at 1250 (quoting Int'l Shoe Co. v. Washington, 326 U.S. 310, 318 (1945)). "This inquiry regarding minimum contacts turns on whether the cause of action arises out of the defendant's contacts with the forum. If a defendant's conduct does provide the basis for the litigation, all that need be shown for jurisdiction to be proper is a 'relationship among the defendant, the forum, and the litigation.'" McKenney, 582 A.2d at 108 (quoting Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408, 414, 104 S. Ct. 1868, 1872, 80 L.Ed. 2d 404, 411 (1984)). In order "[t]o establish that the forum court possesses personal jurisdiction over a nonresident defendant a plaintiff must allege and prove the existence of either general or specific personal jurisdiction." Rose, 819 A.2d at 1250.

1

General Personal Jurisdiction

"When [a defendant's] contacts with a state are continuous, purposeful, and systematic, a nonresident defendant will subject itself to the general jurisdiction of that forum's courts with respect to all claims, regardless of whether they relate to or arise out of the nonresident's contacts with the forum. Thus, if a nonresident's contacts with a forum are sufficient for general personal jurisdiction to exist, then such a party may be sued in that forum for 'causes of action arising from dealings entirely distinct from those activities.'" Id. (Emphasis added). However, "if [a] plaintiff's injury does not arise out of an act done in the forum state, then other contacts

between the corporation and the state must be fairly extensive before the burden of defending a suit there may be imposed upon it without offending traditional notions of fair play and substantial justice." Oddi, 461 F. Supp. at 309 (citing Ratliff v. Cooper Laboratories, Inc., 444 F.2d 745, 748 (4th Cir.), cert. denied, 404 U.S. 948 (1971)); see Orazi v. Hilton Hotels Corp., 2010 WL 4751728, at *5 (E.D. Pa. Nov. 22, 2010) (citing Stinnett v. Atl. City Showboat, Inc., 2008 WL 1924125, at *2 (E.D. Pa. Apr. 28, 2008)) ("The standard for general jurisdiction is demanding: contacts must be 'continuous and systematic' and facts supporting them 'extensive and persuasive.'").

2

Specific Personal Jurisdiction

Since Int'l Shoe, "specific jurisdiction has become the centerpiece of modern jurisdiction theory, while general jurisdiction [has] play[ed] a reduced role."[14] Goodyear Dunlop Tires

[14] In Daimler AG v. Bauman, 134 S. Ct. 746, 749 (2014), the United States Supreme Court recently addressed the limits of general personal jurisdiction. The Court began its analysis by noting that "Goodyear made clear that only a limited set of affiliations with a forum will render a defendant amenable to all-purpose jurisdiction there." Daimler, 134 S. Ct. at 760. "With respect to a corporation, [the Court held] the place of incorporation and principal place of business are 'paradig[m] . . . bases for general jurisdiction.'" Id. (quoting Goodyear Dunlop Tires Operations, S.A., 131 S. Ct. at 2853). Nevertheless, the Daimler Court expressly noted that "Goodyear did not hold that a corporation may be subject to general jurisdiction *only* in a forum where it is incorporated or has its principal place of business; it simply typed those places paradigm all-purpose forums." Id. (emphasis in original). Regarding this more general test for all-purpose jurisdiction, the Court held that the appropriate "inquiry under Goodyear [and International Shoe] is not whether a foreign corporation's in-forum contacts can be said to be in some sense 'continuous and systematic,' it is whether the corporation's 'affiliations with the state are so 'continuous and systematic' as to render [it] essentially at home in the forum state.'" Daimler, 134 S. Ct. at 760; see also Alkanani v. Aegis Def. Servs., LLC, 976 F. Supp. 2d 13, 29 (D.D.C. 2014) (holding that, under Daimler, a court must consider whether a foreign corporation's contacts are "so extensive, so constant, and so prevalent that they render the defendant 'essentially at home' in the forum"); Bancroft & Masters, Inc. v. Augusta Nat'l Inc., 223 F.3d 1082, 1086 (9th Cir. 2000) (citations omitted) (noting "[t]he standard for establishing general jurisdiction is high and requires that defendant's contacts be of the sort that 'approximate physical presence'").

Operations, S.A. v. Brown, 131 S. Ct. 2846, 2854 (U.S. 2011) (citing Twitchell, The Myth of General Jurisdiction, 101 Harv. L. Rev. 610, 628 (1988)). "In the absence of sufficient minimum contacts to warrant general jurisdiction, a party can make a *prima facie* showing of specific personal jurisdiction over a defendant 'if the claim sufficiently *relates to* or *arises from* any of a defendant's purposeful contacts with the forum.'" Cassidy, 920 A.2d at 233 (quoting Rose, 819 A.2d at 1251) (emphasis added); see also Santos v. A.C. McLoon Oil Co., 2013 WL 861548, at *3 (R.I. Super., Feb. 22, 2013) (Gibney, P.J.) ("The reviewing court must consider two prongs to determine whether the plaintiff has demonstrated the existence of specific personal jurisdiction in a given case: the plaintiff's claims must 'relate' to the defendant's specific contacts with the forum, and the defendant must have 'purposefully' created those specific contacts between itself and the forum."). This is accomplished by demonstrating a "relationship among the defendant, the forum, and the litigation." Ben's Marine Sales, 502 A.2d at 812 (quoting Helicopteros Nacionales de Colombia, S.A., 466 U.S. at 414). "To exercise specific jurisdiction, the court must be satisfied that the defendant performed 'some act by which [it] purposefully avail[ed] itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws.'" Cassidy, 920 A.2d at 233 (quoting Rose, 819 A.2d at 1251) (alteration in original).

Proffering proof sufficient to predicate a finding of specific jurisdiction is a far less onerous burden for the plaintiff to carry than that of general jurisdiction. See Ben's Marine Sales, 502 A.2d at 812. Thus, even when a defendant's contacts with the forum are insufficient to support general jurisdiction, a court may exercise specific personal jurisdiction over the nonresident defendant if the claim sufficiently relates to or arises from any of a defendant's purposeful contacts with the forum. Rose, 819 A.2d at 1251.

"The relatedness [prong] is not met merely because a plaintiff's cause of action [arises] out of the general relationship between the parties; rather, the action must directly arise out of the specific contacts between the defendant and the forum state." Sawtelle v. Farrell, 70 F.3d 1381, 1389 (1st Cir. 1995) (alteration in original). Furthermore, "[t]he function of the purposeful availment requirement is to assure that personal jurisdiction is not premised solely upon a defendant's 'random, isolated, or fortuitous' contacts with the forum state." Id. at 1391 (quoting Keeton v. Hustler Magazine, Inc., 465 U.S. 770, 774 (1984)). As such, the "'cornerstones upon which the concept of purposeful availment rest are voluntariness and foreseeability.'" Cerberus Partners, L.P., 836 A.2d at 1121 (quoting Sawtelle, 70 F.3d at 1391). Jurisdiction is proper when the contacts proximately result from actions that create a "substantial connection" with the forum state. McGee v. Int'l Life Ins. Co., 355 U.S. 220, 223 (1957). "Thus where the defendant 'deliberately' . . . has created 'continuing obligations' between himself and residents of the forum, . . . he manifestly has availed himself of the privilege of conducting business there, and because his activities are shielded by 'the benefits and protections' of the forum's laws it is presumptively not unreasonable to require him to submit to the burdens of litigation in that forum as well." Burger King Corp. v. Rudzewicz, 471 U.S. 462, 475-76, 105 S. Ct. 2174 (1985).

Finally, "once a court determines that a nonresident defendant purposefully established minimum contacts with [Rhode Island,] the court must consider whether the exercise of jurisdiction would offend fair play and substantial justice. This determination turns upon a number of factors, including the burden upon the defendant, the interests of the forum state, the plaintiff's interest in obtaining relief, the interstate judicial system's interest in efficiently resolving disputes, and finally the shared interest of the several states in furthering fundamental social policies." State of Md. Cent. Collection Unit v. Bd. of Regents for Educ. of Univ. of

Rhode Island, 529 A.2d 144, 151 (R.I. 1987) (citing Burger King Corp., 471 U.S. at 476-77). "These considerations sometimes serve to establish the reasonableness of jurisdiction upon a lesser showing of minimum contacts than would otherwise be required." Burger King Corp., 471 U.S. at 477. "These factors do not even come into play, however, until it has been shown that a defendant has purposefully established minimum contacts with the forum state." Cerberus Partners, L.P., 836 A.2d at 1121.

B

Summary Judgment

When deciding a motion for summary judgment, the trial justice must keep in mind that it "'is a drastic remedy and should be cautiously applied.'" Steinberg v. State, 427 A.2d 338, 339–40 (R.I. 1981) (quoting Ardente v. Horan, 117 R.I. 254, 366 A.2d 162, 164 (R.I. 1976)). "Thus, '[s]ummary judgment is appropriate when, viewing the facts and all reasonable inferences therefrom in the light most favorable to the nonmoving party, the [C]ourt determines that there are no issues of material fact in dispute, and the moving party is entitled to judgment as a matter of law.'" Quest Diagnostics, LLC v. Pinnacle Consortium of Higher Educ., 93 A.3d 949, 951 (R.I. 2014). However, only when the facts reliably and indisputably point to a single permissible inference can this process be treated as a matter of law. Steinberg, 427 A.2d at 340. The party who opposes the motion for summary judgment "carries the burden of proving by competent evidence the existence of a disputed material issue of fact and cannot rest on allegations or denials in the pleadings or on conclusions or legal opinions." Accent Store Design, Inc. v. Marathon House, Inc., 674 A.2d 1223, 1225 (R.I. 1996); see also McAdam v. Grzelczyk, 911 A.2d 255, 259 (R.I. 2006).

IV

Analysis

A

In Personam Jurisdiction Over an Out-of-State Franchisor

The instant case "poses the questions of what acts by an out-of-state franchisor are sufficient to support a basis for personal jurisdiction . . . , and whether the acts of a franchisee located in this state can be imputed to the franchisor to sustain personal jurisdiction over the franchisor." Campos Enterprises, Inc. v. Edwin K. Williams & Co., 1998-NMCA-131, ¶ 5, 125 N.M. 691, 964 P.2d 855. Generally, courts have struggled to define what actions or contacts by an out-of-state franchisor are sufficient to invoke personal jurisdiction. On one hand, the "mere presence of franchisees within a state does not subject a franchisor to the jurisdiction of that state's courts." Everdry Mktg. & Mgmt., Inc. v. Carter, 885 N.E.2d 6, 12 (Ind. Ct. App. 2008); see Michael Garner, 3 Franchise & Distribution Law & Prac. § 17:14 (2014) ("Ordinarily, the mere presence of a franchisee in a foreign jurisdiction will not make the franchisor amenable to suit there."). On the other hand, if a "sufficient relationship" exists between the franchisee and franchisor, the contacts of the franchisee may be imputed to the franchisor. Daynard v. Ness, Motley, Loadholt, Richardson & Poole, P.A., 290 F.3d 42, 55 (1st Cir. 2002) (noting that even if a defendants' relationship were to fall slightly outside of the confines of a partnership, joint venture, or agency relationship, "the question . . . is whether a sufficient relationship exists under the Due Process Clause to permit the exercise of jurisdiction, not whether [such a] relationship between the two defendants exists").

B

Specific Personal Jurisdiction

In Daimler, the United States Supreme Court cast significant doubt upon whether the agency theory is available in the context of general personal jurisdiction,[15] yet it recognized that "[a]gency relationships . . . may be relevant to the existence of specific jurisdiction." Daimler, 134 S. Ct. at 759 n.13. "As such, . . . *a corporation can purposefully avail itself of a forum by directing its agents or distributors to take action there*." Id. (emphasis added). The First Circuit noted, "the contacts of a corporation's agent can subject the corporation to personal jurisdiction[,]" and such a "result flows naturally from the corporate form." United Elec., Radio & Mach. Workers of Am. v. 163 Pleasant St. Corp., 960 F.2d 1080, 1090 (1st Cir. 1992); see Daynard, 290 F.3d at 55 ("[F]or the purposes of personal jurisdiction, the actions of an agent

[15] In rejecting the application of the agency theory, the Court held "[t]he Ninth Circuit's agency theory . . . appears to subject foreign corporations to general jurisdiction whenever they have an in-state subsidiary or affiliate, an outcome that would sweep beyond even the 'sprawling view of general jurisdiction[.]'" Daimler, 134 S. Ct. at 759-60 (quoting Goodyear Dunlop Tires Operations, S.A., 131 S. Ct. at 2856). Although the Court ultimately overturned the Ninth Circuit's exercise of personal jurisdiction on other grounds, "it is not clear whether [the] agency theory is available in the context of general jurisdiction at all (as opposed to specific jurisdiction)." Acorda Therapeutics, Inc. v. Mylan Pharm. Inc., 2015 WL 186833, at *15 n.18 (D. Del. Jan. 14, 2015); see George v. Uponor Corp., 988 F. Supp. 2d 1056, 1079 (D. Minn. 2013), reconsideration denied (Apr. 14, 2014) (noting that the "Supreme Court in [Daimler] did not universally reject the agency theory; [i]nstead, the Supreme Court criticized the Ninth Circuit's broad application of the theory without explicitly rejecting it as invalid").

Here, even if the agency doctrine were still recognized, this Court cannot properly exercise general personal jurisdiction over the instant Defendant. HDA has franchises in Rhode Island, but is incorporated and headquartered in Massachusetts. As such, the "paradigm forums" of general personal jurisdiction do not exist in the case at bar. Furthermore, this is not an "'exceptional case' where the [Defendant's] contacts are 'so continuous and systematic as to render [it] essentially at home in the forum.'" Gucci Am., Inc. v. Weixing Li, 768 F.3d 122, 135 (2d Cir. 2014) (quoting Daimler, 134 S. Ct. at 761 n.19) (alteration in original); see Monkton Ins. Servs., Ltd. v. Ritter, 768 F.3d 429, 432 (5th Cir. 2014) (concluding that under the standard articulated in Daimler, it is "incredibly difficult to establish general jurisdiction in a forum other than the place of incorporation or principal place of business").

may be attributed to the principal."). Moreover, subjecting a corporation to personal jurisdiction, based on the contacts of its agent, "makes sense" because "[a]n alleged tortfeasor cannot reasonably expect to escape liability merely because he engaged an agent to liaise with the victim on his behalf." Alex & Ani, LLC v. Elite Level Consulting, LLC, 31 F. Supp. 3d 365, 376 (D.R.I. 2014).

Plaintiff argues that the relationship between HDA and CDI satisfies the requirements of either agency or agency by apparent authority. The facts required to establish such a conclusion is an analysis for a jury. For the purpose of answering the question of minimum contacts this Court will not focus on the elements of either doctrine. Rather, the Court "will follow the analytical approach used by the First Circuit in Daynard." Meyersiek v. Richard, 2008 WL 3306647, at *11 (D.R.I. May 30, 2008); see Jet Wine & Spirits, Inc. v. Baccardi & Co., Ltd., 298 F.3d 1, 7–8 (1st Cir. 2002) ("The exact type of agency relationship used to impute contacts is not crucial to our inquiry regarding traditional notions of fair play and substantial justice"); Daynard, 290 F.3d at 56–57 ("[T]he question before us is whether a sufficient relationship exists under the Due Process Clause to permit the exercise of jurisdiction, not whether a partnership, joint venture, or other particular agency relationship between the two defendants exists."). Accordingly, the Court is not required to determine if an agency, partnership or joint venture exists between the parties. Daynard, 290 F.3d at 45. The Court does not draw any conclusion as to the truth of the facts. Rather, this Court "must accept the plaintiff's (properly documented) evidentiary proffers as true for the purpose of determining the adequacy of the prima facie

jurisdictional showing." Id. at 45 (quoting Foster-Miller, Inc. v. Babcock & Wilcox Canada, 46 F.3d 138, 145 (1st Cir. 1995)).[16]

The basic question is whether the relationship between HDA and CDI is sufficient to attribute any of CDI's contacts to HDA for the purpose of reaching HDA under the Rhode Island long arm statute as cabined by the Due Process Clause of the Fourteenth Amendment. Meyersiek, 2008 WL 3306647, at *10 (citing Daynard, 290 F.3d at 53).

Here, HDA exercised a significant degree of control over CDI via its subfranchisor BII. The License Agreement, between HDA and BII, provided that (1) HDA had the right to reject a prospective franchisee; (2) BII would use a standard franchise agreement, which mirrored HDA's franchise agreements; and (3) HDA could terminate the Agreement if BII failed to hold all franchisees in compliance with their respective franchise agreements. See License Agreement 2. Furthermore, the Franchise Agreement, entered into between BII (subfranchisor) and CDI, provided that CDI shall "strictly adhere to the provisions of HDA's Operational Excellence Procedure Manual[,]" which provides "mandatory guidelines as to all aspects of shop operations[.]" Franchise Agreement 8; see Billops v. Magness Constr. Co., 391 A.2d 196, 197-98 (Del. 1978) ("If, in practical effect, the franchise agreement goes beyond the stage of setting

[16] For the purpose of this jurisdictional analysis, the fact that HDA, BII, R.B. Donuts, and CDI are separate entities is immaterial because there is evidence that CDI was a subagent of HDA. See Restatement (Third) Agency § 3.15 cmt. d (2006) ("As between a principal and third parties, it is immaterial that an action was taken by a subagent as opposed to an agent directly appointed by the principal."). "A subagent is a person appointed by an agent to perform functions that the agent has consented to perform on behalf of the agent's principal and for whose conduct the appointing agent is responsible to the principal." See Smith v. State Farm Mut. Auto. Ins. Co., 30 F. Supp. 3d 765, 775 (N.D. Ill. 2014) (quoting Restatement (Third) Agency § 3.15(1) (2006)). As the Restatement notes, "*subagency is governed by a principle of transparency that looks from the subagent to the principal and through the appointing agent*." Restatement (Third) Agency § 3.15 cmt. d (emphasis added). Therefore, "[i]f a principal is responsible for its agent's actions, the principal is also responsible for the actions of its agent's agents (i.e., the principal's subagents)." Unity Healthcare, Inc. v. Cnty. of Hennepin, 2015 WL 2097668, at *5 (D. Minn. May 5, 2015) (citing Restatement (Third) Agency § 3.15 cmt. d).

standards, and allocates to the franchisor the right to exercise control over the daily operations of the franchise, an agency relationship exists."). Additionally, CDI agreed to "allow representatives of [BII] and/or HDA upon the Premises during regular business hours, without prior notice, for the purposes of inspection." Franchise Agreement 11; see Cislaw v. Southland Corp., 4 Cal. App. 4th 1284, 1288, 6 Cal. Rptr. 2d 386, 388 (1992) ("The general rule is where a franchise agreement gives the franchisor the right of complete or substantial control over the franchisee, an agency relationship exists.").

The Franchise Agreement went beyond merely setting standard and required CDI to "use the precise methods" that HDA established. Butler v. McDonald's Corp., 110 F. Supp. 2d 62, 67 (D.R.I. 2000) (noting that the franchise agreement "did not simply set standards that the franchisee had to meet[;] [r]ather, it required the franchisee to use the precise methods that the franchisor established"). Furthermore, HDA "enforced the use of those methods by regularly sending inspectors and retaining the right to cancel" the License Agreement and approve the Franchise Agreement. Id. Accordingly, HDA's control over both BII and CDI "pervaded" CDI's dealings with the forum, and therefore justifies the imputation of CDI's contacts to HDA. In re Chinese-Manufactured Drywall Prods. Liab. Litig., 753 F.3d 521, 532 (5th Cir. 2014) (holding that the principal's "control over its agent . . . pervaded [the agent's] dealings with the forum, and therefore allow[ed] [agent's] contacts . . . to be imputed to [the principal] for the purpose of specific jurisdiction"). Finally, the imputation of CDI's contacts is justified based upon the fact that CDI assists HDA in the pursuit of its business, i.e., the sale of coffee and donut products. See Viega GmbH v. Eighth Jud. Dist. Ct., 328 P.3d 1152, 1159 (2014) (quoting F. Hoffman-La Roche, Inc. v. Superior Court, 130 Cal. App. 4th 782, 798, 30 Cal. Rptr. 3d 407, 419 (2005)) (noting that imputing a subsidiary's contacts to the principal is supported "'when the

local subsidiary performs a function that is compatible with, and assists the parent in the pursuit of, the parent's own business'"). Based upon the foregoing relationship, the forum contacts of CDI are imputed to HDA and considered in determining personal jurisdiction over HDA. See Ganis Corp. of California v. Jackson, 635 F. Supp. 311, 315 (D. Mass. 1986) aff'd, 822 F.2d 194 (1st Cir. 1987) ("The forum-related activities of an agent and a subagent are imputable to the principal and are counted as the principal's contacts for jurisdictional purposes.").[17]

C

***Prima Facie* Case of Specific Personal Jurisdiction**

Having found that the jurisdictional contacts of CDI may be imputed to HDA, this Court turns to "the remaining constitutional [question:]" does HDA have "minimum contacts" with Rhode Island "such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice[?]'" Daynard, 290 F.3d at 60; Int'l Shoe, 326 U.S. at 316, (quoting Milliken v. Meyer, 311 U.S. 457, 463, 61 S. Ct. 339 (1940)). [A] party can make a "*prima facie* showing of specific personal jurisdiction over a defendant 'if the claim sufficiently relates to or arises from any of a defendant's purposeful contacts with the forum' . . . . [and] the court . . . [is] satisfied that the defendant performed 'some act by which [it] purposefully avail[ed] itself of the privilege of conducting activities within the forum state, thus invoking the benefits and

[17] The Court notes that "[w]hen a defendant objects to both jurisdiction and liability on the basis that there is no agency relationship, the question of personal jurisdiction appears circular: personal jurisdiction cannot be exercised without determining the question of agency, but the question of agency cannot be determined without exercising personal jurisdiction. For this reason, *[the] [C]ourt's determination of agency for the purpose of personal jurisdiction is a separate determination from, and is not dispositive of, the substantive issue of the [D]efendant's liability for the actions of the [purported] agent*." Goettman v. N. Fork Valley Rest., 176 P.3d 60, 67-68 (Colo. 2007) (emphasis added); see Daynard, 290 F.3d at 56-57 (noting that "the question before [the Court] [wa]s whether a sufficient relationship exist[ed] under the Due Process Clause to permit the exercise of jurisdiction, *not* whether a partnership, joint venture, or other particular agency relationship between the two defendants exist[ed]") (emphasis added).

protections of its laws.'" Cassidy, 920 A.2d at 233 (quoting Rose, 819 A.2d at 1251). "Finally, once [the] [C]ourt determines that a nonresident defendant purposefully established minimum contacts with the foreign forum, the court must consider whether the exercise of jurisdiction would offend fair play and substantial justice." State of Md. Cent. Collection Unit, 529 A.2d at 151.[18]

1

Relatedness

Whether the Plaintiff's claims sufficiently relate to or arise from HDA's contacts with the forum must be examined. Cassidy, 920 A.2d at 233. The claims must demonstrate a "relationship among the defendant, the forum, and the litigation." Ben's Marine Sales, 502 A.2d at 812 (quoting Helicopteros Nacionales de Colombia, S.A., 466 U.S. at 414). "'[This] relationship . . . need not be terribly robust to support' a finding of specific jurisdiction, [but] there must be some nexus to the litigation for specific jurisdiction to be established." Cassidy, 920 A.2d at 234 (quoting Cerberus Partners, L.P., 836 A.2d at 1119).

The underlying claim is that Mr. Frigault sexually harassed the Plaintiff during his inspections of the Centerdale store. Based upon the direct forum contacts of HDA, as well as the imputed contacts of CDI, there is a sufficient relationship among the defendant, the forum, and the litigation. Regarding HDA's specific jurisdictional contacts, it specifically recommended Mr. Frigault's services to all of its Rhode Island franchises and hired him to perform "secret shopper" operations in Rhode Island. Richard Bowen Dep. 33:8-12; 28:12-15. As to CDI's contacts, there is evidence that CDI hired Mr. Frigault to perform "tape reviews" and "mini

[18] This Court shall not consider whether the exercise of jurisdiction would offend fair play and substantial justice "until it has been shown that [the] [D]efendant has purposefully established minimum contacts with the forum[.]" Cerberus Partners, L.P., 836 A.2d at 1121.

visitations" at the Centerdale store. See RICHR Hr'g Tr. 21:4-7; 24:11-17; 44:1-13, 44:18-24; 58:2-4. Mr. Frigault is alleged to have sexually harassed the Plaintiff during the time when he was at the Centerdale store conducting such work. Accordingly, this Court finds—based upon the contacts of HDA as well as the imputed contacts of CDI—that there is a sufficient nexus between HDA and the instant litigation for specific personal jurisdiction to be established. See Daynard, 290 F.3d at 57 (holding that even "if the . . . relationship were to fall slightly outside the confines of [an agency relationship] . . . a sufficient relationship exists under the Due Process Clause to permit the exercise of jurisdiction").

2

Purposeful Availment

Our Supreme Court has recognized that the "'cornerstones upon which the concept of purposeful availment rest are voluntariness and foreseeability.'" Cerberus Partners, L.P., 836 A.2d at 1121 (quoting Sawtelle, 70 F.3d at 1391). Furthermore, as the Supreme Court noted in Daimler, "a corporation can purposefully avail itself of a forum by directing its agents or distributors to take action there." Daimler, 134 S. Ct. at 759 n.13. Here, HDA voluntarily directed BII—its subfranchisor—to establish Honey Dew franchises in Rhode Island. See Vons Companies, Inc. v. Seabest Foods, Inc. (1996) 14 Cal. 4th 434, 456, 58 Cal. Rptr. 2d 899, 926 P.2d 1085 (concluding "that a nonresident defendant may be subject to the specific jurisdiction of this state if the defendant purposefully has availed itself of forum benefits through an ongoing franchise agreement and there is a substantial nexus or connection between the defendant's forum activities and the plaintiff's claim"). The record does not indicate that BII unilaterally undertook action in Rhode Island; rather, BII has set up approximately thirty-five Honey Dew franchises in Rhode Island after obtaining the express approval from HDA. See Rose, 819 A.2d

at 1255 (quoting Bendick v. Picillo, 525 A.2d 1310, 1312 (R.I. 1987)) (recognizing that "'[t]he unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy' the [voluntariness] requirement"). Therefore, this Court finds that the relationship between HDA and CDI reflects HDA's purposeful availment of the forum. In re Chinese-Manufactured Drywall Prods. Liab. Litig., 753 F.3d at 531.

Furthermore, it is evident that HDA's "'conduct and connection with [Rhode Island] . . . [is] such that [it] should [have] reasonably anticipated being haled into court [here].'" Cerberus Partners, L.P., 836 A.2d at 1121 (quoting World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297, 100 S. Ct. 559 (1980)). HDA, through its subfranchisor BII, has established numerous franchises in the state, inspects such franchises on an annual or biannual basis, and collects advertising fees therefrom. Such conduct demonstrates that HDA has purposefully engaged in a distinct pattern of conduct directed at Rhode Island's economy. See J. McIntyre Mach., Ltd. v. Nicastro, 131 S. Ct. 2780, 2790 (2011) (finding that the "foreseeability" analysis centers on "whether a defendant has followed a course of conduct directed at the society or economy existing within the jurisdiction of a given sovereign, so that the sovereign has the power to subject the defendant to judgment concerning that conduct").

3

Reasonableness

Having determined that HDA has sufficient minimum contacts with the forum state, this Court shall now consider whether the exercise of jurisdiction would "offend traditional notions of fair play and substantial justice." Int'l Shoe Co., 326 U.S. at 316. Put another way, "[t]he relationship between the defendant and the forum must be such that it is 'reasonable . . . to require the corporation to defend the particular suit which is brought there.'" World-Wide

Volkswagen Corp., 444 U.S. at 292 (quoting Int'l Shoe Co., 326 U.S. at 317). The United States Supreme Court explained:

> "[i]mplicit in this emphasis on reasonableness is the understanding that the burden on the defendant, while always a primary concern, will in an appropriate case be considered in light of other relevant factors, including the forum State's interest in adjudicating the dispute, the plaintiff's interest in obtaining convenient and effective relief, at least when that interest is not adequately protected by the plaintiff's power to choose the forum, the interstate judicial system's interest in obtaining the most efficient resolution of controversies, and the shared interest of the several States in furthering fundamental substantive social policies. Id. (internal citations omitted).

Here, the Court's exercise of personal jurisdiction is reasonable. First, the burden of defending this suit in Rhode Island is minimal. HDA's corporate office in Plainville, Massachusetts is less than a half-hour drive from Providence. HDA also regularly sends employees to inspect franchises in Rhode Island. See Ruston Gas Turbines, Inc. v. Donaldson Co., Inc., 9 F.3d 415, 421 (5th Cir. 1993) (holding that "[t]he burden on [the defendant] to defend in [the forum state] [was] not unreasonable, given that [the defendant's] employees [had] traveled to [the forum] in connection with [the defendant's] business relationship with [the plaintiff]"); Liverett v. Island Breeze Int'l, Inc., 2012 WL 3264563, at *4 (D.S.C. Aug. 9, 2012) (concluding that because the defendants had traveled to the forum state for business purposes on numerous occasions, it was not a burden to defend the suit in the forum state). Second, Rhode Island has a significant interest in adjudicating the dispute as the Plaintiff is a Rhode Island resident and the alleged harassment and discrimination occurred in a store located in Rhode Island. See McGee, 355 U.S. at 220 (noting that states have strong interests in protecting their citizens); Liverett, 2012 WL 3264563, at *4 (noting that the state had an interest "in adjudicating disputes involving harm to one of its residents when the person resides in [the forum state] and

the damage [was] felt locally"). Third, the Plaintiff has an interest in "obtaining convenient and effective relief" within this jurisdiction. Guajardo v. Deanda, 690 F. Supp. 2d 539, 554 (S.D. Tex. 2010) (finding that "[p]laintiffs have a strong interest in obtaining convenient and effective relief by litigating close to home"). Finally, HDA's establishment of Honey Dew franchises in Rhode Island has resulted in a large volume of business, in the course of which HDA has received the benefits and protection of the laws of Rhode Island. Accordingly, given the benefits derived from maintaining franchises in Rhode Island, any hardship involved in requiring HDA to litigate the instant suit in Rhode Island could hardly be said to be undue. Therefore, it is reasonable to require HDA to defend the instant suit in Rhode Island. See Bland v. Kentucky Fried Chicken Corp., 338 F. Supp. 871, 875 (S.D. Tex. 1971) ("The burgeoning of franchise operations, the intricate relationship of franchisors, franchisees, subsidiaries and suppliers, and the impact they have on the local economy might well compel a State to assert [personal jurisdiction] over these multifarious operations. It would not fly in the face of due process for a State to do so.").

In sum, this Court's exercise of specific personal jurisdiction over HDA is proper. Plaintiff has alleged sufficient facts to satisfy our state's "long-arm" statute and has also demonstrated that exercising specific personal jurisdiction over HDA comports with constitutional due process.

D

Summary Judgment

The Court now addresses the parties' arguments relating to HDA and BII's motion for summary judgment.

1

Vicarious Liability Under the RICRA

Pursuant to §§ 42-112-1 et seq., Plaintiff seeks to hold HDA and BII vicariously liable for Mr. Frigault's allegedly harassing conduct. Defendants argue that the RICRA only reaches intentional acts of discrimination and thus all of the Plaintiff's claims, which are premised upon the Defendants' vicarious liability for the alleged acts of Mr. Frigault, should be dismissed. Essentially, Defendants make a threefold argument in which they contend that 1) RICRA was modeled on the federal Civil Rights Act of 1866, 42 U.S.C. § 1981; 2) courts have construed 42 U.S.C. § 1981 so as not to impose liability except in cases of intentional discrimination; and 3) because RICRA is based upon 42 U.S.C. § 1981, this Court should conclude that RICRA can be violated only by intentional acts of discrimination. This Court shall address each prong of the Defendants' argument in turn.

a

History of RICRA

Originally passed into law following the Civil War, the principal purpose of 42 U.S.C. § 1981 was "to eradicate the Black Codes, laws enacted by Southern legislatures imposing a range of civil disabilities on freedmen." Gen. Bldg. Contractors Ass'n, Inc. v. Pennsylvania, 458 U.S. 375, 102 S. Ct. 3141 (1982). The legislation was "designed to eradicate blatant deprivations of civil rights, clearly fashioned with the purpose of oppressing the former slaves." Id. at 388. Accordingly, 42 U.S.C. § 1981(a) provides that:

> "[a]ll persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other." 42 U.S.C. § 1981(a).

However, in 1989, the United States Supreme Court construed § 1981 to "cover[] contract formation only (hiring or promotion), and not harassment or discrimination on the job." Iacampo v. Hasbro, Inc., 929 F. Supp. 562, 573 (D.R.I. 1996) (citing Patterson v. McLean Credit Union, 491 U.S. 164, 109 S. Ct. 2363 (1989)). The Supreme Court's narrow interpretation of § 1981 prompted the Rhode Island General Assembly to pass the Rhode Island Civil Rights Act (RICRA). Id.

Accordingly, the Rhode Island General Assembly enacted § 42-112-1(a), which provides:

> "[a]ll persons within the state, regardless of race, color, religion, sex, disability, age, or country of ancestral origin, have, except as is otherwise provided or permitted by law, the same rights to make and enforce contracts, to inherit, purchase, to lease, sell, hold, and convey real and personal property, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property, and are subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other." Sec. 42-112-1(a).

Our Supreme Court "has stated that the 'Rhode Island Civil Rights Act provides *broad protection against all forms of discrimination in all phases of employment*.'" Iacampo, 929 F. Supp. at 573 (quoting Ward v. City of Pawtucket Police Dep't, 639 A.2d 1379, 1381 (R.I. 1994)) (emphasis added). In contrast to § 1981, "the RICRA protects plaintiffs against any discrimination which interferes with the 'benefits, terms, and conditions' of the employment relationship—whether it takes the form of disparate impact, disparate treatment, retaliation, or harassment." Id. Furthermore, the Rhode Island Supreme Court's decision in Ward "mandates that courts read the RICRA as broadly as possible—which means that if individuals discriminate in ways that violate the statute, then they must be liable under it." Id.

b

Intentional Discrimination Under 42 U.S.C. § 1981

Defendants contend that because 42 U.S.C. § 1981 may only be violated by intentional discrimination, the analogous RICRA can only be violated by intentional discrimination. Therefore, Defendants argue that since the Plaintiff's case is premised upon vicarious liability under the RICRA, the Plaintiff's claims must fail. In support of this argument, Defendants direct this Court's attention to the Rhode Island Federal District Court decision of Liu v. Striuli, 36 F. Supp. 2d 452, 469 (D.R.I. 1999).

In Liu, the court held "that although the Rhode Island Supreme Court has never addressed the issue, if faced with the question, it would likely conclude that RICRA can be violated *only by intentional discrimination*, and not by mere negligent acts." Liu, 36 F. Supp. 2d at 469 (emphasis added). Furthermore, the court concluded that "[l]imiting violations of RICRA to intentional acts necessarily forecloses vicarious liability for RICRA violations given Rhode Island's law on the doctrine of respondeat superior." Id. In arriving at this conclusion, the court looked to "federal case law interpreting the federal counterpart to RICRA, 42 U.S.C. § 1981" and found that federal courts had consistently held § 1981 may only be violated by intentional discrimination. Id.

To determine whether § 1981 supports a claim based on the vicarious liability of an employer for the acts of an agent, the Court is guided by Gen. Bldg. Contractors Ass'n, Inc., 458 U.S. at 404. In Gen. Bldg. Contractors Ass'n, the United States Supreme Court "assumed, without deciding, that respondeat superior would apply to suits based on Section 1981. Justice O'Connor's concurring opinion specifically note[d] that respondeat superior had not been applied in the case at bar because there was no evidence of an agency relationship." Yates v.

Hagerstown Lodge No. 212 Loyal Order of Moose, 878 F. Supp. 788, 798 (D. Md. 1995). However, she stated,

> "[o]nce this case has been remanded to the District Court, *nothing in the Court's opinion prevents the respondents from litigating the question of the employer's liability under § 1981 by attempting to prove the traditional elements of respondeat superior*." Gen. Bldg. Contractors Ass'n, Inc., 458 U.S. at 404 (O'Connor, J., concurring) (emphasis added).

In accordance with the Supreme Court's holding, "[t]he greater weight of authority . . . holds that section 1981 does support a claim based on the vicarious liability of an employer for the acts of his [or her] agent."[19] Malone v. Schenk, 638 F. Supp. 423, 425 (C.D. Ill. 1985). Accordingly, this Court is persuaded that under § 1981, an employer may be held vicariously liable for the actions of an employee or agent. See id. at 425 (citing 53 Am. Jur. 2d Master and Servant, 23 (1970)) (finding that vicarious liability exists under § 1981 and that "no fundamental legal distinction exists between the liability of an employer for acts of an employee and the liability of a principal for acts of an agent"); Miller, 600 F.2d at 213 (concluding that respondeat superior does apply [to § 1981], where the action complained of was that of a supervisor, authorized to hire, fire, discipline or promote, or at least to participate in or recommend such actions, even though what the supervisor is said to have done violate[d] company policy").

[19] See, e.g., Miller v. Bank of America, 600 F.2d 211 (9th Cir. 1979) (finding bank liable under doctrine of respondeat superior for actions of supervisor violating Section 1981 and the Civil Rights Act of 1964, 42 U.S.C. § 2000e (1982)); Flowers v. Crouch-Walker Corp., 552 F.2d 1277 (7th Cir. 1977) (holding construction company liable under theory of respondeat superior for actions of construction site supervisor violating Section 1981); Yates, 878 F. Supp. at 798 (concluding that a § 1981 claim could be brought against the local chapter of an international fraternal association, as well as its international association, if an agency relationship could be established); Haugabrook v. City of Chicago, 545 F. Supp. 276 (N.D. Ill. 1982) (holding theory of respondeat superior applicable to section 1981 actions, and rejecting comparison to Section 1983); Jones v. Local 520, Int'l Union of Operating Eng'rs, 524 F. Supp. 487 (S.D. Ill. 1981) (finding construction company liable for hiring agent's violations of Section 1981).

Applying this rationale to the analogous RICRA, it is reasonable to conclude that a franchisor or employer may be held vicariously liable for the actions of an agent or employee. See Mayale-Eke v. Merrill Lynch, 754 F. Supp. 2d 372, 385 (D.R.I. 2010) (noting that the analytical framework developed in federal Title VII cases is routinely applied by Rhode Island courts to claims brought pursuant to RIFEPA and RICRA) (internal citations omitted). Such a conclusion is only further supported by the Rhode Island Supreme Court's broad interpretation of the RICRA. See Iacampo, 929 F. Supp. at 573 ("RICRA protects plaintiffs against any discrimination which interferes with the 'benefits, terms, and conditions' of the employment relationship—whether it takes the form of disparate impact, disparate treatment, retaliation, or harassment."); Rathbun v. Autozone, Inc., 361 F.3d 62, 70 (1st Cir. 2004) ("In sum, there is strong evidence that the authors of the RICRA intended that statute to function as a broad civil rights law aimed at remedying injuries to the person.").

2

Agency Relationship

Plaintiff claims that Mr. Frigault was the apparent agent of HDA and BII. Pl.'s Compl. ¶¶ 10, 71. Defendants disagree and aver that no agency relationship exists. Richard Bowen Aff. ¶ 6, Jan. 22, 2015. "Plainly, actual agency and apparent agency are distinct theories of liability. Unlike actual agency, the doctrine of apparent agency allows a plaintiff to sue a principal for the misconduct of an independent contractor who only reasonably appeared to be an agent of the principal."[20] Franza v. Royal Caribbean Cruises, Ltd., 772 F.3d 1225, 1249 (11th Cir. 2014). "Essentially, . . . liability may be appropriate under apparent agency principles when a

[20] "Apparent agency is [also] a distinct concept from apparent authority. Apparent agency creates an agency relationship that does not otherwise exist, while apparent authority expands the authority of an actual agent." Miller v. McDonald's Corp., 150 Or. App. 274, 282 n.4, 945 P.2d 1107, 1111 (1997). In Rhode Island, apparent agency is sometimes called agency by estoppel or ostensible agency. Butler, 110 F. Supp. 2d at 68.

principal's conduct could equitably prevent it from denying the existence of an agency relationship." Id. at 1249-50; see Engle v. Dinehart, 213 F.3d 639 (5th Cir. 2000) ("Under the doctrine of ostensible agency, the employer or principal may be held liable under circumstances in which his own conduct should equitably prevent him from denying the existence of an agency.").

The context in which the doctrine of apparent agency most frequently arises is between hospitals and physicians and franchisors and franchisees. See Wilson v. Good Humor Corp., 757 F.2d 1293, 1302 (D.C. Cir. 1985) (noting that "many jurisdictions have permitted a finding of vicarious liability under an apparent agency doctrine—typically in a franchisor/franchisee context"); Butler, 110 F. Supp. 2d at 68 (applying the apparent agency doctrine to the franchisor/franchisee relationship and indicating that the Rhode Island Supreme Court might extend the doctrine to such a situation); Rodrigues v. Miriam Hosp., 623 A.2d 456, 462 (R.I. 1993) (extending "the doctrine of apparent agency to the realm of torts for the first time in a medical negligence case"). Here, Plaintiff alleges that Mr. Frigault was the apparent agent of HDA and BII. See Pl.'s Compl. ¶ 71. Notably, Plaintiff does not allege that CDI is an apparent agent of HDA. Therefore, the instant claim is distinct from the more common scenario in which a plaintiff seeks to hold a franchisor liable, under the doctrine of apparent agency, for the acts of a franchisee. Accordingly, this Court must first determine whether the apparent agency doctrine applies in this context.

Initially, it should be noted that "[i]n 1993, the Rhode Island Supreme Court extended the doctrine of apparent agency to the realm of torts for the first time in a medical negligence case." Butler, 110 F. Supp. 2d at 68 (citing Rodrigues, 623 A.2d at 462). In Rodrigues, the Court set

forth the criteria for determining whether the doctrine of apparent agency applied in a medical-malpractice action against a hospital for the actions of an independent contractor physician:

> "The patient must establish (1) that the hospital, or its agents, acted in a manner that would lead a reasonable person to conclude that the physician was an employee or agent of the hospital, (2) that the patient actually believed the physician was an agent or a servant of the hospital, and (3) that the patient thereby relied to his detriment upon the care and skill of the allegedly negligent physician." Rodrigues, 623 A.2d at 462.

"However, the Court did not explicitly state that this legal concept applies to all actions in tort." Butler, 110 F. Supp. 2d at 68. Nevertheless, as the Rhode Island District Court noted, the Rodrigues decision indicates that there may be some situations in which the doctrine might be extended. Id. at 69; see generally Crinkley v. Holiday Inns, Inc., 844 F.2d 156, 166 (4th Cir. 1988). ("In establishing liability based on apparent agency, a plaintiff must show that (1) the alleged principal has represented or permitted it to be represented that the party dealing directly with the plaintiff is its agent, and (2) the plaintiff, in reliance on such representations, has dealt with the supposed agent."). Here, the facts of the instant case are sufficiently analogous to the hospital/physician scenario so as to justify the application of the apparent agency doctrine. Just as a patient in a hospital has no reasonable way of knowing who the attending physician is working for, the Plaintiff, as a manager at a Honey Dew Donuts store, had no indication whether Mr. Frigault was working for HDA, BII, R.B. Donuts, or CDI. Therefore, the doctrine of apparent agency applies to the instant case.

Turning to the factors set forth in Rodrigues, the Court is satisfied for the purposes of this motion that the Plaintiff has provided sufficient proof as to each of the three elements, and as such, there are genuine issues of material fact. As to the first prong, the Plaintiff has submitted some evidence that HDA and BII both acted in a manner that would lead a reasonable person to

believe that Mr. Frigault was their agent. First, HDA hired Mr. Frigault to perform "secret shopper" operations at all of the franchises in Rhode Island, including the Centerdale store. Richard Bowen Dep. 28:2-17. Second, R.B. Donuts, on behalf of BII (HDA's subfranchisor), hired Mr. Frigault to perform "secret shopper" operations at all of the Honey Dew franchises in Rhode Island, including the Centerdale store. Robert Bowen Dep. 105:18-22. In addition, Mr. Frigault was hired to perform "mini visitations" and "tape reviews" at all of the stores directly owned by BII. Robert Bowen Dep. 98:16-25; 104:12-22. Third, there is some evidence that Mr. Frigault, when he was inspecting the Centerdale store, utilized a checklist—with the name Honey Dew Donuts at the top—very similar to the one that Ms. Beale used for her corporate inspections. See Pl.'s Obj. to Defs.' Mot. for Summ. J., Ex. 12 (Honey Dew Donuts Mini Visitation Report signed by Mr. Frigault), Ex. 15 (Honey Dew Store Mini Visitation Report signed by Mr. Frigault), Ex. 16 (Honey Dew Donuts Shop Visitation Checklist signed by Mr. Frigault); Robert Bowen Dep. 88:13-89:24.

The notion that a reasonable juror could conclude that Mr. Frigault was an agent of HDA and/or BII is supported by the testimony of Ms. Beale. Ms. Beale is an employee of R.B. Donuts and has a superior understanding of Honey Dew's corporate structure. Nevertheless, she admitted that if she saw Mr. Frigault at the Centerdale store, she would not know whether he was performing a secret shopper operation or a mini inspection or for whom he was working.[21] See

[21] The colloquy between Plaintiff's counsel and Ms. Beale provides, in relevant part:

> "Q. But if you saw [Mr. Frigault], how would you know who he's working for?
>
> "A. I don't know who he's working for [. . . .]
>
> "Q. How would you find out—if you saw him, how would you find out if he was working as a mystery shopper or not?

Franza, 772 F. 3d at 1252 (finding that medical staff on cruise ship were apparent agents of Defendant, Royal Caribbean, because the cruise line held out medical staff as "members of the ship's crew" to passengers).

As to the second prong, there is sufficient evidence that Plaintiff "actually believed" that Mr. Frigault was an agent of HDA.[22] Plaintiff testified that "as far as [she was] concerned, [Mr. Frigault was] an employee of Honey Dew Donutes [sic]." Korsak Dep. 49:10-18. This belief was only reinforced by the fact that Plaintiff observed Mr. Frigault "fire people, . . . come in and do tape reviews, [and] . . . eat and drink whatever he wanted without paying." Korsak Dep. 50:6-7. Finally, regarding the Plaintiff's detrimental reliance, there is evidence that the Plaintiff relied upon Mr. Frigault's apparent authority. According to the Plaintiff's testimony, Mr. Frigault made her perform demeaning and unnecessary tasks because she refused to sleep with him. Korsak Dep. 21:7-9 ("Jack told me because I don't sleep with him, I have to do extra work."). Furthermore, whether Plaintiff relied to her detriment upon the skill or care of Mr. Frigault is a question of fact. See Butler, 110 F. Supp. 2d at 70 (finding that "whether plaintiff relied to his

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> "A. I would have to ask.
>
> "Q. Why is that?
>
> "A. Because I don't know who he works for." Beale Dep. 86:9-19.

[22] Plaintiff's deposition testimony, regarding her understanding of Mr. Frigault's relationship with Honey Dew Donuts provides:

> "Q. Okay. Now, Jack isn't an employee of Honey Dew Donuts; is that fair to say?
>
> . . .
>
> "A. Not, as far as I'm concerned, *he's an employee of Honey Dew Donutes* [sic]." Korsak Dep. 49:10-18 (emphasis added).

detriment upon the care and skill of the allegedly negligent operator and/or employees of the franchise restaurant again presents a factual issue").

Accordingly, whether Mr. Frigault was an apparent agent of BII or HDA is a question of fact and not appropriate for summary judgment. See Blackstone Canal Nat'l Bank of Providence v. Indus. Trust Co., 66 R.I. 358, 19 A.2d 252, 253 (1941) (noting that "[a]n agent's real or apparent authority is ordinarily one of fact to be determined from all the circumstances in evidence"); Bucci v. Lehman Bros. Bank, FSB, 68 A.3d 1069, 1082 (R.I. 2013) (finding that "the existence of an agency relationship is a question of fact."). It is important to note that this Court is not finding that Plaintiff presented conclusive evidence as to the issue of apparent agency. A jury may ultimately reject this contention, but such a determination is one for the fact finder. See C.A.R. Transp. Brokerage Co. v. Darden Restaurants, Inc., 213 F.3d 474, 480 (9th Cir. 2000) (holding that "unless only one conclusion may be drawn, existence of an agency and the extent of an agent's authority is a question of fact and should not be decided on summary judgment").

3

Vicarious Liability

As this Court has found that a determination of the agency relationship between HDA, BII, and Mr. Frigault is not appropriate for summary judgment, this Court shall now examine whether HDA or BII—if found to be in an agency relationship with Mr. Frigault—may be held vicariously liable for his alleged acts of sexual harassment. "The law in Rhode Island with respect to the vicarious liability of the principal for the intentional torts of the agent is well established. An employer[/principal], in the absence of a statute to the contrary, is generally not responsible for a willful assault by an employee[/agent], unless it is committed while performing

a duty in the course of his [or her] employment and by express or implied authority from the employer." Drake v. Star Mkt. Co., 526 A.2d 517, 519 (R.I. 1987).

Preliminarily, it is clear that the alleged sexual harassment falls well outside the scope of Mr. Frigault's employment. Whitaker v. Mercer Cnty., 65 F. Supp. 2d 230, 243 (D.N.J. 1999) aff'd, 251 F.3d 155 (3d Cir. 2000) (internal quotations omitted) (citing Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 757 (1998)) (noting that "[a]s a general rule, a supervisor who sexually harasses a subordinate is not acting within the scope of his [or her] employment."); see Girden v. Sandals Int'l, Ltd., 206 F. Supp. 2d 605, 607 (S.D.N.Y. 2002) (holding that resort employee acted outside the scope of his employment when he sexually assaulted plaintiff while giving her a sailing lesson). However, even though Mr. Frigault's alleged actions fall outside the scope of his employment, our Supreme Court has recognized a limited exception. Under the doctrine of *respondeat superior*, the Court has held that a "master [will] be liable when the nature of the employee's duty is such that 'its performance would reasonably put the employer on notice that some force may have to be used in executing it.'" Drake, 526 A.2d at 519 (quoting Bryce v. Jackson Diners Corp., 80 R.I. 327, 332, 96 A.2d 637, 640 (1953)). "Typically, an employer held liable under this exception to the general rule was aware, or should have been aware, that the nature of the employee's official tasks involved a substantial risk that the employee might inflict upon a third party an intentional tort in the course of furthering the employer's business." Liu, 36 F. Supp. 2d at 470; see also Doe v. O'Connell, Gelineau, Angell, 1988 WL 1016799, at *6 (R.I. Super. Jan. 28, 1988) ("The master will be found vicariously liable where the type of employment provides a foreseeable opportunity and incentive for the use of force in executing the agent's duties"). However, in the present case, no facts have been set forth indicating that the nature of Mr. Frigault's duty was such that its performance would reasonably put his employer

on notice that some force probably may have to be used in executing it. See Labossiere v. Sousa, 87 R.I. 450, 453, 143 A.2d 285, 287 (1958) (concluding that "[i]t is clear that the nature of the duties of a waitress and hostess are not such that an employer might reasonably be put on notice that some force probably might have to be used in carrying out such duties"); Drake, 526 A.2d at 519 (holding that "[i]n this record there is not one iota of evidence that would support a reasonable inference that the janitor had either an express or an implied grant of authority to use force").

Plaintiff, however, argues that this case falls under the exception to the *respondeat superior* rule of employer nonliability found in 1 Restatement (Second) Agency § 219(2)(d), which was recently adopted by the United States Supreme Court in Vance v. Ball State Univ., 133 S. Ct. 2434, 2441 (2013). Under this exception, an employer or principal is liable for the torts of an employee or agent acting outside the scope of his or her employment when the employee or agent is "aided in accomplishing" the tort "by the existence of the agency relation." Vance, 133 S. Ct. at 2441 (quoting 1 Restatement (Second) Agency § 219(2) at 481 (1957)). Under this doctrine, the Court "held that an employer is vicariously liable 'when a *supervisor* takes a *tangible employment action*[.]'"[23] Id. at 2442 (quoting Ellerth, 524 U.S. at 761-62) (emphasis added).

However, the Vance Court recognized that under the Ellerth[24] and Faragher[25] framework, "even when a supervisor's harassment does not culminate in a tangible employment action, the employer can be vicariously liable for the supervisor's creation of a hostile work environment if

[23] In Ellerth, the Court noted that "Title VII's definition of 'employer' includes the employer's agent[s][.]" Pennsylvania State Police v. Suders, 542 U.S. 129, 144 (2004) (quoting Ellerth, 524 U.S. at 754).
[24] Burlington Indus., Inc. v. Ellerth, 524 U.S. at 742.
[25] Faragher v. City of Boca Raton, 524 U.S. at 775.

the employer is unable to establish an affirmative defense." Vance, 133 S. Ct. at 2442. An employer may raise such an affirmative defense "by showing (1) that it exercised reasonable care to prevent and promptly correct any harassing behavior *and* (2) that the plaintiff unreasonably failed to take advantage of any preventive or corrective opportunities that were provided." Id.; see Ellerth, 524 U.S. at 765 (emphasis added).

a

Supervisor Status

Regarding the definition of a "supervisor," the Court noted that a "supervisor" is someone who "the employer has empowered . . . to take tangible employment actions against the victim, i.e., to effect a 'significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits.'" Vance, 133 S. Ct. at 2443 (quoting Ellerth, 524 U.S. at 761); see Noviello v. City of Boston, 398 F.3d 76, 95 (1st Cir. 2005) (quoting Parkins v. Civil Constructors of Ill., Inc., 163 F.3d 1027, 1034 (7th Cir. 1998)) (holding that the "key to determining supervisory status is the degree of authority possessed by the putative supervisor" and such authority "'primarily consists of the power to hire, fire, demote, promote, transfer, or discipline an employee'"). In doing so, the Court rejected the adoption of a more "nebulous" definition which would encompass individuals who had "[t]he ability to direct another employee's tasks[,]" but not the formal authority to cause 'direct economic harm.'" Id. at 2447 (Ellerth, 524 U.S. at 762).

Here, there is no indication that Mr. Frigault was empowered with the actual supervisory authority described above. However, "he could still qualify as a supervisor under apparent authority principles." Kramer v. Wasatch Cnty. Sheriff's Office, 743 F.3d 726, 741 (10th Cir.

2014). "In the usual case, a supervisor's harassment involves misuse of actual power, not the false impression of its existence." Ellerth, 524 U.S. at 759. "But 'in the unusual case,' apparent authority can suffice to make the harasser a supervisor for Title VII purposes, so long as 'the victim's mistaken conclusion [is] a reasonable one.'" Kramer, 743 F.3d at 741 (quoting Ellerth, 524 U.S. at 759).

"Apparent authority exists where an entity 'has created such an appearance of things that it causes a third party reasonably and prudently to believe that a second party has the power to act on behalf of the first [party].'" Kramer, 743 F.3d at 742 (quoting Bridgeport Firemen's Sick & Death Benefit Ass'n v. Deseret Fed. Sav. & Loan Ass'n, 735 F.2d 383, 388 (10th Cir. 1984)). Furthermore, the question of apparent authority is usually one of fact. Id. "One relevant fact question is how much power the principal has actually given to the agent." Id. (citing Restatement (Third) Agency § 3.03, cmt. c (2006)). Thus, where the principal (HDA or BII) has given the agent (Mr. Frigault) some amount of power, it might be reasonable for the third party (Plaintiff) to believe that the agent has other types of related powers even if the agent actually does not. Id. Therefore, whether Mr. Frigault qualifies as a "supervisor" under apparent agency principles is a genuine issue of material fact, and as such, precludes summary judgment on Mr. Frigault's ''supervisor'' status. Id. at 743; see Glickstein v. Neshaminy Sch. Dist., 1999 WL 58578, at *13 (E.D. Pa. Jan. 26, 1999) (finding that "[a]t the very least th[e] evidence could suggest that [harasser] had the authority to discipline and demote teachers by changing the amount, nature, and character of their work" and thus denying the defendant's motion for summary judgment).

b

Tangible Employment Action

If Mr. Frigault was a "supervisor" within the meaning of Vance, HDA and BII would be held strictly liable for any harassment of the Plaintiff if it culminated in a tangible employment action.[26] Kramer, 743 F.3d at 743 (citing Ellerth, 524 U.S. at 761–62). Plaintiff argues that the following constitute tangible employment actions: (1) assigning her extra work, assigning her less desirable work, and subjecting her to other harm as a result of her refusal to acquiesce to his sexual advances; and (2) Mr. Frigault's relentless mistreatment and harassment of the Plaintiff constituting a constructive discharge from her employment. Pl.'s Obj. to Defs.' Mot. for Summ. J. 27.

As to the Plaintiff's first argument, there is a factual dispute concerning whether she suffered a "tangible employment action" to give rise to the automatic imputation of liability against Defendants for Mr. Frigault's actions. Glickstein, 1999 WL 58578, at *14. Plaintiff testified that Mr. Frigault, in retaliation for not acquiescing to his sexual demands, made her scrub the floor and perform other chores that were time intensive, yet unnecessary. See id. ("[Plaintiff] offers sufficient evidence that she suffered a 'tangible employment action' to give

[26] Even "[i]f no tangible employment action occurs, the employer may still be vicariously liable for the supervisor's harassment if the plaintiff proves the harassment was severe or pervasive and the employer is unable to establish the affirmative defense announced in Faragher . . . and Ellerth[.]" Kramer, 743 F.3d at 737. Here, Plaintiff has submitted some evidence that she met with Mr. Tsoumakas and his wife on January 7th regarding Mr. Frigault's harassment. Korsak Dep. 63:14-64:25. She "told them about the . . . sexual harassment, [and] they said that because [she] didn't like it, they[] [would] tell him to stop, but everybody else, . . . the other girls that worked there . . . , all of them kn[e]w . . . that[] [was] just the way he [was]." Id. at 64:14-18. In essence, Mr. and Mrs. Tsoumakas listened to the Plaintiff's allegations, but dismissed them. See id. at 64:23-24 ("[Ms. Tsoumakas looked at [the Plaintiff] and said [you are] uncomfortable anyway, so really what does it matter."). "Consequently, the [C]ourt holds that the record as presently developed precludes [D]efendant[s] from availing [themselves] of the two-part affirmative defense identified in Burlington Industries." Gauthier v. New Hampshire Dep't of Corr., 2000 WL 1513705, at *7 (D.N.H. Aug. 28, 2000).

rise to the automatic imputation of liability against Defendants for [harasser's] actions. [Plaintiff] testified that [the harasser] assigned her extra work, assigned her less desirable work, and subjected her to other harm as a result of her rejection of [his] sexual advances."). "The circumstances surrounding the assignment of additional work duties could lead a reasonable fact-finder to conclude there was a tangible employment action. Therefore, there exists a genuine question of material fact as to whether the additional tasks assigned to [Plaintiff] were sufficiently excessive and onerous as to constitute a tangible employment action." Monteagudo v. Asociacion de Empleados Del Estado Libre Asociado De Puerto Rico, 425 F. Supp. 2d 206, 215 (D.P.R. 2006).

Second, Plaintiff has alleged that she was constructively discharged. "Alleging constructive discharge presents a 'special wrinkle' that amounts to an additional prima facie element." Landrau-Romero v. Banco Popular De Puerto Rico, 212 F.3d 607, 613 (1st Cir. 2000) (quoting Sanchez v. Puerto Rico Oil Co., 37 F.3d 712, 719 (1st Cir. 1994)). "In such cases, the plaintiff must prove that his [or her] employer imposed 'working conditions so intolerable that a reasonable person would feel compelled to forsake his [or her] job rather than to submit to looming indignities.'" Id. (internal quotations omitted). Here, "[a]ssuming Plaintiff's allegations are true, which the Court must for the purposes of this Motion, Defendant's [summary judgment] claim" must be denied. Reed v. Avian Farms, Inc., 941 F. Supp. 10, 13 (D. Me. 1996). Plaintiff was "subjected to comments which would shock and offend any reasonable person in the workplace." Id. As previously noted, Mr. Frigault repeatedly propositioned the Plaintiff to sleep with him, and when she rejected such offers, he retaliated by assigning her extra work. "The fact finder could certainly conclude, if it believed Plaintiff, that such an atmosphere

would cause a reasonable person to quit her job. This is not an issue for summary judgment, and Defendant's request is denied." Id.

4

Workers' Compensation Release

a

Terms and Language of the Plaintiff's Release Agreement

Prior to bringing the present action, Ms. Korsak filed a petition in the Rhode Island Workers Compensation Court against Mr. Tsoumakas and CDI, seeking compensation for emotional injuries caused by the alleged harassment. Defs.'s Mem. in Supp. of Summ. J., Ex. R (Release). Ms. Korsak also filed a charge of discrimination with the Rhode Island Commission for Human Rights (RICHR) against CDI, Mr. Tsoumakas, and Mr. Frigault. See Defs.' Mem. in Supp. of Summ. J, Ex. F (RICHR Hr'g Tr.). Such claims ended in a settlement for $30,000 and the signing of a Release form.

The Release, provided in exchange for such compensation, states in pertinent part:

> "I, Melissa Korsak, . . . for the sole consideration of [$30,000] to be paid by Hartford Insurance Group on behalf of [CDI] d/b/a Honey Dew Donuts and Charles Tsoumakas (hereinafter referred to as "payors"), companies affiliated with [Mr.] Tsoumakas and [CDI] d/b/a Honey Dew Donuts and their successors, assigns, . . . which sum shall apply to all injuries whether known or unknown, which resulted during the course of [Ms. Korsak's] employment with [CDI] d/b/a Honey Dew Donuts, *do hereby remise, release, discharge, and forever quit-claim unto the said payors, their successor and assigns*, any and all manner of actions, causes of actions, dues, claims, and demands, both in law and equity, both civil and criminal, and under the Workers' Compensation Act of the State of Rhode Island . . . especially those claims arising out of a certain claimed loss as a result of the alleged physical injury/harassment/emotional/anxiety/stress injury which allegedly occurred during employment on December 12, 2009; January 7, 2010; January 13, 2010[.]
>
> . . . .

> "Except as set forth above as to [Mr.] Frigault, it is further agreed that this release expresses a full and complete settlement of liability against only [CDI] d/b/a Honey Dew Donuts and Charles Tsoumakas[.]"[27] Release (emphasis added).

Furthermore, the agreement did "not release [Mr.] Frigault . . . who is not an employee of [CDI]" but rather "an independent contractor who was present at [CDI] at various times." Id.

b

The Controlling Legal Principles

Our Supreme Court has found that "[a] release is a contractual agreement, and the various principles of the law of contracts govern the judicial approach to a controversy concerning the meaning of a particular release." Young v. Warwick Rollermagic Skating Ctr., Inc., 973 A.2d 553, 558 (R.I. 2009). "Whereas the construction of a clear and unambiguous contract presents an issue of law which may be resolved by summary judgment, an ambiguous contract may not properly be resolved on summary judgment[.]" Lennon v. MacGregor, 423 A.2d 820, 822 (R.I. 1980); see Young, 973 A.2d at 558 (finding that "[w]hether a particular contract is or is not ambiguous is a question of law"). "In determining whether or not a particular contract is ambiguous, the court should read the contract 'in its entirety, giving words their plain, ordinary, and usual meaning.'" Young, 973 A.2d at 558 (quoting Mallane v. Holyoke Mut. Ins. Co. in Salem, 658 A.2d 18, 20 (R.I. 1995)). "And, while carrying out this task, the court should 'refrain from engaging in mental gymnastics or from stretching the imagination to read ambiguity . . . where none is present.'" Id. at 559 (quoting Mallane, 658 A.2d at 20).

Here, the Court is tasked with determining whether the signatories of the instant Release intended to release HDA and BII. The Rhode Island Supreme Court has adopted the so-called

[27] The Release includes a parenthetical which disclaims that "this is not a general release."

intent rule in deciding whether omnibus provisions in a general release are effective to release an unnamed third party who seeks to invoke their protection. See Marr Scaffolding Co. v. Fairground Forms, Inc., 682 A.2d 455, 456 (R.I. 1996) ("We now fulfill Judge Selya's prophecy by ruling that such a release will not bar claims against an unnamed third party who invokes its omnibus language when the participants in the original settlement did not, as a factual matter, intend to release this party from liability.").

Accordingly, the Rhode Island Supreme Court has found that "'[t]he element of stability necessary to support the settlement of controversies requires that [the Court] give significant deference to the terms of a general release until [the Court] ha[s] been furnished with an adequate reason to do otherwise.'" Marr Scaffolding Co., 682 A.2d at 457 (quoting Pardey v. Boulevard Billiard Club, 518 A.2d 1349, 1355 (R.I. 1986)). An adequate reason, the Court explained, "must be based upon factual evidence concerning the *intention of the parties* (and for this purpose a relaxation of the parol-evidence rule may well be required), as well as the nature of the consideration paid, and the existence of material mistake, fraud, misrepresentation, or overreaching." Pardey, 518 A.2d at 1355; see Day v. J. Brendan Wynne, D.O., Inc., 702 F.2d 10, 12 (1st Cir. 1983) (holding that "Rhode Island cases on releases in general support the view that a release of one party does not release unidentified third parties, at most holding the matter to be one of intent of the signatories").

In Nedder v. Rhode Island Hosp. Trust Nat'l Bank, our Supreme Court took the "position that a general release would be adequate, *if factually unchallenged on the record*, to bar an action against a party who had been described, though not specifically named in the release." Pardey, 518 A.2d at 1354-55 (citing Nedder, 459 A.2d at 961) (emphasis added). Similarly, in Marr Scaffolding, the Court "held that a general release containing omnibus language will not bar

claims against an unnamed third party attempting to take gratuitous advantage of the release *when the participants in the original settlement never intended to relieve that party from liability*." Bennett v. D'Ambra Constr. Co., 693 A.2d 1023, 1024 (R.I. 1997) (emphasis added). The Marr Court, however, commented that it was "not faced here with the more difficult question presented when the parties to the original settlement [did] not all agree (as they d[id] [in Marr]) that the scope of the omnibus-release language at issue was not intended to reach any possible claims that the settling plaintiff may have against a particular unnamed third-party defendant." Marr Scaffolding Co., 682 A.2d at 458.

While the Court "reserve[d] judgment on th[at] question," it noted that "[it] [would] be more inclined to give 'significant deference to the broad terms of a general release,' and consequently to hold the releasor to the omnibus language purporting to release unnamed third parties, in a situation in which the signatories to the original settlement *[did] not challenge the application of such a release to [the] unnamed party*." Marr Scaffolding Co., 682 A.2d at 458 (emphasis added). Additionally, the Court indicated it "might also be more willing to defer to the omnibus language in a general release when . . . one of the participants in the settlement who paid consideration for the release claim[ed] that [(1)] inclusion of this omnibus language was intentional [or (2)] part of what this participant bargained for [was] to stave off unwanted future claims . . . or [(3)] was included . . . because it was otherwise of specific benefit to one of the settling parties." Marr Scaffolding Co., 682 A.2d at 458.

c

Application

Here, the instant set of facts are distinct from those in Nedder and Marr because BII and HDA were not named in the original release, and Ms. Korsak—the signatory to the Release—

specifically challenges the application of the Release to BII and HDA. While certain language in the Release is consistent with a general release, no explicit reference is made to the liability of HDA or BII. Such an omission is especially telling when compared to the more specific language of the Release, which provides that, "[e]xcept as set forth above as to John (Jack) Frigault, it is further agreed that this release expresses a full and complete settlement of liability against *only* [CDI] d/b/a Honey Dew Donuts and Charles Tsoumakas[.]" (Emphasis added). Here, "[a]mbiguity may be inferred from this omission; and when ambiguity exists, extrinsic evidence may be introduced to ascertain the executing parties' intent. If a dispute about intent is apparent in the record, [as it is here,] then a genuine issue of material fact has been discovered and it may not be decided in a motion for summary judgment." Aetna Cas. & Sur. Co. v. Farr, 594 A.2d 379, 381 (R.I. 1991); see Ritter v. Mantissa Inv. Corp., 864 A.2d 601, 607 (R.I. 2005) (finding language in a release to be ambiguous "if, upon considering the agreement as a whole, the language allows for more than one interpretation").

Accordingly, it is unclear from the plain language of the Release whether the original parties intended for the omnibus language to apply to HDA and/or BII. As such, a genuine issue of material fact exists as to whether the original parties to the Release—Ms. Korsak, CDI, and Mr. Tsoumakas—intended for the omnibus language to apply to HDA and BII. See McInnis v. Harley-Davidson Motor Co., Inc., 625 F. Supp. 943, 949 (D.R.I. 1986) (quoting Lennon, 423 A.2d at 822) (holding that "[e]xtrinsic evidence of the intent of the parties therefore is appropriate when 'two provisions are in apparent conflict and give rise to different interpretations[]'"). As such, summary judgment, based upon the Release document is denied.[28]

[28] Although neither party discusses the issue in its papers, it bears mention that "a release of the servant or agent from liability for tortious conduct would serve to release the master or principal whose liability was only derivative[,]" i.e., premised upon vicarious liability. Pridemore v.

5

***Prima Facie* Case**

Counts I, II, and III of the Plaintiff's Complaint allege *quid pro quo* sexual harassment, hostile work environment sexual harassment, and sex discrimination, respectively, under the RICRA. Generally, Defendants contend that the Plaintiff has failed to establish a *prima facie* case as to each of the three claims. This Court notes that in order "to avoid summary judgment the burden is on the nonmoving party to produce competent evidence that prove[s] the existence of a disputed issue of material fact." Bucci v. Hurd Buick Pontiac GMC Truck, LLC, 85 A.3d 1160, 1169 (R.I. 2014) (internal quotations omitted); see Taylor v. Mass. Flora Realty, Inc., 840 A.2d 1126, 1129 (R.I. 2004) (quoting United Lending Corp. v. City of Providence, 827 A.2d 626, 631 (R.I. 2003)) (holding that "[A] party who opposes a motion for summary judgment 'carries the burden of proving by competent evidence the existence of a disputed material issue of fact and cannot rest on allegations or denials in the pleadings or on conclusions or legal opinions.'"). Accordingly, the Court will "grant . . . summary judgment if the nonmoving party 'fails to make a showing sufficient to establish the existence of an element essential to that party's case . . . .'" Id. (quoting Lavoie v. North East Knitting, Inc., 918 A.2d 225, 228 (R.I. 2007)).

Napolitano, 689 A.2d 1053, 1056 (R.I. 1997); see DelSanto v. Hyundai Motor Fin. Co., 882 A.2d 561, 566 (R.I. 2005). Here, CDI and Mr. Tsoumakas were expressly released from liability. However, for the purposes of summary judgment, the Plaintiff's agency claim is premised upon a theory of apparent agency that runs directly between HDA and BII to Mr. Frigault. Thereby, the release of CDI and Mr. Tsoumakas is of no moment.

a

***Quid Pro Quo* and Hostile Work Environment Sexual Harassment**

Historically, "[c]ourts [have] recognize[d] two forms of sexual harassment: *quid pro quo* sexual harassment and hostile work environment sexual harassment." Steele v. Offshore Shipbuilding, Inc., 867 F.2d 1311, 1315 (11th Cir. 1989). Preliminarily, this Court notes that the first three elements necessary to establish both *quid pro quo* and hostile work environment sexual harassment are identical.[29] Accordingly, this Court shall address them simultaneously. First, Plaintiff is a member of a protected class based on her gender. Second, assuming the validity of Plaintiff's description of Mr. Frigault's conduct, which included repeated requests for the Plaintiff to have sex with him, she was subject to unwelcome sexual advances. Third, based upon the nature of Mr. Frigault's conduct and the fact that "there is no evidence that [Mr. Frigault] treated male employees similarly[,]" such advances were based on sex. Giordano v. William Paterson Coll. of New Jersey, 804 F. Supp. 637, 642 (D.N.J. 1992).

i

Hostile Work Environment Sexual Harassment

"To survive summary judgment on her claim of hostile work environment sexual harassment, [P]laintiff must show that a rational jury could find that the workplace is permeated

[29] Compare Chamberlin v. 101 Realty, Inc., 915 F.2d 777, 783 (1st Cir. 1990) (In order to establish a claim of *quid pro quo* sexual harassment, a plaintiff must show that: "(1) [she] is a member of a protected group; (2) the sexual advances were unwelcome; (3) the harassment was sexually motivated; (4) the employee's reaction to the supervisor's advances affected a tangible aspect of her employment; and (5) *respondeat superior* liability has been established."), with Brown v. Hot, Sexy and Safer Prod., Inc., 68 F.3d 525, 540 (1st Cir. 1995) (To succeed on a claim of hostile work environment sexual harassment, a plaintiff must prove: "(i) that he/she is a member of a protected class; (ii) that he/she was subject to unwelcome sexual harassment; (iii) that the harassment was based upon sex; (iv) that the harassment was sufficiently severe or pervasive so as to alter the conditions of plaintiff's [employment] and create an abusive [employment] environment; and (v) that some basis for employer liability has been established.").

with discriminatory intimidation, ridicule, and insult that are sufficiently severe or pervasive to alter the conditions of [her] employment and create an abusive working environment. In addition, plaintiff must show that the harassing conduct was both objectively and subjectively abusive." Rogers v. City Cnty. Health Dep't of Oklahoma Cnty., 30 F. App'x 883, 886 (10th Cir. 2002). However, "the existence of sexual harassment must be determined 'in light of the record as a whole and the totality of [the] circumstances, such as the nature of the sexual advances and the context in which the alleged incidents occurred.'" Id. (quoting Meritor Sav. Bank v. Vinson, 477 U.S. 57, 69, 106 S. Ct. 2399 (1986)).

Turning to the fourth element under the test for hostile work environment sexual harassment, this Court shall examine whether the Plaintiff has submitted some evidence that the harassment was sufficiently severe or pervasive so as to alter the conditions of her employment and create an abusive employment environment.[30] As the First Circuit has noted, "[t]here is no mathematically precise test to determine whether a plaintiff presented sufficient evidence that he or she was subjected to a severely or pervasively hostile work environment." Pomales v. Celulares Telefonica, Inc., 447 F.3d 79, 83 (1st Cir. 2006) (internal punctuation and citation omitted). However, "[a] Court must consider all the circumstances, including (1) the frequency of the harassing conduct, (2) its severity, (3) whether it was physically threatening or humiliating as opposed to a mere offensive utterance, (4) whether it unreasonably interfered with an

[30] The Rhode Island Supreme Court has adopted a six-part test for gender-based hostile work environment. "The test for determining a gender-based hostile work environment claim is whether: (1) the employee is a member of a protected class; (2) the employee was subjected to unwanted harassment; (3) that harassment was based upon his or her sex; (4) 'that the harassment was sufficiently severe and pervasive so as to alter the conditions of plaintiff's employment and create an abusive work environment'; (5) that harassment 'was both objectively and subjectively offensive, such that a reasonable person would find it hostile or abusive and the victim in fact did perceive it to be so'; and (6) 'that some basis for employer liability has been established.'" DeCamp v. Dollar Tree Stores, Inc., 875 A.2d 13, 22-23 (R.I. 2005) (quoting O'Rourke v. City of Providence, 235 F.3d 713, 728 (1st Cir. 2001)).

employee's work performance, and (5) the effect of the conduct on the employee's psychological well-being." Miranda v. Deloitte LLP, 982 F. Supp. 2d 154, 158 (D.P.R. 2013) (citing Vera v. McHugh, 622 F.3d 17, 26 (1st Cir. 2010)).

Taking the evidence in the light most favorable to the Plaintiff, a reasonable jury could determine that Mr. Frigault's actions were "severe or pervasive." Id. Plaintiff has stated that Mr. Frigault's harassing behavior began in December of 2008 when he called her cell phone at approximately eight-thirty at night to ask her "if she would like to go out with him for a drink." Korsak Dep. 16:2-4; see Marrero v. Goya of P.R., Inc., 304 F.3d 7, 19-20 (1st Cir. 2002) (concluding that "sexual remarks and innuendos," including "a sexual invitation," as well as "unwelcome physical touching" were sufficient to constitute a hostile environment as a matter of law). When the Plaintiff rebuffed his offer, Mr. Frigault allegedly told the Plaintiff that "him and his wife have an understanding, as long as he's discreet, he may go out and do as he pleases, as long as she doesn't hear about it[.]" Id. at 16:5-10. Approximately six months later, in June, Plaintiff states that Mr. Frigault told her that she could not write-up two co-workers because "[t]hey go out with [him.]" Id. at 16:15-17.

In November/December of 2009, Mr. Frigault, according to the Plaintiff's testimony, came into the store and conducted an inspection, and threatened to write her up for failing the inspection. He then allegedly "made [the Plaintiff] crawl between his legs and clean the floor [as he] laugh[ed.]" Id. at 18:4-8; see Miranda, 982 F. Supp. 2d at 158 (holding that harasser's "body language of separating his legs, reclining over the back of a chair, lifting his buttocks, and pretending to pull down his pants [was] sufficient evidence that [harasser's] behavior was physically humiliating"). When the Plaintiff asked Mr. Frigault why she had to do so much extra work—even after she had passed the corporate inspection—Mr. Frigault apparently insinuated

that she had to do extra work because she wasn't sleeping with him. Id. at 17:3-11; see Hernandez-Loring v. Universidad Metropolitana, 233 F.3d 49, 55-56 (1st Cir. 2000) (holding that evidence of two specific incidents of harassment in the context of an ongoing pattern of conduct were sufficient to survive summary judgment in hostile work environment claim). Mr. Frigault then admitted that the inspection was "fake" and asked the Plaintiff if "[she] wanted to go out with him[.]" Id. at 17:12-20. When the Plaintiff again told him that "[she] was all set" Mr. Frigault responded that "he would follow through and make sure that [she] would do everything he said because [she] wasn't sleeping with him, that he would make [her] life worse, and [he] continued [to harass her] through December and into January[.]" Id. at 17:21-25; see id. at 21:7-9 ("[T]he fake inspection [was] when [Mr. Frigault] told [the Plaintiff that] because [she] [woundn't] sleep with him, [she] ha[d] to do extra work[.]"). More generally, Plaintiff alleges that Mr. Frigault routinely insinuated that if the Plaintiff were to sleep with him, she would get better treatment and have to do less work. Id. at 41:25-42:2 (Plaintiff stated that "[Mr. Frigault] would always tell [her] there were ways to make things disappear. Almost every time [she] s[aw] him, he would make some type of comment[.]").

Taken in the light most favorable to the Plaintiff, the record indicates that Mr. Frigault routinely asked the Plaintiff to either date him or have sex with him. When the Plaintiff refused, he made efforts to coerce her into a sexual relationship by giving her extra work and threatening to write her up for minor infractions. Thus, the alleged harassment did not consist merely of the sort of "isolated incidents" that ordinarily "will not amount to discriminatory changes in the terms and conditions of employment." Faragher, 524 U.S. at 788 (internal quotation marks omitted). Therefore, based upon the evidence presented, a reasonable juror could find that Mr. Frigault's behavior was sufficiently severe and pervasive so as to alter the conditions of the

Plaintiff's employment and create an abusive work environment. See Gorski v. N.H. Dep't of Corr., 290 F.3d 466, 474 (1st Cir. 2002) (quoting Lipsett v. Univ. of Puerto Rico, 864 F.2d 881, 895 (1st Cir. 1988)) (observing that the hostile environment "question is commonly one of degree—both as to severity and pervasiveness—to be resolved by the trier of fact on the basis of inferences drawn 'from a broad array of circumstantial and often conflicting evidence'").

As to the fifth element, this Court finds that the alleged harassment was both objectively and subjectively offensive. Most reasonable people would find being repeatedly propositioned for sex, while at work, to be offensive. Furthermore, it is reasonable to assume that the average person would be offended if forced to carry out additional work based on a refusal to engage in a sexual relationship. Additionally, as evidenced by the Plaintiff's tears and anxiety, she considered the conduct to be hostile and offensive. DeCamp, 875 A.2d at 24.

Finally, regarding the sixth element, if HDA and BII are found to be in an agency relationship with CDI, and Mr. Frigault is found to have been given the apparent authority of a "supervisor," then the Defendants may be held vicariously liable for Mr. Frigault's actions. Such liability, if determined by the trier of fact to exist, qualifies as a basis for employer liability. Accordingly, Plaintiff has established a *prima facie* case of hostile work environment sexual harassment which is sufficient to avoid the scythe of summary judgment. See Abeita v. TransAmerica Mailings, Inc., 159 F.3d 246, 252 (6th Cir. 1998) (noting that the plaintiff had created a fact issue on her hostile work environment claim based on her allegations that the president of her company had made sexual and gendered statements towards women and that those remarks were commonplace, ongoing, and continuous, even though only one of those comments had been directed at the plaintiff).

ii

Quid Pro Quo Sexual Harassment

Similarly, "to survive summary judgment on her *quid pro quo* claim, Plaintiff must show that a reasonable jury could find Mr. Frigault conditioned concrete employment benefits on her submission to sexual conduct." Miller v. Regents of Univ. of Colo., 188 F.3d 518, 1999 WL 506520, at *7 (10th Cir. 1999); see Liu, 36 F. Supp. 2d at 465 (quoting Ellerth, 524 U.S. at 753) (noting that "[g]enerally, a plaintiff alleges *quid pro quo* harassment when the plaintiff claims that 'a tangible employment action resulted from a refusal to submit to a supervisor's sexual demands'"). Accordingly, "[t]he gravamen of a *quid pro quo* sexual harassment claim is that tangible job benefits are conditioned on an employee's submission to conduct of a sexual nature and that adverse job consequences result from the employee's refusal to submit to the conduct." Hicks v. Gates Rubber Co., 833 F.2d 1406, 1414 (10th Cir. 1987). "Employers are strictly liable for the actions of their supervisor-employees who engage in *quid pro quo* sexual harassment." Newland v. Stevinson Toyota E., Inc., 505 F. Supp. 2d 689, 697 (D. Colo. 2007) (citing Walton v. Johnson & Johnson Servs., 347 F.3d 1272, 1280 (11th Cir. 2003)). "A *prima facie* claim of *quid pro quo* sexual harassment has five elements." Iacampo, 929 F. Supp. at 574.

As the first three factors have already been established, this Court now turns to the fourth factor: whether the Plaintiff's reaction to Mr. Frigault's advances affected a tangible aspect of her employment. See Chamberlin, 915 F.2d at 783 (concluding that it is the essence of *quid pro quo* harassment when an employee is subjected to unwelcome sexual advances by a supervisor and her reaction to these advances affects tangible aspects of her compensation, terms, conditions, or privileges of employment). Here, although Mr. Frigault did not threaten to fire the Plaintiff—and it is unclear if he had the actual authority to do so—the Plaintiff has set forth

sufficient evidence that Mr. Frigault did require her to perform additional work as a result of her refusal to acquiesce to his sexual demands. Korsak Dep. 21:7-9; see Soto v. John Morrell & Co., 285 F. Supp. 2d 1146, 1175 (N.D. Iowa 2003) (holding that even though the supervisor did not fire the plaintiff, "a genuine issue of material fact [was] raised as to the denial of bathroom breaks, or whether giving [the plaintiff] much shorter bathroom breaks than other female coworkers on the same line, constitute[d] a tangible job detriment"); Bowerman v. Indus. Towel Supply, Inc., 1996 WL 173139, at *4 (W.D. Va. Apr. 10, 1996) (holding that it was "better left to the jury to decide whether a tangible aspect of the plaintiff's employment was affected by [the defendant's] decision to relieve the plaintiff of [some of his] job responsibility"). Therefore, even though Mr. Frigault did not fire the Plaintiff, there is a genuine issue of material fact as to whether a tangible aspect of her employment was affected by Mr. Frigault's conduct. Bowerman, 1996 WL 173139, at *4.

Finally, as to the fifth prong, the general rule of *respondeat superior* is that an employer or principal is not liable for the torts of its employees or agents who act outside the scope of their employment. Drake, 526 A.2d at 519. However, as was discussed above, Vance adopted the exception to the *respondeat superior* rule of employer nonliability found in 1 Restatement (Second) Agency § 219(2)(d). Under this exception, an employer or principal is liable for the torts of an employee acting outside the scope of his or her employment when the employee or agent is "aided in accomplishing" the tort "by the existence of the agency relation." Vance, 133 S. Ct. at 2441. Accordingly, it is a question of fact as to whether *respondeat superior* liability has been established. Ultimately, Plaintiff has set forth a *prima facie* case of *quid pro quo* sexual harassment, and thus summary judgment is not appropriate. See Marrero, 304 F.3d at 19 (quoting Gorski, 290 F.3d at 474) ("'Subject to some policing at the outer bounds,' it is for the

jury to weigh those factors and decide whether the harassment was of a kind or to a degree that a reasonable person would have felt that it affected the conditions of her employment.").

b

Gender-Based Disparate Treatment

In a gender-based disparate treatment claim based upon the three-step [McDonnell Douglas] burden-shifting framework, a plaintiff must establish the following to state a *prima facie* case:

> "'(1) she is a member of a protected class; (2) she was performing her job at a level that rules out the possibility that she was fired for inadequate job performance; (3) she suffered an adverse job action by her employer; and (4) her employer sought a replacement for her with roughly equivalent qualifications.'" DeCamp, 875 A.2d at 21 (quoting Smith v. Stratus Computer, Inc., 40 F.3d 11, 15 (1st Cir. 1994)).

As our Supreme Court has noted, "[t]he burden placed on the complainant at this stage is not especially onerous[.]" Ctr. For Behavioral Health, Rhode Island, Inc. v. Barros, 710 A.2d 680, 685 (R.I. 1998). Once a *prima facie* case of discrimination is established, "[t]he second step requires the employer to offer a legitimate, nondiscriminatory reason for the adverse employment action and the third step requires the employee to convince the fact-finder that the legitimate, nondiscriminatory reason was pretext for unlawful discriminatory animus." DeCamp, 875 A.2d at 21-22.

In the instant case, Plaintiff voluntarily resigned her position; "consequently, as an element of her *prima facie* case, she must demonstrate that her resignation, tendered in response to [Mr. Frigault's harassing behavior], represented a constructive discharge on the part of her employer." Marley v. United Parcel Serv., Inc., 665 F. Supp. 119, 129 (D.R.I. 1987); see Landrau-Romero, 212 F.3d at 613 (quoting Sanchez, 37 F.3d at 719) ("Alleging constructive

discharge presents a 'special wrinkle' that amounts to an additional *prima facie* element."). In order to determine whether Plaintiff has been subject to constructive discharge, "'the trier of fact must be satisfied that the new working conditions would have been so difficult or unpleasant that a reasonable person in the employee's shoes would have felt compelled to resign.'" Id. (quoting Calhoun v. Acme Cleveland Corp., 798 F.2d 559, 561 (1st Cir. 1986)). "The inquiry 'naturally focuses on the reasonable state of mind of the assumed discriminatee . . . and requires proof of more than the usual workplace stress.'" Wellborn v. Spurwink/Rhode Island, 873 A.2d 884, 891 (R.I. 2005) (quoting Marly, 655 F. Supp. at 129). "'[M]ere dissatisfaction with the nature of assignments, criticism of an employee's performance and dissatisfaction with compensation have been held insufficient to establish a triable question of fact on the issue of constructive discharge.'" Meuser v. Fed. Express Corp., 524 F. Supp. 2d 142, 149 (D. Mass. 2007) (quoting GTE Prods. Corp. v. Stewart, 421 Mass. 22, 34, 653 N.E. 2d 161, 169 (1995)); Contardo v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 753 F. Supp. 406, 411 (D. Mass. 1990) ("[C]ases in which constructive discharge has been found evidenced demotion, humiliating and unjustified criticism or additional work loads.").

Here, "[t]he plaintiff meets the *modest* requirements of the *prima facie* case outlined above." DeCamp, 875 A.2d at 22 (emphasis added). Turning to the first element, this Court is satisfied that the Plaintiff, as a woman, is a member of a protected class. Second, the record indicates that the Plaintiff was performing her job at a sufficient level. See DeCamp, 875 A.2d at 22 (holding that plaintiff "appeared to be in good standing with Dollar Tree [store] before she went on medical leave" and thus there was some evidence that she was performing her job at a sufficient level). In fact, Ms. Beale's testimony indicates that under the Plaintiff's supervision, the Centerdale store received a score of ninety-eight out of one-hundred, which is a "a very good

score[.]" Beale Dep. 63:12-14; see Espinal v. Nat'l Grid NE Holdings 2, LLC, 794 F. Supp. 2d 285, 292 (D. Mass. 2011) aff'd, 693 F.3d 31 (1st Cir. 2012) ("Generally speaking, whether an employee is performing his [or her] job satisfactorily is a question of fact for the jury.").

Third, in order to demonstrate that she suffered an adverse job action by her employer, Plaintiff seeks to demonstrate that she was constructively discharged. Marley, 665 F. Supp. at 129. Based upon the Plaintiff's testimony, this Court is satisfied that she has set forth sufficient evidence for a reasonable jury to conclude that her working conditions were so difficult or unpleasant that a reasonable person in her shoes would have felt compelled to resign, i.e., that she suffered a constructive discharge. Plaintiff has alleged that Mr. Frigault repeatedly asked her to engage in a sexual relationship with him, and when she declined, he sought to humiliate her and assign her additional work. See Aviles-Martinez v. Monroig, 963 F.2d 2, 6 (1st Cir. 1992) (finding that chastising the plaintiff for not doing his job, telling the staff that the office was up to date because of the plaintiff, and scolding and ridiculing the plaintiff in front of clients was sufficient evidence, if proved, to constitute a constructive discharge); Declude, Inc. v. Perry, 593 F. Supp. 2d 290, 296 (D. Mass. 2008) (noting that "[h]umiliation and verbal abuse . . . can . . . constitute constructive discharge in some circumstances"). Accordingly, the Plaintiff has set forth sufficient evidence that she suffered an adverse employment action. See DeCamp, 875 A.2d at 22 ("Dollar Tree's termination of plaintiff, despite its attempt to characterize it as a 'voluntary resignation,' undoubtedly qualifies as an adverse employment action."). "Finally, since there is no indication that [Plaintiff's] termination was related to corporate downsizing, [the Court] can assume that [CDI] sought to fill her vacancy with an applicant of roughly equal qualifications." Id. "Accordingly, the burden of production now shifts to defendants to articulate a legitimate, nondiscriminatory reason for her termination." Id.

In the second step of the McDonnell Douglas burden-shifting framework, an employer must offer a legitimate, nondiscriminatory reason for terminating the employee. The offer of a legitimate, nondiscriminatory reason is a burden of production rather than persuasion, and when produced, that reason eliminates the presumption of discrimination created by the prima facie case. Neri v. Ross-Simons, Inc., 897 A.2d 42, 49 (R.I. 2006) (internal quotations omitted). Here, the Defendants have argued that no reasonable juror would believe that the Plaintiff suffered a constructive discharge, but have not offered a nondiscriminatory reason for the adverse job action. "Without it, [this Court] [is] left with the presumption that [D]efendants discriminated against [P]laintiff based on her gender." DeCamp, 875 A.2d at 22; see Gannon v. Narragansett Elec. Co., 777 F. Supp. 167, 170 (D.R.I. 1991) ("If a plaintiff produces facts supporting a *prima facie* case under McDonnell Douglas, then the defendants cannot prevail on a directed verdict or summary judgment motion."). Therefore, summary judgment is denied.

V

Conclusion

Based on the foregoing, HDA's Rule 12(b)(2) Motion to Dismiss for Lack of Personal Jurisdiction is denied and HDA and BII's Rule 56 Motion for Summary Judgment is denied. Counsel shall submit appropriate Orders for entry.

RHODE ISLAND SUPERIOR COURT

Decision Addendum Sheet

TITLE OF CASE:	Melissa B. Korsak v. Honey Dew Associates, Inc., et al.
CASE NO:	PC 13-0105
COURT:	Providence County Superior Court
DATE DECISION FILED:	September 15, 2015
JUSTICE/MAGISTRATE:	Taft-Carter, J.
ATTORNEYS:	
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