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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Equal Employment Opportunity Commission,)	No. CV 06-926-PHX-SMM
Plaintiff,)	ORDER
vs.)	
AutoZone, Inc., a Nevada corporation,)	
Defendant.)	

Pending before the Court is Defendant AutoZone, Inc.’s (“AutoZone”) Motion for Summary Judgement. (Dkt. 79.) Plaintiff Equal Employment Opportunity Commission (“EEOC”) opposes Defendant’s motion on grounds that genuine questions of material fact remain. Fed. R. Civ. P. 56. After careful consideration, the Court finds the following.

BACKGROUND

A. Statement of Facts

Stacy Wing (“Wing”) was hired to work at AutoZone Store 2737 (“2737”) in the first half of 2003. (Wing Dep. at 46-47.) At the time Wing was hired, Jose Contreras (“Contreras”) was the store manager of 2737. (Def.’s Statement of Material Facts ¶ 2.) Contreras resigned as store manager in December 2003. (*Id.* ¶ 69.) Within the first month of being employed, Wing reported by phone to the Regional Human Resources Manager in charge of 2737 that she had been sexually harassed by Contreras. (Anderson Dep. at 49.)

1 At the time, Scott Anderson (“Anderson”) was the Regional Human Resources Manager
2 responsible for 2737. (Def.’s Statement of Material Facts ¶ 17.) Several days thereafter,
3 Anderson went to 2737 to investigate the report. (*Id.* ¶ 31.) While there, Anderson spoke
4 with Wing, Contreras, and allegedly spoke with several other employees of 2737. (*Id.* ¶¶ 32,
5 36, 37.) AutoZone could not corroborate Wing’s reports of harassment based on this
6 investigation. (*Id.* ¶¶ 36, 37.) Anderson did remind Contreras of AutoZone’s policies
7 regarding harassment and retaliation. (*Id.* ¶ 36.) No other action was taken by Anderson at
8 this time. (*Id.*) Wing alleges that physical and verbal sexual harassment continued during
9 the remainder of the year. (Wing Dep. at 125-127.)

10 In December 2003, Joe Acuna (“Acuna”), who also worked at 2737, witnessed
11 Contreras sexually harassing Wing in a physical nature. (Def.’s Statement of Material Facts
12 ¶ 49.) Acuna reported his observations to Anderson. (*Id.*) Anderson confirmed Acuna’s
13 report by watching a surveillance video of the incident. (*Id.* ¶ 56.) Consequently, Anderson
14 was able to identify Contreras engaging in the sexual harassment. (*Id.*) Anderson met with
15 and informed Contreras that AutoZone possessed a video of him sexually harassing Wing.
16 (*Id.* ¶ 68.) Anderson told Contreras “he could either: (1) be suspended during the completion
17 of the investigation and then be fired; or (2) resign immediately.” (*Id.*) Contreras
18 immediately resigned. (*Id.* ¶ 69.)

19 Wing claims that after Contreras resigned, she was denied a requested day off and was
20 scheduled for four consecutive 12-hour shifts. (Def.’s Statement of Material Facts ¶ 74.)
21 The day off Wing requested was January 19, 2004; however, Wing does not recall why she
22 requested this day off. (*Id.* ¶ 75.) Further, Wing does not remember who allegedly denied
23 her request for time off nor what reason was given for the alleged denial. (*Id.*) The
24 consecutive shifts Wing complains of allegedly occurred between the day she was hired and
25 January 29, 2004. (Wing Dep. at 175-176.) Wing does not recall when the four shifts
26 actually occurred or who scheduled her for the specific shifts. (*Id.* at 178.)

1 Wing further claims that she was denied a promotion for the position of Parts Service
2 Manager (“PSM”) in retaliation for reporting the sexual harassment. (Def.’s Statement of
3 Material Facts ¶ 74.) Wing was initially hired as a part-time customer service representative
4 at 2737. (Wing Declaration ¶ 3.) On February 23, 2004, Wing was promoted to “full-time
5 sales.” (Def.’s Statement of Material Facts ¶ 79.) Thereafter, in 2005, Wing was promoted
6 to the position of commercial specialist. (*Id.*) Wing did not hold the position of PSM. (*Id.*
7 ¶ 77.) She twice completed the training required by AutoZone for a promotion to a PSM
8 position. (Wing Declaration ¶ 44; “Pl.’s Local Rule of Practice 56.1(b) Resp. to Def.’s
9 Statement of Facts; Pl.’s Separate Statement of Facts” (“Pl. SoF”) ¶ 112.) The first time
10 Wing completed this training, Contreras was the store manager. (Wing Declaration ¶ 44.)
11 The training occurred sometime after Anderson responded to Wing’s first sexual harassment
12 complaint, but before Acuna lodged his complaint on Wing’s behalf. (*See* Wing Dep. at 72-
13 77.) Wing claims that Contreras told her the reason she was not promoted to PSM after
14 taking the training was because she had complained about him to Scott Anderson. (Wing
15 Declaration ¶ 46.) After Contreras resigned, a temporary store manager gave Wing the pass
16 code necessary to work as a PSM; however, Wing was not told that she was being promoted
17 to that position. (*Id.* ¶ 47.) Shortly thereafter the code was deactivated by a district
18 manager. (*Id.* ¶ 49.) Wing participated in the PSM training a second time under the new
19 store manager, Howard Brown (“Brown”). (*Id.* ¶ 50.) Wing claims that Brown told her that
20 AutoZone had “no intention of promoting [her] to PSM because [she] had gone to an outside
21 agency.” (*Id.* ¶ 51.) Wing claims a district manager, Scott Schmitt, told her that she was not
22 being promoted to PSM because she “did not keep [her] mouth shut and had gone to an
23 outside agency.” (*Id.* ¶ 52.)

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1 evidence must be “such that a reasonable jury could return a verdict for the nonmoving
2 party.” *Id.*; *see Jesinger*, 24 F.3d at 1130.

3 A principal purpose of summary judgment is “to isolate and dispose of factually
4 unsupported claims.” *Celotex*, 477 U.S. at 323-24. Summary judgment is appropriate
5 against a party who “fails to make a showing sufficient to establish the existence of an
6 element essential to that party's case, and on which that party will bear the burden of proof
7 at trial.” *Id.* at 322; *see also Citadel Holding Corp. v. Roven*, 26 F.3d 960, 964 (9th Cir.
8 1994). The moving party need not disprove matters on which the opponent has the burden
9 of proof at trial. *See Celotex*, 477 U.S. at 323-24. The party opposing summary judgment
10 need not produce evidence “in a form that would be admissible at trial in order to avoid
11 summary judgment.” *Id.* at 324. However, the nonmovant “may not rest upon the mere
12 allegations or denials of [the party's] pleadings, but . . . must set forth specific facts showing
13 that there is a genuine issue for trial.” Fed. R. Civ. P. 56(e); *see Matsushita Elec. Indus. Co.,*
14 *Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 585-88 (1986); *Brinson v. Linda Rose Joint*
15 *Venture*, 53 F.3d 1044, 1049 (9th Cir. 1995).

16 DISCUSSION

17 A. Sexual Harassment

18 Title VII prohibits employers from “discriminat[ing] against any individual with
19 respect to his compensation, terms, conditions, or privileges of employment, because of an
20 individual’s . . . sex.” 42 U.S.C. § 2000e-2(a)(1). This anti-discrimination principle “is
21 violated when sexual harassment is sufficiently severe or pervasive so as to alter the
22 conditions of the victim’s employment and create an abusive working environment.”
23 *Hardage v. CBS Broad. Inc.*, 427 F.3d 1177, 1183 (9th Cir. 2005) (*quoting Meritor Sav.*
24 *Bank, FSB v. Vinson*, 477 U.S. 57, 67 (1986)). Unwelcome sexual advances, requests for
25 sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual
26 harassment when . . . such conduct has the purpose or effect of unreasonably interfering with
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1 an individual's work performance or creating an intimidating, hostile, or offensive working
2 environment. 29 C.F.R. § 1604.11(a). To be actionable under Title VII, “a sexually
3 objectionable environment must be both objectively and subjectively offensive, one that a
4 reasonable person would find hostile or abusive, and one that the victim in fact did perceive
5 to be so.” *Faragher v. Boca Raton*, 524 U.S. 775, 786 (1998).

6 As AutoZone has “assumed” the EEOC can establish a claim for *prima facie* sexual
7 harassment, no further analysis of this issue is necessary for the purpose of this motion.
8 (Def.’s Mem. in Supp. of Mot. for Summ. J. at 10.)

9 **B. Vicarious Liability for Sexual Harassment**

10 “[A]n employer is subject to vicarious liability to a victimized employee for an
11 actionable hostile environment created by a supervisor with immediate (or successively
12 higher) authority over the employee.” *Faragher*, 542 U.S. at 807; *Burlington Indus., Inc. v.*
13 *Ellerth*, 524 U.S. 742, 765 (1998). “Notice of the sexually harassing conduct triggers an
14 employer's duty to take prompt corrective action that is reasonably calculated to end the
15 harassment.” *Swenson v. Potter*, 271 F.3d 1184, 1192 (9th Cir.2001) (internal quotations
16 omitted). However, the Supreme Court provides a defense against vicarious liability:

17 “[A] defending employer may raise an affirmative defense to liability or
18 damages, subject to proof by a preponderance of the evidence. . . The defense
19 comprises two necessary elements: (a) that the employer exercised reasonable
20 care to prevent and correct promptly any sexually harassing behavior, and (b)
21 that the plaintiff employee unreasonably failed to take advantage of any
preventive or corrective opportunities provided by the employer or to avoid
harm otherwise . . . No affirmative defense is available, however, when the
supervisor's harassment culminates in a tangible employment action.”

22 *Faragher*, 542 U.S. at 807-808; *Ellerth*, 542 U.S. at 765. The Court will analyze each
23 element individually.

24 **1. Employer Exercised Reasonable Care**

25 The Ninth Circuit has held that the first element of the *Faragher/Ellerth* affirmative
26 defense includes both preventive and remedial measures. *Kohler v. Inter-Tel Tech.*, 244 F.3d
27 1167, 1180-1181 (9th Cir. 2001). “The legal standard for evaluating an employer’s efforts

1 to prevent and correct harassment . . . is not whether any additional steps or measures would
2 have been reasonable if employed, but whether the employer’s actions as a whole established
3 a reasonable mechanism for prevention and correction.” *Holly D. v. Cal. Inst. of Tech.*, 339
4 F.3d 1158, 1177 (9th Cir. 2003) (citation omitted).

5 **a. Preventive Measures**

6 An employer’s adoption and dissemination of an anti-harassment policy can establish
7 that the employer exercised reasonable care to prevent sexual harassment in the workplace.
8 *Kohler*, 244 F.3d at 1180 (employer had clearly defined definitions, consequences, and
9 reporting procedures for sexual harassment in its policy, ensured employees received and
10 understood the policy on their first day of work, and included a supplemental notice
11 specifically summarizing the policy).

12 The reasonableness of an employer’s efforts can depend on the extent of the
13 dissemination. *Faragher*, 524 U.S. at 808. In *Faragher*, the City of Boca Raton had a
14 policy, but failed to adequately disseminate it. *Id.* at 809. This resulted in the Court holding
15 “as a matter of law that the City could not be found to have exercised reasonable care to
16 prevent the supervisors' harassing conduct.” *Id.* at 808.

17 AutoZone contends that its efforts to adopt and disseminate a sexual harassment
18 policy are sufficient to meet the preventive element of the *Faragher/Ellerth* affirmative
19 defense. As support, AutoZone has submitted sections of its 2002 and 2004 Employee
20 Handbooks, each of which contain substantially identical language regarding sexual
21 harassment and reporting procedures therefor. (Def.’s Reply in Supp. of its Mot. for Summ.
22 J. Ex. A.; Statement of Material Facts in Supp. of Mot. for Summ. J. Ex. B.) According to
23 Wing, at some point during her employment, she received *an* Employee Handbook. (Wing
24 Dep. at 61-62). AutoZone cites Wing’s deposition, which shows evidence that when Wing
25 was hired, she was aware that AutoZone had a policy prohibiting sexual harassment. (*Id.* at
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1 66.) Wing knew that a procedure existed to report sexual harassment; however, she could
2 not recall exactly what that procedure entailed. (*Id.*)

3 The EEOC argues that there is no evidence Wing or Contreras received the handbook
4 prior to, or during the time Wing was being sexually harassed by Contreras. (Pl. SOF ¶ 181.)
5 The EEOC further contends there is no evidence Contreras himself ever received training on
6 AutoZone’s sexual harassment policy. (*Id.* ¶ 182.) Furthermore, the EEOC maintains that
7 there is no evidence that AutoZone trained anyone at the store manager level or below with
8 regard to sexual harassment beyond an initial issuance of the handbook containing the policy.
9 (*Arias Dep.* at 15-16.)

10 According to the record, the Court agrees that there is no evidence that Contreras
11 knew a sexual harassment policy existed at the time the initial harassment occurred. As to
12 Wing, there is evidence only as to her knowledge of “a policy” and that at some point during
13 her employment, she received the 2004 handbook. Therefore, although a sexual harassment
14 policy may have existed and may have been reasonable on its face, similar to the policy in
15 *Kohler*, there is no evidence in the instant case of adequate dissemination. As in *Faragher*,
16 a failure to disseminate can render a policy, reasonable on its face, insufficient to raise an
17 affirmative defense. Therefore, the Court finds that a legitimate question exists as to whether
18 AutoZone’s preventive measures were reasonable for the purpose of asserting a
19 *Faragher/ Ellerth* affirmative defense, and consequently denies AutoZone’s motion for
20 summary judgment.

21 **b. Remedial Measures**

22 Assuming AutoZone established the first prong of the *Faragher/ Ellerth* affirmative
23 defense, AutoZone must still establish that it took remedial measures to end the sexual
24 harassment.

25 The reasonableness of a remedy for sexual harassment depends on its ability to: (1)
26 stop harassment by the person who engaged therein and (2) persuade potential harassers to
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1 refrain from sexually harassing conduct. *Nichols v. Azteca Rest. Enter., Inc.*, 256 F.3d 864,
2 875-876 (9th Cir. 2001) (citation omitted). The reasonableness of the remedial measure must
3 track the nature and/or severity of the alleged conduct. *See Swenson v. Potter*, 271 F.3d
4 1184, 1192-1193 (9th Cir. 2001). When the employer fails to undertake any remedial
5 measure, or where the remedial measure undertaken does not put an end to the current
6 harassment and deter future harassment, liability attaches for both the past harassment and
7 any future harassment. *Nichols*, 256 F.3d at 875-876.

8 AutoZone contends that, given the information presented, its efforts were reasonable
9 and sufficient to meet the remedial measure element of the *Faragher/Ellerth* affirmative
10 defense. The EEOC maintains that AutoZone's efforts in both of the investigations fail to
11 meet its burden under *Faragher/Ellerth*. To evaluate the reasonableness of AutoZone's
12 response to the first investigation, the Court must evaluate (1) what conduct AutoZone was
13 responding to and (2) what measures AutoZone took in response to the complaints of
14 harassment by the Plaintiff. *See id.* Three issues have been raised pertaining to the remedial
15 measures taken by AutoZone; the Court will address each individually.

16 I. Nature of the Harassment

17 Within weeks of being hired, Wing called Anderson, alleging she was being sexually
18 harassed by Contreras. (Wing Dep. at 105-106.) AutoZone claims she complained only of
19 verbal sexual harassment during this phone call. (Anderson Dep. at 49.) AutoZone further
20 contends that, during the subsequent interview at 2737 between the two, Wing complained
21 only of verbal sexual harassment. (*Id.* at 58.) Wing, however, contends that it was not
22 merely verbal harassment that she complained of. (Wing Dep. at 118.) She argues that her
23 complaint consisted of reports of physical harassment as well. *Id.* AutoZone claims Wing's
24 testimony on the subject of what type of harassment is "clear," and is limited to verbal
25 harassment. (Def.'s Reply in Supp. of its Mot. for Summ. J. at 5.) However, although
26 AutoZone argues Wing only reported verbal sexual harassment, it does acknowledge that
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1 Wing reported to Anderson the incident wherein Contreras “exposed himself” to her. (*Id.*
2 at 5 n.6.) The Court finds this act is not “clearly” verbal harassment. *Id.* Wing contends she
3 told Anderson that Contreras had “physically touched [her] in a sexual manner.” (Wing Dep.
4 at 118.) According to Wing, this interview was preserved in writing, where “[Anderson]
5 would write out a question and then [Wing] would answer it.” *Id.* at 117. AutoZone has
6 claimed this document has been lost, and therefore is unable to produce a record of the
7 interview. (Pl. SOF ¶ 137.)

8 AutoZone correctly notes that spoliation is a discovery offense. The EEOC’s request
9 for an adverse inference based on this and other lost documents came well after the discovery
10 deadline, therefore the Court will deny this request. However, without this document to
11 clarify a significant discrepancy in material factual recollections, the record consists of two
12 contradictory statements regarding what was said during the phone call and what was
13 reported and discussed at the subsequent interview. As the substance of these conversations
14 would be material in evaluating the reasonableness of the remedial measures taken by
15 AutoZone in response to Wing’s allegations, the discrepancy in material facts is sufficient
16 to establish a legitimate question of fact. The Court therefore denies AutoZone’s motion for
17 summary judgement on this issue.

18 **ii. Method of Investigation**

19 AutoZone argues the “pertinent legal issue is what Mr. Anderson did upon receiving
20 the [initial] report.” (Def.’s Reply in Supp. of its Mot. for Summ. J. at 5.) It is undisputed
21 that Anderson went to 2727 shortly after receiving the initial report and interviewed Wing.
22 (Def.’s Statement of Material Facts ¶ 31.) During the interview, Wing provided Anderson
23 with the names of five employees of 2737 who she claimed would corroborate her
24 allegations. (Anderson Dep. at 60-61.) The names included: Luz Hernandez (now Luz
25 Gomez), Steve Corbeil, Raiza Bracho, Hector Barajas, and Justin Pierce. *Id.* AutoZone
26 claims Anderson interviewed all five of these potential witnesses, as well as Contreras. (*Id.*
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1 at 65-66.) Each of these interviews were allegedly identical in form: “getting a verbal
2 statement and then following that up in writing with where [sic] [Anderson] would write
3 questions and [the employee] would write answers.” *Id.* at 67. According to AutoZone,
4 Anderson gathered all of these statements and sent them to AutoZoner Relations (part of
5 AutoZone’s corporate counsel). *Id.* at 76-77. Anderson claims the allegations could not be
6 corroborated. *Id.* at 70.

7 The EEOC, however, claims a legitimate issue exists as to whether AutoZone
8 conducted a reasonable investigation because AutoZone has no records pertaining to Wing’s
9 sexual harassment claim, thereby prohibiting the EEOC, as well as this Court, from
10 evaluating its reasonableness. (Pl.’s Resp. to Def.’s Mot. for Summ. J. at 8.) Further, the
11 EEOC alleges Anderson’s investigation cannot be as complete as he has claimed. *Id.* Both
12 Luz Hernandez and Hector Barajas have stated that the only time they spoke to anyone
13 regarding sexual harassment between Wing and Contreras was “around the time Contreras
14 was fired.” (Barajas Dep. at 30; Gomez Declaration ¶ 8.) Contreras left AutoZone as a result
15 of a separate investigation of sexual harassment approximately seven months after Anderson
16 claims his initial investigation occurred. (Def.’s Statement of Material Facts ¶¶ 63-69.)

17 In response, AutoZone claims that a legitimate issue of material fact cannot be created
18 by someone’s inability to recall information. (Def.’s Reply in Supp. of its Mot. for Summ.
19 J. at 5 n.7.) For example, AutoZone claims that because Gomez and Barajas cannot
20 remember speaking with Anderson does not mean it did not occur. In support of its
21 assertion, AutoZone cites two **unpublished** opinions: *Flores v. First Penn Pac. Life Ins.*, 215
22 F.3d 1332 (9th Cir. 2000) (not reported in F.3d) and *Mercon Coffee Corp. v. Beanbag*
23 *Storage Co.*, 1992 WL 1352743 (N.D. Cal. 1992))². In both *Flores* and *Mercon Coffee*, the
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26 ²This Court is not bound by unpublished opinions. Further, AutoZone’s reliance on
27 the aforementioned cases is misplaced, as even a cursory reading of the facts of those cases
28 reveals they are inapposite to the case before the Court.

1 courts found the plaintiffs' inability to recall a discussion or terms of a document were
2 directly contradicted by documentation that they *had* made those statements and were aware
3 of what they were doing when they did so. *Mercon*, 1992 WL 1352743, *1; *Flores*, 215 F.3d
4 at 1332, *1. In the present case, AutoZone's inability to retain or locate the documentation
5 of Anderson's investigations necessarily cannot provide the type of support the courts relied
6 on in AutoZone's cited cases. The Court therefore denies AutoZone's motion for summary
7 judgment on this issue.

8 **iii. Sufficiency of Remedial Measures**

9 The sufficiency of the remedial measures undertaken by AutoZone is entirely
10 dependent on the nature of the allegations. *Swenson*, 271 F.3d at 1192-1193. It is impossible
11 to evaluate the reasonableness of this element when the nature of the allegations remains
12 disputed. As this Court has ruled above that material questions remain with regard to what
13 the initial complaints made by Wing to Anderson were, the Court will deny AutoZone's
14 motion for summary judgment on this issue.

15 **2. Employee Unreasonably Failed to Take Advantage**

16 The second element of the *Faragher/Ellerth* defense is met when an employer has a
17 complaint or reporting procedure designed to handle sexual harassment claims, and the
18 employee unreasonably fails to take advantage of it. *Faragher*, 542 U.S. at 807-808.
19 AutoZone argues that Wing's "conduct in waiting to make an initial report and then failing
20 to make any subsequent report is unreasonable as a matter of law." (Def.'s Mem. in Supp.
21 for Mot. for Summ. J. at 13.)

22 To bolster its position, AutoZone cite three cases to provide examples of employee
23 conduct that courts have deemed unreasonable. *Hardage*, 427 F.3d at 1188; *Molly D.*, 339
24 F.3d at 1178; *Molina v. Phoenix High School Dist.*, 2007 WL 1412530, *8 (D. Ariz. 2007)
25 (J. McNamee). In *Hardage*, the employee waited six (6) months to report the harassment;
26 the plaintiff in *Molly D.* waited an entire year. Wing, on the other hand, reported being
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1 sexually harassed to Jim Monti, the district manager responsible for 2737, “shortly after
2 [she] started working [at AutoZone]”, and then received Anderson’s phone number. (Wing
3 Dep. at 43; Def.’s Statement of Material Facts ¶ 19.) At most, Wing waited “a couple of
4 weeks” to call Anderson to report Contreras’s sexual harassment. (Def.’s Statement of
5 Material Facts ¶¶ 23-24.) In *Molina*, the employee “acknowledged receiving the [Employee
6 Conduct/Discipline] Handbook, reading the portions regarding Defendant's harassment
7 policy and understanding the procedure for reporting sexual harassment” and “admitted to
8 being aware of the policies and procedure set forth in the Handbook” and yet “did not follow
9 the reporting procedures set forth in the Handbook.” *Molina*, 2007 WL 1412530, *7-8. In
10 the instant case, there remains an issue as to when Wing received AutoZone’s handbook
11 which contained the sexual harassment policy.³ See discussion *supra* at 7-8. Assuming
12 *arguendo* that Wing did receive the handbook at the time she was hired, the evidence remains
13 that Wing was aware that steps existed to report sexual harassment, but could not recall *what*
14 *those steps were*. (Wing Dep. at 66) (emphasis added). This distinguishes Wing’s
15 “understanding” of the procedure and “awareness” of the reporting policies from the plaintiff
16 in *Molina*.

17 AutoZone further contends that Wing’s failure to make subsequent reports of the
18 ongoing sexual harassment constitutes unreasonable failure. Wing alleges she left three
19 messages for Anderson following his initial investigation, however Anderson failed to return
20 her calls. (Wing Dep. at 144-150.) Anderson denies such messages existed. (Anderson Dep.
21 103-104.) Further, the Ninth Circuit has continuously held that “harassment is to be
22 remedied through actions targeted at the *harasser*, not at the victim.” *Intlekofer v. Turnage*,
23 973 F.2d 773, 780 (9th Cir. 1992) (emphasis in original); *Nichols*, 256 F.3d at 876
24 (employee’s failure to report further harassment was not a defense to liability). The Court
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26 ³Either the 2002 or 2004 handbook, as they are substantively identical regarding
27 sexual harassment policies.

1 (emphasis in original). However, given the liberal interpretation mandated by precedent, this
2 Court will not hold a lay-complainant to a practitioner’s standard when making allegations
3 in an EEOC complaint that may, unbeknownst to the claimant, have a specific meaning as
4 a legal term of art. Consequently, this Court finds a claim of retaliatory demotion to be “like
5 or reasonably related” to a claim of retaliatory failure to promote. *Serpe v. Four-Phase Sys.,*
6 *Inc.*, 718 F.2d 935, 937 (9th Cir. 1983).

7 The only support AutoZone offers for its position is an unreported, district case:
8 *EEOC v. Rest. Mktg. Assoc., Inc.* 1983 WL 608 (D. Ariz. 1983). The Court finds
9 AutoZone’s reliance on this case misplaced. In *Restaurant Marketing Associates, the court*
10 *erroneously mentioned the “Ninth Circuit has never been faced with a case which presents*
11 *the question of whether charges outside those asserted in the determination letter are*
12 *allowable in a subsequent action by the E.E.O.C.” Id., *1. The Circuit had, two months prior*
13 *to the decision in Restaurant Marketing Associates, held “[t]he EEOC charges must be*
14 *construed with utmost liberality since they are made by those unschooled in the technicalities*
15 *of formal pleading.” Serpe, 718 F.2d at 937. Within the case AutoZone has cited, the court*
16 *quoted a Sixth Circuit opinion, “[i]t is clear that the recitation of a claim in the determination*
17 *letter is not a prerequisite to the assertion of such claim by a private litigant. This Court has*
18 *not been presented with a sufficient justification for applying a different rule with regard to*
19 *claims made by the E.E.O.C. We therefore decline to hold that the recitation of each claim*
20 *of discrimination is a rigid prerequisite to the assertion of those claims by the E.E.O.C. at*
21 *trial.” Rest. Mktg. Assoc., Inc. 1983 WL 608, *1-2.*

22 The Court finds the alleged reasons for AutoZone’s failure to promote Wing, if
23 proven, would constitute a tangible employment action, thereby preventing AutoZone from
24 raising the defense set forth in *Faragher/Ellerth*. Questions of material fact remain regarding
25 why Wing was not promoted to a PSM position. Therefore, the Court will deny AutoZone’s
26 motion for summary judgment on this issue.

1 sexual harassment. (Pl's SOF ¶¶ 113, 118, 119.) In response, AutoZone requests dismissal,
2 claiming, without further proof or argument, "the EEOC has no evidence of any causal
3 connection between any alleged adverse employment action and protected activity." (Def.'s
4 Reply in Supp. of its Mot. for Summ. J. at 8.) It has articulated no legitimate,
5 nondiscriminatory reason for the action. Assuming all facts in favor of the nonmovant, as
6 the Court is required to do, this would constitute a causal link between the protected
7 complaint and the adverse employment action. Because AutoZone failed to articulate a
8 legitimate, nondiscriminatory reason, AutoZone's motion for summary judgment will be
9 denied.

10 **CONCLUSION**

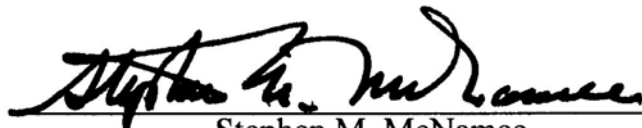
11 In light of the reasons set forth above,

12 **IT IS HEREBY ORDERED DENYING** Defendants's Motion for Summary
13 Judgment. (Dkt. 79.)

14 **IT IS FURTHER ORDERED DENYING** the EEOC's request for an adverse
15 inference. (Dkt. 103.)

16 **IT IS FURTHER ORDERED DENYING** as **MOOT** EEOC's Motions to Strike
17 (Doc. 108 and 112).⁴

18 DATED this 10th day of September, 2008.

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21 _____
22 Stephen M. McNamee
23 United States District Judge

24 _____
25 ⁴ The Court finds that based on the supplementary briefs provided to the court,
26 Handbook 2002 and Handbook 2004 are substantively identical, and therefore the failure of
27 AutoZone to initially provide Handbook 2002 amounts to harmless error. Furthermore, the
28 Court finds that a surreply is not necessary as the Court has addressed and resolved the issues
within the summary judgment discussion, *supra*.