

1 Plaintiff's complaint contains the remaining 15 claims for relief: (1) sex discrimination and
2 sexual harassment under Title VII; (2) retaliation under Title VII; (3) negligent hiring, training, and
3 supervision; (4) vicarious liability; (5) negligence per se; (6) whistle blowing in violation of N.R.S.
4 § 357.240; (7) intentional infliction of emotional distress; (8) negligent infliction of emotional
5 distress; (9) sex discrimination and retaliation in violation of N.R.S. 613.330, N.R.S. 613.333, and
6 any other applicable Nevada statutes; (10) assault; (11) battery; (12) breach of covenant of good faith
7 and fair dealing; (13) breach of contract; (14) compensatory and punitive damages; and (15)
8 defamation.

9 **I. Summary of Facts**

10 Plaintiff's claims stem from alleged incidents of sexual harassment which occurred during
11 her year of employment with defendant Zappos.com. Plaintiff further alleges that defendant
12 Zappos.com failed to remedy the conduct of employee Jacqueline Marsh and that Zappos.com
13 retaliated against her after complaining about the harassment. Plaintiff specifically complains of
14 three incidents in which she was inappropriately touched by Zappos.com employee Jacqueline
15 Marsh.

16 The first incident allegedly occurred in January 2007 at an offsite holiday party sponsored
17 by Zappos.com. *See* Ex. 5 at 60, ll 10-16; 61, ll.19-23. Plaintiff alleges she "felt someone grab and
18 squeeze my buttocks." *Id.* at 64, ll.10-14. The plaintiff described this contact as brief and believes
19 that she was touched with only one hand. *Id.* at 65, ll.1-19. During the third week of February 2007
20 Jacqueline Marsh allegedly admitted she was the person that grabbed plaintiff's buttocks. *Id.* at 69,
21 l. 9 to 70, l. 18. Plaintiff admits that she failed to report the incident to her superiors until May 2007.
22 *Id.* at 71, ll.20-25.

23 The second incident plaintiff complains of occurred in the ladies restroom at Zappos.com in
24 May 2007, when Marsh again allegedly "grabbed and squeezed my buttocks." *Id.* at 78, ll. 11-15.
25 (Plaintiff was on break when the contact occurred and "she was able to get through the day without
26 it having an effect on [her] work." *Id.* at 85, ll. 2-14.) Plaintiff reported the incident to her lead
27 Kimberly Pistole, *Id.* at 78, l.25 to 79, l. 2, who stated, "I'll talk to her [Marsh]." *Id.* at 83, ll. 3-4.
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1 Zappos.com team leader Loren Becker then advised Jacqueline Marsh to refrain from touching
2 anyone in a manner that the person might find offensive. See Ex. 11 at ¶ 18.

3 The third incident plaintiff complains of allegedly occurred on the morning of August 22,
4 2007. *Id.* at 85, ll. 15-18; 110, ll. 15-22. Plaintiff claims Marsh reached out with one hand and
5 grabbed her buttocks, and Dominique Washington’s buttocks, as the two women passed Marsh on
6 the stairs. *Id.* at 102, l. 4 to 103, l. 2. Plaintiff immediately reported this incident to her lead Duke
7 Cajala. *Id.* at 106, ll. 21-24. Cajala seemed surprised by the report and “presented himself as if he
8 wanted to help resolve the matter.” *Id.* at 108, ll. 1-9, and ll. 21-24.

9 Upon receiving this complaint Zappos.com immediately initiated an investigation that was
10 conducted by Human Resources Generalist Manager Hollie Delaney. See Ex. 11 at ¶¶ 15-16. The
11 following day, August 23, 2007, Zappos.com suspended Marsh pending the results of the
12 investigation. *Id.* at ¶¶ 22-23. Following the investigation Marsh was fired on August 28, 2007
13 because she had previously been warned to refrain from such conduct by Loren Becker. See Ex. 11
14 at ¶ 23. As Zappos.com promptly took remedial action in response to plaintiff’s complaints, it
15 cannot be held liable for Marsh’s actions.

16 **II. Legal Standard**

17 Summary judgment is appropriate where the “pleadings, depositions, answers to
18 interrogatories and admissions on file, together with affidavits, if any, to show that there is no
19 genuine issue of material fact and that the moving party is entitled to judgment as a matter of law.”
20 Fed. R. Civ. P. 56(c). The party moving for summary judgment has the burden of proving the
21 absence of a genuine issue of material fact. *Celotex v. Catrett*, 477 U.S. 317, 323 (1986).

22 When ruling on a motion for summary judgment, a trial court can consider only admissible
23 evidence. See Fed. R. Civ. P. 56(e); *Orr v. Bank of America*, 285 F.3d 764, 773 (9th Cir. 2002).
24 “Authentication ‘ is a condition precedent to admissibility,’ and this condition is satisfied by ‘
25 evidence sufficient to support a finding that the matter in question is what its proponent claims.’”
26 *Orr*, 285 F.3d at 773 (quoting Fed. R. Evid. 901(a)). Defendant submitted some fifty-one exhibits
27 along with this motion, all properly authenticated.

1 **III. Sexual Harassment Claims**

2 To prevail on a claim of sexual harassment, a plaintiff must demonstrate that: (1) she was
3 subjected to sexual advances or requests for sexual favors; (2) this conduct was unwelcome; and (3)
4 this conduct was sufficiently severe and pervasive to alter the conditions of employment and create
5 a hostile work environment. *Ellison*, 924 F.2d at 875-76 (9th Cir. 1991).

6 Plaintiff asserts that she was subjected to unwanted sexual advances by Jacqueline Marsh,
7 and also asserts that she conveyed to both Marsh and Zappos.com management that these advances
8 were unwelcome. *See Ex. 5* at 85, ll. 15-20. Regardless if plaintiff satisfies the first two elements
9 of this claim, plaintiff cannot prove that the conduct complained was sufficiently severe or pervasive
10 to have created a hostile work environment.

11 To evaluate a hostile work environment, a court should consider: (1) frequency of conduct;
12 (2) severity of conduct; (3) whether the conduct was physically threatening or humiliating; (4)
13 whether the conduct was a ‘mere offensive utterance’; and (5) whether the conduct unreasonably
14 interfered with work performance.” *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 23 (1993).
15 Furthermore, “Title VII forbids only behavior so offensive as to alter the ‘conditions’ of the victim’s
16 employment.” *Oncale v. Sundowner Offshore Services*, 523 U.S. 75, 81 (1998).

17 Here, plaintiff complains of three incidents of sexual harassment during an eight- month
18 span, all at the hands of Jacqueline Marsh. The unwelcome conduct was not sufficiently severe or
19 pervasive to have altered the conditions of her employment such that a hostile work environment was
20 created because plaintiff never suggests that it impacted her work.

21 Additionally, this court finds that “isolated incidents of sexual horseplay...are not so
22 egregious,” as to create a hostile work environment. *Candelore v. Clark County Sanitation Dist.*,
23 975 F.2d 588,590 (9th Cir. 1992). “Title VII does protect an employee who experiences conduct
24 which is merely offensive or annoying.” *Harris*, 510 U.S. at 21. Furthermore, plaintiff only reported
25 two of the three alleged incidents of sexual harassment to her superiors, who promptly terminated
26 Marsh when an investigation confirmed a recurrence of the offensive conduct. Therefore,
27 Zappos.com promptly remedied the instances of harassment it knew about and cannot be held liable
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1 for Marsh's actions. *See Burlington Indus., Inc. v. Ellerth*, 524 U.S. 724, 758 (1998).

2 **IV. Retaliation Claim**

3 Plaintiff's second cause of action is for retaliation. To prevail on a Title VII retaliation
4 claim a plaintiff must first establish a prima facie case by showing: (1) plaintiff's involvement in a
5 constitutionally protected activity; (2) adverse employment action; and (3) a causal link between
6 protected activity and adverse employment action. *Brooks v. City of San Mateo*, 229 F.3d 917, 928
7 (9th Cir. 2000).

8 Here, plaintiff fails to meet this burden because she has failed to demonstrate a causal link
9 between her reports of harassment to her superiors and her eventual termination. Attendance issues,
10 poor productivity, and poor work performance in the months preceding plaintiff's termination
11 indicate that Zappos.com had legitimate, non-retaliatory reasons for terminating her employment.
12 *See Exs. 30-36, and 39.*

13 She complained of sexual harassment to her lead in May 2007, and received a positive review
14 shortly thereafter, in June 2007. *See Ex. 25 at ZY-282-84.* However, beginning in July 2007, before
15 plaintiff had even complained about defendant's failure to remedy Marsh's conduct, Zappos.com had
16 already begun counseling plaintiff about her worsening attendance and performance, and instructed
17 plaintiff to make sure she arrived on time and took appropriate breaks to avoid future discipline. *See*
18 *Ex. 27.*

19 By August 2007, plaintiff's plunging quality assurance ("QA") scores had continued to
20 decline and she regularly scored below her previous average of 90%. *See Ex. 29.* Therefore,
21 Zappos.com had documented a decline in plaintiff's work performance well before she complained
22 about her supervisors' handling of Marsh. Defendant is entitled to judgment as a matter of law on
23 this claim because plaintiff failed to present evidence that her employer, Zappos.com, discriminated
24 against her because of her gender or retaliated against her because she complained of sexual
25 harassment.

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1 **IV. Tort Claims Precluded by Nevada Industrial Insurance Act**

2 Plaintiff also brings the following causes of action: (1) assault; (2) battery; (3) intentional
3 infliction of emotional distress; (4) negligent hiring, training, and supervision; (5) negligence per se,
4 and (6) negligent infliction of emotional distress. Plaintiff’s tort claims against defendant fail as a
5 matter of law because those claims are preempted by the Nevada Industrial Insurance Act (“NIIA”,
6 NRS 616A-NRS 616D).

7 Nevada Revised Statute 616A.020(1) provides that the “rights and remedies provided in [the
8 Nevada Industrial Insurance Act] for an employee on account of an injury by accident sustained
9 arising out of and in the course of the employment...shall be exclusive of all other rights and
10 remedies of the employee, his personal representatives, dependents or next of kin, at common law
11 or otherwise, on account of such injury.” NRS 616A.020(1). Additionally, Nevada Revised Statute
12 616B.612(4) provides that an employer within the provisions of the NIIA “is relieved from other
13 liability for recovery of damages or other compensation for those personal injuries unless otherwise
14 provided by the terms of [the NIIA].” NRS 616B.612(4).

15 Significantly, in *Wood v. Safeway*, 121 Nev. 724 (2005), the Nevada Supreme Court
16 thoroughly analyzed the NIIA’s preclusive effect on an employee’s claims of negligent hiring,
17 training, and supervision, sexual harassment, and negligent infliction of emotional distress against
18 her employer. Each of these causes of action are alleged by plaintiff in the instant case.

19 In *Wood*, the Nevada Supreme Court adopted the rule that the sexual assault or harassment
20 of an employee in the workplace “falls within the NIIA if the nature of the employment contributed
21 to or otherwise increased the risk of assault beyond that of the general public.” *Id.*, 121 Nev. at 736
22 (citing *Doe v. South Carolina State Hosp.*, 328 S.E.2d 652, 655 (S.C. Ct. App. 1985); *Cummings v.*
23 *United Resort Hotels, Inc.*, 85 Nev. 23, 27 (1969); and *McColl v. Scherer*, 73 Nev. 226, 230)). “That
24 same assault is not within the NIIA, however, when ‘the animosity of the dispute which culminates
25 in the assault is imported into the place of employment from the injured employee’s private or
26 domestic life, ... at least where the animosity is not exacerbated by the employment.’” *Wood*, 121
27 Nev. at 736 (citing *McColl*, 73 Nev. at 230).

1 Here, plaintiff specifically alleges that Zappos.com employee Jacqueline Marsh twice
2 touched her inappropriately at work during regular business hours and also alleges that Marsh
3 touched her at an offsite party sponsored by Zappos.com. Like the plaintiff in *Wood*, the only contact
4 plaintiff had with Marsh was a result of her employment with Zappos.com. As in *Wood*, plaintiff
5 would not have been sexually harassed but for her employment with Zappos.com and she faced a
6 much greater risk of assault than that of the general public because of her employment. There was
7 no any evidence of personal animosity between the two that carried over from their private lives.
8 Therefore, plaintiff's alleged damages resulting from the assault and battery committed by Marsh
9 are injuries which "arose out of and during the course of her employment" and are barred by NIIA
10 under *Wood*.

11 Even assuming arguendo that plaintiff's tort claims are not barred by NIIA, Zappos.com
12 cannot be held liable for tortious actions of its employees that are independent acts outside the scope
13 of their employment. *See* NRS 41.475. In Nevada, employee acts are independent and outside the
14 scope of employment where they are not committed in the course of an actual task assigned the
15 employee and such acts are "not reasonably foreseeable to a person of ordinary prudence and
16 responsibility." *See* NRS 41.475(1); NRS 41.475(2).

17 The tortious conduct plaintiff complains of is well outside the scope of employment because
18 the incidents of harassment complained of are not reasonably foreseeable given the nature of Marsh's
19 duties within the Zappos.com call center. Accordingly, Zappos.com cannot be held liable for
20 employee activity that is not reasonably embraced within said employment and that was not parts
21 of the tasks assigned by the employer. *Prell Hotel Corp. v. Antonacci*, 86 Nev. 390, 392 (1970).

22 In the instant matter, defendant maintained strict policies and procedures prohibiting sexual
23 harassment and discrimination in the workplace. *See* Ex. 9. Marsh was aware of and acknowledged
24 receipt and understanding of these policies. *See* Ex. 44 at ZY-78. Plaintiff also admits that she was
25 aware of the policies and procedures in place and acknowledges that she could have reported any
26 harassment to her supervisors immediately. *See* Ex. 5 at 44, l. 23 to 45, l. 1. In order to prevail upon
27 claims of vicarious liability, plaintiff must prove that Zappos.com was negligent in implementing
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1 and enforcing its policies.

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3 **VI. Intentional Infliction of Emotional Distress**

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5 Furthermore, plaintiff's claim for intentional infliction of emotional distress fails because
6 plaintiff cannot establish the elements of an IIED claim. To prevail on an IIED claim a plaintiff must
7 demonstrate: (1) extreme and outrageous conduct with either the intention of, or reckless disregard
8 for, causing emotional distress; (2) severe emotional distress suffered; and (3) actual or proximate
9 causation. *Olivero v. Lowe*, 116 Nev. 395, 398-99 (Nev. 2000). In Nevada, "extreme and outrageous
10 conduct" has been defined as that which is "outside all bounds of decency and is regarded as utterly
11 intolerable in a civilized society." *Maduik v. Agency Rent-A-Car*, 114 Nev. 1, 4 (1998).

12 Here, plaintiff alleges that she was inappropriately touched three times, that the contact was
13 very brief, and that it did not affect her ability to do her job. *See* Ex. 5 at 85, ll. 2-14. General
14 physical or emotional discomfort is insufficient to demonstrate severe emotional distress. *See*
15 *Maduik*, 114 at 4. Conduct giving rise to a valid IIED claim must be so egregious as to offend
16 human decency. *Olivero*, 116 at 398-99 (Nev. 2000). This court finds that this conduct fails to rise
17 to the level of 'extreme and outrageous conduct beyond all bounds of decency,' and accordingly,
18 defendant is entitled to judgment as a matter of law.

19 **VII. Negligence Claims**

20 Plaintiff's claims for negligent hiring, training, and supervision, negligence per se, and
21 negligent infliction of emotional distress fail as a matter of law because to prevail on these claims
22 a plaintiff must ultimately prove negligence. *Hall v. SSF, Inc.*, 112 Nev. 1384, 1393 (1996); *Falline*
23 *v. GNVL Corp.*, 107 Nev. 1004, 1013 (1991). The plaintiff has failed to prove Zappos.com acted
24 negligently in counseling Marsh after plaintiff complained, suspending Marsh pending an internal
25 investigation, and, finally, terminating Marsh when it determined the conduct had recurred.

26 Zappos.com unsuccessfully moved this court for Rule 11 sanctions on plaintiff's remaining
27 claims for whistle blowing, breach of the covenant of good faith and fair dealing, breach of contract,
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1 and defamation, alleging that no factual basis existed for such claims (Doc. #41). Plaintiff has failed
2 to uncover sufficient facts during discovery to prevail on these claims, and an award of summary
3 judgment is appropriate. Plaintiff also pleaded a cause of action for compensatory and punitive
4 damages; these are remedies and do not constitute an independent cause of action.

5 **VIII. Whistleblowing and Defamation**

6 Plaintiff's claim for whistle blowing asserts wrongful termination based on plaintiff's report
7 to the EEOC . *See* Complaint (Doc. #1) at ¶ 89; *see also* Ex. 5 at 201, ll. 4-12; and Ex. 48. This
8 claim is predicated upon the same facts as plaintiff's Title VII retaliation claim, and fails for many
9 of the same reasons. Nevada's whistleblowing statute is Nevada Revised Statute 357, and it protects
10 employees "blow the whistle" on frauds their employers have perpetrated against the federal
11 government. Plaintiff appears to be asserting wrongful termination based on Zappos.com's failure
12 to adhere to its own sexual harassment procedures, and plaintiff failed to identify any fraud that
13 Zappos.com perpetrated against the state of Nevada

14 NRS 357, Nevada's False Claims Act ("FCA") is inapplicable to plaintiff's whistle blowing
15 claim. NRS 357.420 does not protect an employee that files a claim with the EEOC, a federal
16 regulatory agency. The FCA is designed to "expose and combat attempted fraud against the
17 government; through it, private citizens are encouraged to disclose information regarding wrongful
18 claims for government funds." *International Game Technology, Inc. v. Second Judicial District*
19 *Court*, 179 P.3d 556, 559 (Nev. 2008). As plaintiff has failed to allege any wrongful claim for
20 government funds by Zappos.com, this claim fails as a matter of law.

21 Plaintiff's claims for breach of contract and bad faith discharge also fail as a matter of law.
22 The Nevada Supreme Court has held that employers may use disclaimers in employee handbooks
23 in order to assure that employees are aware of their at will status. *See Martin v. Sears, Roebuck, &*
24 *Co.*, 111 Nev 923, 927-28 (1995); *Baldonado v. Wynn Las Vegas, LLC*, 194 P.3d 96, 106 (Nev.
25 2008)(confirming that "employers may prevent implied contractual liability from arising in the first
26 instance by including a disclaimer in their employment handbooks"). As such, "breach of contract
27 and bad faith discharge are not applicable to at-will employment." *See Martin*, 111 Nev. 929; *Sands*

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1 *Regent v. Valgardson*, 105 Nev. 436, 439 (1989).

2 Here, plaintiff admits that she received Zappos.com’s Employee Handbook, an offer letter,
3 and a Confidential Information and Invention Assignment Agreement; each document explained
4 thoroughly the at-will character of Zappos.com employees. *See* Ex. 5 at 29, l. 21 to 30, l. 8; 36, ll.
5 6-15; and 39, ll. 5-13; Ex. 9 at ZY-5; Ex. 13; Ex. 49, Offer Letter at ZY-305; and Ex. 50,
6 Confidential Information and Invention Assignment Agreement at ZY-307. As plaintiff was an at-
7 will employee, her contract claims fail as a matter of law.

8 Plaintiff’s last cause of action is for defamation. To prevail upon a defamation claim in the
9 state of Nevada a plaintiff must prove that the “defendant made a false and defamatory statement
10 concerning the plaintiff and that the defendant published that statement, without privilege to do so,
11 to a third party.” *Lubin v. Kunin*, 117 Nev. 107, 111 (2001). Whether a statement is capable of a
12 defamatory construction is a question of law. *Branda v. Sanford*, 97 Nev. 643, 646 (1981). A jury
13 question arises only when the statement is susceptible of different meanings, one of which is
14 defamatory. *Id.*

15 **IX. Conclusion**

16 Summary judgment is appropriate in the instant case because plaintiff is unable to identify
17 any specific defamatory statement by any Zappos.com employee that was published to a third party.
18 Instead, plaintiff generally alleges that Zappos.com “engaged in acts that constitute defamation...such
19 as purveying untruths to third parties” about her. *See* Complaint (Doc. #1) at ¶ 159. Therefore,
20 defendant is entitled to judgment as a matter of law on this claim.

21 Finally, neither the federal nor local rules permit a sur-reply by the plaintiff. Pursuant to both
22 Federal Rule of Civil Procedure 56(c) and Local Rule 7-2, the sequencing for a summary judgment
23 motion allows for the filing of a summary judgment motion, a response, and a reply. *See* Fed. R.
24 Civ. P. 56(c)(A) - (C); Local Rule 7-2(a) - (c). No sur-reply is provided for by either of these rules.
25 Furthermore, Federal Rule of Civil Procedure 12(f) and Local Rule 7-2(b) both allow a court to
26 strike a pleading or motion as redundant, impertinent, or immaterial. *See* Fed. R. Civ. P. 12(f); Local
27 Rule 7-2(b)


1 IT IS HEREBY ORDERED, ADJUDGED AND DECREED that defendant Zappos.com's
2 motion for summary judgment (Doc. #95) be, and the same hereby is, GRANTED.

3 IT IS FURTHER ORDERED, ADJUDGED AND DECREED that defendant Zappos.com's
4 motion to strike (Doc. #108) be, and the same hereby is, GRANTED.

5 IT IS FURTHER ORDERED, ADJUDGED AND DECREED that plaintiff's motion for
6 leave to file a sur-reply (Doc. #111) be, and the same hereby is, is DENIED.

7 DATED this 19th day of April, 2010.

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UNITED STATES DISTRICT JUDGE