STATE OF MAINE
CUMBERLAND, ss

SUPERIOR COURT
CIVIL ACTION
DOCKET NO. CV-09-330
REC - CUM - 7/23/2010

TRUDY LITTLE,
Plaintiff

STATE OF MAINE
Cumberland, ss, Clerk's Office
JUL 23 2010
RECEIVED

v.

SAINT JOSEPH'S MANOR,
Defendant

ORDER ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

BEFORE THE COURT

Defendant Saint Joseph's Manor (hereinafter "SJM" or "Defendant") has filed a motion for summary judgment pursuant to M.R. Civ. P. 56 on Plaintiff Trudy Little's (hereinafter "Little" or "Plaintiff") Complaint.

PROCEDURAL BACKGROUND

On June 4, 2009, Little filed a Complaint alleging workplace discrimination in violation of the Civil Rights Act,[1] the Rehabilitation Act,[2] the Americans with Disabilities Act (hereinafter "ADA"), 42 U.S.C. §§ 12131-12134, and the Maine Human Rights Act (hereinafter "MHRA"), 5 M.R.S. §§ 4551-4651, specifically alleging sex discrimination (Count I), hostile work environment

[1] Little does not specify whether her claims under the Civil Rights Act are based on the Federal Civil Rights Act, 42 U.S.C. §§ 1981-2000h-6, or the Maine Civil Rights Act, 5 M.R.S. §§ 4681-4683. For the purposes of this summary judgment order, this Court evaluates Little's claim based on the Maine Civil Rights Act.

[2] It is not clear whether Little asserts claims under the Federal Rehabilitation Act, 29 U.S.C. § 794 et seq. (2010), or the Maine Rehabilitation Act, 26 M.R.S. §§ 1411-1421. For the purposes of this motion the court evaluates Little's claim based on the Maine Rehabilitation Act. While the Maine Rehabilitation Act requires the Commissioner of Labor to adopt a grievance procedure for discrimination on the basis of a disability, unlike the Federal Rehabilitation Act, 29 USC § 794, the Maine Rehabilitation Act does not specifically provide a cause of action for discrimination. Because the Federal District Court for the District of Maine dispensed with Plaintiff's federal claims, this court will only address Plaintiff's claims based on Maine law.

harassment (Count II); constructive discharge (Count III), and disclosure of confidential information (Count IV). On June 30, 2009, the case was removed to the United States District Court for the District of Maine upon the Defendant's motion. The parties proceeded with discovery consistent with the terms of the scheduling order issued by the Federal District Court. Upon completion of discovery, the Defendant filed a motion for summary judgment in the federal court. The motion was fully briefed by both parties, and the Federal District Court heard oral argument on the motion on March 26, 2010. The Honorable Judge D. Brock Hornby of the Federal District Court entered by oral order summary judgment for SJM on the Plaintiff's federal claims, and remanded the case to the State Superior Court for the remaining state claims.

FACTUAL BACKGROUND[3]

Little was employed by SJM as a cook supervisor between May 29, 2006 and July 28, 2007. During Little's employment, Mary Cote (hereinafter "Cote") was SJM's Human Resources Manager. Cote provided Little with her new employee orientation on June 20, 2006, and as part of orientation Little received a copy of SJM's employee handbook. During her employment, Little was directly supervised by Food Services Director Adam Barrows (hereinafter "Barrows") and Assistant Food Director Jill N. Bookataub (hereinafter "Bookataub"). As the Assistant Food Director, Bookataub had some supervisory authority over the cooks and food service workers, however Bookataub had no authority to fire,

[3] In response to SJM's motion for summary judgment, Little filed a two paragraph affidavit signed on February 9, 2010. The affidavit will be disregarded because it contradicts former testimony, *see Schindler v. Nilsen*, 2001 ME 58 ¶ 9, 770 A.2d 638, 641-42 (stating that a party may not submit an affidavit attempting to create disputes of fact by making statements contrary to that party's prior testimony), and because it is unsworn, in violation of M.R. Civ. P 56(e), which requires affidavits submitted in support of summary judgment to be sworn or certified.

discipline, or take other actions that might affect the terms and conditions of employment of the cooks and food service workers, including Little. Little understood that she was to go to Barrows[4] or Bookataub with any complaints about her job. Also during Little's employment, Faith Stilphen (hereinafter "Stilphen") was SJM's Director of Nursing. Stilphen did not supervise Little, but she was a supervisor of other departments at SJM, and testified during her deposition that she felt she had a duty to respond to possible violations of SJM's sexual harassment policy.

At all relevant times, Joe Mitchell (hereinafter "Mitchell") was a cook supervisor at SJM. He did not supervise Little, except for when Little worked on Thursdays as the spare cook. Mitchell did not have the authority to affect the terms and conditions of Little's employment, nor did he exercise the authority to hire or terminate any employee during Little's employment. According to SJM, Mitchell is gay, which SJM asserts was made known to Little during the first week of her employment. Little argues that the evidence does not support that Mitchell is gay, and that his conduct raises questions about whether he is sexually interested in women.

SJM's employee handbook contains a sexual harassment policy with clear guidance to employees who believe they have been subjected to harassment. SJM's sexual harassment policy states that SJM "will not tolerate any form of sexual harassment by supervisors and co-workers." The "policy is intended to prohibit offensive conduct, either physical or verbal, that threatens human dignity and employee morale, and which interferes with a positive and

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[4] Barrows attended harassment/ sexual harassment training sessions provided by SJM to its supervisors on May 4, 2005 and on December 6, 2007.

productive work environment." During Little's employment, SJM used a formal grievance procedure, which instructed employees to direct issues involving their employment to Cote's department in writing. SJM's sexual harassment policy states: "Supervisors and managers are responsible for monitoring behavior which can be construed to be harassment and for initiating necessary action to eliminate such behavior." Under the policy, any SJM employee who feels that he or she is a victim of sexual harassment may immediately report the matter to his or her supervisor, or the Human Rights Director. The policy further states that SJM "will immediately investigate any complaints of sexual harassment and where warranted, take disciplinary action against any employee engaging in sexual harassment."

1. **Mitchell's Conduct**

In July of 2006, Mitchell gave Little a handwritten note to give to her boyfriend George Asali, whom Mitchell had never met. In the note, Mitchell wrote "George – Bring me home some good Shiraz [and] I'll stop doing Trudy in the cooler! She likes to finger my ass! Then smell it! Love Joey." (Little Depo, Ex. 4). Little did not discuss this note with Stilphen and Barrows more than one time. After the first note, Mitchell sent Little several text messages.[5] Some of the text messages included sexual content, such as "Trudy has big ones, takes up the whole kitchen;" "Send me a pic of your tit;" and "Did Serri in the middle room twice." The only co-worker Little told about the text messages was Sherry Poitras, who is not a supervisor. Little never discussed or showed Mitchell's text messages to any SJM supervisor. A couple of months after the first note, Mitchell

[5] The parties dispute how many of the text messages were work related, and how many were sex-specific.

gave Little another note to give to George in which Mitchell bragged about masturbating at work. (Little Depo, Ex. 5). Little never showed this note to anybody at SJM.

In December 2006, Mitchell gave Little a Christmas card to deliver to her adult son, in which Mitchell claims to have had sex with Little twice. (Little Depo, Ex. 7). Little testified that when she confronted Mitchell about the Christmas card and told him that she did not appreciate it, Mitchell responded by saying "it's a fucking joke, Trudy." Little testified that she complained to Stilphen about the note Mitchell sent to George and the Christmas card. Little testified that she had several conversations with Stilphen about Mitchell's inappropriate conduct, although she does not recall exactly how many. Stilphen felt that Barrows, as Little's supervisor, needed to known about the Christmas card. Stilphen reported to Barrows that Little was upset by the card, and made it clear that there were sexual connotations to it. Stilphen offered to be present with Barrows when Barrows met with Mitchell about the card, however Barrows declined saying that Mitchell was on vacation and that he would speak with both Mitchell and Little. Barrows testified that after speaking with Stilphen about the Christmas card he did not do anything to look into the issue. Stilphen testified that when she followed up with Barrows about the card, Barrows told her he had taken care of the issue.

SJM claims that Little did not say anything about this card to anyone at SJM other than Mitchell and Stilphen. Little testified that Bookataub also knew about the card. SJM claims that when Stilphen "checked in" with Little following discussions about the Christmas card, Little assured her that things were fine. Little denies ever assuring Stilphen that "things were fine". The parties dispute

the number of sex-related notes Mitchell gave to Little, but Little estimates that there were three to four additional sex-related handwritten notes, although Little does not remember exactly what they said. SJM argues, and Mitchell testified in his deposition, that Mitchell wrote the notes and text messages as a joke and that Little encouraged him to write notes that were bizarre to make her boyfriend laugh.

In addition to the text messages and handwritten notes, Mitchell made comments directly to Little about her breasts and breast size, and made other comments that had sexual connotations that Little thought were offensive and hurtful. On one occasion at the end of a meeting and in the presence of supervisors Bookataub and Barrows, as Little stood up to leave Mitchell fell back and said "get those fucking things out of my face, Trudy," referring to Little's breasts. Little claims that this made her extremely embarrassed. Barrows was present when Mitchell made this remark at the meeting, and he perceived that Little and Mitchell were laughing and joking around. He responded by telling Little and Mitchell "that's enough." Bookataub testified that she heard Mitchell make sexual comments to Little, including comments about Little's breasts. Bookataub did not take any action in response to Mitchell's comments to Little because she perceived that Mitchell and Little were joking. Bookataub also testified during her deposition that two or three times Mitchell commented on her (Bookataub's) breasts if she was wearing a revealing top.

Little states that Mitchell referred to her as "ugly" "all the time." On one occasion, Little was excited about getting contact lenses, and Mitchell said to her "Don't bother, Trudy, you can't hide ugly." On another occasion, Little came to work with her daughter-in-law and two grandchildren to show them where she

worked, and in the presence of her family, Mitchell came by and commented to Little that she was still ugly. SJM disputes the frequency with which Mitchell called Little ugly, pointing out that Little was only able to support this assertion with evidence of two instances in which Mitchell referred to her as ugly.

Little complained to Barrows about Mitchell calling her ugly when she was getting contact lenses. Little testified that Barrows confronted Mitchell in her presence over the incident, and that Mitchell declared, "fuck her if she can't take a joke . . . I call it as I see it, Adam." Little testified that in response Barrows did not say anything to Mitchell and returned to his office, leaving Little embarrassed. Little also testified that Barrows was present when Mitchell called her ugly in front of her family, and then when Barrows confronted Mitchell, Mitchell again responded, "fuck her if she can't take a joke."

Barrows tells a different story. Barrows testified that he was not present when Mitchell called Little ugly after she announced she was getting contact lenses. Barrows stated that Little did report this incident to him, but that she did not want Barrows to address Mitchell about the situation. Barrows told Little that he would pay attention to Mitchell and address the issue with him if it ever happened again. Barrows stated that when Little brought her grandchild to SJM, he overheard Mitchell say "how can someone so ugly produce a beautiful baby like that." Barrows claims that Little laughed in response, and that when Little left, he confronted Mitchell and told Mitchell his comment was inappropriate. Barrows stated that Mitchell responded by saying he was kidding.

According to Little, Mitchell frequently made comments to her and others about his genitals and about their sexual activity. According to Little, on one occasion Mitchell was upset with Nadine Nyder, a female a co-worker, so in

Little's presence, Mitchell took Nyder's coffee cup, stuck his hands down his pants, and then rubbed his hands on the lip of the co-worker's cup. Little testified that when she told Mitchell what he did was horrible, Mitchell responded with laughter. Little testified during her deposition that on four to five occasions, Mitchell told Bookataub that he would love to go to bed with her. Little acknowledges that Mitchell's comments to Bookataub were part of an on-going banter.[6] Def.'s Response to Pl.'s SAMF, ¶ 26 citing Little Dep. p. 131. However, Little testified that these comments made her feel uncomfortable because the sexual topics were inappropriate for the workplace. (Little Dep. pp. 131-132). SJM claims that Mitchell referred to his genitalia at work only once while Little was employed by SJM. In April or May of 2007, Sue LaRoche, the cook supervisor for the evening shift, complained to Barrows that Mitchell was

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[6] The following questions and answers are from Little's deposition.

> Q (Attorney LaMourie): They – they saw Mr. Mitchell – they saw this – they saw his behavior in connection with you every day? Is that your testimony?
>
> A (Little): Not necessarily with me, in particular. They did see a lot that was to do with me. But his behavior on a daily basis in front of the bosses was never – they never did anything. It was accepted. It was accepted behavior. He used to say to Jill [Bookataub], I'd love to go to bed with you tonight or – and she'd give it right back. Why would I say something to these people if they were involved in it?
>
> Q: So Mr. Mitchell used to say that to Jill?
>
> A: To Jill, yeah, all the time.
>
> Q: How often did you hear him make that comment?
>
> A: Probably four or five times.
>
> Q: And how – how would she respond?
>
> A: She'd laugh and say, come on, Joe, let's go or –
>
> Q: Did you ever say to Jill that it made you uncomfortable to hear those comments?
>
> A: No. What would be the point. She thought they were funny. You know I had already complained to Adam, which I'm sure he told Jill. They all just thought I was – couldn't take a joke.

Little Dep., 131:4-23.

talking about his penis and/or erection while at work. In response Barrows spoke to Mitchell and Mitchell apologized.

Little had troubles with anxiety and panic attacks. She claims that Barrows and Stilphen were the only people she told about her panic disorder at SJM. Little testified that a few days before giving her notice of resignation, Barrows called Little into his office because she seemed more nervous and Little told Barrows of her panic attacks. Little further testified that Mitchell made her panic disorder worse. According to Little, the day after she spoke with Barrows, she went to work and Mitchell got in her face and asked "how her mental condition was." Little stated that Mitchell then went to people whom she supervised and told them to be nice to her tonight because she is crazy. Little believes Mitchell learned of her panic disorder through Barrows. Little states that she had to leave her job at SJM because of Mitchell's harassment, and because Barrows told Mitchell about her panic disorder. Little says a few days after leaving her employment at SJM, Mitchell called her to ask why she left. Little testified that she told Mitchell that Barrows disclosure of her medical condition was the last straw and that she could not continue to work with Mitchell.

Barrows testified that Little had discussed with him having anxiety on several occasions. Barrow claims that he never told Mitchell about Little's anxiety disorder. Mitchell testified that he knew about Little's anxiety because they got along and shared things with each other. Mitchell says that Little told him shortly after she started at SJM that she suffered from anxiety and a panic disorder. Additionally, Mitchell testified that when he spoke with Little on the

phone after she left SJM, Little told him she quit because she could not stand Barrows or Bookataub.

2. **Co-Workers' Observations of Little and Mitchell and Co-Workers' Interactions with Mitchell**

According to SJM, at least five SJM employees recall that they observed Mitchell and Little talking, teasing, and joking with each other on numerous occasions, and that Mitchell and Little appeared to be friends and acted friendly towards each other. According to Barrows, he often observed Little and Mitchell laugh and share jokes, and he perceived that they were friends. Bookataub testified that she never observed Little seem uncomfortable in Mitchell's presence, nor did she get any indication that Mitchell's conduct toward her was unwelcome. Stilphen also testified that she had the impression that Mitchell and Little got along. Little claims that she and Mitchell were not friends, and that she complained to Mitchell and made complaints to management about his conduct. According to SJM, Mitchell's other co-workers, both male and female, got along with him and had no problems or issues with him at work, and Mitchell was helpful to Little and to all the other male and female employees who worked in the kitchen at SJM.

Mitchell testified during his deposition that he did not think his actions were hurtful or offensive. Mitchell stated during his deposition that he got along with Little. He stated that he interacted with Little in the manner he did because they were friends who joked with each other.

3. **Notice of Complaint**

According to SJM, during Little's employment at SJM, SJM's Director of Human Relations Mary Cote spoke with Little and interacted with her on many

occasions. Cote stated that Little never made any verbal or written complaints to her about Mitchell. Cote also stated that no employee ever brought a complaint to her attention involving inappropriate behavior by Mitchell directed at Little. During Little's employment, Cote was never shown any documents, notes, or records written by Mitchell that were given to Little. According to Cote, Little did not utilize the complaint procedure set forth in SJM's employee handbook pertaining to sexual harassment. Cote states that she first learned of Little's complaints about Mitchell when she received a copy of Little's filing with the Maine Human Rights Commission after Little had resigned. Cote began her investigation immediately after she received a copy of the filing. Cote did not become aware of the handwritten notes Mitchell gave to Little until after copies of them were provided to the Maine Human Rights Commission, at which point she took action to investigate them. Cote states that her investigation concluded that Mitchell's other co-workers perceived Mitchell and Little were friends, and none of the co-workers felt that Mitchell engaged in behavior that created a sexually hostile work environment. Following Cote's investigation, Mitchell was subject to disciplinary action.

Barrows testified that during Little's employment he heard that Little had complaints about work, and that he responded by "checking in" with Little on four or five occasions. Barrows used these "check-ins" as an opportunity to see how Little was doing and to give her an opportunity to share any specific issues she might be having at work. Barrows testified that during these "check-ins" Little told him she was unhappy with her job. Barrows observed that Little never seemed uncomfortable in Mitchell's presence, and that he never saw Little object to anything Mitchell said or did, with the exception of a time when Mitchell

called Little ugly. Barrows testified that at no time did Little complain to him that Mitchell was a cause of her anxiety.

In contrast, Little states that Barrows received frequent notice that Mitchell was sexually harassing her. Little further responds that she did use the SJM's procedure for reporting sexual harassment claims because she complained to supervisors – Stilphen and Barrows – about the notes, the Christmas card, and Mitchell's conduct. Little testified that a few days before she left her employment she told Barrows that Mitchell's harassment was exacerbating her panic disorder. She further points out that Barrows testified that it was his responsibility under SJM's procedure to pass notice of possible sexual harassment to Cote. Little claims that if Barrows followed SJM's procedure, then Cote knew/should have known about her complaints about Mitchell's conduct, and about the notes when Stilphen and Barrows initially brought them to Cote's attention. Little claims that Mitchell was disciplined following Cote's investigation because the evidence establishes that he sexually harassed her.

Little never: (1) wrote down her concerns about Mitchell's behavior in order to share them with anyone; (2) asked anyone at SJM if her shift could be changed so that she would not have contact with Mitchell; (3) asked anyone at SJM if she could move her work station away from Mitchell; (4) never talked to Bookataub about Mitchell's behavior, or told Bookataub that Mitchell's conduct made her feel uncomfortable; and (5) never showed Bookataub any notes or documents that she had received from Mitchell. Additionally, no other SJM employee approached Bookataub to report or complain about Mitchell's behavior directed at Little.

Little's resignation letter was left in Barrow's mailbox on July 28, 2007. (Little Depo, Ex. 6).[7] While the resignation note refers to Mitchell, it makes no allegation of misconduct by him. Little did not meet with Cote in advance of her resignation for any reason. Barrows claims that Little made no attempt to give him notice that she intended to quit her job. Little also never gave Bookataub notice that she would be leaving. Additionally, Stilphen testified that Little never gave her a reason for leaving her employment, except that she wanted to work where it was air conditioned. In contrast, Little testified that she met with Barrows and gave him three days notice. Little states that she told Stilphen the last straw occurred when Barrows told Mitchell of her anxiety disorder, and Mitchell made fun of her medical condition. Little decided to file a charge of harassment against SJM approximately three weeks after she resigned, because her sisters encouraged her to do so.

DISCUSSION

1. Standard of Review

In a motion for summary judgment, the court views the evidence in the light most favorable to the nonmoving party to decide whether the parties' statements of material facts and the referenced record material reveal a genuine issue of material fact. *Rogers v. Jackson*, 2002 ME 140, ¶ 5, 804 A.2d 379, 380 (citations omitted). The court gives the party opposing summary judgment the benefit of any inferences that might reasonably be drawn from the facts presented. *Curtis v. Porter*, 2001 ME 158, ¶ 9, 784 A.2d 18, 22. If the record

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[7] The resignation letter states:
"I really hate to do this to you guys, but I feel I have no alternative. My "condition" as Joe [Mitchell] so eloquently put it, is getting too much for me to handle right now. I can't seem to control it this time, so I have found a part time job with a lot less stress . . . ."

reveals no genuine issue of material fact then summary judgment is proper. *Id.* at ¶ 6, 784 A.2d at 21.

A contested fact is "material" if it could potentially affect the outcome of the suit under the governing law. *Inkel v. Livingston*, 2005 ME 42, ¶ 4, 869 A.2d 745, 747. A fact is "genuine" if there is sufficient evidence supporting the claimed fact to require a fact-finder to choose between competing versions of facts at trial. *Id.* For the purposes of summary judgment, factual disputes and ambiguities must be resolved against the movant. Nevertheless, when the facts offered by a party in opposition to summary judgment would not, if offered at trial, be sufficient to withstand a motion for judgment as a matter of law, summary judgment should be granted. *Rodrigue v. Rodrigue*, 1997 ME 99, ¶ 8, 694 A.2d 924, 926. A defendant moving for summary judgment has the burden to assert those elements of the cause of action for which the defendant contends there is no genuine issue to be tried. *Corey v. Norman, Hanson & DeTroy*, 1999 ME 196, ¶ 9, 742 A.2d 933, 938. "A party seeking summary judgment always bears the initial responsibility of informing the . . . court of the basis for its motion." *Id. citing Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S. Ct. 2548 (1986).

2. Sex Based / Gender Based Discrimination and Sexual Harassment

Count I of Little's Complaint is pled as sex/gender based discrimination in violation of the Maine Human Rights Act (hereinafter "MHRA").[8]

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[8] The Maine Human Rights Act prohibits employment discrimination on the basis of sex and physical or mental handicap as follows:

> It shall be unlawful employment discrimination in violation of this Act . . .
>
> > A. For any employer to fail or refuse to hire or otherwise discriminate against any applicant for employment because of . . . sex, sexual orientation, physical or mental handicap . . . or because of any such reasons to discharge an employee or discriminate with respect to hire, tenure, promotion,

However, in their summary judgment briefs the parties treat Count I as a "hostile sexual environment harassment" claim. (Pl's Opp. to Def.'s M. for Summ. J. at 3). Because the facts in the record do not support a claim for gender-based discrimination,[9] the court addresses Little's claim as a claim for sexual harassment.

SJM argues that it is entitled to summary judgment on Little's sex/gender discrimination claim "because Little has advanced no evidence to demonstrate she was subjected to harassment based upon or because of her sex and cannot establish a basis for employer liability." (Def.'s Mot. for Summ. J. at 4). The MHRA authorizes employment-related claims of sexual harassment based on a hostile work environment. *See* 5 M.R.S. § 4572(1)(A); *see also Watt v. Unifirst Corp.*, 2009 ME 47, ¶ 22, 969 A.2d 897, 902-03 (stating that both the federal Civil Rights Act and the MHRA recognize unlawful employment discrimination based on sexual harassment sufficiently severe or pervasive to create a hostile work environment). [10] To succeed on such a claim, the First Circuit has required that, pursuant to the MHRA, a plaintiff must demonstrate:

> transfer, compensation, terms, conditions or privileges or employment, or any other matter directly or indirectly related to employment. . . .

5 M.R.S. § 4572(1)(A).

[9] Generally in an employment discrimination claim based on gender, the plaintiff must make a prima facie case that shows disparate treatment between men and women. *Maine Human Rights Comm'n v. Dep't of Corrections*, 474 A.2d 860, 865 (Me. 1983). In such cases, the plaintiff makes a prima facie showing of disparate impact "where an employer's practice (such as a written or oral test, or a particular job requirement) is facially neutral but in fact affects more harshly one group than another." *Id.* citing *Maine Human Rigths Comm'n v. Auburn*, 408 A.2d 1253, 1264 (Me. 1979).

[10] It is appropriate for the court to look to analogous federal case law for guidance in the interpretation of the Maine Human Rights Act. *See Bowen v. Dep't of Human Servs.*, 606 A.2d 1051, 1053 (Me. 1992). In *Maine Human Rights Comm'n v. Local 1361, Me.*, the

> (1) that she (or he) is a member of a protected class; (2) that she was subject to unwelcome sexual harassment; (3) that the harassment was based upon sex; (4) that the harassment was sufficiently severe or pervasive so as to alter the conditions of plaintiff's employment and create an abusive work environment; (5) that sexually objectionable conduct 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.

Watt, ¶ 22, 969 A.2d at 903-02. "For sexual harassment to be actionable, it must be sufficiently severe or pervasive, 'to alter the conditions of [the victim's] employment and create an abusive working environment.'" *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 67 (1986) (alteration in original) quoting *Henson v. City of Dundee*, 682 F.2d 897, 904 (11th Cir. 1982); *see also Bowen v. Dep't of Human Servs.*, 606 A.2d 1051 (Me. 1991).

The inquiry in a sexual harassment hostile work environment claim is fact intensive. A hostile work environment claim requires an examination of "all the circumstances, including the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." *Doyle v. Dep't of Human Servs.*, 2003 ME 61, ¶ 23, 824 A.2d 48, 56 (quotation marks omitted). Whether the conduct is so severe as to cause the environment to become hostile or abusive is left to the determination of the trier of fact. *Nadeau v. Rainbow Rugs, Inc.*, 675 A.2d 973, 976 (Me. 1996). Even if a hostile work environment exists, an employer may evade liability if "it exercised

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Law Court noted that "structural and linguistic similarities" between the Maine Human Rights Act and the federal Civil Rights Act suggested "the employment discrimination provisions in [the MHRA] were intended to be the state counterparts of the Federal Act. 383 A.2d 369 (1978). The Law Court concluded that decisions by federal courts interpreting the federal statute provided significant guidance in the construction of Maine's statute. *Id.*

reasonable care to prevent and correct" the alleged harassment and if the plaintiff "unreasonably failed to take advantage of" the employer's preventative or corrective measures. *See Faragher v. City of Boca Raton*, 524 U.S. 775, 807 (1998).

Generally, a "hostile environment harassment claim involves a pattern of inappropriate conduct, [however] there is no requirement that harassment occur more than one time in order to be actionable." *Nadeau*, 675 A.2d at 976. For example, in *Nadeau* the Law Court found support for a sexual harassment claim when an employer offered money for sex to an employee on one occasion, left the offer on the table, and requested that the employee subsequently lie about their interactions to employees. *Id.* In contrast, vulgar and inappropriate language alone has been found insufficient to support a sexual harassment claim. *See Fontanez-Nunez v. Janssen Ortho, LLC*, 447 F.3d 50, 57 (1st Cir. 2006) (where the court found that a co-worker's vulgar language and behavior was inappropriate in the workplace and completely unprofessional, but that the conduct was not related to the reasons the plaintiff's employment was terminated and did not unreasonably interfere with or alter the plaintiff's work conditions).

a. **Mitchell's Harassment Was Based on Sex**

It is undisputed that Little is a member of a protected class because she is a female and she claims she was subjected to sexual harassment in the workplace. The court now addresses whether Little was subject to unwelcome sexual harassment based on sex. Citing *Oncale v. Sundowner Offshore Servs.*, SJM claims that Little cannot show that Mitchell's conduct was based on sex. *Oncale*, 523 U.S. 75, 80-81 (1997). SJM claims that the fact that Mitchell is gay (a fact Little disputes) precludes Little from making the inference that Mitchell's

statements were motivated by a sexual desire, and SJM further claims that Little cannot show that Mitchell's conduct was based on some general hostility toward the presence of a woman in the workplace. *Oncale*, 523 U.S. at 80-81.

The court disagrees. In *Oncale*, the U.S. Supreme Court held that same-sex sexual harassment in the workplace was actionable under Title VII of the Civil Rights Act. *Oncale*, 523 U.S. at 79 citing 42 U.S.C. § 2000e-2(a)(1). The core of the Supreme Court's holding in *Oncale* can be broken into two prongs: A plaintiff alleging sexual harassment needs to show that (1) the discrimination was "because of sex,"[11] and (2) that the harasser's conduct was so objectively offensive as to alter the conditions of the victim's employment." *Oncale*, 523 U.S. at 81. The fact that Mitchell may be gay and that Little is a female has no bearing on whether Mitchell's conduct may be considered sexual harassment. The *Oncale* court held that sexual harassment does not need to be motivated by a sexual desire and may involve members of the same sex. *Oncale*, 523 U.S. at 79. As the U.S. Supreme Court acknowledged in *Oncale*, the "many facets of human motivation" make it nearly impossible to establish conclusive presumptions about discriminatory acts. *Oncale*, 523 U.S. at 78. A plaintiff in a sexual harassment case may show that harassment was because of sex by offering "comparative evidence about how the alleged harasser treated members of both sexes in a mixed-sex workplace." *Oncale*, 523 U.S. at 80-81.

Whether Mitchell's conduct was discriminatory because of sex is an issue of fact. SJM argues that there is no evidence that Mitchell treated men and

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[11] The Supreme Court's conclusion was supported by the broad language of Title VII of the Civil Rights Act, which prohibits "discrimination . . . because of . . . sex" in the terms or conditions of employment. *Id.* citing 42 U.S.C. § 2000e-2(a)(1). This language is similar to the language of the MHRA.

women differently, and there is no evidence that other female employee found Mitchell's conduct created a sexually hostile environment. However, the evidence suggests that Mitchell discriminated because of sex because he only targeted women with his conduct. Aside from the fact that Mitchell gave notes to Little to deliver to her boyfriend, and gave a Christmas card to deliver to her son, there is no evidence that Mitchell targeted men with his conduct. Moreover, it appears that the content of one of the notes (Little Depo, Ex. 4) and the card aimed to embarrass Little. In addition to harassing Little, the evidence shows that Mitchell also directed his comments toward Bookataub, Sherry Poitras, and Sue LaRoche, and possibly towards Nadine Nyder. This pattern of conduct directed at female co-workers suggests that Mitchell's discriminatory conduct was because of sex.

b. **Mitchell's Conduct was Both Objectively and Subjectively Offensive**

The sexually objectionable conduct must be both objectively and subjectively offensive – such that a reasonable person would find it hostile or abusive, and the victim did in fact perceive it to be so. Sexual harassment "can take a myriad of forms including everything from excessive sexually-oriented "joking to demands for sexual favors." *Maine State Academy of Hair Design v. Commercial Union Ins. Co.*, 1997 ME 188, ¶ 8, 699 A.2d 1153, 1157. It is hard to draw the fine line between tasteless jokes and sexual harassment. The MHRA, like the federal Civil Rights Act, is not intended to provide a general civility code. *Oncale*, 523 U.S. at 81, 118 S. Ct. at 1002. The U.S. Supreme Court's analysis of Title VII of the Civil Rights Act provides guidance:

> Title VII does not prohibit all verbal or physical harassment in the workplace; it is directed only at "*discrimination* . . . because of . . .

> sex." We have never held that workplace harassment, even harassment between men and women, is automatically discrimination because of sex merely because the words used have sexual content or connotations.

Oncale, 523 U.S. at 80, 118 S. Ct. at 1002. The requirement of an objectively hostile and abusive work environment "ensure[s] that courts and juries do not mistake ordinary socializing in the workplace – such as male-on-male horseplay or intersexual flirtation – for discriminatory conditions of employment." *Oncale*, 523 U.S. at 81, 118 S. Ct. at 1003. There is no question that Little was subjected to conduct that was objectively offensive. Mitchell gave Little two notes to deliver to her boyfriend and a Christmas card to deliver to her son, which alleged he engaged in sexual acts at the workplace with Little; he sent Little a text message commenting on the size of her breasts and another text message requesting a picture of her breasts; he made comments at work about Little's breasts; he talked about his genitals and other peoples' sexual activity at work; and he called Little "ugly."

Whether Mitchell's conduct was subjectively offensive to Little and altered Little's work environment is an issue of fact. SJM points out that co-workers observed Little's and Mitchell's relationship as friendly, and that they would joke and tease each other. According to SJM, Mitchell's conduct was simply sexual banter, and was not harassment. The facts show that Little never requested to have her hours or work station changed to avoid Mitchell. However, Little disputes SJM's characterization of her relationship with Mitchell, claims they were not friends, and that she had complained about Mitchell's conduct to Barrows and Stilphen. She claims that Mitchell's conduct contributed to her panic disorder, and was ultimately the reason she left her employment at

SJM. Whether Little's work environment was altered remains a question for the jury.

c. Employer Liability

SJM argues that it should not be liable because there is no evidence from which a reasonable jury could infer that SJM management had notice of the harassment Little alleges. (Def.'s M. for Summ. J. at 9). In *Watt v. Unifirst Corp.*, the Law Court adopted the regulation issued by the Maine Human Rights Commission governing employer liability for the acts of co-workers. *Watt*, ¶ 26, 969 A.2d at 904 citing 11 C.M.R. 94 348 003-6 § 3.06(I)(3) (2007). Under that standard "employers may be liable for the sexual harassment of an employee by a co-worker or workers under a hostile environment claim where the employer *knew or should have known* of the charged sexual harassment and failed to take immediate and appropriate corrective action." *Watt*, ¶ 27, 969 A.2d at 904 (emphasis added). Under SJM's sexual harassment policy, employees may file a formal grievance with the SJM's Human Rights Director, or they may report suspected sexual harassment to a supervisor or the Human Rights Director. Additionally, the policy provides that "[s]upervisors and managers are responsible for monitoring behavior which can be construed to be harassment and for initiating necessary action to eliminate such behavior."

Whether SJM had notice of Mitchell's harassment towards Little is a question of fact. The evidence shows that Little (1) never made a formal complaint to Cote, the Human Rights Director, (2) never made a complaint in writing, and (3) never talked to Bookataub about Mitchell's conduct. Additionally, Barrows "checked in" with Little on several occasions and he testified that Little never objected to Mitchell's conduct, with the exception of

calling her "ugly." However, the evidence also shows that Stilphen and Barrows were both aware of the Christmas card, and that Barrows never followed up with Mitchell about the card even though Stilphen told him Little had complained to her. The evidence also shows that Bookataub and Barrows witnessed Mitchell comment on Little's breasts, that Barrows was aware that Mitchell had called her "ugly," and that Bookataub also was subjected to Mitchell's conduct, even if she perceived it to be a joke. A reasonable juror could find that under these circumstances the SJM's supervisors knew or should have known of Mitchell's conduct.

3. Constructive Discharge Claim

The test for a constructive discharge claim is whether a reasonable person facing such unpleasant workplace conditions would feel compelled to resign. *King v. Bangor Fed. Credit Union*, 611 A.2d 80, 82 (Me. 1992). If there is no hostile work environment there is no constructive discharge. *See Miller v. E. Maine Medical Ctr.*, Mem-09-169 (Oct. 13, 2009) citing *Pa. State Police v. Suders*, 542 U.S. 129, 147 (2004) (noting that facts that cannot support a hostile work environment claim cannot support a claim for hostile environment constructive discharge). Accordingly, the fate of this claim hinges on the outcome of the sexual harassment hostile work environment claim.

4. Disability Discrimination / Harassment Claim

Count IV of Little's Complaint alleges disclosure of confidential medical information in violation of the MHRA and the Rehabilitation Act. Neither the MHRA nor the Rehabilitation Act appear to provide a cause of action for disclosure of confidential information. SJM addressed Count IV as a claim for disability discrimination. It appears that Little has abandoned her claim under

Count IV because she has failed to counter SJM's motion for summary judgment on this claim.

If Count IV were construed as a claim for disability discrimination, it is insufficient to survive summary judgment. In order to make a claim that she was subjected to harassment based on her disability under the ADA or the MHRA, Little must show that (1) she was disabled, (2) she was subjected to a hostile work environment, and (3) that the hostility was directed at her because of her disability. *Quiles-Quiles v. Henderson*, 439 F.3d 1, 5 (1st Cir. 2006). To establish a hostile work environment based on her disability, Little must show that she was subjected to "repeated or intense harassment sufficiently severe or pervasive to create an abusive working environment." *Doyle*, ¶ 23, 824 A.2d at 57. Among the factors examined to determine whether an actionable hostile work environment claim exists are the frequency and severity of the harassment and whether it unreasonably interferes with the employee's work performance. *Id.*

Little stated during her deposition that Mitchell first learned about her panic disorder only a few days before resigning. Even assuming Little was disabled within the meaning of the MHRA, the ADA, or the Rehabilitation Act, her claim fails because she cannot show that Mitchell's conduct regarding her panic disorder was severe, frequent, or affected her work performance. Additionally, there is no evidence that Little reported any incidents in which Mitchell harassed her based on her disability before she decided to resign. Therefore summary judgment is granted on Count IV of Little's Complaint.

Therefore, the entry is:

Summary judgment is DENIED on Counts I, II, and III. Summary judgment is GRANTED on Count IV.

Dated at Portland, Maine this 23rd day of July, 2010.

Robert E. Crowley
Justice, Superior Court

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