2004 WL 2202641
United States District Court,
W.D. New York.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Plaintiff,
v.
GRIEF BROTHERS CORPORATION,[1] Defendant.

[1] Defendant has incorrectly been sued as "Grief Brothers Corporation." Defendant's correct corporate name is Greif, Inc. (Defendant's Statement of Material Facts, p. 1.)

No. 02–CV–468S. | Sept. 30, 2004.

Attorneys and Law Firms

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Opinion

DECISION AND ORDER

SKRETNY, J.

I. INTRODUCTION

***1** In this action, the United States Equal Employment Opportunity Commission ("the EEOC") alleges that Defendant Greif, Inc. engaged in unlawful employment practices against its former employee, Michael Sabo, on the basis of his sex. In particular, Sabo alleges that he was subjected to repeated same-sex sexual harassment and then constructively discharged by Defendant after it failed to remedy the sexually hostile work environment. Plaintiff alleges violations of Section 703(a)(1) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e–2(a)(1) ("Title VII"). This Court has jurisdiction pursuant to 28 U.S.C. §§ 1331, 1343 and 1345.

Presently before this Court is Defendant's Motion for Summary Judgment. For the following reasons, Defendant's motion is denied in its entirety.

II. BACKGROUND

A. Facts

Almost every fact related to the conditions of Michael Sabo's employment with Defendant is disputed.[2] However, the parties agree on many of the background facts in this case. Michael Sabo was employed by Defendant at its Tonawanda, N.Y. plant. (Defendant's Statement of Material Facts ("Defendant's Statement"), ¶ 1; Plaintiff's Response to Defendant's Statement of Material Facts ("Plaintiff's Statement"), ¶ 1.) Defendant's Tonawanda plant manufactures fibre drums used in industrial packaging applications. (Defendant's Statement, ¶ 6; Plaintiff's Statement, ¶ 6.) During 1998 and 1999, the time period that Sabo worked at the plant, there were 65 hourly and 9 salaried employees. (Defendant's Statement, ¶ 2; Plaintiff's Statement, ¶ 2.) The production and maintenance employees were members of the United Paperworkers International Union, AFL–CIO ("the Union").[3]

[2] Indeed, Plaintiff disputes 35 of Defendant's 45 statements of undisputed material fact.

[3] Union representation has since changed. The production and maintenance employees are now members of the Paper, Allied Industrial, Chemical & Energy Workers International Union, AFL–CIO, CLC. (Defendant's Statement, ¶ 7; Plaintiff's Statement, ¶ 7.)

The top supervisor at the plant at that time was David Lotz, the Plant Manager. (Defendant's Statement, ¶ 3; Plaintiff's Statement, ¶ 3.) Three Production Managers directly supervised the hourly production employees and reported to Lotz. (Defendant's Statement, ¶ 4; Knoer Aff., ¶ 4; Plaintiff's Statement, ¶ 4.) Sally Knoer, an on-site Human Resources Administrative Assistant and Greg Wagoner, a Regional Human Resources Manager, handled the human resources functions for the Tonawanda plant. (Defendant's Statement, ¶ 5; Plaintiff's Statement, ¶ 5.)

Between August of 1998 and October of 2001, SPS Temporaries, Inc. ("SPS"), provided temporary employees for the Tonawanda plant. (Defendant's Statement, ¶ 12; Plaintiff's Statement, ¶ 12.) Sabo was employed by SPS from October 27, 1998, through February 23, 1999. (Barker Aff., ¶ 3.) Throughout this

period, Sabo was assigned to Defendant's Tonawanda plant, although it appears from the record that Sabo did not actually begin working at the plant until November 9, 1998. (Barker Aff., ¶ 3; Plaintiff's Statement, ¶ 18.) On February 24, 1999, Defendant hired Sabo as a full-time employee. (Defendant's Statement, ¶ 20; Knoer Aff., ¶ 4; Plaintiff's Statement, ¶ 20.) Sabo worked for Defendant until April 21, 1999. (Knoerr Aff., ¶ 4.) While Sabo's employment status changed when he was hired by Defendant, his duties within the plant did not. (Defendant's Statement, ¶ 22; Plaintiff's Statement, ¶ 22.)

***2** When Sabo initially started working for Defendant through SPS, three other temporary employees from SPS began with him. (Defendant's Statement, ¶ 14; Plaintiff's Statement, ¶ 14.) Each of the temporary employees, including Sabo, was permitted to select their assignment at the plant. (Defendant's Statement ¶ 14; Plaintiff's Statement, ¶ 14.) Sabo chose to work in the Riveting Department. (Sabo Dep., p. 87, 90.) John Walters supervised the Riveting Department. (Defendant's Statement, ¶ 16; Plaintiff's Statement, ¶ 16.)

As noted above, the conditions of Sabo's employment with Defendant are heavily contested. Defendant does not admit the bulk of the following allegations.

Sabo is a homosexual man. (Defendant's Statement, ¶ 26; Plaintiff's Statement, ¶ 26.) The EEOC contends that employees at the Tonawanda plant started harassing Sabo within his first two weeks on the job, and that the harassment continued and escalated through April 21, 1999. (Plaintiff's Statement, ¶¶ 23, 25.) Three of Sabo's co-workers—Ron Parkhurst, John Dryzga, and Jamie Milson—are identified as the principal harassers. (Plaintiff's Statement, ¶ 24.) None of these three individuals knew that Sabo was homosexual or thought that he was homosexual. (Plaintiff's Statement, ¶ 26.)

The EEOC contends that Parkhurst, Dryzga and Milson harassed, emasculated, humiliated and ridiculed Sabo because he did not conform to the stereotypical view of masculinity. (Plaintiff's Statement, ¶ 26.) Sabo contends that he was harassed in part because he wore an earring in his left ear and refused to participate in sexually explicit discussions about women. (Plaintiff's Statement, ¶¶ 19, 23, 25; Sabo Dep., p. 187–188.) The EEOC alleges that Sabo's co-workers further engaged in offensive verbal and physical conduct, including conduct that caused Sabo concern for his physical safety. (Plaintiff's Statement, ¶ 25, 26.) The EEOC alleges that the following incidents took place:

> (1) Parkhurst repeatedly sang a song to Sabo to the tune of "Put Your Head on My Shoulder" that included the lyrics: "Put your lips on my testes, lick them up and down, Mikey. Lick them all around Mikey. Put your lips on my testes." (Plaintiff's Statement, ¶ 26a.; Sabo Dep., p. 145.)
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> (2) When Sabo walked behind Parkhurst, Parkhurst would "always cover his rear end and say, don't go there, I don't go there, exit only." (Plaintiff's Statement, ¶ 26b; Sabo Dep., p. 148.)
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> (3) When Sabo crouched to pick something up from the floor, Parkhurst would say "while you are down there ...," the implication being that Sabo could perform oral sex on Parkhurst. (Plaintiff's Statement, ¶ 26b.)
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> (4) Parkhurst, Dryzga and Milsom called Sabo derogatory names such as "faggot," "queer" and "fudgepacker." (Plaintiff's Statement, ¶ 26c; Sabo Dep., p. 148.)
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> (5) Parkhurst and other employees engaged in daily sexually explicit conversations about their sexual fantasies and encounters with women, the female anatomy, penis size, oral sex and anal sex. (Plaintiff's Statement, ¶ 26d.) Sabo objected to these conversations and refused to participate in them. (Plaintiff's Statement, ¶ 26d.)
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> ***3** (6) On one occasion, Parkhurst wore an apron with a kitchen towel on the front of it. Beneath the towel was a fake erect penis attached to the apron. Parkhurst paraded around the workplace displaying the fake penis and flashed it at Sabo. (Plaintiff's Statement, ¶ 26e.)
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> (7) On one occasion Milsom asked Sabo what shape and what color he liked. When Sabo responded that he liked triangles and the color purple, Milsom announced that based on a test from an article related to the "Teletubbies" television show, Sabo was a "queer" and a "faggot." (Plaintiff's Statement, ¶ 26f.) Milsom apparently told everyone at the plant, including a newly hired employee, that Sabo proved that he was a "faggot." (Sabo Dep., p. 157.) This nearly led to a physical confrontation between Sabo and Milsom. (Plaintiff's Statement, ¶ 26f.)
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> (8) Milsom encouraged new employees to call Sabo names such as "homo," "faggot," "fudgepacker" and "queer." (Plaintiff's Statement, ¶ 26g.) Milsom also commented that Sabo must be a virgin because he refused to join in the discussions about sex and the female anatomy.
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> (9) Both Parkhurst and Dryzga threatened to force Sabo out of the plant. (Plaintiff's Statement, ¶ 25.)

The EEOC contends that Sabo complained about these incidents involving Parkhurst, Dryzga and Milsom to Walters (Sabo's supervisor), Lotz (the Plant Manager), Parkhurst (the Union President)[4] and Michael Gerbec

(Sabo's Union Representative). (Plaintiff's Statement, ¶¶ 26a, 26b, 26e, 26f, 27.)

[4] As a point of clarification, Ron Parkhurst was both the Union President and the man who the EEOC alleges was Sabo's "chief harasser." (Plaintiff's Statement, ¶ 34.)

Defendant contends that Sabo did not complain about the conduct he now attributes to Dryzga or Milsom, and only complained once to Walters about Parkhurst's "name calling." (Defendant's Statement, ¶¶ 27, 28.) Defendant alleges that on April 1, 1999, the same day Sabo complained to Waiters about Parkhurst, Walters took the issue to Lotz. (Defendant's Statement, ¶ 29.) With Lotz's approval, Walters conducted a fifteen-minute group meeting with members of the Riveting Department to address Defendant's Sexual Harassment policy and to "nip the problem in the bud." (Defendant's Statement, ¶ 29.) Defendant contends that Sabo's harassment stopped after this meeting. (Defendant's Statement, ¶ 30.) The EEOC disputes this claim. It contends that the April 1, 1999 meeting was ineffective and maintains that the harassers continued to call Sabo sexually explicit names, as well as names such as "cry baby," "kiss ass" and "snitch." (Plaintiff's Statement, ¶¶ 30–31.)

On April 21, 1999, Sabo contends that he complained to Walters that his co-workers were deliberately trying to make his work more difficult by speeding up the assembly line. (Plaintiff's Statement, ¶ 35.) Walters allegedly dismissed Sabo's complaint and directed him to go back to work. (Defendant's Statement, ¶ 35; Plaintiff's Statement, ¶ 35.) Sabo returned to work briefly and then determined that he could not "take this anymore." (Sabo Dep., p. 177; Sabo Decl, ¶ 10.) On his way out of the plant, Sabo went to the office to try to speak to Lotz, but Lotz was off that day. (Plaintiff's Statement, ¶ 36.) Instead, Sabo advised Knoer (the Human Resources Assistant) that he was quitting and asked her to have Lotz call him. (Plaintiff's Statement, ¶ 36.) Sabo subsequently called Lotz and left him a message, but Lotz never returned Sabo's call. (Plaintiff's Statement, ¶ 36.) Defendant disputes this version of events, and contends that on his way out of the plant, Sabo simply told Knoer to tell Lotz that "if he has any questions or wants to talk to me, tell him to give me a call." (Defendant's Statement, ¶ 36.)

***4** The EEOC alleges that Sabo was constructively discharged on April 21, 1999, because the conditions of Sabo's employment with Defendant became so intolerable that he was forced to quit. (Plaintiff's Statement, ¶¶ 38, 39.) Defendant contends that Sabo voluntarily resigned on April 21, 1999. (Defendant's Statement, ¶ 38.)

B. Procedural History

Plaintiff filed a Charge of Discrimination with the EEOC on February 10, 2000, alleging sex discrimination. (Lizana Decl., Exh. 4.) Therein, Plaintiff alleged that he had been sexually harassed and was forced to resign his employment because of the hostile work environment. (Lizana Decl., Exh. 4.) On November 29, 2001, the EEOC issued a Determination Letter finding probable cause to believe that Defendant unlawfully discriminated against Sabo. (Lizana Decl., Exh. 4.) By letter dated June 26, 2002, the EEOC notified Defendant that it had concluded that the parties' efforts at conciliation had not been successful and that further efforts in that regard would be futile. (Lizana Decl., Exh. 4.) It further advised Defendant that Sabo's case would be forwarded to the EEOC's Regional Attorney for possible litigation. (Lizana Decl., Exh. 4.)

The EEOC instituted this action on July 1, 2002, by filing a Complaint in the United States District Court for the Western District of New York. Defendant filed its Answer to the Complaint on September 5, 2002. On December 31, 2003, Defendant filed the instant Motion for Summary Judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure.[5] After full briefing on the motion, this Court heard oral argument on June 2, 2004, and reserved decision at that time.

[5] In support of its Motion for Summary Judgment, Defendant filed the following documents: the Affidavit of Darlene Hoegel, the Affidavit of Sally Knoer, the Affidavit of Anthony Monte, the Affidavit of Greg Wagoner, the Affidavit of Melissa Barker, a Rule 56 Statement of Undisputed Facts with appendix, a memorandum of law, a reply memorandum of law, and a supplemental memorandum of law. In opposition to Defendant's motion, the EEOC filed the following documents: the Declaration of Arnold Lizana, Esq., with attached exhibits, a Statement in Response to Defendant's Rule 56 Statement of Undisputed Facts, with attached exhibits, a memorandum of law, and a supplemental memorandum of law. This Court recognizes and appreciates the fine effort put forth by counsel in this case.

III. DISCUSSION AND ANALYSIS

A. Summary Judgment Standard

Federal Rule of Civil Procedure 56 provides that summary judgment is warranted where the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is

no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." FED. R. CIV. P. 56(c). A "genuine issue" exists "if the evidence is such that a reasonable jury could return a verdict for the non-moving party." *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986). A fact is "material" if it "might affect the outcome of the suit under governing law." *Id.*

In deciding a motion for summary judgment, the evidence and the inferences drawn from the evidence must be "viewed in the light most favorable to the party opposing the motion." *Addickes v. S.H. Kress and Co.,* 398 U.S. 144, 158–59, 90 S.Ct. 1598, 1609, 26 L.Ed.2d 142 (1970). "Only when reasonable minds could not differ as to the import of evidence is summary judgment proper." *Bryant v. Maffucci,* 923 F.2d 979, 982 (2d Cir.1991). The function of the court is not "to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Anderson,* 477 U.S. at 249.

***5** In the context of employment discrimination cases, the United States Court of Appeals for the Second Circuit has explicitly cautioned district courts to use extra care when deciding whether to grant summary judgment in employment discrimination cases because "the ultimate issue to be resolved in such cases is the employer's intent, an issue not particularly suited to summary adjudication." *Eastmer v. Williamsville Cent. Sch. Dist.,* 977 F.Supp. 207, 212 (W.D.N.Y.1997) (quoting *Gallo v. Prudential Residential Servs.,* 22 F.3d 1219, 1224 (2d Cir.1994)). Nonetheless, "[t]he summary judgment rule would be rendered sterile ... if the mere incantation of intent or state of mind would operate as a talisman to defeat an otherwise valid motion." *Meiri v. Dacon,* 759 F.2d 989, 998 (2d Cir.1985). Indeed, the Second Circuit has noted that "the salutary purposes of summary judgment—avoiding protracted, expensive and harassing trials—apply no less to discrimination cases than to commercial or other areas of litigation." *Id.*

B. Defendant's Motion for Summary Judgment

As discussed above, Plaintiff's Complaint alleges sex harassment and constructive discharge claims. The EEOC argues that Sabo was the victim of same-sex harassment designed to harass, emasculate, humiliate and ridicule him because he did not conform to the stereotypical view of masculinity. Moreover, the EEOC alleges that Defendant constructively discharged Sabo because it failed to remedy the sexually hostile work environment.

Defendant moves for summary judgment on the EEOC's claim of same-sex harassment on three grounds. First, it argues that the claim is time-barred. Second, it argues that the alleged harassment was not severe or pervasive, and that it cannot be held liable for Sabo's co-workers' conduct. Third, Defendant argues that the EEOC cannot prove that the alleged harassment was directed at Sabo because he is male, rather than because he is a homosexual. As for the EEOC's constructive discharge claim, Defendant argues that it is entitled to summary judgment because the EEOC cannot prove that Sabo resigned due to deliberate action by Defendant. The parties' arguments are addressed below.

1. The EEOC's Same–Sex Harassment Claim

a. Statute of Limitations

Defendant argues that the EEOC's harassment claim is time-barred because the last act of alleged sexual harassment occurred on April 1, 1999, which is more than 300 days prior to the filing date of Sabo's EEOC charge. The EEOC argues that evidence in the record demonstrates that acts of sexual harassment occurred after April 1, 1999, and that the hostile work environment existed until the day Sabo left the plant. Thus, the EEOC argues that Sabo's charge was timely.

In order to maintain an action under Title VII, a plaintiff must ordinarily file a timely charge with the EEOC, receive from that agency a right to sue letter, and file an action within 90 days of receipt of that letter. *Van Zant v. KLM Royal Dutch Airlines,* 80 F.3d 708, 712 (2d Cir.1996); *Cornwell v. Robinson,* 23 F.3d 694, 706 (2d Cir.1994). Because New York is a state with a fair employment agency, a charge of discrimination must be filed with the EEOC or the New York State Department of Human Rights within 300 days of the alleged discrimination. *Harris v. City of New York,* 186 F.3d 243, 247 n. 2 (2d Cir.1999).

***6** A hostile work environment claim "is composed of a series of separate acts that collectively constitute one 'unlawful employment action.' " *Nat'l R.R. Passenger Corp. v. Morgan,* 536 U.S. 101, 117, 122, 122 S.Ct. 2061, 153 L.Ed.2d 106, S.Ct. 2061, 2074, 536 U.S. 101, 122 S.Ct. 2061, 153 L.Ed.2d 106 (2002) (citation omitted). When faced with a timeliness challenge to such a claim, "[the] court's task is to determine whether the acts about which an employee complains are part of the same actionable hostile work environment practice, and if so, whether any act falls within the statutory time period." *Id.* at 120. *Morgan* explicitly sets forth the applicable considerations:

> The timely filing provision only requires that a Title VII plaintiff file a charge within a certain number of days after the unlawful practice happened. It does not matter, for purposes of the statute, that some of the component acts of the hostile work environment fall outside the statutory time period. Provided that an act

> contributing to the claim occurs within the filing period, the entire time period of the hostile work environment may be considered by a court for the purposes of determining liability. That act need not, however, be the last act. As long as the employer has engaged in enough activity to make out an actionable hostile environment claim, an unlawful employment practice has "occurred," even if it is still occurring. Subsequent events, however, may still be part of the one hostile work environment claim and a charge may be filed at a later date and still encompass the whole.
>
> ...
>
> Given, therefore, that the incidents constituting a hostile work environment are part of one unlawful employment practice, the employer may be liable for all acts that are part of this single claim. In order for the charge to be timely, the employee need only file a charge within 180 or 300 days of any act that is part of the hostile work environment.

Id. at 118 (footnote omitted).

Here, it is undisputed that Sabo filed his charge with the EEOC on February 10, 2000. (Lizana Decl., Exh. 4.) Accordingly, at least one act of harassment must have occurred after April 16, 1999 (300 days prior to February 10, 2000), for Sabo's harassment claim to be timely. Defendant contends that Sabo conceded at his deposition that the last incident of sexual harassment occurred on April 1, 1999. Defendant relies upon the following excerpt from Sabo's deposition:

> Q. But the name calling had no sexual connotations to it after this point in time; is that accurate?
>
> Mr. Lizana: Objection.
>
> A. Not that I can recall.

(Sabo Dep., p. 171.)

This selective excerpt, however, does not properly reflect Sabo's deposition testimony. This exchange continued as follows:

> Q. Not that you can recall that -
>
> A: I was so used to it by then they might have been, but they started saying other things, so I don't remember exactly every word they said to me, no.
>
> Q. And I understand that and I'm not trying to trap you into something that you're uncomfortable testifying to. But I believe your testimony was the name calling was not as vulgar. They started calling you crybaby and snitch. My specific question to you is this: When they started calling you crybaby and snitch, did they stop calling you faggot and queer?
>
> ***7** A: *I'd say it probably went down like 90 percent. There was still a few comments, names,* but the—like the flash, stuff like that, the penis and stuff didn't go on. When I bent down to pick a part up, Ron didn't say, while your [sic] down there. Pretty much he cut me off.

(Sabo Tr., p. 171–72 (emphasis added).)

Thus, a proper characterization of Sabo's testimony is that the direct sexual harassment, particularly the sexually explicit comments and names, and the hostile work environment as a whole, continued beyond April 1, 1999, though in a reduced manner. Indeed, in his EEOC charge, Sabo alleges that "the comments, gestures, and jokes of a sexual nature" continued through April 21, 1999. (Lizana Aff., Exh. 4.) Finally, the EEOC alleges that Sabo continued to complain of the harassment until the day he left the plant. (Plaintiff's Statement, ¶¶ 30–35.)

Accordingly, this Court finds that Defendant is not entitled to summary judgment on the basis that Sabo's claim is time-barred. There is evidence in the record that Sabo was subjected to sexually explicit comments and name-calling within the limitations period. Sabo's EEOC charge was therefore timely. *Morgan,* 536 U.S. at 118 ("In order for the charge to be timely, the employee need only file a charge within 180 or 300 days of any act that is part of the hostile work environment."). At the very least, there exists a material issue of fact that must be resolved by the jury.[6]

[6] Because there is evidence in the record that the alleged sexual harassment continued into the limitations period, this Court need not consider the parties' alternative arguments addressing whether conduct occurring after April 1, 1999, was "shunning." *See, e.g., Wyatt v. Hunt Plywood Co., Inc.,* 297 F.3d 405, 412–13 (5th Cir.2002); *Alfano v. New York Dep't of Corr. Servs.,* 294 F.3d 365, 376 (2d Cir.2002).

b. Hostile Work Environment

Defendant next argues that the harassment that Sabo complains of is not sufficiently severe or pervasive to constitute a hostile work environment. Plaintiff contends that the evidence in the record is more than sufficient to support a finding that a hostile work environment existed.[7]

[7] This Court notes that there is evidence in the record that Sabo did not complain about several incidents that the EEOC contends contributed to the hostile work environment. However, "unreported incidents of harassment alleged by the plaintiff regarding the issue

> of hostile work environment, whether or not an explanation for the failure to report is proffered, stand on the same footing as reported incidents; both must be taken as true at the summary judgment stage." *Distasio v. Perkin Elmer Corp.,* 157 F.3d 55, 62–63 (2d Cir.1998); *Nader v. Brunalli Const. Co.,* 98 CV 2085, 2002 WL 724597, *10 (D.Conn. Mar.26, 2002).

The Supreme Court has held that Title VII's protection extends beyond "economic" or "tangible" discrimination. *Harris v. Forklift Sys.,* 510 U.S. 17, 21, 114 S.Ct. 367, 370, 126 L.Ed.2d 295 (1993) (citing *Meritor Sav. Bank, FSV v. Vinson,* 477 U.S. 57, 64, 106 S.Ct. 2399, 91 L.Ed.2d 49 (1986)). Rather, Congress enacted Title VII to "strike at the entire spectrum of disparate treatment of men and women in employment," including the requirement that employees work in a hostile or abusive environment. *Harris,* 510 U.S. at 21.

To survive a motion for summary judgment, an individual claiming that he was subjected to a hostile work environment must produce evidence from which a reasonable trier of fact could conclude "(1) that the workplace was permeated with discriminatory intimidation that was sufficiently severe or pervasive to alter the conditions of her work environment, and (2) that a specific basis exists for imputing the conduct that created the hostile environment to the employer." *Mack v. Otis Elevator Co.,* 326 F.3d 116, 122 (2d Cir.2003) (quoting *Richardson v. New York State Dep't of Corr. Servs.,* 180 F.3d 426, 436 (2d Cir.1999)). "The sufficiency of a hostile work environment claim is subject to both subjective and objective measurement: the plaintiff must demonstrate that she personally considered the environment hostile, and that the environment rose to some objective level of hostility." *Leibovitz v. New York City Transit Auth.,* 252 F.3d 179, 188 (2d Cir.2001).

(i) Severe or Pervasive Discriminatory Intimidation

***8** Courts examine various factors to ascertain whether a work environment is sufficiently hostile or abusive to support a Title VII claim. These factors include "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 performance." *Leibovitz,* 252 F.3d at 188 (citing *Harris,* 510 U.S. at 23); *Terry v. Ashcroft,* 336 F.3d 128, 147–48 (2d Cir.2003). Isolated and occasional instances of harassment do not ordinarily rise to this level. *See Clark County Sch. Dist. v. Breeden,* 532 U.S. 268, 270–271, 121 S.Ct. 1508, 149 L.Ed.2d 509 (2001) (per curiam). The appropriate test is whether the "harassment is of such quality or quantity that a reasonable employee would find the conditions of her employment altered for the worse...." *Torres v. Pisano,* 116 F.3d 625, 632 (2d Cir.1997). The Second Circuit has recently stated:

> The environment need not be unendurable or intolerable. Nor must the victim's psychological well-being be damaged. In short, the fact that the law requires harassment to be severe or pervasive before it can be actionable does not mean that employers are free from liability in all but the most egregious cases."

Terry, 336 F.3d at 147–48 (quotations, citation and alterations omitted).

This Court need not linger on this point. As noted at the beginning of this decision, virtually every fact related to the treatment Sabo endured during his employment with Defendant is contested. Nonetheless, there can be no doubt that these incidents viewed in their totality (if found by a jury to have occurred), are sufficiently pervasive, severe, and frequent to support a finding that Plaintiff's workplace was altered for the worse. *See Torres,* 116 F.3d at 632; *Leibovitz,* 252 F.3d at 188. That is, the record contains sufficient evidence from which a reasonable jury could find that Sabo was subjected to severe and pervasive discriminatory conduct that altered his work environment. (Plaintiff's Statement, 26a-f.) The evidence would support such a finding on both the subjective and objective prongs. *See Leibovitz,* 252 F.3d at 188. Accordingly, summary judgment on this basis is not warranted.

(ii) Imputation of Conduct to the Employer

"[W]hen a 'co-employee'—as distinct from a supervisor—is alleged to have engaged in harassing activity, the 'employer will generally not be liable unless the employer either provided no reasonable avenue of complaint or knew of the harassment but did nothing about it." ' *Quinn v. Green Tree Credit Corp.,* 159 F.3d 759, 766 (2d Cir.1998) (quoting *Tomka v. Seiler,* 66 F.3d 426, 441 (2d Cir.1995)). An employer is considered to have notice of sexual harassment if "the employer—or any of its agents or supervisory employees—knew or should have known of the conduct." *Distasio v. Perkin Elmer Corp.,* 157 F.3d 55 (2d Cir.1998); *see also* 29 C.F.R. § 1604.11(d) ("With respect to conduct between fellow employees, an employer is responsible for acts of sexual harassment in the workplace where the employer (or its agents or supervisory employees) knows or should have known of the conduct, unless it can show that it took immediate and appropriate corrective action"). In either case, the plaintiff's burden is to demonstrate " 'that the employer did not take reasonable steps to address the

situation." ' *Reissner v. Rochester Gas & Elec. Corp.,* No. 02–CV–6353, 2004 WL 941645, at *10 (W.D.N.Y. Apr.22, 2004) (quoting *Bartniak v. Cushman & Wakefield, Inc.,* 223 F.Supp.2d 524, 529 (S.D.N.Y.2002)).

***9** Defendant argues that it is entitled to summary judgment on this point because it had a harassment policy in place, provided a copy of the policy to Sabo, provided harassment training to its employees, and took immediate action once Sabo formally complained. However, this Court finds that summary judgment is precluded because material issues of fact exist regarding Defendant's actual or constructive knowledge of the harassment, and whether its actions cured the hostile work environment.

Initially, this Court notes that "[t]he mere existence of a harassment policy does not automatically shield the employer from liability." *Simon v. City of Naperville,* 88 F.Supp.2d 872, 876 (N.D.Ill.2000) (citing *Faragher v. City of Boca Raton,* 524 U.S. 775, 791, 118 S.Ct. 2275, 2285, 141 L.Ed.2d 662 (1998)). Moreover, Sabo denies that he was given a copy of a sexual harassment policy and does not recall ever seeing a policy posted anywhere in the plant. (Plaintiff's Statement, ¶ 10.) Further, the EEOC contends that there is no evidence that Defendant conducted any sexual harassment training prior to or during Sabo's tenure at the plant. (Plaintiff's Statement, ¶ 11.)

In addition, material issues of fact exist as to the scope of Sabo's complaints. Defendant contends that Sabo did not complain about the conduct he attributes to Dryzga or Milsom, and only complained once to Walters about Parkhurst's "name calling." (Defendant's Statement, ¶¶ 27, 28.) The EEOC contends, however, that Sabo complained about the incidents involving Parkhurst, Dryzga and Milsom to Walters (Sabo's supervisor), Lotz (the Plant Manager), Parkhurst (the Union President) and Michael Gerbec (Sabo's Union Representative). (Plaintiff's Statement, ¶¶ 21, 26a, 26b, 26e, 26f, 27.) Moreover, the EEOC contends that Walters witnessed the event where Parkhurst paraded around with the apron and fake penis, as well as the near physical confrontation that occurred after Milsom announced that Sabo was a "faggot" and a "queer." (Plaintiff's Statement, ¶¶ 26e, 26f.)

Finally, there is an issue of material fact regarding whether Defendant acted reasonably in response to Sabo's complaints of harassment. Defendant alleges that Walters and Lotz decided to hold a department-wide meeting on April 1, 1999, after Sabo complained to Walters about Parkhurst. (Defendant's Statement, ¶ 29.) Defendant contends that this fifteen-minute meeting about the sexual harassment policy cured the problem. (Defendant's Statement, ¶¶ 29, 30.) The EEOC denies that this meeting eliminated the hostile work environment or ended the sexually harassing comments and name-calling. (Plaintiff's Statement, ¶¶ 30–33.)

Thus, this Court finds that there is evidence in the record from which a reasonable jury could find that Defendant had actual or constructive notice of the harassment and failed to remedy it. Summary judgment is therefore inappropriate.

c. Harassment was not based on Sabo's Gender

***10** Finally, Defendant argues that it is entitled to summary judgment on the EEOC's same-sex harassment claim because the EEOC cannot prove that Sabo was harassed because he is male. First, Defendant argues that it is clear from the record that any harassment Sabo suffered was because of his sexual orientation, which is not a protected basis under Title VII. Second, Defendant argues that the Supreme Court's decision in *Oncale v. Sundowner Offshore Servs., Inc.* forecloses the EEOC's male gender stereotype theory, and in any case, the EEOC's theory has not been recognized as actionable under Title VII by the Second Circuit Court of Appeals. 523 U.S. 75, 76, 118 S.Ct. 998, 1000, 140 L.Ed.2d 201 (1998).

In opposition, the EEOC argues that evidence in the record demonstrates that Sabo was harassed because he is a male, not because he is a homosexual. In addition, the EEOC argues that its male gender stereotype theory is viable under Title VII and existing caselaw. Therefore, the EEOC argues that Defendant's motion must be denied.

Under Title VII, it is unlawful for an employer to "discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex or national origin." 42 U.S .C. § 2000e–2(a)(1). It is well-settled that Title VII's prohibition of sex discrimination applies to men as well as women. *Newport News Shipbuilding & Dry Dock Co. v. EEOC,* 462 U.S. 669, 682, 103 S.Ct. 2622, 2630, 77 L.Ed.2d 89 (1983) ("Male as well as female employees are protected against discrimination.").

(i) Was Sabo Harassed Because of his Sexual Orientation?

The Second Circuit has joined the rest of the circuits to reach the question and determined that Title VII does not prohibit harassment or discrimination because of an individual's sexual orientation. *Simonton v. Runyon,* 232 F.3d 33, 35 (2d Cir.2000). In *Simonton,* a male homosexual employee of the United States Postal Service was repeatedly subjected to a barrage of morally reprehensible conduct. *Id.* The co-workers who repeatedly

harassed Simonton knew that he was a homosexual and focused their attacks against him on that basis. *See id.* (setting forth the explicit nature of the comments and conduct directed at Simonton).

Defendant argues that like Simonton, Sabo was targeted for harassment because he is a homosexual. Thus, Defendant argues that it is entitled to summary judgment because the EEOC's claim on behalf of Sabo is not cognizable under Title VII. Evidence in the record, however, refutes the factual predicate of Defendant's argument.

Unlike in *Simonton,* Sabo's harassers did not know that he was a homosexual, nor did they believe that he was. (Plaintiff's Statement, ¶ 26.) Parkhurst testified that he did not ask Sabo if he was gay and did not know of anyone asking Sabo that question. (Parkhurst Dep., p. 45.) When asked if he thought Sabo was gay, Parkhurst testified, "I don't know. I don't know. I got no [sic] thought on that." (Parkhurst Dep., p. 45.) Milsom testified that he did not think that Sabo was gay. (Milsom Dep., p. 37.) Moreover, Sabo testified that he did not disclose his sexual orientation to his co-workers (including the harassers) when he began working at the plant. (Sabo Dep., p. 148.) He further testified that he never had any discussions with any of his co-workers about his sexual orientation because "it was nobody's business." (Sabo Dep., p. 148–149.) Finally, Sabo testified that he did not maintain any social contacts in the plant that would cause anyone working for Defendant to know his sexual orientation. (Sabo Dep., p. 149.)

***11** This Court recognizes that many of the comments and much of the conduct that Sabo was allegedly subjected to appear at first blush to be directed at sexual orientation. However, this notion is dispelled by the fact that none of the harassers knew or thought Sabo was a homosexual. It is further dispelled by the fact that evidence in the record demonstrates that language and conduct of this nature carried a non-sexual connotation of weakness or disparagement as used by the employees in the plant. *See Oncale,* 523 U.S. 81–82 (noting that viewing alleged conduct in the context within which it arises is important, in part, because "[t]he real social impact of workplace behavior often depends on a constellation of surrounding circumstances, expectations, and relationships which are not fully captured by a simple recitation of the words used or the physical acts performed").

For example, Walters testified that he would view someone coming up to him and calling him a "faggot" as demeaning. (Walters Dep., p. 48.) In addition, Gerbec testified that the terms "homo," "faggot," "fudgepacker" and "kiss ass" were used in the plant as a type of motivational tool. He explained the use and meaning of these terms as follows:

> Q. Okay, in your opinion, is the word homo crude?
>
> A. As it's issued to the individual, yes, that's going to be derogatory and they're expecting a response to come back either to provoke or instigate something. The way I have heard it at Greif Brothers is between myself and my buddies, just get each other motivated, to get the blood going, to make fun of each other, when I say get the blood going, it gets us motivated, we're ticked off, we start pounding out more and more production, we're razzing each other to keep going faster and faster, come on, you SOB, move it, move it, move it.
>
> Q. So those are motivational terms, things like homo and fudge packer and faggot and kiss ass?
>
> A. Oh, yeah, what's the holdup, kiss ass.
>
> Q. Is this interpreted to be motivational?
>
> A. Yes, at least that's what I know, and thing that I've heard.
>
> Q. Okay, so you also include those terms in your definition of what shop talk is?
>
> A. Yes.
>
> Q. Homo, fudge packer, kiss ass, faggot?
>
> A. Yes.

(Gerbec Dep., p. 29–30.)

Accordingly, this Court finds that there is sufficient evidence in the record from which a jury could find that Sabo was not harassed because he is a homosexual, but rather, was harassed because he is a male. *See Lankford v. BorgWarner Diversified Transmission Prods., Inc.,* 02 CV 1876, 2004 WL 540983, at *4 (S.D.Ind. Mar.12, 2004) ("It is not uncommon for sexual harassment and other manifestations of sex discrimination to be accompanied by homophobic epithets.") Summary Judgment in Defendant's favor on this basis is therefore not warranted.

(ii) Does *Oncale* Foreclose the EEOC's Male Gender Stereotype Theory?

In *Oncale v. Sundowner Offshore Servs., Inc.,* the Supreme Court resolved in the affirmative the issue of "whether workplace harassment can violate Title VII's prohibition against 'discriminat[ion] ... because of ... sex,' 42 U.S.C. § 2000e–2(a)(1), when the harasser and the harassed employee are of the same sex." 523 U.S. at 76 (alterations in original). This ruling is consistent with the Court's recognition of the common sense notion that

"[b]ecause of the many facets of human motivation, it would be unwise to presume as a matter of law that human beings of one definable group will not discriminate against other members of their group." *Castaneda v. Partida,* 430 U.S. 482, 499, 97 S.Ct. 1272, 1282, 51 L.Ed.2d 498 (1977).

***12** *Oncale* explained three available avenues of proof for a plaintiff asserting a same-sex harassment claim: (1) a showing that the harasser was homosexual, (2) evidence of harassment carried out in such sex-specific and derogatory terms that it is clear that the harasser is motivated by general hostility towards the presence of that gender in the workplace, or (3) presentation of direct comparative evidence about how the alleged harasser treated members of both sexes in a mixed-sex workplace. *Oncale,* 523 U.S. at 80–81; *see also Reissner,* 2004 WL 941645, at *9–*13 (discussing and applying *Oncale* avenues of proof).

Defendant argues that the EEOC's same-sex harassment claim in this case fails under *Oncale* because the EEOC cannot meet any of the above-discussed evidentiary paths. Importantly, however, nothing in *Oncale* suggests that the three identified avenues of proof are the *only* theories under which same-sex harassment claims may be brought. *See Bibby v. Phila. Coca Cola Bottling Co.,* 260 F.3d 257, 264 (3d Cir.2001) (discussing *Oncale* methods of proof and concluding that "[b]ased on the facts of a particular case and the creativity of the parties, other ways in which to prove harassment occurred because of sex may be available"); *Shepherd v.. Slater Steels Corp.,* 168 F.3d 998, 1009 (7th Cir.1999) ("we discern nothing in the Supreme Court's [*Oncale*] decision indicating that the examples it provided were meant to be exhaustive rather than instructive"). Indeed, the Supreme Court stated in *Oncale* itself that its holding that sexual harassment meets the definition of sex discrimination in Title VII "must extend to sexual harassment of any kind that meets the statutory requirements." *Oncale,* 523 U.S. at 79–80. Accordingly, this Court rejects Defendant's argument that *Oncale* forecloses the EEOC's theory because it does not follow any of the three paths set forth in that decision.

The Supreme Court addressed gender stereotyping under Title VII in *Price Waterhouse v. Hopkins,* a case in which a female associate of an accounting firm was denied partnership, in part, because she did not conform to the traditional female stereotype. 490 U.S. 228, 250–252, 109 S.Ct. 1775, 1789, 1792, 104 L.Ed.2d 268 (1989) (plurality opinion). Comments made by members of the partnership committee included that Hopkins was "macho," that she "overcompensated for being a woman," that she should "take a course at a charm school," and that she used foul language. *Id.* at 235. In what the Supreme Court described as the *coup de grace,* the man responsible for explaining to Hopkins why she was not named a partner told her that she should "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry." *Id.* The Court had little difficulty recognizing this as gender stereotyping, and stated that "[i]n the specific context of sex stereotyping, an employer who acts on the basis of a belief that a woman cannot be aggressive, or that she must not be, has acted on the basis of gender." *Id.* at 250.

***13** Although *Price Waterhouse* is not on all fours with the case at hand, the principle of law annunciated therein clearly applies. *Price Waterhouse* holds that sex stereotyping is impermissible under Title VII because it necessarily is done on the basis of one's sex. *Id.; see Smith v. City of Salem,* 378 F.3d 566, 571–575 (6th Cir.2004) (employers who discriminate against men because they act femininely are engaging in sex discrimination "because the discrimination would not occur but for the victim's sex"); *see also Kay v. Independence Blue Cross,* No. CIV .A. 02–3157, 2003 WL 21197289, at *4 (E.D.Pa. May 16, 2003) (citing *Price Waterhouse* and noting that "[t]he Supreme Court has held that this prohibition applies to adverse treatment of an employee because his or her appearance or conduct is perceived as not conforming to gender stereotypes").

Several Circuit Courts of Appeals recognize nonconformance with gender stereotypes as a viable theory of sex discrimination (either same-sex or between sexes) under Title VII. *See Higgins v. New Balance Athletic Shoe, Inc.,* 194 F.3d 252, 261 n. 4 (1st Cir.1999) ("[J]ust as a woman can ground an action on a claim that men discriminated against her because she did not meet stereotyped expectations of femininity, a man can ground a claim on evidence that other men discriminated against him because he did not meet stereotypical expectations of masculinity."); *Bibby,* 260 F.3d at 264 (explaining that one way to demonstrate that same-sex sexual harassment is based on sex is to show that "the harasser was acting to punish the victim's noncompliance with gender stereotypes"); *Smith v. City of Salem,* 378 F.3d at 571–575 (finding a claim that the plaintiff was discriminated against because he failed to conform to sex stereotypes by expressing less masculine, and more feminine mannerisms and appearance was actionable under Title VII; "[s]ex stereotyping based on a person's gender non-conforming behavior is impermissible discrimination"); *Doe v. City of Belleville,* 119 F.3d 563, 581 (7th Cir.1997)[8] ("a man who is harassed because his voice is soft, his physique is slight, his hair is long, or because in some other respect he exhibits his masculinity in a way that does not meet his coworkers' idea of how men are to appear and behave, is harassed 'because of his sex' "); *Nichols v. Azteca Rest. Enters.,* 256 F.3d 864, 874–75 (9th Cir.2001) (holding that "the systematic abuse directed at [the plaintiff] reflected a belief that [he] did not act as a man should act" constituted actionable harassment under Title VII).

[8] *City of Belleville* was vacated and remanded by the Supreme Court for further consideration in light of *Oncale.* However, the gender stereotypes holding of *City of Belleville* was not disturbed. *SeeBibby v. Phila. Coca Cola Bottling Co.,* 260 F.3d 257, 263 n. 5 (3d Cir.2001) (explaining treatment of *City of Belleville* and concluding that it remains good law).

Recognition of same-sex discrimination on the theory of nonconformity with gender stereotypes is also consistent with the intent of Title VII. As the Supreme Court has stated, sex stereotyping is legally relevant because

> we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group, for '[i]n forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes.'

***14** *Price Waterhouse,* 490 U.S. 228, 251, 109 S.Ct. 1775, 104 L.Ed.2d 268 (quoting *Los Angeles Dep't of Water & Power v. Manhart,* 435 U.S. 702, 707, n. 13, 98 S.Ct. 1370, 1375, n. 3, 55 L.Ed.2d 657 (1978)). This statement holds equally true for co-employee harassment on this basis. *See City of Belleville,* 119 F.3d at 581.

The hallmark of sex stereotyping "rests on a belief that an employee of one gender either cannot or must not possess or display qualities stereotypically associated with perceptions and expectations of how the other gender should or should not look or behave." *Dawson v. Bumble & Bumble,* 246 F.Supp.2d 301, 314 (S.D.N.Y.2003) (citing *Price Waterhouse,* 490 U.S. at 250). The evidence in this case is that Sabo was harassed because he wore an earring, refused to engage in daily discussions about women, sexual fantasies, the female anatomy, penis size, oral and anal sex and sexual encounters with women, and otherwise rebuffed his harassers attempts to engage him in offensive discussions. (Plaintiff's Statement, ¶ 26d.) Moreover, Sabo was subjected to taunts disparaging his masculinity, such as "fag," "fudgepacker," "homo" and "queer." This Court is satisfied that evidence in the record supports the EEOC's gender stereotype theory of sex discrimination.

Finally, this Court notes that the Second Circuit has yet to be presented with a case directly raising this issue. The plaintiff in *Simonton* raised the theory, but the Second Circuit did not address it because it found that he had failed to plead sufficient facts for full consideration of the issue. *Simonton,* 232 F.3d at 38. Although the court could have declined to discuss the theory altogether on that basis, it took the time to note *Price Waterhouse* and several cases recognizing failure to conform to gender stereotypes as a basis for sex discrimination. *See Simonton,* 232 F.3d at 37 (citing *Schwenk v. Hartford,* 204 F.3d 1187, 1202 (9th Cir.2000) and *Higgins,* 194 F.3d at 261 n. 4). The court stated that *Price Waterhouse* "implied that a suit alleging harassment or disparate treatment based upon nonconformity with sexual stereotypes is cognizable under Title VII as discrimination because of sex." *Id.* at 38. While this Court in no way intends to convey the false impression that the Second Circuit has decided this issue—it clearly has not[9]—it can reasonably be concluded that this is not a theory it would discard out of hand. *Cf. Galdieri–Ambrosini v. Nat'l Realty & Dev. Corp.,* 136 F.3d 276, 289 (2d Cir.1998) ("Evidence of sexual stereotyping may provide proof that an employment decision or an abusive environment was based on gender."); *Martin v. New York State Dep't of Corr. Servs.,* 224 F.Supp.2d 434, 446 (N.D.N.Y.2002) (implying that Second Circuit's dicta discussion of nonconformance to gender stereotype theory in *Simonton* left the door open to application of the theory, but finding that the record before it failed to contain evidence of gender stereotyping). Indeed, the court preemptively distinguished non-actionable sexual orientation discrimination from sexual stereotype discrimination, an effort that may signal the court's inclination to join those circuits that have recognized the theory. Again from *Simonton:*

[9] The Second Circuit specifically stated in *Simonton* that "the wisest course is to defer consideration of the merits of such an argument to another case in which it comes to us after being properly pled and presented to the district court." *Simonton,* 232 F.3d at 38. This Court's attention has not been drawn to any conforming case that has made its way to the circuit court.

> ***15** This theory [sex harassment based on nonconformity with sexual stereotypes] would not bootstrap protection for sexual orientation into Title VII because not all homosexual men are stereotypically masculine. But, under this theory, relief would be available for discrimination based upon sexual stereotypes.
> 232 F.3d at 38.

Accordingly, this Court finds that the EEOC's theory of same-sex discrimination in this case is neither factually unsupported, nor legally barred. This Court finds that nonconformance with gender stereotypes is a viable theory of sex discrimination (either same-sex or between sexes) under Title VII.[10] Defendant's motion seeking summary judgment on the EEOC's same-sex discrimination claim is therefore denied.

[10] This Court notes that a jurist in this district has found that a female plaintiff's claim that she was

discriminated against for failing to conform to female stereotypes was a sufficiently plausible theory of discrimination under Title VII to survive a motion to dismiss. *See Samborski v. West Valley Nuclear Servs., Co., Inc.,* No. 99–CV–213, 1999 WL 1293351, at *3–*5 (W.D.N .Y. Nov. 24, 1999) (Elfvin, J.).

2. Constructive Discharge

The EEOC alleges that Defendant constructively discharged Sabo when it failed to remedy the sexually hostile work environment in the plant. Defendant argues that it is entitled to summary judgment on this claim because (1) Sabo's resignation was not caused by deliberate action, and (2) a reasonable person under similar circumstances would not have felt compelled to resign.

"A constructive discharge occurs when the employer, rather than acting directly, deliberately makes an employee's working conditions so intolerable that the employee is forced into an involuntary resignation." *Lopez v. S.B. Thomas, Inc.,* 831 F.2d 1184, 1188 (2d Cir.1987) (quotation and citation omitted); *see also Whidbee v. Garzarelli Food Specialties, Inc.,* 223 F.3d 62, 73–74 (2d Cir.2000). The employer's conduct in causing the employee's resignation must be "deliberate action."[11] *Whidbee,* 223 F.3d at 74. The claim must fail if it is predicated on the employer's mere negligence, ineffectiveness or incompetence. *Id.* (citing cases).

[11] The EEOC argues that last term the Supreme Court essentially overruled the Second Circuit's requirement that an employee alleging a constructive discharge claim demonstrate deliberate action on the part of the employer. *See Pennsylvania State Police v. Suders,* —— U.S. ——, 124 S.Ct. 2342, 2354, 159 L.Ed.2d 204 (2004) The EEOC relies on the Court's statement that "harassment so intolerable as to cause a resignation may be effected through co-worker conduct, unofficial supervisory conduct, or official company acts. Unlike an actual termination, which is *always* effected through an official act of the company, a constructive discharge need not be." *Suders,* —— U.S. at ——, 124 S.Ct. at 2355 (emphasis in original). This Court does not agree with the EEOC's interpretation of this passage. This statement by the Court is simply a recognition that constructive discharge does not ordinarily involve an official, overt adverse employment action by the employer—an unremarkable proposition. *Cf. Lopez v. S.B. Thomas, Inc.,* 831 F.2d 1184, 1188 (2d Cir.1987) ("When a constructive discharge is found, an employee's resignation is treated ... as if the employer had actually discharged the employee). This Court does not read *Suders* as eliminating the requirement that an employer's disregard to the hostile environment be deliberate, and neither have other courts in this circuit. *See, e.g., Flakowicz v. Raffi Custom Photo Lab, Inc.,* No. 02 Civ. 9558, 2004 WL 2049220, at *10–*11 (S.D.N.Y. Sept.13, 2004) (citing *Kirsch v. Fleet Street, Ltd.,* 148 F.3d 149, 161 (2d Cir.1998), in tandem with *Suders,* and noting that pursuant to *Kirsch,* "an employee is constructively discharged when an employer 'deliberately [makes] his working conditions so intolerable that he [is] forced into an involuntary resignation' "); *Cecil v. United States Postal Serv.,* No. 03 Civ. 8404, 2004 WL 1886202, at *1 (S.D.N.Y. Aug.24, 2004) (citing *Suders* and *Whidbee* in support of the requirement that a plaintiff demonstrate "that the employer deliberately imposed intolerable working conditions in order to force the employee to retire").

"The same circumstances and facts that a court examines in reviewing a plaintiff's hostile work environment claim are examined on a plaintiff's constructive discharge claim." *Legrand v. New York Rest. Sch./Educ. Mgmt. Corp.,* No. 02 Civ. 2249, 2004 WL 1555102, at *8 (S.D.N.Y. July 12, 2004) (citing *Arroyo v. WestLB Admin., Inc.,* 54 F.Supp.2d 224, 231–32 (S.D.N.Y.1999)). However, last term, the Supreme Court made clear that "a hostile-environment constructive discharge claim entails something more [than a showing of a hostile work environment]: A plaintiff who advances such a compound claim must show working conditions so intolerable that a reasonable person would have felt compelled to resign." *Pennsylvania State Police v. Suders,* —— U.S. ——, 124 S.Ct. 2342, 2354, 159 L.Ed.2d 204 (2004); *Flakowicz v. Raffi Custom Photo Lab, Inc.,* No. 02 Civ. 9558, 2004 WL 2049220, at *10–*11 (S.D.N.Y. Sept.13, 2004) (applying *Suders*). Accordingly, the plus-factor attendant to a hostile work environment-based constructive discharge claim (as opposed to a hostile work environment claim) is the requirement of evidence that shows that the working conditions were such that a reasonable person would be compelled to resign rather than work in the altered conditions of his employment. *Cf. Suders,* —— U.S. at ——, 124 S.Ct. at 2347 (an employee "must show that the abusive working environment became so intolerable that [the employee's] resignation qualified as a fitting response"). Having thoroughly reviewed the record, this Court finds that there is a material issue of fact as to whether Sabo was constructively discharged. Cognizant of the fact that the showing for a constructive discharge claim is higher than that of a hostile work environment claim, this Court finds that the EEOC has put forth sufficient evidence to create an issue of fact as to the severity of the work environment and whether a reasonable person in Sabo's place would have felt compelled to resign.

***16** This Court has already found that the record contains evidence from which a reasonable factfinder could conclude that Sabo's working conditions were severe. That same finding holds true on this claim: based on the evidence in the record, a jury could find that Sabo's

treatment in the plant was so difficult and unpleasant that it constituted intolerable working conditions. Moreover, this Court has already found that an issue of fact exists as to the nature and sufficiency of Sabo's complaints about the harassment. There is evidence in the record that Sabo complained about the harassment, but became frustrated because his complaints were ignored. (Plaintiff's Statement, ¶ 16.) For example, Sabo testified that he became less comfortable discussing his concerns with Walters because Walters failed to address or investigate his complaints and ignored the harassment. (Plaintiff's Statement, ¶ 16.) Accordingly, this Court finds that a jury could credit the EEOC's evidence and find that based on the nature and severity of Sabo's harassment and the lack of response to his complaints, a reasonable person in his shoes would have felt compelled to resign. *Chertkova,* 92 F.3d at 89.

Finally, this Court also finds that a material issue of fact exists as to whether Defendant's failure to remedy Sabo's hostile work environment was deliberate. Again, there is conflicting evidence in the record regarding Sabo's complaints and Defendant's response. As previously discussed, there are issues of material facts regarding Defendant's actual or constructive notice of the treatment that Sabo was allegedly subjected to. If the jury finds that Defendant had notice of the harassment and failed to adequately respond, it could reasonably find that Defendant's failure to remedy the harassment was deliberate. Accordingly, Defendant's request for summary judgment on the EEOC's constructive discharge claim is denied.

IV. CONCLUSION

For the foregoing reasons, Defendant's Motion for Summary Judgment is denied in its entirety.

V. ORDER

IT HEREBY IS ORDERED, that Defendant's Motion for Summary Judgment (Docket No. 33) is DENIED.

SO ORDERED.

Parallel Citations

94 Fair Empl.Prac.Cas. (BNA) 941