

UNITED STATES DISTRICT COURT  
DISTRICT OF MAINE

DAN'YET L. O'HALLORAN, )  
 )  
 Plaintiff )  
 v. ) Civ. No. 96-0029-B  
 )  
 SEARS, ROEBUCK AND CO., )  
 )  
 Defendant )

ORDER AND MEMORANDUM OF DECISION

BRODY, District Judge

Plaintiff, Dan'Yet L. O'Halloran, alleges in an eight-count Complaint that Defendant, Sears, Roebuck and Co. ("Sears"), violated Title VII of the 1964 Civil Rights Act, 42 U.S.C. §§ 2000e to 2000e-17, and the Maine Human Rights Act ("MHRA"), 5 M.R.S.A. §§ 4551 - 4632, by sexually harassing her, discriminating against her on the basis of her gender, and unlawfully retaliating against her for complaining about sexual discrimination. Plaintiff also alleges that Sears violated the Americans with Disabilities Act ("ADA"), 42 U.S.C. §§ 12101-12213, by discriminating against her on the basis of a disability she suffered. Sears filed a Motion for Partial Summary Judgment on August 26, 1996, as to Plaintiff's claims for sex discrimination (Counts III and VI) and retaliation (Counts IV and VII), including O'Halloran's request for back pay and front pay damages emanating from the underlying offenses. For the reasons set forth below, the Court grants Sears' Motion for Partial Summary Judgment.

**I. SUMMARY JUDGMENT**

Summary judgment is appropriate in the absence of a genuine issue as to any material fact and when the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). An

issue is genuine for these purposes if “the evidence is such that a reasonable jury could return a verdict for the nonmoving party.” Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). A material fact is one that has “the potential to affect the outcome of the suit under applicable law.” Nereida-Gonzalez v. Tirado-Delgado, 990 F.2d 701, 703 (1st Cir. 1993). The Court views the record in the light most favorable to the nonmoving party. See McCarthy v. Northwest Airlines, Inc., 56 F.3d 313, 315 (1st Cir. 1995).

## **II. BACKGROUND**

O’Halloran began working part-time as a salesperson at the Sears store located in the Bangor Mall in Bangor, Maine, in 1984. O’Halloran alleges that when she began working at Sears, Jeff Bennett, a coworker, asked her out for dates on several occasions. O’Halloran always refused Bennett’s requests. In 1990, Bennett became manager of the department in which O’Halloran worked. O’Halloran claims that subsequent to his promotion, Bennett implied to O’Halloran that she should date him. Bennett insulted O’Halloran’s boyfriend and declared that O’Halloran should date a man who made as much money as he, Bennett, was making.

In 1991 O’Halloran asked Bennett to promote her to full-time status. He refused to do so, even though there was a position available. Instead, Bennett gave the position to a man “right off the street” who lacked O’Halloran’s experience. (O’Halloran Aff. ¶ 16). Shortly thereafter, Bennett promoted another man to a full-time position. When asked why he did not promote O’Halloran, Bennett responded that the man had a family to support. Also in 1991, Bennett promoted a man to a full-time position instead of O’Halloran, claiming that O’Halloran’s sales figures were not high enough. O’Halloran alleges that her sales figures were in fact better than those of the man Bennett promoted. O’Halloran claims that when she told Bennett this, he yelled

at her and threatened to fire her if she asked to be promoted to full-time once more.

In November 1993, a full-time male employee decided to become part-time. O'Halloran again asked to be promoted. Bennett refused to promote O'Halloran to that position, explaining that there was no longer a need for that position to be filled. Bennett did not, in fact, fill that position with anyone, male or female. O'Halloran continued to request to be made full-time in 1994, whether there was a position available or not. She claims that Bennett often threatened to fire her if she persisted in her efforts. O'Halloran also alleges that Bennett sometimes would respond to her requests to be made full-time by telling her that she should have dated him when he first asked her out. On September 1, 1994, another full-time position became available. O'Halloran eventually was promoted to this position. She contends that before she was promoted, however, Bennett told her that she had to agree to work split shifts, even though no other employee was required to make such an agreement. Sears contends that she was promoted to full-time on September 25. O'Halloran argues that she had no definitive knowledge that she was promoted until December 1994.

O'Halloran contends that Bennett did not promote her to a full-time position earlier than 1994 because she is a woman. Additionally, O'Halloran contends that sex discrimination was a systemic problem at Sears. She alleges that when Bennett became manager in 1990, there were ten men and nine women working full-time in his department. By October 1994, there were thirteen men and four women working full-time. Also, O'Halloran claims that Jim Leighton, the loss prevention supervisor at Sears in charge of investigating improper behavior, kept a picture of himself on a bulletin board in which he was depicted with a hot dog hanging out of the fly of his pants. O'Halloran also alleges that a female employee once complained that Leighton had

commented that she “could suck a golf ball through a garden hose.”

O’Halloran filed charges of sex discrimination with the Maine Human Rights Commission (“MHRC”) on August 1, 1994, and with the Equal Employment Opportunity Commission (“EEOC”) on August 19, 1994. O’Halloran claims that soon after she filed these charges, she noticed that the security cameras on the ceiling of her department were focused solely on her. She also contends that she was reprimanded for using a coupon in the same manner as other employees at Sears, who never were punished. O’Halloran argues that these acts by Sears constitute adverse employment action and were committed in direct retaliation of her filing charges with the MHRC and the EEOC.

The MHRC and the EEOC issued “right to sue” letters to O’Halloran on August 28, 1995, and November 6, 1995, respectively.

### **III. TITLE VII AND THE MAINE HUMAN RIGHTS ACT**

#### **A. Sexual Discrimination**

Title VII of the Civil Rights Act of 1964 makes it 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). Title 5, section 4572(1)(A) of the Maine Revised Statutes similarly prohibits discrimination based on sex. The Court’s analysis of the federal and state statutes is identical. See Weeks v. State of Maine, 866 F.Supp. 601, 603 n.2 (D. Me 1994) (citing Bowen v. Department of Human Servs., 606 A.2d 1051, 1053 (Me. 1992) (deferring to federal analysis of Title VII when examining the Maine Human Rights Act)).

Prior to filing a Title VII action in a federal district court, a plaintiff first must exhaust her

administrative remedies. 42 U.S.C. § 2000e-5. In order for her claims to be deemed actionable, she generally must file administrative charges with the EEOC no later than 180 days after the alleged unlawful employment practice occurred. 42 U.S.C. § 2000e-5(e)(1). If the state in which the alleged discrimination occurred is a “deferral state,” a plaintiff must file with the EEOC within 300 days after the discrimination, or within thirty days after the plaintiff has received notice that the state has terminated its proceedings. *Id.* A “deferral state” is “a state that has its own anti-discrimination laws and agency.” *EEOC v. Green*, 76 F.3d 19, 20 (1st Cir. 1996). Maine is a “deferral state” because it has its own civil rights statute, the Maine Human Rights Act, and agency, the Maine Human Rights Commission. In deferral states, the EEOC must defer taking any action until sixty days have passed since a charge was filed with the state agency or until the state proceedings have terminated. 42 U.S.C. § 2000e-5(c). “The sixty-day period of exclusive jurisdiction is intended to ‘give States and localities an opportunity to combat discrimination free from premature federal intervention.’” *EEOC v. Green*, 76 F3d. at 21 (quoting *EEOC v. Commercial Office Prods. Co.*, 486 U.S. 107, 110 (1988)).

A charge filed with the EEOC is not considered “filed” for purposes of the 300-day time limit until sixty days have elapsed since the filing of charges with the state agency or the state agency has terminated its proceedings. See *Mohasco Corp. v. Silver*, 447 U.S. 807, 817 (1980). Thus, a plaintiff must file a charge with a state agency within 240 days of an unlawful employment action in order to ensure timely filing with the EEOC. See *Mohasco Corp. v. Silver*, 447 U.S. 807, 814 n.16 (1980). Of course, a filing with a state agency after 240 days but before 300 days still may be timely if the state agency terminates its proceedings before the expiration of the 300-day period. See *Cajigas v. Banco de Ponce*, 741 F.2d 464, 467 n.8 (1st Cir. 1984).

O'Halloran filed administrative charges with the MHRC on August 1, 1994. She also filed charges with the EEOC on August 19, 1994. The MHRC did not terminate its proceedings until August 28, 1995, when it issued a right to sue notice. Because the MHRC did not terminate its proceedings before the expiration of sixty days, the charges with the EEOC were not considered "filed" until sixty days after August 1, 1994, the date O'Halloran filed with the MHRC. In order for O'Halloran's claims to be considered actionable, they must be based on allegations of unlawful employment practices that occurred within 240 days of August 1, 1994. O'Halloran's claims, therefore, must be based on allegations that she was discriminated against on or after December 4, 1993. Because O'Halloran cannot point to one instance after December 4, 1993, when Bennett failed to promote her because of her sex, Sears' Motion for Partial Summary Judgment as to Counts III and VI is granted.

In order for a plaintiff to prove a prima facie case of sex discrimination for failure to promote, she must show "1) that the plaintiff is within a class protected by Title VII; 2) that plaintiff applied, and was qualified for the position for which the employer was seeking a replacement; 3) that despite plaintiff's qualifications he or she was rejected; and 4) that after plaintiff's rejection the position was filled, or continued its efforts to fill, the position with someone with complainant's qualification." Petitti v. New England Tel. and Tel. Co., 909 F.2d 28, 32 (1st Cir. 1990) (citing McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973)). The relevant issue for present purposes is whether there is at least one occasion when Bennett allegedly failed to promote O'Halloran to a position for which Sears was seeking a replacement. The Court holds that there is none. Assuming for the moment that O'Halloran's claim that in November 1993 Bennett failed to promote her to a full-time position that became vacant when an

employee decided to work part-time is not time-barred, the uncontroverted fact is that Bennett did not seek a replacement for that position. Bennett did not promote anyone to fill that position, male or female. It is irrelevant that O'Halloran did not believe Bennett when he told her that the position would not be filled. O'Halloran cannot claim that she was denied promotion to a position that did not exist.

O'Halloran's only other allegation of discrimination that occurred after December 4, 1993, revolves around the opening of a full-time position on September 1, 1994. Fatal to O'Halloran's Complaint, however, is the fact that she eventually was promoted to this position. O'Halloran claims that she did not become aware that she had been promoted until a Sears employee in Chicago told her in December 1994. Nevertheless, she does not dispute Sears' contention that as early as October 1994, she began working full-time hours and sought and received certain benefits, such as personal holidays and short term disability benefits, that are only available to full-time employees. For purposes of O'Halloran's sex discrimination claims based on a failure to promote, it is irrelevant whether or not and at what time O'Halloran "had definitive knowledge" that she was promoted. The fact that she was promoted is determinative. Accordingly, she cannot satisfy a necessary requirement of a prima facie sex discrimination case for failure to promote: that despite her qualifications she was rejected from a position for which she applied.

O'Halloran cannot cite one occasion after December 4, 1993, when she was not promoted to an available full-time position. Although it is true that a series of alleged violations may be actionable if they "emanat[e] from the same discriminatory animus," see Sabree v. United Bhd. of Carpenters and Joiners Local No. 33, 921 F2d. 396, 400 (1st Cir. 1990), at least one such

violation must take place within the statutory period. Id. Therefore, the Court will not consider Bennett's failure to promote O'Halloran before December 4, 1993.

O'Halloran argues in the alternative that Sears had a systemic policy of discriminating against women, and that this policy was in effect during the statutory period. The First Circuit has held:

[A] systemic violation need not involve an identifiable, discrete act of discrimination transpiring within the limitations period. A systemic violation has its roots in a discriminatory policy or practice; so long as the policy or practice itself continues into the limitation period, a challenger may be deemed to have filed a timely complaint.

Sabree v. United Brotherhood of Carpenters and Joiners Local No. 33, 921 F.2d 396, 400 n.7 (1st Cir. 1990) (citing Jensen v. Frank, 912 F.2d 517, 523 (1st Cir. 1990)). O'Halloran cites statistical evidence to prove a policy of discrimination: She alleges that there were ten men and nine women working full-time when Bennett became manager in 1990, and thirteen men and four women working full-time in 1994. Further, she alleges that Jim Leighton, the loss prevention supervisor in charge of investigating improper behavior at Sears, illustrated the store's insensitivity to discrimination by displaying on a bulletin board a picture of himself at a company picnic with a hotdog hanging out of the fly of his pants. Finally, O'Halloran contends that Leighton once commented that an unnamed female employee "could suck a golf ball through a garden hose." While the latter two allegations might withstand summary judgment on a claim for sexual harassment based on a hostile work environment, they do not suggest that Sears had a policy of failing to promote qualified women to available positions. "The preponderance of the evidence must establish that some form of intentional discrimination against the class of which plaintiff was a member was the company's 'standard operating procedure.'" Jewett v.

International Tel. and Tel. Corp., 653 F.2d 89, 91-92 (1st Cir. 1981). The alleged evidence falls short of such demonstrating the existence of such a procedure. O’Halloran’s statistical “evidence” similarly is not persuasive to establish the existence of a discriminatory policy. The First Circuit already has held that a rote recitation of statistics without any indication of probativeness is insufficient to demonstrate a policy of discrimination. See Mack v. Great Atl. and Pac. Tea Co., 871 F.2d 179, 184 (1st Cir. 1989). “The naked numbers, standing unadorned and unexplained, lacked sufficient convictive force to derail appellee's summary judgment initiative.” Id. For these reasons, the Court finds that even when viewed in the light most favorable to O’Halloran, the evidence does not suggest the existence of a systemic policy of discrimination at Sears.

Because O’Halloran cannot demonstrate either 1) that she was discriminated against based on a failure to promote within the statutory period or 2) that Sears employed a policy of discriminating against women, Sears’ Motion for Partial Summary Judgment as to Counts III and VI is granted.<sup>1</sup>

## **B. Retaliation**

The elements of an employment retaliation claim are: “(1) the plaintiff engaged in statutorily protected activity, and (2) his employer thereafter subjected him to an adverse employment action (3) as a reprisal for having engaged in the protected activity.” Blackie v. State of Maine, 75 F.3d 716, 722 (1st Cir. 1996). Specifically, a plaintiff must show that there is a causal connection between the protected activity and the adverse employment retaliation in

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<sup>1</sup> Accordingly, O’Halloran cannot pursue a claim for back pay or front pay based on her allegation of failure to promote.

order to avoid summary judgment. See Weeks v. State of Maine, 866 F.Supp 601, 603 (D. Me. 1994).

O'Halloran argues that soon after she filed charges with the MHRC and EEOC, Sears retaliated against her by focusing the security cameras on her and by unlawfully reprimanding her for misusing coupons. Sears contends that O'Halloran's claims for retaliation are not properly before the Court because O'Halloran failed to exhaust her administrative remedies. Specifically, Sears argues that since O'Halloran did not file a charge with the EEOC or MHRC based on a claim of retaliation, her federal retaliation claim now must be dismissed. In Johnson v. General Electric, 840 F2d. 132 (1st Cir. 1988), the First Circuit held that a complaint related to one brought before the EEOC, but which was not itself the subject of a separate EEOC investigation, "must reasonably be expected to have been within the scope of the EEOC's investigation in order to meet the jurisdictional requirement." Id. at 139. The court decided that a retaliation claim that was not the subject of a separate EEOC complaint "could not have been expected to be part of the scope of the EEOC's investigation growing out of appellant's earlier complaints, because plaintiff has not alleged that he even informed the EEOC of the alleged retaliation." Id. at 139. Nevertheless, the First Circuit left unresolved the question of whether a court would have ancillary jurisdiction over a retaliation claim that was not included in a prior EEOC complaint because the court dismissed the remaining counts in the case to which the retaliation claim might have been ancillary. Id. n.8. Although the Court here has dismissed O'Halloran's claims of sex discrimination, there still remain several claims of harassment and disability discrimination that are not before the Court in this Summary Judgment Order. Therefore, O'Halloran's claim of retaliation properly may be considered ancillary to these remaining claims.

The Court holds that it does in fact have ancillary jurisdiction over O'Halloran's retaliation claim. Compare Borase v. M/A-COM, Inc., 906 F. Supp. 65, 69 (D. Mass. 1995) (exercising ancillary jurisdiction over retaliation claim despite the fact that plaintiff did not file a separate charge of retaliation with the EEOC). Nevertheless, the Court is not persuaded that O'Halloran has stated enough facts from which a reasonable jury could decide that Sears subjected O'Halloran to adverse employment action. As a result, there was no retaliation. The Court therefore grants Sears' Motion for Partial Summary Judgment as to Counts IV and VII.

#### **IV. CONCLUSION**

The Court grants Sears' Motion for Partial Summary Judgment as to Counts III, IV, VI, and VII.

SO ORDERED.

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MORTON A. BRODY  
United States District Judge

Dated this 13<sup>th</sup> day of January, 1997.