

**UNITED STATES DISTRICT COURT**  
**DISTRICT OF MAINE**

<b>FELICIA E. GAVETT,</b>	)	
	)	
<i>Plaintiff</i>	)	
	)	
<b>v.</b>	)	<b>Civil No. 96-369-P-H</b>
	)	
<b>BO-ED, INC.,</b>	)	
<i>d/b/a ATRIUM HOTEL,</i>	)	
	)	
<i>Defendant</i>	)	

**MEMORANDUM DECISION ON DEFENDANT’S MOTION FOR SANCTIONS  
AND RECOMMENDED DECISION ON  
DEFENDANT’S MOTION FOR SUMMARY JUDGMENT**

The plaintiff asserts claims under federal and Maine law alleging sexual harassment and retaliation following her discharge from employment by the defendant. Now before the court are the defendant’s motion for summary judgment (Docket No. 6) and a separate motion filed by the defendant (Docket No. 8) seeking sanctions for two alleged transgressions committed by the plaintiff during the course of discovery. Since resolution of the latter has a potential impact on the summary judgment proceedings, I take up the motions in reverse order.<sup>1</sup>

**I. The Sanctions Motion**

The defendant’s motion for sanctions raises two distinct issues. First, the defendant contends that counsel for the plaintiff should be sanctioned for causing a paralegal on his staff to interview an employee of the defendant, which the defendant contends was in violation of Maine Bar Rule 3.6(f)

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<sup>1</sup> The plaintiff has requested oral argument on both motions (Docket Nos. 20 and 27). Because I am satisfied that the written submissions of the parties are sufficient to permit the court to resolve the issues raised therein, the requests for oral argument are denied.

proscribing direct contact with an adverse party when the party is represented by counsel.<sup>2</sup> Second, the defendant alleges that the plaintiff violated Fed. R. Civ. P. 26(g)(2) by withholding from the defendant, based on the attorney work-product doctrine, a document that counsel for the plaintiff knew to be subject to disclosure.

#### **a. The Ex Parte Interview**

The witness interview involved Rosalind Clancy, whom the defendant characterizes as a “managerial employee.” Motion of Defendant Bo-Ed, Inc. for Sanctions, etc., and Integrated Memorandum of Law in Support Thereof (“Sanctions Motion”) (Docket No. 8) at 2. It is undisputed that in late 1996, while Clancy was employed by the defendant, a paralegal associated with counsel for the plaintiff contacted Clancy by telephone to elicit information about the plaintiff’s case. It is also undisputed that, as of the time of this contact, the defendant was represented by counsel in connection with the plaintiff’s allegations relative to her discharge from employment in early 1995. According to the defendant, by having a paralegal interview Clancy in these circumstances counsel for the plaintiff has improperly obtained an overview of the defendant’s personnel policies and has made use of this ill-gotten information in his deposition questioning of the defendant’s general

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<sup>2</sup> Maine Bar Rule 3, which is the codification of the Maine Code of Professional Responsibility, sets forth the ethical obligations of attorneys practicing in this court. *See Cutler v. FDIC*, 782 F.Supp. 9, 10 (D.Me. 1992). The plaintiff does not dispute the defendant’s contention that the court has the authority to enforce the Maine Bar Rules by imposing sanctions against a party, as opposed to instituting separate disciplinary proceedings against the attorney. I agree that such authority exists, to be invoked with great care. *See Amarin Plastics, Inc. v. Maryland Cup Corp.*, 116 F.R.D. 36, 38-39 (D.Mass. 1987) (describing this power as inherent); *but see Johnson v. Cadillac Plastic Group, Inc.*, 930 F.Supp. 1437, 1442 (D.Colo. 1996) (exclusion of evidence for violation of rule against *ex parte* contact “frustrates truth and does not punish the ethical violation” but “works against the client who may have been wronged by the opposing party as far as the substantive claim is concerned.”) (citations omitted).

manager, Robert Rosenthal.<sup>3</sup> Sanctions Motion at 4. The defendant therefore asks the court to strike from the record anything from Rosenthal’s deposition that is “tainted” by the Clancy interview. *Id.* The defendant further requests that the court disqualify the plaintiff’s attorney from further participation in the case, absent a showing of how he can “proceed with his representation of the Plaintiff without making any use of unethically derived evidence.” *Id.* at 5.

The plaintiff contends that no violation of the Bar Rules took place because, although Clancy held the title of “Dining Room Manager” at the time of the contact in question and was the “Banquet Manager” of the defendant’s hotel at the time of the plaintiff’s discharge, Clancy was not a sufficiently high-level employee to preclude her from being contacted directly by the plaintiff, her counsel or a paralegal associated with the plaintiff’s counsel. Plaintiff’s Objection to Motion of Defendant for Sanctions (Docket No. 22) at 2. According to the plaintiff, it had been adduced in discovery that there were three levels of management at the hotel — president, general manager and assistant manager — above Clancy during her tenure as banquet manager. *Id.* According to the plaintiff, *ex parte* contact with Clancy was also permissible because she lacked the authority to make personnel decisions on behalf of the defendant. *Id.*

Perhaps owing to the degree of care Maine lawyers have traditionally taken to avoid improper contact with parties represented by counsel, there is a relative paucity of guidance concerning how

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<sup>3</sup> The defendant’s theory of why the plaintiff contacted Clancy modulated significantly in its reply memorandum concerning the sanctions motion. According to the defendant’s reply, the plaintiff believes that Clancy played a role in allowing employees of the hotel to consume alcohol on the premises at a New Year’s Eve party — an incident the defendant contends is germane to the plaintiff’s termination. *See* Reply of Defendant Bo-Ed, Inc., etc. (Docket No. 25) at 2.

Bar Rule 3.6(f) would apply in this situation.<sup>4</sup> The Professional Ethics Commission of the Board of Overseers of the Bar has observed that, “[w]hen the party is a corporation or other incorporeal entity, the prohibited contacts have generally been limited to officers and employees who have the authority to commit the entity, either to an agreement or to an admission.” Professional Ethics Commission, Board of Overseers of the Bar, Opinion No. 90, reprinted in *Maine Manual on Professional Responsibility* (1992 ed.) (citation omitted). “[T]he question [is] one of agency; does the employee have express, implied or apparent authority to effect an improvident settlement or similar major capitulation of the client’s legal position?” *Id.*, Opinion No. 94. In a case arising under Missouri’s substantially similar bar rule, the Eighth Circuit recently formulated the principle as one prohibiting *ex parte* contact with

- (1) persons having managerial responsibility on behalf of the organization, (2) persons whose acts or omissions in connection with the matter litigated may be imputed to the organization, and (3) persons whose statements may constitute an admission on the part of the organization.

*Hill v. St. Louis Univ.*, 123 F.3d 1114, 1121 (8th Cir. 1997) (quoting Model Rules of Prof. Conduct 4.2(1) cmt. (1992)).

To resolve the issue, it is not necessary for the court to determine whether Clancy was truly a managerial employee notwithstanding the titles she has held. Both the Maine commentary, and the

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<sup>4</sup> The text of the rule itself is unilluminating:

**Communicating With Adverse Party.** During the course of representation of a client, a lawyer shall not communicate or cause another to communicate on the subject of the representation with a party the lawyer knows to be represented by another lawyer in that matter unless the lawyer has the prior consent of the lawyer representing such other party or is authorized by law to do so.

M.Bar R. 3.6(f).

broader formulation quoted from the *Hill* case, proscribe *ex parte* attorney contact with an employee of an opposing party when the employee's statements might be imputed to her employer as an admission. A statement is an admission within the meaning of the Federal Rules of Evidence when, *inter alia*, it is "a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship." Fed.R.Evid. 801(d)(2)(D). Considered in that light, Bar Rule 3.6(f) most certainly provides ample reason for plaintiff's counsel to have been extremely cautious about *ex parte* contact with any of the defendant's employees while still so employed.

Still, even assuming that counsel was not as cautious as a Maine lawyer with due regard for his ethical obligations should be, and even taking the defendant's characterization of the relevant events at face value, an insufficient basis exists for the imposition of sanctions. In its sanctions motion, the defendant objects to the discussion between Clancy and the paralegal concerning the defendant's personnel policies.<sup>5</sup> Nowhere is it alleged by the defendant that the promulgation of personnel policies (as opposed to the making of personnel decisions) is a matter within the scope of Clancy's employment. The chief complaint in this aspect of the sanctions motion is that the plaintiff has used information gained from Clancy about personnel policies to pose knowledgeable deposition

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<sup>5</sup> The motion papers filed by the defendant are vague, at best, concerning the precise subject or subjects of the allegedly improper discussion with Clancy. The most detailed statement is contained in an affidavit executed by Clancy herself:

I recall that I explained to Mr. Webbert's office that I was not present during a party that I understood was at issue in Felicia Gavett's dispute with the Atrium. I recall that I was asked a number of questions about another manager at the Atrium named Colleen Sebastian, and a number of questions about the Atrium's employee policies on, among other things, employee drinking.

First Affidavit of Rosalind Clancy, Exh. 4 to Sanctions Motion, at ¶ 8.

questions to the person who *did* have authority to promulgate such policies, and thus whose statements on the subject would likely constitute admissions of the defendant. The distinction between personnel policies, which I assume Clancy did not have authority to promulgate, and personnel decisions, which I assume Clancy was in a position to influence given her responsibilities as banquet and/or dining room manager, may seem microscopic in the circumstances. Still, the imposition of sanctions, with the attendant effects on this litigation and on the resolution of similar issues in the future, is a very serious matter. Simply by alleging that a paralegal in the employ of the plaintiff's attorney questioned an employee of the defendant about the defendant's personnel policies, the defendant has not convinced me that a violation of Bar Rule 3.6(f) has occurred.<sup>6</sup> I therefore decline to impose sanctions based on this asserted ground, at the same time stressing that reckless

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<sup>6</sup> The concerns expressed in the defendant's reply memo, that the plaintiff's interest in Clancy as a witness is a function of her possible role in permitting subordinate employees to consume alcohol on the hotel's premises on a particular occasion, do not change my conclusion. Assuming that this contention is properly before the court, *see* Loc.R. 7(c) (reply memorandum "shall be strictly confined to replying to new matter raised in the objection or opposing memorandum"), and that any statement by Clancy concerning such matters would be an admission imputed to the defendant, nothing in the record suggests that Clancy was actually questioned about the occasion at issue.

I also note the concern expressed by the plaintiff that the timing of the defendant's sanctions motion is suspect, coming as it does following the filing of the plaintiff's summary judgment papers, which rely to some extent on the deposition which the defendant seeks to strike in part. While I am not aware that anything in the applicable discovery rules required the defendant to raise this issue at some earlier point, I note that the same bar rules the defendant would invoke against the plaintiff contain this admonition:

A lawyer possessing unprivileged knowledge of a violation of the Maine Bar Rules that raises a substantial question as to another lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects shall report such knowledge to a tribunal or other authority empowered to investigate or act upon such violation.

M.Bar R. 3.2(e)(1). Implicit is the notion of prompt reporting, so as to mitigate the impact of violations and thus achieve justice, as opposed to reporting that is timed to gain a tactical advantage in litigation.

*ex parte* contact by attorneys and their paralegals with employees of opposing parties is inconsistent with the ethical standards that prevail in this district.

**b. The Withheld Document**

The second part of the sanctions motion concerns a written statement, dated August 15, 1995, of Barbara Anne Moore, apparently a former employee of the defendant's hotel. The statement appears in the record as Exhibit 14 to the Sanctions Motion and, to say the least, describes the hotel and, in particular, one of its top managers, in a highly unfavorable light.

On or about June 2, 1997 counsel for the plaintiff provided the defendant with a written set of objections and responses to the defendant's request for document production. Exh. 6 to Sanctions Motion. Responding to a request for "[a]ll statements taken from persons who witnessed, participated in or were otherwise privy to any of the events alleged in the Complaint," the plaintiff responded as follows:

OBJECTION: This document request is objected to on the ground that it seeks statements obtained from witnesses by the attorney for the Plaintiff in anticipation of litigation and such statements are protected by the work product privilege.

RESPONSE: Subject to and without waiving the foregoing objection, Plaintiff's counsel has obtained a written statement from former employee Barbara Moore.

*Id.* at 6. By letter dated August 25, 1997 counsel for the plaintiff again indicated to the defendant that any "information" the plaintiff had pertaining to Moore (as well as certain other potential witnesses) "was obtained by my office in preparation of litigation and thus is protected attorney work product privileged material." Exh. 13 to Sanctions Motion at 1.

Counsel for the defendant deposed Moore on September 18, 1997. It is undisputed that, as the deposition commenced, the defendant's attorney asked her counterpart whether he had a copy of

Moore's statement available so that she could question Moore about its allegedly privileged nature. Also undisputed is that the plaintiff's attorney at this point simply turned the document over to the defendant, informing opposing counsel that the delay was of her own making because she had failed to move to compel production of the document. Affidavit of Julie Boesky, Exh. 8 to Sanctions Motion, at ¶ 9. The defendant now contends that withholding Moore's statement until the commencement of her deposition was a sanctionable violation of Fed. R. Civ. P. 26(g)(2).<sup>7</sup> I most emphatically agree.

Counsel for the plaintiff contends he had a good faith basis for withholding the document, as required by Rule 26(g)(2), because it was "obtained by counsel through investigative efforts in anticipation of litigation" and was thus arguably protected work product. Plaintiff's Corrected Objection to Motion of Defendant for Sanctions (Docket No. 26) at 7. This position is so patently frivolous that its very assertion here, in a pleading signed by an attorney, is itself probably sanctionable under the provisions of Fed. R. Civ. P. 11 that are analogous to those in Rule 26(g)(2).

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<sup>7</sup> The cited rule requires that every discovery request, response or objection made by a represented party be signed by at least one attorney of record. Fed. R. Civ. P. 26(g)(2). The signature

constitutes a certification that to the best of the signer's knowledge, information, and belief, formed after a reasonable inquiry, the request, response, or objection is:

(A) consistent with these rules and warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law; [and]

(B) not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation . . . .

*Id.*

Rule 26 itself makes clear that the work product doctrine applies only to documents and tangible things that are “*prepared,*” as distinct from received, “in anticipation of litigation or for trial by or for another party or by or for that other party’s representative (including the other party’s attorney, consultant, surety, indemnitor, insurer, or agent).” Fed. R. Civ. P. 26(b)(3) (emphasis added). A document that was prepared by someone not a representative of the opposing party, even if ultimately obtained by counsel for the opposing party in anticipation of litigation, is not protected work product under any plausible construction of the rule.<sup>8</sup>

I must also agree with the defendant that the situation is rendered all the more egregious by the misleading manner in which the plaintiff invoked the work product doctrine in the first place. A reasonable person, even one trained in the law, would read the plaintiff’s reference to a statement “obtained by counsel through investigative efforts” as a representation that counsel had interviewed the witness and then committed the results to paper. This kind of practice could not be farther from what is contemplated by the following express requirement in Rule 26:

When a party withholds information otherwise discoverable . . . by claiming that it

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<sup>8</sup> Nor does the plaintiff gain any ground through her citation of *Hickman v. Taylor*, 329 U.S. 495 (1947), the Supreme Court’s seminal opinion discussing the work product doctrine. The central holding of *Hickman* is that

an attempt, without purported necessity or justification, to secure written statements, private memoranda and personal recollections *prepared or formed by an adverse party’s counsel in the course of his legal duties* . . . falls outside the arena of discovery and contravenes the public policy underlying the orderly prosecution and defense of legal claims.

*Id.* at 510 (emphasis added). Thus, in a passage quoted by the plaintiff, when the *Hickman* court described attorney work product as “written statements of witnesses . . . secured by an adverse party’s counsel in the course of preparation for possible litigation,” *id.* at 497, the court was referring to records of statements that were made to an attorney, not documents obtained by an attorney that reflect statements made to others.

is privileged or subject to protection as trial preparation material, the party shall make the claim expressly and shall describe the nature of the documents, communications, or things not produced or disclosed in a manner that, without revealing the information itself privileged or protected, will enable other parties to assess the applicability of the privilege or protection.

Fed. R. Civ. P. 26(b)(5). Attorneys who practice in this court, and who read the requirement contained in Rule 26(b)(5) as one allowing them to err on the side of obfuscation in asserting privileges to withhold otherwise discoverable material, do so at their peril.

What remains is to determine an appropriate sanction. Contending that it would not have gone to the trouble of deposing Moore had her statement been produced in a timely manner, the defendant seeks to recover its costs and attorney fees associated with the deposition. The defendant also requests that Moore's statement and any deposition testimony derived therefrom be stricken from the record, that the plaintiff be barred from calling Moore as a witness at trial, and that the court consider a fine and/or other unspecified sanctions as deemed appropriate by the court.

I agree with the defendant that, at a minimum, it should recover its costs and attorney fees incurred as a result of preparing for and conducting what turned out to be the unnecessary deposition of Moore. Simply entering an order to that effect, however, creates a significant risk that counsel for the plaintiff will view the Moore incident as a minor skirmish that an aggressive attorney might well risk losing in the interest of attaining an overall strategic advantage in the litigation. In the interest of deterrence, it is appropriate both to impose an additional monetary sanction and to specify that both this sanction and the burden of reimbursing the defendant for the expenses associated with the Moore deposition be borne by counsel for the plaintiff, as opposed to be plaintiff herself. Similarly, an order striking any evidence from either the summary judgment record or from the evidence that may be admitted at trial, would, in my judgment, punish the wrong person and might well have the

unwelcome effect of impeding the quest for the truth that is at the heart of any lawsuit.

Having thus determined that the sanctions motion should not have any effect on the summary judgment record as otherwise developed by the parties, I now turn to the summary judgment motion itself.

## **II. Summary Judgment Standards**

Summary judgment is appropriate only if “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 a judgment as a matter of law.” Fed. R. Civ. P. 56(c). “In this regard, ‘material’ means that a contested fact has the potential to change the outcome of the suit under the governing law if the dispute is resolved favorably to the nonmovant. By like token, ‘genuine’ means that ‘the evidence about the fact is such that a reasonable jury could resolve the point in favor of the nonmoving party . . . .’” *McCarthy v. Northwest Airlines, Inc.*, 56 F.3d 313, 315 (1st Cir. 1995) (citations omitted). The party moving for summary judgment must demonstrate an absence of evidence to support the nonmoving party’s case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). In determining whether this burden is met, the court must view the record in the light most favorable to the nonmoving party and “give the party the benefit of all reasonable inferences to be drawn in its favor.” *Ortega-Rosario v. Alvarado-Ortiz*, 917 F.2d 71, 73 (1st Cir. 1990). Once the moving party has made a preliminary showing that no genuine issue of material fact exists, “the nonmovant must contradict the showing by pointing to specific facts demonstrating that there is, indeed, a trialworthy issue.” *National Amusements, Inc. v. Town of Dedham*, 43 F.3d 731, 735 (1st Cir.) (citing *Celotex*, 477 U.S. at 324), *cert. denied*, 132 L. Ed. 2d 255 (1995); Fed. R. Civ. P. 56(e). “This is especially true in respect to claims or issues on

which the nonmovant bears the burden of proof.” *International Assn. of Machinists & Aerospace Workers v. Winship Green Nursing Ctr.*, 103 F.3d 196, 200 (1st Cir. 1996) (citations omitted).

### **III. Factual Context**

Viewed in the light most favorable to the plaintiff as the non-moving party, the summary judgment record reveals the following relevant facts: The plaintiff was employed by the defendant as a dining room supervisor at the Atrium Hotel in Brunswick, Maine from December 14, 1994 to January 4, 1995. Affidavit of Robert Rosenthal (“Rosenthal Aff.”), Exh. A to Motion of Defendant Bo-Ed, Inc. for Summary Judgment, etc. (“Defendant’s Motion”) (Docket No. 6), at ¶¶ 8, 14. The defendant’s employee handbook provided that all new employees were on probationary status for the first 31 days of their employment. *Id.* at ¶ 9. The plaintiff was an employee at will. *Id.* at ¶ 29.

Following a New Year’s Eve party at the hotel, early in the morning of January 1, 1995, the plaintiff participated in a social gathering with fellow employees on the hotel premises that involved the consumption of alcoholic beverages. Deposition of Felicia E. Gavett (“Gavett Dep.”) (Docket No. 14) at 114-22. The plaintiff began drinking only after she had turned in her hotel keys and had completed her responsibilities as dining room supervisor. *Id.* at 121. A fellow employee, identified by the plaintiff as “Rosalyn,” a person whom the plaintiff considered to have been superior to her in the hotel’s hierarchy, was present. *Id.* at 117. During the revelry, feeling the effects of champagne, the plaintiff lifted her skirt, exposing her thighs. *Id.* at 119-21. In addition to the foregoing, hotel general manager Robert Rosenthal received complaints that the plaintiff’s performance was substandard during her employment because the nightly clean-up of the hotel kitchen was not being appropriately supervised and that the cleanups were unsatisfactory as a result. Rosenthal Aff. at ¶ 10.

In the early evening of January 1, 1995 the plaintiff received a telephone call during her work

at the hotel from her supervisor, assistant general manager Colleen Sebastian. Affidavit of Colleen Sebastian Lecalvez (“Sebastian Aff.”), Exh. B to Defendant’s Motion, at ¶ 2; Gavett Dep. at 131-32. Sebastian was calling from her home to tell the plaintiff that a “VIP” named Angie Cialdea was staying at the hotel, that Cialdea was “a very lonely man,” and that the plaintiff “was to do everything in [her] power to make him happy.” *Id.* at 133. Sebastian also informed the plaintiff that Cialdea was a good friend of Rosenthal’s. *Id.* at 139.

Cialdea was a frequent guest at the hotel. Deposition of Robert Rosenthal (“Rosenthal Dep.”) (Docket No. 13) at 87-88. During at least parts of the plaintiff’s tenure at the hotel, Cialdea was actually living there. *Id.* at 88. He had been a frequent guest of the hotel for several years, sometimes staying there for months at a time. *Id.* at 88-89. Rosenthal regarded him as a free-spender and a good customer of the hotel. *Id.* at 139-41. On at least one occasion prior to the events giving rise to this lawsuit, Cialdea had hugged a female employee of the hotel and, by doing so, made her uncomfortable. Deposition of Elizabeth A. Strout (“Strout Dep.”) (Docket No. 15) at 15. The plaintiff believed that Sebastian’s instructions to her regarding Cialdea had sexual connotations, and that she was being instructed to have sex with him. Gavett Dep. at 134-35.

Immediately following her phone conversation with the plaintiff, Sebastian spoke with Cialdea. *Id.* at 138. Thereafter, Cialdea asked the plaintiff to join him at his table in the hotel dining room for a drink and dinner, the plaintiff declined politely, Cialdea persisted and the plaintiff ultimately sat down at his table and had a non-alcoholic beverage. *Id.* at 145, 147. Cialdea dominated the conversation with talk of how he had dated employees of the hotel, the special privileges he enjoyed at the hotel “to come and go as he pleased,” and other braggadocio. *Id.* at 148. He stated that he had, on at least one prior occasion, dated one of the hotel’s hostesses and one of its

waitresses, and that there had even been talk of marriage with the former. *Id.* at 148-49.

By 7 p.m. Cialdea had finished his meal and gone to the hotel bar, where he remained until it closed at approximately 11 p.m. *Id.* at 156. The plaintiff was working during this period; every time she would walk by Cialdea in the bar, he would ask her to hurry up and finish her work so that she could join him. *Id.* at 157. She indicated that she would do so as soon as she had completed her work. *Id.* At approximately 10:30, when the restaurant had closed down, the plaintiff finally joined Cialdea at the bar. *Id.* When the bar closed at 11, the plaintiff accepted Cialdea's invitation to join him in his room for a glass of wine. *Id.* at 160. She did this in direct response to the order she had received from Sebastian to do everything in her power to make Cialdea happy. *Id.* at 210. She would not otherwise have gone to his room, and was not sexually attracted to him. *Id.*

During the approximately 45 minutes that she was in Cialdea's room, she mentioned that she was happily married and had a son. *Id.* at 165. At one point, the plaintiff got up from her chair to use the bathroom and, when she emerged, Cialdea attempted to kiss her by grabbing her shoulders and pulling her towards him. *Id.* at 166. She pushed Cialdea away, stated that she was happily married and not interested in any intimacies with Cialdea, and told him that she intended to leave. *Id.* at 166-67. She then did so. *Id.* at 167.

The plaintiff was not scheduled to work at the hotel on January 2 or 3, 1997. *Id.* at 172-73. She reported for work as scheduled at approximately 4 p.m. on January 4. *Id.* at 173. Within a few minutes of her arrival, Sebastian informed the plaintiff that she was being discharged from her job at the hotel. *Id.* at 174, 177. Sebastian stated that the reasons for the termination were her inappropriate behavior on New Year's Eve and problems with the level of the cleanliness of the kitchen floor. *Id.* at 177. The plaintiff responded by describing these reasons as "garbage" because

cleaning the kitchen floor was not her responsibility, and because Sebastian had previously been told about everything that happened on New Year's Eve and had characterized it as "no big deal." *Id.* at 177. The plaintiff pressed Sebastian for what the plaintiff characterized as the real reason for her discharge, and Sebastian responded that she could not say because she was "on the clock," but that she would give the plaintiff "page two" over coffee sometime. *Id.* at 177-78. Sebastian also told the plaintiff she was a good employee and that Sebastian would be willing to give her a positive recommendation. *Id.*

#### **IV. Discussion**

##### **a. Sexual Harassment**

The defendant contends that it is entitled to summary judgment on Count I (Title VII) and Count II (Maine Human Rights Act) because the plaintiff fails to make out a triable case of quid pro quo sexual harassment. The plaintiff concedes that her harassment case rises and falls on the quid pro quo theory, and appropriately does not contest the assertion that federal case law arising under Title VII will be dispositive of both the federal claims and those arising under the Maine Human Rights Act. *See Morrison v. Carleton Woolen Mills, Inc.*, 108 F.3d 429, 436 n.3 (1st Cir. 1997).

Discussing a case in which an employee was allegedly terminated after rejecting the sexual advances of her supervisor, the First Circuit has laid out the following elements of a claim of quid pro quo sexual harassment: (1) the plaintiff must be a member of a protected group, (2) the sexual advances must be unwelcome, (3) the harassment must be sexually motivated, (4) the employee's reaction to the sexual advances must have "affected a tangible aspect of her employment," and (5) *respondeat superior* liability must be established. *Chamberlin v. 101 Realty, Inc.*, 915 F.2d 777, 783 (1st Cir. 1990). The defendant first contends it is entitled to summary judgment because evidence

is lacking that the plaintiff's rejection of the sexual advance in question was the reason for her termination. According to the defendant, this is so because it had legitimate reasons to fire the plaintiff based on her job performance and because Rosenthal made the decision to fire the plaintiff immediately upon returning from a vacation without any knowledge of the Cialdea incident.

This version of events, if credited by the jury, would certainly defeat the sexual harassment claims. At the summary judgment stage, however, the court is constrained by the requisite plaintiff-favorable view of the record; that record is more than sufficient to sustain a reasonable inference that the plaintiff's termination was causally linked to the Cialdea incident. This is so notwithstanding the contention that Rosenthal was out of the country and on vacation from mid-December of 1994 through January 3, 1995, that he first returned to the hotel on January 4, that he had no knowledge of the Cialdea incident when he made the decision to fire the plaintiff and, indeed, that no member of the defendant's management team "had any knowledge of [the plaintiff's] socializing with Mr. Cialdea in his hotel room" until the plaintiff made a complaint to the Maine Human Rights Commission. *See* Statement of Undisputed Material Facts in Support of Defendant's Motion for Summary Judgment (Docket No. 7) at ¶¶ 22-30. A reasonable jury could disbelieve these assertions in light of the explicit and innuendo-tinged instructions to make Cialdea happy, the proximity of the plaintiff's firing to the Cialdea incident, and the explicit suggestion from Sebastian that the stated reasons for firing the plaintiff were pretextual. *See Playboy Enters., Inc. v. Public Serv. Comm'n of Puerto Rico*, 906 F.2d 25, 40 (1st Cir. 1990) (non-moving party may generate factual issue circumstantially by "showing the existence of specific facts which would give a reasonable jury cause to disbelieve assertions supporting the movant's version").

Next the defendant takes the position that the plaintiff cannot establish the requisite

*respondeat superior* liability, given that the sexual advance in question was made by a person who was not in the defendant's employ. I disagree. Sexual advances that are actionable as quid pro quo harassment are not limited to those made by the victim's immediate supervisor — as long as there is a causal nexus between the rejection of the advance(s) and the harm suffered. See *Jones v. Clinton*, 974 F.Supp. 712, 722-23 (E.D.Ark. 1997). Indeed, the applicable regulations promulgated by the Equal Employment Opportunity Commission make clear that an employer may be responsible for workplace sexual harassment committed by non-employees “where the employer (or its agents or supervisory employees) knows or should have known of the conduct and fails to take immediate and appropriate corrective action.” 29 C.F.R. § 1604.11(e); accord *Wenner v. C.G. Bretting Mfg. Co.*, 917 F.Supp. 640, 646 (W.D.Wis. 1995) (sexual advances of customer may be attributable to employer when employer “made clear to its employee that submission to the customer’s advances was a condition of employment”). In the circumstances suggested by a plaintiff-favorable view of the record, a reasonable jury could conclude that submission to Cialdea’s sexual advances was effectively a condition of the plaintiff’s employment.

The defendant finally contends that the plaintiff’s case is fatally flawed because Sebastian’s single instruction to make Cialdea “happy” cannot constitute a sexual advance that would form the basis of a harassment claim. According to the defendant, the remark was too ambiguous to trigger liability. The cases cited by the defendant to support this proposition do not support it. *Galloway v. General Motors Serv. Parts Operations*, 78 F.3d 1164 (7th Cir. 1996), *Mart v. Dr. Pepper Co.*, 923 F.Supp. 1380 (D.Kan. 1996), and *Schweitzer-Reschke v. Avnet, Inc.*, 874 F.Supp. 1187 (D.Kan. 1995), all involve claims of “hostile environment” harassment and thus offer no insight into when a remark that is not sexually explicit can nevertheless trigger a claim of quid pro quo harassment.

In my opinion, a reasonable jury could conclude that the instruction given to the plaintiff by Sebastian, in combination with the sexual advance made by Cialdea, is actionable.

### **b. Retaliation**

The defendant advances two arguments for why it is entitled to summary judgment on the plaintiff's claims of retaliatory discharge under Title VII (Count III) and the Maine Human Rights Act (Count IV). First, the defendant contends that the retaliation claim amounts to nothing more than speculation on the part of the plaintiff. Second, the defendant contends that, to the extent the retaliation claims are based on a letter sent to the plaintiff on July 27, 1995, the plaintiff has failed to exhaust administrative remedies and thus the defendant is entitled to summary judgment on the Title VII claim. I take up these contentions in reverse order.

There is no reference to the July 27, 1995 letter in the defendant's statement of material facts submitted pursuant to Local Rule 56. Therefore, the letter is not properly among the evidence the court considers in assessing the defendant's entitlement to summary judgment. *See Pew v. Scopino*, 161 F.R.D. 1,1 (D.Me. 1995) ("The parties are bound by their [Local Rule 56] Statements of Fact and cannot challenge the court's summary judgment decision based on facts not properly presented therein."). Moreover, even if the court were to consider this letter, and determine the extent to which it forms the basis of any retaliation claim, there would be no entitlement to summary judgment based on the exhaustion doctrine. Although exhaustion of administrative remedies is indeed a prerequisite to the litigation of any Title VII in this court, *see Lawton v. State Mut. Life Assurance Co. of Am.*, 101 F.3d 218, 221 (1st Cir. 1996), it is undisputed that the plaintiff has exhausted administrative remedies as to her sexual harassment claim. The July 27, 1995 letter, from Rosenthal to the plaintiff, advises the plaintiff that, subsequent to her termination by the defendant, the defendant "learned that

[she] engaged in serious misconduct at work which would have caused [the defendant] to terminate [her] employment had [it] been aware of the misconduct at the time.” Exh. G to Defendant’s Memorandum. To the extent this letter was written in retaliation for the plaintiff’s assertion of a sexual harassment claim, the allegation of retaliation is an “ancillary” claim of the sort discussed in *Borase v. M/A-COM, Inc.*, 906 F.Supp. 65 (D. Mass. 1995). As the District Court for the District of Massachusetts noted in *Borase*, the question of whether such ancillary claims require exhaustion of administrative remedies remains open in the First Circuit, *id.* at 67 (citing *Johnson v. General Electric*, 840 F.2d 132, 139 (1st Cir. 1988)), but every circuit to have confronted the question has answered it in the negative, *id.* at 66. Thus, the *Borase* court concluded it had jurisdiction of an ancillary, non-exhausted claim, *id.* at 69, and the defendant offers no argument for why this principle is incorrect as a matter of law. The defendant is not entitled to summary judgment on Count III based on the exhaustion doctrine.

Bearing in mind the principle noted *supra* that Title VII case law will also be dispositive of the claims arising under the Maine Human Rights Act, I am also unable to agree with the defendant that the plaintiff fails to make out a *prima facie* case of retaliation. In *Bowen v. Department of Human Servs.*, 606 A.2d 1051 (Me. 1992), the Law Court crafted this description of a *prima facie* case of actionable retaliation under Title VII: The plaintiff “must show that (1) she engaged in a protected activity, (2) her employer thereafter subjected her to adverse employment action, and (3) a causal link existed between the two events.” *Id.* at 1054 (citing *Cohen v. Fred Meyer Inc.*, 686 F.2d 793, 796 (9th Cir. 1982). “[P]rotected activity” in this context means conduct by the plaintiff “that is in opposition to an unlawful employment practice of the defendant.” *Id.* (citing *Payne v. McLemore’s Wholesale & Retail Stores*, 654 F.2d 1130, 1136 (5th Cir. Unit A 1981)). The

defendant invokes this formulation, without objection from the plaintiff.

Conceding that its retaliation claim is grounded in the July 27, 1994 letter, the plaintiff asserts that this communication is “clearly retaliatory because the misconduct referred to as the justification for the termination was actually information the employer admits elsewhere it was aware of by January 4, 1995,” which was the date of the plaintiff’s discharge. Plaintiff’s Objection to Defendant’s Motion for Summary Judgment (“Plaintiff’s Memorandum”) (Docket No. 10) at 16. Leaving aside an obvious question not raised by the defendant, i.e., whether an employer can retaliate against an employee by firing her from a job from which it has already discharged her, the court is again hampered by the lack of reference to the letter in question, or the circumstances surrounding it, in either party’s Local Rule 56 factual statement. Where neither side has therefore presented the court with properly supported factual assertions that are relevant to the issues at hand, summary judgment on the retaliation claims must be denied because the moving party has failed to demonstrate its entitlement to judgment as a matter of law. *See McDermott v. Lehman*, 594 F.Supp. 1315, 1321 (D.Me. 1984) (citations omitted).<sup>9</sup>

## V. Conclusion

For the foregoing reasons, the defendant’s motion for sanctions is **GRANTED** and counsel

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<sup>9</sup> In her opposition to the summary judgment motion, the plaintiff devotes considerable attention to matters that have no bearing on the defendant’s contentions concerning its entitlement to judgment as a matter of law. *See, e.g.*, Plaintiff’s Memorandum at 4-6 (describing Sebastian’s alleged behavior with other employees and guests of the hotel); *id.* at 10-11, 16 (alleging that defendant did not provide appropriate sexual harassment training for its employees); *id.* at 15 (asserting that Maine Human Rights Commission findings are admissible evidence in federal court); *id.* at 15 (arguing that evidence of similar incidents of sexual harassment of other employees admissible). Although the defendant allowed itself to be drawn into debate on at least some of these issues, *see Reply of Defendant Bo-Ed, Inc., etc.* (Docket No. 18) at 1-3, 7, I do not discuss them beyond noting the obvious waste of attorney resources.

for the plaintiff are *personally* directed to reimburse the defendant for its costs and attorney fees incurred in preparing for and conducting the Moore deposition and, in addition, to remit the sum of \$500 to the clerk of this court within ten days of the docketing of this order;<sup>10</sup> further, I recommend that the defendant's motion for summary judgment be **DENIED**.

**NOTICE**

*A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.*

*Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.*

*Dated this 1st day of December, 1997.*

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*David M. Cohen  
United States Magistrate Judge*

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<sup>10</sup> Counsel for the plaintiff are not to obtain reimbursement of these amounts from the plaintiff directly or indirectly.