

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

<i>ELIZABETH DUFRESNE,</i>)	
)	
<i>Plaintiff</i>)	
)	
<i>v.</i>)	<i>Docket No. 98-445-P-H</i>
)	
<i>COOPER INDUSTRIES, INC.</i>)	
)	
<i>Defendant</i>)	

**RECOMMENDED DECISION ON DEFENDANT’S MOTION
FOR SUMMARY JUDGMENT**

The defendant, Cooper Industries, Inc., moves for summary judgment on all counts of the plaintiff’s complaint in this action alleging employment discrimination based on sex and pregnancy. I recommend that the court grant the motion in part and deny it in part.

I. 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 that party the benefit of all reasonable inferences in its favor. *Cadle Co. v. Hayes*, 116 F.3d 957, 959 (1st Cir. 1997). 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. 1995) (citing *Celotex*, 477 U.S. at 324); 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 Ass'n of Machinists & Aerospace Workers v. Winship Green Nursing Ctr.*, 103 F.3d 196, 200 (1st Cir. 1996) (citations omitted).

II. Factual Background

The following undisputed material facts are appropriately supported in the summary judgment record.¹ The named defendant is apparently related to Arrow Hart Wiring Devices

¹ The affidavit of Brian Rayl, submitted by the defendant in support of its motion, is made at least in part on information and belief. Fed. R. Civ. P. 56(e) requires affidavits submitted in connection with a motion for summary judgment to be made upon personal knowledge only. The submissions of both parties are replete with testimony that would be considered hearsay if an objection were made. Neither party has made any objection on these bases, however, so I will consider this evidence. *See Rivas v. Federacion de Asociaciones Pecuarias de Puerto Rico*, 929 F.2d 814, 819 n.13 (1st Cir. 1991). In addition, the defendant did not submit the separate statement responding to the plaintiff's opposing statement of material facts that is required by this court's Local Rule 56(d), instead including in its reply memorandum attacks on two entries in the plaintiff's opposing statement. Defendant Cooper Industries, Inc.'s Reply to Plaintiff's Opposition to Motion (continued...)

(“Arrow Hart”) in some way neither party chooses to make clear to the court in the summary judgment record² that makes the defendant liable for damages that may be assessed against Arrow Hart. Arrow Hart manufactures wiring devices in a plant located in Brunswick, Maine. Affidavit of Brian Rayl (“Rayl Aff.”), attached to Cooper Industries’ Statement of Undisputed Material Facts (“Defendant’s SMF”) (Docket No. 9), ¶ 4. The operations manager, the senior employee in the Brunswick facility, reports directly to Arrow Hart’s general manager who is located in Syracuse, New York. *Id.* ¶ 8. In January 1998 the plaintiff and an individual named Mininger were unit leaders at the Brunswick plant and the likely internal candidates for the position of operations manager, which was about to be vacated by one Proscia. *Id.* ¶¶ 12, 14.

Both the plaintiff and Mininger hold degrees in mechanical engineering and masters degrees in business administration. *Id.* ¶ 15; Defendant’s SMF ¶ 10; Plaintiff Elizabeth Dufresne’s Response to Defendant Cooper Industries’ Statement of Undisputed Material Facts (“Plaintiff’s Responding SMF”) (Docket No. 12) ¶ 10. Mininger was first employed at the Brunswick facility in 1994; the plaintiff began working there in 1990. Rayl Aff. ¶ 16; Defendants’ SMF ¶ 10; Plaintiffs’ Responding SMF ¶ 10. For some time prior to his departure, Proscia treated the plaintiff as his second in command at the Brunswick facility. Deposition of Richard Proscia (“Proscia Dep.”), excerpts attached as Exhibit 2 to Plaintiff’s Statement of Material Facts (“Plaintiff’s SMF”) (Docket No. 11), at 45. Mininger had less supervisory experience than the plaintiff had. *Id.* at 42-43.

¹(...continued)

for Summary Judgment (Docket No. 13) at 4-5. In the absence of an appropriate denial of a party’s stated material facts, they shall be deemed admitted. Local Rule 56(e).

² The defendant states in its final pretrial memorandum, filed on September 24, 1999, that Arrow Hart is a division of Cooper Industries. Defendant Cooper Industries, Inc.’s Final Pretrial Memorandum (Docket No. 16) at 1.

Senior management at Arrow Hart felt that Proscia's style of leadership had affected the Brunswick facility adversely and they wanted to replace him with a person who had a less confrontational style. Rayl Aff. ¶ 22. The plaintiff and Mininger were interviewed for the position in Syracuse in February 1998. *Id.* ¶ 17; Deposition of Elizabeth Dufresne ("Plaintiff's Dep."), attached to Defendant's SMF, at 34. Raymond Rosenberger, general manager of Arrow Hart Wiring Devices, made the decision to hire Mininger for the position, after gaining the approval of his immediate supervisor. Deposition of Raymond E. Rosenberger and Brian D. Rayl ("Rule 30(b)(6) Dep."), excerpts attached as Exhibit 5 to Plaintiff's SMF, at 5, 26-27. Mininger was promoted to the position of operations manager effective March 1, 1998. Rayl Aff. ¶ 30.³

The plaintiff was pregnant when the decision to promote Mininger was made. Proscia Dep. at 52; Rule 30(b)(6) Dep. at 66. Rosenberger subsequently told the plaintiff that she did not receive the promotion due to "poor people skills." Plaintiff Elizabeth Dufresne Answers First Set of Interrogatories and Request for Production of Documents Propounded by Defendant, Exhibit 16 to Plaintiff's SMF, at Question 9, p. 4. The plaintiff began a maternity leave from Arrow Hart after May 28, 1998. Plaintiff's Dep. at 16. In mid-June 1998 the plaintiff responded to an advertisement for the position of operations manager at Brunswick Technology, Inc. in Brunswick. *Id.* at 44. She was offered this job and accepted it; she was paid approximately \$7,000 more than her salary had been at Arrow Hart. *Id.* at 45-46. The plaintiff resigned from Arrow Hart effective July 31, 1998. Cooper Industries, Inc. Exempt Status Change Form, Exhibit 15 to Plaintiff's SMF.

This action was filed on December 23, 1998.

³ The Rayl affidavit gives the date as March 1, 1999, but that is obviously a typographical error. See Plaintiff's Responding SMF ¶ 21.

III. Discussion

The complaint asserts claims in three counts. Count I alleges a violation of 42 U.S.C. § 2000e-2(a) (“Title VII”), specifically, employment discrimination and constructive discharge based on sex. Count II alleges a violation of 42 U.S.C. § 2000e-2(a)⁴ (the “Pregnancy Discrimination Act”). Count III alleges a violation of the Maine Human Rights Act, 5 M.R.S.A. § 4551 *et seq.*, specifying discrimination based on sex and pregnancy. Complaint (Docket No. 1) ¶¶ 16-25.

A. Count I

The federal statute invoked by the plaintiff provides in relevant part as follows:

It shall be an unlawful employment practice for an employer —

(1) to fail or refuse to hire or to discharge any individual, or otherwise 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). A private civil action for violation of this statute is provided by 42 U.S.C. § 2000e-5(f).

On this count, the defendant contends that the plaintiff cannot establish either a *prima facie* case or that the reason given by the defendant for promoting Mininger instead of her is a pretext and that its decision was in fact based on her gender, for either her claim of discrimination in the denial of the promotion or her claim of constructive discharge.⁵ Defendant Cooper Industries, Inc.’s

⁴ The term “because of . . . sex” in section 2000e-2(a) is defined by 42 U.S.C. § 2000e(k) to include pregnancy, childbirth or related medical conditions.

⁵ The plaintiff does not dispute the defendant’s statement that she offers no direct evidence of discrimination. *Cf. Shorette v. Rite Aid of Maine, Inc.*, 155 F.3d 8, 13 (1st Cir. 1998). When only circumstantial evidence of discrimination is presented, the burden-shifting analysis introduced in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973), is applied. *Rossy v. Roche Prods., Inc.*, 880 F.2d 621, 624 (1st Cir. 1989).

Motion for Summary Judgment with Incorporated Memorandum of Law (“Defendant’s Memorandum”) (Docket No. 8) at 6-9.

The plaintiff responds to the defendant’s arguments by contending that she has submitted sufficient evidence to establish a *prima facie* case on both claims and to show that the defendant’s proffered reason for its decision is a pretext for gender-based discrimination. Plaintiff’s Objection to Defendant’s Motion for Summary Judgment (“Plaintiff’s Objection”) (Docket No. 10) at 3-15.⁶

1. The failure-to-promote claim.

The inquiry in a Title VII case is whether the defendant intentionally discriminated against the plaintiff. . . . [A] *prima facie* case may be established by showing by a preponderance of the evidence that: 1) the plaintiff is within a class protected by Title VII; 2) she applied for and was qualified for the position for which the employer was seeking a replacement; 3) despite her qualifications she was rejected; and 4) after her rejection, the position was filled by a person not within the protected class.

Rossy, 880 F.2d at 624 (citation and internal quotation marks omitted). The person who fills the position must be shown to be no more qualified than the plaintiff. *Ramos v. Roche Prods., Inc.*, 936

⁶ The plaintiff contends that “whether the Plaintiff has in fact made out a *prima facie* case becomes irrelevant if she is a member of a protected class and ‘the employer has come forward with its explanation,’ . . . as the Defendant has done in this case,” Plaintiff’s Objection at 3, citing *Cumpiano v. Banco Santander Puerto Rico*, 902 F.2d 148, 155 (1st Cir. 1990), as her only argument in response to the defendant’s contention that she has not submitted enough evidence to establish a *prima facie* case. This contention is plainly incorrect. In *Cumpiano*, the First Circuit was discussing the approach to be taken by an appellate court and by the federal district court after a bench trial. 902 F.2d at 151, 155. As the First Circuit has subsequently and repeatedly made clear, when the question is before the district court on a motion for summary judgment, “a plaintiff must adduce some minimally sufficient evidence to support a jury finding that he has met his burden at the first stage, and again at the third stage” *Vega v. Kodak Caribbean, Ltd.*, 3 F.3d 476, 479 (1st Cir. 1993). Because much of the evidence discussed by the plaintiff with respect to pretext is also applicable to her *prima facie* case, and because this court must determine a motion for summary judgment on the merits even when the nonmoving party submits no opposition, *Redman v. FDIC*, 794 F. Supp. 20, 22 (D. Me. 1992), I will proceed to examine the sufficiency of the plaintiff’s *prima facie* case as it appears from the record before the court.

F.2d 43, 47 (1st Cir. 1991). Once the plaintiff has established a *prima facie* case, the burden of production shifts to the defendant to articulate a legitimate, nondiscriminatory reason for its action. *Id.* Thereafter, the plaintiff must demonstrate that the reason or reasons stated by the defendant were a pretext for discrimination and that unlawful discrimination was the actual reason for the defendant's action. *Thomas v. Eastman Kodak Co.*, 183 F.3d 38, 56 (1st Cir. 1999). The burden of persuasion remains throughout with the plaintiff.

The defendant contends that the plaintiff cannot establish the fourth element of her *prima facie* claim because she cannot show that Mininger was equally or less qualified for the position than she was. Defendant's Memorandum at 7-8. According to the defendant, the plaintiff was less qualified for the position because her leadership style was more autocratic than Mininger's and because she had less developed interpersonal skills, while both candidates were "similarly qualified with regard to education and experience." *Id.* at 8. While the summary judgment record raises no question about the similarity of the candidates' education, the same cannot be said of their experience. Mininger had been at the Brunswick plant since 1994, Defendant's SMF ¶ 9, Plaintiff's Responding SMF ¶ 9, while the plaintiff had been there since 1990, Plaintiff's SMF 3.⁷ The plaintiff had three years and seven months experience in a supervisory position at the time Rosenberger selected a replacement for Proscia, Plaintiff's SMF ¶ 3, while Mininger had only one year of such experience, *id.* ¶ 4. When Proscia had to be away from the plant, he left the plaintiff in charge, not Mininger. Proscia Dep. at 45.

The plaintiff does not dispute the defendant's statement that it wished to replace Proscia with

⁷ The defendant did not file the response to the plaintiff's statement of material facts required by this court's Local Rule 56(d). Accordingly, any facts included in the plaintiff's statement are to be deemed admitted if properly supported by citations to the record. Local Rule 56(e).

an individual with a less confrontational style of management, Defendant's SMF ¶ 14, Plaintiff's Responding SMF ¶ 14, but she does dispute the evidence submitted by the defendant in support of its position that Mininger was less confrontational than she was as a supervisor and that Mininger had better interpersonal skills than she did. While the evidence she cites is not as one-sided in favor of her interpersonal skills as she presents it to be, *see, e.g.*, Personal Progress Review dated December 19, 1997, Exh. 11 to Plaintiff's SMF, at 000048 ("Brunswick employees have reported that Beth is short tempered and sometimes curt in her response. As one of our Unit Leaders Beth needs to give more attention to reflective listening and to building relationships and support with employees throughout the plant."), and her own view of her abilities⁸ cannot be determinative, *Shorette*, 155 F.3d at 15, she does present sufficient information to allow the court to determine that she could establish a *prima facie* case that Mininger was not more qualified than she in terms of managerial style. *E.g.*, Proscia Dep. at 35 (not aware that plaintiff had been criticized for having dictatorial style), 38 (not aware of any issues concerning plaintiff's leadership style that differed from those for any other employee), 64 (no one told him there was problem with plaintiff's overall style);⁹ Plaintiff's Dep. at 29 (no one told her that she was hard on people or should be more relaxed in dealing with employees she supervised); Summary Appraisal dated 11/02/94, Exh. 6 to Plaintiff's SMF, at 1 ("Beth has worked hard at developing a team atmosphere among her direct reports.");

⁸ The plaintiff cites her own interrogatory responses as evidence of her interpersonal skills and to challenge the defendant's evidence on this issue. Plaintiff's SMF ¶¶ 14, 18, 19.

⁹ The defendant dismisses Proscia's testimony as "biased opinions," Defendant Cooper Industries, Inc.'s Reply to Plaintiff's Opposition to Motion for Summary Judgment ("Defendant's Reply") (Docket No. 13) at 3, but credibility is an issue reserved for the finder of fact. Just as a challenge to the credibility of a movant's witnesses, standing alone, does not create a genuine issue of material fact, *Moreau v. Local Union No. 247*, 851 F.2d 516, 519 (1st Cir. 1988), a challenge to the credibility of a nonmovant's witness cannot demonstrate the absence of such an issue.

Summary Appraisal dated 11/02/94, Exh. 9 to Plaintiff's SMF, at 1 ("Beth . . . works hard at maintaining good relations with all employees. . . . She is widely respected for her ability to work with people at all levels."). Nothing more is required for purposes of summary judgment.

The defendant has articulated a legitimate, nondiscriminatory reason for its choice of Mininger for the position — that his leadership traits and interpersonal skills were more suited to its needs for the Brunswick facility than were the plaintiff's. The inquiry thus shifts to the plaintiff's proffered evidence on the issue of pretext, without the benefit of the presumption of discrimination that accompanies the *prima facie* case analysis. The defendant contends that "[t]here is no evidence that Plaintiff's gender was the true reason for her failure to be selected for the promotion and that the stated reasons were offered to cover up that she was not promoted because of her gender." Defendant's Memorandum at 9. While this is a closer question in this action than that of the existence of a *prima facie* case, I conclude that the plaintiff has offered sufficient evidence of pretext and actual intent to allow this claim to go to a jury.

In addition to challenging the defendant's evidence offered in support of its stated reason for the decision to promote Mininger rather than the plaintiff, which she has done, the plaintiff must offer evidence that would allow a jury to find that the defendant's real reason for the decision was the plaintiff's gender. *Shorette*, 155 F.3d at 13; *Menard v. First Sec. Servs. Corp.*, 848 F.2d 281, 287 (1st Cir. 1988). On this point, the plaintiff has provided the following evidence: (i) all of the people who reported to Rosenberger at the time he made the decision to promote Mininger were men, Rule 30(b)(6) Dep. at 61; (ii) Rosenberger "never had a kind word to say about any female manager within the organization," Proscia Dep. at 33; (iii) Rosenberger "always made a point" to tell Proscia how

incompetent the female managers he worked with at the Syracuse plant were, *id.* at 33-34;¹⁰ (iv) he made off-color remarks to Proscia about women at Arrow Hart, *id.* at 34; (v) on at least three occasions when Rosenberger visited the Brunswick plant he visited all of Proscia's "direct reports" except the plaintiff, who was the only female "direct report," *id.* at 50; (vi) Rosenberger did not talk with the plaintiff about business issues, Plaintiff's Dep. at 9-10; and (vii) when Proscia was away and the plaintiff was in charge of the Brunswick plant, Rosenberger would call the people who worked for her to get information rather than contacting her directly, *id.* at 42. This evidence, with reasonable inferences drawn in favor of the plaintiff, is sufficient to allow her to present her claim of intentional discrimination to a jury.

The defendant is not entitled to summary judgment on that portion of Count I that alleges discrimination in the decision to deny the plaintiff's application for the position of operations manager.

2. The constructive discharge claim.

In the context of a claim of constructive discharge, the First Circuit has "long applied an 'objective standard' in determining whether an employer's actions have forced an employee to resign." *Serrano-Cruz v. DFI Puerto Rico, Inc.*, 109 F.3d 23, 26 (1st Cir. 1997). In order to show that a constructive discharge has occurred, the plaintiff must demonstrate that "the new working conditions would have been so difficult or unpleasant that a reasonable person in the employee's shoes would have felt compelled to resign." *Id.*, quoting *Alicea Rosado v. Garcia Santiago*, 562 F.2d 114, 119 (1st Cir. 1977). "An employee may not, therefore, be unreasonably sensitive to a

¹⁰ Such statements are also probative of pretext. *Hodgens v. General Dynamics Corp.*, 144 F.3d 151, 171 (1st Cir. 1998).

change in job responsibilities.” *Id.* “Not only is it necessary to show intolerable working conditions, but the plaintiff must also allege facts sufficient to prove that these conditions were intentionally created by the employer for the purpose of inducing the employee’s resignation” *Victory v. Hewlett-Packard Co.*, 34 F.Supp.2d 809, 826 (E.D.N.Y. 1999).

Here, the plaintiff, while acknowledging the objective standard, relies primarily on evidence of her own reaction to the promotion of Mininger to the position for which she had applied and events surrounding that promotion. She “felt that it would undermine [her] authority if [her subordinates] knew that [she] had applied but was not awarded the position,” Plaintiff’s Answers to Interrogatories, Question 10, at 5, although she does not allege that any representative of the defendant actually made it known to her subordinates that she had in fact applied. During a visit to the Brunswick plant after the plaintiff had been interviewed for the position but before it had been filled, Rosenberger asked a group of unidentified “mainly male” employees “inappropriate leading,” but otherwise unspecified, questions about her “ability to operate the facility.” *Id.* One of these employees told the plaintiff that he felt Rosenberger had expressed a lack of confidence about her and how she treated employees. *Id.* Rosenberger’s “comments” became “public knowledge” and resulted in “rumor and innuendo” that made the “work environment very uncomfortable” for the plaintiff. *Id.* She apparently considered Rosenberger’s questioning of these employees to represent a “vocal lack of support for [her] as a manager” which “undermined [her] ability to manage these same employees from that point on.” *Id.* At an unspecified time, Rosenberger “made it clear” to the plaintiff that she could never improve in the area of managerial performance. *Id.* She believed that this was actually a reference to her gender rather than her abilities and this made it “impossible for [her] to continue working in the same environment.” *Id.* Finally, when Proscia requested an

increase of 8% in her annual salary in January 1998 in connection with her annual salary review, Rosenberger refused to approve the request until it was reduced to 4% and a statement that she “was the most qualified in the facility for the position of Operations Manager” was removed.¹¹ *Id.* She “felt future increases with the company would be treated similarly.” *Id.*¹²

The defendant emphasizes the facts that the plaintiff remained in her position for three months after Mininger was promoted, until the start of her planned maternity leave and that she only resigned from her position at Arrow Hart after applying for and obtaining a higher-paying job elsewhere.¹³

Failure to promote is not by itself sufficient to result in constructive discharge. *Irving v. Dubuque Packing Co.*, 689 F.2d 170, 172 (10th Cir. 1982). In this case, the additional facts offered by the plaintiff all refer to her own interpretation of events, and this subjective standard is not the

¹¹ The basis for the plaintiff’s knowledge of Rosenberger’s actions in this regard is not apparent from her answer to the defendant’s interrogatory, which is the only citation she makes to the summary judgment record in support of this factual allegation. I have relied upon the allegation because the defendant has not challenged it. However, the same is not true of the plaintiff’s statement that “[Rosenberger] wanted no positive proof of my competency in the Division records.” Plaintiff’s Interrogatory Responses, Question 10, at 5. As the plaintiff notes repeatedly elsewhere in her summary judgment submissions, there is other proof of her competence in her employer’s records. More important, as presented, this statement of Rosenberger’s motivation is no more than “[o]ptimistic conjecture, unbridled speculation, or hopeful surmise,” none of which demonstrates the existence of “definite, competent evidence fortifying the plaintiff’s version of the truth.” *Vega*, 3 F.3d at 479 (citation and internal quotation marks omitted).

¹² The plaintiff also submitted evidence demonstrating that she had, over the 18 months immediately prior to the submission of this request, received three raises, in comparison to the average Cooper Industries employee who would receive one raise in a 12 to 18 month period. *Proscia Dep.* at 39.

¹³ The defendant also cites the “undisputed” fact that the plaintiff “had been seeking a different job for some time,” Defendant’s Reply at 6, but that fact is not included in the only statement of material facts submitted by the defendant and so may not be considered by the court.

appropriate approach to the issue of constructive discharge. Constructive discharge cannot be predicated on general knowledge in the workplace that an individual has applied unsuccessfully for a promotion; to hold otherwise would be to subject most businesses to such claims. The plaintiff's proffered facts concerning this issue are too subjective or too indefinite, or both, to support a claim of constructive discharge under the circumstances. *See generally Dudley v. Augusta Sch. Dep't*, 23 F.Supp.2d 85, 90-91 (D. Me. 1998) (discussing sufficiency of evidence to avoid entry of summary judgment on constructive-discharge claim).

The defendant is entitled to summary judgment on that portion of Count I that alleges constructive discharge.

B. Count II

The defendant contends that the plaintiff cannot establish a *prima facie* case of pregnancy discrimination in connection with the denial of her application for the operations manager position, the only claim set forth in Count II of her complaint, Complaint ¶ 23, because she “offers no evidence that [her pregnancy] played any role in Mr. Mininger’s promotion.” Defendant’s Memorandum at 10. In response, the plaintiff offers the facts that Rosenberger knew she was pregnant at the time, Rule 30(b)(6) Dep. at 66, and that he asked her “several times” whether she would be coming back to work after her pregnancy, Plaintiff’s Dep. at 53-54.¹⁴ The plaintiff notes

¹⁴ The plaintiff also states in her objection that “[Rosenberger’s] personal feelings were that women with newborn children should or would decided [sic] to stay at home.” Plaintiff’s Objection at 7. This factual allegation is not included in her statement of material facts and therefore cannot be considered by the court; indeed, my review of the summary judgment record suggests that the statement is without any support whatsoever in the record. The plaintiff does include in her statement of material facts an allegation that Rosenberger “asked similar questions of other women who were pregnant” and also added “comments like, ‘Is your husband going to let you come back to work?’ and ‘Shouldn’t you be staying at home with the baby?’” Plaintiff’s SMF ¶ 29. Her only
(continued...)

in her objection that “[t]hroughout this memorandum, the Plaintiff uses the term ‘sex’ to include pregnancy,” Plaintiff’s Objection at 3 n.2, but it should be obvious that evidence of discrimination based on gender is not necessarily evidence of discrimination based on pregnancy.¹⁵ In order to avoid the entry of summary judgment on this claim, the plaintiff must produce evidence of discrimination based on her pregnancy, not just her gender.

The plaintiff has not submitted sufficient evidence to establish a *prima facie* case of pregnancy discrimination. The question attributed to Rosenberger, even if repeated, is insufficient to establish discrimination within the meaning of Title VII. Interpreted most favorably to the plaintiff, the question could mean that Rosenberger did not expect the plaintiff to return to work after her maternity leave. However, a termination so motivated is not a violation of the pregnancy discrimination provisions of Title VII. *Troupe v. May Dep’t Stores Co.*, 20 F.3d 734, 737-38 (7th Cir. 1994). There is no reason to treat a failure to promote any differently. The plaintiff offers no

¹⁴(...continued)

stated authority for these assertions is an employee named Heather Speech. The pages of Speech’s deposition transcript cited as authority and submitted by the plaintiff do not support these allegations. The full transcript, submitted by the defendant, reveals that Speech denied that Rosenberger made any such statements to her. Deposition of Heather Speech, attached to Defendant’s Reply, at 3-7.

¹⁵ Included in the plaintiff’s statement of material facts, but not mentioned in her memorandum, is an allegation that her “interview with [a man other than Rosenberger who was one of four people who interviewed her in Syracuse after she had applied for the position of operations manager] was somewhat uncomfortable due to his conversation about the Plaintiff’s pregnancy.” Plaintiff’s SMF ¶ 23. The fact that a single interviewer discussed the plaintiff’s pregnancy with her, or even that she felt “somewhat uncomfortable” during the conversation, does not, without more specific information about the nature of the conversation, indicate discrimination or bias based on pregnancy. The plaintiff’s deposition testimony about this conversation, the only record evidence that she cites in support of the statement quoted above, is to the effect that “when I first got in there, we started talking about my pregnancy. And he told me about his wife making the decisions when they had kids.” Plaintiff’s Dep. at 36. The only specific information reported by the plaintiff about that conversation concerns the interviewer’s family, not the plaintiff. This testimony cannot give rise to an inference favorable to the plaintiff’s claim of pregnancy-based discrimination.

other evidence, direct or circumstantial, specific to a claim that she was denied the promotion based on her pregnancy, rather than her gender. The defendant is entitled to summary judgment on Count II.

C. Count III

The parties agree that claims under the Maine Human Rights Act are subject to the same legal standards as are applicable to federal Title VII claims. *Morrison v. Carleton Woolen Mills, Inc.*, 108 F.3d 429, 436 n.3 (1997); *Bowen v. Department of Human Servs.*, 606 A.2d 1051, 1053 (Me. 1992). Accordingly, the defendant is entitled to summary judgment on Count III to the extent that it raises claims of constructive discharge and pregnancy discrimination.

D. Punitive Damages

The defendant contends that the plaintiff is not entitled to punitive damages, as requested by her complaint, because “there is no evidence that [it] acted willfully or with reckless indifference towards Plaintiff’s protected [federal] rights,” Defendant’s Memorandum at 13, and the plaintiff “has not presented clear and convincing evidence that [its] conduct was motivated by ill will or was so outrageous as to justify an implication of malice” on her state law claim, *id.* at 12. The plaintiff responds that the legal standard for an award of punitive damages is identical on the federal and state claims and that the evidence is sufficient to go to the jury, particularly since the court should be reluctant to grant summary judgment on this issue. Plaintiff’s Objection at 18. In reply, the defendant argues that it cannot be held vicariously liable for the discriminatory employment decisions of its agents if those decisions were contrary to its good-faith efforts to comply with Title VII, citing *Kolstad v. American Dental Ass’n*, 119 S.Ct. 2118 (1999), and that the plaintiff’s failure

to submit evidence of bad faith means that it is entitled to summary judgment on this claim. Defendant's Reply at 6-7.

The standards for the award of punitive damages on the state and federal claims do appear to be the same. Unlike the state common-law standard cited by the defendant, the Maine Human Rights Act provides a statutory standard for the award of punitive damages:

A complaining party may recover punitive damages under this subparagraph against a respondent if the complaining party demonstrates that the respondent engaged in a discriminatory practice or discriminatory practices with malice or with reckless indifference to the rights of an aggrieved individual protected by this Act.

5 M.R.S.A. § 4613(2)(B)(8)(c). The availability of punitive damages for a claim based on 42 U.S.C. § 2000e-2, which is enforced by a private action under 42 U.S.C. § 2000e-5, is governed by 42 U.S.C. § 1981a(a) & (b), which provides, in relevant part:

A complaining party may recover punitive damages under this section against a respondent . . . if the complaining party demonstrates that the respondent engaged in a discriminatory practice or discriminatory practices with malice or with reckless indifference to the federally protected rights of an aggrieved individual.

42 U.S.C. § 1981a(b)(1).

The Supreme Court has interpreted the terms “malice” and “reckless indifference” in this statute to “pertain to the employer’s knowledge that it may be acting in violation of federal law, not its awareness that it is engaging in discrimination.” *Kolstad*, 119 S.Ct. at 2124. “[A]n employer must at least discriminate in the fact of a perceived risk that its actions will violate federal law to be liable in punitive damages.” *Id.* at 2125. It is not clear from the *Kolstad* opinion whether the burden of proof lies with the employer to show that it has made good faith efforts to comply with Title VII to which the alleged actions of its supervisory employee are contrary or with the plaintiff employee

to show that the employer has not made such good faith efforts. However, it appears more reasonable to impose upon the employer the burden of demonstrating, after a plaintiff has provided proof that one of its managing or supervisory employees has engaged in unlawful discrimination, that such conduct was in violation of its policy or other good faith efforts to comply with Title VII in order to avoid the imposition of punitive damages than it does to impose upon the plaintiff who has demonstrated unlawful discrimination the additional burden of proving that the employer did not make such efforts in order to obtain punitive damages.

In any event, the evidence submitted by the plaintiff in this case does not and cannot demonstrate malice in its traditional sense nor a perception by the defendant that Rosenberger's decision to promote Mininger rather than the plaintiff was a possible violation of state or federal law. The case law cited by the plaintiff, which may be read to interpret the statutory standard for the award of punitive damages in a broader manner, pre-dates *Kolstad*. While egregious behavior by the supervisory employee is no longer necessary, *Kolstad*, 199 S.Ct. at 2125-26, knowledge or reckless disregard of the prohibited nature of the conduct is required. Here, the plaintiff asks the court to infer a discriminatory motive in Rosenberger's decision not to award the operations manager position to her and then to infer from the same evidence the additional conclusion that he knew, or was recklessly indifferent to the possibility, that action upon such a motive was contrary to law. Basing the second inference upon the first goes beyond the summary judgment standard that requires the court to draw all reasonable inferences in favor of the nonmoving party.

The defendant is entitled to summary judgment in its favor on any claims for punitive damages.

IV. Conclusion

For the foregoing reasons, I recommend that the defendant's motion for summary judgment be **GRANTED** as to Count II, any claims in Count I or Count III based on constructive discharge or discrimination due to pregnancy, and any claims for punitive damages, and otherwise **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 29th day of September, 1999.

*David M. Cohen
United States Magistrate Judge*