

I. Summary Judgment Standards

Summary judgment is appropriate only if the record shows “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 over it 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. Defendant’s Motion

A. Factual Context

Before setting forth the facts cognizable with respect to the Navy’s motion for summary judgment, I address at the outset a related motion by Smith to strike the bulk of the Navy’s reply

statement of material facts. *See generally* Plaintiff’s Objection and Motion To Strike Defendant’s Reply Statement of Material Facts (“Motion To Strike”) (Docket No. 49). This motion ostensibly has two bases: (i) that, in contravention of Local Rule 56, the Navy failed to confine its reply to that portion of Smith’s opposing statement of material facts containing a separately titled section of “additional facts” and (ii) that in any event most of the Navy’s objections to Smith’s facts are meritless. In a conference with counsel held July 10, 2001 counsel for Smith clarified that he moved to strike only on the first basis.

With the benefit of this clarification, I deny the Motion To Strike. The majority of the Navy’s responses to Smith’s facts are evidentiary objections (*e.g.*, hearsay, materiality). *See generally* Defendant’s Reply to Plaintiff’s Opposing Statement of Material Facts (“Defendant’s Reply SMF”) (Docket No. 46). Local Rule 56 speaks to the admission, denial or qualification of facts. *See, e.g.*, Loc. R. 56(d). The rule neither addresses nor precludes evidentiary objections to the presentation of facts (regardless whether they are “additional” facts or facts submitted in support of a denial or qualification). To the extent that the Defendant’s Reply SMF does in certain cases squarely deny or qualify facts (other than the so-called “additional” facts), *see, e.g.*, Defendant’s Reply SMF ¶¶ 7, 14, I have found those responses unnecessary to consideration of the instant motion and overlook them on that basis.

With respect to the substance of the Navy’s evidentiary objections, at the July 10th conference I permitted counsel for Smith an opportunity to file an affidavit addressing those asserted deficiencies.² In due course counsel for Smith filed a supplemental declaration as well as a revised opposing statement of material facts (incorporating references to the new declaration). *See*

² Counsel for the Navy had indicated in his papers that he had no objection to this solution so long as counsel for Smith confined himself to the facts originally stated. *See* Opposition to Plaintiff’s Motion To Strike Defendant’s Reply Statement of Material Facts (“Strike Opposition”) (Docket No. 50) at 2.

Supplemental Declaration of Martha M. Smith (“Smith Supp. Decl.”) (Docket No. 55); Plaintiff’s [Revised] Opposing Statement of Material Facts in Support of Her Objection to Defendant’s Motion for Summary Judgment (“Plaintiff’s Opposing SMF”) (Docket No. 56). To the extent the revised opposing statement of material facts continues to cite the materials to which the Navy objected, I rule that:

1. Smith may rely on her Equal Employment Opportunity (“EEO”) affidavit. Although the EEO affidavit is not sworn to be true based on Smith’s personal knowledge, but rather sworn to be “true and complete to the best of [her] knowledge and belief,” *see* Affidavit [of Martha Mary Smith] (“Smith EEO Aff.”), attached to Defendant’s Statement of Undisputed Facts Including Material Facts (“Defendant’s SMF”) (Docket No. 22) at Bates Stamp Nos. 219, 236, it is clear from the nature of the statements themselves that they are in fact made on personal knowledge. In the narrow circumstance in which statements sworn to be true only to an affiant’s information and belief clearly can be discerned to flow from personal knowledge, such statements may be considered on summary judgment. *See Keating v. Bucks County Water & Sewer Auth.*, 2000 WL 1888770 at *4 (E.D. Pa. 2000) (noting that, to extent averments in affidavit sworn to be “true and correct to the best of [affiant’s] knowledge, information and belief” clearly were based on personal knowledge, they were appropriately considered on summary judgment); *Murray v. Bath Iron Works Corp.*, 867 F. Supp. 33, 38 n.5 (D. Me. 1994) (“[I]f it is clear that the affidavit statements are made on the basis of the affiant’s personal knowledge, they satisfy the requirements of Rule 56(e), regardless of a blanket recitation stating otherwise.”).

2. Smith may not rely on her workers’ compensation statement, which is unsworn and unsigned. *See generally* Evidence Required in Support of a Workers’ Compensation Claim (“Smith

WC Statement”), attached to Defendant’s SMF; *see also, e.g., Sellers v. Henman*, 41 F.3d 1100, 1101 (7th Cir. 1994) (unsigned and therefore unsworn affidavit inadmissible on summary judgment).³

3. Smith adequately verifies (via a separately submitted declaration) that the allegations contained in paragraph 50 of her statement of material facts are true to her personal knowledge and that the conduct described in paragraphs 50(A)-(I) took place up to the point that she reported the conduct to the Navy’s EEO counselor. *See generally* Declaration of Martha M. Smith (“Smith Decl.”) (Docket No. 37). The Navy’s arguments notwithstanding, *see* Defendant’s Reply SMF at 2, Fed. R. Civ. P. 56(e) does not proscribe cross-referencing (at least where, as here, it is clear which averments are being referenced). *See, e.g., Spriggs v. Diamond Auto Glass*, 242 F.3d 179, 189 n.13 (4th Cir. 2001) (“The district court erroneously characterized the February 10 letter as ‘unsworn and hearsay not properly considered on a motion for summary judgment.’ To the contrary, Spriggs submitted the letter with a properly executed affidavit affirming that the letter’s contents were based on his personal knowledge and accurately reflected the February 7 conversation. As incorporated by reference into the affidavit, the letter meets the foundational requirements of Fed. R. Civ. P. 56(e).”) (citation omitted).

With these peripheral issues resolved, the parties’ statements of material facts, credited to the extent that they are either admitted (in certain instances solely for purposes of summary judgment) or

³ At the July 10th conference Smith’s counsel repeated an argument made in his papers that to the extent the Navy introduced the documents in issue (including the workers’ compensation statement), he was entitled to rely on any material in the document – or at least material on the same pages cited by the Navy – much as if the document had been offered by the Navy at trial and admitted into evidence. *See* Motion To Strike at 2. In the absence of any authority for this proposition, I decline to embrace it. As I construe the relevant rule, each party on summary judgment is responsible for providing its own admissible evidence in support of or in opposition to a motion for summary judgment. *See* Fed. R. Civ. P. 56(e) (“Supporting and opposing affidavits shall be made on personal knowledge [and] shall set forth such facts as would be admissible in evidence[.]”). The Navy offered the EEO affidavit and the workers’ compensation statement as admissions of a party-opponent pursuant to Fed. R. Evid. 801(d)(2), *see* Strike Opposition at 2, which is not a basis on which the party that itself made the admissions may offer them, *see, e.g.,* 30B M. Graham, *Federal Practice and Procedure* § 7015, at 172 n.2 (2000) (“Obviously, a prior statement of a party offered by that party is not an admission of a party-opponent.”) (emphasis in original).

supported by record citations in accordance with Local Rule 56, reveal the following material to the Defendant's Motion:

On August 19, 1997 the Naval Air Station Brunswick ("NASB") hired Smith as an office automation clerk with no tenure, her temporary job to expire September 30, 1997. Defendant's SMF ¶ 12; Plaintiff's Opposing SMF ¶ 12. Her conditions of temporary employment were explained to her, including that she was an "at will" employee subject to termination at any time without use of adverse action and that her temporary appointment did not confer eligibility to be promoted or reassigned to other positions, or the ability to be noncompetitively converted to a career-conditional appointment. *Id.*

On about October 1, 1997 Smith's temporary assignment was extended to December 16, 1997. *Id.* ¶ 8. On about December 4, 1997 her temporary assignment was extended by an additional ninety days to March 16, 1998. *Id.*

On Smith's first day of work she learned that her temporary position had been assigned to the Office of Information Technology ("IT") and that she would be working for Lieutenant Steven Smith ("Lt. Smith"), who had supervised the IT division since late 1996. *Id.* ¶ 3; Defendant's SMF ¶ 19; Smith EEO Aff. at 8. Smith recalled that during her initial meeting with Lt. Smith he asked questions about her personal life, such as whether she was married, how many children she had, whether she had a boyfriend and why she did not have a boyfriend. Defendant's SMF ¶ 20; Smith WC Statement at 153. She was "not comfortable" with these personal questions, which she knew at the time Lt. Smith was not supposed to ask. Defendant's SMF ¶ 21; Smith EEO Aff. at 8; Smith WC Statement at 153. Nevertheless, she expressed no concern and readily answered every question about her professional and personal life that he asked because she was assuming he was evaluating her professionalism, capabilities and level of maturity. Defendant's SMF ¶ 22; Smith EEO Aff. at 8.

During this initial meeting Smith discussed her community work with the City of Bath Development Office, including her work writing grants. Defendant's SMF ¶ 23; Smith WC Statement at 153. She asked Lt. Smith if he could help her with the more technical computer-related aspects of the grant application. Defendant's SMF ¶ 24; Smith EEO Aff. at 8. Lt. Smith said yes, but not during business hours because the Navy could not support that kind of thing. *Id.* He said he could help Smith after hours. *Id.* Smith was glad because she thought she would be able to get the grant much easier with his help. *Id.* On Smith's second day of work Lt. Smith asked her out to dinner that Friday night. Defendant's SMF ¶ 25; Smith WC Statement at 153. She said that she had no money to pay, and Lt. Smith graciously offered to pay. *Id.* She asked whether dinner would present a conflict of interest, but recalls Lt. Smith responding that it would not because they would be doing "community work." *Id.* She agreed to go out with Lt. Smith the following Friday, August 29, 1997, Defendant's SMF ¶ 27; Smith WC Statement at 153-54, although she did not regard this meeting as a date, Plaintiff's Opposing SMF ¶ 27; Smith EEO Aff. at 9.

On the day of the planned dinner Lt. Smith told Smith that rather than going out for dinner he wanted to go to the Comedy Connection in Portland (Smith having previously told Lt. Smith that she liked comedy). Defendant's SMF ¶¶ 26, 28; Smith EEO Aff. at 9. Although Smith felt "uneasy" with this proposal, she agreed. Defendant's SMF ¶ 28; Smith EEO Aff. at 9. At the Comedy Connection, there was no dinner and it was too noisy to discuss the grant. Defendant's SMF ¶ 30; Smith EEO Aff. at 9. The following Monday Smith asked Lt. Smith not to talk about how they went to the Comedy Connection together; she felt it was "unprofessional." Defendant's SMF ¶ 31; Smith WC Statement at 154.

The week following the trip to the Comedy Connection Lt. Smith continued to insist that he still owed Smith a dinner to the point where Smith felt harassed. Plaintiff's Opposing SMF ¶ 32; Smith

EEO Aff. at 10. Lt. Smith also stated that he sailed every day after work, that he could move around on his sailboat “like a panther” and that he wanted Smith to go sailing with him. *Id.* He asked Smith to visit Boothbay Harbor with him, assuring her that they would work on the grant application. *Id.* Smith did not want to accept the invitation but felt “stuck.” Plaintiff’s Opposing SMF ¶ 32; Smith EEO Aff. at 11. Lt. Smith had told her that he would be able to get her job extended. *Id.* Smith accepted the invitation only reluctantly to “get it over with” in hopes that she would never be placed in that position again. *Id.*

On about September 6, 1997 Smith and Lt. Smith traveled together to Boothbay Harbor for a day trip. Defendant’s SMF ¶ 32; Smith EEO Aff. at 10. They stopped at a number of craft places and together walked all over Boothbay Harbor. Defendant’s SMF ¶ 34; Smith EEO Aff. at 10. They had dinner with friends of Smith’s whom they happened to meet. *Id.* During the trip Lt. Smith began to act as if they were a couple. Plaintiff’s Opposing SMF ¶ 34; Deposition of Martha M. Smith (“Smith Dep.”), filed with Plaintiff’s Statement of Undisputed Facts in Support of Motion for Summary Judgment on Defendant’s Second Affirmative Defense (“Plaintiff’s SMF”) (Docket No. 16), at 113. He attempted to hold Smith’s hand, and she jerked it away from him. *Id.* He rubbed up against her, and she pushed him away. *Id.* Smith said “right to his face to make it completely clear” that she would not date him. Plaintiff’s Opposing SMF ¶ 34; Smith Dep. at 112-13. After the visit, Lt. Smith took Smith home. Defendant’s SMF ¶ 35; Smith EEO Aff. at 10. When Lt. Smith apparently tried to kiss her, she was caught “off guard” and resisted. *Id.* She told Lt. Smith she would never date him and ran into her house. Defendant’s SMF ¶ 35; Smith EEO Aff. at 10-11.

During approximately the second week of Smith’s employment Lt. Smith began calling her at home. Defendant’s SMF ¶ 38; Smith EEO Aff. at 11. The week following the visit to Boothbay Harbor he called her at home and shared his feelings about personal issues, such as that he had no

friends and no family support, was lonely and valued his friendship with her. Defendant's SMF ¶ 39; Plaintiff's Opposing SMF ¶ 39. During this time period he asked Smith several times if she would join him for dinner, but she told him that she was too busy. Defendant's SMF ¶ 40; Smith WC Statement at 154. After declining several dinner offers Smith felt that she should invite Lt. Smith over to her house and explain the situation. Defendant's SMF ¶ 41; Smith WC Statement at 154. She was planning to tell Lt. Smith "firmly but nicely again" so that she did not lose her job that she did not want to go out with him. Plaintiff's Opposing SMF ¶ 42; Smith EEO Aff. at 12. During the week of September 15, 1997 she invited Lt. Smith to her house for pizza. Defendant's SMF ¶ 43; Smith EEO Aff. at 12. On his way to Smith's home, Lt. Smith called on his cell phone to ask if he could bring his 15-year-old daughter. Defendant's SMF ¶ 44; Smith EEO Aff. at 12. Smith agreed, but the presence of the daughter precluded her from discussing with Lt. Smith the nature of their relationship. *Id.* After dinner, Lt. Smith, his daughter and Smith took a walk together on the beach. Defendant's SMF ¶ 45; Smith EEO Aff. at 12. Lt. Smith made Smith uncomfortable, particularly when he tried to grab her hand and she had to jerk it away. Plaintiff's Opposing SMF ¶ 45; Smith Dep. at 136-37.

Sometime near the end of that week Smith invited Lt. Smith to join her for a walk after work. Defendant's SMF ¶ 46; Smith WC Statement at 154. During that walk she told him that she could not continue to go out with him, explaining that it would impact her job and people's impression of her. Defendant's SMF ¶ 47; Smith WC Statement at 154. She explained that he was bothering her and making it difficult for her to work productively in IT. Plaintiff's Opposing SMF ¶ 47; Smith Dep. at 140. She recalled that Lt. Smith was good about it; "I thought he understood the situation until I got a card in the mail." Defendant's SMF ¶ 48; Smith WC Statement at 154.

On or about September 23, 1997 Smith received a card from Lt. Smith stating: "Thank you so very much for being a friend and a very special lady in my life. Lately, I am the happiest when we are

together or I am having thoughts of you. I understand that I am complicating your life and I am very thankful for the time we have spent together. I care for you and feel an excitement that I haven't known for a long time. Thinking of you, Steve.” Defendant’s SMF ¶ 49; Plaintiff’s Opposing SMF ¶ 49. After receiving this card Smith decided that from then on at work, she would only say “good morning,” answer questions briefly, but keep any conversations “curt and professional.” Defendant’s SMF ¶ 50; Smith WC Statement at 154.

Lt. Smith responded by trying to prevent Smith’s co-workers in the IT Department from communicating with her. Plaintiff’s Opposing SMF ¶ 50(A); Smith Decl. ¶ 2. Whenever Smith attempted to speak with male staff members Lt. Smith would approach her and stand close to her face, not saying anything and just staring, making everyone feel uncomfortable. *Id.* In addition, Lt. Smith:

1. Ordered Smith’s male co-workers not to speak to her for any reason – even if the subject fell within the scope of her employment responsibilities – and physically confronted some of those who did. Plaintiff’s Opposing SMF ¶ 50(B); Smith Decl. ¶ 2. He ordered other male military personnel not to enter the office where Smith worked and instructed her not to initiate any conversations with them. *Id.* This conduct interfered with her ability to perform her job responsibilities. *Id.*

2. Continued to refer to Smith as “dear.” Plaintiff’s Opposing SMF ¶ 50(C); Smith Decl. ¶ 2.

3. Displayed a tendency toward violence that intimidated Smith, including yelling profanities, throwing objects and slamming his desk. Plaintiff’s Opposing SMF ¶ 50(D); Smith Decl. ¶ 2. Petty Officer Gower stayed beyond his regular working hours and would accompany Smith to her car because she was afraid to be alone with Lt. Smith. *Id.*

4. Exercised complete control over Smith's time and whereabouts by keeping her time card and prohibiting her from leaving the office to attend to business elsewhere on base or even in the same building. Plaintiff's Opposing SMF ¶ 50(E); Smith Decl. ¶ 2. This conduct interfered with Smith's ability to perform her job responsibilities. *Id.*

5. Continually called Smith at home through December 1998 to discuss highly personal matters unrelated to work. Plaintiff's Opposing SMF ¶ 50(F); Smith Decl. ¶ 2.

6. Stared at Smith's legs and breasts at work to the point where she felt compelled to stop wearing dresses and to cover herself with loose, bulky clothing. Plaintiff's Opposing SMF ¶ 50(G); Smith Decl. ¶ 2.

7. Stood so close to Smith that he would touch or nudge and push against her. Plaintiff's Opposing SMF ¶ 50(H); Smith Decl. ¶ 2.

8. Repeatedly pressured Smith to go out on dates with him. Plaintiff's Opposing SMF ¶ 50(I); Smith Decl. ¶ 2.

9. Yelled at Smith inches from her face and, when she lowered her head in fear, lifted her chin with his hand while she recoiled in fear. Plaintiff's Opposing SMF ¶ 50(J); Smith Decl. ¶ 2.

10. Ordered Smith to move her chair to sit with him at his desk for no legitimate reason. Plaintiff's Opposing SMF ¶ 50(K); Smith Decl. ¶ 2.

11. Frequently asked Smith to provide car rides for him on personal matters. Plaintiff's Opposing SMF ¶ 50(L); Smith Decl. ¶ 2.

Lt. Smith engaged in the kind of conduct described in paragraphs 1-8, above, throughout Smith's employment. Plaintiff's Opposing ¶ 50(M); Smith Decl. ¶¶ 2-3.

In about September 1997 Smith complained to Chief of IT Jack Yon about Lt. Smith's behavior and told Yon that she was being sexually harassed by Lt. Smith. Defendant's SMF ¶¶ 7, 51-52;

Deposition of Chief Jack Yon (“Yon Dep.”), filed with Plaintiff’s SMF, at 9, 36; Smith Dep. at 91, 104. Yon was the leading chief of IT during the time Smith was a temporary employee there, up until Yon transferred out of that department on about December 23, 1997. Defendant’s SMF ¶ 7; Plaintiff’s Opposing SMF ¶ 7; *see also* Yon Dep. at 9, 44. Smith recalled that in filling out a sexual harassment survey that was given to everybody on the base she actually wrote on the survey that her military supervisor, a lieutenant, was sexually harassing her. Defendant’s SMF ¶ 53; Plaintiff’s Opposing SMF ¶ 53.

In approximately October 1997 Yon initiated military sexual harassment training for the whole department. Defendant’s SMF ¶ 54; Smith WC Statement at 155. This training was prompted by Smith’s concerns about Lt. Smith. Defendant’s SMF ¶ 55; Plaintiff’s Opposing SMF ¶ 55. Smith recalled that during the period of time following the training she and Lt. Smith worked together every day and got a lot of things accomplished, although she still kept conversations “curt and professional.” Defendant’s SMF ¶ 57; Smith WC Statement at 155. Lt. Smith resumed his inappropriate conduct after approximately one week. Plaintiff’s Opposing SMF ¶ 57; Yon Dep. at 38.

On or about November 1, 1997 Smith had a “terrible altercation” with Lt. Smith over a book that she gave him about mediation. Defendant’s SMF ¶ 58; Smith Dep. at 173-74. According to Smith, Lt. Smith screamed and swore at her and said he did not need her book. Defendant’s SMF ¶ 58; Smith Dep. at 175. Smith was so frightened that she felt compelled to run out the door and stayed home for the rest of the day. Plaintiff’s Opposing SMF ¶ 58; Smith Dep. at 175-76. The next day, she returned to work to find a card on her desk from Lt. Smith. Defendant’s SMF ¶ 58; Smith Dep. at 176. The card stated: “Thank[] you for standing beside me! I really appreciate it even though I act like an ASS sometimes. You are the most talented, honest, and sweetest woman I’ve known. You are making a lasting impression on my life – one that [I] like and cherish. I may not always agree with your

advice, but it does make me look at things differently. Thanx [sic]! P.S. If my heads [sic] up my ass – tell me to pull it out!” Defendant’s SMF ¶ 59; Plaintiff’s Opposing SMF ¶ 59. Smith was disgusted. Plaintiff’s Opposing SMF ¶ 58; Smith Dep. at 176.

Smith recalled that shortly before Thanksgiving 1997 Lt. Smith called her at home to discuss why she was behaving differently toward him and friendlier toward other people. Defendant’s SMF ¶ 60; Smith WC Statement at 155. She recalled telling Lt. Smith that his behavior was horrible, that he did not listen to anybody, that he caused people to feel he did not care about them, and that he always thought negatively. *Id.* After this conversation Lt. Smith’s behavior improved, but then he asked if Smith would date him if he were not her boss. Plaintiff’s Opposing SMF ¶ 60; Smith Supp. Decl. ¶ 29. She told him “never.” *Id.* After about one week, he reverted to his prior conduct. *Id.*

On either January 28 or January 29, 1998 Smith first sought informal EEO counseling. Defendant’s SMF ¶ 89; Plaintiff’s Opposing SMF ¶ 89. In response to Smith’s allegations the Navy also assigned a military officer from outside the command to investigate the matters raised by Smith. *Id.* ¶ 91.

Lt. Smith had recommended that Smith be advanced as a temporary employee from a GS-3, Step 10, to a GS-5 pay grade. Defendant’s SMF ¶ 92; Declaration [of Jerome Netko] (“Netko Decl.”), attached to Defendant’s SMF, ¶ 3. Lt. Smith had advised Jerome Netko, the lieutenant commander at NASB who was supervisor of the Information Services Department, that he considered Smith to be performing work beyond her current pay grade. Defendant’s SMF ¶¶ 2, 93; Netko Decl. ¶¶ 2-3. Netko had spoken to Smith about some of the training she was performing at the direction of Lt. Smith and perceived that she was doing a good job. Defendant’s SMF ¶ 93; Netko Decl. ¶ 3. Netko had no reason to question Lt. Smith’s assessment, although he had not personally reviewed the work Smith was then performing or compared that work with the criteria for a temporary GS-5 clerical position.

Id. Netko initially had agreed to raise this issue with the Position Management Board (“PMB”), on which he served. Defendant’s SMF ¶¶ 2, 93; Deposition of Jerome Netko (“Netko Dep.”), filed with Plaintiff’s SMF, at 36; Netko Decl. ¶ 3.⁴

After Smith complained, Netko recommended to Commander Douglas Horsman, the executive officer of the base who also served on the PMB, that the PMB table any discussion on the upgrade to a temporary GS-5 position. Defendant’s SMF ¶¶ 6, 94; Netko Decl. ¶¶ 4, 6. Netko was concerned that, pending an investigation into Smith’s allegations about Lt. Smith, it would be improper for the command to consider this request further until it was determined whether Lt. Smith’s recommendation was made in part or in whole based on certain improper conduct between Smith and Lt. Smith. Defendant’s SMF ¶ 94; Netko Decl. ¶ 6. Until the recommended upgrade was determined to be based solely on Smith’s work performance or on merit, Netko considered that the decision should be deferred. *Id.* Netko suggested that, if the investigation determined that Lt. Smith’s recommendation was based on improper conduct, this would be an improper and perhaps illegal basis for deciding that Smith should become a temporary employee at a GS-5 pay grade. *Id.* Netko believed that Horsman agreed with his assessment. *Id.*

At all times that Lt. Smith supervised Smith, he expressed that she was a very good worker who was valuable to the base in terms of the quality of her work, and he did not have any negative or adverse comments about her. Defendant’s SMF ¶ 61; Plaintiff’s Opposing SMF ¶ 61. Generally, everyone in IT thought Smith was doing a good job there. *Id.* ¶ 62.

⁴ In 1997 and 1998 the NASB used the PMB to review and make recommendations for all employment allocation decisions for the base. Defendant’s SMF ¶ 14; Netko Decl. ¶ 4. The job of the PMB was to evaluate the merits of requests for new positions, consider the available funding, analyze the manpower documents and make a recommendation to the commanding officer. Defendant’s SMF ¶ 17; Plaintiff’s Opposing SMF ¶ 17. There were times when the PMB did not recommend approval of requests for positions from various department heads and times when its hiring recommendations were not followed by the commander or his designee. *Id.*

Smith's job in IT was a temporary position that could be moved anywhere within the base at the request of the commanding officer. *Id.* ¶ 95. Captain Carter, the base commander of NASB during the time period at issue, and Horsman discussed the appropriateness of changing Smith's working environment during the ongoing investigation into matters she had raised. Defendant's SMF ¶¶ 5, 96; Netko Decl. ¶ 4; Deposition of Douglas E. Horsman ("Horsman Dep."), filed with Plaintiff's SMF, at 49. Kathleen Brainerd, who was then the director of the Family Service Center ("FSC"), had expressed a need for some additional computer expertise. Defendant's SMF ¶ 96; Declaration of Mary Ann Green ("Green Decl."), attached to Defendant's SMF, ¶ 4. Brainerd had previously expressed a need for clerical and/or technical assistance and was in the process of classifying and recruiting for an office automation assistant. *Id.* Carter and Horsman thought that it would be a good fit for Smith to have an opportunity to help out at FSC. Defendant's SMF ¶ 96; Horsman Dep. at 72.

The transfer of Smith to FSC was conditioned on the agreement of both Smith and Brainerd. Defendant's SMF ¶ 97; Green Decl. ¶ 4. Smith agreed to the transfer. *Id.* It was explained to Smith, and she appeared to understand, that the transfer would not result in any change in her grade or pay and that there was no negative connotation associated with it. *Id.*

The parties dispute whether Smith was, or was not, promised a permanent job at FSC. According to the Navy, Horsman explained to Smith that if she were interested in being considered for the office automation assistant position, she would have to apply and be considered just like every other potential employee, but that the transfer would be an opportunity to learn about the position firsthand. *Id.*⁵ According to Smith, Horsman assured her that he would arrange for her to be placed in a permanent GS-7 position at FSC, informed her that she would be verbally detailed to FSC until the

⁵ Only a small percentage of employees holding temporary jobs at NASB are able to obtain full-time employment. Defendant's SMF ¶ 75; Defendant's Third Amended Response to Plaintiff's First Set of Interrogatories, attached to Defendant's SMF, ¶ 14. During the past ten years, temporary employment at NASB has led to permanent employment (either at NASB or elsewhere in the federal [civil] *(continued on next page)*

full-time position became available and described her as a “perfect match” for the position. Plaintiff’s Opposing SMF ¶¶ 76, 97; Smith Supp. Decl. ¶ 33; Smith Dep. at 199-200. These promises were the reason Smith accepted reassignment to FSC. *Id.* Smith was detailed to FSC on February 3, 1998. Defendant’s SMF ¶ 98; Plaintiff’s Opposing SMF ¶ 98.

Lt. Smith was on leave at the time of Smith’s transfer. *Id.* ¶ 99. During a meeting with Smith at about the time of the transfer, Netko and Horsman assured her that Lt. Smith would have no further contact with her. *Id.* ¶ 100. Nevertheless, on February 9, 1998 an incident occurred during which Lt. Smith went to FSC as part of a Red Cross community blood drive. Defendant’s SMF ¶ 101; Horsman Dep. at 71; Smith Dep. at 201. Smith saw Lt. Smith, although she did not have a conversation with him, and was upset that he was in the building. *Id.* Prior to Lt. Smith’s visit to FSC no one had spoken with him about avoiding contact with Smith. Defendant’s SMF ¶ 102; Plaintiff’s Opposing SMF ¶ 102. Netko thought Horsman would take care of it, and Horsman thought others were responsible for informing Lt. Smith. *Id.* After Brainerd informed Horsman that Lt. Smith had visited FSC, Horsman had a very stern conversation with Lt. Smith about the incident. *Id.* ¶ 103.

On February 18, 1998 Smith had her final EEO interview and on March 5, 1998 filed her formal EEO complaint. *Id.* ¶ 104. Smith’s temporary position as an office automation clerk expired on March 16, 1998. *Id.* ¶ 106. She never applied for any other position at NASB. Defendant’s SMF ¶ 78; Smith Dep. at 118.⁶

By letter dated June 11, 1998 the Navy accepted the following issues for investigation: “(a) the complainant alleges that she was subjected to a hostile work environment which was created by

service) less than nine percent of the time. *Id.*

⁶ Smith states that she had no reason to apply for any other position because she had received assurances first from Lt. Smith that he could extend her appointment and second from Horsman that she would be assigned to a permanent position in FSC. Plaintiff’s Opposing SMF ¶ 78; Smith Dep. at 119-20, 199-200.

. . . Lt. Smith’s display of sexual attraction toward her.” Plaintiff’s Opposing SMF ¶ 107; Affidavit of Louis B. Butterfield in Opposition to Defendant’s Motion for Summary Judgment (“Butterfield Aff.”) (Docket No. 35) ¶ 2; Letter dated June 11, 1998 from Commanding Officer, Naval Air Station, Brunswick to Mr. Louis B. Butterfield, Esq., attached as Exh. A to Butterfield Aff., at 1. The Navy accepted and investigated Smith’s allegations of incidents occurring both before and after December 14, 1997 that gave rise to her complaint of sex harassment. Plaintiff’s Opposing SMF ¶ 108; Butterfield Aff. ¶¶ 4-5; Letter dated August 3, 2000 from Armandina C. Sexton to Ms. Martha Smith & enclosure thereto (“Final EEO Decision”), attached as Exh. D to Butterfield Aff.

B. Analysis

1. Count II: Hostile Work Environment

Smith alleges in Count II of her complaint that the Navy unlawfully discriminated against her on the basis of her sex in violation of Title VII of the Civil Rights Act of 1964, as amended (“Title VII”), through the creation of a hostile work environment. Complaint and Demand for Jury Trial, Injunctive Relief in Nature of Mandamus Sought (“Complaint”) (Docket No. 1) ¶¶ 27-34. The Navy seeks summary judgment as to this claim primarily on grounds that (i) the applicable statute of limitations bars recovery for most of the incidents about which Smith complains (those occurring prior to December 14th or 15th, 1997), and (ii) the remaining (timely) incidents fall short as a matter of law of constituting an actionable hostile work environment. Defendant’s Motion at 6-12.⁷ Alternatively, the Navy argues that even in the absence of a time bar, the evidence as a whole falls short of creating a triable workplace-discrimination issue. *Id.* at 12-14.

⁷ The Navy correctly observes that a federal employee’s failure to file a timely discrimination complaint with an EEO counselor constitutes a failure to exhaust remedies, which in turn precludes suit in federal court. *See* Defendant’s Motion at 6-7; *Velazquez-Rivera v. Danzig*, 234 F.3d 790, 794 (1st Cir. 2000); *Cano v. United States Postal Serv.*, 755 F.2d 221, 223 (1st Cir. 1985). Nonetheless, the late filing of such a complaint can be excused under certain circumstances, obviating the exhaustion problem. *See, e.g., Velazquez-Rivera*, 234 F.3d at 794 (continuing-violation doctrine); *Rodgers v. Scott*, 901 F. Supp. 224, 228 (N.D. Tex. 1995) (*continued on next page*)

Smith attacks the timeliness defense on multiple fronts, positing (i) waiver based on the Navy's acceptance of the assertedly time-barred incidents for EEO review, (ii) waiver predicated on the Navy's failure to plead the statute of limitations as an affirmative defense, (iii) estoppel and (iv) excuse of any untimeliness by application of the so-called "continuing violation" doctrine. Plaintiff's Objection to Defendant's Motion for Summary Judgment, etc. ("Plaintiff's SJ Opposition") (Docket No. 33) at 2-12. At least two of these theories independently suffice to deflect the statute-of-limitations defense.

As Smith points out, *id.* at 3, regulations governing federal-agency EEO investigations provide that "[p]rior to a request for a hearing in a case, the agency shall dismiss an entire complaint . . . [t]hat fails to comply with the applicable time limits . . . unless the agency extends the time limits in accordance with § 1614.604(c)," 29 C.F.R. § 1614.107(a)(2). Time limits "are subject to waiver, estoppel and equitable tolling." 29 C.F.R. § 1614.604(c).

An agency does not waive a timeliness defense merely by accepting or investigating a discrimination complaint. *See, e.g., Ester v. Principi*, 250 F.3d 1068, 1072 n.1 (7th Cir. 2001). However, in this case there was more: The Navy issued a final decision on the merits of the incidents it now asserts are time-barred without so much as alluding to the statute of limitations. *See generally* Final EEO Decision. The Court of Appeals for the Seventh Circuit, confronting identical circumstances, recently held that "when an agency decides the merits of a complaint, without addressing the question of timeliness, it has waived a timeliness defense in a subsequent lawsuit." *Ester*, 250 F.3d at 1071-72; *see also Bowden v. United States*, 106 F.3d 433, 438-39 (D.C. Cir. 1997) ("[W]e have suggested that if [agencies] not only accept and investigate a complaint, but also

(waiver, estoppel, equitable tolling).

decide it on the merits – all without mentioning timeliness – their failure to raise the issue in the administrative process may lead to waiver of the defense when the complainant files suit.”).

The Seventh Circuit recognized that “the courts of appeals that have considered the issue have not produced uniform results” – with one court requiring that an agency have made an explicit finding of timeliness, and another that an agency have made a finding of discrimination, to be held to have waived a timeliness defense. *Ester*, 250 F.3d at 1071. However, the *Ester* court rested its holding primarily on Supreme Court precedent and “strong policy considerations,” noting:

[T]he values of judicial economy, agency autonomy, accuracy and the need for a well-developed record for review, are all served by requiring objections – even those objections possessed by the agency itself – to be raised in the agency proceeding. We decline to adopt a rule that encourages an agency to overlook and leave completely undeveloped allegations that a particular complaint is untimely. Even more than the difficulty an agency’s failure to assert a timeliness defense in its own proceeding causes subsequent courts, it creates a significant prejudice to plaintiffs who suddenly must defend a claim of untimeliness never before raised.

Id. at 1072 (citation omitted). If faced with this issue, the First Circuit likely would concur with this well-reasoned and persuasive opinion.⁸ The Navy accordingly waived its timeliness defense by deciding the merits of Smith’s complaint without addressing the timeliness issue.

In any event, even assuming *arguendo* that the Navy preserved its timeliness defense at the administrative level, it waived it in its conduct of the instant litigation. In answering Smith’s complaint the Navy omitted to catalogue the statute of limitations among its affirmative defenses. *See generally* Answer (Docket No. 3). “To avoid waiver, a defendant must assert all affirmative defenses in the answer.” *McKinnon v. Kwong Wah Rest.*, 83 F.3d 498, 505 (1st Cir. 1996) (citing Fed. R. Civ. P. 8(a)). The Navy seeks to duck the consequences of its failure to plead on two grounds: (i) that it “is

⁸ The Navy views *Ester* as “internally inconsistent” in that it both reaffirms and departs from the well-settled rule that an agency does not waive a timeliness defense merely by accepting and investigating a complaint. Reply to Plaintiff’s Opposition to Summary Judgment (“Defendant’s Reply”) (Docket No. 45) at 9 n.3. I perceive no such tension. A final decision on the merits is quite a different animal than a mere acceptance of or investigation into a complaint.

not asserting the 45-day [statute-of-limitations] rule as an affirmative defense or an ‘avoidance’ under Federal Rule of Civil Procedure 8” but rather relies on that rule “to define the factual scope of the Plaintiff’s timely substantive allegations,” and (ii) that Smith was not prejudiced by the omission. Defendant’s Reply at 7-8.

The first point is patently meritless: The Navy clearly seeks summary judgment (or avoidance of liability) in part on the basis of a statute-of-limitations defense. To the extent that the Navy wished to press the second point, it should have sought to amend its answer pursuant to Fed. R. Civ. P. 15(a), in which context prejudice (or lack thereof) would have been taken into consideration. *See Depositors Trust Co. v. Slobusky*, 692 F.2d 205, 208 (1st Cir. 1982) (“where an affirmative defense is not raised in the pleadings, for whatever reason, the party’s remedy lies through an amendment of the pleadings”); *Jakobsen v. Massachusetts Port Auth.*, 520 F.2d 810, 813 (1st Cir. 1975) (“The ordinary consequence of failing to plead an affirmative defense is its forced waiver and its exclusion from the case. Doubtless, when there is no prejudice and when fairness dictates, the strictures of this rule may be relaxed. Under Rule 15 the district court may and should liberally allow an amendment to the pleadings if prejudice does not result.”) (citations omitted). Nowhere – either in a separate motion or in its papers submitted on summary judgment – does the Navy request that its pleadings be amended to add the affirmative defense in question.

The Navy’s final argument is readily dispatched. The Navy contends that, even taking the assertedly time-barred events into consideration, Smith raises no triable issue that the conduct of Lt. Smith was severe or pervasive enough to alter the terms and conditions of her employment. Defendant’s Motion at 12-14; *see also O’Rourke v. City of Providence*, 235 F.3d 713, 728 (1st Cir. 2001) (“Title VII . . . allows a plaintiff to prove unlawful discrimination by showing that the workplace is permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe

or pervasive to alter the conditions of the victim’s employment and create an abusive working environment.”) (citation and internal quotation marks omitted). To the contrary, Smith adduces evidence that throughout her short tenure at BNAS, her direct supervisor was unable to control his attraction to her or jealousy of others’ attention to her, as a result of which he interfered in myriad ways with the performance of her job. Smith contends, and I agree, that a trier of fact (crediting her version of events) reasonably could conclude that she was required to “run a gauntlet of sexual abuse in return for the privilege of being allowed to work and make a living.” Plaintiff’s SJ Opposition at 13 (quoting *Henson v. City of Dundee*, 682 F.2d 897, 902 (11th Cir. 1982) (quoted in *O’Rourke*, 235 F.3d at 730)).

2. Count III: Retaliation

In Count III of her complaint Smith alleges that the Navy violated Title VII by retaliating against her, including denying her the opportunity for advancement and permanent employment at NASB, after she filed charges of sex discrimination. Complaint ¶¶ 35-39. A plaintiff makes out a *prima facie* case of retaliation by showing that “(1) the employee engaged in conduct that Title VII protects; (2) the employee suffered an adverse employment action; and (3) the adverse action is causally connected to the protected activity.” *Santiago-Ramos v. Centennial P.R. Wireless Corp.*, 217 F.3d 46, 57 (1st Cir. 2000). “Once a *prima facie* showing has been made, the burden shifts to the defendant to articulate a legitimate, non-retaliatory reason for its employment decision.” *Fennell v. First Step Designs, Ltd.*, 83 F.3d 526, 535 (1st Cir. 1996). “If the defendant does so, the ultimate burden falls on the plaintiff to show that the proffered legitimate reason is in fact a pretext and that the job action was the result of the defendant’s retaliatory animus.” *Id.*

The Navy seeks summary judgment on the ground that neither event occurring after Smith filed her EEO complaint – her transfer to FSC and the postponement of the upgrade of her temporary position to a GS-5 level – constituted an “adverse action” for purposes of retaliation analysis. Defendant’s Motion at 16-18. Smith presses no argument concerning the FSC transfer, Plaintiff’s SJ Opposition at 16-19, essentially conceding the Navy’s entitlement to summary judgment on that point, *see, e.g., Graham v. United States*, 753 F. Supp. 994, 1000 (D. Me. 1990) (“It is settled beyond peradventure that issues mentioned in a perfunctory manner, unaccompanied by some effort at developed argumentation are deemed waived.”) (citation and internal quotation marks omitted). However, she asserts that the Navy took two adverse actions: not only tabling its decision on the upgrade but also renegeing on an alleged promise to hire her in a permanent position at FSC. Plaintiff’s SJ Opposition at 16-19. In her view, both can be causally linked to the filing of her discrimination complaint. *Id.* The Navy responds that (i) Smith offers no evidence controverting the Navy’s legitimate justification for the tabling the tabling of the GS-5 upgrade, (ii) in any event the tabling cannot be “adverse” because it involved no tangible loss of benefits and (iii) Smith adduces insufficient evidence to establish that the Navy promised her a permanent job at FSC. Defendant’s Reply at 1-4.

I agree that Smith falls short of generating a triable issue whether the Navy’s proffered justification for the tabling of consideration of the GS-5 upgrade was a sham; however, I am unpersuaded that her FSC claim founders.

With respect to the GS-5 upgrade Smith points to two pieces of evidence: timing (the proximity of the adverse action to the filing of her EEO complaint) and the fact that she generally was considered a good worker in the IT department. Plaintiff’s SJ Opposition at 17-18. As Smith suggests, the proximity of an adverse action to the filing of an EEO complaint can suffice to create an inference of

retaliatory motive. *See id.* at 18; *see also Hodgens v. General Dynamics Corp.*, 144 F.3d 151, 168 (1st Cir. 1998) (“[C]lose temporal proximity between two events may give rise to an inference of causal connection. Thus, protected conduct closely followed by adverse action may justify an inference of retaliatory motive.”) (citation and internal quotation marks omitted). However, in this case timing is a non-issue: The Navy admits that it tabled consideration of the promotion precisely because Smith filed her EEO complaint.

Smith’s remaining evidence, that she generally was considered a good worker, weighs too lightly in the scales to tip the balance to a finding of pretext. At most, it simply casts doubt on the Navy’s explanation that, under the circumstances, it considered it prudent to table Lt. Smith’s upgrade recommendation pending further investigation. This does not suffice to stave off summary judgment. *See, e.g., Shorette v. Rite Aid of Maine, Inc.*, 155 F.3d 8, 13 (1st Cir. 1998) (a plaintiff “must do more than cast doubt on the rationale proffered by the employer, the evidence must be of such strength and quality as to permit a reasonable finding that the . . . [adverse action] was *obviously or manifestly unsupported*.”) (citations and internal quotation marks omitted) (emphasis in original).

The Navy’s remaining argument – that Smith does not properly controvert its evidence with respect to a permanent FSC job – is considerably less persuasive. According to the Navy, Horsman told Smith that she “would have to apply and be considered just like every other potential employee” if she were interested in the permanent FSC position. Defendant’s Reply at 2-3 (quoting Green Decl. ¶ 4). Smith’s cited materials do in fact dispute this statement head-on, constituting evidence that she was promised a permanent job at FSC, to wit: that “CDR Horsman told me I would get a GS-7 job in Family Services. That’s the only reason why I agreed to Family Services,” and that “Commander Horsman told me . . . that I could go over to Family Services; and that would eventually be my full-

time permanent job.” *Id.* at 3-4 (quoting Smith EEO Aff. ¶ 28 at Bates Stamp No. 234; Smith Dep. at 199-200).

For the foregoing reasons, the Defendant’s Motion should be granted solely with respect to any claim of retaliation (Count III) based on Smith’s transfer to FSC or the tabling of consideration of upgrade of her temporary position to a GS-5 level and otherwise denied.

III. Plaintiff’s Motion

A. Factual Context

In this context, as in the case of the Defendant’s Motion, I again confront at the outset a quibble over the proper contours of the parties’ statements of material facts. Specifically, the Navy moves to file an additional affidavit and declaration (each with attached exhibits) to cure alleged deficiencies in material submitted in opposition to the Plaintiff’s Motion. *See generally* Defendant’s Motion for Leave To File the Appended Affidavit and Declaration Including Attached Documents (“Motion To File”) (Docket No. 43). For the following reasons, the Motion To File is denied:

1. Two of the documents sought to be authenticated via the second Kenney declaration (NAS BRUNSWICK INSTRUCTION 5354.5 and SECNAVIST 5300.26B) never were referenced in or submitted with the Navy’s original response to the Plaintiff’s Motion. *Compare* Second Declaration [of Michael P. Kenney] (“Second Kenney Decl.”), filed with Motion To File, ¶¶ 3-4 & Exhs. 7-8 thereto *with* Defendant’s Response to Plaintiff’s Statement of Material Facts in Regard to Plaintiff’s Motion for Summary Judgment on Defendant’s Second Affirmative Defense (“Defendant’s Opposing SMF”) (Docket No. 30); Declaration [of Michael P. Kenney] (“First Kenney Decl.”), attached to Defendant’s Opposing SMF; Affidavit of Authenticity (“First Collins Aff.”), attached to Defendant’s Opposing SMF, & Exhs. 1-4 thereto. These documents therefore exceed the bounds of clarifications in response to Smith’s objections.

2. Two other documents sought to be authenticated via the second Kenney declaration, SECNAVIST 5300.26C and OPNAV INSTRUCTION 5354.1D, were referenced, respectively, in the Navy's memorandum of law opposing summary judgment and in the first Kenney declaration, but not in the Navy's statement of opposing facts. *Compare* Second Kenney Decl. ¶¶ 4-5& Exh. 9 thereto; Defendant's Opposition to Plaintiff's Motion for Summary Judgment on Defendant's Second Affirmative Defense ("Defendant's SJ Opposition") (Docket No. 29) at 9-10; First Kenney Decl. ¶ 3 *with* Defendant's Opposing SMF. In addition, OPNAV INSTRUCTION 5354.1D was merely referenced in the first Kenney declaration; no copy of the document was provided. These two documents accordingly are not cognizable on summary judgment. *See, e.g.*, Loc. R. 56(e) ("The court shall have no independent duty to search or consider any part of the record not specifically referenced in the parties' separate statement of facts."); *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.").

3. The final document sought to be authenticated by the second Kenney affidavit, the so-called non-punitive letter of caution issued to Lt. Smith, cannot be authenticated by Kenney, who from all that appears neither had personal knowledge of events leading to issuance of the letter nor served as custodian of such records for the Navy. *See* Second Kenney Decl. ¶¶ 2-5.⁹

4. For all of the above reasons, none of the documents referenced in the second Collins affidavit is cognizable on summary judgment. *See generally* Second Affidavit of Authenticity, filed with Motion To File.

⁹ At the July 10th conference the Navy's counsel conceded that the non-punitive letter of caution is not a self-authenticating document pursuant to Fed. R. Evid. 902(5). He argued that the document was admissible pursuant to Fed. R. Evid. 902(2) or (8), but acknowledged when pressed that the certification required under either of those subsections is lacking.

With the Motion To File resolved, the parties' statements of material facts, credited to the extent that they are either admitted (in certain instances solely for purposes of summary judgment) or supported by record citations in accordance with Local Rule 56, reveal the following material to the Plaintiff's Motion:

Smith began employment with the Navy on August 19, 1997 as an office automation clerk in the IT Division at NASB. Plaintiff's SMF ¶ 1; Defendant's Opposing SMF ¶ 1. Lt. Smith was Smith's first-line supervisor throughout the term of her employment in the IT Division. *Id.* ¶ 2. Smith's temporary appointment was twice extended at the request of Lt. Smith, first in October 1997 and again in December 1997. *Id.* ¶ 3.

The Navy has adopted an Informal Resolution System set forth in a booklet titled "Resolving Conflict . . . Following the Light of Personal Behavior" ("Booklet") as part of its anti-discrimination policy. Plaintiff's SMF ¶ 4; Deposition of Donald G. Dekker ("Dekker Dep."), filed with Plaintiff's SMF, at 65; Booklet, attached as Exh. 3 to Dekker Dep., at Bates Stamp Nos. 110-11.¹⁰ The Informal Resolution System metaphorically describes "behavior zones" as the colors of a traffic light (*e.g.*, "Red means, 'Stop, don't do it!'") and provides methods for employees to resolve conflict created by sexual harassment. Plaintiff's SMF ¶ 4; Booklet. The Navy provided a copy of the Informal Resolution System policy to Smith within the first couple of days that she began employment at NASB. Plaintiff's SMF ¶ 5; Smith Dep. at 49-50.¹¹ Smith read it. Plaintiff's SMF ¶ 5; Smith Dep. at 57.

¹⁰ The Navy objects, in essence, that paragraph 4 of the Plaintiff's SMF is not supported by the citations given. Defendant's Opposing SMF ¶ 4. The statements made therein are adequately supported by the cited portion of the Deposition of Donald G. Dekker and by the Booklet itself, which is self-authenticating inasmuch as it is an official Navy publication. *See* Dekker Dep. at 65; Booklet at Bates Stamp Nos. 110-11; *see also* Fed. R. Evid. 902(5) (describing "[b]ooks, pamphlets, or other publications purporting to be issued by public authority" as among self-authenticating documents).

¹¹ The Navy suggests that paragraph 5 of the Plaintiff's SMF is not supported by the citations given. Defendant's Opposing SMF ¶ 5. Although Smith, in the cited portion of her deposition testimony, does not identify the Booklet by exact name or exhibit number, she states that she was provided a "pamphlet" and training with respect to the "red light, yellow light" concept. *See* Smith Dep. at 49. Further, the Navy acknowledges that Smith produced the Booklet in response to a document request. Defendant's Opposing SMF ¶ 4. I agree with the Navy that the sweeping statement that Smith "followed the policy" is not supported by the citations given. Smith (*continued on next page*)

However, she said that she considered it “useless” to her and added: “Red light, green light, yellow light. People laugh about it when you say yellow light or red light.” Defendant’s Opposing SMF ¶ 4; Smith Dep. at 59.¹²

The Booklet states in part, “The *Informal Resolution System* enables [the employee] to resolve conflicts in the workplace at the lowest possible level.” Defendant’s Opposing SMF ¶ 6; Booklet at 1.¹³ The Booklet describes “Behavior Zones,” noting that “[b]ehavior can fall into three different zones, just like the red, yellow, and green of the traffic light.” Defendant’s Opposing SMF ¶ 4; Booklet at 3. “**Red means, ‘Stop, don’t do it!’**” *Id.* “Red zone behavior is **ALWAYS UNACCEPTABLE** and includes asking for sexual favors in return for a good performance evaluation[.]” *Id.* “**Yellow means ‘Use caution, prepare for red!’**” *Id.* “Yellow zone behavior is **REGARDED AS INAPPROPRIATE BY MOST PEOPLE** and includes making . . . sexual comments or jokes; violating personal ‘space’; and touching someone in a sexually suggestive way.” *Id.*

The Booklet further provides:

RESOLUTION OPTIONS

When a conflict occurs, there are three options in the Informal Resolution System that you can use to reach satisfactory resolution. Use as many options as you feel necessary.

DIRECT APPROACH

merely testified in relevant part that she was trying to take care of her problem with Lt. Smith herself, as per the pamphlet, and asked Chief Yon to do sexual-harassment training inasmuch as that was what the pamphlet said to do. Smith Dep. at 57-58.

¹² Smith recalled that she received training on what to do if she perceived that sexual harassment had occurred, including lodging a complaint against the officer. Defendant’s Opposing SMF ¶ 4; Smith Dep. at 48-50. She acknowledged that she knew that there were EEO counselors available to her. Defendant’s Opposing SMF ¶ 4; Smith Dep. at 51.

¹³ To the extent there are minor discrepancies (in punctuation, typeface and the like) between the Navy’s extensive quotations from the Booklet and the Booklet itself, I have followed the format of the original. I have in addition quoted passages from the Booklet in the order in which they appear in that document.

? ***In person***, by approaching the individual(s) involved. First, give yourself time to collect your thoughts or cool down. Stay focused on the behavior and its impact. Use common courtesy and ensure your approach is not disrespectful. You may consider writing down your thoughts before approaching the individual(s) involved. (*The comments do not have to be given to the offending person but can be used as documentation if you have to resort to formal action.*)

? ***In writing***, by sending a letter to the offending person stating the facts, your feelings about the behavior, and expected resolution.

Writing:

Will help collect thoughts and evidence

Will help emotionally

Will help choose and prepare for any option

May be used to make the offending person stop the harassment

May be used as documentation to prove the behavior was unwelcome

INFORMAL THIRD PARTY

? ***Request assistance from another person.*** Ask another person to talk with the individuals involved, accompany you or intervene on your behalf to help resolve the conflict. This will normally be a friend or co-worker.

TRAINING INFORMATION RESOURCES (TIR)

? ***Request training or resource materials*** for presentation to the workplace in the areas of discrimination, harassment or inappropriate behavior. Using these materials is a good method of communicating to the offending person and other individuals in the workplace, in a non-threatening way, that the behavior is inappropriate.

Training Information Resources includes videos, books, lesson plans, posters and other materials. Request a TIR from your unit TIR Coordinator (usually the EO/DEEOO) in writing or in person. You need not identify yourself. The CO or the unit commander decides if using the TIR is appropriate.

Defendant's Opposing SMF ¶ 7; Booklet at 4-5. The Booklet also states, "Using the Informal Resolution System does not interfere with your right to use the formal complaint process. Civilians have 45 days from the date of an alleged discriminatory action to contact an EEO Counselor."

Defendant's Opposing SMF ¶ 4; Booklet at 6. The Booklet further provides:

When [an employee feels that he or she has been] the recipient of harassing or offending behavior . . .

Evaluate

- ? What exactly happened?
- ? What was the impact of the behavior?
- ? Did it disrupt the work environment?
- ? Would it have offended a reasonable person?
- ? Was behavior RED, YELLOW or GREEN?
- ? What are my responsibilities and options?

Take Action

If behavior is RED:

Inform chain of command of actions taken or needed.

Determine whether taking formal action is appropriate or whether the Informal Resolution System can resolve the problem.

If behavior is YELLOW:

Approach the offending person directly to discuss the situation. (approach in a non-accusatory manner, in case behavior may have been misunderstood)

Send a letter to the offending person stating the facts and [the employee's] feelings about the matter.

Ask another person or supervisor to advise [the employee], accompany [the employee] to the offending person, or intervene on [the employee's] behalf.

Ask for a Training Information Resource (TIR) for the workplace.

Defendant's Opposing SMF ¶ 4; Booklet at 8-9. After discussing the "Evaluate" and "Take Action" concepts and reviewing a "Sample Format for Letter" for an employee to provide to the "offending person," the Booklet notes: "Remember: If informal options are not successful, you may take formal action through the chain of command." Defendant's Opposing SMF ¶ 8; Booklet at 8-9.¹⁴ The Booklet states: "The *Informal Resolution System* depends on you and your commitment to resolve conflict

¹⁴ The Navy also notes that Smith produced in discovery a pamphlet titled "Sexual Harassment Drawing the Line." Defendant's Opposing SMF ¶ 4 n.4. It is not clear from the face of this document, nor does the Navy otherwise make clear, whether it represented official Navy policy or how it interacted with official Navy policy. See First Collins Aff. ¶ 4 & Exh. 1 thereto.

early and at the lowest possible level.” *Id.* ¶ 6. “You can resolve conflict without making a big incident out of it by using the *Informal Resolution System* in your workplace.” *Id.*

Sometime near the end of the week of September 15, 1997 Smith invited Lt. Smith to join her for a walk after work. Defendant’s Opposing SMF ¶ 9; Smith WC Statement at 154. During the walk Smith told Lt. Smith that she could not continue to go out with him, that it would impact her job and people’s impression of her. *Id.* Smith recalled that Lt. Smith “was good about it; I thought he understood the situation until I got a card in the mail.” *Id.* In about September 1997 Smith complained to Chief Petty Officer Jack Yon, who also worked in the IT Department, about Lt. Smith’s behavior. Plaintiff’s SMF ¶ 10; Defendant’s Opposing SMF ¶ 10. Smith recalled that she begged Yon not to say anything to Lt. Smith. Defendant’s Opposing SMF ¶ 11; Smith WC Statement at 155. Nonetheless, Yon spoke with Lt. Smith, reorganized the office layout and helped designate personal space for Smith. Plaintiff’s SMF ¶ 11; Yon Dep. at 24-25, 32-33, 41-42. Smith also requested, and Yon provided, anti-harassment training to members of the IT Department, including Lt. Smith. Plaintiff’s SMF ¶ 12; Smith Dep. at 58-59; Yon Dep. at 36.¹⁵

The formal complaint process begins with pre-complaint counseling and ends with a final decision issued by the Navy. Plaintiff’s SMF ¶ 14; Defendant’s Opposing SMF ¶ 14; *see also* Deposition of Mary Ann Green, filed with Plaintiff’s SMF, at 64-65. On January 28 or 29, 1998 Smith first sought informal EEO counseling. Defendant’s Opposing SMF ¶ 15; Green Decl. ¶ 3. She primarily complained that Rick Cooper, the local union president, had harassed her by making

¹⁵ The Navy disputes that Smith requested the training, noting that elsewhere in her deposition Smith testified that she told Yon he “had no right” to do anything about her complaint and that, although Yon said he was prompted by the plaintiff’s complaint to do the training, he did not say that she requested it. Defendant’s Opposing SMF ¶ 12. Neither statement controverts the plaintiff’s statement. Smith testified that she told Yon “he had no right” to take her complaint to anyone else; the comment does not pertain to and is not inconsistent with requesting training. Smith Dep. at 92. Yon merely testified “Yes” in response to the question, “Was the sexual harassment training that you gave prompted by [Smith’s] complaint?” Yon Dep. at 36. This does not necessarily mean that Smith did not request the training. Smith’s cited materials do not support her further assertion that she requested training “after the first two options failed.”

reference to her sex and that because of that she lost out on a job. *Id.*; *see also* Counselor's Intake Worksheet, attached as Exh. A to Green Decl.; at Bates Stamp No. 18; Declaration [of Rickie V. Cooper], attached to Defendant's SMF, ¶ 13. Lt. Cdr. Netko said he initially spoke to plaintiff to determine if her complaints about Cooper were union issues or management issues, and that during that discussion she started talking about Lt. Smith. Defendant's Opposing SMF ¶ 15; Netko Dep. at 42-43. Smith's employment at NASB ended on March 16, 1998 without any further extensions of her appointment. Plaintiff's SMF ¶ 17; Defendant's Opposing SMF ¶ 17.

B. Analysis

In its answer to Smith's complaint the Navy seeks to avoid vicarious liability for the actions of Lt. Smith in part on the ground that it "exercised reasonable care to prevent and promptly correct any sexually harassing behavior" and that Smith "unreasonably failed to take advantage of any preventive or corrective opportunities provided by the defendant or to avoid harm otherwise." Answer at 1 (Second Defense). Smith contends that the Navy cannot prove either point, entitling her to summary judgment as to this so-called *Ellerth/Faragher* defense. Plaintiff's Motion at 3-9 (citing *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (1998), and *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998)).¹⁶ Inasmuch as a defendant must prove both elements of an *Ellerth/Faragher* defense by a preponderance of the evidence, *see, e.g., Ellerth*, 524 U.S. at 765, and the Navy falls short of

¹⁶ Smith correctly observes that to the extent she proceeds on a theory of direct (in addition to vicarious) liability, the *Ellerth/Faragher* defense is not even applicable. *See* Plaintiff's Motion at 5-6; *see also Ellerth*, 524 U.S. at 765 ("An employer is subject to vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over the employee. When no tangible employment action is taken, a defending employer may raise an affirmative defense to liability or damages, subject to proof by a preponderance of the evidence. The defense comprises two necessary elements: (a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.") (citation omitted).

demonstrating that Smith unreasonably failed to take advantage of the preventive or corrective opportunities the Navy afforded, Smith is entitled to summary judgment as to this affirmative defense.

A reasonable jury could not conclude that Smith unreasonably failed to heed the Informal Resolution System protocol – the only Navy sexual-harassment policy properly before the court on summary judgment. Although the Booklet states that use of informal procedures “does not interfere” with an employee’s right to use the formal EEO process and observes that an employee has forty-five days from the date of an alleged incident to file an EEO complaint, it strongly encourages resolution of problems via less formal means. Only in cases of “red light” behavior does it state that an employee must inform the chain of command and even consider (at the outset) taking formal action. Options outlined for “yellow light” behavior are all informal (confronting the harasser, seeking help from “another person or supervisor” and requesting training) with the proviso: “Remember: If informal options are not successful, you may take formal action through the chain of command.” The Booklet neither indicates that formal action is a necessity at any point when confronting “yellow light” behavior nor that formal action, if any, should be taken during any particular time frame following the failure of one (or more) attempts at informal resolution.

The Navy suggests *inter alia* that Smith confronted “red light” conduct, warranting immediate report to the chain of command. Defendant’s SJ Opposition at 17. However, the argument is made in a factual vacuum; the Navy adduces no evidence that Lt. Smith engaged in “red light” (or any other particular) behavior. By contrast, the record is clear that Smith was trained shortly after she was hired regarding the “red light, yellow light” concept and attempted prompt informal resolution of her problem with Lt. Smith along the lines the Booklet advised. That she may have subjectively considered the “red light, yellow light” concept silly or useless, *see id.* at 17-18, is irrelevant.¹⁷

¹⁷ The Navy relies in part on *Madray v. Publix Supermarkets, Inc.*, 208 F.3d 1290 (11th Cir. 2000), and *Coates v. Sundor* (continued on next page)

It is not clear how long Smith pursued informal options or at what point she deduced they were ineffective; however, inasmuch as appears from the Booklet (and in the absence of any evidence that she confronted “red light” behavior) she never was obligated to make a formal report through the chain of command, let alone make such a report within any specific time frame.¹⁸ Her delay of at most four months in moving from informal to formal action and her initial failure to name Lt. Smith as her harasser (focusing instead on Cooper) therefore cannot, as a matter of law, constitute an “unreasonable failure” to follow the Navy’s anti-harassment policy as articulated in the Booklet.¹⁹

Smith hence is entitled to summary judgment as to the Navy’s second affirmative defense.

IV. Conclusion

For the foregoing reasons, I recommend that the Defendant’s Motion be **GRANTED** as to any retaliation claim (Count III) by Smith based on her transfer to FSC or the tabling of the upgrade of her temporary job to a GS-5 level, and otherwise **DENIED**; and that the Plaintiff’s Motion be **GRANTED**.

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

Brands, Inc., 164 F.3d 1361 (11th Cir. 1999), for the proposition that Smith unreasonably failed to take advantage of corrective opportunities afforded her. Defendant’s SJ Opposition at 15-16. Both are distinguishable. In *Madray*, the Court of Appeals for the Eleventh Circuit held in part that two employees had unreasonably failed to follow either the employer’s formal sexual-harassment policy or its more informal Open Door Policy in reporting sexual harassment. *Madray*, 208 F.3d at 1302. However, the Open Door Policy in *Madray* provided that if a problem were not resolved, an employee “should” – as opposed to “may” – go higher in the management chain, *id.*, and the plaintiffs did not effectively notify management until as much as six months after first making informal complaints to other employees, *id.* at 1295. The policy at issue in *Coates* provided that “[a]ny employee who feels he or she is being sexually harassed should immediately contact their [sic] line manager, Personnel Contact, or other manager with whom they [sic] feel comfortable.” *Coates*, 164 F.3d at 1364.

¹⁸ The Booklet in essence warned that an employee electing not to pursue formal EEO rights risked running afoul of the forty-five day statute of limitations; however, it did not mandate that those rights be exercised.

¹⁹ Although “proof that an employee failed to fulfill the corresponding obligation of reasonable care to avoid harm is not limited to showing an unreasonable failure to use any complaint procedure provided by the employer[.]” *Faragher*, 524 U.S. at 807, I do not construe the Navy’s brief to argue that apart from Smith’s alleged unreasonable failure to follow available Navy complaint procedures she failed to mitigate damages for purposes of the *Ellerth/Faragher* defense. See Defendant’s SJ Opposition at 1, 15-21.

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 20th day of July, 2001.

David M. Cohen
United States Magistrate Judge

TRLIST STNDRD

U.S. District Court
District of Maine (Portland)

CIVIL DOCKET FOR CASE #: 00-CV-216

SMITH v. SECRETARY OF NAVY, et al Filed: 07/21/00
Assigned to: JUDGE D. BROCK HORNBY Jury demand: Plaintiff
Demand: \$0,000 Nature of Suit: 442
Lead Docket: None Jurisdiction: US Defendant
Dkt# in other court: None

Cause: 28:1361 Petition for Writ of Mandamus

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v.

NAVY, US SEC, Richard J. DAVID R. COLLINS
Danzig, in his official 207-780-3257

capacity as Secretary of the [COR LD NTC]

Navy EVAN ROTH, ESQ.

defendant [COR]

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