

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

RUTH W. COLE,)
)
 Plaintiff,)
)
 v.) Civil No. 04-27-B-W
)
 DEAN NORTHEAST, LLC,)
)
 Defendant.)

RECOMMENDED DECISION ON MOTION FOR SUMMARY JUDGMENT

Ruth W. Cole is pursuing whistle blower protection and age discrimination claims against her former employer, Dean Northeast, LLC. Her suit includes allegations of a hostile environment and a constructive discharge. Dean has moved for summary judgment, (Docket No. 24). I recommend that the court grant the motion because Cole's claims are time barred.

Facts

The following factual statement is constructed from the parties' competing statements of material facts (Docket Nos. 26, 33, 39) in accordance with Local Rule 56. All citations are to docket number 39, Dean's reply statement, which reproduces the entire contents of Dean's initial statement and Cole's opposing statement.

Cole was born in 1936. (¶ 8.) Cole worked for Dean Northeast, LLC, at its Bangor facility from 1984 to March 20, 2002. (¶ 7.) During Cole's employment, she was responsible for accounts receivables, collections, reconciling accounts, and serving as a liaison between customers and management. (¶ 9.) From 1991 through March 20, 2002 (when Cole resigned her employment), Cole's job duties did not materially change.

(Id.) As of 2000, Cole's immediate supervisor was Cindy Kilpatrick. Kilpatrick is the daughter of Cole's sister. (¶ 10.) The General Manager of the Bangor facility is John Economy. He has held that position since June 2000. (¶ 1.)

In May or June 2001, Dean's Bangor facility installed a new computer system, which resulted in the administrative staff, including Cole, working more than the normal amount of hours. (¶ 13.) In early summer 2001, Cole spoke with her accounts receivable colleagues who worked at Dean's Franklin, Massachusetts, facility and learned that those employees were classified as "non-exempt" for purposes of overtime compensation, meaning that they were entitled to enhanced pay for any overtime hours they worked. (¶ 15.) Unlike her Massachusetts counterparts, Cole was not receiving overtime compensation from Dean. (¶¶ 15-16.)

In May or early June 2001, Cole approached Kilpatrick and complained about the fact that she had not received overtime compensation like the employees in the Franklin facility and requested that Dean pay her for 130 hours of overtime hours she had worked. (¶¶ 16, 89.) Cole also asked Kilpatrick to check Dean's internal guidelines to determine how Cole was classified and whether Cole should have been classified as nonexempt under those guidelines. (¶ 17.) Kilpatrick reviewed the overtime hours that had been worked by the other administrative employees at Dean's Bangor facility during the week ending April 28, 2001, through the week ending June 29, 2001, and then calculated the average number of overtime hours the other administrative employees had worked. Based on this information, Kilpatrick offered to pay Cole for 65 hours of overtime. (¶ 18.) Cole agreed to accept that figure. (¶ 19.) Somewhere in this timeframe, Cole told Ms. Kilpatrick that she may have to go see a lawyer about that issue. (¶ 93.) After Cole

made a demand for unpaid overtime, Kilpatrick reported to her that Economy was “not pleased” that she was making an overtime claim. (¶ 133.)

Although Cole was given the choice whether to remain exempt or be re-classified as nonexempt, she did not request any change because she was instructed not to work any more overtime hours. (¶¶ 19, 97.) Because Cole had previously worked five 10-hour days, she changed her schedule to work four 10-hour days per week. (¶¶ 19, 95.) After July 23, 2001, Cole did not again work in excess of 40 hours per week during her employment with Dean. (¶ 21.) She maintains that it was an impossibility for her to compress her workload into a 40-hour work week, which she found to be “an impossibility.” (¶ 96.) There is no evidence that Cole ever requested authorization to work overtime or asked for a reduction in her workload.

Dean’s normal policy regarding overtime was that employees must have overtime authorized prior to working extra hours. When the number of hours caused by the change in computer systems reduced, Kilpatrick sent out a notice to inform all of the hourly employees that the normal rules continued to apply. (¶ 23.) According to Cole, she was not allowed to work overtime but her fellow employees continued to work overtime without authorization. (¶ 94.) Cole cites her own deposition testimony for this assertion.

That testimony was as follows:

Q. Wasn't everybody in the office told not to work overtime without authorization?

A. No. They bleed that company crazy and they get away with it.

Q. You're saying the rest of the staff wasn't told they weren't supposed to work overtime without authorization?

A. Or they're supposed to get authorization but they don't.

(Id.; Cole Depo. at 149-150.)¹ Also according to Cole, following her request for overtime pay, the attitude of her second-line supervisor, John Economy, "changed." (¶ 98.)

Sometime during the summer of 2001, Cole asked Kilpatrick to obtain some information about Cole's retirement benefits and requested a change of benefits form, which she submitted to terminate the payroll deductions for her 401K contribution. (¶¶ 36-37.) Also that summer, during an office visit with her physician, Cole told her physician, Dr. Riker, that she planned to retire that fall. (¶ 38.) At the end of July 2001, around the time the overtime issue was being settled, Cole submitted an employment application to a local school district. In the application, Cole identified John Economy and Cindy Kilpatrick as references because she felt she had a good relationship with them. (¶ 39.) Following the settlement of Cole's request for back wages, neither Kilpatrick nor Economy ever again raised with Cole the issue of Cole's request for overtime compensation. (¶ 22.)

When Cole stopped working more than 40 hours a week, at the end of July 2001, Cole was stressed about trying to get all of her work done in that time frame. The stress of trying to get her work done in a 40-hour work week caused the majority of workplace stress for Cole from the time she settled her overtime dispute in July 2001 until she left Dean in March 2002. (¶ 75.)

Throughout 2001 and for several years prior, Cole had worked in one of four enclosed offices at Dean's Bangor facility. (¶ 24.) In September 2001, Economy decided

¹ On page 150 of her deposition transcript, Cole's testimony reflects that she no longer wished to work more than 40 hours per week at Dean after learning that she had been denied overtime compensation over the course of her employment at Dean. (Deposition of Ruth W. Cole, Docket No. 19.) Dean has filed excerpts of the Cole deposition transcript with its statements of material facts, but a more convenient, complete copy of Cole's deposition transcript was filed by Cole and can be found on the electronic docket at entry 19.

to promote one of Dean's current employees in the sales department, David Lorenz, to the position of sales manager, a position Economy previously held along with his general manager duties. (¶ 25.) Cole was informed by Kilpatrick in September that she would be relocated and was, in fact, relocated to a cubicle on October 22, 2001, so that her office would be available for use by Lorenz. (¶¶ 26, 105, 107.)² At the time Economy decided to promote Lorenz, there were no enclosed offices at the Bangor facility that were not already in use. Economy felt, and Cole agreed, that the new sales manager needed his own office. At the time, the four enclosed offices were occupied by the following individuals: Economy, Kilpatrick, the distribution manager and Cole. (¶ 27.) Cole contends that Economy's decision to move her from an enclosed office to a cubicle was a result of her request to be paid overtime in June 2001 and that she "suspect[ed]" it was meant to demean her. (¶¶ 30, 106.)

During her deposition, Cole responded in the negative to the question whether she had "any reason to believe anything was motivated by [her] request to be paid overtime in July." (Cole Depo. at 161-62, Docket No. 19.) I construe this testimony as a concession on Cole's part that she does not have any *direct* evidence that her overtime request caused Economy to relocate her to a cubicle. (¶ 31.) In Cole's view, causation can be inferred from the temporal proximity of the relocation to her request for overtime (after having occupied the office for seven years), Economy's decision to have Kilpatrick inform Cole of the relocation (rather than informing her himself), and Economy's avoidance of her after the relocation decision was communicated to her. (¶¶ 31, 107.)

Before she was actually moved out of her office into the open office area, Cole raised some concerns about the noise level in the area her cubicle was located in. (¶ 108.)

² Cole took offense that Economy did not tell her herself. (¶ 107.)

However, she agrees that the noise level was not connected to her age or her overtime compensation request. Cole attributed the noise to a lack of discipline in the office area. (§ 33.) In an effort to reduce the noise level in the administrative office, Kilpatrick asked employees to keep their voices down, situated Cole in a cubicle away from the office door, and had installed six-foot partitions around Cole's work area. (§ 34.) Before deciding to move Cole from her enclosed office to the cubicle, Economy investigated whether it was feasible to construct a new office space. The plant engineer told him that it would be expensive. (§ 35.)

Cole contends that Economy avoided her for approximately three weeks after Cole moved into her cubicle. She "assumes" that he did not approach her because of the issues surrounding the office talk regarding her retirement and the office move. (§ 83.) As to her assumptions, however, Cole also suggested that Economy first had an "attitude change" toward her when she asked for a raise in 2000, before the overtime issue arose, because, in her view, "[he] didn't have any respect or probably didn't have any knowledge of the workload that I carried." (§ 77.) Cole asserts that by July 2001, she found her employment with Dean to be "very unpleasant." (§ 99.)

Cole took a vacation following the overtime incident. In August 2001 she returned from her vacation and several people congratulated her on her upcoming retirement. (§ 100.) Cole told them she was not planning on retiring and she asked them where they had heard that rumor. The drivers informed her that they had heard it from Mr. Fitts, a salesperson for Dean. Cole had already spoken with Fitts, who had also congratulated her on her upcoming retirement. When Cole had asked Fitts where he had heard that rumor, Fitts told her that he had overheard Kilpatrick telling some of the men in

the office. (¶ 44.) From Cole's perspective, neither her conversation with Fitts nor with the two drivers was in anyway demeaning or derogatory. (¶ 45.) After speaking with Fitts, Cole went to speak with Economy. Cole told him that she had learned that Kilpatrick was talking about Cole's potential retirement. Cole told Economy that she did not plan on retiring for another five or six years. (¶ 103.) Economy told Cole that he did not have any plans for her to retire. (¶¶ 46, 104.)

When asked at her deposition whether she had "any reason to believe [Kilpatrick] said that [Cole] may be retiring because of [her] age," Cole responded, "I don't know." (¶ 47; Cole Depo. at 177.) When the question was reiterated for clarification, plaintiff's counsel directed Cole not to answer on the ground that the question had already been asked and answered. (Cole Depo. at 177.) Accordingly, as the record stands, Cole does not know whether she had any reason to believe that Kilpatrick spoke of her retirement to others based on Cole's age, or based on another factor such as Cole's request to Kilpatrick as to what her benefits would be if she retired. (¶ 102.) Cole suggests that her request about her retirement benefits was nothing unusual because she had also asked that question the previous year. She maintains that her inquiry was due to the frequent change in corporate ownership, and her concern as to whether benefits changed as a result. (¶ 102.)

During an office visit with Dr. Riker in October 2001, Cole again told her physician that she intended to retire in November 2001. (¶ 49.)

As November 2001 approached, Kilpatrick spoke to Economy about her belief that Cole may retire in November 2001 because she wanted the company to be prepared in the event Cole decided to retire. (¶ 43.) When Cole was temporarily out of work, her

job functions were temporarily transferred to the Franklin office. (¶ 41.) Economy wanted the accounts receivable functions to remain at the Bangor facility because its local customers appreciated dealing with a local person and it gave him some control over the receivables. He believed that, if Cole left the company (for whatever reason), the accounts receivable functions might be moved to the Franklin office. (¶ 42.)

When Cole came into the office on November 19, 2001, she discovered a package of earplugs on her desk. (¶ 109.) Ms. Cole asked each girl as she came in that day if she knew anything about the earplugs. (¶ 110.) When Cole asked Ivey about the package, Ivey laughed and said that she and another employee (a Mr. Stoddard) had put the earplugs on Cole's desk as a joke because of Cole's complaints about the noise. (¶¶ 52, 110.) Ivey and Stoddard later told Economy that the earplugs had been left on Cole's desk purely by accident. (¶¶ 111, 135.)

A few days later, Economy called Cole at home to discuss the earplug incident and acknowledged during a conversation that he had been told by Kilpatrick that Cole was going to retire, and that he did not think moving her out of her office for the five or six weeks before her retirement would make any difference to her. (¶¶ 112, 134.)

Cole was out of work on medical leave from November 20, 2001, to March 17, 2002. (¶ 113.) During this time Cole underwent surgery for carpal tunnel syndrome. (¶ 114.)³ While on leave, Cole contacted Dean in regard to her application for disability. Other than that isolated communication, according to Cole, she did not call into work at all between November 21, 2001 (when Cole went on health related leave), to March 18, 2002. (¶ 54.) Cole looked for a new job while she was on medical leave. On March 1,

³ Cole asserts as a material fact that during her medical leave she was on medication prescribed by her doctor for nerves. (¶ 114.) However, there is no allegation that Cole's medical leave was caused or related to events or conditions in the workplace.

2002, Cole applied for position at A.E. Robinson, listing her separation of employment from Dean as “retirement.” (¶ 55.) According to Cole, she would indicate "retirement" as a reason for leaving so as to avoid having to flag the issue that she was dissatisfied with her employment at Dean. (¶ 86.)

In January 2002, Cindy Kilpatrick received an email from the corporate office requesting, among other things, an explanation of the overtime issue raised by Ruth Cole. (¶ 128.) In response, Ms. Kilpatrick prepared a memo dated January 23, 2002, that related the contours of the matter as follows:

1. Overtime. Ruth was not coded as being eligible for Overtime. After much discussion with John Economy and Janet Slayton, terms were arrived at to reimburse overtime. Since there was not any accurate record of overtime an estimate was used. Personnel Records (HR system) was changed so that overtime would be allowed when approved. So far no approval has been necessary since there are no special projects.

(¶ 129, quoting Kilpatrick Depo. Ex. 8, Docket No. 39, Elec. Attach. 3.)

Cole returned to work on March 18, 2002. Her return lasted only two days: March 18-19, 2002. (¶¶ 56, 63.) After March 20, Cole did not have any further employment-related contact with Dean. (Id.)

During that time, Cole spoke informally with Economy, who told her he was glad that she had returned to work. Cole believed him. (Id.) Cole also spoke with Kilpatrick. Cole did not raise any concerns with Kilpatrick. (Id.) At her deposition, Cole complained that the office atmosphere on her return was tense, that Ivey ignored her,⁴ that "nobody seemed overly overwhelmed to see" her and that she "felt so unwanted."

⁴ Over the 2001 Christmas season, Ivey attempted to give Cole a Christmas present by sending it to Cole through an intermediary. Cole refused to accept the gift. (¶ 84.)

(¶¶ 57, 115, 117.)⁵ On March 19, 2002, Cole had a bad headache, called the nurse at her physician's office, and went to see Dr. Riker. (¶ 60.) He diagnosed her as having shingles. (¶ 119.) Cole returned to the office and told Ivey that she had shingles.⁶ Cole remained at the office only long enough to turn her computer off and then went home shortly after 1:00 p.m. (¶ 60.) Besides briefly speaking with Ivey to describe what was happening, and to advise that co-workers who had not had chicken pox earlier faced a risk of contracting chicken pox from her (¶ 120), Cole does not recall any negative conduct by any of her co-workers, her supervisor, or any other employee of Dean on March 19, 2002. (¶ 61.)

Cole contends that there was an overall tension in the office and absolutely nobody was happy working at Dean's Bangor facility. According to Cole, the tension was caused by office politics and the interaction between the sales department and the rest of the office. (¶ 64.) Cole contends that the reason she left Dean was that she came down with shingles and that her shingles condition was caused by the earplug incident and the problems that she was having with the sales staff. (¶ 65.)

On March 20, 2002, Cole called in and reported her condition to Kilpatrick. Cole describes the conversation as follows:

Q: What did you say to Cindy Kilpatrick?

A: I said, I'm sorry but you're going to have to give the receivables back to Garelick and I had full-blown shingles, that I couldn't hold my head up, and that the doctor said that I would probably be out for another three months. She immediately almost sounded happy. I'll tell, John. I'll

⁵ In the course of reviewing other portions of the record cited by the parties, I also read testimony by Cole in which she stated, "when I came back in March everybody was putting on a bright face and smiling except for a few that did their bastardly [sic] deed to me and wouldn't speak to me." (Cole Depo. at 70.)

⁶ Evidently, Ivey was the only other person present in the office at the time.

clean out your desk for you. I'll take it over to [Mom's], you can pick it up there.

Q: What did you say?

A: I was so damn sick I didn't care. I just said, okay. She assumed I was quitting. I quit. She didn't even ask me, don't you think you could come back in another month or two months or anything. Just assumed that I had quit and I let her assume that, so that's my fault.

(¶¶ 66, 122; Cole Depo. at 85-86.) Cole agrees that she had the opportunity to tell Kilpatrick that Kilpatrick's assumption that Cole was permanently leaving the company as of March 20, 2002, was incorrect, but Cole chose not to do so. (¶ 68.) Cole conceded the possibility that "the way I put it to her, she may have misinterpreted." (¶ 69.) In fact, Kilpatrick understood Cole's statements during the telephone conversation to mean that Cole was permanently leaving the company, but she was unsure whether Cole was resigning, quitting, or retiring. (¶ 70.) Cole also testified that she has never "been forced to resign from an employer." (¶ 74.) At some point, Kilpatrick prepared a letter of resignation for Cole to sign, but Cole never did sign it. (¶ 124.)

After Cole left her employment with Dean, Cole's duties were absorbed by the administrative staff at Dean's Franklin facility. (¶ 82.) Thus, Cole's former position at Dean's Bangor facility no longer exists. (¶ 82.)

Cole filed her complaint in this action on or after February 4, 2004. (¶ 81.) Cole's complaint recites two counts. Count I presents a Maine law whistleblower protection claim and includes an allegation of "constructive discharge." Count II alleges age discrimination in employment in violation of Maine law and includes a "hostile work environment" claim. The complaint does not recite any federal claim, was filed in state court and was removed to this court by Dean on the basis of diversity of citizenship. Both of Cole's claims arise from section 4572 of the Maine Human Rights Act (MHRA),

which makes it unlawful to discriminate against an employee on the basis of, *inter alia*, activity qualifying for protection under the Maine Whistleblowers' Protection Act (MWPA), 26 M.R.S.A. §§ 831-840, or the employee's age. 5 M.R.S.A. § 4572(1).

Discussion

A movant is entitled to summary judgment 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 judgment as a matter of law." Fed. R. Civ. P. 56(c). A fact is material if its resolution would "affect the outcome of the suit under the governing law," and the dispute is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). In reviewing the record for a genuine issue of material fact, the Court must view the summary judgment facts in the light most favorable to the nonmoving party and credit all favorable inferences that might reasonably be drawn from the facts without resort to speculation. Merchants Ins. Co. v. United States Fid. & Guar. Co., 143 F.3d 5, 7 (1st Cir. 1998). If such facts and inferences could support a favorable verdict for the nonmoving party, then there is a trial-worthy controversy and summary judgment must be denied. ATC Realty, LLC v. Town of Kingston, 303 F.3d 91, 94 (1st Cir. 2002).

Dean contends that Cole's action is barred by the statute of limitation. Dean also maintains that Cole cannot establish *prima facie* claims for either count I or count II, let alone pretext. Next Dean argues that the facts are insufficient to establish either a hostile work environment or a constructive discharge. Finally, Dean argues that Cole's claim is procedurally barred because Cole was aware of and failed to follow Dean's internal

complaint procedures. I do not address all of these contentions because I find that Cole's action is barred by the statute of limitation.

The Maine Human Rights Act provides that an "action shall be commenced not more than 2 years after the act of unlawful discrimination complained of." 5 M.R.S.A. § 4613(2)(C). As Dean correctly observes, because Cole filed her complaint on February 4, 2004, her claims must be based on events occurring after February 4, 2002. (Mem. of Law in Support of Mot. Summ. J., Docket No. 24 at 5.) The summary judgment record reflects that all of the adverse employment actions Cole complains of occurred prior to February 4, 2002, and that, on account of Cole's four-month medical leave, Cole only worked two days within the limitation period (March 18-19, 2002) before she quit. This circumstance explains Cole's allegations of constructive discharge and hostile work environment. According to Cole, Dean's statute of limitation argument "fails to recognize that (a) the discrete act of discrimination of which Ms. Cole complains was her constructive discharge on March 20, 2002; and (b) the continuing violation theory applies to Ms. Cole's complaint of a hostile work environment." (Pl.'s Mem. Law in Opp. to Mot. Summ. J., Docket No. 32, at 5.)

A. *Constructive discharge and whistle blowing activity*

Cole maintains that workplace reprisals for her summer of 2001 whistle blowing activity culminated in a constructive discharge in March 2002. The evidence in this case falls well short of the constructive discharge standard. In order for a plaintiff to establish constructive discharge, she must be able to produce evidence that "the working conditions imposed by the employer had become so onerous, abusive, or unpleasant that a reasonable person in the employee's position would have felt compelled to resign."

Suarez v. Pueblo Int'l, Inc., 229 F.3d 49, 54 (1st Cir. 2000). The concept of constructive discharge does not provide succor to the "eggshell" plaintiff. The First Circuit has cautioned that the standard "cannot be triggered solely by an employee's subjective beliefs, no matter how sincerely held." Id. As explained in Suarez, "[t]he workplace is not a cocoon, and those who labor in it are expected to have reasonably thick skins – thick enough, at least, to survive the ordinary slings and arrows that workers routinely encounter in a hard, cold world. . . . [T]he constructive discharge standard, properly applied, does not guarantee a workplace free from the usual ebb and flow of power relations and inter-office politics." Id.

Although Cole argues that a constructive discharge finding might preclude application of the statute of limitation, Cole does not articulate why the court should deem her workplace experience to be so intolerable that a reasonable person would feel compelled to resign. Reviewing the issue independently, I feel compelled to conclude that the record would not allow a constructive discharge instruction to be made to a jury. The picture presented of Dean's Bangor facility does not present a workplace so onerous, abusive, or unpleasant as to compel resignation. Dean and Cole negotiated a settlement of her overtime dispute. Cole testified that, thereafter, she voluntarily refrained from requesting overtime and that she never requested any reduction in her workload. Cole's subsequent placement in a cubicle, although perhaps sufficient to constitute an adverse employment action, does not amount to an intolerable condition of employment. Cubicles are common in administrative offices and Cole's assignment to one merely placed her on a level with the accounts receivable employees at Dean's Franklin facility. Nor can the noise Cole complained of seriously be considered so unpleasant as to compel

retirement. For that matter, the solitary instance of teasing (the earplug incident) is really but a species of noise. An objectively reasonable person would not be incapacitated by such treatment from her fellow employees, particularly as it was an isolated occurrence.⁷ As for treatment by her supervisors, Cole asserts only that Economy avoided her. Compared to active harassment, avoidance is a pretty tame condition of employment. Many employees would be pleased to avoid their supervisors' attention and Cole fails to describe how or why Economy's avoidance of her made her job intolerable. Furthermore, when she returned from medical leave, Economy told Cole that he was happy to have her back. Based on Cole's testimony, Economy's statement was sufficiently sincere for Cole to believe him. As for Kilpatrick's behavior, Cole concedes that she does not know whether Kilpatrick raised the prospect of Cole retiring because of Cole's age or because of Cole's inquiry regarding her 401k. Moreover, as to her final telephone communication with Kilpatrick, in which Cole effectively quit, Cole concedes that "the way I put it to her, she may have misinterpreted." Cole's willingness to give her niece the benefit of the doubt reflects that Kilpatrick's actions cannot support a constructive discharge finding. Because all of the issues Cole complains of occurred outside of the limitation period and did not give rise to a constructive discharge within the limitation period, I recommend that the court grant Dean's motion for summary judgment on Count I.

B. Continuing violation and age-related hostile work environment

Cole's age-based hostile work environment claim fares no better. According to Cole, the continuing violation theory applies to her age discrimination, hostile work

⁷ That Cole was more thin-skinned than the average, reasonable individual is reflected in the fact that Cole contends she left due to her shingles, which, during her deposition, she attributed exclusively to the earplug incident and some unidentified problems she was having with the sales staff. (¶ 65.) Understandably, her counsel tries to build a suit out of more evidence than this.

environment claim. (Docket No. 32 at 6-8.) Cole characterizes the hostile work environment as commencing with her overtime dispute, suggesting that after the dispute was resolved younger workers were routinely given overtime and that she was denied overtime on account of her age (*id.* at 8), although she fails in her summary judgment statement of facts to assert that she ever requested overtime or to provide any evidence of what other workers requested overtime and what their ages were. Cole also spins her co-workers' mistaken congratulations about her retirement as a form of workplace harassment (Docket No. 32 at 8), although she conceded in her deposition testimony that there was nothing mean-spirited about the congratulations she received (Docket No. 39, ¶ 45). As for the earplug incident, Cole recasts that as "jokes about her hearing (a frequent stereotype of the aged)" (Docket No. 32 at 8), although the only evidence in the record reflects that Ivey and Stoddard's boorish practical joke stemmed from Cole's complaints about excessive noise in the workplace (Docket No. 39, ¶¶ 52, 110). As for activity falling within the limitation period, Cole points to Ivey's refusal to acknowledge her when she returned to work on March 18-19, 2002, Economy's statement that he did not want to hear about Ivey's refusal to talk to Cole, and to her constructive discharge. (Docket No. 32 at 8.) I have already concluded that this record does not support a finding of constructive discharge. Accordingly, all that remains within the limitation period is the personal animosity between Ivey and Cole and Economy's understandable brush off of this petty antagonism. Here is the evidence Cole relies on to establish a continuing pattern of harassment after one day back at work following four months of medical leave:

- Q: So you sat down and chatted with John Economy –
A: For two or three minutes.
Q: What did you talk about?

A: He just said that he was glad to see me back, and I said, you know, John[,] [Ivey]⁸ still will not talk to me. I cannot tell you word-for-word what the conversation was. He more or less – he didn't want to talk about it. He wanted to put it behind. That's basic[ly] what he his [sic] attitude was.

(¶ 116, quoting Cole Depo. at 78.) This evidence cannot reasonably be viewed as contributing to a hostile work environment because no reasonable juror could conclude that Cole's issue with Ivey or Economy's desire to move beyond it constituted harassment "of a kind or to a degree that a reasonable person would have felt that it affected the conditions of her employment." Marrero v. Goya of P.R., Inc., 304 F.3d 7, 19 (1st Cir. 2002). Furthermore, the Ivey issue has no logical relation to any of the retirement-related events that occurred prior to the start of the limitation period. Indeed, Cole concedes that the noise level was not connected to her age or her overtime compensation request, but arose from a lack of discipline in the office area. (Docket No. 39, ¶ 33.) Cole's memorandum of law reflects that her age discrimination claim is focused on the fact that Kilpatrick raised the issue of her retirement within the workplace and Economy stated that he did not think Cole would mind moving out of her office for the five or six weeks remaining before her retirement. (Docket No. 32 at 20-21.) All of this occurred outside of the limitation period and the issue of Cole and Ivey's animosity over the earplug joke and the Christmas present snub have no logical relation to the retirement issue. Accordingly, I recommend that the Court grant Dean's motion for summary judgment on count II.

⁸ In her deposition testimony, Cole indicated "those two still will not talk to me," meaning Ivey and Stoddard. However, Cole elsewhere testified that she did not encounter or even see Stoddard on March 18 or 19, 2002. (¶ 115.)

Conclusion

For the reasons set forth herein, I **RECOMMEND** that the court **GRANT** the defendant's motion for summary judgment.

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, and request for oral argument before the district judge, if any is sought, within ten (10) days of being served with a copy thereof. A responsive memorandum and any request for oral argument before the district judge 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.

/s/ Margaret J. Kravchuk
U.S. Magistrate Judge

Dated February 10, 2005

COLE v. DEAN NORTHEAST LLC

Assigned to: JUDGE JOHN A. WOODCOCK, JR
Case in other court: Penobscot County Superior
Court, CV-04-00032

Cause: 28:1441 Petition for Removal- Civil Rights
Act

Date Filed: 02/25/2004
Jury Demand: Plaintiff
Nature of Suit: 442 Civil Rights:
Jobs
Jurisdiction: Federal Question

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