

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

CAROLE JONES,)
)
 Plaintiff,)
)
 v.) 1:11-cv-00232-JAW
)
 WAL-MART STORES EAST, L.P.,)
)
 Defendant.)

ORDER ON THE DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

In this employment discrimination action, Carole Jones claims that her former employer, Wal-Mart Stores East, L.P. (Wal-Mart), subjected her to a hostile work environment based on her gender; she also claims she was constructively discharged. Having carefully considered the much-disputed record in this case, the Court concludes that there are genuine issues of material fact that require jury resolution and therefore denies Wal-Mart's motion for summary judgment.

I. STATEMENT OF FACTS

A. Procedural History

On June 9, 2011, Carole Jones filed a complaint against Wal-Mart, alleging that Wal-Mart engaged in employment discrimination against her and constructively discharged her. *Pl.'s Compl. for Sexual Harassment, Sex Discrimination & Constructive Discharge* (ECF No. 1) (*Compl.*). Wal-Mart filed its Answer to Ms. Jones' Complaint on August 29, 2011, denying the essential allegations and positing several affirmative defenses. *Answer & Affirmative*

Defenses of Def., Wal-Mart Stores East, L.P. (ECF No. 5). On March 21, 2012, Wal-Mart filed a notice of intent to file a motion for summary judgment. *Notice of Intent to File Summ. J. Mot. & Req. for Pre-Filing Conference* (ECF No. 18). In preparation for a Rule 56(h) Conference, Wal-Mart filed a pre-conference filing memorandum on March 29, 2012, *Summ. J. Pre-Filing Conference Mem. of Def. Wal-Mart Stores East, L.P.* (ECF No. 20), and Ms. Jones responded to the memorandum on April 5, 2012, *Pl.'s Opp'n to Def.'s Summ. J. Pre-Conference Filing Mem.* (ECF No. 21). On April 10, 2012, the parties attended a Local Rule 56(h) Pre-Filing Conference. *Local Rule 56(h) Pre-Filing Conference* (ECF No. 22).

Wal-Mart filed a Motion for Summary Judgment on May 23, 2012. *Def.'s Mot. for Summ. J. & Incorporated Mem. of Law* (ECF No. 25) (*Def.'s Mot.*). On May 24, 2012, Wal-Mart filed a statement of material facts together with a joint stipulated statement of material facts. *Statement of Material Facts in Supp. of Def. Wal-Mart Stores East, L.P.'s Mot. for Summ. J.* (ECF No. 32) (DSMF). On June 13, 2012, Ms. Jones filed a response to Wal-Mart's statement of facts, *Pl.'s Resp. to Def.'s Statement of Material Facts* (ECF No. 35) (PRDSMF), and an additional statement of material facts, *Pl.'s Statement of Material Facts in Opp'n to Def. Wal-Mart Stores East, L.P.'s Mot. for Summ. J.* (ECF No. 38) (PSAMF). On the same day, Ms. Jones responded to Wal-Mart's summary judgment motion. *Pl.'s Memo of Law in Supp. of Pl.'s Opp'n to Def. Wal-Mart Stores East, L.P.'s ("Wal-Mart") Mot. for Summ. J.* (ECF No. 40) (*Pl.'s Opp'n*). Wal-Mart replied to Ms. Jones' opposition memorandum on July 3, 2012, *Def.'s Reply Mem. in Supp. of its Mot. for Summ. J.*

(ECF No. 45) (*Def.'s Reply*), and to her additional statement of material facts. *Def.'s Response to Pl.'s Statement of Material Facts* (ECF No. 47) (DRPSAMF). The Court held a Local Rule 56(h) pre-filing conference on April 10, 2012.¹ *See* D. ME. LOC. R. 56(h). On February 6, 2013, under the misimpression that he had moved for oral argument during the Rule 56(h) conference, Plaintiff's counsel formally moved for

¹ Old habits die hard. The District adopted Local Rule 56(h) as an experiment to see whether the growing judicial dissatisfaction with the summary judgment procedure could be ameliorated by a frank pre-filing discussion among the Court and counsel. Generally, this Court has used the Local Rule 56(h) conference to nudge, even elbow the parties away from ineffective, time-consuming and irritating practices, mostly about the point, counterpoint, and re-point back and forth in the statements of material fact. Noting that all the non-movant has to do is generate a single genuine issue of material fact to deflect the motion, the Court has urged the parties, particularly the movant, to posit only those material facts that are truly not disputed, to attempt to stipulate to as much of the record as possible, to limit evidentiary objections to those that the parties would raise at trial, and, especially for the movant, to use Local Rule 56(g) to admit even contested facts for purposes of summary judgment only. In other words, the Court has entreated the moving party to consider a summary judgment motion as a message to the Court that the movant can take the non-movant's best evidentiary shot and would still be entitled to judgment as a matter of law.

On April 10, 2012, the Court discussed all these points with counsel. They listened politely, nodded in agreement, returned to their respective offices, and forgot the discussion. In its opening foray, Wal-Mart proposed 215 material facts; Ms. Jones outright admitted only sixty-five of them, leaving 150 material facts in dispute. Ms. Jones then proposed 216 material facts; Wal-Mart outright admitted only thirty, leaving 186 facts in dispute. Furthermore, the parties, Wal-Mart in particular, effectively threw the Rules of Evidence at the motion, quibbling, moving to strike, and qualifying. The result has been an inordinate delay in the disposition of the motion, requiring the Court to painstakingly rule on over 170 objections, sustaining only a handful. To give the parties credit, they agree with the Court's suggestion about stipulated facts, and presented some stipulated facts—a grand total of eight.

In the end, the motion boiled down to the undeniable conclusion that Wal-Mart had a rogue employee, a man who was continually acting inappropriately toward its female employees, and this rogue employee operated against a backdrop of some degree of sexual banter by other employees. Once he physically approached Ms. Jones and later threatened to rape her, the situation changed. There is no question that Wal-Mart reacted relatively quickly in investigating and ultimately terminating the offending employee. Yet, from the Court's perspective whether this employee and his co-employees had generated a hostile work environment was quite clearly a jury question. Constructive discharge was much closer, especially in view of the timing. However, here, Ms. Jones credibly said she felt compelled to quit after she was required to continue to work in the same store as a co-employee who had threatened to rape her, and whose threat she took seriously, while the investigation was ongoing. Ultimately, in these circumstances, the Court resolved she had generated a jury question on the issue of constructive discharge. The Court could have reached these conclusions much more efficiently if the parties had presented a cleaner, less contentious record.

The parties here are represented by extremely able and experienced attorneys and the Court has no doubt that in preparing their papers, they were attempting to put forward the very best arguments for their respective clients. However, the next time they attend a Rule 56(h) conference, perhaps when they return to the office, they could try a bit harder to put into practice what was preached.

oral argument. *Pl.'s Mot. for Oral Arguments* (ECF No. 50). On February 11, 2013, the Court held a telephone conference with counsel concerning the motion and, upon reflection, Plaintiff's counsel withdrew the motion. The motion for oral argument is therefore deemed withdrawn.

B. Factual Background²

Ms. Jones began working at the Wal-Mart Superstore in Augusta, Maine (the store) in August of 2006. DSMF ¶ 1; PRDSMF ¶ 1. Wal-Mart hired her as an "Overnight Receiver" in the grocery department. DSMF ¶ 2; PRDSMF ¶ 2. Ms. Jones worked thirty-two hours per week on the third shift from 10 p.m. until 7 a.m. and was assigned to work in aisle 7, which contained mostly juices. DSMF ¶ 3; PRDSMF ¶ 3.

An Overnight Receiver is responsible for stocking grocery items by placing merchandise on racks and shelves and in display cases, ensuring merchandise is properly showcased and stocked, transferring older merchandise from inventory storage in the backroom to the sales floor and organizing the backroom to receive new stock from trucks, and maintaining the appearance of the grocery department by cleaning and organizing shelves. DSMF ¶ 4; PRDSMF ¶ 4. Overnight Receivers also help downstack merchandise from large pallets onto smaller carts with wheels and then take those smaller carts into their respective aisles in order to stock the shelves. DSMF ¶ 5; PRDSMF ¶ 5.

² In accordance with "the conventional summary judgment praxis," the Court recounts the facts in the light most hospitable to Ms. Jones' case theories consistent with record support. *Gillen v. Fallon Ambulance Serv., Inc.*, 283 F.3d 11, 17 (1st Cir. 2002). In compliance with this obligation, the Court recites supported facts as true even if Wal-Mart disputes them.

Carol Acedo, the overnight manager, described Ms. Jones as “a good worker. She is meticulous about the—we give certain grocer receivers—because that’s where she is working—aisles.” PSAMF ¶ 1; DRPSAMF ¶ 1. James Clifford, one of Ms. Jones’ coworkers, described her “as a good worker. I love the way she worked. She was very good at her job because she cared, you know, she cared what her aisle looked like.” PSAMF ¶ 25; DRPSAMF ¶ 25.

1. Wal-Mart’s Store Policies

When it hired Ms. Jones, Wal-Mart provided her with some handbooks.³ DSMF ¶ 9; PRDSMF ¶ 9. These handbooks contained Wal-Mart’s personnel policies, including Wal-Mart’s medical leave policies, the Discrimination and Harassment Prevention Policy (DHP Policy), the “Open Door Policy,” and Wal-Mart’s Ethics policy. DSMF ¶ 10; PRDSMF ¶ 10. Wal-Mart’s DHP Policy prohibits “any discrimination or harassment . . . by or directed at any associate”⁴ DSMF

³ Wal-Mart’s paragraph nine stated: “When hired, Plaintiff was given a copy of the employee Handbook.” DSMF ¶ 9. Ms. Jones denied Wal-Mart’s statement asserting that she did not testify that she was given “a copy of the employee handbook”, but rather that she was given “handbooks” which were “mostly about benefits.” PRDSMF ¶ 9. Viewing the facts in the light most favorable to Ms. Jones, the Court omits the disputed portions of paragraph 9.

⁴ Ms. Jones admitted that Wal-Mart’s policy prohibits “any discrimination or harassment . . . by or directed at any associate”, but denied “that Wal-Mart enforces the policy.” PRDSMF ¶ 11. “To the contrary,” she stated, “male coworkers of Jones, including Kyle Elliott, harassed Jones, and Wal-Mart managers had notice of the harassment yet [] did not immediately take action to investigate the notice.” PRDSMF ¶ 11. Wal-Mart objected to Ms. Jones’ denial contending that her statement is “nothing more than ‘additional facts cloaked as facts that rebut or qualify.’” DRPSAMF at 1-2. In addition, Wal-Mart objected because Ms. Jones’ denial is argumentative and conclusory. DRPSAMF at 1-2. Finally, Wal-Mart argued that Ms. Jones’ “denial” is unsupported as Ms. Jones “merely string cites her . . . statement of [additional] material facts, in some instances to upwards of 100 paragraphs.” DRPSAMF at 1-2.

The Court refuses to accept Ms. Jones’ denial because it is argument, not fact. *Learnard v. Inhabitants of Van Buren*, 182 F. Supp. 2d 155, 119 n.3, 119-20 (D. Me. 2000) (stating “[s]ome of the statements are not facts at all” for example, one “fact” begins, “Richard Daigle has always been out to get Leonard”); *see also Daigle v. Stulc*, 794 F. Supp. 2d 194, 225 n.88 (D. Me. 2011). Ms. Jones’ response is also unresponsive given that Wal-Mart was quoting its store policies, not asserting that those policies were implemented. DSMF ¶ 11.

¶ 11; PRDSMF ¶ 11; PSAMF ¶ 65; DRPSAMF ¶ 65. The DHP Policy also states that Wal-Mart “will not tolerate any form of discrimination or harassment in any aspect” of its business and that the company “prohibits any discriminatory action based on an individual’s status.”⁵ DSMF ¶ 12; PRDSMF ¶ 12; PSAMF ¶ 65; DRPSAMF ¶ 65.

The DHP Policy lists examples of harassment, such as “verbal kidding, teasing or joking,” “making offensive comments about an individual’s status, appearance or sexual activity,” and “leering or making offensive gestures.” DSMF ¶ 13; PRDSMF ¶ 13; PSAMF ¶ 65; DRPSAMF ¶ 65. The DHP Policy also states that any associate who experiences conduct that may violate the policy should “immediately report the violation to any salaried member of management or confidentially and/or anonymously to the Global Ethics Offices, 1-800-WMETHIC.” DSMF ¶ 14; PRDSMF ¶ 14; PSAMF ¶ 67; DRPSAMF ¶ 67. The DHP Policy instructs members of management that “[i]f you observe, receive a report or otherwise become aware of a possible violation of the policy, you must immediately report such conduct to the appropriate level of management for investigation,” which includes, but is not limited to, the Field Logistics Human Resource Manager, Employment Advisor, Market Human Resource Manager, Regional Human

Moreover, Local Rule 56(f) states 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.” D. ME. LOC. R. 56(f). Ms. Jones did not comply with this rule as she refers the Court to over one hundred paragraphs (paragraphs 1-64, 75-192). The Court deems Wal-Mart’s statement in paragraph 11 admitted.

⁵ Ms. Jones admitted that “Wal-Mart[’s] DHP policy states that Wal-Mart will not tolerate harassment or discrimination” but she denied that Wal-Mart enforces that policy. PRDSMF ¶ 12. The Court refuses to accept Ms. Jones’ denial. *See supra* note 4.

Resources Manager or People Director.⁶ PRDSMF ¶ 14; PSAMF ¶ 68; DRPSAMF ¶ 68. The DHP Policy states that it will “take all reasonable measures to prevent discrimination and harassment.”⁷ PSAMF ¶ 66; DRPSAMF ¶ 66.

Further, the DHP Policy provides that Wal-Mart will promptly and thoroughly investigate any report of a possible violation of the policy “in accordance with the procedures set forth in the management guidelines.”⁸ DSMF ¶ 15; PRDSMF ¶ 15; PSAMF ¶ 69; DRPSAMF ¶ 69. It also prohibits any negative action against an associate for reporting conduct that may violate the policy or for filing a

⁶ Ms. Jones interposed a qualified response to Wal-Mart’s statement in paragraph 14. PRDSMF ¶ 14. In compliance with its obligation to view the facts in the light most favorable to the non-movant, the Court has incorporated Ms. Jones’ qualification.

⁷ Wal-Mart objected to this paragraph on the ground that the “written policy speaks for itself” and it is “unnecessarily repetitive of DSMF ¶ 14.” DRPSAMF ¶ 66. The Court overrules Wal-Mart’s best evidence rule objection, FED. R. EVID. 1002, and its cumulative evidence objection. FED. R. EVID. 403. The Court notes that throughout its responses to the Plaintiff’s statement of material facts, Wal-Mart makes multiple best evidence objections, contending that the document referred to in a statement of material fact “speaks for itself”. Wal-Mart’s best evidence objections are frivolous and betray a fundamental misunderstanding of the Local Rule 56 process. *United States v. Walsh*, 702 F. Supp. 2d 6, 8 (D. Me. 2010) (“While the Local Rule 56 process may be cumbersome to describe, [t]he rule is intended to focus both the parties and the Court on what facts are actually in dispute”) (quoting *Toomey v. Unum Life Ins. Co. of Am.*, 324 F. Supp. 2d 220, 222 n.1 (D. Me. 2004)).

Local Rule 56 contemplates that the parties will present the Court with a “separate, short and concise” set of facts that the presenting party contends is uncontested. D. ME. LOC. R. 56(b). These statements are not evidence, but must be supported by a citation to evidence. When filing a statement of material fact that references a document, the presenting party is expected to highlight the material portion of the document in the statement of material fact and to cite the document. The party is not expected to place the document itself in the statement. To do so would be unwieldy and would defeat the purpose of Local Rule 56, which was “to halt the former summary judgment practice of submitting a voluminous record and leaving to the court the duty to comb the record in search of material facts.” *Ricci v. Applebee’s Ne., Inc.*, 297 F. Supp. 2d 311, 321 (D. Me. 2003).

The Court notes that Wal-Mart was not really making a best evidence objection. It never asserts that the document cited in the record was not an original or that the document was not authentic or was otherwise inadmissible. *See* FED. R. EVID. 1002, 1003. Instead, Wal-Mart seems to be insisting on the impractical and wrongheaded view that the proponent of the statement must put the document itself in the statement.

⁸ Ms. Jones admitted Wal-Mart’s paragraph 15; however, she denied that “Wal-Mart enforces the policy” referencing paragraphs 75-192 of her Statement of Additional Material Facts. PRDSMF ¶ 15. The Court refuses to accept her denial. *See supra* note 4.

complaint of discrimination with a government agency or court.⁹ DSMF ¶ 16; PRDSMF ¶ 16. If a Wal-Mart associate makes a report of harassment or discrimination, the DHP Policy states that Wal-Mart may put in place reasonable interim measures during the investigation, including the transfer of the associate who reportedly violated the policy.¹⁰ DSMF ¶ 17; PRDSMF ¶ 17. The DHP Policy states that Wal-Mart “will take further appropriate action once the reported violation has been thoroughly investigated. If the investigation reveals that an associate has violated this policy ‘or any other policy’ that associate will be subject to disciplinary action up to and including termination and any other appropriate corrective action.”¹¹ PSAMF ¶ 70; DRPSAMF ¶ 70. The DHP Policy also states Wal-Mart will make “every reasonable effort to maintain the confidentiality of all parties involved in any investigation”, that it will “disclose information to only those having a need to know in order to facilitate the investigation or resolution”, and that “[a]ny disclosure of information, other than on a need to know basis . . . , will

⁹ Ms. Jones admitted that Wal-Mart’s DHP Policy states it prohibits negative action against employees for reporting violations of the policy but denied that Wal-Mart enforces the Policy. PRDSMF ¶ 16. The Court refuses to accept Ms. Jones’ denial. *See supra* note 4.

¹⁰ Ms. Jones admitted that Wal-Mart’s DHP Policy permits the Store to put reasonable interim measures in place; however, she denied that Wal-Mart put interim measures in place in her case. PRDSMF ¶ 17. The Court refuses to accept Ms. Jones’ denial. *See supra* note 4.

In paragraph 72 of Ms. Jones’ Statement of Additional Material Facts she states “[the] [p]olicy required that ‘when somebody’s being investigated, they’re supposed to be suspended from work until they find out whether or not it was true.’” PSAMF ¶ 72. Wal-Mart denied this statement citing the Policy provision described in DSMF ¶ 17. After reviewing the record citation, the Court excludes Ms. Jones’ paragraph 72 because it is not supported by the record.

¹¹ Ms. Jones’ paragraph 70 states: “Wal-Mart claims that it ‘will take further appropriate action’” PSAMF ¶ 70. Wal-Mart objected to paragraph 70 because the term “claims” is argumentative and because the “written policy speaks for itself.” DRPSAMF ¶ 70. The Court includes paragraph 70 in accordance with footnote 6 but omits the argumentative introductory language. *See supra* note 7.

constitute a breach of confidentiality and will result in disciplinary action including termination.”¹² DSMF ¶ 18; PRDSMF ¶ 18; PSAMF ¶ 71; DRPSAMF ¶ 71.

2. Ms. Jones’ Exposure to Wal-Mart’s Store Policies

Ms. Jones had access to and became familiar with Wal-Mart’s policies on the Store computer system, specifically the Store’s policies on selling cigarettes to minors, forklift operations, and sexual harassment.¹³ DSMF ¶ 19; PRDSMF ¶ 19. Wal-Mart’s internal computer platform is known as “The Wire.” DSMF ¶ 20; PRDSMF ¶ 20. During Ms. Jones’ employment at the Store, the Wire was operational and associates like Ms. Jones were able to view any company policy while at work or at the Store. DSMF ¶ 23; PRDSMF ¶ 23. Ms. Jones completed a lesson on how to use the Wire shortly after she was hired. DSMF ¶ 21; PRDSMF ¶ 21.

Ms. Jones also received one sexual harassment training session on the computer when she started working at the Store.¹⁴ DSMF ¶ 22; PRDSMF ¶ 22. Ms.

¹² Ms. Jones admitted that the DHP Policy states Wal-Mart will maintain confidentiality but denied that Wal-Mart maintained confidentiality in her case. PRDSMF ¶ 18. Wal-Mart objected to this additional statement of fact because it is conclusory, argumentative and not supported by the record. DRPSAMF at 1-2. The Court agrees with Wal-Mart and refuses to accept Ms. Jones’ denial. *See supra* note 4. Wal-Mart’s statement in paragraph 18 is deemed admitted.

¹³ Wal-Mart’s paragraph 19 states that Ms. Jones “had access to and became familiar with Wal-Mart’s policies, including the DHP Policy, on the Store computer system.” DSMF ¶ 19. Ms. Jones denied paragraph 19 of Wal-Mart’s statement because “[t]he cited testimony only establishes that Jones testified to receiving training, through computer sessions on ‘selling cigarettes to minors’, ‘forklift’ operations, [and] one on sexual harassment.” PRDSMF ¶ 19. After reviewing the record and viewing all facts and reasonable inferences in Ms. Jones’ favor, the Court agrees with Ms. Jones’ objection to the breadth of Wal-Mart’s statement and omits “including the DHP Policy.” As Ms. Jones admitted that she was trained in some matters, the Court inserts a list of the policies Ms. Jones admits in her denial. PRDSMF ¶ 19; DSMF Attach 11, *Dep. Tr. of Carole Jones* at 18:22-20:-13 (ECF No. 32-11) (*Jones Dep.*).

¹⁴ Wal-Mart’s paragraph 22 states that “Plaintiff received sexual harassment training on the computer when she started working at the Store.” DSMF ¶ 22. Ms. Jones interposed a qualified response, noting that the record citation by Wal-Mart establishes that Ms. Jones “testified she received one computer training session on sexual harassment.” PRDSMF ¶ 22. Based on its review

Jones was generally aware of the reporting procedures for incidents of harassment or discrimination.¹⁵ DSMF ¶ 24; PRDSMF ¶ 24. Ms. Jones was also aware of the availability of Wal-Mart’s hotline.¹⁶ DSMF ¶ 25; PRDSMF ¶ 25.

Wal-Mart had an “Open Door” Policy in effect at the time of Ms. Jones’ employment with the company.¹⁷ DSMF ¶ 26; PRDSMF ¶ 26. Ms. Jones was trained on the Open Door Policy when she was hired. DSMF ¶ 29; PRDSMF ¶ 29. The Open Door Policy offers each associate an opportunity to bring suggestions, observations, problems or concerns regarding an associate or the company to the attention of any supervisor or manager at any time.¹⁸ DSMF ¶ 27; PRDSMF ¶ 27. Wal-Mart prohibits retaliation against any associate who avails herself of the Open Door Policy.¹⁹ DSMF ¶ 28; PRDSMF ¶ 28.

3. Ms. Jones’ Initial Complaints to Management

of Wal-Mart’s record citation, the Court rephrases Wal-Mart’s statement to accurately reflect Ms. Jones’ deposition testimony.

¹⁵ Wal-Mart’s paragraph 24 states that “Plaintiff was aware of the reporting procedures in the DHP Policy.” DSMF ¶ 24. Ms. Jones interposed a qualified response to Wal-Mart’s paragraph 24 by listing a series of her statements which explain and confirm her understanding of the various levels of Wal-Mart’s reporting procedure for harassment or discrimination. DSMF ¶ 24; PRDSMF ¶ 24. The Court rephrases Wal-Mart’s statement to more accurately reflect Ms. Jones’ testimony, which was not tied to the DHP Policy, but to her general knowledge. *See Jones Dep.* 24:20-25:-8.

¹⁶ Wal-Mart’s paragraph 25 states that “Plaintiff was aware of the availability of the Global Ethics Office hotline.” DSMF ¶ 25. Ms. Jones denied paragraph 25 because the “cited evidence does not establish [she] knew of the ‘Global Ethics Office hotline.’” PRDSMF ¶ 25. The record establishes that Ms. Jones was aware of and had used “Wal-Mart’s hotline,” not the Global Ethics Office hotline. The Court rephrases paragraph 25 to reflect her testimony. *See Jones Dep.* 25:25-26:-4.

¹⁷ Ms. Jones admitted that “Wal-Mart claims it had an open door policy;” however, she denied that Wal-Mart enforced that policy. PRDSMF ¶ 26. The Court declines to accept Ms. Jones’ denial. *See supra* note 4.

¹⁸ Ms. Jones admitted that “Wal-Mart claims it had an open door policy;” however, she denied that Wal-Mart enforced that policy. PRDSMF ¶ 27. The Court declines to accept Ms. Jones’ denial. *See supra* note 4.

¹⁹ Ms. Jones admitted that “Wal-Mart[s] policy states that it prohibits any retaliation action against an employee for reporting possible violations of the subject policy;” however, she denied that Wal-Mart enforced that policy. PRDSMF ¶ 28. The Court refuses to accept Ms. Jones’ denial. *See supra* note 4.

During June or July of 2010, Ms. Jones told her managers several times that some coworkers were throwing merchandise in her aisle at work and causing the juice bottles to break and spill.²⁰ DSMF ¶ 30; PRDSMF ¶ 30; PSAMF ¶ 79; DRPSAMF ¶ 79. In that same timeframe, she began to complain to her supervisors Carol Acedo, Shawn Ames, Ryan Bullis and John Gregoire about offensive sexual behavior by male coworkers.²¹ PSAMF ¶ 75; DRPSAMF ¶ 75. Mr. Clifford testified that Charlene Bigelow complained about Mr. Elliott's sexual comments.²² PSAMF ¶ 35; DRPSAMF ¶ 35.

a. Complaints to Carol Acedo

Ms. Jones testified that she spoke with Carol Acedo, her shift manager, on several different occasions during the summer of 2010 about issues with coworkers, including that her coworkers stacked juice boxes so high that the juice would spill, that they put the wrong merchandise in her aisle, and that they made sexual

²⁰ Wal-Mart's paragraph 30 states: "During June or July of 2010, Plaintiff told her managers several times that some co-workers (the Co-workers) were throwing merchandise in her aisle at work, causing the juice bottles to break and spill." DSMF ¶ 30. Ms. Jones responds: "Deny that Jones only told managers several times of coworkers throwing merchandise in her aisle at work causing juice bottles to break." PRDSMF ¶ 30. She says that she gave notice of other problems at work, including sexual harassment. PRDSMF ¶ 30. The Court rejects Ms. Jones' denial because paragraph 30 does not state or imply that she complained only about her coworkers throwing merchandise.

²¹ Wal-Mart interposed a qualified response to this paragraph, citing specific portions of Ms. Jones' testimony that it contends contradict this paragraph. DRPSAMF ¶ 75. The Plaintiff's paragraph 75, however, is supported by her affidavit and viewing the facts in the light most favorable to Ms. Jones, the Court has included it without qualification. PSAMF Attach 9, *Aff. of Carole Jones*. ¶ 3 (ECF No. 38-9) (*Jones Aff.*)).

²² Wal-Mart interposed a qualified response to this paragraph, observing that Mr. Clifford clarified in his errata sheet that Ms. Bigelow told him what Ms. Jones had told her that Mr. Elliott had said to Ms. Jones. DRPSAMF Attach. 5, *Clifford Errata Sheet* (ECF No. 47-5). The Court refuses to accept Wal-Mart's qualified response. Ms. Jones' paragraph 35 does not assert what the complaint was or what her source of information was, only that Ms. Bigelow complained about Mr. Elliott's sexual comments.

comments in her presence.²³ DSMF ¶ 31; PRDSMF ¶ 31. During Ms. Jones' first conversation with Ms. Acedo about her coworkers, she told Ms. Acedo that her coworkers had stacked juice boxes up so high in her aisle that the lower boxes were getting crushed and would spill.²⁴ DSMF ¶ 32; PRDSMF ¶ 32. Ms. Jones also complained to Ms. Acedo about "the way the guys were talking, making sexual comments over there."²⁵ PSAMF ¶ 81; DRPSAMF ¶ 81. Ms. Acedo was with Assistant Manager John Gregoire when Ms. Jones told her about the juice box problem.²⁶ DSMF ¶ 33; PRDSMF ¶ 33.²⁷

²³ In paragraph 31 Wal-Mart stated: "Plaintiff states that she spoke with Shift Manager Carol Acedo ("Acedo") three times during the summer of 2010 about issues with the Co-Workers." DSMF ¶ 31. Ms. Jones denied paragraph 31, contending that she complained to Ms. Acedo more than three times during the summer of 2010. PRDSMF ¶ 31. Wal-Mart's paragraph 31 does not exclude the possibility that Ms. Jones made more than three complaints about her coworkers' behavior. The Court does not accept her denial.

After reviewing the record, the Court cannot accept Ms. Jones' qualification of the frequency of her complaints because the record and Ms. Jones' own statements establish that Ms. Jones complained to management on "several different occasions." PRDSMF ¶ 31; *Jones Dep.* 35:19-37:-25. Yet, viewing the facts and inferences in the non-moving parties favor, the Court has rephrased paragraph 31 to reflect Ms. Jones' exact testimony regarding the frequency and the substance of her complaints to Ms. Acedo.

²⁴ Ms. Jones denied that she "only reported to Acedo about the boxes being stacked too high." PRDSMF ¶ 32. She says she also made complaints to Ms. Acedo about sexual comments. PRDSMF ¶ 32. However, Wal-Mart's paragraph 32 does not state that the complaint about boxes was the only complaint Ms. Jones made. Ms. Jones' denial is, therefore, unresponsive because it does not address the contents of Wal-Mart's statement in paragraph 32. The Court does not accept her denial.

²⁵ Ms. Jones' paragraph 81 stated that Ms. Jones "gave notice to Carol Acedo." PSAMF ¶ 81. Wal-Mart objected and moved to strike on the ground that "notice" is not supported by the record citation. DRPSAMF ¶ 81. Wal-Mart then denied the paragraph, citing Ms. Jones' deposition testimony in which she testified that she notified Ms. Acedo about the coworkers' improper stacking and throwing of juice boxes. DRPSAMF ¶ 81. The Court reviewed Ms. Jones' deposition and contrary to Wal-Mart's contention, Ms. Jones clearly testified that she complained to Ms. Acedo about her male coworkers making sexual comments. *Jones Dep.* 36:5-9 ("I told her about the way that the guys were talking, making sexual comments over there"). The Court declines to accept Wal-Mart's denial.

²⁶ Ms. Jones admitted that John Gregoire, the Assistant Manager, was present when she complained to Ms. Acedo. PRDSMF ¶ 33. Yet, Ms. Jones denied that she "only reported about the boxes being stacked too high." PRDSMF ¶ 33. Ms. Jones' denial is unresponsive because it does not address the contents of Wal-Mart's statement. The Court does not accept her denial.

²⁷ The parties dispute whether Ms. Jones told Ms. Acedo who was responsible for the juice stacking problems. Wal-Mart's paragraph 34 stated that Ms. Jones "did not know who stacked the juice boxes so Acedo talked with all of the associates who had been downstacking that evening and

Ms. Jones' coworkers Shawn and Mike worked in general merchandise, not in grocery, but they would help out from time to time in the grocery department. DSMF ¶ 65; PRDSMF ¶ 65. Ms. Jones testified that Shawn "would throw things in [Jones'] aisle and break things causing juice to go everywhere" and he "would stack the Gatorade in the isle so high that she wouldn't be able to reach it."²⁸ PSAMF ¶ 16; DRPSAMF ¶ 16. Her coworkers John and Kyle Elliott worked in grocery as overnight receivers; John typically worked in Aisle 4 and Mr. Elliott typically worked in Aisle 6. DSMF ¶ 66; PRDSMF ¶ 66.

In response to Ms. Jones' complaint, Ms. Acedo talked with all of the associates who had been downstacking that evening and told them not to stack too high or throw boxes. DSMF ¶ 34; PRDSMF ¶ 34. Ms. Acedo did not impose discipline on anyone for the juice damage.²⁹ DSMF ¶ 35; PRDSMF ¶ 35. Thrown

told them not to stack too high or throw boxes." DSMF ¶ 34. This statement is confirmed by Ms. Acedo's sworn declaration. DSMF Attach. 2, *Decl. of Carol Acedo* ¶ 39 (ECF No. 32-2) (*Acedo Decl.*). Ms. Jones denied paragraph 34 and objected to Wal-Mart's statement that "Plaintiff did not know who had stacked the juice boxes." DSMF ¶ 34; PRDSMF ¶ 34. Citing her own deposition transcript, she affirmatively stated that she identified Shawn Jones, Mike, John, and Kyle Elliott. PRDSMF ¶ 34 (citing *Jones Dep.* 33:23-34-7, 35:4-11).

By denying Wal-Mart's asserted fact with a record citation, Ms. Jones has effectively denied Wal-Mart's paragraph 34. However, the Local Rules require that if the non-movant desires to place additional facts into the summary judgment record, she shall do so "in a separately numbered paragraph and supported by a record citation as required by subsection (f) of this rule." D. ME. LOC. R. 56(c). Ms. Jones never placed before the Court as a separate fact, her assertion that she informed Ms. Acedo of the names of the individuals responsible for the juice stacking incident and therefore the Court has not included the assertion.

²⁸ Wal-Mart interposed a qualified response to Ms. Jones' statement in paragraph 16, "[b]ecause Plaintiff did not know who had stacked or thrown the juice." DRPSAMF ¶ 16. In support of her statement, Ms. Jones cited her deposition testimony where she explicitly named Shawn as one of the people who threw merchandise in her aisle and stacked boxes too high. PSAMF ¶ 16; *Jones Dep.* 33:23-34:-2. The Court rejects Wal-Mart's qualified response and deems the paragraph admitted.

²⁹ Ms. Jones admitted that Ms. Acedo did not impose discipline; however, she denied "that Ms. Acedo did not know who had stacked the boxes too high." PRDSMF ¶ 35. Ms. Jones has effectively denied that Ms. Acedo did not know who was responsible for the juice incident, *see supra* note 27,

boxes and damaged product was experienced by other associates in different aisles.³⁰ DSMF ¶ 36; PRDSMF ¶ 36. Sometimes merchandise might be damaged or broken due to accidents or things that happened before the merchandise arrived at the store; other times, merchandise might break because an associate at the store was careless while handling the merchandise. DSMF ¶ 37; PRDSMF ¶ 37.

Certain coworkers' carelessness with the freight was a general workplace issue caused by the pressure of quickly unloading, downstacking and stocking shelves with massive amounts of product during an overnight shift in which crews were often short-handed as a result of people calling out sick.³¹ DSMF ¶ 38; PRDSMF ¶ 38. Other associates talked with Wal-Mart managers about the way in which their coworkers downstacked groceries in 2010. DSMF ¶ 40; PRDSMF ¶ 40. During several shift meetings in the summer of 2010 and at other times, various managers, including Ryan Bullis, Shawn Ames, and Carol Acedo, reminded associates that it was critical that they put the merchandise in the right aisle, that the associates work like a team, and that the associates handle the merchandise with care. DSMF ¶ 39; PRDSMF ¶ 39.

and therefore the Court has not included the portion of Wal-Mart's paragraph 35, which states that the reason Ms. Acedo did not discipline anyone was that she did not know who was responsible.

³⁰ Ms. Jones denied "that thrown boxes and damaged product was experienced by other associates in different aisles at the same rate experienced by Jones." PRDSMF ¶ 36. Wal-Mart's paragraph 36 does not assert that other associates' experiences with thrown boxes and damaged product were different than that experienced by Ms. Jones. The Court included Wal-Mart's paragraph 36 as written.

³¹ Ms. Jones denied that other workers experienced the same high rate of thrown boxes and damaged product in their aisles as she did. PRDSMF ¶ 38. The Court included Wal-Mart's paragraph 38 as written.

Ms. Jones told Ms. Acedo on one occasion in the summer of 2010 that “the guys” stacked the Gatorade too high in or near her aisle.³² DSMF ¶ 41; PRDSMF ¶ 41. On that occasion, Ms. Acedo helped Ms. Jones downstack the Gatorade. DSMF ¶ 42; PRDSMF ¶ 42. Products shipped to the store, including Gatorade, are taken off the trucks at the receiving platforms and placed on pallets before being brought into the store for shelf stocking. DSMF ¶ 43; PRDSMF ¶ 43. The Gatorade that Ms. Jones complained was stacked too high was shrinkwrapped in one tall stack before being shipped, unloaded off the truck at the store, and brought into the store in the manner in which it had arrived. DSMF ¶ 44; PRDSMF ¶ 44.

No one “stacked” the Gatorade once it got to the store—it arrived in the store that way—and the protocol in grocery was to forego downstacking a pallet that contained a single shrink-wrapped product. DSMF ¶ 45; PRDSMF ¶ 45. For the sake of efficiency, associates were instructed to leave single, shrink-wrapped products on one pallet without downstacking, move the product to the aisle where it belonged, and let the associate responsible for stocking shelves in that aisle downstack the product. DSMF ¶ 46; PRDSMF ¶ 46.

In June or July 2010, Ms. Jones told Ms. Acedo that she was “stressed” by the way the juice was being put in her aisle and Ms. Acedo responded: “If you think you’re the only one under stress, think again.”³³ DSMF ¶ 47; PRDSMF ¶ 47;

³² Ms. Jones denied that she “only complained to Acedo about the guys stacking the Gatorade too high.” PRDSMF ¶ 41. Wal-Mart’s paragraph 41 does not assert that she only complained to Ms. Acedo and therefore the Court included Wal-Mart’s paragraph as written.

³³ The parties disagree about when Ms. Jones told Ms. Acedo that she was stressed about the stacked Gatorade and sexual comments. Wal-Mart says the conversation took place in August. DSMF ¶ 47. Citing her sworn declaration, Ms. Jones says it was July. PRDSMF ¶ 47 (citing *Jones Aff.* ¶ 3). Ms. Jones has effectively denied that the conversation took place in August.

PSAMF ¶ 106; DRPSAMF ¶ 106. In August 2010, she complained to Ms. Acedo about the Gatorade being stacked too high, about coworkers putting things in her aisle that did not belong there, and about the coworkers swearing and making comments about strippers, their girlfriends or wives, breasts, and “Hooters” in her vicinity. DSMF ¶ 47; PRDSMF ¶ 47; PSAMF ¶¶ 4-5, 17, 80, 82-85; DRPSAMF ¶¶ 4-5, 17, 80, 82-85. Ms. Jones stated that “all the guys would join in the conversation and add their own little bit of whatever comment.” PSAMF ¶ 18; DRPSAMF ¶ 18. Except for Mr. Elliott, Ms. Jones’ coworkers’ sexual comments or banter was not directed at her.³⁴ DSMF ¶ 48; PRDSMF ¶ 48. These comments occurred approximately once per week during the summer of 2010.³⁵ DSMF ¶ 49; PRDSMF ¶ 49; PSAMF ¶ 22; DRPSAMF ¶ 22. In August 2010, Ms. Jones told Ms. Acedo that she was offended by some of the language.³⁶ DSMF ¶ 50; PRDSMF ¶ 50.

In her paragraph 106, Ms. Jones stated: “In fact after Jones complained to Acedo in June or July, Acedo simply said, ‘If you think you’re the only one under stress, think again.’” PSAMF ¶ 106. Wal-Mart denied Ms. Jones’ paragraph 106 referring to actions that Ms. Acedo took in response to Ms. Jones’ complaints. DRPSAMF ¶ 106. Wal-Mart’s record citations do not, however, effectively deny Ms. Jones’ claim about Ms. Acedo’s response or the date of her complaint to her. The Court has included Ms. Jones’ paragraph 106.

³⁴ Ms. Jones denied paragraph 48 because she “testified the comments were made ‘like maybe two feet away from me.’” PRDSMF ¶ 48. A review of the record confirms that Ms. Jones stated multiple times that the comments made by her coworkers were not directed at her but rather comments that she overheard. *Jones Dep.* 38:2-39:-7, 41:19-25, 53:6-24. In light of Ms. Jones’ testimony, the Court refuses to accept her denial.

³⁵ Ms. Jones denied “that the comments took place only once a week or only in the summer of 2010.” PRDSMF ¶ 49. A review of the record, shows that when asked how often the comments were made Ms. Jones testified, “I would say maybe once a week” and later stated, when discussing what she had told a manager about the comments that “I told him that they talk like that every night, basically, almost every night.” *Jones Dep.* 38:2-10, 53:1-54:-4. Because when directly asked how often the comments took place Ms. Jones answered “maybe once a week”, the Court has decided to include Wal-Mart’s statement in paragraph 49. For the same reasons, the Court has declined to include Ms. Jones’ additional statement of fact in paragraph 22— “[t]he above sexual conduct took place in the presence of Jones and took place almost every shift.” PSAMF ¶ 22.

³⁶ Ms. Jones admitted that “in August of 2010 Jones again told Acedo that she was offended by some of the language”; however, she denied “that was the extent of the conversation.” PRDSMF ¶

After Ms. Jones told Ms. Acedo that her coworkers' comments bothered her, Ms. Acedo met with all of the overnight associates, including Ms. Jones, during a shift meeting and, without mentioning Ms. Jones' name, told the staff that she had been talked to about foul language on the floor and that they should watch their language and avoid swearing because it may offend customers or coworkers.³⁷ DSMF ¶ 58; PRDSMF ¶ 58. Ms. Acedo told the associates that if she heard about any more swearing she would write them up or otherwise hold them accountable.³⁸ DSMF ¶ 59; PRDSMF ¶ 59.

With respect to comments about Hooters, James Clifford, Ms. Jones' coworker, liked to go to the restaurant, which he had visited during a trip to Texas. DSMF ¶ 51; PRDSMF ¶ 51. Mr. Clifford joked about buying a business and opening his own Hooters. DSMF ¶ 52; PRDSMF ¶ 52. Ms. Jones, Kenny Curtis, and Mr. Clifford were friendly at work and sometimes went to the Irving together during breaks. DSMF ¶ 53; PRDSMF ¶ 53.³⁹ On several occasions Ms. Jones asked Mr.

50. Because Wal-Mart's statement does not limit the scope of Ms. Jones' conversation with Ms. Acedo, the Court views Ms. Jones' denial as non-responsive and declines to accept it.

³⁷ Ms. Jones denied "that the evidence supports the fact [in Wal-Mart's paragraph 58]" and objected to its inclusion since "the alleged fact does not have a proper foundation." PRDSMF ¶ 58. Ms. Bigelow's and Mr. Clifford's testimony and Ms. Acedo's declaration confirm that Ms. Acedo held a meeting to cover Ms. Jones' concerns about coworkers' swearing. Their statements comply with Rule 602. FED. R. EVID. 602. The only portion of paragraph 58 susceptible to Ms. Jones' foundation objection, is the first phrase, "[t]he day after Plaintiff told Acedo that the coworkers[]" comments bothered her" because the record does not support that timing. The Court omits that phrase; otherwise, the Court declines to accept Ms. Jones' denial.

³⁸ Ms. Jones denied "that the evidence supports the fact [in Wal-Mart's paragraph 59]" and objected that "the alleged fact does not have a proper foundation." PRDSMF ¶ 59. For the reason described in footnote 37, the Court included Wal-Mart's paragraph 59.

³⁹ In paragraph 54, Wal-Mart stated, "Ms. Jones never told Mr. Clifford that she was offended by his comments about the Hooters restaurant, nor did she ask him to stop making those comments." DSMF ¶ 54. Ms. Jones denied Wal-Mart's statement because "Clifford [n]ever made any offensive comments about Hooter[s] restaurant or made any sexual references to the restaurant." PRDSMF ¶ 54. In compliance with its obligation to view the facts in the light most favorable to the non-movant, the Court excludes Wal-Mart's paragraph 54.

Clifford whether he had won the lottery yet and bought his Hooters restaurant.
DSMF ¶ 55; PRDSMF ¶ 55.

Strippers and strip clubs were sometimes mentioned in the workplace especially since three or four women believed to be strippers often pulled into the Wal-Mart parking lot during the overnight shift's break time, would get out of a van, get into their personal cars, and drive away.⁴⁰ DSMF ¶ 56; PRDSMF ¶ 56. Ms. Jones' coworkers understood these women to be strippers who worked in Portland, and some of the male workers would make comments about them, such as "there's the strippers," or "there's my dancers," and "I need to find where they work and go watch them."⁴¹ DSMF ¶ 57; PRDSMF ¶ 57.

b. Complaints to Mr. Ames

In the summer of 2010, Ms. Jones told Shawn Ames, a shift manager, that her coworkers were being "rude towards her" breaking stuff in her aisle, using foul language, and making troubling comments, which may have been about strippers.⁴²

⁴⁰ Ms. Jones admitted "that strippers were sometimes mentioned in the workplace" but denied that "the conversation about strippers was limited to those who parked in the parking lot." PRDSMF ¶ 56. After reviewing the record and viewing the facts in the light most favorable to Ms. Jones, the Court has rephrased paragraph 56 to reflect that her male coworkers discussed strippers beyond those seen in the parking lot.

⁴¹ Ms. Jones admitted "that strippers were sometimes mentioned in the workplace" but denied that "the conversation about strippers was limited to those who parked in the parking lot." PRDSMF ¶ 57. Ms. Jones' qualified response has already been addressed by the amendments to paragraph 56 and therefore refuses to accept her qualified response in paragraph 57. *See supra* note 40.

⁴² The parties dispute whether Ms. Jones told Mr. Ames about her coworkers' sexual comments. Wal-Mart's paragraph 60 stated that "Plaintiff told Shift Manager Shawn Ames in the Summer of 2010 that the Co-workers were throwing juice in her aisle and swearing too much." DSMF ¶ 60. In paragraph 61, Wal-Mart stated that "[p]rior to August 27, 2010, Plaintiff did not talk to Ames about alleged sexual harassment, only that the guys were rude to her." DSMF ¶ 61. Ms. Jones admitted "that [she] gave notice to Ames of workers throwing juice and swearing too much" but denied that she "did not give notice of any further harassment." PRDSMF ¶¶ 60-61.

For purposes of summary judgment, the issue is resolved by Plaintiff's paragraph 86, which alleges that Ms. Jones notified Mr. Ames of the sexual comments. PSAMF ¶ 86; DRPSAMF ¶ 86.

DSMF ¶ 60; PRDSMF ¶ 60; PSAMF ¶¶ 86-89; DRPSAMF ¶¶ 86-89. Ms. Jones testified that she told Mr. Ames “about the guys’ language, the way they talked, you should hear the way they talk over there” and he responded “Oh, I can imagine.”⁴³ PSAMF ¶ 90; DRPSAMF ¶ 90. Ms. Jones also testified that she told Mr. Ames “that they talk like that every night basically, almost every night.”⁴⁴ PSAMF ¶ 91; DRPSAMF ¶ 91.

c. Complaints to Mr. Gregoire

Also, in the summer of 2010, Ms. Jones told John Gregoire, an assistant manager, that her coworkers were throwing juice in her aisle.⁴⁵ DSMF ¶ 62; PRDSMF ¶ 62.⁴⁶ Ms. Jones testified that prior to August 27th, she spoke to

Although Wal-Mart interposed a qualified response, the Court has reviewed the record citation and concludes that viewing Ms. Jones’ testimony in the light most favorable to her, she told Mr. Ames about her coworkers’ sexual comments and the Court declines to accept Wal-Mart’s qualified response. DRPSAMF ¶ 86. The Court excludes Wal-Mart’s paragraph 61 for the same reason.

⁴³ Wal-Mart interposed a qualified response because “Jones did not talk to Ames about alleged sexual harassment prior to August 27, 2010, only that the guys were ‘rude’ to her.” DRPSAMF ¶ 90. For the reason explained in footnote 42, the Court declines to accept Wal-Mart’s qualified response.

⁴⁴ Wal-Mart interposed a qualified response because “Jones testified that she did not tell Ames about the alleged sexual harassment prior to August 27, 2010.” DRPSAMF ¶ 91. For the reason explained in footnote 42, the Court declines to accept Wal-Mart’s qualified response.

⁴⁵ Ms. Jones admitted “Jones gave John Gregoire notice of workers throwing juice in her aisle” but denied that she “did not provide Gregoire with notice of any further harassment.” PRDSMF ¶ 62. Wal-Mart’s paragraph 62 does not state or imply that she did not make other complaints to Mr. Gregoire. The Court has accepted Wal-Mart’s paragraph 62.

⁴⁶ Wal-Mart’s paragraph 63 states: “Plaintiff did not tell Gregoire about the harassing, the swearing or any of the alleged sexual comments.” DSMF ¶ 63. Ms. Jones denied this paragraph, citing portions of her deposition transcript. PRDSMF ¶ 63. The Court reviewed Wal-Mart’s record citation; the full interchange reads:

Q. Did you talk to John about anything else that was bothering you?

A. Yeah, I did. I told him about, you know, the guys were - - I told him that nothing is being done about it and he said, what makes you think that, and I said, because they are still doing it.

Q. Okay. Let me break that down a little bit. You told John nothing was being done about it. What do you mean by it?

A. The way that the guys were harassing me and treating me.

Q. Okay. And when you say harassing and treating, those are particular words, so I just want to make sure we are clear. When you say treating you, you are talking about putting the juice in your aisle, the Gatorade issue, and then when you say, quote, unquote,

Manager John” about the “way the guys were harassing and treating me.” PSAMF ¶ 93; DRPSAMF ¶ 93. Ms. Jones testified that she complained to Mr. Gregoire about how nothing was being done about the way the guys were treating her and how when he asked, “what makes you think that[?]”, she responded “because they are still doing it.” PSAMF ¶ 94; DRPSAMF ¶ 94.

d. Complaints to Mr. Bullis

During the summer of 2010, Ms. Jones told Ryan Bullis, an assistant manager, that her coworkers were putting things in her aisle that did not belong there, throwing things in her aisle, stacking Gatorade containers too high, and making comments about “Hooters” and strippers in her vicinity; these comments were not directed at her.⁴⁷ DSMF ¶ 64; PRDSMF ¶ 64; PSAMF ¶¶ 95-96; DRPSAMF ¶¶ 95-96. Ms. Jones stated that she gave notice to Mr. Bullis “about the swearing, the sexual comments these men were saying to each other,” that the

harassing, you are talking about the banter that they had, the comments they would make that weren’t directed at you, and the swearing that they would do that wasn’t directed at you; is that right?

A. No.

Q. Okay.

A. Just about the way that the guys were treating me.

Q. So you didn’t tell him about the harassing, the swearing and that sort of thing, you didn’t tell John that, is that what you are telling me?

A. No.

Jones Dep. 54:14-55:15. The questions and answers here are inherently ambiguous. The body of the question is framed in the negative and followed by an affirmative: You didn’t do that, is that right? When Ms. Jones answers “no,” it is unclear whether she is agreeing that she did not or whether she is disagreeing that she did. Based on its obligation to view the evidence in the light most favorable to Ms. Jones, the Court accepts her initial statement that she informed Mr. Gregoire that the “guys were harassing me.” The Court declines to accept Wal-Mart’s paragraph 63 and for the same reason has included Ms. Jones’ paragraphs 93 and 94.

⁴⁷ Ms. Jones admitted “Jones gave Ryan Bullis notice as described” but denied that she “did not provide Bullis with additional notice of sexual harassment.” PRDSMF ¶ 64. The Court has set forth her additional alleged comments to Mr. Bullis in Ms. Jones’ paragraphs 95 through 99.

sexual comments were not just made “in front of me,” but in front of coworkers and customers.⁴⁸ PSAMF ¶ 97; DRPSAMF ¶ 97.

Ms. Jones suggested that Mr. Bullis should conceal himself by going to the “grocery side, like hide on the other side of the aisle, [so] he could see what they were doing and he could hear what they were saying” to which he responded, “I have worked over there on several occasions and I haven’t heard anything.” PSAMF ¶ 98; DRPSAMF ¶ 98. Ms. Jones replied, “that’s because you are there, they are not going to do anything in front of you.” PSAMF ¶ 98; DRPSAMF ¶ 98. Mr. Bullis basically told her that she “wasn’t giving him enough time to do anything.” PSAMF ¶ 98; DRPSAMF ¶ 98. Their conversation took place sometime in June or July— way before August 27th.⁴⁹ PSAMF ¶ 99; DRPSAMF ¶ 99.

4. Ms. Jones’ Complaints about Mr. Elliott and the Initiation of the Red Book Investigation

a. The August 27, 2010 Incident

On August 27, 2010, Ms. Jones, accompanied by Ms. Bigelow, told Mr. Ames, the shift manager, that Mr. Elliott had come into her aisle swinging a box of tea and he looked like he was mad.⁵⁰ DSMF ¶ 67; PRDSMF ¶ 67; PSAMF ¶¶ 100, 115;

⁴⁸ Wal-Mart interposed a qualified response to Plaintiff’s paragraph 97, referring to its qualified response to Plaintiff’s paragraph 77. DRPSAMF ¶ 97. In its qualified response to paragraph 77, Wal-Mart asserted that Ms. Jones told Mr. Bullis “sometime in the summer of 2010 that male co-workers were making comments about “Hooters” and strippers in her vicinity, however, these comments were not directed at her.” DRPSAMF ¶ 77. As paragraph 97 does not state or imply that the comments were or were not directed to Ms. Jones, the Court declines to accept Wal-Mart’s qualified response.

⁴⁹ Wal-Mart interposed a qualified response because Ms. Jones testified “it had to have been like June or July, I know it was way before August 27th.” DRPSAMF ¶ 99. The Court does not view the Plaintiff’s paragraph as substantively different from her testimony and included the Plaintiff’s paragraph as written.

⁵⁰ Ms. Jones interposed a qualified response, stating that Ms. Bigelow accompanied her to talk to Mr. Ames and that she told Mr. Ames that Mr. Elliott was swinging the box of tea and that he

DRPSAMF ¶¶ 100, 115. Ms. Jones told Mr. Elliott that the box of tea did not belong in her aisle. DSMF ¶ 68; PRDSMF ¶ 68; PSAMF ¶¶ 100, 115; DRPSAMF ¶¶ 100, 115. Ms. Jones told Mr. Ames that Mr. Elliott looked like he was mad, like he was going to throw the box, and then said, “I’m going to fuck you up the ass in a minute.”⁵¹ DSMF ¶ 69; PRDSMF ¶ 69; PSAMF ¶¶ 100, 115; DRPSAMF ¶¶ 100, 115. Later, contrary to Ms. Jones’ and Ms. Bigelow’s recollection and to Wal-Mart’s Red Book investigation findings, Mr. Ames testified that Ms. Jones and Ms. Bigelow did not tell him about Mr. Elliott’s statement that he “would fuck [her] up the ass in a minute.”⁵² PSAMF ¶ 116; DRPSAMF ¶ 116. Ms. Jones subsequently reported this comment to Mr. Ames, who rolled his eyes and said, “Oh, that’s Kyle.”⁵³ PSAMF ¶ 64; DRPSAMF ¶ 64.

looked like he was mad. PRDSMF ¶ 67. The Court amended Wal-Mart’s paragraph to reflect that Ms. Jones was accompanied by Ms. Bigelow and to include Ms. Jones’ testimony.

⁵¹ Ms. Jones interposed a qualified response, stating that when she told Mr. Elliott that the tea did not belong in her aisle, he looked mad, like he was going to throw the box, and then made the threat. PRDSMF ¶ 69. After reviewing the record and viewing the facts in the light most favorable to Ms. Jones, the Court has qualified paragraph 69.

⁵² Wal-Mart denied this statement because “Ames testified that Jones and Bigelow did not tell him on August 27th that Elliott had threatened a sexual assault against Jones and specifically that ‘he was going to fuck her in the ass.’” DRPSAMF ¶ 116. During his deposition, Mr. Ames stated that he never learned of this particular allegation against Mr. Elliott while he was at Wal-Mart. See DSMF Attach. 18, *Dep. Tr. of Shawn Ames* 16:24-25, 17:1-10 (ECF No. 32-18) (*Ames Dep.*). The Court has included the statement, but declines to accept Wal-Mart’s denial.

Ms. Jones’ and Ms. Bigelow’s recollections conflict with Mr. Ames’. Generally, because the Court is required to view conflicting evidence in the light most favorable to the non-movant, the Court would accept Ms. Jones’ and Ms. Bigelow’s version over Mr. Ames’ recollection. However, Mr. Ames’ denial was posited by the Plaintiff and the Court has included it.

⁵³ Wal-Mart denied this assertion, stating that it was not supported by the record. DRPSAMF ¶ 64. Ms. Jones’ record citation was to paragraph two of her affidavit and to paragraph 19 of her Complaint. PSAMF ¶ 64. In paragraph two of her affidavit, Ms. Jones stated that she made the complaints referred to in her Complaint. *Jones Aff.* ¶ 2. Paragraph 19 of her Complaint alleges that when she reported the “fuck you up the ass” comment to her manager, he rolled his eyes and said “Oh, that’s Kyle.” *Compl.* ¶ 19. As the paragraph is supported by the record citation, the Court deems the paragraph admitted.

Ms. Jones told Mr. Ames on August 27, 2010, that about one week prior, Mr. Elliott had said to her “[w]hy have a tugboat when you can have the Titanic” and that he was “hung like a horse.” DSMF ¶ 70; PRDSMF ¶ 70; PSAMF ¶¶ 10-11, 101, 117; DRPSAMF ¶¶ 10-11, 101, 117. The morning after Ms. Jones reported Mr. Elliott’s comments to Mr. Ames, Mr. Ames called Gerald Tyler, the store manager, and sought guidance on the next steps.⁵⁴ DSMF ¶ 71; PRDSMF ¶ 71. Mr. Tyler instructed Mr. Ames to contact Ms. Acedo, to contact Wal-Mart’s corporate headquarters, and to follow the instructions from the corporate office on starting a Red Book investigation into Ms. Jones’ allegations.⁵⁵ DSMF ¶ 72; PRDSMF ¶ 72; PSAMF ¶ 122; DRPSAMF ¶ 122.

Mr. Ames testified that he understood Wal-Mart’s sexual harassment policy to require that as soon as he received notice of any possible violation of the policy he should contact Mr. Tyler and then the advisory board to start a Red Book investigation. PSAMF ¶ 73; PRDSMF ¶ 73. He also testified that Wal-Mart teaches its assistant managers and support managers to contact the advisory board and to start a Red Book investigation upon receiving notice of a possible violation of

⁵⁴ Wal-Mart’s paragraph 71 asserts that the morning after Ms. Jones reported Mr. Elliott’s comments to Mr. Ames, Mr. Ames “documented the complaint” and called Gerald Tyler, the store manager. DSMF ¶ 71. Ms. Jones denied “that Ames documented the complaint the next day.” PRDSMF ¶ 71. Wal-Mart’s record citations are to Mr. Ames’ deposition testimony and Mr. Tyler’s declaration, which fail to confirm that Mr. Ames documented the complaint the next day. The only evidence pertaining to the completion of a formal complaint relates to Ms. Acedo’s actions on September 9, 2010. PRDSMF ¶ 71; *see* DSMF Attach 1, *Dep. Tr. of Carol Acedo* 57:19-58:4 (ECF No. 32-1) (*Acedo Dep.*). Because this part of paragraph 71 is not supported by the record citation, the Court has excluded it.

⁵⁵ Ms. Jones admitted “that Tyler instructed Ames to contact Acedo” but denied “that Tyler instructed Ames to contact corporate” because “Ames only testified that Tyler instructed Ames to contact Acedo.” PRDSMF ¶ 72. In Mr. Tyler’s declaration, however, he states that he instructed Mr. Ames to “contact corporate headquarters” and in his deposition, Mr. Ames testified that Mr. Tyler told him to start a “Red Book”; the Court declines to accept Ms. Jones’ qualification. *See* DSMF Attach. 26, *Decl. of Gerald Tyler* ¶ 4 (ECF No. 32-26) (*Tyler Decl.*); *Ames Dep.* 17:13-20.

its sexual harassment policy.⁵⁶ PSAMF ¶ 74; DRPSAMF ¶ 74. He testified that he knew that it was his responsibility to gather information and that it was his “job to follow the facts for any leads that [he] might gather by asking questions.” PSAMF ¶ 118; DRPSAMF ¶ 118. Mr. Ames did not ask any coworkers if they were aware of Mr. Elliott making inappropriate comments, such as the “hung like a horse” comment.⁵⁷ PSAMF ¶ 121; DRPSAMF ¶ 121.

Mr. Ames testified that during his sexual harassment training through Wal-Mart he understood that one person’s perception of kidding could be perceived by another person as sexual harassment. PSAMF ¶ 119; DRPSAMF ¶ 119. Mr. Ames testified that Wal-Mart never provided him with training regarding how to document interviews but stated that his job was to ask questions and for an assistant manager to record basic facts.⁵⁸ PSAMF ¶ 120; DRPSAMF ¶ 120. When describing how Ms. Acedo conducted the Red Book investigation, Mr. Ames testified that he had never investigated a claim of harassment and that Wal-Mart had never

⁵⁶ Wal-Mart objected to Ms. Jones’ use of the term “conceded” and interposed a qualified response because Mr. Ames testified that he was supposed to contact “the Advisory Board” rather than “the store manager.” DRPSAMF ¶ 74. After reviewing the record, the Court included Wal-Mart’s qualification and omitted the term “conceded.”

⁵⁷ Wal-Mart objected to the inclusion of the term “admits” in paragraph 121 and interposed a qualified response stating, “that prior to Jones and Bigelow coming to him and telling him about Elliott’s comment . . . , he did not ask any coworkers if they were aware of Elliott making inappropriate comments.” DRPSAMF ¶ 121. A review of the record confirms that Mr. Ames was asked whether after his discussion with Ms. Jones and Ms. Bigelow he asked anyone about Mr. Elliott’s previous conduct. Thus, the Court has omitted the word “admits” but has not included Wal-Mart’s qualification because it is not supported by the record.

⁵⁸ Ms. Jones’ paragraph 120 reads: “Ames admits that Wal-Mart never provided him with training with regard to how to document interviews.” PSAMF ¶ 120. Wal-Mart moved to strike the verb, “admits”, on the ground that it is conclusory. DRPSAMF ¶ 120. Wal-Mart also interposed a qualified response because during Mr. Ames’ deposition testimony, he also stated that it was his job to ask questions and for an assistant manager to record the basic facts. DRPSAMF ¶ 120. Because this qualification was supported by the record citation, the Court qualified paragraph 120.

provided him with any training regarding how to conduct such an investigation.⁵⁹ PSAMF ¶ 123; DRPSAMF ¶ 123.

b. Initiation of the Red Book Investigation and Store Contact with Wal-Mart’s Employment Advisory Services Department

Ms. Acedo initially learned of the allegations by Ms. Jones on August 28, 2010, when she received a phone call from Mr. Ames stating that Ms. Jones and Ms. Bigelow had told Mr. Ames about a statement by Mr. Elliott, claiming he was “hung like a horse.” PSAMF ¶ 124; DRPSAMF ¶ 124. Ms. Acedo testified that at the time of the phone call she was not aware of any other offensive comments. PSAMF ¶ 124; DRPSAMF ¶ 124. She did not go around asking workers in the store whether Mr. Elliott had engaged in this kind of behavior prior to August 27, 2010.⁶⁰ PSAMF ¶ 125; DPSAMF ¶ 125.

Ms. Acedo understood that the allegations against Mr. Elliott involved a possible violation of the sexual harassment policy and that she had to immediately respond and get the investigation going. PSAMF ¶ 126; DRPSAMF ¶ 126. At the end of August, Ms. Acedo moved Mr. Elliott to the opposite side of the store to work

⁵⁹ Ms. Jones’ paragraph 123 stated: “Ames conceded that he never investigated a claim of harassment and Wal-Mart had never provided him with any training how to conduct such an investigation.” PSAMF ¶ 123. Wal-Mart objected to Ms. Jones’ use of “conceded” in paragraph 123 and interposed a qualified response because Ms. Acedo conducted the Red Book investigation. DRPSAMF ¶ 123. Because “conceded” is argumentative and the record supports Wal-Mart’s qualification, the Court has omitted “conceded” and qualified paragraph 123.

⁶⁰ Wal-Mart objected to Ms. Jones’ paragraph 125 on the grounds that it is conclusory and fails to define the term “this kind of behavior.” DRPSAMF ¶ 125. In the event its objection is overruled, Wal-Mart interposed a qualified response stating that “Acedo was unaware of any other allegations about Elliott” prior to August 27, 2010. DRPSAMF ¶ 125. After reviewing the record and viewing the facts in the light most favorable to Ms. Jones, the Court declines to alter the paragraph.

in the Pet Department during the investigation.⁶¹ DSMF ¶ 73; PRDSMF ¶ 73. Ms. Acedo testified that she did not remember Wal-Mart giving her any training as to how to investigate claims of possible sexual harassment but stated that she had received CBL training and understood the need to investigate.⁶² PSAMF ¶ 127; DRPSAMF ¶ 127. She also understood that she had to interview all witnesses. PSAMF ¶ 128; DRPSAMF ¶ 128. Ms. Acedo, however, did not look into whether Mr. Elliott had engaged in this kind of behavior before August 27, 2010.⁶³ PSAMF ¶ 125; DRPSAMF ¶ 125.

⁶¹ Ms. Jones denied this statement because “after August 27, Elliott would still work next to Jones at the beginning of the night when they had a meeting . . . as they downstacked product . . . [and] would continue to go over to Jones’ area where he would make remarks to her.” PRDSMF ¶ 73. Wal-Mart’s paragraph does not state or imply that Mr. Elliott did not continue to bother Ms. Jones during the investigation. In fact, Ms. Jones testified that Wal-Mart moved Mr. Elliott across the store. *Jones Dep.* 86:9-22. The Court declines to accept Ms. Jones’ denial yet has eliminated “[s]hortly after August 27th” from paragraph 73 because the record does not support Wal-Mart’s characterization.

In Ms. Jones’ paragraph 105, she stated “[e]very time Jones tried to talk to management about the harassment, management did not do anything to correct the problem.” PSAMF ¶ 105. Wal-Mart denied this statement citing a series of actions taken by management. DRPSAMF ¶ 105. After reviewing the record, the Court has excluded this statement because it is argumentative and unsupported.

⁶² Ms. Jones’ paragraph 127 states: “Acedo admits that Wal-Mart never gave her any training with regards as to how to investigate claims of possible sexual harassment.” PSAMF ¶ 127. She cites page 23, lines 12 through 15 of Ms. Acedo’s deposition. PSAMF ¶ 127. Citing various other parts of Ms. Acedo’s deposition, Wal-Mart objected to the term “admits” and interposed a qualified response to paragraph 127 on the ground that Ms. Acedo stated she did not remember Wal-Mart providing her with training and that she received a CBL training and understood the need to investigate. DRPSAMF ¶ 127.

For some reason, the parties have not supplied the Court with an unredacted transcript of Carol Acedo’s deposition and the Court could not locate all of the testimony to which they have made reference. In the absence of the transcript, the Court accepted both Ms. Jones’ assertion and Wal-Mart’s qualification because the resolution of this dispute is immaterial to the resolution of the merits of the motion.

⁶³ Wal-Mart objected to the term “admitted” and the Court has rephrased this portion of Ms. Jones’ paragraph. DRPSAMF ¶ 125. Wal-Mart also objected to this paragraph on the ground that Ms. Acedo was not aware of any allegations of Mr. Elliott’s conduct other than what Ms. Jones reported on August 27, 2010. DRPSAMF ¶ 125. The Court overrules Wal-Mart’s objection. Ms. Jones’ paragraph 125 does not assert that Ms. Acedo knew about other allegations, only that she failed to investigate whether Mr. Elliott had engaged in similar prior conduct.

On September 9, 2010, Ms. Acedo separately interviewed Ms. Jones and Ms. Bigelow as part of the store's investigation into Ms. Jones' allegations. DSMF ¶ 76; PRDSMF ¶ 76. Ms. Acedo began taking other witness statements on September 10, 2010.⁶⁴ PSAMF ¶¶ 129, 136; DRPSAMF ¶¶ 129, 136. As part of the investigation, Ms. Jones signed an "Individual Acknowledgement" form. DSMF ¶ 80; PRDSMF ¶ 80. The form stated that Wal-Mart strictly prohibits retaliation against an individual who makes a complaint of harassment, and that anyone who believes she has been retaliated against should immediately report any perceived retaliation to a salaried member of management.⁶⁵ DSMF ¶ 81; PRDSMF ¶ 81.

Investigations of this type run through Wal-Mart's Employment Advisory Services Department (EAS).⁶⁶ DSMF ¶ 74; PRDSMF ¶ 74. According to EAS documentation, Ms. Acedo did not contact corporate to report Ms. Jones' complaint until September 10, 2010 at 9:14 A.M. PSAMF ¶ 130; DRPSAMF ¶ 130. The notes from EAS state that "Shift Mgr. has two female overnight receivers Carol[e] and

⁶⁴ Ms. Jones' paragraph 129 stated: "Acedo then waited over two weeks, until 9/10/2010, to even begin to take witness statements, only on 9/9/2010 when it obtained and interviewed Jones and Big[e]low." PSAMF ¶ 129. Wal-Mart objected to the argumentative phrasing of paragraph 129 and interposed a qualified response stating that Ms. Acedo interviewed Ms. Jones and Ms. Bigelow on September 9, 2010. DRPSAMF ¶ 129. The Court agrees and omits the argumentative language from paragraph 129 but excludes Wal-Mart's qualification because the qualified fact is already included within the section.

⁶⁵ Ms. Jones admitted that "the form guarantees confidentiality"; however, she denied that Wal-Mart maintained confidentiality. PRDSMF ¶ 81. Wal-Mart's paragraph 81 does not make any assertions as to how Wal-Mart maintained confidentiality, but rather only states that Wal-Mart had such a written policy. The Court declines to accept Ms. Jones' denial.

⁶⁶ Ms. Jones denied this statement because Ms. Acedo stated that she led the investigation into Ms. Jones' allegations against Mr. Elliott. PRDSMF ¶ 74. In her declaration, Ms. Acedo specifically states that these types of investigations must be "run through EAS" not that they must be conducted by EAS. *Acedo Decl.* ¶ 20. In describing the investigatory process, Ms. Acedo describes how "EAS instructed us to take preliminary statements from Plaintiff and Charlene Bigelow . . ." and gave Ms. Acedo other advice on how to conduct the investigation. *Id.* ¶ 21. The Court declines to accept Ms. Jones' denial.

Charlene that allege Kyle is making inappropriate sexual comments . . . Overnight Mgr. has gotten initial statements from Carol[e] and Charlene.” PSAMF ¶ 130; DRPSAMF ¶ 130. EAS confirmed that Ms. Acedo took initial statements from Ms. Jones and Ms. Bigelow and EAS instructed the store to determine who else should be interviewed before meeting with Mr. Elliott.⁶⁷ DSMF ¶ 75; PRDSMF ¶ 75.

On September 10, 2010, EAS instructed Ms. Acedo to “complete a Red Book investigation”⁶⁸ PSAMF ¶ 130; DRPSAMF ¶ 130. That was her “cue to get [her] paperwork together, to get [her] witnesses in line and to start the investigation.” PSAMF ¶ 131; DRPSAMF ¶ 131. After discussing the initial interviews with EAS, Ms. Acedo was advised to continue with the formal investigation, to interview additional witnesses, and to advise each witness that retaliation of any kind would not be tolerated.⁶⁹ DSMF ¶ 82; PRDSMF ¶ 82.

⁶⁷ Ms. Jones denied this statement because Ms. Acedo had already taken statements from Ms. Jones and Ms. Bigelow before contacting EAS. PRDSMF ¶ 75. Viewing the facts in the light most favorable to Ms. Jones, the Court rephrases paragraph 75 to reflect that Ms. Jones’ and Ms. Bigelow’s statements were already taken by Ms. Acedo.

⁶⁸ Wal-Mart objected to paragraph 130 because it was argumentative and contained multiple assertions. DRPSAMF ¶ 130. Wal-Mart also interposed a qualified response—“the referenced documents speak for themselves.” DRPSAMF ¶ 130. The Court overrules this best evidence objection. *See supra* note 7. The Court has omitted the argumentative language and allows the multiple assertions.

⁶⁹ Ms. Jones denied this statement because “[t]he EAS notes state that management from Augusta did not contact EAS until 9/10/2010, after the Jones and Bigelow interviews on 9/9/2010” took place. PRDSMF ¶ 82. Ms. Jones’ denial does not contradict paragraph 82 because Wal-Mart stated that “[a]fter discussing the interviews with EAS” Ms. Acedo was told to continue with the formal investigation. DSMF ¶ 82. Further, EAS notes regarding Ms. Acedo’s phone call and Ms. Acedo’s declaration confirm the facts in paragraph 82. The Court declines to accept Ms. Jones’ denial.

In paragraph 83, Wal-Mart stated, “[b]ecause most overnight associates work part-time and shift managers work four days on and four days off and rotate schedules, coordinating schedules for interviews was challenging.” DSMF ¶ 83. Ms. Jones denied that the “scheduling of interviews was difficult because of the various schedules.” She referenced her own declaration which states that Ms. Acedo staffed the overnight shift and that the managers’ schedules did not prevent the immediate commencement of the investigation. PRDSMF ¶ 83. The record is therefore contradictory; however,

On September 11, 2010, Linda Burke of EAS sent an email to Ms. Acedo, copying it to Mr. Ames and Mr. Tyler, and advising Ms. Acedo that she would serve as Ms. Acedo's advisor for the investigation. PSAMF ¶ 132; DRPSAMF ¶ 132. The email also instructed Ms. Acedo to use "the HR protocol", "to complete sections 1-3 of the Red Book investigation" and established a target date of September 20, 2010 to complete the investigation.⁷⁰ PSAMF ¶ 132; DRPSAMF ¶ 132.

Ms. Acedo testified that she understood a Red Book investigation to involve "any policy that is broken as far as the sexual harassment discrimination policy goes in to an investigation, which a few managers are involved [in,] [t]hat way, it doesn't get into the public view of Wal-Mart per say." PSAMF ¶ 133; DRPSAMF ¶ 133. She stated, "[w]e try to keep it as discrete and confidential as possible to get all the facts together, talking to witness[es], and different associates, getting their statements on what happened."⁷¹ PSAMF ¶ 133; DRPSAMF ¶ 133. During the interviews, Ms. Acedo testified that management asked witnesses if "they had

as the Court is required to view the facts in the light most favorable to Ms. Jones, it has excluded Wal-Mart's paragraph 83.

⁷⁰ Ms. Jones' paragraph 132 read: "On 9/11/2010, Linda Burke from EAS sent an email to Acedo, (with a cc to Ames, and Tyler) advising Acedo that Burke would serve as Acedo's advisor for the investigation. The email also instructed Acedo to use 'the HR Investigation protocol', 'to complete sections 1-3 of the Red Book investigation' and to complete the investigation by 9/20/2010." Wal-Mart objected to Ms. Jones' "argumentative" phrasing and inclusion of multiple factual assertions in paragraph 132. DRPSAMF ¶ 132. Without waiving its objection, Wal-Mart also interposed a qualified response stating that "the referenced documents speak for themselves" and that, in her email, Ms. Burke did not say the investigation had to be completed by September 20, 2010. DRPSAMF ¶ 132. The Court does not view Ms. Jones' statement as argumentative and overrules the objection to multiple assertions of fact. The Court rejects Wal-Mart's best evidence objection. *See supra* note 7. After reviewing the record citation, the Court included Wal-Mart's qualification and clarified that Ms. Burke mentioned September 20, 2010 as a target date rather than a deadline.

⁷¹ Wal-Mart objected to the multiple assertions in paragraph 133 and interposed a qualified response because the description of a Red Book investigation was merely Ms. Acedo's understanding of the process. DRPSAMF ¶ 133. After reviewing the record citation, the Court clarified that Ms. Acedo had made this statement. The Court otherwise overrules Wal-Mart's objection.

heard any comments as far as being hung like a horse or any other inappropriate comments, or gestures that were made within the last couple of weeks toward any associates, if they heard or saw anything and they said they did not.”⁷² PSAMF ¶ 134; DRPSAMF ¶ 134. Ms. Acedo stated that she limited the time frame to the prior couple of weeks because “I was trying to keep it in the same time frame that [Ms. Jones] had reported.”⁷³ PSAMF ¶ 135; DRPSAMF ¶ 135.

c. Ms. Jones’ Interview and Accusations against Mr. Elliott

Ms. Jones did not tell anyone in management about the allegations in her written statements until August 27, 2010. DSMF ¶ 78; PRDSMF ¶ 78. During Ms. Jones’ interview and in her written statement, both occurring on September 9, 2010, Ms. Jones stated that Mr. Elliott had “asked for hugs quite a few times”, that she had given him a hug, and that Mr. Elliott had started coming into aisle 7 and “grabbing [her] from behind pulling [her] to him.”⁷⁴ DSMF ¶ 77; PRDSMF ¶ 77;

⁷² Ms. Jones’ paragraph 134 began with the phrase that “In the interviews, Ms. Acedo claims” PSAMF ¶ 134. Wal-Mart objected to Ms. Jones’ argumentative phrasing and inclusion of multiple assertions in paragraph 134. DRPSAMF ¶ 134. The Court overrules Wal-Mart’s objections but omits “claims” from Ms. Jones’ statement. Although Wal-Mart also interposed a qualified response to this paragraph because “Wal-Mart’s policy defines the parameters of the investigation”, the Court included Ms. Jones’ assertion because it describes, from Ms. Acedo’s perspective, how she conducted this investigation.

⁷³ Wal-Mart objected to Ms. Jones’ use of the term “claims” because it was argumentative and otherwise admits paragraph 135. DRPSAMF ¶ 135. The Court omitted the offending term and included Ms. Jones’ statement.

⁷⁴ In response to Wal-Mart’s paragraph 77, Ms. Jones denied that “Elliott once asked for a hug” and that he only “grabbed her from behind a couple of times” by citing her individual statement. PRDSMF ¶ 77. After reviewing the record citation, the Court omitted Wal-Mart’s characterization of these asserted facts.

Wal-Mart objected to the inclusion of paragraphs 139 and 141 of Ms. Jones’ Statement of Additional Material Facts because the facts they recite are “needlessly repetitive and the document speaks for itself.” DRPSAMF ¶¶ 139, 141. Wal-Mart stated, “[w]ithout waiver of said objection[s], Admit.” DRPSAMF ¶¶ 139, 141. With respect to Wal-Mart’s repetitiveness objection, the Court allows Ms. Jones, the non-movant, to repeat these facts a second time within this section. Second, the Court overrules Wal-Mart’s best evidence objection. *See supra* note 7. After reviewing the

PSAMF ¶¶ 21, 139, 141, 143; DRPSAMF ¶¶ 21, 139, 141, 143. Ms. Jones' statement also recounted the "hung like a horse" comment.⁷⁵ PSAMF ¶ 140; DRPSAMF ¶ 140. She also recounted the swearing and the sexual comments.⁷⁶ PSAMF ¶ 142; DRPSAMF ¶ 142.

During Ms. Acedo's investigation interview with Ms. Jones on September 9, 2010, Ms. Jones provided additional examples of what she believed to be harassment by Mr. Elliott, which were not included in her written statement. DSMF ¶ 79; PRDSMF ¶ 79; PSAMF ¶¶ 6-9, 15, 19-20, 144-46; DRPSAMF ¶¶ 6-9, 15, 19-20, 144-46. These examples included:

1. Ms. Jones overheard Mr. Elliott tell a coworker, Jimmy, that his daughter was hot and that Mr. Elliott would not mind having sex with her;
2. Ms. Jones overheard Mr. Elliott mention to someone else something about a guy who had herpes;
3. Mr. Elliott asked Ms. Jones to go to lunch and told her that he wanted her to "do him" at lunch, and that when she declined because she was having lunch with her coworker Kenny, Mr. Elliott told her that Kenny wanted to "do" her;
4. Mr. Elliott once called Ms. Jones a "cougar"; and
5. Mr. Elliott talked about his coworker's, John's, wife and about John being tired because he was up all night having sex.⁷⁷

record, the Court accepted Wal-Mart's qualification of the date Ms. Jones reported Mr. Elliott's behavior.

⁷⁵ Wal-Mart objected to this paragraph because the facts it contains are "needlessly repetitive and the document speaks for itself." DRPSAMF ¶ 140. The Court overrules these objections. See *supra* note 7.

⁷⁶ Wal-Mart objected to the inclusion of paragraph 142 because the facts it recites are "needlessly repetitive and the document speaks for itself." DRPSAMF ¶ 142. Wal-Mart alternatively interposed a qualified response stating that Ms. Jones testified that she told Ms. Acedo about the swearing and Hooters comments earlier. DRPSAMF ¶ 142. The Court overrules Wal-Mart's objections. See *supra* note 7. Additionally, the Court does not accept Wal-Mart's qualification because Ms. Jones' deposition confirms that she discussed the swearing and Hooters comments with Ms. Acedo during her investigation interview.

⁷⁷ Wal-Mart objects to paragraphs 144, 145, and 146 because the statements are "needlessly repetitive" and the "document speaks for itself." DRPSAMF ¶¶ 144-46. The Court overrules Wal-Mart's objection; however, after reviewing the record, the Court accepts its qualification—that these

DSMF ¶ 79; PRDSMF ¶ 79; PSAMF ¶¶ 6-9, 15, 19-20, 144-46; DRPSAMF ¶¶ 6-9, 15, 19-20, 144-46. Mr. Elliott also made comments about Ms. Jones “not being with anyone.”⁷⁸ PSAMF ¶ 8; DRPSAMF ¶ 8.

When Ms. Jones recounted Mr. Elliott’s threat that he would “fuck her up the ass”, Mr. Bullis responded by laughing.⁷⁹ PSAMF ¶ 137; DRPSAMF ¶ 137. Ms. Jones testified that she made a “facial expression like I can’t believe he’s laughing and I looked at [Ms. Acedo] and her face was all red like she was mad and she looked at him too and then she looked back at me . . . [w]e kind of both looked at each other for a second and then she looked back at Ryan and said, ‘are you having a hard time keeping up’, and he said ‘yes.’” PSAMF ¶ 138; DRPSAMF ¶ 138.

d. Mr. Smith’s and Mr. Curtis’ Statements about Mr. Elliott’s Conduct

Wal-Mart Associates Jarred Smith and Kenny Curtis were interviewed separately on September 10, 2010, as part of the investigation. DSMF ¶ 84; PRDSMF ¶ 84; PSAMF ¶ 156; DRPSAMF ¶ 156. Mr. Smith and Mr. Curtis were interviewed about the events and comments that took place among Mr. Elliott, Ms.

incidents were reported to Ms. Acedo by Ms. Jones during her August 27, 2010, interview. See *supra* note 7.

⁷⁸ Wal-Mart interposed a qualified response, stating that Ms. Jones did not include this allegation in her written statement. DRPSAMF ¶ 8. The Court has excluded Wal-Mart’s qualification because Ms. Jones’ statement is supported by the record and the paragraph does not suggest that it was included in Ms. Jones’ written statement to Wal-Mart.

⁷⁹ Wal-Mart objected to the use of the term “threat” and interposed a qualified response, which essentially repeated the factual allegations in Ms. Jones’ paragraph 138. DRPSAMF ¶ 137. Accordingly, the Court overrules Wal-Mart’s objection because viewed in the light most favorable to Ms. Jones, Mr. Elliott’s statement is a threat.

Jones, and Ms. Bigelow. No said incident was recalled by either one.⁸⁰ PSAMF ¶ 161; DRPSAMF ¶ 161.

Ms. Acedo stated that Mr. Curtis' interview took about five minutes.⁸¹ PSAMF ¶ 156; DRPSAMF ¶ 156. According to the notes of Mr. Ames' interview with Mr. Curtis, Mr. Curtis stated, "I have heard a lot of hearsay about Carole. Carole will tell me about some of the things that have happened. Carole is talking about Kyle."⁸² PSAMF ¶ 157; DRPSAMF ¶ 157. Mr. Curtis also stated that although he had not seen or heard any inappropriate conduct himself, Ms. Jones "has come to me to complain about her frustration with [Mr. Elliott's] behavior. She has been almost in tears when she has approached me about his issue. She has also discussed this with Jimmie. She has said that [Mr. Elliott] has grabbed her by the hips and such."⁸³ PSAMF ¶¶ 158, 160; DRPSAMF ¶¶ 158, 160.

⁸⁰ Wal-Mart objected to paragraph 161 because "the document speaks for itself" and alternatively admits the statement. DRPSAMF ¶ 161. For the reasons outlined in footnote 7, the Court overrules Wal-Mart's objection.

⁸¹ Wal-Mart objected to the use of the term "claims" in paragraph 156 but otherwise admitted the statement. DRPSAMF ¶ 156. The Court has omitted "claims" and included Ms. Jones' statement.

⁸² Wal-Mart objected to the inclusion of this statement because it lacked clarity and misquoted the document, "which speaks for itself." DRPSAMF ¶ 157. Alternatively, Wal-Mart interposed a qualified response giving context to Mr. Curtis' interview notes. DRPSAMF ¶ 157. The Court overrules Wal-Mart's best evidence objection. *See supra* note 7. However, because Wal-Mart's qualification corrects Ms. Jones' slight mischaracterization of Mr. Curtis' interview, the Court includes Wal-Mart's qualification.

⁸³ Wal-Mart objected to paragraph 158 because of the use of the term "disclosed" and because "the document speaks for itself." DRPSAMF ¶ 158. Without waiving its objections, Wal-Mart interposed a qualified response—that Curtis also stated that "he had not seen or heard any inappropriate conduct by Elliott towards Jones." DRPSAMF ¶ 158. The Court overrules Wal-Mart's best evidence objection. *See supra* note 7. After reviewing the record citation, the Court has omitted the term "disclosed" from paragraph 158.

In paragraph 159, Ms. Jones stated: "Mr. Ames did not remember asking Mr. Curtis about what Ms. Jones told him about things that happened with Mr. Elliott." PSAMF ¶ 159. Wal-Mart objects to this statement because it was not supported by the record and alternatively qualifies it by pointing out that Mr. Ames "testified that he did not remember asking" Mr. Curtis about his conversations with Ms. Jones. DRPSAMF ¶ 159. Ms. Jones' citation for this proposition is a general

Mr. Curtis also testified during a deposition that Ms. Jones complained to him about Mr. Elliott harassing her.⁸⁴ PSAMF ¶ 37; DRPSAMF ¶ 37. Mr. Curtis described Mr. Elliott as “a cocky little bastard” and that Mr. Elliott thought he was a ladies man. PSAMF ¶¶ 39, 41; DRPSAMF ¶¶ 39, 41. Mr. Curtis also testified that Mr. Elliott would go into Ms. Jones’ aisle and stand close to her, making her very uncomfortable.⁸⁵ PSAMF ¶ 38; DRPSAMF ¶ 38. Mr. Curtis stated that this conduct went on for six months and at the end, “it was getting real bad.” PSAMF ¶ 38; DRPSAMF ¶ 38. Mr. Curtis also testified that Mr. Elliott would go into Ms. Jones’ aisle more often than others and that it was “pretty obvious.”⁸⁶ PSAMF ¶ 40; DRPSAMF ¶ 40. Mr. Curtis also testified that on one occasion, when a new female began to work at the Store who was, in his words, “tall” and “big busted”, Mr. Elliott

citation to Ms. Acedo’s affidavit. PSAMF ¶ 159. Local Rule 56(f) requires that the record citation be “to the specific page or paragraph of identified record material supporting the assertion.” D. ME. LOC. R. 56(f). As this general citation violates the local rule, the Court has not included the assertion.

Wal-Mart objects to paragraph 160 because “the document speaks for itself” and, without waiver, alternatively admits the statement. DRPSAMF ¶160. For the reasons outlined in footnote 7, the Court overrules Wal-Mart’s objection.

⁸⁴ Wal-Mart interposed a qualified response because “Curtis did not witness the ‘harassment’ and did not testify whether it occurred before or after August 27, 2010.” DRPSAMF ¶ 37. The Court declines to incorporate Wal-Mart’s qualification because it is unresponsive to the statement in paragraph 37 given that the statement does not reference a specific date nor suggest that Mr. Curtis witnessed the harassment.

⁸⁵ Ms. Jones’ paragraph 38 states: “Curtis testified that Elliott would go into Jones aisle and stand very close to Jones, making her very uncomfortable. Curtis testified the subject behavior could have gone on for six months and at the end ‘it was getting real bad.’” PSAMF ¶ 38. Wal-Mart objected to the portion of Ms. Jones’ statement in paragraph 38 in which she stated that Mr. Elliott was making Ms. Jones “uncomfortable” on the ground that Mr. Curtis “lacks the requisite personal knowledge to testify to Jones’ level of comfort.” DRPSAMF ¶ 38. The Court overrules Wal-Mart’s objection but has incorporated Wal-Mart’s qualification that Mr. Elliott stood “close” rather than “very close” to Ms. Jones because that phrasing more accurately reflects Mr. Curtis’ deposition testimony.

⁸⁶ Wal-Mart objected to the asserted fact that “it was pretty obvious” because it was conclusory, not based on Mr. Curtis’ personal knowledge, and was unintelligible. DRPSAMF ¶ 40. The Court overrules Wal-Mart’s objection. DRPSAMF ¶ 40.

said “I’m gonna get some of that”, meaning he would try to have sex with the new employee. PSAMF ¶¶ 42, 50; DRPSAMF ¶¶ 42, 50.

Mr. Curtis stated that Ms. Jones complained to him that Mr. Elliott was rude, calling her names, and that he “was hitting on her.” PSAMF ¶ 43; DRPSAMF ¶ 43. Mr. Curtis testified that on one occasion, Mr. Elliott pointed to Ms. Jones and told Mr. Curtis—“I’m going to have that”—and that when Mr. Curtis told him to “watch what you say . . . what you do”, Mr. Elliott responded “I’m still going to get some of that.”⁸⁷ PSAMF ¶ 44; DRPSAMF ¶ 44. Mr. Curtis testified that he thinks he went to management, possibly Mr. Ames, to tell him that “he needed to speak to Carole because she looks upset, she[s] got a problem, she’s got an issue with something or somebody.”⁸⁸ PSAMF ¶ 46; DRPSAMF ¶ 46. Sometime in late 2009 or early 2009, Mr. Elliott went to work at another Wal-Mart location for a period of time. PSAMF ¶ 3; DRPSAMF ¶ 3. Mr. Curtis testified that when Mr. Elliott returned to the Augusta Store, he resumed with his sexual manner and comments. PSAMF ¶ 45; DRPSAMF ¶ 45.

⁸⁷ Wal-Mart objected to Ms. Jones’ statement in paragraph 44 because it contained multiple assertions of fact and Wal-Mart interposed a qualified response. DRPSAMF ¶ 44. The Court overrules Wal-Mart’s objection and excludes Wal-Mart’s qualification as unresponsive.

⁸⁸ Citing Mr. Curtis’ errata sheet, Wal-Mart interposed a qualified response on the ground that Mr. Curtis later testified that he would not have brought up Mr. Elliott’s name or mentioned sexual harassment in his conversation with management and Ames. DRPSAMF ¶ 46; DRPSAMF Attach. 7, *Errata Sheet for Kenneth E. Curtis Dep.* (ECF No. 47-7). Even though Mr. Curtis changed his testimony by filing an errata sheet, the Court is not required to accept the change for purposes of creating an issue of material fact. *Colantuoni v. Calcagni & Sons*, 44 F.3d 1, 4-5 (1st Cir. 1994) (“When an interested witness has given clear answers to unambiguous questions, he cannot create a conflict and resist summary judgment with an affidavit that is clearly contradictory, but does not give a satisfactory explanation of why the testimony changed”). Consistent with its obligation to view the evidence in the light most favorable to Ms. Jones, the Court declines to accept Wal-Mart’s qualified response.

Mr. Curtis also testified that Mr. Elliott sent Mr. Ames a text which referenced Mr. Ames' wife. PSAMF ¶ 47; DRPSAMF ¶ 47. Mr. Curtis stated that Mr. Ames showed him this text a few days after his interview and the Red Book investigation had concluded, which referenced Mr. Ames' wife in a sexual way—referring to her as “being hot” and that “she must be a nice piece of ass”—and that Mr. Ames “kind of laughed about it.”⁸⁹ PSAMF ¶¶ 48, 163-64, 166; DRPSAMF ¶¶ 48, 163-64, 166. Mr. Curtis testified that he told Mr. Ames that “Kyle should be fired, you can't be doing that. I mean that's not right.” PSAMF ¶¶ 49, 167; DRPSAMF ¶¶ 49, 167. The Red Book investigation did not mention this incident.⁹⁰ PSAMF ¶ 165; DRPSAMF ¶ 165.

⁸⁹ Wal-Mart interposed a qualified response to paragraph 48 stating that “Curtis testified that he didn't know what Mr. Ames' reaction was but that ‘he kind of laughed about it.’” DRPSAMF ¶ 48. The Court has included the portion of Wal-Mart's response that more accurately reflects Mr. Curtis' words in his deposition testimony—“[h]e kind of laughed about it” as opposed to “he simply laughed about it.”—but has excluded Mr. Curtis' statement, “I don't know”, in accordance with the Court's obligation to view the facts in the light most favorable to Ms. Jones.

Wal-Mart interposed a qualified response to paragraph 163 addressing the timing when Mr. Ames' showed Mr. Curtis the text and the content of the text—referring to Mr. Ames' wife as “being hot' or something along those lines.” DRPSAMF ¶ 163. After reviewing the record, the Court has only included Wal-Mart's qualification concerning the timing; its proposed qualification regarding the content of Mr. Ames' text is not supported by the record.

After interposing a qualified response to paragraph 163 regarding the content of Mr. Ames' text, Wal-Mart objected to Ms. Jones' reference to the same fact in paragraph 164 as “inadmissible hearsay” to which no hearsay exception applies. DRPSAMF ¶ 164. The Court overrules Wal-Mart's objection because a statement is only hearsay when it is offered to prove “the truth of the matter asserted.” *See* FED. R. EVID. 801(c). Ms. Jones does not seek to prove that Mrs. Ames is what Mr. Elliott described but rather that these descriptions were referenced in Mr. Ames' text and to posit Mr. Ames' reaction. Furthermore, paragraph 164 is accepted because it is supported by the record; however, Ms. Jones' description of the communication as an “email” instead of a text has been omitted.

Similarly, in paragraph 168, Ms. Jones stated that “Wal-Mart's investigation, however, does not in any way reference Elliott's text.” PSAMF ¶ 168. In support of this factual statement, Ms. Jones cites to a blank Individual Statement of Facts with Mr. Ames' name on it. *Acedo Decl.* Attach 4, WM000084 (ECF No. 32-6). The Court agrees with Wal-Mart that the cited reference to the record does not support Ms. Jones' statement and therefore has omitted paragraph 168. However, the substance of paragraph 168 has been included under paragraph 165.

⁹⁰ In paragraph 165, Ms. Jones stated “Ames, however, didn't do anything in response to the text.” DRPSAMF ¶ 165. Wal-Mart objects to this statement, arguing that it is not supported by the

Mr. Curtis testified that every now and then he would hear female employees complain about Mr. Elliott.⁹¹ PSAMF ¶ 51; DRPSAMF ¶ 51. Mr. Curtis also stated that Mr. Elliott would make a comment about anyone who walked by, it did not matter.⁹² PSAMF ¶ 52; DRPSAMF ¶ 52. In Mr. Curtis' opinion, Mr. Elliott's reputation was pretty well known and "nobody liked him."⁹³ PSAMF ¶ 104; DRPSAMF ¶ 104. At his deposition, Mr. Curtis testified that in his interview with Ryan Bullis and Shawn Ames, "I probably told them a little worse . . . a fucking asshole . . . I would just look at Shawn (Ames) and tell him he's a fucking asshole."⁹⁴ PSAMF ¶ 162; DRPSAMF ¶ 162.

e. Mr. Clifford's Statements about Mr. Elliott's Conduct

Associate James Clifford was interviewed on September 17, 2010 as part of the investigation. DSMF ¶ 85; PRDSMF ¶ 85. Mr. Clifford testified that his

record and Ms. Jones does not have the requisite personal knowledge to testify about the scope of Wal-Mart's investigation. DRPSAMF ¶ 165. After reviewing the record citation, the Court altered paragraph 165 to correspond to Ms. Jones' actual testimony; namely, that although Mr. Ames knew about the text, the incident was not mentioned in the Red Book investigation. *Jones Dep.* 79:1-13.

⁹¹ Ms. Jones' paragraph 51 stated: "Curtis testified that female employees complain about Elliott." PSAMF ¶ 51. Wal-Mart interposed a qualified response because Mr. Curtis testified "every now and then, you would hear some [female employees' complaints]." DRPSAMF ¶ 51. The Court has included Wal-Mart's qualification and rephrased paragraph 51 to accurately reflect Mr. Curtis' testimony.

⁹² Ms. Jones' paragraph 52 stated: "Any female that would walk by Elliott would have a comment about the female." PSAMF ¶ 52. Wal-Mart interposed a qualified response stating that Mr. Curtis testified that "Elliott would have a comment about 'anybody' who walked by" rather than just "females." DRPSAMF ¶ 52. The Court included Wal-Mart's qualification and rephrased paragraph 52.

⁹³ Wal-Mart interposed a qualified response to clarify that Mr. Curtis was voicing his opinion rather than a fact. DRPSAMF ¶ 104. The Court qualified paragraph 104 accordingly.

⁹⁴ Wal-Mart objected to this paragraph, arguing that it contains multiple assertions, misquotes the deposition testimony, and, without waiver, also qualified the statement. DRSAMF ¶ 162. The Court reviewed the cited portion of Mr. Curtis' deposition, overrules the objection, and declines to accept Wal-Mart's qualification.

interview lasted about forty-five minutes.⁹⁵ PSAMF ¶ 170; DRPSAMF ¶ 170. Wal-Mart’s documentation of the interview states: “James Clifford was interviewed about said incident and he did not recall any of the comments discussed.”⁹⁶ PSAMF ¶ 169; DRPSAMF ¶ 169. During his deposition testimony, Mr. Clifford described Mr. Elliott as a person of bad character, “his work ethics aren’t real good ethics . . . he has no caring attitude. He didn’t care if the job got done. Just very negative. Negativity doesn’t make a place of employment.” PSAMF ¶ 23; DRPSAMF ¶ 23. He also testified that Mr. Elliott “showed negativity in his way of working, he didn’t care if anything in the aisles got done at all.” PSAMF ¶ 24; DRPSAMF ¶ 24.

Mr. Elliott also made sexual comments about Mr. Clifford’s nineteen year-old daughter and one time when Mr. Clifford showed Mr. Elliott a picture of his daughter, Mr. Elliott said that he wanted to “F her.”⁹⁷ PSAMF ¶¶ 26, 33; DRPSAMF ¶¶ 26, 33. During his Red Book investigation interview, Mr. Clifford disclosed that on one occasion, Mr. Elliott told Mr. Clifford that “he wanted to get in [Ms. Jones’] pants.”⁹⁸ PSAMF ¶ 27; DRPSAMF ¶ 27; PSAMF ¶¶ 171-72; DRPSAMF

⁹⁵ Wal-Mart interposed a qualified response to paragraph 170 because in an Errata Sheet Mr. Clifford corrected his original testimony and stated that he did not remember how long his interview lasted. DRPSAMF ¶ 170. As Ms. Jones’ record citation supports her statement of fact and the Court has not been provided with an unredacted Errata Sheet for Mr. Clifford, the Court excludes Wal-Mart’s qualification.

⁹⁶ Wal-Mart objected to this statement because it includes multiple assertions of fact, violates the best evidence rule, and is not supported by the record. DRPSAMF ¶ 169. The Court overrules Wal-Mart’s objections.

⁹⁷ Wal-Mart interposed a qualified response: “Clifford stated that on one occasion, Elliott made a comment about Clifford’s daughter, saying something about he wanted to ‘F her.” DRPSAMF ¶ 26. According to the record, Mr. Elliott made the “F her” comment after Mr. Clifford showed him a picture of his daughter. DRPSAMF ¶ 26. The Court included language indicating that Mr. Elliott made comments about Mr. Clifford’s daughter on several occasions but has clarified that the “F her” comment happened once.

⁹⁸ Plaintiff’s paragraph 27 asserts that Mr. Clifford said that Mr. Elliott had come over to Ms. Jones’ aisle when he made this comment. PSAMF ¶ 27. Wal-Mart interposed a qualified response to

¶¶ 171-72. He also stated that Mr. Elliott would use the “F” word a lot.⁹⁹ PSAMF ¶¶ 28, 32; DRPSAMF ¶¶ 28, 32.

Mr. Clifford described how Mr. Elliott would make derogatory comments about different women that he went out with and stuff and that Mr. Elliott had no respect for women.¹⁰⁰ PSAMF ¶¶ 29, 32; DRPSAMF ¶¶ 29, 32. He also stated that he saw Mr. Elliott go into Ms. Jones’ aisle more than he should and that he would sometimes see Mr. Elliott throw around cartons without putting them in their proper place.¹⁰¹ PSAMF ¶¶ 31, 114; DRPSAMF ¶¶ 31, 114. Mr. Clifford testified

paragraph 27 stating that “Clifford testified that Elliott made this comment to him and Clifford was the only person present when it was said” and that they were three aisles down from Ms. Jones’ aisle when Mr. Elliott made this comment. DRPSAMF ¶ 27. Mr. Clifford’s testimony confirms this fact, and the Court has rephrased paragraph 27 accordingly.

In paragraph 171 Ms. Jones stated that during Mr. Clifford’s interview “he gave Wal-Mart notice of the incident when Elliott said he wanted to get in Jones’ pants.” PSAMF ¶ 171. Wal-Mart objected to this statement because “gave Wal-Mart notice of the incident” is conclusory. DRPSAMF ¶ 171. Wal-Mart also interposed a qualified response, which essentially confirmed the facts in its own paragraph 27. DRPSAMF ¶ 171. In light of Wal-Mart’s objection and qualification, the Court has rephrased Ms. Jones’ paragraph 171 and included it with Wal-Mart’s paragraph 27.

⁹⁹ Wal-Mart objected to the statement because it was not supported by the record. DRPSAMF ¶ 28. Ms. Jones did not provide the accurate citation to the record for her statement in paragraph 28; however, she reiterated this allegation in paragraph 32 with an appropriate record citation. PSAMF ¶ 32. The Court overrules Wal-Mart’s objection and declines to strike Ms. Jones’ statement in paragraph 28.

¹⁰⁰ Wal-Mart interposed a qualified response stating, that the derogatory “comments were not directed at Jones and she did not report them to management.” DRPSAMF ¶ 29. The Court declines to accept Wal-Mart’s qualification. Paragraph 29 does not assert that these derogatory comments were directed at Ms. Jones or that she reported them. Wal-Mart also objected to the assertion that Mr. Clifford testified that Mr. Elliott had no respect for women. DRPSAMF ¶ 32. The Court reviewed the cited portion of Mr. Clifford’s deposition transcript and declines to accept Wal-Mart’s qualified response. Viewing Mr. Clifford’s testimony in the light most favorable to Ms. Jones, Mr. Clifford was referring to Mr. Elliott’s attitude toward women when he said that Mr. Elliott had no respect.

In paragraph 30, Ms. Jones stated that “Elliott would make degrading comments about the women at the store.” PSAMF ¶ 30. Wal-Mart qualified this response because the record citation does not support “the asserted fact that Elliott made comments about women ‘at the store.’” DRPSAMF ¶ 30. After reviewing the record, the Court has excluded Ms. Jones’ paragraph 30 because it is not supported by the record.

¹⁰¹ Wal-Mart interposed a qualified response stating, “Clifford also testified that other coworkers entered Jones’ aisle regularly.” DRPSAMF ¶ 31. The fact that people worked in the aisles together regularly does not affect Mr. Clifford’s opinion that Mr. Elliott entered Ms. Jones’ aisle “more than he should.” The Court declines to accept Wal-Mart’s qualification. Ms. Jones’ paragraph

that in his interview he disclosed the information about what happened in the aisle.¹⁰² PSAMF ¶ 172; DRPSAMF ¶ 172. After the investigation started, Mr. Clifford testified that he observed Mr. Elliott acting “like he was really pissed, you know, that something was going to happen.”¹⁰³ PSAMF ¶ 113; DRPSAMF ¶ 113.

f. Ms. Bigelow’s Statements about Mr. Elliott’s Conduct

34 reiterates most of paragraph 31. PSAMF ¶ 34. Wal-Mart qualified its response, asserting that coworkers also entered Ms. Jones’ aisle. DRPSAMF ¶ 34. For the same reason, the Court declines to accept Wal-Mart’s qualified response.

In paragraph 113 Ms. Jones stated: “After Elliott learned he was a target of the investigation he became even more belligerent and mad ‘like he was really pissed’ something was going to happen.” PSAMF ¶ 113. Wal-Mart objected to this paragraph because Mr. Clifford did not have personal knowledge of Mr. Elliott’s knowledge or feelings about the investigation. DRPSAMF ¶ 113. The Court reviewed the cited portion of Mr. Clifford’s deposition testimony and agrees with Wal-Mart that Mr. Clifford does not say how he knew that Mr. Elliott knew that the investigation had begun. Therefore, the Court omitted that portion of paragraph 113. *See* FED. R. EVID. 602. However, Mr. Clifford confirmed that Mr. Elliott started “throwing things around” and displaying a “very bad attitude.” *Clifford Dep.* 32:20-22. This is a sufficient basis for Mr. Clifford’s testimony that Mr. Elliott appeared angry after the investigation began. The Court declines to accept Wal-Mart’s qualified response on this point.

In paragraph 36 Ms. Jones stated: “Clifford testified that he saw how Elliott’s behavior upset Jones.” PSAMF ¶ 36. Wal-Mart denied that statement because “Clifford testified that Jones never complained about Elliott’s behavior.” DRPSAMF ¶ 36. The cited portion of Mr. Clifford’s deposition testimony confirms that Mr. Clifford thought Ms. Jones was upset but it also confirms that she did not tell him why or complain about Mr. Elliott. *Clifford Dep.* 23:8-24. The Court omits Ms. Jones’ paragraph 36.

¹⁰² Wal-Mart interposed a qualified response to paragraph 172 because Mr. Clifford did not state that he disclosed all of the same information during his interview but rather that he disclosed the same information about what happened in the aisle during his interview. DRPSAMF ¶ 172. After reviewing the record citation, the Court has qualified paragraph 172.

In paragraph 173 Ms. Jones stated that Mr. Clifford’s interview notes do not reference his disclosure of Mr. Elliott’s “pants” comment or Mr. Elliott’s comment that he wanted to “F” Mr. Clifford’s daughter. PSAMF ¶ 173. Wal-Mart objected to this statement because “the document speaks for itself” and it is not supported by the record. DRPSAMF ¶ 173. After reviewing the record, the Court sustains Wal-Mart’s objection because paragraph 173 is not supported by the record.

¹⁰³ Wal-Mart objected to the inclusion of paragraph 113 on the ground that Mr. Clifford did not have personal knowledge of Mr. Elliott’s awareness of the investigation or his feelings. DRPSAMF ¶ 113. Wal-Mart also interposed a qualified response. DRPSAMF ¶ 113. After reviewing the record citation, the Court overrules Wal-Mart’s objection, accepts Wal-Mart’s qualification, and rephrases Mr. Clifford’s testimony so that it only reflects his personal observations of Mr. Elliott’s behavior—his personal knowledge under Rule 602—as discussed in his deposition. FED. R. EVID. 602; *see Clifford Dep.* 31:22-32:-19.

On September 9, 2010, Ms. Bigelow was interviewed by Ms. Acedo and Mr. Bullis.¹⁰⁴ PSAMF ¶ 147; DRPSAMF ¶ 147. Although Ms. Bigelow was uncertain as to the length of the interview, she estimated that it took one-half hour.¹⁰⁵ PSAMF ¶ 148; DRPSAMF ¶ 148. She did not hear the “I’m going to fuck you up the ass in a minute” comment. DSMF ¶ 88; PRDSMF ¶ 88. In her written statement, Ms. Bigelow stated that Mr. Elliott made comments about being hung like a buffalo or hung like a horse, or something like that while she was with Ms. Jones, and that he once bumped into her and then asked Ms. Bigelow if she “wanted his body.”¹⁰⁶

¹⁰⁴ In paragraph 155 Ms. Jones stated that “Wal-Mart did not question Bigelow about any other allegations other than the ‘hung like a horse’ and ‘climbing Mt. Rushmore’ statements.” PSAMF ¶ 155. Wal-Mart objected to this assertion on the ground that the record does not support it. DRPSAMF ¶ 155. For record support, Ms. Jones referred to a handwritten statement signed by Ms. Bigelow, which is listed as Exhibit 6 to Ms. Acedo’s deposition transcript. PSAMF ¶ 155 (citing DSMF Attach. 6, WM000057 (ECF No. 32-4)). The form asked Ms. Bigelow in general terms to describe what she knew about the workplace incidents. *Id.* Ms. Bigelow wrote about the hung like a horse or buffalo and Mount Rushmore comments, but she did not mention anything else. *Id.* However, the form itself did not restrict Ms. Bigelow’s responses and therefore the Court omits Ms. Jones’ paragraph 155 because it is not supported by the record citation.

¹⁰⁵ In paragraph 148 Ms. Jones stated that “[t]he interview was only about fifteen minutes.” PSAMF ¶ 148. Wal-Mart denied this statement because when asked how long her interview lasted, Ms. Bigelow testified, “I don’t know. I’m going to say maybe a half an hour. I don’t know. I don’t remember.” DRPSAMF ¶ 148; DRPSAMF Attach 3, *Dep. Tr. of Charlene Bigelow 37:2-9* (ECF No. 47-3) (*Bigelow Dep.*). The Court has rephrased Ms. Jones’ paragraph 148 to reflect Ms. Bigelow’s actual testimony.

¹⁰⁶ According to Wal-Mart’s paragraph 87, “Bigelow stated that she heard Elliott make the comments about the being hung like a buffalo or hung like a horse, or something like that.” DSMF ¶ 87. Ms. Jones admitted “that Bigelow confirmed the ‘hung like a horse or buffalo comment’” but denied “that Bigelow did not provide any further relevant information.” PRDSMF ¶ 87. As Wal-Mart’s paragraph 87 does not assert or imply that Ms. Bigelow did not provide additional information, the Court declines to accept Ms. Jones’ denial.

Wal-Mart objected to paragraph 149 because it is “needlessly repetitive” and “the document speaks for itself.” DRPSAMF ¶ 149. Wal-Mart also interposed a qualified response because Ms. Bigelow made this statement in her written statement rather than her interview. DRPSAMF ¶ 149. For the reasons articulated in footnote 7, the Court has included paragraph 149 but has rephrased the statement to reflect the record—that Ms. Bigelow’s statements regarding Mr. Elliott were made in her written statement.

Wal-Mart objected to paragraph 153 because “the document speaks for itself” and also interposed a qualified response because the cited document does not support that Tanya and Linda witnessed this interaction between Mr. Elliott and Ms. Bigelow. DRPSAMF ¶ 153. For the reasons set out in footnote 7, the Court rejects Wal-Mart’s objection but includes its qualification as it is supported by the record.

DSMF ¶ 87; PRDSMF ¶ 87; PSAMF ¶¶ 53, 153; DRPSAMF ¶¶ 53, 153. With respect to the “buffalo” and “horse” comments, Ms. Bigelow understood that Mr. Elliott was referring to the size of his penis. PSAMF ¶ 54; DRPSAMF ¶ 54. Ms. Bigelow stated that she told Mr. Elliott that it was an inappropriate thing to say and that he responded by saying “it’s better to climb Mt. Rushmore than a small blank, or something like that.”¹⁰⁷ PSAMF ¶ 55; DRPSAMF ¶ 55. Ms. Bigelow concluded that, “Elliott has a really bad mouth on him.” PSAMF ¶¶ 57, 150; DRPSAMF ¶¶ 57, 150.

In her written statement, Ms. Bigelow disclosed that in response to Mr. Elliott’s comment Ms. Jones said, “I can’t believe you said that” and that Linda, a co-worker, said, “I believe that would be taken as sex discrimination”, and that Ms. Bigelow “tried to avoid him while down stacking the rest of the night.”¹⁰⁸ PSAMF ¶¶ 56, 150; DRPSAMF ¶¶ 56, 150. Ms. Bigelow stated that Tanya and Linda were present at the time the “hung like a horse” and “Mount Rushmore” comments were made.¹⁰⁹ PSAMF ¶ 151; DRPSAMF ¶ 151. She also stated that Marissa and Jarred

¹⁰⁷ Wal-Mart objected to Ms. Jones’ statement in paragraph 55 on the ground that it “contains multiple factual assertions in violation of Local Rule 56(c).” D. ME. LOC. R. 56(c); DRPSAMF ¶ 55. The Court overrules Wal-Mart’s objection. Wal-Mart otherwise admitted the paragraph and the Court has included it.

¹⁰⁸ Wal-Mart objected to paragraph 56 on the ground that it contains multiple factual assertions in violation of Local Rule 56(c). The Court overrules Wal-Mart’s objection. Wal-Mart otherwise admitted the paragraph and the Court has included it.

Ms. Jones’ paragraph 150 stated: “Bigelow disclosed that in response, ‘Carol said, I can’t believe you said that and I believe Linda said that would be taken as sex discrimination, so I tried to avoid him while down stacking the rest of the night. I think he has a really bad mouth on him.’” PSAMF ¶ 150. Wal-Mart objected to paragraph 150 on the grounds that the term, “disclosed” is conclusory, that “the document speaks for itself”, and that Ms. Bigelow made the disclosure in her written statement. DRPSAMF ¶ 150. The Court overrules Wal-Mart’s first two objections and has amended the paragraph to reflect that Ms. Bigelow’s statement appears in a written statement.

¹⁰⁹ Ms. Jones’ paragraph 151 stated: “Bigelow also identified Tanya and Linda as witnesses to the statement.” PSAMF ¶ 151. Wal-Mart objected to paragraph 151 because “the document speaks

may have overheard Mr. Elliott's comment.¹¹⁰ PSAMF ¶ 152; DRPSAMF ¶ 152. Wal-Mart did not speak to the witnesses—Tanya, Linda, and Marissa—identified by Ms. Bigelow.¹¹¹ PSAMF ¶ 154; DRPSAMF ¶ 154.

Ms. Bigelow described Mr. Elliott as “very cocky . . . he thinks he knows everything, you know, he’s macho.” PSAMF ¶ 58; DRPSAMF ¶ 58. She also testified that Mr. Elliott bragged “he could get anyone to go out with him and, you know, stupid stuff like that.”¹¹² PSAMF ¶ 59; DRPSAMF ¶ 59. Ms. Bigelow testified that some associates at Wal-Mart said Mr. Elliott needed to grow up.¹¹³ PSAMF ¶ 60; DRPSAMF ¶ 60. Another overnight receiver at Wal-Mart, Linda Fox, testified that about ninety percent of her male coworkers thought he was an

for itself.” DRPSAMF ¶ 151. The Court overrules that objection. *See supra* note 6. Wal-Mart also interposed a qualified response on the ground that the document only stated that Tanya and Linda were present at the time the “Mt. Rushmore” comment was made. DRPSAMF ¶ 151. After reviewing the record, the Court rejects Wal-Mart’s qualified response. Viewing the record in the light most favorable to Ms. Jones, the Bigelow handwritten statement implies that Tanya and Linda were present throughout Mr. Elliott’s remarks.

¹¹⁰ Ms. Jones’ paragraph 152 states: “Bigelow also identified Tanya, Linda, Marissa and Jarred as further witnesses to the statement.” PSAMF ¶ 152. Wal-Mart objected to paragraph 152 on the ground that “the document speaks for itself” and it interposed a qualified response on the ground that Ms. Bigelow stated in the document that “maybe” Marissa and Jared overheard the comments. DRPSAMF ¶ 152. The Court overrules Wal-Mart’s objection but has amended Plaintiff’s paragraph 152 to more accurately reflect Ms. Bigelow’s statement. *See supra* note 7.

¹¹¹ Wal-Mart objected to paragraph 154 because the “cited document does not support the asserted fact” and interposed a qualified response that Wal-Mart’s policy defines the parameters of the investigation. DRPSAMF ¶ 154. After reviewing the record citation and drawing all reasonable inferences in Ms. Jones’ favor, the Court has included paragraph 154 because it is a reasonable inference supported by the record citation.

¹¹² Wal-Mart interposed a qualified response stating that the “term ‘bragged’ should be stricken because it is not supported by the record citation and it is conclusory and argumentative.” DRPSAMF ¶ 59. The Court overrules Wal-Mart’s objection and denies the motion to strike. It is a logical inference that in saying he could get anyone to go out with him, Mr. Elliott was bragging.

¹¹³ Wal-Mart objected to Ms. Jones’ use of the term “complained” on the ground that it is argumentative and also denied the statement on the ground that “Bigelow testified that some associates thought Elliott was a ‘kid’ and ‘needs to grow up.’” DRPSAMF ¶ 60. The Court has rephrased Ms. Jones’ paragraph 60 to omit “complained.” The Court declines to accept Wal-Mart’s qualified response as the statement in Ms. Jones’ paragraph 60 is accurate without Wal-Mart’s addition.

“arrogant asshole.”¹¹⁴ PSAMF ¶ 61; DRPSAMF ¶ 61. She also testified that Mr. Elliott would “tell you to his face that he was an arrogant jackass.”¹¹⁵ PSAMF ¶ 62; DRPSAMF ¶ 62.

g. Mr. Elliott’s Interview and Statement

Mr. Elliott was interviewed on or about September 20, 2010 as part of the investigation and denied Ms. Jones’ allegations of harassment.¹¹⁶ DSMF ¶ 86; PRDSMF ¶ 86; PSAMF ¶ 174; DRPSAMF ¶ 174. In the interview, Mr. Elliott admitted to “horsing around.”¹¹⁷ PSAMF ¶ 174; DRPSAMF ¶ 174. Ms. Acedo testified that she did not come to any conclusions about what Mr. Elliott meant when he said he was horsing around.¹¹⁸ PSAMF ¶ 175; DRPSAMF ¶ 175. Also, the interview notes from Mr. Elliott’s interview show that he had stated “Charlene,

¹¹⁴ Wal-Mart interposed a qualified response because Ms. Fox’s deposition testimony confirmed that “90 percent of the male coworkers” had that opinion of him rather than “ninety percent of the coworkers.” DRPSAMF ¶ 61; PSAMF ¶ 61. After reviewing the record citation, the Court has included Wal-Mart’s qualification and rephrased paragraph 61.

¹¹⁵ Wal-Mart interposed a qualified response to Ms. Jones’ statement on the ground that it did not accurately reflect Ms. Fox’s testimony. DRPSAMF ¶ 62. After reviewing the record citation, the Court has included Wal-Mart’s qualification and rephrased paragraph 62.

¹¹⁶ Ms. Jones denied “that Elliott denied any allegations of harassment” because he “admitted to ‘horsing around’” and referring to Charlene as “Charlene baby.” PRDSMF ¶ 86. The record citation does not support Ms. Jones’ denial. When Mr. Elliott admitted to referring to Ms. Bigelow as “Charlene baby” and to “horsing around” he was not admitting to the specific instances of harassment at issue in this case such as making sexual comments towards Ms. Jones, threatening her, or touching her. *See Acedo Decl. Attach 6, WM000050 (ECF No. 32-6)*. The Court declines to accept Ms. Jones’ denial.

¹¹⁷ Wal-Mart interposed a qualified response stating that “the document speaks for itself.” DRPSAMF ¶ 174. The Court overrules Wal-Mart’s objection. *See supra* note 7.

¹¹⁸ In paragraph 175, Ms. Jones states “[t]he investigation, however, did not inquire as to what Mr. Elliott meant by horsing around and never came to any conclusion as to what Mr. Elliott meant by horsing around.” PSAMF ¶ 175. Wal-Mart interposed a qualified response, setting forth what it contends Ms. Acedo stated in her deposition. DRPSAMF ¶ 175. In support of her paragraph, Ms. Jones cited pages 39 and 41 of Ms. Acedo’s deposition transcript. However, Ms. Jones failed to provide the Court with an unredacted transcript of those pages. Without any means to confirm whether Ms. Acedo’s testimony is in accordance with the Plaintiff’s paragraph, the Court would ordinarily omit the paragraph. D. ME. LOC. R. 56(f) (“The court may disregard any statement of fact not supported by a specific citation to record material properly considered on summary judgment”). However, as Wal-Mart agrees with a different version of Ms. Acedo’s testimony, the Court included Wal-Mart’s conceded version.

baby what are you doing. Jimmy says it too.”¹¹⁹ PSAMF ¶ 178; DRPSAMF ¶ 178. Wal-Mart did not conduct any further preliminary interviews after Mr. Elliott’s interview on September 20, 2010.¹²⁰ PSAMF ¶ 180; DRPSAMF ¶ 180.

5. Wal-Mart’s Continued Investigation Efforts

On September 24, 2010, Ms. Burke sent Ms. Acedo an email requesting an update on the investigation. PSAMF ¶ 181; DRPSAMF ¶ 181. Before the investigation concluded, on September 25, 2010 beginning at 3:43 A.M., the Augusta Wal-Mart responded to Ms. Burke’s email by sending out a ten page fax containing: (1) Mr. Elliott’s statement and acknowledgement; (2) Ms. Bigelow’s statement and acknowledgement; (3) Ms. Jones’ statement and acknowledgement; (4) the documentation of the initial complaint on August 27, 2010 with the “I will fuck you up the ass now” allegations; and (5) some of the findings of the investigation, which stated that the investigation could not substantiate the allegations against Mr. Elliott. PSAMF ¶ 182; DRPSAMF ¶ 182. Specifically, the

¹¹⁹ Wal-Mart objected to paragraph 178 because it is conclusory and, without waiving its objection, interposed a qualified response by directly quoting the language from Mr. Elliott’s interview notes. DRPSAMF ¶ 178. The Court omitted the conclusory language—“admitted”—and has included Wal-Mart’s qualification to accurately reflect the information gathered from Mr. Elliott’s interview.

In paragraph 179, Ms. Jones states “Acedo admits that it was inappropriate for Mr. Elliott to refer [to] Bigelow as ‘baby’, but the investigation never did any further investigation into the comment.” PSAMF ¶ 179. Wal-Mart objected to Plaintiff’s paragraph 179 on the ground that the cited reference did not support the paragraph. DRPSAMF ¶ 179. Wal-Mart also interposed a qualified response. *Id.* Because the Court has not been provided with an unredacted version of Ms. Acedo’s deposition, specifically page 42, the Court cannot confirm this statement and has excluded it from the facts.

¹²⁰ Wal-Mart objected to paragraph 180 because it is not supported by the record and Ms. Jones does not define “interviews.” DRPSAMF ¶ 180. Without waiving its objections, Wal-Mart also admits the contents of paragraph 180. DRPSAMF ¶ 180. Complying with its duty to construe all reasonable inferences in the non-movant’s favor, the Court overrules Wal-Mart’s objections because it can reasonably infer from the record citation that Mr. Elliott was the last person Wal-Mart interviewed. However, the Court agrees that interviews must be further defined in light of the record citation and therefore has inserted the word “preliminary” in front of “interviews.”

findings state: “Kyle – inappropriate comments and touching to Carol – No witness[es], all associates that were named did not remember any of the times or comments in question” with a box checked “Cannot be substantiated” and “Kyle – inappropriate comments to Charlene – All witnesses stated do not recall incident” with a box checked “Cannot be substantiated.”¹²¹ PSAMF ¶ 182; DRPSAMF ¶ 182.

6. The Conditions of Ms. Jones’ Work Environment after her August 27, 2010 Complaint to Management

Ms. Jones continued working at the Store from the time she made her complaint on August 27, 2010 until on or about October 6, 2010, when she went out on approved medical leave. DSMF ¶ 95; PRDSMF ¶ 95. A couple of days after Ms. Jones’ August 27, 2010 report, Mr. Elliott was moved to the Pet Department on the other side of the store, except that he would sometimes help downstack in the Grocery Department before going to the Pet Department and would also be around Ms. Jones in the beginning of the night when the store had a meeting.¹²² DSMF ¶ 96; PRDSMF ¶ 96; PSAMF ¶ 107; DRPSAMF ¶ 107. The store occupies approximately 204,000 square feet. DSMF ¶ 97; PRDSMF ¶ 97.

¹²¹ Wal-Mart objected to paragraph 182 because it contains multiple assertions and “the documents speak for themselves.” DRPSAMF ¶ 182. The Court overrules Wal-Mart’s objections. *See supra* note 7. Wal-Mart also interposed a qualified response because the checked boxes actually stated “cannot be substantiated” and the investigation was not concluded on September 25, 2010. DRPSAMF ¶ 182. The Court accepts Wal-Mart’s qualification because it is supported by the record.

¹²² Ms. Jones denied “that Elliott was move[d] to the Pet Department” and that “shortly after August 27th, Acedo moved Elliott to the opposite side of the store.” PRDSMF ¶ 96. During her deposition, Ms. Jones testified that Mr. Elliott was moved across the store. *Jones Dep.* 86:9-23. Further, although the cited testimony confirms that Mr. Elliott made his way over to Ms. Jones’ part of the store, his actions do not contradict the fact that Ms. Acedo formally moved Mr. Elliott to a different department on the other side of the store. The Court declines to accept Ms. Jones’ denial.

In paragraph 107 Ms. Jones repeated many facts set out in Wal-Mart’s paragraph 96 but included a few additional facts. PSAMF ¶ 107. Wal-Mart interposed a qualified response. DRPSAMF ¶ 107. In light of Wal-Mart’s paragraph 96, the Court included paragraph 107’s additional fact that Mr. Elliott would sometimes be around Ms. Jones in the beginning of the night for meetings into the same statement.

Ms. Jones stated that one time she heard a male coworker talking about a stripper or something similar and heard Mr. Elliott tell the coworker to “be careful what you say”; Mr. Elliott looked at Ms. Jones, and then told the coworker again to “be careful what you say, I’m just saying.”¹²³ DSMF ¶ 98; PRDSMF ¶ 98; PSAMF ¶ 108; DRPSAMF ¶ 108. Ms. Jones did not consider this comment to be inappropriate.¹²⁴ DSMF ¶ 99; PRDSMF ¶ 99. Ms. Jones did not report this comment by Mr. Elliott to anyone in management at Wal-Mart because she believed that if she complained, nothing would be done.¹²⁵ DSMF ¶ 100; PRDSMF ¶ 100. During this same period, Ms. Jones claims she overheard Mr. Elliott make a comment to an unnamed coworker about how to have anal sex. DSMF ¶ 101; PRDSMF ¶ 101. Ms. Jones did not report this comment to anyone in management at Wal-Mart because she believed nothing would be done about it.¹²⁶ DSMF ¶ 102; PRDSMF ¶ 102; PSAMF ¶ 110; DRPSAMF ¶ 110.

¹²³ Ms. Jones denied the portion of Wal-Mart’s statement—that the incident “took place between August 27th and October 5th.” PRDSMF ¶ 98. After reviewing the record, the Court has excluded the dates from Wal-Mart’s paragraph because they cannot be verified in the cited record.

In paragraph 108 Ms. Jones stated, “Elliott would also continue to go over to Jones’ area where he would threaten her by saying things such as ‘you better be careful with what you say around here.’” PSAMF ¶ 108. Wal-Mart denied this statement because the “threat” was made to a coworker rather than Ms. Jones and Ms. Jones’ characterization of the comment as a “threat” is not supported by her deposition testimony. DRPSAMF ¶ 108. The Court agrees that in view of Ms. Jones’ later testimony that, although she thought the comment was inappropriate, she did not think it was retaliatory, Mr. Elliott’s comment cannot be seen as a threat. *See Jones Dep.* 86:18-87:-20. The Court eliminated the phrase, “where he would threaten her”, from the paragraph.

¹²⁴ Ms. Jones interposed a qualified response, stating that she found Mr. Elliott’s comment to be “inappropriate” as opposed to “retaliatory.” PRDSMF ¶ 99. The Court substitutes “inappropriate” for “retaliatory” because a review of the record confirms that Ms. Jones used that term in her deposition testimony to describe Mr. Elliott’s actions. *See Jones Dep.* 87:17-20.

¹²⁵ Ms. Jones interposed a qualified response, stating that “she did not again complain about the subject comments ‘because every time I went to them, nothing was done. And the fact he was still working there blew my mind.’” PRDSMF ¶ 100. The Court added Ms. Jones’ explanation to Wal-Mart’s paragraph 100.

¹²⁶ Ms. Jones interposed a qualified response to paragraph 102 stating that she did not again complain about the subject comments “because every time I went to them, nothing was done.”

With Mr. Elliott still in the store, Ms. Jones was afraid of retaliation and would continuously look over her shoulder. PSAMF ¶ 192; DRPSAMF ¶ 192. After he was fired, she did not know if he would go to her home—she was scared—however, she stated Mr. Elliott never came to her home, called her, or sent her any texts so the only interactions she had with him were those she described at the store.¹²⁷ PSAMF ¶ 192; DRPSAMF ¶ 192. Also, during the investigation and afterwards, on several occasions Ms. Jones asked the managers about what was being done with the investigation and why it was taking so long. PSAMF ¶ 183; DRPSAMF ¶ 183. She believed that they “never gave any answers,” but Mr. Tyler stated that he met with Ms. Jones twice to discuss the investigation and that he told her he would advise her when the process was finished.¹²⁸ PSAMF ¶ 183; DRPSAMF ¶ 183.

7. Ms. Jones’ Request for Time Off from Work

Sometime in September 2010, after Ms. Jones was interviewed as part of the investigation, Ms. Jones met with Store Manager Mr. Tyler and asked if she could take leave from work while the investigation was ongoing because it was stressful

PRDSMF ¶ 102. Viewing the facts in the light most favorable to Ms. Jones, the Court has included her qualified response.

¹²⁷ Wal-Mart interposed a qualified response to this paragraph because the record citation does not support the timing of the statements and because Mr. Elliott never visited Ms. Jones’ home, called her or texted her. DRPSAMF ¶ 192. Because Wal-Mart’s qualifications accurately reflect the record citation, the Court has incorporated them into Plaintiff’s paragraph 192.

¹²⁸ Wal-Mart objected to the statement—“Management, however, did not advise Jones of findings”—on the ground that it is not supported by the record citation and alternatively interposed a qualified response based on Ms. Jones’ testimony and Mr. Tyler’s declaration. DRPSAMF ¶ 183. The Court overrules Wal-Mart’s objection as the majority of Ms. Jones’ statement is confirmed by the record but strikes the unsupported quoted language referenced above. After reviewing the record, the Court has incorporated Wal-Mart’s qualification and rephrased Ms. Jones’ statement to reflect that it was her belief that no one in management would give her answers about the investigation.

for her.¹²⁹ DSMF ¶ 103; PRDSMF ¶ 103. More specifically, in the middle of September, 2010, Ms. Jones asked Mr. Tyler for time off from work, telling him, “I needed to take time off from work for the simple fact that Kyle [Elliott] was still working there, and [he] said no that I couldn’t.”¹³⁰ PSAMF ¶ 184; DRPSAMF ¶ 184. When Ms. Jones made this request, Mr. Tyler became angry and told her that she could not take time off because of the investigation.¹³¹ PSAMF ¶ 188; DRPSAMF ¶ 188. Ms. Jones testified that Mr. Tyler said “that I couldn’t take time off of work and I opened my mouth.”¹³² PSAMF ¶ 185; DRPSAMF ¶ 185. Instead, Mr. Tyler told Ms. Jones that she could take personal leave, although he encouraged her to keep working.¹³³ DSMF ¶ 118; PRDSMF ¶ 118; PSAMF ¶ 184; DRPSAMF ¶ 184.

¹²⁹ Ms. Jones denied this paragraph on the ground that she did not ask for time off only because of the investigation. PRDSMF ¶ 103. The Court incorporated the substance of Ms. Jones’ denial in the next sentence.

¹³⁰ Wal-Mart interposed a qualified response, asserting that Mr. Tyler told her that she could take personal time off and that she had not requested medical leave. DRPSAMF ¶ 184. As Ms. Jones’ paragraph is supported by her record citation and the Court is required to view the evidence in the light most favorable to her, the Court declines to accept Wal-Mart’s qualified response. However, Wal-Mart’s contention—that Mr. Tyler told Ms. Jones that she could take personal time off—is confirmed by Ms. Jones’ testimony and is captured in the next sentence.

¹³¹ Wal-Mart interposed a qualified response to Ms. Jones’ paragraph 188 on the ground that Mr. Tyler told Ms. Jones she could take leave. DRPSAMF ¶ 188. The Court included this part of Mr. Tyler’s response under Wal-Mart’s paragraph 118.

¹³² In paragraph 185 Ms. Jones’ stated: that she “testified that Tyler said ‘that I couldn’t take time off of work and I opened my mouth.’” PSAMF ¶ 185. Wal-Mart interposed a qualified response, saying that it was after Ms. Jones brought up confidentiality, that Mr. Tyler made this comment. DRPSAMF ¶ 185. As the paragraph is supported by the record citation and the Court is required to view the evidence in the light most favorable to the non-movant, the Court has included Ms. Jones’ paragraph 185.

¹³³ The parties’ assertions and qualified responses on the interchange between Ms. Jones and Mr. Tyler are extremely confusing. DSMF ¶ 118; PRDSMF ¶ 118; PSAMF ¶¶ 184-85, 188; DRPSAMF ¶¶ 184-85, 188. The Court carefully reviewed Ms. Jones’ deposition transcript and concluded the following: (1) in the middle of September, 2010, Ms. Jones approached Mr. Tyler and asked him for time off because Mr. Elliott was still working there; (2) she did not request paid time off, just time off, but she did not specify that she was not asking for paid time off; (3) Mr. Tyler became angry and declined to allow her time off because of the investigation; (4) he did say that she could take personal time off; (5) during this conversation, Ms. Jones mentioned that she was concerned about the lack of confidentiality about the investigation; (6) Mr. Tyler mentioned to her that she had opened her mouth and told people; (7) Ms. Jones did not ask for medical leave. *Jones*

Ms. Jones asked Mr. Tyler why the investigation was taking so long. DSMF ¶ 104; PRDSMF ¶ 104. She believed that Mr. Elliott should have been suspended.¹³⁴ DMSF ¶ 105; PRDSMF ¶ 105.¹³⁵

Ms. Jones also told Mr. Tyler that she believed “everybody” in the store knew about the investigation. DSMF ¶ 106; PRDSMF ¶ 106.¹³⁶ Ms. Jones stated that “employees would come up to [her] and say ‘I can’t believe that you have to put up with this for so long’ or another person asked ‘is this the way that they handle sexual harassment?’”¹³⁷ PSAMF ¶ 187; DRPSAMF ¶ 187. Mr. Tyler told Ms. Jones that she had opened her mouth and told other people about her issues with Mr. Elliott and that may be why others were talking about it. DSMF ¶ 117; PRDSMF ¶ 117.

Dep. 89:22-94:18. The Court included these statements, which are supported by Ms. Jones’ deposition testimony, and overrules the multiple objections and equivocations by the parties.

¹³⁴ Ms. Jones denied that she made the statement in paragraph 105 to Mr. Tyler. PRDSMF ¶ 105. Given that Ms. Jones’ objection only concerns who she made the statement to rather than the substance of the statement, the Court has omitted the specific reference to Mr. Tyler.

¹³⁵ Wal-Mart’s paragraph 107 stated: “Mr. Tyler explained the investigation process to her, including Wal-Mart’s obligation to consult with the corporate office and interview multiple witnesses, that these things take time, and that the company could not simply fire someone until it had investigated to determine whether and to what extent there had been wrongdoing.” DSMF ¶ 107. Ms. Jones denied that “Tyler gave the subject explanation.” PRDSMF ¶ 107. Instead, she cites her deposition testimony where she stated that after asking Mr. Tyler for time off, he “was angry and said no, I can’t let you take time off because of the investigation.” PRDSMF ¶ 107. Viewing the evidence in the light most favorable to Ms. Jones, the Court has excluded Wal-Mart’s paragraph 107.

¹³⁶ Wal-Mart’s paragraph 108 stated: “Plaintiff told Tyler that she had talked to other associates about the investigation.” DSMF ¶ 108. Ms. Jones denied this paragraph, noting that two associates, Amy and Jessie, came to her and told her that they could not believe that she had put up with the harassment for so long and another associate commented to her that this is the way they handle sexual harassment. PRDSMF ¶ 108. As the Court is required to view the evidence in the light most favorable to Ms. Jones, it has excluded Wal-Mart’s paragraph 108 in its recitation of facts.

In paragraph 186, Ms. Jones stated “[t]he confidentiality of the investigation was broken as ‘everybody knew in the store’ when it was only suppose[d] to be known to the three people involved.” PSAMF ¶ 186. Wal-Mart objected to this statement because of its conclusory and argumentative nature and also denies its contents. DRPSAMF ¶ 186. The Court sustains Wal-Mart’s objections and strikes the statement especially given Ms. Jones’ admission. *See* DSMF ¶ 108.

¹³⁷ Wal-Mart interposed a qualified response because Ms. Jones admitted to telling people about Mr. Elliott’s comments and the investigation. DRPSAMF ¶ 187. Viewing the evidence in the light most favorable to Ms. Jones, the Court has not included Wal-Mart’s qualified response.

Specifically, one night at work while in the restroom, Ms. Jones told her coworker Amy Gillcash about the comment Mr. Elliott had made to her on August 27th. DSMF ¶ 109; PRDSMF ¶ 109. Ms. Gillcash told Ms. Jones to report the comment to management. DSMF ¶ 110; PRDSMF ¶ 110. Ms. Jones told Ms. Gillcash that she had reported Mr. Elliott's comment to management and that she was awaiting the results. DSMF ¶ 111; PRDSMF ¶ 111. Ms. Gillcash did not tell anyone at the store about what Ms. Jones had told her that Mr. Elliott said. DSMF ¶ 112; PRDSMF ¶ 112.

Ms. Jones also told her coworkers Jimmy, Kenny, and John about the comment Mr. Elliott made to her on August 27th.¹³⁸ DSMF ¶ 113; PRDSMF ¶ 113. Ms. Jones told Mr. Curtis about other comments Mr. Elliott had made, and Mr. Curtis told her to report them to management.¹³⁹ DSMF ¶ 114; PRDSMF ¶ 114. Ms. Jones told Mr. Curtis that she did not want to tell management about Mr. Elliott's comments or behavior because she did not want to hurt anyone's feelings and she did not want people to be mad at her.¹⁴⁰ DSMF ¶ 115; PRDSMF ¶ 115. Ms. Gillcash, Mr. Curtis, and Ms. Bigelow encouraged Ms. Jones to report her concerns

¹³⁸ Citing paragraph 3 of her affidavit, Ms. Jones interposed a qualified response, stating that she "told the associates of the subject comment before the start of the investigation." PRDSMF ¶ 113. The referenced portion of Ms. Jones' affidavit does not support her qualification, and the Court declines to include it.

¹³⁹ Ms. Jones interposed a qualified response to paragraph 114 by stating that she "did give management notice of the comments." PRDSMF ¶ 114. The statement in paragraph 114 does not state or imply that Ms. Jones gave notice of the comments to management but rather describes the content of her conversation with Mr. Curtis. The Court declines to incorporate Ms. Jones' qualification because it is unresponsive to paragraph 114.

¹⁴⁰ Ms. Jones interposed a qualified response stating that she "did feel that way, but she eventually gave notice to Defendant of the harassment." PRDSMF ¶ 115. However, Wal-Mart's paragraph 115 does not address whether Ms. Jones told management of the harassment and given that Ms. Jones admits the contents of paragraph 115, the Court does not incorporate her qualification.

to management prior to or on August 27, 2010.¹⁴¹ DSMF ¶ 119; PRDSMF ¶ 119. Ms. Gillcash does not recall reporting Ms. Jones' concerns about Mr. Elliott to management at any time; Ms. Bigelow went with Ms. Jones on August 27, 2010 to report Mr. Elliott to management.¹⁴² DSMF ¶¶ 116, 120; PRDSMF ¶¶ 116, 120.

8. Profanity on Boxes in Ms. Jones' Aisle

On or about October 4, 2012, Plaintiff saw the words “ass, dink, and shit” written on a box at the end of her aisle. DSMF ¶ 121; PRDSMF ¶ 121; PSAMF ¶ 189; DRPSAMF ¶ 189. John, the assistant manager, took pictures of the writing on the boxes with his cellphone and unsuccessfully tried to determine who had written on the boxes.¹⁴³ DSMF ¶ 123; PRDSMF ¶ 123; PSAMF ¶ 189; DRPSAMF ¶ 189. He could not verify who had written on the box and could not impose discipline on

¹⁴¹ Ms. Jones interposed a qualified response to Wal-Mart's paragraph 119, stating that she “did give management notice of the comments.” PRDSMF ¶ 119. The statement in paragraph 119 does not address whether Ms. Jones gave notice to management but rather describes Ms. Gillcash's, Mr. Curtis', and Ms. Bigelow's advice to Ms. Jones. The Court declines to incorporate Ms. Jones' qualification because it is unresponsive to paragraph 119.

¹⁴² Ms. Jones denied Wal-Mart's paragraph 120 and responded that she “did give management notice of the comments.” PRDSMF ¶ 120. Again, Wal-Mart's paragraph 120 does not address whether Ms. Jones gave management notice of the comments but rather whether her coworkers gave management notice of the comments. The Court declines to accept Ms. Jones' denial because it is unresponsive.

Ms. Jones denied Wal-Mart's statement in paragraphs 116 and 120 citing various statements Mr. Curtis made in his deposition testimony. PRDSMF ¶¶ 116, 120. Viewing Mr. Curtis' testimony in the light most favorable to Ms. Jones, the Court declines to include Wal-Mart's paragraph 116 and the portion of Wal-Mart's paragraph 120 addressing Mr. Curtis.

¹⁴³ Ms. Jones admitted “that the manager John Gregoire took pictures of boxes” but denied “that Gregoire tried to determine who wrote on the boxes.” PRDSMF ¶ 123. Although Ms. Jones cited page 105 of her deposition transcript in support of her denial, she did not include a copy of that page with the record; her unredacted transcript ends at page 102. Wal-Mart supplied a heavily redacted version of page 105 (even in the unredacted part of the record). The unredacted testimony on that page states only that Ms. Jones never heard anything about the investigation after the assistant manager took pictures. The Court amended the relevant paragraphs to reflect the revealed portion of Ms. Jones' testimony in Plaintiff's paragraph 189.

anyone.¹⁴⁴ DSMF ¶ 124; PRDSMF ¶ 124. Ms. Jones did not hear anything further about the assistant manager's investigation.¹⁴⁵ PSAMF ¶ 189; DRPSAMF ¶ 189. From time to time, boxes would come into the Store from the warehouse with offensive writing on them. DSMF ¶ 122; PRDSMF ¶ 122. Ms. Jones reported this incident to Mr. Tyler. PSAMF ¶ 190; DRPSAMF ¶ 190.

9. Ms. Jones' Communication with Wal-Mart's Ethics Hotline, her Ethics Complaint, and Mr. Elliott's Termination

On October 6, 2010, Ms. Jones called Wal-Mart's ethics hotline to file another complaint regarding sexual harassment by Mr. Elliott, how she had told the manager about it, how she had not heard anything back about her complaint, and how Mr. Elliott was still working in the building.¹⁴⁶ DSMF ¶¶ 7, 125; PRDSMF ¶¶ 7, 125; PSAMF ¶ 196; DRPSAMF ¶ 196. In response, the hotline representative told Ms. Jones to call the Ethics Committee because "they said that didn't sound

¹⁴⁴ Ms. Jones denied "that manager John could not verify who had written on the boxes [because] Jones told him it was associate John and his wife Melissa." PRDSMF ¶ 124. Because Ms. Jones did not provide the Court with the relevant transcript she cites to support her denial, the Court included the entire paragraph because it is supported by Wal-Mart's record citation.

¹⁴⁵ As explained above, the Court included this statement in lieu of Ms. Jones' paragraph 189 to reflect what it could verify based on the limited transcripts the parties supplied.

¹⁴⁶ In Ms. Jones' paragraph 196, Ms. Jones stated: "On 10/6/10, Jones called the employee hotline to file another complaint regarding the sexual harassment by Elliott, her notice to management about the sexual harassment, the lack of response by management, and the fact that Elliott was [still] working in the building." PSAMF ¶ 196. Wal-Mart interposed a qualified response to paragraph 196 because "[Ms.] Jones did not level a new complaint" when she called the hotline on October 6, 2010. DRPSAMF ¶ 196. Viewing the hotline statements in the light most favorable to Ms. Jones, the Court declines to accept Wal-Mart's qualification. The parts of Ms. Jones' complaint that are new are that Wal-Mart had failed to take action and that Mr. Elliott was still working at the store.

right.”¹⁴⁷ PSAMF ¶ 197; DRPSAMF ¶ 197. Ms. Jones believes the individuals at the ethics office looked into her complaint. DSMF ¶ 126; PRDSMF ¶ 126.

Ms. Jones called the Ethics Committee but not on the day the hotline representative told her to call.¹⁴⁸ PSAMF ¶ 198; DRPSAMF ¶ 198. Ms. Jones told the Ethics Committee about the sexual harassment, the Red Book investigation, that she had not heard anything back with regard to the investigation except for her conversations with Mr. Tyler, and that Mr. Elliott was still working at Wal-Mart.¹⁴⁹ PSAMF ¶ 199; DRPSAMF ¶ 199. The person from the Ethics Committee said that they would look into the matter.¹⁵⁰ PSAMF ¶ 200; DRPSAMF ¶ 200.

On October 6, 2012, Ms. Burke received Ms. Jones’ ethics complaint. PSAMF ¶ 201; DRPSAMF ¶ 201. She reviewed the documentation and noted that the investigation documented that the allegations “could not be substantiated even though both Carol[e] and Charlene heard Kyle’s comment.”¹⁵¹ PSAMF ¶ 201; DRPSAMF ¶ 201. Ms. Burke also noted that Ms. Acedo had not sent her all of the

¹⁴⁷ Wal-Mart objected to this paragraph on the ground it is hearsay not within an exception. DRPSAMF ¶ 197. The statement, however, is by a Wal-Mart representative and is not hearsay under Rule 801(d)(2)(A). FED. R. EVID. 801(d)(2)(A).

¹⁴⁸ Ms. Jones’ paragraph 198 stated: “Jones did then call the Ethics Committee.” PSAMF ¶ 198. Wal-Mart interposed a qualified response because Ms. Jones testified that she called the Ethics Committee but not on the day the hotline told her to call. DRPSAMF ¶ 198. After reviewing the record citation, the Court included Wal-Mart’s qualification.

¹⁴⁹ Wal-Mart interposed a qualified response on the ground that Mr. Tyler met with Ms. Jones twice prior to her calling the Ethics Committee. DRPSAMF ¶ 199. Ms. Jones’ paragraph 199, however, alleges what she told the Ethics Committee, and does not address whether she had met with Mr. Tyler. The Court declines to accept Wal-Mart’s qualified response.

¹⁵⁰ Wal-Mart objected to this statement because it is hearsay not within a recognized exception. DRPSAMF ¶ 200. As the statement is a statement of a Wal-Mart representative, it is not hearsay. FED. R. EVID. 801(d)(2)(A).

¹⁵¹ Wal-Mart objected to paragraph 201 because the “cited document speaks for itself.” DRPSAMF ¶ 201. The Court overrules Wal-Mart’s objection and includes Ms. Jones’ paragraph. See *supra* note 7.

interview statements, but that Ms. Acedo would fax the documentation.¹⁵² PSAMF ¶ 202; DRPSAMF ¶ 202. On October 8, 2010, Ms. Burke received additional documentation from Ms. Acedo. PSAMF ¶ 203; DRPSAMF ¶ 203. Ms. Burke noted:

Kyle has an active D-Day. On the information provided, Kyle's behavior is inconsistent with the Harassment & Discrimination Policy and [w]ritten coaching and re-training would be supported by the policy. Requested that sections 4 and 5 of the IR be completed after the employment action is taken and follow up with the reporting associate has occurred. Requested that steps 3-5 be faxed to EAS for closure of the investigation. CM will terminate Kyle this evening.¹⁵³

PSAMF ¶ 203; DRPSAMF ¶ 203. Wal-Mart determined that Mr. Elliott violated the DHP Policy and, after consultation with EAS, it terminated his employment with a last date worked of October 8, 2010.¹⁵⁴ DSMF ¶ 89; PRDSMF ¶ 89.

¹⁵² Wal-Mart objected to paragraph 202 because the "cited document speaks for itself." DRPSAMF ¶ 202. The Court overrules Wal-Mart's objection and includes Ms. Jones' paragraph. See *supra* note 7.

¹⁵³ Wal-Mart objected to this paragraph because the "cited document speaks for itself." DRPSAMF ¶ 203. The Court overrules Wal-Mart's objection and includes Ms. Jones' paragraph. See *supra* note 7. However, Wal-Mart interposed a qualified response, quoting the entire passage. Under the rule of completeness, the Court includes Ms. Burke's note in its entirety.

¹⁵⁴ Ms. Jones denied "that Acedo and Ames found Elliott had violated the DHP policy. To the contrary, Acedo and Ames concluded the investigation could not corroborate the allegation made by Jones and Bigelow." PRDSMF ¶ 89. However, Wal-Mart's paragraph 89 does not state that "Ms. Acedo and Mr. Ames found that Mr. Elliott violated the DHP Policy" but says "Wal-Mart determined" he violated the policy. DSMF ¶ 89. Furthermore, Exhibit 2 of Loranger's Affidavit establishes that at some point during the investigation, someone noted that the claims could not be substantiated. See PSAMF Attach 11, WM000129 (ECF No. 38-11). However, Exhibit 5 of Ms. Acedo's declaration, which Wal-Mart cited in support of its assertion, clearly confirms that Wal-Mart involuntarily terminated Mr. Elliott on October 8, 2010 for misconduct with coaching. *Acedo Decl.* Attach 7, WM000112 (ECF No. 32-7). As it is obvious that Wal-Mart terminated Mr. Elliott on October 8, 2010, the Court takes a dim view of Ms. Jones' attempt to generate a factual issue on this point.

The Court corrected Wal-Mart's statement that the effective date of Mr. Elliott's termination was October 8, 2010, since the Exit Interview states that the effective date is October 25, 2010. *Id.* The last date worked was October 8, 2010, which the Court inserted into Wal-Mart paragraph 89. *Id.*

10. Ms. Jones' Medical Leave and Notification of Mr. Elliott's Termination

On October 6, 2010, Ms. Jones went into the store, where she spoke with Melissa Labbe, the Human Resource Manager at the time, and Mr. Tyler. DSMF ¶¶ 8, 127; PRDSMF ¶¶ 8, 127. Ms. Jones told Ms. Labbe and Mr. Tyler that she could not be at work because of “stress” and “having to look over [her] shoulder.” DSMF ¶ 128; PRDSMF ¶ 128. On October 5, 2010, Ms. Jones had to go to the emergency room due to ongoing stress at work; the doctor prescribed her Xanax and gave her a note to be out of work.¹⁵⁵ PSAMF ¶¶ 193-94; DRPSAMF ¶¶ 193-94. The next day, Ms. Jones saw her primary care physician, Dr. Szela who provided Ms. Jones with a note excusing her from work until October 21, 2010 and referred her to counseling.¹⁵⁶ PSAMF ¶ 195; DRPSAMF ¶ 195.

Ms. Jones also attended a visit with Doctor Gardner who diagnosed her with “mixed disorders as reaction to stress” and referred her to counseling at Crisis and

¹⁵⁵ In Ms. Jones' paragraph 193, she states: “On October 5, 2010, Jones had to go to the emergency room because of ongoing stress at work.” PSAMF ¶ 193. Wal-Mart objected to paragraph 193 because the portion of the statement—she “had to go to the emergency room because of ongoing stress at work”—is not supported by the record. DRPSAMF ¶ 193. In fact, the Court is unable to verify Ms. Jones' statement because she failed to provide the Court with an unredacted version of the relevant record citation. Generally, a party's failure to provide an accurate record reference would be fatal to the paragraph. D. ME. LOC. R. 56(f). Nevertheless, the Court has included the statement because although Wal-Mart objected to the fact that the record citation did not support the assertion, it admitted the paragraph. DRPSAMF ¶ 193. In this circumstance, it places form over substance to exclude a statement that the parties otherwise agree is accurate. The Court has also corrected Ms. Jones' inaccurate reference to Zeonex in her paragraph 194.

¹⁵⁶ Wal-Mart objected to part of Ms. Jones' statement where she states that her doctor “referred [her] to counseling” because it is not supported by the record. DRPSAMF ¶ 195. Again, the Court is unable to verify the contents of Ms. Jones' statement because the relevant record citation is redacted. Nevertheless, as Wal-Mart admitted the paragraph after objecting to the lack of record support, the Court has included the paragraph.

Counseling.¹⁵⁷ PSAMF ¶ 204; DRPSAMF ¶ 204. On October 10, 2010, Ms. Jones went to see a counselor at Crisis and Counseling.¹⁵⁸ PSAMF ¶ 205; DRPSAMF ¶ 205. Ms. Jones saw a rape counselor given Mr. Elliott's threat to her and a prior rape.¹⁵⁹ PSAMF ¶ 206; DRPSAMF ¶ 206. On October 22, 2010, Dr. Szela ordered Ms. Jones out of work until November 7, 2010 and on November 4, 2010, he ordered her to remain out of work until November 18, 2010.¹⁶⁰ PSAMF ¶¶ 208-09; DRPSAMF ¶¶ 208-09.

Ms. Jones returned to the store a few days after her meeting with Ms. Labbe and after her appointment with the workers' compensation physician, at which time

¹⁵⁷ Wal-Mart objected to this paragraph because it contains multiple statements of fact and relies on inadmissible hearsay by Dr. Gardner. DRPSAMF ¶ 204. The Court overrules Wal-Mart's multiple assertion objection. The Court also overrules Wal-Mart's hearsay objection because Dr. Gardner's office notes reflecting his diagnosis are regularly kept business records. FED. R. EVID. 803(6). However, as the referenced citation does not support Ms. Jones' statements that "Wal-Mart referred Jones", the Court excluded that portion of paragraph 204.

In paragraph 210 and 211 Ms. Jones describes how her psychiatrist, Margaret Jenner, diagnosed Ms. Jones with Post Traumatic Stress Disorder (PTSD) and recommended that Ms. Jones not return to work at Wal-Mart. PSAMF ¶¶ 210-11. In support of these assertions, Ms. Jones cites her deposition transcript and her affidavit. PSAMF ¶¶ 210-11. Wal-Mart objected to these paragraphs because they reference "inadmissible hearsay" and rely on "the purported diagnosis of a medical expert without any supporting or competent medical or expert testimony, or admissible documentation." DRPSAMF ¶¶ 210-11. The Court agrees with Wal-Mart and sustains its objections because unlike in paragraph 204, here, Ms. Jones does not cite to any documentary evidence from Ms. Jenner, which might allow these statements to come into evidence under Rule 803(6). FED. R. EVID. 803(6). Thus, the Court has excluded Ms. Jones' paragraphs 210 and 211 from the facts.

¹⁵⁸ Wal-Mart objected to paragraph 205 because the counselor's "referral" is inadmissible hearsay not within a hearsay exception. DRPSAMF ¶ 205. Because the Court is unable to confirm that a counselor made a referral given that the record citation is redacted, the Court excludes this portion of Ms. Jones' statement. Yet, because Wal-Mart did not object to the contents of paragraph 205's first sentence and acknowledged that Ms. Jones saw a counselor in its response, the Court includes the first part of Ms. Jones' paragraph 205.

¹⁵⁹ Wal-Mart interposed a qualified response, which the Court excludes because it does not actually qualify Ms. Jones' statement. DRPSAMF ¶ 206.

¹⁶⁰ In paragraphs 208 and 209, Ms. Jones stated: "On 10/22/10, Dr. Szela ordered that Jones not return to work until 11/7/10 at the earliest" and on 11/4/10, Dr. Szela ordered Jones not to return to work until 11/19/10 at the earliest." PSAMF ¶¶ 208-09. Ms. Jones supported these statements by referring to Exhibits 5 and 6 attached to her affidavit. PSAMF ¶¶ 208-09. Wal-Mart objected to paragraphs 208 and 209 because they were not supported by the record citation. DRPSAMF ¶¶ 208-09. Ms. Jones erred in referring to Exhibits 5 and 6. The out of work notes appear in Exhibit 2 of Ms. Jones' affidavit and the Court has included the statements.

she spoke with Ms. Acedo by telephone from the store. DSMF ¶ 131; PRDSMF ¶ 131. Ms. Acedo informed Ms. Jones that Wal-Mart had terminated Mr. Elliott's employment on October 8, 2010 as a result of his violation of the DHP Policy. DSMF ¶ 132; PRDSMF ¶ 132.

On October 8, 2010, Ms. Jones applied for workers' compensation benefits.¹⁶¹ PSAMF ¶ 204; DRPSAMF ¶ 204. Ms. Jones, at Ms. Labbe's urging, filled out workers' compensation paperwork and agreed to visit Wal-Mart's workers' compensation provider. DSMF ¶ 129; PRDSMF ¶ 129. Ms. Labbe also provided Ms. Jones with Family Medical Leave Act (FMLA) paperwork, and advised her to fill out this paperwork to ensure she had job-protected leave while she was seeking workers' compensation benefits, and to make sure she had job protection in the event her workers' compensation claim was denied. DSMF ¶ 130; PRDSMF ¶ 130.

On October 19, 2010, Wal-Mart denied Ms. Jones' workers' compensation claim on the grounds that there was "no causal relationship—stress non-work related and no medical evidence."¹⁶² PSAMF ¶ 207; DRPSAMF ¶ 207. Ms. Jones'

¹⁶¹ Ms. Jones' paragraph 204 states in part: "On 10/8/10, Jones applied for workers comp." PSAMF ¶ 204. Wal-Mart objected to the statement, saying that it is not supported by the record citation. DRPSAMF ¶ 204. Again, Ms. Jones miscited the record. The Wal-Mart Notice of Controversy is marked as Exhibit 4, not Exhibit 3. It states that the employer was notified of Ms. Jones' workers' compensation claim on October 8, 2010. The Court has included this part of Plaintiff's paragraph 204.

¹⁶² Wal-Mart admitted to the statement but objected to the use of "claiming." DRPSAMF ¶ 207. The Court agrees and has amended the paragraph to reflect that Wal-Mart contested her workers' compensation claim on the ground that there was no causal relationship, that stress was non-work-related, and that there was no medical evidence. DRPSAMF ¶ 207. Further, in paragraph 138, Wal-Mart stated "[a]t some point after October 5, 2010, Ms. Jones withdrew Ms. Jones' workers compensation claim." DSMF ¶ 138. Ms. Jones denied Wal-Mart's paragraph 138 because "Wal-Mart denied the workers comp claim" on October 19, 2010. PRDSMF ¶ 138. After reviewing the referenced documents and viewing the facts in the light most favorable to Ms. Jones, the Court has excluded paragraph 138 because Ms. Jones provided the Court with evidence that Wal-Mart denied

claim for reimbursement under the employer-sponsored health plan for the Crisis & Counseling visit was denied by the insurance company because, as Ms. Jones reports it, she was not in a proper setting, or because she should have been seeing someone else.¹⁶³ DSMF ¶ 141; PRDSMF ¶ 141. Ms. Jones' employer-sponsored insurance was also cancelled on October 31, 2010 because Ms. Jones failed to pay her premiums while she was out on leave. DSMF ¶ 142; PRDSMF ¶ 142.

Ms. Labbe followed up with Ms. Jones several times to encourage her to complete the FMLA paperwork, but Ms. Jones never turned in the paperwork to Wal-Mart.¹⁶⁴ DSMF ¶ 133; PRDSMF ¶ 133. Although Ms. Jones never filed the FMLA paperwork, Wal-Mart allowed Ms. Jones to take job-protected FMLA leave for nearly two months. DSMF ¶ 134; PRDSMF ¶ 134. Ms. Jones' FMLA-qualifying leave entitlement expired on November 15, 2010, at which time Wal-Mart continued to approve non-FMLA leave for Ms. Jones until she chose to resign. DSMF ¶ 135; PRDSMF ¶ 135.

11. Ms. Jones' Maine Human Rights Commission Charge

Ms. Jones filed a Maine Human Rights Commission (MHRC) charge against Wal-Mart on November 17, 2010, alleging hostile work environment, sexual harassment, and gender discrimination under the Maine Human Rights Act.

her Workers' Compensation claim. Wal-Mart's admission in paragraph 207 supports the Court's decision.

¹⁶³ Ms. Jones denied paragraph 141 because she believes "the claim was denied because Wal-Mart had denied the workers comp claim." PRDSMF ¶ 141. Because Ms. Jones' testimony confirms Wal-Mart's statement and the workers' compensation document she cites does not support her denial, the Court declines to accept her denial.

¹⁶⁴ Ms. Jones denied that her deposition and Mr. Labbe's declaration cited by Wal-Mart for paragraph 133 support the paragraph. PRDSMF ¶ 133. Although Wal-Mart's citation to Ms. Jones' deposition testimony does not support paragraph 133, Ms. Labbe's declaration does. DSMF Attach 21, *Decl. of Melissa Labbe* ¶ 6 (ECF No. 32-21). The Court declines to accept her denial.

DSMF ¶ 90; PRDSMF ¶ 90. Ms. Jones' MHRC charge contains some allegations about Mr. Elliott that Ms. Jones did not raise during her September 9, 2010 investigation interview or in her September 9, 2010 written statement. DSMF ¶¶ 6, 91; PRDSMF ¶¶ 6, 91.

In her MHRC charge, Ms. Jones alleges she overheard Mr. Elliott describe to other coworkers his sexual activities, how to have anal sex, a comment that he "fucked" another female associate, and comments about strippers and coworkers' female family members.¹⁶⁵ DSMF ¶ 92; PRDSMF ¶ 92; PSAMF ¶¶ 12-14, 109; DRPSAMF ¶¶ 12-14, 109. These comments were not directed at Ms. Jones.¹⁶⁶ DSMF ¶ 93; PRDSMF ¶ 93. Ms. Jones also alleged in her MHRC charge that Mr. Elliott had asked her for hugs, called her a "cougar", claimed he "was hung like a horse", and commented about Ms. Jones not being with anyone and having sexual relations with her.¹⁶⁷ PRDSMF ¶ 92.

¹⁶⁵ Ms. Jones admitted "that the MHRC complaint alleges what Defendant references" but denied "that the MHRC complaint contains no other allegations." PRDSMF ¶ 92. As Wal-Mart's paragraph 92 does not state or imply that she made no other complaints, the Court declines to accept Ms. Jones' qualified response to Wal-Mart's paragraph 92.

¹⁶⁶ Ms. Jones denied Wal-Mart's statement in paragraph 93 because "[t]he comments were made in the vicinity of Jones as she overheard the sexual comments." PRDSMF ¶ 93. A review of the record confirms that Ms. Jones stated multiple times that the comments made by her coworkers and Mr. Elliott were not directed at her but rather comments that she "overheard." *Jones Dep.* 38:2- 39:-7, 41:19-25, 53:6-24, 73:8-17, 74:3-21. Given Ms. Jones' testimony, the Court declines to accept Ms. Jones' denial.

¹⁶⁷ In paragraph 94, Wal-Mart stated "that Plaintiff did not tell Wal-Mart management prior to filing the MHRC charge about these comments." DSMF ¶ 94. Ms. Jones denied "that [she] did not give notice to Wal-Mart of Elliott describing his sexual activities, how to have anal sex and the fact that he 'fucked' another female associate." PRDSMF ¶ 94. As the Court's recitation of the facts in this case reveals, Wal-Mart was aware of Mr. Elliott's comments through its investigation before Ms. Jones filed the MHRC complaint. Viewing the facts in the light most favorable to Ms. Jones, the Court declines to include Wal-Mart's paragraph 94.

12. Ms. Jones' Resignation

On December 6, 2010, while Ms. Jones was still on leave, she “went in and quit.” DSMF ¶ 136; PRDSMF ¶ 136. Ms. Jones told Ms. Acedo that she could not work there anymore.¹⁶⁸ DSMF ¶ 137; PRDSMF ¶ 137; PSAMF ¶ 212; DRPSAMF ¶ 212. Ms. Jones felt, but did not inform Wal-Mart on December 6, 2010 that she could not return to work given management’s refusal to take action against Mr. Elliott prior to the Red Book investigation, the way management treated her during the Red Book investigation, the fact that the other men who harassed her still worked for Wal-Mart, and her PTSD.¹⁶⁹ PSAMF ¶ 214; DRPSAMF ¶ 214.

When she quit, Ms. Jones did not request a transfer, move to another store or another shift. DSMF ¶ 139; PRDSMF ¶ 139. Ms. Jones was denied federal and state disability benefits because the relevant agencies determined she had work capacity. DSMF ¶ 143; PRDSMF ¶ 143. Ms. Jones filed for unemployment benefits with the state of Maine. DSMF ¶ 144; PRDSMF ¶ 144. On March 18, 2011, the state of Maine denied Ms. Jones’ unemployment benefits after determining that she

¹⁶⁸ Citing page 119 of her deposition, Ms. Jones interposed a qualified response to paragraph 137 asserting that she testified that she had to leave her employment because of “stress caused by sexual harassment.” PRDSMF ¶ 137. As Ms. Jones did not provide the Court with page 119 of her deposition testimony, the Court cannot verify her qualification and has excluded it. For the same reasons, the Court excluded Ms. Jones’ paragraphs 212 and 213. PSAMF ¶¶ 212-13; DRPSAMF ¶¶ 212-13.

In paragraph 140, Wal-Mart stated “[h]ad Ms. Jones asked, the Store would have reassigned her or approved a transfer without any loss in pay or benefits.” DSMF ¶ 140. Ms. Jones denied this statement because when she tendered her resignation, she was not offered a transfer to a different position or store.” PRDSMF ¶ 140. The Court excludes this statement because it is speculative, not well supported, and viewing the facts in the light most favorable to Ms. Jones requires the Court to exclude it.

¹⁶⁹ Wal-Mart objected to paragraph 214 because it contains multiple assertions and is conclusory and argumentative. DRPSAMF ¶ 214. Without waiving its objections, Wal-Mart interposed a qualified response because Ms. Jones only told Wal-Mart on December 6, 2010 that she could not work there anymore. DRPSAMF ¶ 214. The Court overrules Wal-Mart’s objection.

voluntarily resigned her position with Wal-Mart.¹⁷⁰ DSMF ¶ 145; PRDSMF ¶ 145. That unemployment appeal decision was final.¹⁷¹ DSMF ¶ 146.

Ms. Jones testified that since her separation from Wal-Mart she finds it hard to be away from home for too long because anxiety sets in and she has no trust of anyone.¹⁷² PSAMF ¶ 215; DRPSAMF ¶ 215. Ms. Jones suffers from nightmares from her experience at Wal-Mart.¹⁷³ PSAMF ¶ 216; DRPSAMF ¶ 216.

II. THE PARTIES' POSITIONS

A. Count I: Hostile Work Environment¹⁷⁴

1. Wal-Mart's Motion

Wal-Mart argues that Ms. Jones cannot make out a prima facie case for a hostile work environment claim. *Def.'s Mot.* at 7. Specifically, Wal-Mart argues she fails to establish (1) that harassment was based on her sex, (2) that the harassment was objectively offensive, and (3) that there is some basis for employer liability. *Id.* at 9-15. Wal-Mart boils Count I down into "two essential parts." *Id.* at 7. The first

¹⁷⁰ Ms. Jones denied Wal-Mart's statement in paragraph 145 because "[u]nemployment originally ruled in Jones' favor. Wal-Mart appealed . . . Jones however did not appear for the appeal . . ." PRDSMF ¶ 145. After reviewing the record citations, the Court does not accept Ms. Jones' denial as it is unresponsive and does not contradict Wal-Mart's paragraph 145.

¹⁷¹ Ms. Jones did not respond to Wal-Mart's paragraph 146. The Court has deemed the paragraph admitted and has included it.

¹⁷² Although the Court is unable to verify the contents of Ms. Jones' paragraph 215 because the relevant deposition pages were not provided, the Court has included the paragraph because Wal-Mart interposes a minor qualification to clarify that Ms. Jones' statement was made during her deposition.

¹⁷³ Wal-Mart interposed a qualified response to Ms. Jones statement because "currently takes Celexa for her condition' is an impermissible medical conclusion and/or diagnosis." DRPAMF ¶ 216. As the Court has not been provided with a copy of the record citation to support this disputed portion of Ms. Jones' statement, the Court adopted Wal-Mart's qualification and omitted the later part of paragraph 216.

¹⁷⁴ In her Complaint, Ms. Jones initially asserted an additional claim in Count II for sex/gender discrimination, *Compl.* ¶¶ 33-36; however, she withdrew Count II in her pre-conference memorandum for her Rule 56 Conference. *See Pl.'s Opp'n to Def.'s Summ. J. Pre-Filing Conference Mem.* at 9 (ECF No. 72).

concerns Ms. Jones' allegations against her coworkers for their handling of freight, sexual comments, and swearing; the second involves her allegations against Mr. Elliott. *Id.*

Wal-Mart insists that Ms. Jones' coworkers' "comments and actions do not constitute hostile work environment sexual harassment [as a matter of law]" because "Title VII and the [Maine Human Rights Act] do not and are not meant to eradicate the 'ordinary tribulations' of the workplace, such as the sporadic use of abusive language, gender-related jokes, and occasional teasing." *Id.* at 7, 9 (quoting *Faragher v. City of Boca Raton*, 524 U.S. 775, 788 (1998)). Wal-Mart also asserts that none of Ms. Jones' coworkers' comments were directed at her, "based on her sex", were objectively offensive, or "unreasonably" interfered with her work performance. *Id.* at 9-12. Wal-Mart also finds Ms. Jones' argument about her coworkers' handling of freight to amount to "rank speculation." *Id.* at 10.

With respect to Mr. Elliott, Wal-Mart contends that even if Mr. Elliott's conduct constitutes sexual harassment under the law, Ms. Jones "cannot show negligence on the part of the Store in its response to those allegations." *Id.* at 7. Wal-Mart argues that it did not have notice of Mr. Elliott's behavior, or her coworkers' behavior, which rose to the level of sexual harassment prior to August 27, 2010. *Id.* Further, Wal-Mart notes that even if the Court found that the coworkers' comments put the store on notice, Ms. Acedo took prompt and appropriate action to address the issue. *Id.* at 14.

Moreover, Wal-Mart argues that the store took “timely and appropriate action” to address Ms. Jones’ complaints against Mr. Elliott because it: (1) had a discrimination policy in place; (2) opened an official investigation the same day Ms. Jones complained about Mr. Elliott; (3) did not receive complaints about Mr. Elliott prior to August 27, 2010; (4) moved Mr. Elliott to the other side of the store; (5) did not receive reports of further harassment; and (6) consulted with its corporate office, interviewed six employees, and ultimately fired Mr. Elliott. *Id.* at 15.

2. Ms. Jones’ Opposition

In response, Ms. Jones insists that she was harassed based on her sex because “[a] woman may prove sex-based discrimination in the workplace even though she is not subjected to sexual advances or propositions.” *Pl.’s Opp’n* at 3-4, 6. Ms. Jones references Mr. Elliott’s statement, “I’m going to fuck you up the ass in a minute”, how he grabbed her by the waist and pulled her towards him, and her coworkers’ “degrading gender specific comments about women” as examples of incidents from which a reasonable jury could conclude she was discriminated against based on her sex. *Id.* at 4, 6.

Next, Ms. Jones argues “it is undisputed that she has presented evidence from which a jury could find that the harassment [was] objectively offensive.” *Id.* at 7. She cites Mr. Elliott’s “physically threatening conduct[]”, his “verbally degrading conduct directed at [her]”, and her coworkers’ “humiliating conduct objectifying women as sex objects” as evidence from which a reasonable jury could infer that an

objective woman in Ms. Jones' position would find her work environment "hostile or abusive." *Id.* at 7-8.

With respect to employer liability, Ms. Jones lays out a timeline regarding when she gave notice of the "harassment" to each manager and asserts that this evidence "would certainly allow a trier of fact to reasonably infer that [she] gave her supervisors sufficient notice of harassing conduct." *Id.* at 12. She disputes Wal-Mart's "undisputed" facts (1)-(6) and emphasizes that Wal-Mart did not begin its investigation until two weeks after Mr. Elliott threatened to sexually assault her, which would allow a reasonable jury to conclude that the Store's response was not immediate. *Id.* at 14-15. Finally, Ms. Jones asserts that a jury could easily find Wal-Mart's investigation efforts to be a sham designed to exonerate local management given the store's limited questioning of witnesses, Ms. Acedo's and Mr. Ames' conclusion that they could not find any evidence to corroborate the allegations against Mr. Elliott, and the fact that management "kept the findings [of the investigation] from [Ms. Jones]." *Id.* at 16.

3. Wal-Mart's Reply

In reply, Wal-Mart argues that even construing all inferences in Ms. Jones' favor, her allegations of harassment against her coworkers do not meet the severe and pervasive standard because "the law does not protect against 'petty slights, minor annoyances, and simple lack of good manners.'" *Def.'s Reply* at 2 (quoting *Scarborough v. Nestle Waters N. Am., Inc.*, No. 07-193-P-S, 2008 WL 4787573, at *8 (D. Me. Oct. 30, 2008)). Next, Wal-Mart contends that "while admittedly crude, the

alleged isolated comments by [Mr. Elliott] did not create a [severe or pervasive] hostile work environment” given that courts routinely dismiss hostile work environment claims that are based on single incidents. *Id.* at 3.

Wal-Mart also notes that Ms. Jones cites cases involving the wrong standard of review in support of her employer liability argument—namely cases involving harassment by a supervisor. *Id.* at 4. Wal-Mart emphasizes that Ms. Jones “completely avoids applicable co-worker harassment cases from the First Circuit, including the *Wilson*”, which stresses that “an employer can only be liable if the harassment is causally connected to some negligence on the employer’s part.” *Id.* (quoting *Wilson v. Moulison North Corp.*, 639 F.3d 1, 7 (1st Cir. 2011)).

Moreover, Wal-Mart argues that it was not negligent in responding to Ms. Jones’ complaints because it was not put on notice of Mr. Elliott’s behavior until August 27, 2010. *Id.* at 6. Wal-Mart insists that it should not be held liable for unreported incidents subsequent to Ms. Jones’ August 27th complaint and that it properly investigated the incident relating to profanity written on a box in Ms. Jones’ aisle. *Id.* at 6. Finally, Wal-Mart explains that “[s]imply because the investigation took longer than [Ms. Jones] liked does not support a finding of negligence on the part of the Store in its response to her complaint.” *Id.* at 7.

B. Count III: Constructive Discharge

1. Wal-Mart’s Motion

Wal-Mart argues that to prove constructive discharge, Ms. Jones must show that there was objectively a greater severity or pervasiveness of harassment than

required to prove a hostile work environment claim. *Def.'s Mot.* at 16. Wal-Mart notes that Ms. Jones voluntarily resigned her position two months after Mr. Elliott was fired and three months into her approved medical leave. *Id.* at 15. Thus, “the timing of [her] resignation . . . belies any legitimate constructive discharge claim.” *Id.* at 16.

Next, Wal-Mart emphasizes that “in order for a resignation to constitute a constructive discharge, it effectively must be void of choice or free will.” *Id.* (quoting *Torrech-Hernandez v. Gen. Elec. Co.*, 519 F.3d 41, 50 (1st Cir. 2008)). Wal-Mart notes “that there is ample evidence of the Store’s willingness to help [Ms. Jones] and hold her job open for her” given its efforts to (1) designate her leave as FMLA-qualified even though she did not fill out the requisite paperwork and to (2) hold her job open for her even though it had no legal obligation to do so. *Id.* at 17. Furthermore, because she told her coworkers about the investigation, Wal-Mart points out that she “cannot now reasonably assert or circularly argue that she was compelled to resign her position because workers knew about the investigation.” *Id.* at 18.

2. Ms. Jones’ Opposition

Ms. Jones lists twenty-eight bullet points containing “material facts” and reasons for her discharge to support her constructive discharge claim. *Pl.’s Opp’n* at 17-20. Ms. Jones insists that these facts would allow a reasonable trier of fact to infer that someone in Ms. Jones’ position would feel compelled to resign. *Id.* at 20. In her last bullet point, Ms. Jones states that she resigned from Wal-Mart because

of the sexual harassment, management's refusal to take action against Mr. Elliott before the Red Book investigation, the way management treated her during the investigation, the fact that the men who harassed her still worked for Wal-Mart, and her PTSD. *Id.* at 20.

3. Wal-Mart's Reply

Wal-Mart asserts that “[t]he central problem with [Ms. Jones’] argument is that it assumes that it is her subjective view of her work environment at the time she quit that governs a constructive discharge claim” when in actuality constructive discharge is assessed according to an objective standard. *Def.’s Reply* at 8. Thus, Wal-Mart disputes each of the five reasons Ms. Jones lists for her constructive discharge claim. *Id.* at 8-11. First, Wal-Mart contends that Ms. Jones could not reasonably have resigned because of sexual harassment since Wal-Mart investigated her prior complaints and terminated Mr. Elliott. *Id.* at 9. Second, Wal-Mart argues that it took action to address her sexual harassment complaints but that, contrary to her view, it was not required to automatically fire Mr. Elliott. Third, Wal-Mart asserts that there is ample evidence it was willing to work with Ms. Jones and help her throughout the investigation. *Id.* Fourth, Wal-Mart points to Ms. Jones’ statements that no harassment occurred after August 27, 2010 and that her coworkers’ comments were not directed at her to undermine her argument about her coworkers’ continued employment. *Id.* at 10. Finally, Wal-Mart contends that because the summary judgment record does not support Ms. Jones’ own diagnosis of PTSD, the Court should disregard that reason. *Id.* “In sum,” Wal-Mart

insists that “the facts do not support a claim for constructive discharge especially when, at the time [Ms. Jones] quit, her job was open and available and no harassment had occurred in months.” *Id.* at 11.

III. DISCUSSION

A. Summary Judgment Standard

Summary judgment is appropriate “if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” FED. R. CIV. P. 56(a). A fact is “material” if it “has the potential to change the outcome of the suit.” *Tropigas de Puerto Rico, Inc. v. Certain Underwriters at Lloyd’s of London*, 637 F.3d 53, 56 (1st Cir. 2011) (quoting *McCarthy v. Nw. Airlines, Inc.*, 56 F.3d 313, 315 (1st Cir. 1995)). An issue is “genuine” if “a reasonable jury could resolve the point in favor of the nonmoving party.” *Id.* (quoting *McCarthy*, 56 F.3d at 315).

Once this evidence is supplied by the moving party, the nonmovant must “produce ‘specific facts, in suitable evidentiary form, to establish the presence of a trialworthy issue.” *Triangle Trading Co., Inc. v. Robroy Indus., Inc.*, 200 F.3d 1, 2 (1st Cir. 1999) (quoting *Morris v. Gov’t Dev. Bank of Puerto Rico*, 27 F.3d 746, 748 (1st Cir. 1994)). In other words, the non-moving party must “present ‘enough competent evidence’ to enable a factfinder to decide in its favor on the disputed claims.” *Carroll v. Xerox Corp.*, 294 F.3d 231, 237 (1st Cir. 2002) (quoting *Goldman v. First Nat’l Bank of Boston*, 985 F.2d 1113, 1116 (1st Cir. 1993)).

The Court then “views the facts and draws all reasonable inferences in favor of the nonmoving party.” *Ophthalmic Surgeons, Ltd. v. Paychex, Inc.*, 632 F.3d 31, 35 (1st Cir. 2011). However, the Court “afford[s] no evidentiary weight to ‘conclusory allegations, empty rhetoric, unsupported speculation, or evidence which, in the aggregate, is less than significantly probative.’” *Tropigas*, 637 F.3d at 56 (quoting *Rogan v. City of Boston*, 267 F.3d 24, 27 (1st Cir. 2001)); accord *Sutcliffe v. Epping Sch. Dist.*, 584 F.3d 314, 325 (1st Cir. 2009); *Carroll*, 294 F.3d at 237.

B. Count I: Hostile Work Environment Claim

Title VII of the Civil Rights Act of 1964 prohibits an employer from discriminating “against any individual with respect to his compensation, terms, conditions or privileges of employment, because of such individual’s race, color, religion, sex, or national origin.” 42 U.S.C. § 2000e-2(a)(1). Employers can also violate Title VII by “requiring people to work in a discriminatorily hostile or abusive work environment.” *Valentin-Almeyda v. Municipality of Aguadilla*, 447 F.3d 85, 94 (1st Cir. 2006) (quoting *Harris v. Forklift Sys.*, 510 U.S. 17, 21 (1993)). Generally an employee may recover damages under Title VII when “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.” *Wilson*, 639 F.3d at 6-7.

To prevail on a hostile work environment claim, a plaintiff must establish:

(1) that she (or he) is a member of a protected class; (2) that she was subjected to unwelcome sexual harassment; (3) that the harassment was based upon sex; (4) that the harassment was sufficiently severe or pervasive so as to alter the conditions of plaintiff’s employment and

create an abusive work environment; (5) that sexually objectionable conduct was both objectively and subjectively offensive, such that a reasonable person would find it hostile or abusive and the victim in fact did perceive it to be so; and (6) that some basis for employer liability has been established.

Valentin-Almeyda, 447 F.3d at 94 (quoting *O'Rourke v. City of Providence*, 235 F.3d 713, 728 (1st Cir. 2001)). “Application of the hostile work environment test requires an assessment of the totality of the circumstances, including ‘the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee’s work performance.’” *Id.* (quoting *Harris*, 510 U.S. at 23). Nevertheless, the elements of the test are intended to be “sufficiently demanding to ensure that Title VII does not become a ‘general civility code.’” *Faragher*, 524 U.S. at 775 (quoting *Oncala v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 80 (1998)).

Ms. Jones asserts that Wal-Mart had notice of a hostile work environment but failed to take appropriate action to remedy the environment, which resulted in violations of her rights under Title VII, the Maine Human Rights Act (MHRA), and led to her constructive discharge.¹⁷⁵ 42 U.S.C. § 2000e-2; 5 M.R.S.A. § 4551. Her hostile work environment claim is comprised of two parts: (1) complaints about her coworkers’ swearing, sexual comments, and handling of freight, and (2) complaints concerning Mr. Elliott’s sexual comments, his “threat”, and physical touching. *Pl.’s Opp’n* at 3-13. Wal-Mart contests elements (3)-(6) of Ms. Jones’ hostile work

¹⁷⁵ According to *Forrest v. Brinker Int’l Payroll Co.*, “Maine courts apply the MHRA in accordance with federal anti-discrimination law.” 511 F.3d 225, 228 n.1 (1st Cir. 2007). Therefore, the Court analyzes Ms. Jones’ claim under federal and state law together. See *Bodman v. Maine*, 787 F. Supp. 2d 89, 99 n.14 (D. Me. 2011) (“the Court’s analysis while focusing on federal law applies with equal force to Plaintiff’s state law claims”).

environment claim relating to her coworkers' behavior and elements (4) and (6) concerning Mr. Elliott's behavior. *Def.'s Mot. at 7; Def.'s Reply at 1-4*. The Court examines each element in light of the record.¹⁷⁶

1. Harassment Based Upon Sex

In *Oncale*, the Supreme Court stressed that a sexual harassment claim is actionable under Title VII as long as the "*discrimination* [was] . . . because of . . . sex." 523 U.S. at 80 (emphasis in original). The Court noted, "[w]e have never held that workplace harassment, even harassment between men and women, is automatically discrimination because of sex merely because the words used have sexual content or connotations." *Id.* Instead, the critical issue for a Title VII claim "is whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed." *Id.* (quoting *Harris*, 510 U.S. at 25). Ultimately, "[w]hatever evidentiary route the plaintiff chooses to follow, he or she must always prove that the conduct at issue was not merely tinged with offensive sexual connotations, but actually constituted '*discrimination . . . because of . . . sex.*'" *Id.* at 81 (emphasis in original); see *Foss v. Circuit City Stores, Inc.* 521 F. Supp. 2d 99, 108 (D. Me. 2007).

Although Wal-Mart seeks to segregate the coworkers' comments from Mr. Elliott's more egregious behavior, the Court is not convinced that Ms. Jones' hostile work environment claim should be separated into discreet segments. In *O'Rourke*, the First Circuit cautioned that when faced with a hostile work environment claim

¹⁷⁶ The Court is mindful that both parts of Ms. Jones' hostile work environment claim must be weighed together in the Court's assessment of the totality of the circumstances. See *O'Rourke*, 235 F.3d at 730; *Williams v. GMC*, 187 F.3d 553, 561-62, 562 n.3 (6th Cir. 1999).

based on both sex and race, “[c]ourts should avoid disaggregating a hostile work environment claim, dividing conduct into instances of sexually oriented conduct and instances of unequal treatment, then discounting the latter category of conduct. Such an approach defies the *Meritor*¹⁷⁷ Court’s directive to consider the totality of the circumstances in each case and robs the incidents of their cumulative effect.” *O’Rourke*, 235 F.3d at 730 (internal punctuation omitted). This same principle applies here. To analyze the coworkers’ conduct in a vacuum would fail to take into account Ms. Jones’ actual employment experience. Mr. Elliott’s more disturbing conduct took place, from her perspective, against a backdrop of a workplace where sexual comments were tolerated. Instead, the Court must consider the “totality of the circumstances” when it considers whether Ms. Jones’ claim survives Wal-Mart’s dispositive motion. 29 C.F.R. § 1604.11(b) (1985); *Meritor*, 477 U.S. at 69.

Despite Wal-Mart’s argument that some of Ms. Jones’ coworkers’ comments concerned the “mere observation” of strippers in Wal-Mart’s parking lot, the record establishes that other sexual comments were exchanged between workers at the Store. *Def.’s Mot.* at 11; *see* DSMF ¶ 47; PRDSMF ¶ 47. Regardless Wal-Mart argues that because Ms. Jones acknowledged that her coworkers’ sexual comments were not directed at her during her deposition, the Court cannot conclude that this alleged harassment was “based upon sex.” *Def.’s Mot.* at 10-11. In evaluating whether the totality of the circumstances supports a plaintiff’s hostile work environment claim, a court may consider whether the comments were directed at the plaintiff or were generalized. *See Rodriguez-Torres v. Gov’t Dev. Bank*, 704 F.

¹⁷⁷ *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57 (1986).

Supp. 2d 81, 102 (D. P.R. 2010) (concluding there was no sex or age discrimination because plaintiff merely overheard comments and there was no evidence that the offensive comments were directed at her); *Bonilla v. Electrolizing, Inc.*, 607 F. Supp. 2d 307, 318-19 (D. R.I. 2009) (finding no sex-based discrimination where the employers' "swearing, throwing or yelling had [nothing] to do with sex or national origin or was personally directed at the Plaintiff").

However, to survive a motion for summary judgment in a hostile work environment claim, the plaintiff does not necessarily have to establish that sexual harassment was directed at her in order to constitute discrimination "based upon sex." See *Petrosino v. Bell Atl.*, 385 F.3d 210, 220 (2d Cir. 2004) ("[t]he fact that much of this offensive material was not directed specifically at Petrosino—indeed, her male coworkers would likely have traded sexual insults every morning . . . regardless of [her] presence . . . does not, as a matter of law, preclude a jury from finding that the conduct subjected [her] to a hostile work environment based on her sex"); *Harris v. Mayor of Baltimore*, 429 F. Appx. 195, 200 (4th Cir. 2011) (affirming the Fourth Circuit's previous ruling that "the critical inquiry is whether the plaintiff's environment was hostile . . . because of her sex' and not solely on whether the conduct was directed at the plaintiff"); *Gallagher v. C.H. Robinson Worldwide, Inc.*, 567 F.3d 263, 271 (6th Cir. 2009) (holding that plaintiff established discrimination "based on sex" as "both the direct and indiscriminate conduct by her coworkers - - is explicitly sexual and patently degrading of women") (emphasis in original).

With the exception of Mr. Elliott’s comments which are akin to the sexually degrading and discriminatory comments made by defendants in the listed cases, the facts here do not suggest that Ms. Jones’ coworkers referred to women in derogatory terms like “bitch” and “whore.” *See Gallagher*, 567 F.3d at 272. Instead, Ms. Jones’ states in general terms that her coworkers swore and made sexual comments about strippers, Hooters, women’s breasts, and their wives or girlfriends in her vicinity. DSMF ¶ 47; PRDSMF ¶ 47. According to *Gallagher*, where harassment is explicitly sexual and patently degrading of women, “the natural effect of exposure to such offensive conduct is embarrassment humiliation and degradation, irrespective of the harasser’s motivation—especially and all the more so if the captive recipient of the harassment is a woman.” *Id.* at 271. The Sixth Circuit continued, “even though members of both sexes were exposed to the offensive conduct . . . considering the nature of the patently degrading and anti-female nature of the harassment, it stands to reason that women would suffer, as a result of the exposure, greater disadvantage in the terms and conditions of their employment than men.” *Id.*

Applying this analysis, a reasonable jury could conclude that Ms. Jones’ coworkers’ sexual comments about females constituted discrimination based on Ms. Jones’ sex even though they were not specifically directed at her.¹⁷⁸ *See O’Rourke*, 235 F.3d at 729 (“harassing conduct need not be motivated by a sexual desire to

¹⁷⁸ Because the Court concludes that Ms. Jones has established harassment “based upon sex”, the Court does not examine what role her coworkers’ handling of freight plays in this element of the test. Notably, the First Circuit has held that even conduct that appears to “have no-sex based connotation at all . . . does not diminish the force of the evidence indicating gender discrimination.” *Rosario v. Dep’t of the Army*, 607 F.3d 241, 248 (1st Cir. 2010); *O’Rourke*, 235 F.3d at 730 (stating that in “reality [] incidents of non-sexual conduct . . . can in context contribute to a hostile work environment”).

support an inference of discrimination on the basis of sex' [] [e]vidence of sexual remarks, innuendoes, ridicule, and intimidation may be sufficient to support a jury verdict for a hostile work environment") (quoting *Oncale*, 523 U.S. at 80). In short, when Ms. Jones' coworkers' behavior is viewed in conjunction with Mr. Elliott's explicitly sexual and aggressive behavior towards her and other females, Ms. Jones has raised a genuine issue of material fact as to whether she was discriminated against based on her sex.

2. Severe or Pervasive

"Harassment that creates a sexually hostile and abusive work environment is actionable when it is sufficiently severe [or] pervasive to effect constructive alternations in the terms or conditions of employment." *Perez-Cordero v. Wal-Mart P.R., Inc.* 656 F.3d 19, 26 (1st Cir. 2011). When determining whether harassment meets the definition of "severe or pervasive" the Court must assess "the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." *Harris*, 510 U.S. at 23; *Valentin-Almeyda*, 447 F.3d at 94. The effect of the harassment on the employee's psychological well-being is another factor to weigh in this analysis. *Harris*, 510 U.S. at 23. This element of the hostile work environment test is not designed to be easily met given the Supreme Court's guidance in *Oncale*: "[w]e have always regarded [the severe or pervasive] requirement as crucial, and as sufficient to ensure that courts and juries do not mistake ordinary socializing in the workplace - - such as male-on-male

horseplay or intersexual flirtation - - for discriminatory ‘conditions of employment.’”
523 U.S. at 81.

Accordingly, whether harassment in a work environment is severe or pervasive should be assessed “from the perspective of a reasonable person in the plaintiff’s position, considering ‘all of the circumstances’” and by considering “the social context in which the harassment occurs and is experienced by its target.” *Id.* (quoting *Harris*, 510 U.S. at 23). “Common sense” and “an appropriate sensitivity to social context” must guide the Court in its analysis. *Id.* at 82; *Kosereis v. Rhode Island*, 331 F.3d 207, 216 (1st Cir. 2003). Thus, the Court should not find “ordinary tribulations of the workplace, such as the sporadic use of abusive language, gender-related jokes, and occasional teasing” to be severe or pervasive. *Faragher*, 524 U.S. at 788 (internal citations omitted). Generally, “‘simple teasing’ [], offhand comments, and isolated incidents (unless extremely serious) will not amount to” severe or pervasive harassment. *Id.* (quoting *Oncale*, 523 U.S. at 82).

a. Ms. Jones’ Coworkers’ Actions

Ms. Jones accuses her male coworkers of creating a hostile work environment because they swore, made sexual comments in her vicinity, and mishandled freight. *Pl.’s Opp’n* at 7-8. Whether this harassment was severe or pervasive depends on a number of factors. *See Valentin-Almeyda*, 447 F.3d at 94. Here, some factors support her claim; others do not. First, when compared to other hostile work environment cases, Ms. Jones’ coworkers’ conduct was frequent. *See Alvarado v. Donahoe*, 687 F.3d 453, 462 (1st Cir. 2012) (concluding that three discrete verbal

exchanges over eight months does not rise to the level of pervasiveness or gravity); *Conto v. Concord Hosp., Inc.*, 265 F.3d 79, 82, 82 n.8 (1st Cir. 2001) (concluding that the Hospital’s conduct was not sufficiently frequent when it took place during a “greatly abbreviated four-day period” as compared to other cases where plaintiffs experienced harassment for months or years). Here, the coworkers made sexual comments approximately one time per week during the summer of 2010. DSMF ¶ 49; PRDSMF ¶ 49; PSAMF ¶ 22; DRPSAMF ¶ 22. The record also establishes six occasions where Ms. Jones complained to management about her coworkers’ handling of freight. DSMF ¶¶ 31, 60, 62, 64; PRDSMF ¶¶ 31, 60, 62, 64; PSAMF ¶¶ 86-89, 95-96; DRPSAMF ¶¶ 86-89, 95-96. Although the facts here are not overwhelming, a reasonable jury could conclude that Ms. Jones’ coworkers’ conduct was frequent.

Yet, Ms. Jones’ coworkers’ conduct was not sufficiently severe given that unlike cases where plaintiffs were directly confronted with the harassing conduct, Ms. Jones admitted that her coworkers did not direct their comments at her. *See Conto*, 265 F.3d at 82 n.6, 82-83 (holding that the plaintiff’s coworkers’ “uttering sexually-charged profanities and making obscene bodily gestures to nurses (or one another), but never to her” and slapping her buttocks did not satisfy the severe and pervasive element); *White v. N.H. Dep’t of Corr.*, 221 F.3d 253, 260 (1st Cir. 2000) (holding that harassment was sufficiently severe and pervasive where plaintiff’s coworkers “graphically spoke of their evenings at clubs and bars, read pornographic magazines at work, discussed the size of men’s penises”, accused the plaintiff of

“blowing” and “screwing” an inmate, and propositioned her for oral sex on two occasions); *Lacadie v. Town of Milford*, No. 07-101-B-W, 2008 U.S. Dist. LEXIS 35987, at *9-10 (D. Me. May 1, 2008), *aff’d* No. 07-101-B-W, 2008 U.S. Dist. LEXIS 47542 (D. Me. June 19, 2008) (concluding the harassment was not severe or pervasive although plaintiff’s coworkers directed sexual comments at female workers such as “nice ass, geez you look hot today, that must be a Victoria Secret bra, if those legs get any longer, Darcie, you could wrap them around my neck three times” and plaintiff’s coworker kissed her forcefully on the lips). Further, the fact that improper handling of freight was a “general workplace issue” which bothered other workers at the store undermines Ms. Jones’ argument that this conduct constituted additional evidence of harassment. *See* Part I.B.3.a.

Next, the record does not set forth evidence that Ms. Jones’ coworkers’ sexual comments or swearing was physically threatening or directly humiliating to her. Rather, it appears from the record that Ms. Jones’ coworkers’ comments and swearing constitute “mere offensive utterance[s].” *See Faragher*, 524 U.S. at 788. Finally, the record reflects that Ms. Jones’ coworkers’ comments did not unreasonably interfere with her work performance. Instead, the record establishes that Ms. Jones began feeling stressed at work after she reported Mr. Elliott’s conduct because he was still working at the store and she felt management was not doing anything about her complaints. *See* DSMF ¶ 128; PRDSMF ¶ 128; PSAMF ¶¶ 184, 188, 199; DRPSAMF ¶¶ 184, 188, 199.

b. Mr. Elliott's Actions

According to the record, Mr. Elliott directed sexually-charged conduct at Ms. Jones at least six times during the summer of 2010.¹⁷⁹ His conduct was frequent. See Part III.B.2.a. With respect to the severity of Mr. Elliott's conduct, Wal-Mart cites *Pomales v. Celulares Telefonica, Inc.*, for the proposition that an isolated sexual advance, unless extremely serious, will not amount to a hostile work environment. 447 F.3d 79, 81, 83-84 (1st Cir. 2006). In *Faragher*, the Supreme Court concluded that an "isolated incident" must be "extremely serious" to surpass the severe or pervasive threshold. 524 U.S. at 788. The First Circuit built upon this standard and suggested that it would "not preclude the possibility of a single-incident hostile work environment claim based exclusively on verbal conduct, [but that] successful single-incident claims typically have involved unwanted physical contact." *Pomales*, 447 F.3d at 84.

Contrary to Wal-Mart's position, the facts establish that the harassment Ms. Jones complains of occurred more than once and involved some physical contact. See n.179. Beyond the "I'm going to fuck you up the ass in a minute" incident, Ms. Jones also states that Mr. Elliott grabbed her from behind and tried to pull her into him. DSMF ¶ 69; PRDSMF ¶ 69; PSAMF ¶¶ 100, 115; DRPSAMF ¶¶ 100, 115. He also called her a cougar, told her he wanted her to "do him" at lunch, told her he

¹⁷⁹ Mr. Elliott came at Ms. Jones and said "I'm going to fuck you up the ass in a minute", told her she was a "cougar" once, asked her for hugs a few times, told her he was "hung like a horse", started grabbing her from behind and pulling her towards him, and asked her if she would "do him" during lunch. See Part I.B.3. Notably, Ms. Jones made additional accusations of harassment against Mr. Elliott in her MHRC charge. See Part I.B.11.

was “hung like a horse”, asked her “Why have a tugboat when you can have the Titanic”, and asked her for hugs a few times. *See* Part I.B.4.c.

The First Circuit has arrived at different results when faced with hostile work environment cases involving physical conduct and cases involving only non-physical conduct. *Compare Marrero v. Goya of P.R., Inc.*, 304 F.3d 7, 19-20 (1st Cir. 2002) (upholding the jury’s finding of a severe or pervasive hostile work environment where the plaintiff’s supervisor touched her on five occasions and made sexually charged remarks to her), *with Rivera-Martinez v. Puerto Rico*, No. 05-2605, 2007 U.S. App. LEXIS 160, at *3-5, 10-11 (1st Cir. Jan. 4, 2007) (unpublished) (concluding that the harassment was not severe or pervasive where the plaintiff’s supervisor touched her forearm, grabbed her by her torso, and used his hip and pelvis to push her out of his office), *and Billings v. Town of Grafton*, 515 F.3d 39, 41, 48 (1st Cir. 2008) (finding a supervisor’s conduct severe or pervasive based on his repeated staring at the plaintiff’s breasts for over a two year period). In *Billings*, the First Circuit stressed that “no particular ‘type[] of behavior’ [is] essential to a hostile environment claim” and that “[p]rior cases in which we have concluded that a reasonable juror could find that the work environment was objectively hostile do not establish a baseline that subsequent plaintiffs must reach in order to prevail.” 515 F.3d at 48-49 (quoting *Schiano v. Quality Payroll Sys., Inc.*, 445 F.3d 597, 606 (2d Cir. 2006)). Viewing the facts in the light most favorable to Ms. Jones and drawing all reasonable inferences in her favor, the Court concludes that a reasonable jury could find Mr. Elliott’s conduct was sufficiently severe.

Further, when Mr. Elliott stated “I’m going to fuck you up the ass in a minute” Ms. Jones said he looked mad. PSAMF ¶¶ 100, 115; DRPSAMF ¶¶ 100, 115. After this incident, Ms. Jones said she was afraid of retaliation for complaining of his conduct. See DSMF ¶ 128; PRDSMF ¶ 128; PSAMF ¶ 192; DRPSAMF ¶ 192. Based on the content of Mr. Elliott’s statement and the way he appeared to Ms. Jones, a reasonable jury could find that he physically threatened her. Thus, Ms. Jones may have reasonably regarded Mr. Elliott as a threat to her safety. See *Vera v. McHugh*, 622 F.3d 17, 27 (1st Cir. 2010) (stating “[a]lthough Rodriguez did not overtly threaten Vera, the allegation that he blocked her from leaving the office on at least one occasion suggests a physically threatening environment”); *Lacadie*, 2008 U.S. Dist. LEXIS 35987, at *39-40.

Finally, unlike the plaintiffs in *Lee-Crespo* and *Lacadie*, Ms. Jones stated that the incident adversely affected her work performance. See *Lee-Crespo v. Shcering-Plough Del Caribe, Inc.*, 354 F.3d 34, 46 (1st Cir. 2003); *Lacadie*, 2008 U.S. Dist. LEXIS 35987, at *39-40. Ms. Jones told her supervisor, Mr. Tyler that she felt “stress” and worried about retaliation. DSMF ¶ 128; PRDSMF ¶ 128; PSAMF ¶ 192; DRPSAMF ¶ 192. Ms. Jones also asked to leave work and eventually took time off from work on medical leave. See Parts I.B.7, I.B.12. She was prescribed Xanax, diagnosed with “mixed disorders as reaction to stress”, and sought counseling at Crisis and Counseling. PSAMF ¶¶ 193-94, 204; DRPSAMF ¶¶ 193-94, 204. Finally, based on the stress she felt from the workplace, her physicians kept her out of work at Wal-Mart. PSAMF ¶¶ 193-94, 204, 208-09; DRPSAMF ¶¶ 193-94, 204, 208-09.

Viewing the facts and drawing all inferences in Ms. Jones' favor, a reasonable juror might find that Mr. Elliott's conduct adversely affected her work performance. *See Marrero*, 304 F.3d at 20 (concluding that the plaintiff's work was adversely affected where she became anxious and depressed and her supervisors noticed changes in her behavior).

Although Ms. Jones' coworkers' conduct alone would not satisfy this element of the hostile work environment test, taking the totality of the circumstances and the relevant facts together, her coworkers' conduct and Mr. Elliott's conduct was sufficiently severe or pervasive to alter the conditions of Ms. Jones' employment and create an abusive work environment.

3. Objectively Offensive

It is undisputed that Ms. Jones found her coworkers' swearing, sexual comments, and handling of freight to be subjectively offensive. Here, the Court is asked to evaluate whether Ms. Jones' coworkers' conduct was objectively offensive "such that a reasonable person would find it hostile or abusive." *Valentin-Almeyda*, 447 F.3d at 94 (quoting *O'Rourke*, 235 F.3d at 728 (1st Cir. 2001)). Again, this element requires the Court to assess "the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." *Harris*, 510 U.S. at 23; *Valentin-Almeyda*, 447 F.3d at 94.

According to the facts, Ms. Jones' coworkers made unspecified comments about strippers, their wives or girlfriends, Hooters, and women's breasts. DSMF ¶

47; PRDSMF ¶ 47. Given that Ms. Jones' coworkers' swearing and sexual comments occurred approximately once a week, were not directed at her but rather stated in her vicinity, constituted mere offensive utterances rather than physical threats, and likely did not cause her work performance issues, the totality of the circumstances demonstrate that a reasonable person in Ms. Jones' shoes would not find her coworkers' behavior to be "objectively offensive." See Part III.B.3.a. This is especially true in light of the Supreme Court's instruction that "[t]he prohibition on harassment based on sex requires neither asexuality nor androgyny in the workplace" and that "ordinary socializing in the workplace—such as male-on-male horseplay or intersexual flirtation" should not count as "discriminatory 'conditions of employment'" in violation of Title VII. *Oncale*, 523 U.S. at 81. Furthermore, when hostile work environment claims are properly analyzed, Title VII should not be used to police "the ordinary tribulations of the workplace, such as the sporadic use of abusive language, gender-related jokes, and occasional teasing." *Faragher*, 524 U.S. at 788.

Even if "most individuals would find these incidents unpleasant to forebear," Ms. Jones' co-workers' actions on their own "do not constitute the severe or pervasive adverse conduct that [] case law recognizes as discriminatory changes in the terms and conditions of employment sufficient to establish an objectively hostile or abusive work environment." *Alvarado*, 687 F.3d at 462 (internal punctuation and citation omitted). However, because Wal-Mart concedes that Mr. Elliott's

conduct was objectively offensive, the combination of both parties' conduct satisfies this element of the test.

4. Basis for Employer Liability

Different standards for establishing employer liability apply to hostile work environment claims depending on whether the plaintiff was harassed by a supervisor or coworkers. *Crowley v. L.L. Bean, Inc.*, 303 F.3d 387, 401 (1st Cir. 2002). Where, as here, the plaintiff alleges that coworkers harassed her, “an employer can only be liable if the harassment is causally connected to some negligence on the employer’s part.” *Wilson*, 639 F.3d at 7 (quoting *Noviello v. City of Boston*, 398 F.3d 76, 95 (1st Cir. 2005)). The plaintiff is required to show that “the employer knew or should have known about the harassment yet failed to take prompt and appropriate remedial action.” *Id.* “[N]otice alone is not enough. Liability only attaches if the employer, after receiving notice fails to take prompt and appropriate ameliorative action.” *Id.* at 8. What constitutes a lawful response is undefined as the law recognizes that “the imposition of employee discipline is not a rote exercise, and an employer must be accorded some flexibility in selecting condign sanctions for particular instances of employee misconduct.” *Id.* Therefore, summary judgment will be appropriate “when the undisputed facts show that a reasonable jury could not help but conclude that the employer’s response was both timely and appropriate.” *Id.*

a. Complaint against her Coworkers

The record establishes that Wal-Mart was aware of Ms. Jones' coworkers' behavior; however, it is unclear whether the store took prompt and appropriate remedial action to stop it. Shortly after Ms. Jones informed Ms. Acedo about the destructive handling of freight, Ms. Acedo held a meeting with Wal-Mart staff to discuss the issue. DSMF ¶ 34; PRDSMF ¶ 34. Also, during several other shift meetings, management reminded staff that they should handle the freight with care and work as a team. DSMF ¶ 39; PRDSMF ¶ 39. In early August of 2010, shortly after Ms. Jones first told Ms. Acedo about her coworkers' swearing and sexual comments, Ms. Acedo held a meeting with all of the overnight associates to notify them that foul language would not be tolerated and that they would be penalized if the conduct continued. DSMF ¶¶ 58-59; PRDSMF ¶¶ 58-59. In *Wilson*, the First Circuit held that an employer's verbal reprimand and warning to its coworkers following the plaintiff's complaint of racial slurs being used by his coworkers was "both swift and appropriate" as an investigation was conducted the day after plaintiff made his complaint. 639 F.3d at 8. Similar to the employer's remedial actions in *Wilson*, Ms. Acedo's actions following Ms. Jones' complaints were both prompt and appropriate.

Yet, Ms. Jones also told other managers—Mr. Bullis, Mr. Ames, and Mr. Gregoire—about her coworkers' conduct and whether their reactions to her complaints would satisfy this element is unclear. The record shows that Ms. Jones informed Mr. Bullis of her coworkers' behavior sometime in June or July before Ms.

Acedo knew of the behavior. DSMF ¶ 64; PRDSMF ¶ 64; PSAMF ¶¶ 95-96, 99; DRPSAMF ¶¶ 95-96, 99. In response to Ms. Jones' complaints, Mr. Bullis said that he had worked near the named coworkers in the past and had never heard any inappropriate comments. PSAMF ¶ 98; DRPSAMF ¶ 98. Next, Ms. Jones informed Mr. Ames about the "guy's language" sometime during the summer and his response was "Oh, I can imagine." PSAMF ¶ 90; DRPSAMF ¶ 90. Finally, she also informed Mr. Gregoire about how her coworkers were "treating her" but did not specifically tell him about the harassing or swearing. DMSF ¶ 63; PRDSMF ¶ 63.

Notably, Ms. Jones complained to Mr. Gregoire about how "nothing was being done about the way the guys were treating her." PSAMF ¶ 94; DRPSAMF ¶ 94. Thus, unlike in *Wilson*, here, there is evidence that Ms. Jones' coworkers were "repeat offenders." 639 F.3d at 8. Furthermore, it is unclear whether Ms. Jones' complaints to Mr. Ames and Mr. Gregoire occurred after her complaints to Ms. Acedo such that Wal-Mart should have been put on notice that Ms. Jones' coworkers' behavior was ongoing and merited further action. If Mr. Ames was notified in June or July of 2010 about the coworkers' swearing and sexual comments, the store's remedial actions may or may not be considered prompt and appropriate. Here, there is an issue of material fact.

b. Complaint against Mr. Elliott

Here, the issue of employer liability is clearer. Ms. Jones approached Mr. Ames on August 27, 2010 and informed him of the "I'm going to fuck you up the ass in a minute" incident and other sexual comments Mr. Elliott had made to her. *See*

Part I.B.4. The following morning Mr. Ames called the Store Manager, Mr. Tyler, to get advice on how to proceed with Ms. Jones' complaints. DSMF ¶ 71; PRDSMF ¶ 71. He also called Ms. Acedo and informed her of Mr. Elliott's behavior. PSAMF ¶ 124; DRPSAMF ¶ 124. Thereafter, Ms. Acedo moved Mr. Elliott to the opposite side of the store to work in the Pet Department until the investigation was complete. DSMF ¶ 73; PRDSMF ¶ 73. Notably, investigations into workplace harassment must run through EAS. DSMF ¶ 74; PRDSMF ¶ 74. Ms. Acedo interviewed Ms. Jones and Ms. Bigelow on September 9, 2010 and began taking witness statements on September 10, 2010. DSMF ¶ 76; PRDSMF ¶ 76. Ms. Burke, EAS's representative in this matter, instructed Ms. Acedo to begin an investigation on September 10, 2010 and to attempt to complete the investigation by September 20, 2010. PSAMF ¶¶ 130, 132; DRPSAMF ¶¶ 130, 132.

On September 25, 2010, Ms. Acedo responded to an email from Ms. Burke and gave her an update on the progress of the investigation. PSAMF ¶¶ 181-82; DRPSAMF ¶¶ 181-82. On October 6, 2010, Ms. Acedo sent Ms. Burke Ms. Jones' Ethics Complaint and stated that Ms. Jones' allegations in the complaint "could not be substantiated even though both Carol[e] and Charlene heard Kyle's comment." PSAMF ¶ 201; DRPSAMF ¶ 201. Two days later, on October 8, 2010, Ms. Acedo sent Ms. Burke information regarding how Mr. Elliott violated the store's DHP policy and would be fired that evening. PSAMF ¶ 203; DRPSAMF ¶ 203.

Before Ms. Jones' August 27, 2010 complaint, the record establishes that management was not aware of any offensive or sexual interactions specifically

between Mr. Elliott and Ms. Jones. DSMF ¶ 78; PRDSMF ¶ 78. Even if management were put on notice by Ms. Jones' complaints about her coworkers' language and sexual comments, Ms. Jones cannot establish that Wal-Mart's remedial actions were slow or inappropriate. *See Wilson*, 639 F.3d at 8. Given the timeline of the investigation, contrary to Ms. Jones' view, a reasonable jury could not infer that "the investigation by local management was a sham designed to exonerate [Mr.] Elliott and local management." *Pl.'s Opp'n* at 16. Instead, Wal-Mart took prompt action to address Ms. Jones' complaints against Mr. Elliott. *See Wilson*, 639 F.3d at 8 (finding no employer liability where the employer looked into the plaintiff's complaint against his coworkers the next day, verbally reprimanded the coworkers, and warned them that they would be fired if the conduct continued); *Forrest*, 511 F.3d at 232 (concluding that the employer's response to plaintiff's complaint against her coworker was prompt and appropriate where it "progressive[ly] disciplined" the coworker and eventually fired him within a month of a warning from management that he needed to change his behavior).

Despite the fact that Ms. Jones believes the investigation took too long, her opinion cannot on its own support a finding that Wal-Mart did not take prompt action. *See Wilson*, 639 F.3d at 8; *Forrest*, 511 F.3d at 232. Wal-Mart's investigation was reasonably "prompt" given that it was conducted according to the store's corporate anti-discrimination policy. Furthermore, it was reasonable for store management to investigate the evidence both for and against Mr. Elliott before suspending or terminating him. *See DSMF* ¶¶ 17, 107; *PRDSMF* ¶¶ 17, 107;

PSAMF ¶ 70; DRPSAMF ¶ 70. Finally, after Ms. Jones made her complaint, Ms. Acedo moved Mr. Elliott to the other side of the store, away from her. DSMF ¶ 73; PRDSMF ¶ 73.

It is true that “Title VII operates less mechanically; it does not invariably require termination or suspension as a response to harassment.” *Wilson*, 639 F.3d at 8. Also, Wal-Mart policy encourages management to “put in place reasonable interim measures” while an investigation is pending and to reevaluate those measures “once the reported violation has been thoroughly investigated.” *See* DSMF ¶ 17; PRDSMF ¶ 17; PSAMF ¶ 70; DRPSAMF ¶ 70. In compliance with store policy, Ms. Acedo spent September conducting interviews and corresponding with EAS regarding her findings. *See* Part I.B.3. This process culminated in Mr. Elliott losing his job on October 8, 2010. DSMF ¶ 132; PRDSMF ¶ 132. Because the store’s investigation took a little over a month and was continuous during its pendency, a reasonable juror would find that it was prompt.

Although reasonably prompt, Wal-Mart’s interim actions were arguably not appropriate or reasonably effective given the circumstances. *Wilson*, 639 F.3d at 7. Mr. Elliott had not merely made a callous or sexist comment to Ms. Jones: he had directly threatened to rape her. PSAMF ¶ 116; DRPSAMF ¶ 116. In light of his direct threat, his history of demeaning and aggressive comments and actions, some of which were directed to her, and his apparent anger at her for making the complaint to management, Ms. Jones was placed in reasonable fear, as the investigation proceeded, that Mr. Elliott might sexually assault her. Whether Wal-

Mart's interim remedial action—simply placing Mr. Elliott across the store as opposed to assigning him to another Wal-Mart store, temporarily suspending him, or allowing Ms. Jones to take paid leave—was negligent raises a jury question.

In sum, Ms. Jones may be able to establish employer liability concerning Wal-Mart's handling of the coworkers' and Mr. Elliott's conduct.

5. Summary

Although the Court has analyzed Ms. Jones' hostile work environment claim by party and the type of harassment, the Court must consider the totality of the circumstances to make a final determination on Ms. Jones' claim. *See O'Rourke*, 235 F.3d at 730; *Williams*, 187 F.3d at 561-62, 562 n.3 (reversing the district court's grant of summary judgment because by "disaggregate[ing] the plaintiff's claims, contrary to the Supreme Court's 'totality of the circumstances' directives, [it] robbed the incidents of their cumulative effect"). Accordingly, Ms. Jones' claims against these two groups—who are her coworkers—viewed in the aggregate would allow a reasonable jury to find in her favor.

Ms. Jones' evidence is not overwhelming. Yet, Ms. Jones has raised genuine issues of material fact and the Court concludes that whether Wal-Mart's "workplace [was] permeated with discriminatory intimidation, ridicule, and insult" such that it altered the conditions of her employment and whether Wal-Mart was negligent in its response to her complaints are decisions best left for the jury. *See Wilson*, 639 F.3d at 6-7; *Forrest*, 511 F.3d at 232 ("[d]etermining what constitutes a 'prompt and appropriate' employer response to allegations of sexual harassment often requires

the sort of case-specific, fact-intensive analysis best left to a jury”); *Che v. Mass. Bay Transp. Auth.*, 342 F.3d 31, 40 (1st Cir. 2003). The Court denies Wal-Mart’s motion for summary judgment on Count I.

C. Count III: Constructive Discharge Claim

“Alleging constructive discharge presents a ‘special wrinkle’ that amounts to an additional prima facie element” of a harassment claim. *Landrau-Romero v. Banco-Popular de Puerto Rico*, 212 F.3d 607, 613 (1st Cir. 2000) (citation omitted); *Bodman*, 787 F. Supp. 2d at 100. To prevail in a constructive discharge claim, a plaintiff must “show that her working conditions were so difficult or unpleasant that a reasonable person in [her] shoes would have felt compelled to resign.” *Lee Crespo*, 354 F.3d at 45. This is an objective standard such that “an employee’s subjective perceptions do not govern.” *Id.* (“It is not enough that a plaintiff suffered ‘the ordinary slings and arrows that workers routinely encounter in a hard, cold world’”) (quoting *Suarez v. Pueblo Int’l, Inc.*, 229 F.3d 49, 54 (1st Cir. 2000)). Also, in conducting its analysis, the Court should consider whether plaintiff resigned within a reasonable period after the harassment, *Landrau-Romero*, 212 F.3d at 613, “how the employer responded to the plaintiff’s complaints[,] and whether it was likely that harassment would continue”, *Lee-Crespo*, 354 F.3d at 45. Ultimately, “[i]n order for a resignation to constitute a constructive discharge, it effectively must be void of choice or free will.” *Torrech-Hernandez*, 519 F.3d at 50.

In *Landrau-Romero*, the First Circuit held that the plaintiff could not prevail on his constructive discharge claim because he waited seven months after the last

incident of harassment to resign. *Id.*; see also *Smith v. Bath Iron Works Corp.*, 943 F.2d 164, 167 (1st Cir. 1991) (finding no constructive discharge where the plaintiff did not resign until six months after last incident of sexual harassment). Further, in *Lee-Crespo*, the First Circuit concluded that the plaintiff could not show constructive discharge despite the fact that her harassing supervisor was still working for the company because she was on medical leave for three months before tendering her resignation and did not suffer any harassment while on leave. 354 F.3d at 42, 46.

Here, Ms. Jones left Wal-Mart on medical leave beginning October 6, 2010 until she quit her job on December 6, 2010. See Parts I.B.10, I.B.12. Two days after Ms. Jones began her leave, Wal-Mart fired Mr. Elliott. See DSMF ¶¶ 127-28, 132; PRDSMF ¶¶ 127-28, 132. Although the last reported incident of harassment involving Ms. Jones and Mr. Elliott occurred on August 27, 2010, when she approached management and complained of his conduct, as the Court has discussed, Mr. Elliott had directly threatened to rape Ms. Jones, a threat she reasonably took seriously. During the investigation, Ms. Jones continually looked over her shoulder and, after she left work, she was referred to a rape counselor. DSMF ¶ 128; PRDSMF ¶ 128; PSAMF ¶ 206; DRPSAMF ¶ 206. Her medical providers ordered her to remain out of work and diagnosed her as suffering from a stress-related condition. See Part I.B.10. Whether her December 6, 2010 resignation was caused by the psychological condition brought about by her

experience as a Wal-Mart employee is another factual issue that requires jury resolution.

Viewing the evidence in the light most favorable to Ms. Jones, under the reasoning of *Landrau-Romero* and *Lee-Crespo*, Ms. Jones resigned within a reasonable period of the harassment because the harassment reflected by Mr. Elliott's presence in the store continued up to the date of her leaving work.

IV. CONCLUSION

The Court DENIES Wal-Mart's Motion for Summary Judgment (ECF No. 25).

V. SEALING OF THIS DECISION

The Court directs the Clerk of Court to seal this Order when docketed. The parties shall notify the Court no later than noon on Wednesday, February 13, 2013 whether this decision contains any confidential information that should remain sealed, and, if so, indicate explicitly what language should be redacted with due regard to the public's interest in access to court proceedings. If counsel take the position that certain portions of the Order must be sealed, they should anticipate that the Court will order them to justify their position against public disclosure with relevant case law. If the Court does not hear from counsel by noon on Wednesday, February 13, 2013, the Order will be unsealed in its entirety.

SO ORDERED.

John A. Woodcock, Jr.
JOHN A. WOODCOCK, JR.
CHIEF UNITED STATES DISTRICT JUDGE

Dated this 11th day of February, 2013

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