

(Docket No. 15). To support her own statement of additional material facts filed pursuant to Local Rule 56(c), the plaintiff filed, *inter alia*, another affidavit from her attorney in which he identifies 61 exhibits as “true and correct” copies of certain documents. Affidavit of Guy D. Loranger in Support of Plaintiff’s Statement of Undisputed Facts (“Second Loranger Aff.”), Attachment 1 to Plaintiff’s Separate Statement of Undisputed Facts (“Plaintiff’s SMF”) (Docket No. 16). In each affidavit, the attorney states that all of his statements are made “under the penalty of perjury.” First Loranger Aff. at 4; Second Loranger Aff. at 6. In each affidavit he states that all of the documents to which the affidavit refers were produced by the defendant “as part of Plaintiff’s employment file” and were business records of the defendant. First Loranger Aff. ¶ 1; Second Loranger Aff. ¶ 61.

The defendant moves to strike both affidavits and those portions of the plaintiff’s responsive and additional statements of material facts “that are supported only by citation to one of the Loranger Affidavits.” Defendant’s Motion to Strike, etc. (“Motion to Strike”) (Docket No. 20) at 1. Most of the paragraphs of the two statements of material facts are supported only by citation to one or the other of the affidavits. The defendant contends that the attorney’s affidavits are not made on personal knowledge, as required by Fed. R. Civ. P. 56(e), because the attorney could not possibly have the necessary knowledge to identify and authenticate the documents. *Id.* at 3-5.

The plaintiff responds that “in a summary judgment” documents produced and identified by an employer as a plaintiff’s personnel file do not need further authentication. Plaintiff’s Opposition to Defendant’s Motion to Strike (“Strike Opposition”) (Docket No. 25) at 1. She also contends that the defendant authenticated her personnel file as its business record in the affidavit of its vice-president, Wendy Laidlaw, submitted in support of the motion for summary judgment, and that “most” of the exhibits attached to the Loranger affidavits do not rely solely on the affidavits for authentication. *Id.* at 2. The second

argument is based on a mischaracterization of the Laidlaw affidavit, which in no way can reasonably be construed to authenticate the plaintiff's "personnel file," or anything other than the documents attached to the affidavit. Affidavit of Wendy A. Laidlaw ("Laidlaw Aff.") (Docket No. 14). The third argument is based on a listing of new sources for authentication of specific documents listed in the Loranger affidavits. Strike Opposition at 4-9. Each of those documents was authenticated in the plaintiff's initial filings only by one or the other of the Loranger affidavits. The plaintiff, having been alerted to a possible deficiency in her authentication of the documents on which those filings rely, cannot now be allowed to remedy the deficiency after the fact, particularly when that approach would require the court to examine each new source cited for each document, an exercise that would not have been necessary had plaintiff's counsel made a proper authentication in the first place. I will accordingly consider only the plaintiff's first arguments.

The plaintiff cites three decisions in support of her first argument, to which the defendant has not responded. In one of those cases, the cited language is clearly *dicta*, because the court chose an alternate basis for its decision. *Sharma v. Brown*, 1997 WL 43472 (N.D. Ill. Jan. 29, 1997), at *4. The courts in the other two cases do hold that a document produced in discovery by the defendant employer from the plaintiff's personnel file is sufficiently authenticated thereby, although in one case the court notes that such provenance is "perhaps enough to overcome a hearsay objection," *Corral v. Chicago Faucet Co.*, 2000 WL 628981 (N.D. Ill. Mar. 9, 2000), at *3, and in the other case the court finds the documents sufficient because they "are business records maintained by the" defendant employer and "are verifiable and of known origin," *Johnson v. Medical Ctr. of Louisiana*, 2002 WL 31886829 (E.D. La. Dec. 26, 2002), at *2. I will accept the plaintiff's general argument for purposes of the motion for summary judgment, *see also Denson v. Northeast Illinois Reg'l Commuter R.R. Corp.*, 2002 WL 15710 (N.D. Ill. Jan. 4, 2002), at *2- *3, but that does not end the matter.

The defendant points to two specific documents that have additional authentication deficiencies. Motion to Strike at 4. Exhibit 23 to the second Loranger affidavit is a handwritten note that the affidavit identifies as “a hand written note by Kimberly Kalicky.” Second Loranger Aff. ¶ 23. While the document is written on paper with a letterhead bearing Ms. Kalicky’s name, the attorney’s affidavit makes no attempt to assert that the handwriting belongs to Ms. Kalicky. Exh. 23 to Second Loranger Aff. This document accordingly is neither verifiable — at least by the plaintiff’s attorney — nor of known origin. The second document, Exhibit 61 to the second Loranger affidavit, is identified in the affidavit as “an email from Wendy Laidlaw to Gerry Crouter.” Second Loranger Aff. ¶ 60. This document has several handwritten notes on it. Exh. 61 to Second Loranger Aff. The plaintiff’s statement of material facts apparently assumes that the notes were written by Wendy Laidlaw. Plaintiff’s SMF ¶¶ 8, 89.¹ This portion of the document is neither verifiable nor can the origin possibly be known by the attorney; indeed, the handwritten portions could not be part of an e-mail. Paragraphs 23 and 60 of the second Loranger affidavit will be stricken, along with paragraphs 8, 48 and 89 of the plaintiff’s statement of material facts. The remainder of the defendant’s motion to strike is denied.

II. Motion for Summary Judgment

A. Summary Judgment Standard

Summary judgment is appropriate only if the record shows “that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” Fed. R. Civ. P. 56(c). “In this regard, ‘material’ means that a contested fact has the potential to change the outcome of the suit under the governing law if the dispute over it is resolved favorably to the nonmovant. By like token,

¹ I note also that portions of paragraph 89 of the defendant’s statement of material facts, which cites only Exhibit 61 to the *(continued on next page)*

‘genuine’ means that ‘the evidence about the fact is such that a reasonable jury could resolve the point in favor of the nonmoving party.’” *Navarro v. Pfizer Corp.*, 261 F.3d 90, 93-94 (1st Cir. 2001) (quoting *McCarthy v. Northwest Airlines, Inc.*, 56 F.3d 313, 315 (1st Cir. 1995)).

The party moving for summary judgment must demonstrate an absence of evidence to support the nonmoving party’s case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). In determining whether this burden is met, the court must view the record in the light most favorable to the nonmoving party and give that party the benefit of all reasonable inferences in its favor. *Nicolo v. Philip Morris, Inc.*, 201 F.3d 29, 33 (1st Cir. 2000). Once the moving party has made a preliminary showing that no genuine issue of material fact exists, the nonmovant must “produce specific facts, in suitable evidentiary form, to establish the presence of a trialworthy issue.” *Triangle Trading Co. v. Robroy Indus., Inc.*, 200 F.3d 1, 2 (1st Cir. 1999) (citation and internal punctuation omitted); Fed. R. Civ. P. 56(e). “As to any essential factual element of its claim on which the nonmovant would bear the burden of proof at trial, its failure to come forward with sufficient evidence to generate a trialworthy issue warrants summary judgment to the moving party.” *In re Spigel*, 260 F.3d 27, 31 (1st Cir. 2001) (citation and internal punctuation omitted).

B. Factual Background

The following undisputed material facts are appropriately supported in the parties’ respective statements of material facts.

The defendant, which is in the business of providing investment and wealth management services and advice, had 38 employees during the relevant period of time, 32 of whom were salaried employees and six of whom were hourly employees. Defendant’s Statement of Material Facts (“Defendant’s SMF”)

second Loranger affidavit, are presented following a quotation mark, but none of the language following the mark appears (*continued on next page*)

(Docket No. 7) ¶¶ 1-2; Plaintiff's Responsive SMF ¶¶ 1-2. The defendant had a policy manual which included the following policy:

R. M. Davis, Inc. is not subject to the Federal Family Medical Leave Act at this time; however, the company is subject to the State of Maine Family Medical Leave Act. Each employee who has been employed consistently by the company for at least one year may receive up to 10 weeks of unpaid medical leave in any two calendar year period [sic] due to the 1) birth of an employee's child, 2) placement of a child 16 years old or younger with the employee in connection with the adoption or foster care of the child by the employee, 3) care for a child, parent or spouse with a serious health condition, or 4) the [sic] employee's own serious health condition. The 10 weeks may run concurrently with other paid or unpaid leave that may be available to the employee such as sick, personal, vacation, or maternity leave. Employees must provide at least 30 days notice to the company of any foreseeable event that could involve family medical leave. If 30 days notice is not possible, then notice must be provided as soon as practicable.

Id. ¶¶ 4-5.² The defendant also had a written policy requesting employees to keep personal telephone calls during working hours few in number and brief in length. *Id.* ¶ 7. The defendant also had a policy that personal use of the internet was permitted only during non-working hours and breaks and must not interfere with business activity. *Id.* ¶ 6.³

The defendant also had the following written policy:

It has been traditional practice that during the months of July and August each year, employees may leave at 1:00 p.m. on alternating Friday afternoons. A schedule is established in the spring of each year and circulated. Employees are strategically divided into two equally sized groups to provide proper coverage and support in the office. Each group is assigned the set of dates when they may leave early. Changes and substitutions to the schedule are strongly discouraged due to the strategic nature of the group selection process and so that the list can

in that document.

² The plaintiff purports to deny paragraph 5 of the defendant's statement of material facts, which quotes the language of the policy, but the denial is not responsive, Plaintiff's Responsive SMF ¶ 5, and the paragraph is accordingly deemed admitted, Local Rule 56(e).

³ The plaintiff purports to deny this paragraph of the defendant's statement of material facts, Plaintiff's Responsive SMF ¶ 6, but the denial is not responsive and the paragraph is accordingly deemed admitted, Local Rule 56(e).

be relied upon by all employees. Employees are asked to work through 1:00 p.m. on the days when they are leaving early to permit the other group of employees to each lunch and return to the office by 1:00 p.m.

Id. ¶ 11.

In July 1996 the defendant hired the plaintiff for an eight-week temporary position as an administrative assistant. *Id.* ¶ 13. At the end of that period she was hired as a permanent part-time employee, working 24 hours per week. *Id.* In June 1997 she began working 30 hours per week and in January 1998 this was increased to 35 hours per week. *Id.* She was permitted to remain a part-time employee even after the defendant adopted a policy requiring all employees to work full time. *Id.* Wendy Laidlaw, the defendant's chief operating officer, was the plaintiff's supervisor for her first four years of employment with the defendant. *Id.* ¶ 14. Kimberley Kalicky took over as the plaintiff's supervisor in January 2001. *Id.* ¶ 15.

Laidlaw evaluated the plaintiff in writing after she had been employed by the defendant for three months, six months and yearly thereafter. *Id.* ¶ 16. In these evaluations, the plaintiff was repeatedly complimented for her friendly demeanor, excellent word processing skills and clerical work. *Id.* ¶ 19. One area identified by Laidlaw where the plaintiff needed to improve was in the amount of time she was missing from work and the amount of time she spent on personal matters during the work day. *Id.*⁴ Laidlaw addressed these concerns with the plaintiff during her performance reviews. *Id.* ¶ 20.⁵ In the 1998 performance evaluation, Laidlaw wrote:

⁴ The plaintiff purports to deny this portion of paragraph 19 of the defendant's statement of material facts by asserting that she did not need to improve in this area. Plaintiff's Responsive SMF ¶ 19. That assertion is not responsive to the statement that Laidlaw identified this as an area for improvement. The defendant's statement is accordingly deemed admitted.

⁵ The plaintiff purports to deny this paragraph of the defendant's statement of material facts, Plaintiff's Responsive SMF ¶ 20, but the denial is not responsive and the paragraph is accordingly deemed admitted.

With some regularity, events in your personal life seem to affect your demeanor and ability to function in an effective and work-focused way in the office. While we all have days and periods when our work-life is impacted by our home-life, it is important that we try to minimize the impact of these at work as much as possible. One way in which this might be accomplished is for you to exercise good management of your leave time so that you have days to take as leave when emergencies and unforeseen events occur. In 1998 your management of your leave time was poor. I need you to improve your management of your leave time in 1999.

Id. ¶ 21.⁶ In the 2000 review, Laidlaw wrote:

My general concern in the performance area, Robyn, is if the Company is consistently getting your focus, attention and productivity for a full 35 hour a week (not including paid leave time, lunch breaks, etc.). I am concerned, outside the occasional bad or distracting days we all have, that you are not as productive during working hours as you could be or should be. With the attractive distractions of personal emails — received and sent, phone calls, non-work related chats, the hours taken away from work can add up surprisingly quickly. I would like to know your view of this matter regarding your performance.

Id. ¶ 22.⁷

In February 2001 the plaintiff notified the defendant that she was required to be on bed rest for the remainder of her pregnancy. *Id.* ¶ 26. In a letter to the plaintiff dated February 23, 2001 Laidlaw wrote that she would decide whether the plaintiff would be allowed to work from home after hearing from the plaintiff that she had discussed her ability to do so with her physician. *Id.* ¶ 27. The plaintiff never told Laidlaw after this date that she was able to work from home. *Id.* ¶ 28.⁸ The plaintiff was out of work for six months, until August 13, 2001. *Id.* ¶ 30.

⁶ The plaintiff purports to deny this paragraph of the defendant's statement of material facts, which quotes the content of a document, Plaintiff's Responsive SMF ¶ 21, but the denial is not responsive and the paragraph is accordingly deemed admitted.

⁷ The plaintiff purports to deny this paragraph of the defendant's statement of material facts, which quotes the content of a document, Plaintiff's Responsive SMF ¶ 22, but the denial is not responsive and the paragraph is accordingly deemed admitted.

⁸ The plaintiff purports to deny this paragraph of the defendant's statement of material facts based on a memorandum dated three days before the date of the letter. Plaintiff's Responsive SMF ¶ 28. That denial is not responsive, and the *(continued on next page)*

When the plaintiff was getting ready to return to work, she had difficulty getting her new infant to take a bottle. *Id.* ¶ 31. She told Kalicky that she would have to leave early each day to feed the baby and that she would use personal time for that purpose. *Id.* ¶ 34. Kalicky agreed, and the plaintiff did this for her first two weeks back at work. *Id.* The plaintiff also expressed milk for her baby during breaks in the working day. *Id.* ¶ 35. Upon her return to work, the plaintiff had only one week of leave remaining for the entire year. Plaintiff's SMF ¶ 15; Reply Statement of Facts ("Defendant's Responsive SMF") (Docket No. 24) ¶ 15. The plaintiff used her thirty minutes allotted for lunch to pump. *Id.* ¶ 18. She continued this arrangement until April 2002 when she was able to discontinue pumping. *Id.*

Although some of the plaintiff's job duties changed when she returned from maternity leave, she did not care about this. Defendant's SMF ¶ 37; Plaintiff's Responsive SMF ¶ 37. After her return, all of the people who worked in close proximity to the plaintiff remarked to Kalicky that the plaintiff was making excessive personal use of the telephone. *Id.* ¶ 39.⁹ After the plaintiff's return, a co-worker, Ruth Briggs, complained to Kalicky that the plaintiff was doing personal business on the internet instead of her work. *Id.* ¶ 40. Also at this time, Angela Hagan, who worked near the plaintiff, complained two or three times to Kalicky that the plaintiff was disruptive because of her talking and her radio. *Id.* ¶ 41. Ms. Vigneault, for whom the plaintiff was supposed to work, felt that the quality of the plaintiff's work decreased after she returned from maternity leave. *Id.* ¶ 42.¹⁰ On one occasion, Vigneault observed the plaintiff shopping on

paragraph is accordingly deemed admitted.

⁹ The plaintiff admits that Kalicky so testified at her deposition, but purports to deny this paragraph of the defendant's statement of material facts on the basis of Exhibit 9 to the first Loranger affidavit, Plaintiff's Responsive SMF ¶ 39, an e-mail in which Kalicky states that she does not have "hard evidence that too much time during the day is taken up with personal things like emails/internet usage/phone calls." Exh. 9 to First Loranger Aff. This statement is does not contradict the factual assertion set forth in paragraph 39 of the defendant's statement of material facts, which is accordingly deemed admitted.

¹⁰ The plaintiff purports to deny this paragraph of the defendant's statement of material facts by asserting that the quality of her work did not decrease at this time, citing her own affidavit. Plaintiff's Responsive SMF ¶ 42. This assertion does *(continued on next page)*

the Toys-R-Us website for over an hour. *Id.* ¶ 44.¹¹ Vigneault raised her concerns about the plaintiff's work to Kalicky. *Id.* ¶ 45. The plaintiff's supervisors asked the defendant's systems people to monitor the plaintiff's internet usage. *Id.* ¶ 46.

Approximately a week after the plaintiff returned, Kalicky sent an e-mail to Hagen asking, "Now that Robyn has been back for over a week, and your space has now changed, how are you making out?" Plaintiff's SMF ¶ 20; Defendant's Responsive SMF ¶ 20. On August 28, 2001 Laidlaw sent an e-mail to Kalicky suggesting that she remind the plaintiff "what our standard is for handling personal issues or phone calls or emails during business hours." *Id.* ¶ 21. On September 17, 2001 Laidlaw sent Kalicky an e-mail asking whether she was comfortable with productivity. *Id.* ¶ 22. At the end of September 2001 Kalicky asked the plaintiff's three supervisors to "think back on the work you have given Robyn this week and try to give me a fairly accurate guess of how much this work should have taken her over the two weeks." *Id.* ¶ 23. From the responses, Kalicky determined that the plaintiff should have worked thirty-five hours but that she could only account for twenty hours. *Id.* ¶ 24. In a memo dated October 12, 2001 to Laidlaw, Kalicky concluded from her review of printouts provided by the defendant's computer technicians that that plaintiff's personal use of the internet had been excessive. *Id.* ¶ 31.

Kalicky and Laidlaw met with the plaintiff on October 12, 2001 to discuss performance concerns. Defendant's SMF ¶ 48; Plaintiff's Responsive SMF ¶ 48. One topic discussed at this meeting was the plaintiff's excessive personal use of the telephone. *Id.* ¶ 49. The plaintiff conceded that she had been

not respond to the statement that Vigneault felt otherwise, and the defendant's assertion to that effect is accordingly deemed admitted.

¹¹ The plaintiff purports to deny this paragraph of the defendant's statement of material facts based on paragraph 8 of her first affidavit. Plaintiff's Responsive SMF ¶ 44. However, that paragraph of that affidavit does not mention this factual assertion at all. Affidavit of Robyn Vachon in Support of Plaintiff's Opposition to Defendant's Separate [sic] Statement of Material Facts ("Plaintiff's First Aff."), Attachment 2 to Plaintiff's Responsive SMF, ¶ 8. The paragraph is accordingly *(continued on next page)*

spending more time on personal business and asked how much time she could spend each day on personal telephone calls. *Id.* ¶¶ 50-51. Laidlaw told the plaintiff that she could use ten minutes per day as a rule of thumb. *Id.* ¶ 51. During the meeting Kalicky told the plaintiff that over the past two weeks the plaintiff had visited over a dozen personal internet websites. Plaintiff's SMF ¶ 38; Defendant's Responsive SMF ¶ 38. Kalicky also told the plaintiff to tell her friends not to call her at work; that if she chose to express milk on her lunch break, it would cut into the time she had to make personal calls; that she would not let the plaintiff make up time when the office was closed or on weekends and that the plaintiff could only make up seven hours per week, all in the same week, so that she could not keep extra work time "in reserve;" and that the plaintiff was to file weekly reports summarizing her work. *Id.* ¶¶ 40-41, 43-44, 47.¹²

On October 16, 2001 the plaintiff asked Kalicky if it would be possible for her to work from home if one of her two children were sick. *Id.* ¶ 49. On that date Kalicky admitted in an e-mail to Laidlaw that she had allowed another administrative assistant to work from home due to her mother's illness. *Id.* ¶ 50. In a memo dated October 17, 2001 Kalicky denied the plaintiff's request to work from home. *Id.* ¶ 51. On October 26, 2001 Kalicky told the plaintiff that they were very happy with her productivity. *Id.* ¶ 56. On February 1, 2002 Kalicky told the plaintiff:

Your performance for your team since our meeting has been highly satisfactory. Your management of leave time was handled professionally on your part. Personal business done during office hours seems to have dropped off considerably in [sic] your management of this has been done well. I have no issues at that [sic] time.

deemed admitted.

¹² The plaintiff makes additional factual assertions about this meeting in paragraphs 39 and 48 of her statement of material facts. The document cited in support of paragraph 39 was not supplied to the court, nor was it supplied to the defendant. Defendant's Responsive SMF ¶ 39. Accordingly, the factual assertion in that paragraph cannot be considered by the court. Paragraph 48 of the plaintiff's statement of material facts has been stricken.

Id. ¶ 61. In an April 2, 2002 memo Laidlaw said that if the plaintiff exceeded her leave, she may be terminated. *Id.* ¶ 68. In an April 18, 2002 memo Laidlaw sought Kalicky's assistance in gathering documentation showing that the plaintiff had exceeded her leave time "by how much and when during the years in which she did this." *Id.* ¶ 69. In an April 29, 2002 memo to Laidlaw, Kalicky found that the plaintiff exceeded her leave in 2001 by eight hours and five minutes. *Id.* ¶ 70.

In April 2002 Kalicky officially notified the plaintiff that her performance had improved. Defendant's SMF ¶ 52; Plaintiff's Responsive SMF ¶ 52. In a note dated April 5, 2002 Kalicky recorded that at her meeting with the plaintiff the plaintiff said that "she knows she will exceed her leave time so this will be her last year with R.M.D. She said what [sic] she doesn't know if she should let us fire her or quit first, but she said that she would make that decision." Plaintiff's SMF ¶ 77; Defendant's Responsive SMF ¶ 77. In May 2002 Kalicky did an informal review of the plaintiff's performance. Defendant's SMF ¶ 55; Plaintiff's Responsive SMF ¶ 55. Kalicky identified minimizing personal calls and keeping personal business in its place as areas that the plaintiff needed to work on. *Id.* ¶ 56.¹³ In an August 19, 2002 memo Laidlaw told Kalicky to put the following statement in each of the plaintiff's reviews:

Robyn, you exceeded your company paid leave allotments in 1998, 2000 and 2001. Exceeding your paid leave allotment in any year must not occur again, if you do exceed your company leave allotment at any time in the future by any amount, your employment with R. M. Davis may be immediately terminated.

Plaintiff's SMF ¶ 71; Defendant's Responsive SMF ¶ 71.

In the summer of 2002 the plaintiff's desk was moved from the third to the fourth floor. Defendant's SMF ¶ 57; Plaintiff's Responsive SMF ¶ 57. After the move, Kalicky received complaints

¹³ The plaintiff purports to deny paragraph 56 of the defendant's statement of material facts, Plaintiff's Responsive SMF ¶ 56, but that denial is unresponsive and the paragraph accordingly is deemed admitted.

from a number of the plaintiff's co-workers about her chatter. *Id.* ¶ 59.¹⁴ She addressed the concerns with the plaintiff, who thereafter, contrary to Kalicky's instructions, asked some of her co-workers if they had complained about her. *Id.* In a September 11, 2002 e-mail Kalicky asked two of the plaintiff's co-workers how things were going with the plaintiff. Plaintiff's SMF ¶ 86; Defendant's Responsive SMF ¶ 86. One responded, "Things are fine. I want you to know however, that I will not be providing any future input because twice I have given input and twice the issues were not addressed discretely [sic]." *Id.*

Laidlaw and Kalicky decided to have a meeting with the various employees who had been involved to discuss working together. Defendant's SMF ¶ 60; Plaintiff's Responsive SMF ¶ 60. Kalicky notified these employees, including the plaintiff, of the meeting by e-mail. *Id.* ¶¶ 60-61. The plaintiff went immediately to Laidlaw's office and resigned. *Id.* ¶ 62.¹⁵

Laidlaw identified the need for a finance administrator by early 2002. *Id.* ¶ 65.¹⁶ The defendant's executive committee approved the position in early 2002. *Id.* ¶ 66.¹⁷ Some of the duties assigned to this position had been performed by the plaintiff and some had not. *Id.* ¶¶ 67-68. The job was posted internally, and the plaintiff chose not to apply. *Id.* ¶ 69. The person hired for the position has a college degree in accounting and 29 years of experience in financial jobs. *Id.* ¶¶ 70-71. The plaintiff does not have a college degree. *Id.* ¶ 72.

¹⁴ The plaintiff purports to deny this portion of paragraph 59 of the defendant's statement of material facts, Plaintiff's Responsive SMF ¶ 59, but the material cited in support of that deny does not necessarily contravene the testimony. The sentence is accordingly deemed admitted.

¹⁵ The plaintiff purports to deny this paragraph of the defendant's statement of material facts, Plaintiff's Responsive SMF ¶ 62, but the denial is not responsive and the paragraph accordingly will be deemed admitted.

¹⁶ The plaintiff purports to deny this paragraph of the defendant's statement of material facts, Plaintiff's Responsive SMF ¶ 65, but the denial is based on a conclusory assertion about Laidlaw's motive that is an expression of opinion rather than a statement of fact. The defendant's factual assertion is therefore not denied and is deemed admitted.

¹⁷ The plaintiff purports to deny this paragraph of the defendant's statement of material facts, Plaintiff's Responsive SMF ¶ 66, but the denial is not responsive and the paragraph is accordingly deemed admitted.

The defendant's management has tracked the time of three employees who had a perceived attendance problem. *Id.* ¶ 75.¹⁸

C. Discussion

The complaint asserts claims for relief under the federal Pregnancy Discrimination Act, 42 U.S.C. §§ 2000e(k), 2000e-2(a) (“the PDA”) and the Maine Human Rights Act, 5 M.R.S.A. § 4572-A (“the MHRA”). Complaint (Docket No. 1) at 7-8. The federal statutes provide, in relevant part:

It shall be an unlawful employment practice for an employer —
(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex . . .

42 U.S.C. § 2000e-2(a)(1).

The term[] “because of sex” . . . include[s], but [is] not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes . . . as other persons not so affected but similar in their ability or inability to work.

42 U.S.C. § 2000e(k). The state statute provides, in relevant part:

1. Sex defined. For the purpose of this Act, the word “sex” includes pregnancy and medical conditions which result from pregnancy.

2. Pregnant women who are able to work. It shall be unlawful employment discrimination in violation of this Act, except where based on a bona fide occupational qualification, for an employer . . . to treat a pregnant woman who is able to work in a different manner from other persons who are able to work.

3. Pregnant women who are not able to work. It shall also be unlawful employment discrimination in violation of this Act, except where based on a bona fide occupational qualification, for an employer . . . to treat a pregnant woman who is not able to work because of a disability or illness resulting from

¹⁸ The plaintiff contends that “[t]he cited evidence does not support the fact” stated in this paragraph of the defendant's statement of material facts, Plaintiff's Responsive SMF ¶ 75, but the cited document does in fact support the statement, Laidlaw Aff. ¶ 26.

pregnancy, or from medical conditions which result from pregnancy, in a different manner from other employees who are not able to work because of other disabilities or illnesses.

4. Employer not responsible for additional benefits. Nothing in this section may be construed to mean that an employer . . . is required to provide sick leave, a leave of absence, medical benefits or other benefits to a woman because of pregnancy or other medical conditions that result from pregnancy, if the employer . . . does not also provide sick leaves, leaves of absence, medical benefits or other benefits for the employer’s other employees and is not otherwise required to provide those leaves or benefits under other state or federal laws.

5 M.R.S.A. § 4572-A. This court has previously stated that its analysis of claims brought under the PDA applies equally to claims brought under 5 M.R.S.A. § 4572-A. *Green v. New Balance Athletic Shoe, Inc.*, 182 F.Supp.2d 128, 135 (D. Me. 2002).¹⁹

“[A]n employee claiming discrimination on the basis of pregnancy may proceed under either a disparate treatment or a disparate impact theory.” *Smith v. F. W. Morse & Co.*, 76 F.3d 413, 420 (1st Cir. 1996). The plaintiff does not dispute the defendant’s assertion that she is proceeding under a disparate treatment theory. Defendant’s Motion for Summary Judgment, etc. (“Summary Judgment Motion”) (Docket No. 6) at 6. Her memorandum of law makes clear that she is contending that the defendant treated her differently from the manner in which it treated one or more non-pregnant employees, Plaintiff’s Memorandum of Law in Support of her Opposition to Defendant’s Motion for Summary Judgment (“Summary Judgment Opposition”) (Docket No. 18) at 18-24, which is the essence of a disparate treatment claim, *Green*, 182 F.Supp.2d at 134. Accordingly, the plaintiff

¹⁹ I will follow this course in my analysis of the defendant’s motion for summary judgment in this case, although I note that the state statute apparently applies only to discrimination that occurs while the plaintiff is pregnant, 5 M.R.S.A. § 4572-A(2) & (3), while the federal act applies to plaintiffs who are “affected by” pregnancy and to discrimination “because of” pregnancy, 42 U.S.C. § 2000e-2(a)(1), regardless of when it occurs. *See, e.g., Donaldson v. American Banco Corp.*, 945 F. Supp. 1456, 1464 (D. Colo. 1996) (plain language of PDA does not require plaintiff to be pregnant when alleged discrimination occurs). Neither party addresses the possible significance of this difference.

can establish a prima facie case of pregnancy discrimination by showing that (1) she is pregnant (or has indicated an intention to become pregnant), (2) her job performance has been satisfactory, but (3) the employer nonetheless dismissed her from her position (or took some other adverse employment action against her) while (4) continuing to have her duties performed by a comparably qualified person. Establishing the prima facie case raises a rebuttable presumption that discrimination sparked the adverse employment action and imposes upon the employer a burden to put forward a legitimate, nondiscriminatory motive for the action. If the defendant clears this modest hurdle, the presumption of discrimination vaporizes, and the plaintiff (who retains the ultimate burden of persuasion on the issue of discriminatory motive throughout) must then prove that the employer's proffered justification is a pretext for discrimination.

Smith, 76.3d at 421 (citations omitted). Ultimately, the plaintiff must show that “her employer purposely took adverse action against her because of her pregnancy.” *Green*, 182 F.Supp.2d at 135.

The defendant contends that the plaintiff has not offered evidence that would allow a reasonable factfinder to conclude that she suffered any adverse employment action, that she was treated differently from non-pregnant employees or that the nondiscriminatory reasons proffered by the defendant for its challenged actions were pretextual. Summary Judgment Motion at 6-12.

In response, the plaintiff identifies three alleged adverse employment actions: the defendant's (i) “conduct with regard to her need to breast feed and pump,” (ii) “continually threatening her with termination for violating her annual leave while at the same time making it as difficult as possible for Plaintiff to stay within her annual leave limits,” and (iii) creation of “an environment, by way of the overall adverse employment actions, which eventually forced Plaintiff to quit.” Summary Judgment Opposition at 19.

1. Adverse Employment Action. “Adverse employment actions” for the purposes of claims brought under Title VII (42 U.S.C. §§ 2000e-2 & 2000e-3) include “demotions, disadvantageous transfers or assignments, refusals to promote, unwarranted negative job evaluations, and toleration of harassment by other employees.” *Hernández-Torres v. Intercontinental Trading, Inc.*, 158 F.3d 43, 47 (1st Cir. 1998).

Typically, the employer must either (1) take something of consequence from the employee, say, by discharging or demoting her, reducing her salary, or divesting her of significant responsibilities, or (2) withhold from the employee an accouterment of the employment relationship, say, by failing to follow a customary practice of considering her for promotion after a particular period of service.

Blackie v. State of Maine, 75 F.3d 716, 725 (1st Cir. 1996) (citations omitted). With respect to her “need to breast feed and pump,” the plaintiff asserts that Kalicky “did not offer Plaintiff any accommodation.” Summary Judgment Opposition at 5. The defendant disputes this, Reply Memorandum in Support of Motion for Summary Judgment (“Reply”) (Docket No. 23) at 2, pointing to the undisputed fact that the plaintiff was allowed to leave work early every day for the first two weeks after she returned from maternity leave to breast feed her child, Defendant’s SMF ¶ 34; Plaintiff’s Responsive SMF ¶ 34. Whatever the factual background, however, the plaintiff’s argument at this point depends on her characterization of the alleged failure to accommodate as “denying Plaintiff a term, condition or privilege of employment.” Summary Judgment Opposition at 20. She cites no authority in support of this necessary underpinning of her claim. My own research has generated no authority for the proposition that accommodating an employee’s choice to breast feed her child by giving her extra paid or unpaid leave on a daily basis is a term, condition or privilege of employment or that denial of such accommodation is an adverse employment action. It is not something that fits within the parameters of the definitions of those terms as they are applied by the courts, and I see no justification for expanding those definitions to include this activity. Indeed, the available case law counsels to the contrary. *See, e.g., Jacobson v. Regent Assisted Living, Inc.*, 1999 WL 373790 (D. Or. Apr. 9, 1999), at *11(PDA does not cover breast feeding concerns); *Fejes v. Gilpin Ventures, Inc.*, 960 F. Supp. 1487, 1491 (D. Colo. 1997) (same) (citing cases). *See also Martinez v. N.B.C., Inc.*, 49 F.Supp.2d 305, 310-311 (S.D. N.Y. 1999) (failure

to accommodate need to pump breast milk not gender discrimination under Title VII). The plaintiff is not entitled to recover on her first theory of adverse employment action.

With respect to her second theory, the plaintiff contends that the defendant “threatened [her] with termination if she exceeded her leave,” citing paragraphs 45 and 48 of her statement of material facts. Summary Judgment Opposition at 10. Paragraph 48 has been stricken; paragraph 45 states only that “Kalicky also said she would not let Plaintiff take unpaid leave.” Plaintiff’s SMF ¶ 45. The plaintiff relies on *Nelson v. University of Maine Sys.*, 923 F. Supp. 275, 281 (D. Me. 1996), to support her assertion that such a threat, standing alone, constitutes an adverse employment action. Even if she had presented admissible evidence of such threats,²⁰ however, *Nelson* will not bear the weight that the plaintiff seeks to assign to it. In that case, this court found that no adverse employment action would occur if an employer subjected an employee to unsubstantiated complaints of sexual harassment, defamed him as a result of an internal review of his complaints against a colleague, and reprimanded him, causing him professional embarrassment and anxiety. *Id.* at 281. Judge Brody did note that the Northern District of Texas, in an unreported case, held that “a letter threatening suspension if the employee’s conduct is not corrected” constituted adverse employment action, *id.* at 282, but he did not adopt that reasoning. The Texas case, *Rivers v. Baltimore Dep’t of Recreation & Parks*, 1990 WL 112429 (D. Md. Jan. 9, 1990), states that “a threatened suspension is an adverse employment action,” *id.* at 10, without any analysis or citation to authority. Like Judge Brody, I believe that the courts should not define an “adverse employment action in a manner which discourages open communication, critical or otherwise, between employers or supervisors and their employees as to the employee’s employment performance.” 923 F. Supp. at 281. Informing an

²⁰ The plaintiff later refers to paragraphs 71, 75 and 77 of her statement of material facts in support of a similar argument. (continued on next page)

employee at will on one occasion that further instances of taking leave without permission may result in discharge is not an adverse employment action.²¹ See *Hernández-Torres*, 158 F.3d at 46-47 (threat to fire plaintiff if caught reading religious matter again not adverse employment action).

The fact that the defendant was not willing to allow the plaintiff to make up time whenever she wished to do so, so that she could avoid exceeding her allowed leave, also does not constitute an adverse employment action. Unrestricted ability to make up time at the employee's discretion is not a term, condition or privilege of employment; indeed, the plaintiff's argument would essentially allow at-will employees to set their own hours without concern for the employer's needs, a plainly insupportable position as a practical matter. Again, the plaintiff offers no authority in support of her position and my research has located none.

The plaintiff's third alleged adverse employment action is a constructive discharge. An objective standard is applied to determine whether a plaintiff has made a *prima facie* showing of constructive discharge. *Serrano-Cruz v. DFI Puerto Rico, Inc.*, 109 F.3d 23, 26 (1st Cir, 1997). The plaintiff must show that the working conditions existing at the time she resigned were so difficult or unpleasant, as a result of her pregnancy, that a reasonable person in her place would have felt compelled to resign. *Id.* Here, the plaintiff contends that "the overall adverse employment actions" forced her to resign. Summary Judgment Opposition at 19. She includes in the "overall actions" the failure to accommodate her breast feeding, the

Summary Judgment Opposition at 12. Of these paragraphs, only paragraph 75 can reasonably be read to allege that such a threat was made, on April 5, 2002.

²¹ The plaintiff bases a later argument on the contention that the defendant's alleged threats of termination were invalid because the defendant did not have a written policy providing that termination might result from the taking of excessive leave. Summary Judgment Opposition at 22-23. However, the plaintiff offers no evidence that she had an employment contract with the defendant, nor does she argue that the defendant's employee manual was a *de facto* employment contract. For all that appears in the record, she was an employee at will. Under Maine law, such an employee may be terminated for any reason not otherwise unlawful. See, e.g., *Taliento v. Portland W. Neighborhood Planning Council*, 705 A.2d 696, 699 (Me. 1997); *Libby v. Calais Reg'l Hosp.*, 554 A.2d 1181, 1183 (Me. 1989). Neither Maine nor federal law prohibits discharge of an employee for absenteeism. The plaintiff takes nothing from her arguments concerning the absence of a written "excessive leave" policy.

“refusal to allow her to preserve leave time,” soliciting criticism from her co-workers, limiting her to 10 minutes of personal business per day, “falsely accusing her of dishonesty and stealing fifteen hours a week from the company,” “falsely accusing her of excessive internet usage, not allowing her to receive any personal phone calls or emails, . . . requiring her to file weekly reports,” and hiring someone else “to take over her responsibilities and duties and then forcing her to train her own replacement.” *Id.* at 21. None of these actions —most of which are denied by the defendant — other than the final item on the list possibly constitutes adverse employment action. *See generally Gu v. Boston Police Dep’t*, 312 F.3d 6, 14-15 (1st Cir. 2002); *Martin v. Inhabitants of City of Biddeford*, 261 F.Supp.2d 34, 38-39 (D. Me. 2003).

In addition, the evidence in the summary judgment record does not support the assertion that the defendant did not allow the plaintiff to receive personal phone calls or e-mails. The plaintiff cites paragraph 51 of her statement of material facts in support of this assertion, Summary Judgment Opposition at 9, but that paragraph does not mention the plaintiff’s receipt of personal telephone calls or e-mails. Plaintiff’s SMF ¶ 51. The paragraph of the plaintiff’s statement of material facts that is closest to this assertion merely states that Kalicky told the plaintiff to tell her friends not to call her at work. *Id.* ¶ 40. There is no reference at all to personal e-mails, and a request to tell friends not to call the plaintiff at work is not the equivalent of a refusal to allow the plaintiff to receive any personal telephone calls.

The plaintiff obviously believes that the defendant hired Ann Peterson to “take over” her job. Summary Judgment Opposition at 16. However, her argument on this point is significantly weakened by her admission that she did not apply for the position when it was posted before Peterson was hired, Defendant’s SMF ¶ 69; Plaintiff’s Responsive SMF ¶ 69, and the fact that she does not offer any evidence that her hours or compensation were affected by the hiring of Peterson, *id.* ¶ 73. Some of the duties assigned to Peterson had been performed by the plaintiff, but some had not. *Id.* ¶ 68. The fact that a

plaintiff's salary remains unchanged by a transfer of job responsibilities is one important factor in determining whether a constructive discharge has occurred. *Serrano-Cruz*, 109 F.3d at 26 (citing cases). The fact that the plaintiff chose not to apply for the position is also a factor to be considered. *Id.* at 26-27 (considering plaintiff's rejection of offered new position). In addition, if the hiring of Peterson under the circumstances could reasonably be characterized as an effort to marginalize the plaintiff, "this sort of injury to an employee's ego or prestige does not furnish a legally cognizable reason to treat a resignation as a constructive discharge." *Suarez v. Pueblo Int'l, Inc.*, 229 F.3d 49, 55 (1st Cir. 2000). "[A] reduction in responsibility or a change in the way that business is done, unaccompanied by diminution of salary or some other marked lessening of the quality of working conditions, does not constitute a constructive discharge." *Id.* The plaintiff has not shown that the hiring of Peterson constituted a constructive discharge.

It is also possible that the combination of events, none of which standing alone would be sufficient to cause a constructive discharge as a matter of law, might be sufficient to show constructive discharge. *Simas v. First Citizens' Fed. Credit Union*, 170 F.3d 37, 47-48 (1st Cir. 1999). Here, the plaintiff has not shown a series of "otherwise minor slights, relentlessly compounded." *Id.* at 48. Even "personal animus, hostility, disrespect and ostracism" which "certainly indicate that the plaintiff's workplace was not an idyllic retreat" do not constitute a material change in the terms, conditions or privileges of the plaintiff's job or a constructive discharge. *Martin*, 261 F.Supp.2d at 38. The plaintiff in this case has shown nothing more.

The defendant is entitled to summary judgment because the plaintiff has not presented evidence of adverse employment actions sufficient to allow a reasonable factfinder to return a verdict in her favor.

2. *Different Treatment and Pretext.* Given my conclusion that the plaintiff has failed to establish the existence of any adverse employment action actionable under the PDA, it is not necessary to reach the

defendant's remaining arguments. I will nonetheless make two observations about the plaintiff's arguments on the necessary element of proof of different treatment on which she bears the evidentiary burden.

The plaintiff contends in this regard that "it is undisputed that Defendant treated Plaintiff differently than the employee Michelle Whitmore." Summary Judgment Opposition at 22. However, the evidence concerning Whitmore proffered by the plaintiff is that "Defendant never gave Plaintiff two thirty minute sessions per day to pump as it had done with the employee Michelle." Plaintiff's SMF ¶ 18. To the extent that the plaintiff's breast feeding claim is cognizable under the PDA, Whitmore must be considered to have been as pregnant as was the plaintiff. This evidence cannot possibly establish that the defendant treated the plaintiff "differently than it treated other, non-pregnant employees who had a similar ability or inability to work." *Green*, 182 F.Supp.2d at 135.

The plaintiff also argues in this section of her memorandum of law that "there is no evidence that Defendant treated its other employees as it treated Plaintiff," listing some specific areas in which there is no such evidence. Summary Judgment Opposition at 22-23. This argument reverses the burden of proof. It is the plaintiff's burden to show that the defendant treated its other employees differently from the allegedly discriminatory manner in which it treated the plaintiff; it is never the defendant's burden to show that it treated other employees in a similar manner.

III. Conclusion

For the foregoing reasons, (i) the defendant's motion to strike is **GRANTED** as to paragraphs 23 and 60 of Attachment 1 to the plaintiff's statement of material facts (Docket No. 16) and paragraphs 8, 48 and 89 of the plaintiff's statement of material facts and otherwise **DENIED**; and (ii) I recommend that the defendant's motion for summary judgment be **GRANTED**.

NOTICE

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

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

Dated this 13th day of April, 2004.

/s/ David M. Cohen
David M. Cohen
United States Magistrate Judge

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