

**UNITED STATES DISTRICT COURT
DISTRICT OF MAINE**

MICHAEL E. THURSTON,)
)
 PLAINTIFF))
)
v.))
)
WILLIAM J. HENDERSON,)
POSTMASTER GENERAL,)
)
 DEFENDANT)

Civil No. 99-40-P-H

**ORDER AFFIRMING RECOMMENDED DECISION OF THE MAGISTRATE JUDGE
ON THE DEFENDANT’S MOTION TO DISMISS OR, IN THE
ALTERNATIVE, FOR SUMMARY JUDGMENT**

Michael Thurston filed suit against the Postmaster General, asserting two counts of disability discrimination under the Rehabilitation Act, 29 U.S.C. § 791 (Count I) and § 794 (Count II). Thurston claims that several of his co-workers in the Auburn Post Office harassed him and that the postal management did nothing to stop the harassment. The Postmaster General moved to dismiss the complaint, or, alternatively, for summary judgment. The Magistrate Judge filed with the Court on January 5, 2000, with copies to the parties, his Recommended Decision on the defendant’s motion. The Magistrate Judge recommended that the defendant’s motion for summary judgment be granted because Thurston failed to produce evidence that he is disabled within the meaning of the Rehabilitation Act. Thurston filed an objection to the Recommended Decision on January 19, 2000. The Postmaster General filed a partial objection. I have reviewed and considered the Recommended Decision, together with the entire record; I have made a *de novo*

determination of all matters adjudicated by the Recommended Decision; I agree that summary judgment should be **GRANTED** to the Postmaster General, but for different reasons than those set forth by the Magistrate Judge.

I. THE POSTMASTER GENERAL'S MOTION TO DISMISS THE COMPLAINT

The Postmaster General moved to dismiss the complaint or, alternatively, for summary judgment. In his statement of undisputed facts, the Postmaster General did *not* assert that Thurston was not disabled or was not substantially limited in any major life activity. See Def.'s Statement of Material Facts Not in Dispute ("Def.'s Facts") ¶¶ 3-5. Rather, the Postmaster General argued that Thurston failed to *plead* a factual basis from which it could be determined that he is substantially limited in any major life activity. See Def.'s Motion to Dismiss, or in the Alternative, for Summary Judgment ("Def.'s Mot. for Summ. J.") at 5. In other words, this particular argument was made under Rule 12(b)(6), not Rule 56.¹ The Magistrate Judge ruled in favor of the Postmaster General on the basis that Thurston did not point to specific facts in the summary judgment record to demonstrate a trialworthy issue. See Recommended Decision at 13-14. But, since the Postmaster General had not asserted that Thurston failed the "disabled person" status under the Rehabilitation Act as a matter of summary judgment, Thurston was not obliged to point to any facts in the summary judgment record in response. See Local Rule 56. Because I am ruling in favor of the plaintiff on this issue, there is no need to grant the plaintiff's request for oral argument directed to this issue.

¹ Only in the Reply Brief does the Postmaster General refer to the summary judgment record on this particular issue. Thus, Thurston had no reason to respond.

I proceed, therefore, to consider the Postmaster General's other arguments, as well as Thurston's motion to amend his complaint. I conclude that even if Thurston were to amend his complaint to refer specifically to his limitations in a major life activity, summary judgment must be granted to the Postmaster General for the reasons explained below. Where there is any factual dispute, I take the plaintiff's version for purposes of this ruling.

II. THE POSTMASTER GENERAL'S MOTION FOR SUMMARY JUDGMENT

A. Background

Thurston has been diagnosed with a service-connected anxiety disorder and has been assigned a 10% disability rating by the Veteran's Administration. Def.'s Facts ¶ 4, Pl.'s Response to Defendant's Statement of Material Facts Not in Dispute ("Pl.'s Facts") ¶ 4. Thurston worked at the Auburn Post Office as a Part-time Flexible ("PTF") Clerk primarily from May 1995 to December 1996, and again from July 11, 1997 through 1998 (with a temporary paid leave from October 31, 1997 to January 5, 1998). Def.'s Facts ¶¶ 1, 7, 8, 19, 22; Pl.'s Facts ¶¶ 1, 7, 8, 19, 22. Thurston filed an Equal Employment Opportunity ("EEO") complaint on October 23, 1997. Def.'s Facts ¶ 16; Pl.'s Facts ¶ 16. Thurston's disability discrimination claims stem from events in these two time periods.

B. The 1996 Events

Between March 22, 1996 and December 1996, Thurston was assigned to work as a temporary supervisor for one day or more per week. Def.'s Facts ¶ 8; Pl.'s Facts ¶ 8. During this period, Thurston claims that a co-worker, Paul Lauziere, and one or two other co-workers made jokes or bets about when Thurston would

snap, lose his temper or crack. Def.'s Facts ¶ 21; Pl.'s Facts ¶ 21. He also complains that on March 29, 1996, Lauziere, dropped to his knees and said to Thurston: "O great God PTF around here, can you get these newspapers to me at once?" Def.'s Facts ¶ 21, Pl.'s Facts ¶ 21.²

The Postmaster General asserts that these events should not be considered in this lawsuit because (1) they fall outside of the 45-day filing deadline for claims for discrimination, 29 C.F.R. § 1614.105(a)(1),³ and (2) Thurston failed to appeal the Postal Service's dismissal of the 1996 claims within 90 days of receiving the notice of its final decision, 29 C.F.R. § 1614.408.⁴ See Def.'s Mot. for Summ. J. at 7-8.

According to the summary judgment record, the chronology of Thurston's administrative complaints is as follows. During the 1996 time period, Thurston complained about this conduct to his supervisor, to then-Postmaster Peter Desjardins, and to the Employment Assistance Program ("EAP") Coordinator, Melissa Shattuck, in an attempt to get Shattuck to assemble what he labels a hostile environment investigation team (actually called a "Threat Assessment Team") to investigate the hostile environment allegedly created by Lauziere. See

² Presumably, "PTF" means "part-time flexible," in reference to Thurston's position.

³ 29 C.F.R. § 1614.105(a)(1) provides "An aggrieved person must initiate contact with a[n EEO] Counselor within 45 days of the date of the matter alleged to be discriminatory. . . ."

⁴ 29 C.F.R. § 1614.408(a) provides that a complainant is authorized to file a civil action in district court "[w]ithin 90 days of receipt of the final decision on an individual or class complaint if no appeal has been filed."

Thurston Aff. at 2-4.⁵ Contrary to the applicable regulations, he did not file a complaint with the EEO Counselor Marc Scheele. Thurston claims that he did not have knowledge or notice of the correct procedure or time limits for filing a complaint with the EEO Counselor and that despite his many conversations with Shattuck, Shattuck never informed him how to file a complaint. See Thurston Aff. at 3-4. Although he once contacted the EEO Counselor's office, he told a worker there that he "was trying to control my frustration at work and was taking it home which was making it hard for my wife and children." Id. at 4. He was then referred to outside counseling. See id.

Thurston eventually did file a complaint with the EEO Counselor on October 23, 1997. Def.'s Facts ¶ 16; Pl.'s Facts ¶ 16. On May 19, 1998, the Postal Service sent him a final decision dismissing as untimely the portion of his claim concerning events that occurred in 1996. See Def.'s Facts ¶ 20; Pl.'s Facts ¶ 20. That decision informed him that he had alleged "ongoing discriminatory harassment by your co-workers based on your disability since March 29, 1996" and that the Postal Service had evaluated that complaint under a "continuing violation" theory. See Scheele Decl. (Nov. 16, 1999) ¶¶ 6-7, Attach. B. The letter stated that Thurston could not avail himself of the continuing violation theory, that this was a "final decision" of the Postal Service, and that Thurston had the right to appeal

⁵ Thurston asserts that he contacted EAP Coordinator Shattuck after reading a brochure entitled Zero Tolerance Manual, distributed by the Post Office, that described the function of the "Threat Assessment Team." The Threat Assessment Team, according to the portion of the brochure Thurston submitted, is comprised of many groups, including the EAP and the EEO, and is designed to assess threatening situations and the potential for violence within the workplace. See Pl.'s Opp'n Mem. at Tab 5.

this decision to the EEOC within 30 days or to file a civil action in district court within 90 days. *Id.* Thurston did not appeal this decision but instead pursued the remainder of his claim dealing with events in 1997. *See* Pl.’s Opp’n Mem. at 14-15, Tab 8. On November 24, 1998, the Postal Service issued its final decision regarding Thurston’s claim that he was subjected to “harassment/hostile work environment by [his] co-workers.” *Id.* at Tab 8, p. 1.

(1) Exhaustion of Administrative Remedies

In his opposition memorandum, Thurston asserts several arguments for considering his 1996 claims as still actionable. Thurston first argues that filing complaints with his supervisor and with the EAP Coordinator Shattuck should qualify as “initiating contact” with an EEO Counselor, especially given his claims that he did not know that he could file a complaint with the EEO or that there was a 45-day deadline. *See* Pl.’s Opp’n Mem. at 10-13. Regardless of the merits of these arguments,⁶ Thurston has offered no evidence that he raised these arguments during the administrative process.⁷ The First Circuit has made clear that when a complainant has never presented these arguments during the administrative proceeding, he has not exhausted his administrative remedies regarding this portion of his claim. *See Roman-Martinez v. Runyon*, 100 F.3d 213, 219 (1st Cir.

⁶ I note that the EEOC has sometimes held that notice of an employee’s grievance to an agency official logically connected with the EEO process within the 45-day time limit may fulfill the requirement of 29 C.F.R. § 1614.105(a) or at least trigger a duty of that official to advise the employee of the proper procedure. *See, e.g., Guerra v. Runyon*, App. No. 01944190, 1994 WL 744965, at *2 (E.E.O.C. Nov. 9, 1994); *Hernandez v. Runyon*, App. No. 01972231, 1998 WL 156079, at *2 (E.E.O.C. Mar. 31, 1998).

⁷ *See* Def.’s Facts ¶ 20; Pl.’s Fact ¶ 20; Pl.’s Opp’n Mem. at 13; Scheele Decl. (Nov. 16, 1999) ¶¶ 6-7, Attach. B.

1996). Therefore, Thurston may not litigate this portion of his claim in federal court. See id.⁸

(2) Continuing Violation Doctrine

Thurston argues next that he may reach back to the 1996 events because he was subjected to a “continuing violation” of disability harassment. Because Thurston is not alleging a general discriminatory practice or policy, the proper analysis is whether he satisfies the “serial violation” test. See Provencher v. CVS Pharmacy, 145 F.3d 5, 14 (1st Cir. 1998). To do so, he must (1) show an actionable violation within the limitations period that stems from the same discriminatory animus that anchors the past discriminatory acts, and (2) show that he was not or should not have been aware that he was being unlawfully discriminated against while the earlier acts were occurring. Id.; DeNovellis v. Shalala, 124 F.3d 298, 307 (1st Cir. 1997).

This second requirement is Thurston’s undoing. Throughout 1996, Thurston believed that the behavior by Lauziere and his co-workers created a hostile environment based on his disability. In May or June of 1996, he contacted the EAP Coordinator to request what he deemed a “hostile environment team.” Thurston

⁸ Thurston also argues that because, under 29 C.F.R. § 1614.107(b) (1999), he was not able to appeal this portion of his decision until the date of the Postal Service’s final action on the remainder of his complaint, he may now properly litigate the May 19, 1998 ruling. But the regulation Thurston refers to was not in effect during the administrative proceedings of this case. See Federal Sector Equal Employment Opportunity, 64 FR 37,644, *37,647 (1999) (now codified as 29 C.F.R. § 1614.107(b)) (effective on November 9, 1999). In 1998, a complainant like Thurston had a right to appeal immediately the agency’s partial dismissal of his claim. See 29 C.F.R. § 1614.401(a) (1998). Thurston has not argued that the new regulation should be applied retroactively and I see no basis for such an argument.

Aff. at 3. Thurston states that he felt Lauziere was aware of his disability and that he notified Shattuck that his work atmosphere “met the definition of a hostile environment.” Thurston Aff. at 2-3. Thurston complained to his supervisor and to Postmaster Peter Desjardins about his co-workers’ behavior and called Shattuck numerous times. *Id.* at 2-4. Under First Circuit law, this knowledge is fatal to his continuing violation argument. See *Provencher*, 145 F.3d at 15; see also *Bolt v. Norfolk Southern Corp.*, 22 F. Supp.2d 512, 517 (E.D.Va. 1997) (rejecting continuing violation argument of plaintiff who argued that he did not realize he had an avenue of redress for his same sex harassment claim but complained to supervisors). Therefore, Thurston may not resuscitate his 1996 claims.

C. The 1997-98 Claims

On October 14, 1997, Thurston had an argument with Lauziere in front of union steward Bill Holden. Def.’s Facts ¶¶ 11-12; Pl.’s Facts ¶¶ 11-12. Subsequent investigation revealed that the argument began when Thurston asked Holden to pursue several grievances on his behalf and Holden told Thurston that Thurston did not have a basis for those grievances. Def.’s Facts ¶ 12; Pl.’s Facts ¶ 12. Lauziere, the union president, came over, and an argument between Lauziere and Thurston ensued, during which Lauziere called Thurston a “child.”⁹ Def.’s Facts ¶ 12; Pl.’s Facts ¶ 12. Thurston told Lauziere “we are going to dance,” to which Lauziere responded that Thurston was “mentally ill,” “sick in the head” and “needed help.” Def.’s Facts ¶ 12; Pl.’s Facts ¶¶ 12, 21(2). The next day, Postmaster

⁹ Thurston claims that Lauziere said “Take this fucking child into the union office.” Pl.’s Facts ¶ 12.

Robert Balko instructed supervisor Audrey Johnson to investigate what had occurred. Def.'s Facts ¶ 12; Pl.'s Facts ¶ 12.¹⁰ One week later, on October 21, 1997, Balko met with Lauziere and told Lauziere that his behavior was unacceptable and not to be repeated. Def.'s Facts ¶ 13; Pl.'s Facts ¶ 13. Lauziere subsequently wrote a letter of apology to Thurston ("The president of local 5622 was unprofessional in expressing his personal opinion on the work room floor . . . You have my deepest regret for uttering such mentioned above.") Pl.'s Facts ¶ 13; Letter from Lauziere to Thurston of 10/28/97 (Docket Item 26, Ex. B). On October 30, Thurston admitted himself to a local mental health center because he feared he would harm Lauziere. Def.'s Facts ¶ 17; Pl.'s Facts ¶ 17.¹¹

On October 21, 1997, Balko also discussed with Shattuck the creation of a work environment assessment team. Such a team was created and it investigated the Auburn Post Office between November 25-27, 1997. Def.'s Facts ¶¶ 14, 18; Pl.'s Facts ¶¶ 14, 18. When Thurston went to the Post Office during that period to pick up his mail, Balko told him, without explanation, to leave and not to return. Pl.'s

¹⁰ Thurston argues that this investigation was insufficient because Johnson did not question the parties about their own statements or the statements of other witnesses, did not fully comprehend the meaning of what behavior constitutes harassment, and submitted her written report almost one month later. See Pl.'s Opp'n Mem. at 20-21. Despite these limitations, Balko reprimanded Lauziere within one week of the incident and discussed forming a work environment assessment team. See Def.'s Facts ¶¶ 13-14; Pl.'s Facts ¶¶ 13-14.

¹¹ Thurston asserts that on October 30, 1997, he "discovered that Lauziere had filed an unauthorized grievance on [his] behalf." Thurston Aff. at 7. However, he has not offered evidence of any false grievance other than through this statement, which shows no foundation for this "discovery" and appears to be based upon hearsay. For summary judgment, only admissible evidence suffices. See Fed. R. Civ. P. 56(e). Therefore, I have not considered this assertion.

Facts ¶ 21(5). The team interviewed 24 employees and recommended to Balko that Thurston be removed from the Auburn Post Office because of his threatening behavior. Def.'s Facts ¶¶ 18-19; Pl.'s Facts ¶¶ 18-19.¹² Rather than remove Thurston permanently, Balko placed Thurston on temporary paid leave until December 5, 1997, while he reviewed the statements. Def.'s Facts ¶ 19; Pl.'s Facts ¶ 19.¹³ After reviewing the statements, Balko decided not to remove Thurston. Def.'s Facts ¶ 19; Pl.'s Facts ¶ 19.

Before Thurston returned from leave, Balko convened the Auburn employees on December 16, 1997. Def.'s Facts ¶ 19; Pl.'s Facts ¶ 19. At that meeting, Balko told the workers that he expected employees to treat each other with dignity and respect, that any unprofessional behavior was to cease, that references to disabilities would not be tolerated, and that if any employees had problems, they could approach Balko. Def.'s Facts ¶ 19; Pl.'s Facts ¶ 19. Thurston was aware of this meeting and thought it a "wonderful thing." Def.'s Facts ¶ 19; Pl.'s Facts ¶ 19.

¹² Thurston vigorously criticizes both the conduct and the accuracy of the team's investigation. See Pl.'s Opp'n Mem. at 22 ("The Postal Service does not appear to suggest that the appearance of the hostile environment team on November 25, 1997 was in any way a response to . . . the October 14th. . . . incident[]). Although the head of the team was advised by Postmaster Balko that Paul Lauziere had been "demeaning" Mr. Thurston because of his disability, the team simply noted the issue in its report without attempting to resolve it"). Assuming these criticisms are accurate, they do not reflect Postmaster Balko's responses, which are what is at issue in this case. Balko's responses were independent of the team's investigation or report. Balko reviewed the statements the team collected and did not follow the team's recommendation to remove Thurston permanently from the Auburn Post Office. See Def.'s Facts ¶ 19; Pl.'s Facts ¶ 19. Further, Balko had told Lauziere his behavior was unacceptable within a week of the October 14th incident. See Def.'s Facts ¶ 13; Pl.'s Facts ¶ 13.

¹³ Thurston alleges that he was not told why he was placed on leave in the written notice he received from Balko. See Thurston Aff. at 10; Pl.'s Facts ¶ 21(5). However, this fact adds nothing to his hostile environment claim.

When Thurston returned to work, Balko also told Thurston to come to him with any further problems with his co-workers. Def.'s Facts ¶ 22; Pl.'s Facts ¶ 22.

Upon Thurston's return, the problems with co-workers continued. Although Lauziere never again referred to Thurston's disability after January, 1998, see Def.'s Facts ¶ 23; Pl.'s Facts ¶ 23,¹⁴ Lauziere and Quentin Curtis avoided Thurston during breaks, see Def.'s Facts ¶ 21; Pl.'s Facts ¶ 21; Thurston Dep. at 67-70; 198-200. In January, Balko stopped this avoidance practice by Thurston's co-workers. Def.'s Facts ¶ 22; Pl.'s Facts ¶ 22. In early 1998, Thurston overheard a co-worker yell to Curtis to come to the cage for a minute. Curtis yelled back, "I can't right now. I'm too stressed out. . . . I can't move out of my chair right now. You know how stressful this job is." Pl.'s Facts ¶ 21(3); Thurston Aff. at 10-11. Thurston believed that this comment was strictly for his benefit. See id. However, Thurston does not claim in his responding statement of facts or in his opposition memorandum that he reported Curtis's comment to Balko. See Pl.'s Facts ¶¶ 1-23; Pl.'s Opp'n Mem. at 16-22. After January 1998, Curtis did not do anything else that Thurston felt constituted harassment. Thurston Dep. at 122.

A representative from the district office came to Auburn on February 4, 1998, sat near where Thurston was working and watched him. Pl.'s Facts ¶ 21(4);

¹⁴ The parties have not pointed to evidence in the record that Lauziere referred to Thurston's disability after October, 1997. See Def.'s Facts ¶¶ 21-23; Pl.'s Facts ¶¶ 21-23. After October, 1997, Thurston's only allegations involving Lauziere are that Lauziere avoided him on breaks and did not talk to him. Def.'s Facts ¶ 21; Pl.'s Facts ¶ 21; Thurston Dep. at 70, 198.

Thurston Aff. at 11.¹⁵ After several hours, the representative asked Thurston, “Am I stressing you out?” Id. Neither party cites any evidence that Thurston reported this comment to his supervisor or to Balko.

In late February, co-worker Ray Hamilton—a worker whom Thurston describes as a “loud,” “happy-go-lucky kind of guy,” Thurston Dep. at 75—said to Thurston in the break room in front of several employees, “What am I asking you for, you’re on suicide watch.” Def.’s Facts ¶ 21; Pl.’s Facts ¶ 21; Thurston Dep. at 75, 99. The day after Balko learned of this incident (apparently a third party informed him of what occurred), he gave Hamilton an “official discussion,” which is characterized as a “corrective measure” under the union contract. Def.’s Facts ¶ 22; Pl.’s Facts ¶ 22.¹⁶ Thurston has not experienced any problems with his Auburn co-workers since he became a union steward on May 2, 1998. Def.’s Facts ¶ 23; Pl.’s Facts ¶ 23.

¹⁵ In the plaintiff’s Response to Defendant’s Statement of Material Facts Not in Dispute, this individual is described as a “supervisor”; however, Thurston’s affidavit, which is cited for support, refers to the individual as a “representative from the district office.” Thurston Aff. at 11. Further, the underlying affidavit characterizes this event somewhat differently than the plaintiff’s responding statement of facts. I therefore follow the version of events contained in the affidavit.

¹⁶ In the Defendant’s Statement of Material Facts Not in Dispute, the defendant recites instances that Thurston alleges to have been discriminatory including (1) an incident, which Thurston acknowledged during Balko’s investigation could have been unintentional, in which a co-worker bumped Thurston; (2) a 1997 conversation in which Thurston asked a co-worker why he made fun of Thurston in 1996 and the co-worker said “well, you got to admit, Mike, couple of times you were so red in the face, you looked like you were just going . . . [to] go off;” (3) a 1998 incident where Thurston was improperly given a letter of warning for falsely reporting that a co-worker had sustained an on the job injury; (4) an incident in which his supervisor reprimanded him for leaving early; and (5) his voluntary assignment in 1999 as an officer-in-charge in Danville, Maine. See Def.’s Facts ¶¶ 21-22; Pl.’s Facts ¶¶ 21-22; Thurston Dep. at 91. Thurston, however, has not argued that any of these events, either individually or collectively, contributed to the creation or maintenance of a hostile environment. See Pl.’s Opp’n Mem. at 17-18.

III. ANALYSIS

A plaintiff claiming a hostile environment must point to sufficient evidence to establish that the conduct in question is “sufficiently severe and pervasive to alter the conditions of the victim’s employment.” Harris v. Forklift Sys., Inc., 510 U.S. 17, 21 (1993) (citations omitted). Trivial offenses or isolated incidents do not suffice. DeNovellis v. Shalala, 124 F.3d 298, 310 (1st Cir. 1997). In evaluating a hostile environment claim, a fact finder must use both an objective and subjective standard. See Harris, 510 U.S. at 21-22. Factors to be considered are: “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 performance.” Harris, 510 U.S. at 23. A reviewing court must assess the totality of the circumstances and may consider conduct that is not expressly based upon the plaintiff’s disability. However, “the overtones of such behavior must be, at the very least, [disability]-based, so as to be a recognizable form” of discrimination. Morrison v. Carleton Woolen Mills, Inc., 108 F.3d 429, 441 (1st Cir. 1997). As the First Circuit has cautioned, mere unsociability or difficulty in getting along is not sufficient, unless underlying motives of a discriminatory nature are implicated. Id.

After September 8, 1997 (the beginning of the 45-day period culminating in Thurston’s filing of a complaint with the EEO Counselor), Thurston alleges four overt disability-related incidents: (1) the October 14, 1997 confrontation with Lauziere; (2) Curtis’s remark about being “too stressed out”; (3) the visiting representative’s conduct; and (4) the “suicide watch” comment. These incidents

range over the course of three months (not including the period on leave). The latter three incidents fall within what the Supreme Court in Harris characterized as the “mere offensive utterance” category. The “mere utterance of an . . . epithet which engenders offensive feelings in an employee . . . does not sufficiently affect the conditions of employment to implicate” the anti-discrimination laws. Harris, 510 U.S. at 21. Further, the October 14th name-calling by and heated exchange with Lauziere, while certainly upsetting, was not repeated. During the actionable period, Thurston has not offered sufficient evidence to show that a reasonable jury could find that this was a workplace “permeated with ‘discriminatory intimidation, ridicule, and insult.’” Harris, 510 U.S. at 21 (citations omitted). These events, considered singly or in combination, simply are not sufficiently severe or pervasive to create a genuine issue regarding the establishment of a hostile environment.

Thurston further argues for the existence of a hostile environment through conduct that is not overtly based upon his disability: specifically, the avoidance by Lauziere and Curtis.¹⁷ Even if this avoidance has disability-based “overtones,” judged collectively with the other four incidents it still cannot *objectively* be found to be sufficiently severe or pervasive as to constitute the establishment of a hostile environment. See, e.g., Morgan v. Massachusetts Gen. Hosp., 901 F.2d 186, 188,

¹⁷ Thurston also argues that when he arrived at the Post Office in November, 1997 (during the period he was on leave), Balko told him to leave and not to return, without explanation. See Pl.’s Opp’n Mem. at 17. However, Thurston has not alleged any other instances of overt behavior by Balko based upon his disability. See id. (“This method of dealing with an employee with an anxiety disorder who had recently been hospitalized was so inappropriate as to suggest that Mr. Balko intended to cause Mr. Thurston additional distress”). He has therefore not alleged sufficient facts to create a link between this event and his disability as required under Morrison. See 108 F.3d at 441. Therefore, I do not consider this incident.

192-93 (1st Cir. 1990) (upholding grant of summary judgment when employee alleged (1) gay co-worker stood behind him while employee mopped causing employee to bump into him, (2) co-worker “peeped” at employee’s “privates” in the restroom, (3) co-worker asked him to dance at party and began to “pull at him,” (4) co-worker “hung around him a lot”); Landrau Romero v. Caribbean Restaurants, Inc., 14 F. Supp.2d 185, 190-91 (D.P.R. 1998) (granting summary judgment when employee alleged five incidents of winks and smiles, as well as crude language and gestures); Mullenix v. Forsyth Dental Infirmary for Children, 965 F. Supp. 120, 151-156 (D. Mass. 1996) (granting summary judgment when employee alleged that she was laughingly told to wear a short skirt to a meeting, that she was asked why she needed a paycheck when she had a husband, and that she was called “hysterical” when she presented her findings).

If the above analysis is incorrect and if a reasonable jury could find that the 1997 and 1998 incidents established a hostile environment claim, the summary judgment record nevertheless establishes that the Postmaster General took reasonable steps to remedy conduct of which it was aware. To avoid liability for co-workers’ harassing behavior, an employer must show that it took “reasonable steps under the circumstances to correct and/or prevent . . . harassment.” DeGrace v. Rumsfeld, 614 F.2d 796, 805 (1st Cir. 1980); see also Lipsett v. University of Puerto Rico, 864 F.2d 881, 901 & n. 22 (1st Cir. 1988) (citing 29 C.F.R. § 1604.11(d)). What is “reasonable” depends upon the seriousness of the harm posed by the allegedly harassing conduct. See DeGrace, 614 F.2d at 805.

In this case, each time Balko became aware of conduct that disturbed Thurston, he investigated the event promptly and reprimanded those involved.¹⁸ He also called a group meeting before Thurston returned from leave to inform his co-workers that any disability-based references would not be tolerated. Notably, after each reprimand or individual discussion by Balko with a particular worker, there is no evidence that the conduct discussed recurred. Given that the incidents were sporadic in nature and generally involved isolated comments by only a few co-workers, Balko's decision to conduct "official discussions" or other more informal discussions with the wrongdoers was tailored to the severity of the incidents alleged.

Thurston personally may feel that stronger discipline would have been more appropriate, but that is not the legal standard. Rather, the reasonableness of the defendant's action is the issue. See, e.g., Saxton v. American Tel. and Tel. Co., 10 F.3d 526, 535 (7th Cir. 1993) ("Although [the defendant's] remedial efforts did not meet [the plaintiff's] expectations, they were both timely and reasonably likely to prevent the conduct underlying her complaint from recurring"). There is no evidence in the summary judgment record that Balko did not take feasible and reasonable measures to combat the offensive conduct as he became aware of it.

¹⁸ For example, Balko assigned a supervisor to investigate the October 14th confrontation between Lauziere and Thurston the following day. He met with Lauziere within one week of the incident to discuss Lauziere's behavior. A week later, Lauziere sent a letter to Thurston expressing his "deep regrets" over his conduct. Regarding the "suicide watch" comment, Balko gave Hamilton an "official discussion" the day after he learned of the incident. Balko stopped Lauziere's and Curtis's practice of avoiding Thurston on breaks.

See DeGrace, 614 F.2d at 805. Indeed, after Balko took action against the individual wrongdoers, the conduct did not recur.

IV. CONCLUSION

I conclude on the summary judgment record, construing the facts properly established under Local Rule 56 in Thurston's favor, that Thurston cannot establish his harassment claim under the applicable legal standards. Therefore, summary judgment is **GRANTED** to the defendant.

SO ORDERED.

DATED THIS 8TH DAY OF MARCH, 2000.

D. BROCK HORNBY
UNITED STATES CHIEF DISTRICT JUDGE

