

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

BARBARA VOISINE,)	
)	
<i>Plaintiff</i>)	
)	
v.)	<i>Docket No. 98-340-P-DMC</i>
)	
RICHARD J. DANZIG, Secretary,)	
Department of the Navy,)	
)	
<i>Defendant</i>)	

**MEMORANDUM DECISION ON DEFENDANT’S MOTION
FOR SUMMARY JUDGMENT¹**

The defendant, the Secretary of the Navy, moves for summary judgment on all counts of the complaint in this action by a former civilian employee of the Portsmouth Naval Shipyard in Kittery, Maine. I grant the motion in part and deny it in part.

I. Summary Judgment Standards

Summary judgment is appropriate only if “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” Fed. R. Civ. P. 56(c). “In this regard, ‘material’ means that a contested fact has the

¹ Pursuant to 28 U.S.C. § 636(c), the parties have consented to have United States Magistrate Judge David M. Cohen conduct all proceedings in this case, including trial, and to order entry of judgment.

potential to change the outcome of the suit under the governing law if the dispute is resolved favorably to the nonmovant. By like token, ‘genuine’ means that ‘the evidence about the fact is such that a reasonable jury could resolve the point in favor of the nonmoving party’” *McCarthy v. Northwest Airlines, Inc.*, 56 F.3d 313, 315 (1st Cir. 1995) (citations omitted). The party moving for summary judgment must demonstrate an absence of evidence to support the nonmoving party’s case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). In determining whether this burden is met, the court must view the record in the light most favorable to the nonmoving party and give that party the benefit of all reasonable inferences in its favor. *Cadle Co. v. Hayes*, 116 F.3d 957, 959 (1st Cir. 1997). Once the moving party has made a preliminary showing that no genuine issue of material fact exists, “the nonmovant must contradict the showing by pointing to specific facts demonstrating that there is, indeed, a trialworthy issue.” *National Amusements, Inc. v. Town of Dedham*, 43 F.3d 731, 735 (1st Cir. 1995) (citing *Celotex*, 477 U.S. at 324); Fed. R. Civ. P. 56(e). “This is especially true in respect to claims or issues on which the nonmovant bears the burden of proof.” *International Ass’n of Machinists & Aerospace Workers v. Winship Green Nursing Ctr.*, 103 F.3d 196, 200 (1st Cir. 1996) (citations omitted).

II. Factual Background

The following undisputed material facts are appropriately supported in the summary judgment record.

The plaintiff began to work at the Portsmouth Naval Shipyard, which is operated by the United States Navy, in 1980. Complaint (Docket No. 1) ¶ 3; Answer (Docket No. 2) ¶ 3. She became an apprentice in the sheet metal shop in 1981. *Id.* She worked on the second shift as a sheet

metal worker. Deposition of Barbara M. Voisine (“Plaintiff’s Dep.”), copy of transcript attached to Affidavit of Authenticity [of David R. Collins] (“Collins Aff.”), submitted with Statement of Facts including Statement of Material Facts (“Defendant’s SMF”), attached to Defendant’s Motion for Summary Judgment (“Motion”) (Docket No. 14), at 146. The second shift foreman was Ronald Rumberger. Plaintiff’s Dep. at 102.

In or around 1992 the shipyard went through a reduction in force and many workers were laid off, including some from the sheet metal shop. Complaint ¶ 6; Answer ¶ 6; Plaintiff’s Dep. at 124. After the layoffs, the plaintiff was the only woman working in the sheet metal shop. Defendant’s SMF ¶ 41 n.31; Plaintiff’s Opposing Statement of Material Facts (“Plaintiff’s SMF”) (Docket No. 17) ¶ 41.

One of two bathrooms in close proximity in the sheet metal shop was designated as the ladies’ room. Plaintiff’s Dep. at 96-97. This bathroom was near the “coffee mess,” and male employees had used the bathroom for many years to get water to make coffee and to clean their lunch dishes. *Id.* at 95-96; Affidavit [of Barbara Mason Voisine] (“Plaintiff’s Aff.”), copy attached to Declaration of Authenticity [of Lorrie Oeser] (“Oeser Decl.”), submitted with Defendant’s SMF, ¶ 20; Defendant’s SMF ¶ 42; Plaintiff’s SMF ¶ 42. On December 20, 1994, when the plaintiff used the toilet in that bathroom at around 5:30 p.m., she sat in a substance that she believed to be semen. Defendant’s SMF ¶ 40; Plaintiff’s SMF ¶ 40; Plaintiff’s Dep. at 100. Prior to that date the plaintiff had complained about male employees using the toilet in that bathroom. Plaintiff’s Dep. at 123-24; Deposition of Lorrie P. Oeser (“Oeser Dep.”), copy of transcript attached to Plaintiff’s Additional Statement of Material Facts (“Plaintiff’s Second SMF”) (Docket No. 18), at 18-23. The plaintiff immediately reported the semen incident to Rumberger. Plaintiff’s Dep. at 106. Rumberger went

into the bathroom and looked at the substance on the toilet seat. Affidavit [of Ronald Rumberger] (“Rumberger Aff.”), attached to Oeser Decl., ¶ 6. The plaintiff was very upset and went home a few minutes later. Plaintiff’s Dep. at 106, 108.

Rumberger reported the incident to Sherman Alexander, the structural shop supervisor. Rumberger Aff. ¶¶ 3, 12-13. Alexander believes that the plaintiff also showed the toilet seat to him. Affidavit [of Sherman Alexander] (“Alexander Aff.”), attached to Oeser Decl., ¶ 6. Several other shipyard employees saw the substance on the toilet seat the following day. Affidavit [of Richard R. Boucher], attached to Oeser Decl., ¶¶ 5-6; Affidavit [of Steve Meagher], attached to Oeser Decl., ¶¶ 6-8; Affidavit [of Stephen Szydlo] (“Szydlo Aff.”), attached to Oeser Decl., ¶¶ 4-8. Alexander and Szydlo cleaned the toilet seat without taking a sample of the material. Alexander Aff. ¶¶ 10-11; Szydlo Aff. ¶ 10.

On December 21, 1994 the plaintiff attended a training class at the shipyard, after which she went to speak with Alexander about the incident. Plaintiff’s Dep. at 128-30. She took the rest of the day off, with Rumberger’s permission. *Id.* at 135. On December 22 the plaintiff attended the second shift Christmas party. *Id.* at 135-36. On December 23 the plaintiff called Tom Ducharme, shop superintendent for the sheet metal shop and others, Affidavit [of Tom Ducharme] (“Ducharme Aff.”), attached to Oeser Decl., ¶ 3, told him that she didn’t want to come back to work until something was done about the incident and asked him to put her on leave without pay “while you figure out what’s going to be done,” Plaintiff’s Dep. at 138.

The plaintiff returned to work on January 4, 1995. Plaintiff’s Aff. ¶ 23. Alexander told her that he had told “everybody” not to use the ladies’ bathroom. Plaintiff’s Dep. at 267-68. The plaintiff went into the bathroom and found half a canned pear floating in the toilet. *Id.* at 145;

Rumberger Aff. ¶ 19. She immediately brought Rumberger into the bathroom and he saw the pear. Rumberger Aff. ¶ 19; Plaintiff's Dep. at 145. The plaintiff told Rumberger that she was going to file a complaint with the shipyard's equal employment opportunity office, Plaintiff's Dep. at 148, and she did so on January 5, 1995, *id.* at 10-12; Deposition of Carol L. Lemelin ("Lemelin Dep."), copy of transcript attached to Collins Aff., at 34-36. The plaintiff filed a formal, written complaint on March 10, 1995. Lemelin Dep. at 61.

A lock was installed on the door of the ladies' room on January 6, 1995. Plaintiff's Aff. ¶ 21. A training session on the prevention of sexual harassment for all supervisors and general foremen in the sheet metal shop was conducted by Ducharme on January 17, 1995. Ducharme Aff. ¶ 23. Carol Lemelin, the equal employment specialist with whom the plaintiff filed her informal complaint, investigated that complaint. Lemelin Dep. at 5, 34; Plaintiff's Dep. at 13. The EEO office did not find anything in its investigation that warranted proceeding to the shipyard's disciplinary process. Lemelin Dep. at 77-78. The plaintiff stopped working at the shipyard in July 1995. Plaintiff's Aff. ¶ 1. Her physician submitted a note dated July 13, 1995 to the shipyard stating as follows: "Please place Ms. Voisine on worker's comp. leave of absence due to mental and emotional stress. This stress is a consequence of sexual harassment at her work site." Handwritten note signed by Frederick K. Thaler, M.D., Document No. 474, attached to Oeser Decl.

On October 10, 1995 Ducharme sent the plaintiff a letter in which he requested medical documentation to support her continued absence from work. Letter dated October 10, 1995 from T. N. Ducharme to Barbara Voisine, Document Nos. 469-70, attached to Oeser Decl. The plaintiff's physician responded to this request, stating *inter alia* that the nature of her illness was "stress due to sexual harassment," that it was unknown whether she could resume any type of work at that time,

that the minimum expected recovery time was unknown, and that her expected date of return to work was unknown. Statement signed by Frederick K. Thaler, M.D., dated October 15, 1995, Document No. 464, attached to Oeser Decl. (must be read in conjunction with Document Nos. 469–70). In a letter to the shipyard dated November 19, 1995 the psychologist treating the plaintiff reported that she “had a good response to the combined treatment of medication and psychotherapy,” but that “in the absence of official action in regard to the sexual harassment she experienced, Ms. Voisine would experience a significant relapse were she to return to her previous work environment.” Letter from Constance Hanley, Ph.D., to G. F. Alamed, dated November 19, 1995, Document No. 431, attached to Oeser Decl.

On December 13, 1995 Ducharme wrote to the plaintiff, advising her that the shipyard had determined that she could return to light duty work away from her regular work site and directing her to report for duty on January 2, 1996. Letter from T. N. Ducharme to Barbara Voisine dated December 13, 1995, Document No. 457, attached to Oeser Decl. The plaintiff did not report for this work because she believed that male employees who were responsible for harassing her were often in the Reserve Manpower Workcenter, where she had been assigned for light duty work. Plaintiff’s Dep. at 271. By letter dated January 22, 1996 the plaintiff’s attorney submitted a letter from Dr. Hanley indicating that “even light duty in the same work environment in which the original harassment occurred continues to [sic] contraindicated.” Letter dated January 20, 1996 from Constance Hanley, Ph.D., to William P. Briggs, Esq., attached to letter dated January 22, 1996 from William P. Briggs to T. N. Ducharme, Document Nos. 451 & 453, attached to Oeser Decl.

The shipyard sent the plaintiff a notice of proposed separation dated August 19, 1996 based on her “physical inability to perform the full duties of [her] position as Sheet Metal Mechanic.”

Notice of Proposed Separation dated August 19, 1996, Document Nos. 447-49, attached to Oeser Decl. Another note from the plaintiff's physician was submitted, stating in its entirety: "Barbara Voisine is unable to return to work at the Portsmouth Naval Shipyard until the issues of the work environment are resolved." Handwritten note signed by Frederick K. Thaler, M.D., dated September 9, 1996, Document No. 441, attached to Oeser Decl. In response to the shipyard's request for more information, Document No. 438, Dr. Thaler wrote to the shipyard on September 19, 1996 stating in full: "Ms. Voisine is unable to work safely at her job because of continued sexual harassment at her workplace," Document No. 436, both attached to Oeser Decl. The shipyard again requested additional information and scheduled an appointment for the plaintiff with a physician at the Naval Medical Clinic. Letter from G. F. Alamed to Barbara Voisine dated October 31, 1996, Document Nos. 433-34, attached to Oeser Decl. The plaintiff produced a letter from Dr. Hanley dated November 19, 1996 in which Hanley reported seeing the plaintiff eight times between October 1995 and April 1996 with one follow-up session in October 1996 and repeating almost word for word the diagnostic section of her January 1996 letter. Letter from Constance Hanley, Ph.D., to G. F. Alamed dated November 19, 1996, Document No. 431, attached to Oeser Decl. The physician who saw the plaintiff at the Naval Medical Clinic reported on November 26, 1996 that he "[f]ully concurs with Dr. Hanley's assessment and treatment." Supervisor's Report, Document No. 429, attached to Oeser Decl.

A notice of decision dated December 19, 1996 informed the plaintiff of the decision of M. Cannon, production resources officer, to terminate her employment based on her "physical inability to perform the full duties of [her] position as Sheet Metal Mechanic." Notice of Decision to Separate You from Government Service, dated December 19, 1996, Document Nos. 426-27, attached to Oeser

Decl. The plaintiff appealed her separation to the Merit Systems Protection Board. Letter from Suzanne J. O'Reilly to Merit System Protection Board, dated February 3, 1997, and enclosed appeal form, Document Nos. 394, 399-407, attached to Oeser Decl. A hearing was held before an administrative judge on May 20, 1997. Transcript, in the Matter of the Appeal of Barbara M. Voisine v. United States Department of the Navy, Merit Systems Protection Board, May 20, 1997 ("Tr."), attached to Oeser Decl. The administrative judge affirmed the separation in an opinion dated January 7, 1998. Barbara M. Voisine v. Department of the Navy, Merit Systems Protection Board, Docket No. BN-0752-97-0071-I-1, Document Nos. 258-69, attached to Oeser Decl. The Board subsequently denied the plaintiff's petition for review of this decision. Barbara M. Voisine v. Department of the Navy, Merit Systems Protection Board, Docket No. BN-0752-97-0071-I-1, Order dated August 28, 1996, Document Nos. 231-33, attached to Oeser Decl.

In September 1998 the Navy issued its final decision denying the plaintiff's formal EEO complaint that had been filed on March 10, 1995. Undated letter from Maxanne Witkin to Ms. Barbara Voisine, marked "Rec'd 1114 9/28/98," Document Nos. 1073-77, attached to Oeser Decl.

The plaintiff filed this action on September 29, 1998.

III. Discussion

A. Count I

Count I of the complaint alleges discriminatory employment practices in violation of Title VII of the Civil Rights Act of 1964, specifically 42 U.S.C. § 2000e-2(a)(1). Complaint (Docket No. 1) ¶ 30. The plaintiff's response to the defendant's motion for summary judgment on this claim makes clear that she is raising a claim of hostile work environment and that she does not rely on a

theory of continuing violation, instead offering evidence of incidents that would otherwise be time-barred as “background evidence.” Memorandum of Law in Opposition to the Defendant’s Motion for Summary Judgment (“Plaintiff’s Memorandum”) (Docket No. 16) at 7-15.

The statute invoked by the complaint provides:

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 race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-2(a). “For sexual harassment to be actionable, it must be sufficiently severe or pervasive to alter the conditions of the victim’s employment and create an abusive working environment.” *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 67 (1986) (internal quotation marks and brackets omitted). *See also* 29 C.F.R. § 1604.11(a).

The plaintiff must establish the following elements of this claim:

(i) that he/she is a member of a protected class; (ii) that he/she was subject to unwelcome sexual harassment; (iii) that the harassment was based upon sex; (iv) that the harassment was sufficiently severe or pervasive so as to alter the conditions of plaintiff’s [employment] and create an abusive [working] environment; and (v) that some basis for employer liability has been established.

Brown v. Hot, Sexy & Safer Prod., Inc., 68 F.3d 525, 540 (1st Cir. 1995); *Higgins v. New Balance Athletic Shoe, Inc.*, 21 F.Supp.2d 66, 73 (D. Me. 1998). The defendant contends that the plaintiff will be unable to establish the fourth element set forth above and that he is accordingly entitled to summary judgment on this claim. Memorandum of Law in Support of the Defendant’s Motion for Summary Judgment (“Defendant’s Memorandum”), attached to Defendant’s Motion for Summary Judgment (Docket No. 14), at 9. The defendant correctly points out that conduct that is not severe

or pervasive enough to create an environment that a reasonable person would find hostile or abusive falls outside the scope of Title VII. *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993). In this case, the perspective to be applied is that of a reasonable woman. See *Harris v. International Paper Co.*, 765 F. Supp. 1509, 1516 (D. Me. 1991). In addition, in order to determine whether an environment is hostile or abusive, a court must look at all of the circumstances, which may include “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.

In addition to the two incidents involving the ladies’ bathroom described above, the plaintiff also relies on the fact that “in 1994 and 1995 it took approximately six months after a request from the EEO for an offensive poster to be removed,”² Plaintiff’s Memorandum at 16, to support her hostile-environment claim.³ This was a poster, displayed on an employee’s locker in an area of the

² A federal employee alleging employment discrimination must exhaust administrative remedies before bringing a court action. *Jensen v. Frank*, 912 F.2d 517, 520 (1st Cir. 1990). In order to exhaust her administrative remedies, a plaintiff must contact an EEO counselor within 45 days of the allegedly discriminatory incident. 29 C.F.R. § 1614.105(a)(1). Failure to do so bars a plaintiff from bringing a court action based on that incident. *Jensen*, 912 F.2d at 520. Here, the defendant contends that the plaintiff raised only the bathroom incidents on a timely basis when she contacted the shipyard EEO office in January 1995. Defendant’s Memorandum at 6-7. However, there is evidence in the summary judgment record that the plaintiff also mentioned the presence of the offensive poster to the EEO counselor at this time. “Analysis of the Case,” Re: DON No. 95-001-2-003, Document Nos. 1078-83, attached to Oeser Decl., at 1082; Deposition of Lorrie P. Oeser, transcript attached to Plaintiff’s Additional Statement of Material Facts (Docket No. 18), at 24-27. The plaintiff has made no showing that any of the other incidents to which she refers in support of Count I were brought to the attention of an EEO counselor in a timely fashion.

³ The plaintiff also asserts, all without citation to the summary judgment record, that “[d]uring the spring of 1995, she continued to be verbally harassed by men in the shop,” “the conduct began to escalate over a period of time until it had a totally debilitating effect on Plaintiff’s ability to do her job,” and “[f]ollowing her complaint to the EEO, verbal harassment, especially by Mr. (continued...)

sheet metal shop through which the plaintiff had to walk to get to the lunch area, of a “scantily clad” woman “sprawled across a motorcycle.” Plaintiff’s Aff. ¶ 55. Although the plaintiff did not complain about the poster, it was removed in October 1994. *Id.* ¶¶ 57-58. In January 1995 the poster, with the figure of the woman cut out, was again placed on display, with a note that said, “There used to be a girl with the motorcycle, but she had to be removed. I guess she was jealous.” *Id.* ¶ 58; Plaintiff’s Dep. at 204-05. The altered poster was taken down on the day when the plaintiff first saw it, although the plaintiff had not complained about it. Plaintiff’s Aff. ¶ 60. The plaintiff did report to the EEO office that the poster was back up. Plaintiff’s Dep. at 218-19.

There is no need to determine at this time whether the untimely incidents to which the plaintiff refers in this case are sufficiently similar to the three timely incidents to allow the court to consider them as “background evidence in a proceeding in which the status of a current practice is at issue,” *United Air Lines, Inc. v. Evans*, 431 U.S. 553, 558 (1977); *Morrison v. Carleton Woolen Mills, Inc.*, 108 F.3d 429, 439 (1st Cir. 1997), because the three incidents alone provide sufficient evidence of the fourth element of a hostile environment sexual discrimination claim to avoid the entry of summary judgment in favor of the defendant on Count I.

³(...continued)

Lightfoot, escalated.” Plaintiff’s Memorandum at 4, 10, 14. One citation to the record made in the plaintiff’s memorandum in support of her contention that the alleged harassment “was more pervasive than the discrete incidents indicated by the Defendant,” Plaintiff’s Memorandum at 7, suggests that the plaintiff reported to a supervisor, but not to the EEO office, that Lightfoot was “intentionally saying things within her earshot and being unpleasant and . . . making insinuations” in April 1995. Lemelin Dep. at 68 & Document No. 1900, copy attached to Affidavit of Authenticity [of Cynthia A. Dill, Esq.] (Docket No. 20). When considering a motion for summary judgment, the court may not credit conclusory allegations, improbable inferences or unsupported speculation. *Shorette v. Rite Aid of Maine, Inc.*, 155 F.3d 8, 12 (1st Cir. 1998). The plaintiff has not provided evidence sufficient to allow the court to consider any possible harassment that took place after the bathroom and poster incidents.

In general, “isolated acts or occasional episodes will not merit relief” on a hostile work environment claim. *Duplessis v. Training & Dev. Corp.*, 835 F. Supp. 671, 677 (D. Me. 1993) (quoting *Kotcher v. Rosa & Sullivan Appliance Ctr., Inc.*, 957 F.2d 59, 62 (2d Cir. 1992)). However, a single incident may be sufficiently egregious to create a hostile work environment. *King v. Board of Regents of Univ. of Wisconsin Sys.*, 898 F.2d 533, 537 (7th Cir. 1990). Sporadic behavior, if sufficiently abusive, may support a Title VII claim. *Chalmers v. Quaker Oats Co.*, 61 F.3d 1340, 1345 (7th Cir. 1995). Here, viewing the record in the light most favorable to the plaintiff and from the perspective of a reasonable woman, the first bathroom incident is egregious, and the second incident, which occurred on the plaintiff’s first day of work following the first incident, could be interpreted, as did the plaintiff, as a visible warning to her that the toilet she used could be sullied whenever the harasser chose to do so again. The poster incident, standing alone, could not create a hostile working environment, but it may be considered along with the bathroom incidents. Under the circumstances, I cannot say that no reasonable jury could conclude on the basis of this record that the harassment alleged by the plaintiff was sufficiently severe to alter the conditions of her employment. *See, e.g., Llewellyn v. Celanese Corp.*, 693 F. Supp. 369, 372-73, 380 (W.D.N.C. 1988) (incidents in which male co-employees falsely told plaintiff that only shower available was not in use by any male co-employee and in which male co-employee exposed his genitals to plaintiff as she was on her way to women’s restroom subjected her to “a work environment in which her innermost privacy was intentionally assaulted by co-workers”).

The defendant also contends that he is entitled to summary judgment on Count I because the plaintiff’s evidence concerning the fifth element, employer liability, is insufficient. Defendant’s Memorandum at 15-19. Specifically, he argues that the shipyard’s “management responded

reasonably to those incidents that were brought to its attention.” *Id.* at 17. The applicable regulation provides that an employer is responsible for sexually harassing conduct between fellow employees that occurs in the workplace where it knew or should have known of the conduct, “unless it can show that it took immediate and appropriate corrective action.” 29 C.F.R. § 1604.11(d).⁴ *See Faragher v. City of Boca Raton*, 118 S.Ct. 2275, 2289 (1998) (listing cases). “[A]n employer who has taken reasonable steps under the circumstances to correct and/or prevent . . . harassment by its nonsupervisory personnel has not violated Title VII.” *DeGrace v. Rumsfeld*, 614 F.2d 796, 805 (1st Cir. 1980).

The defendant bases his argument primarily on *DeGrace*, a case decided on appeal following trial, citing the following language from the opinion:

[F]or plaintiff to prevail on the theory that defendants violated Title VII by discharging him for absenteeism stemming from the offensive conduct of his fellow employees, we think plaintiff had to establish

1. that he was reasonably placed in fear for his personal safety as a result of the . . . misconduct of his fellow employees;

2. that after [the employer] was aware or should have been aware of the misconduct and plaintiff’s reasonably based fear it failed to take reasonably feasible measures to deal with the situation;

3. that but for his reasonably based fear and his supervisors [sic] culpable failure to take corrective action plaintiff would have reported for duty;

4. that plaintiff, himself, acted in a manner reasonable under the circumstances.

614 F.2d at 804. Subsequent case law has established a more appropriate test for the first element

⁴ The plaintiff does not contend that any of the alleged harassment was perpetrated by supervisory personnel, a situation to which a different standard applies. 29 C.F.R. § 1604.11(c).

set forth in *DeGrace* by the First Circuit: whether the conduct created an abusive working environment. *Harris*, 510 U.S. at 21. “Reasonable fear for [her] personal safety” no longer appears to be an element of a hostile environment sexual harassment claim. *DeGrace* was also decided some eleven months before 29 C.F.R. § 1604.11 became effective, 45 Fed. Reg. 74677, and does not mention the requirement included in the regulation that the remedial action by the employer be “immediate” as well as “appropriate.” Accordingly, to the extent that *DeGrace* remains applicable, I conclude that the first item on its list has been satisfied for purposes of summary judgment for the reasons discussed above and that further references to the plaintiff’s “reasonably based fear” in the *DeGrace* list must be read as “the altered conditions of employment,” see *Vinson*, 477 U.S. at 67, and the reference to “reasonably feasible measures to deal with the situation” must be read as “immediate and appropriate corrective action,” 29 C.F.R. § 1604.11(d).

The defendant contends that by installing a lock on the door to the ladies’ bathroom, trying to determine who was responsible, issuing a memorandum prohibiting men from using the bathroom at issue, and conducting additional training for supervisors on the prevention of sexual harassment, it responded reasonably to the two bathroom incidents and that by removing the motorcycle poster it responded reasonably to the other incident reported in a timely fashion by the plaintiff. Defendant’s Memorandum at 17-18. That is an argument that may well prevail at trial. At the summary judgment stage of this proceeding, however, the test is whether there are any disputed material facts regarding this issue that, interpreted in the light most favorable to the plaintiff, could allow a jury to find in the plaintiff’s favor. Here, there is clearly a dispute about the timeliness and effectiveness of the actions listed by the defendant with respect to the bathroom incidents. The lock was not installed until January 6, 1995, sixteen days after the plaintiff had reported the first incident

and two days after the second incident. The memorandum was not issued until January 11, 1995. Document No. 1990, attached to Oeser Decl. The additional training was not conducted until January 17, 1995. Ducharme Aff. ¶ 23. The extent and the effectiveness of the shipyard's investigation of the plaintiff's complaint is hotly disputed by the parties.

That dispute is essentially the same as the parties' dispute concerning the third item in the *DeGrace* list. The plaintiff contends that she would have returned to work if the shipyard's investigation had been effective, and the shipyard contends that it could not have done anything beyond what it did in an attempt to identify the person responsible for the bathroom incidents. That dispute presents a quintessential jury issue. Finally, the defendant's contention that the plaintiff did not act reasonably in refusing to return to work until the perpetrator was identified and punished is based on his conclusion that the shipyard had done all that it could do to identify that person. That conclusion is not the only one that may be drawn from the evidence in the summary judgment record, and, accordingly, the defendant is not entitled to judgment as a matter of law under *DeGrace*. See *Duplessis*, 835 F. Supp. at 679-80 (discussing sufficiency of employer's response on motion for summary judgment). See also *Sarin v. Raytheon Co.*, 905 F.Supp. 49, 53 (D. Mass. 1995) (chief measure of adequacy of employer's response is not victim's personal sense of justice but rather, "particularly where there is no prior history of workplace harassment," whether behavior that gave rise to complaint has ceased and does not threaten to reoccur).

The defendant offers no other basis for summary judgment on Count I. His motion is denied on this count.

B. Count II

Count II raises two claims: refusal to accommodate the plaintiff's disability and engaging in

a prohibited personnel practice, in violation of 5 U.S.C. §§ 2302(b) and 7701(c)(2). Complaint ¶ 32. Here, the defendant professed in his initial memorandum of law to understand that the plaintiff asserts in Count II only a discrimination claim, upon which she is entitled to *de novo* review in this court, and not a claim that the decision of the Merit Systems Protections Board should be reversed on any ground other than that of prohibited discrimination, to which an appellate standard of review would apply. Defendant's Memorandum at 2 n.2; 5 U.S.C. § 7703(c). The plaintiff has suggested in her response that she did intend to raise both types of claims in Count II, although she does not address any non-discrimination claims, apparently because they "have not been raised in Defendant's Motion for Summary Judgment." Plaintiff's Memorandum at 5. The defendant does not mention this issue, upon which he initially "reserve[d] the right to brief the Court," Defendant's Memorandum at 2 n.2, in his reply memorandum.

As a result, any claims raised in Count II seeking review of the decision of the Merit Systems Protection Board on grounds other than the alleged discrimination will not be affected by the court's ruling on the instant motion. It is clear that such claims are properly before this court, despite the language of section 7703(b)(1) that limits review of such claims to the United States Court of Appeals for the Federal Circuit. If a plaintiff raises "both discrimination and distinct nondiscrimination claims arising from the MSPB determination," the district court has jurisdiction over both types of claims. *Sever v. Department of Commerce*, 818 F. Supp. 382, 389 (D.D.C. 1993); *Sloan v. West*, 140 F.3d 1255, 1260 (9th Cir. 1998); *Wiggins v. United States Postal Serv.*, 653 F.2d 219, 220-22 (5th Cir. 1981). However, it is not at all clear that the plaintiff is entitled to a jury trial on her claim for review of the Merit System Protection Board's action with respect to issues other than the alleged discrimination, for which the standard of review is whether the action is arbitrary,

capricious, an abuse of discretion, unsupported by substantial evidence, obtained without lawful procedure, or otherwise not in accordance with law, 5 U.S.C. § 7703(c), a standard customarily applied by courts rather than juries. The parties should be prepared to address the question whether the plaintiff is entitled to a jury trial on this aspect of Count II of the complaint in the near future.

The plaintiff's discrimination claim arises under 5 U.S.C. §§ 2302(b)(1)(D) and 7702(a)(1)(B)(iii).⁵ Both of those statutes incorporate the Rehabilitation Act of 1973, 29 U.S.C. § 791 *et seq.*, as the basis for any claim of discrimination based on disability, as is the plaintiff's claim here, Complaint ¶ 21. Under the Rehabilitation Act, "[n]o otherwise qualified individual with a disability. . . shall, solely by reason of her or his disability, . . . be subjected to discrimination under any program or activity . . . conducted by any Executive agency" 29 U.S.C. § 794. In order to state a claim under the Act, a plaintiff must show that she has a disability covered by the Rehabilitation Act, that she is a "qualified individual" with respect to the position at issue, that the disability was a reason for the discharge, and that the requested accommodation was reasonable. *Leary v. Dalton*, 58 F.3d 748, 752-53 (1st Cir. 1995). The defendant contends that the plaintiff cannot show that she is a handicapped individual under the Rehabilitation Act, that she was not "otherwise qualified" for her position, and that her requested accommodation was not reasonable. Defendant's Memorandum at 20-24. The plaintiff responds, without citation to authority, that she met all of the requirements for this claim.⁶

⁵ Section 7703(a)(1) provides that an employee aggrieved by a final decision of the Merit Systems Protection Board may obtain judicial review of that decision. Section 7703(b)(2) provides the time limit for filing for judicial review of claims of discrimination subject to section 7702.

⁶ The plaintiff contends that the shipyard should have investigated the possibility of transferring her to another shipyard as an accommodation. Plaintiff's Memorandum at 20. The
(continued...)

The regulation that implements the Rehabilitation Act provides, in relevant part:

(a) Definitions.

(1) Individual with handicap(s) is defined for this section as one who:

(i) Has a physical or mental impairment which substantially limits one or more of such person's major life activities;

* * *

(3) Major life activities means functions, such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.

* * *

(6) Qualified individual with handicaps means with respect to employment, an individual with handicaps who, with or without reasonable accommodation, can perform the essential functions of the position in question without endangering the health and safety of the individual or others and who, . . .

(i) Meets the experience or education requirements . . . of the position in question

(b) The Federal Government shall become a model employer of individuals with handicaps. . . . An agency shall not discriminate against a qualified individual with physical or mental handicaps.

(c) Reasonable accommodation.

(1) An agency shall make reasonable accommodation to the known physical or mental limitations of an applicant or employee who is a qualified

⁶(...continued)

defendant responds that the plaintiff did not seek this accommodation at any time before mentioning it in her memorandum, and that an employer is not required to anticipate every possible accommodation that the employee might accept. Reply to the Plaintiff's Opposition to the Defendant's Motion for Summary Judgment ("Defendant's Reply") (Docket No. 27) at 4 n.4. A plaintiff may not rely upon the failure to provide an accommodation that she did not seek from the employer. *Feliciano v. State of Rhode Island*, 160 F.3d 780, 787 (1st Cir. 1998). See also *Gonzagowski v. Widnall*, 115 F.3d 744, 749 (10th Cir. 1997) (plaintiff who never requested transfer at issue and makes no showing that such position was open cannot rely on lack of such transfer as evidence of lack of accommodation); *Schmidt v. Safeway, Inc.*, 864 F. Supp. 991, 997 (D.Or. 1994) (employee cannot expect employer to know that he secretly wanted a particular accommodation and sue the employer for not providing it).

individual with handicaps unless the agency can demonstrate that the accommodation would impose an undue hardship on the operations of its program.

29 C.F.R. § 1614.203.

The defendant contends that the plaintiff does not qualify as a handicapped individual under the Rehabilitation Act and the applicable regulatory definition because she is not substantially limited in a major life activity. The plaintiff identifies her disability as “[t]he mental and physical symptoms of stress she experienced . . . caused by inappropriate sexual harassment on the job” which precluded her “from working in circumstances where she would be in contact with her harassers.” Plaintiff’s Memorandum at 19. The only major life activity possibly limited by this disability is working.

When an individual claims that she is substantially limited in the major life activity of working, her condition must significantly restrict her ability to perform either a class of jobs or a broad range of jobs in various classes; an impairment does not substantially limit the ability to work if it only prevents the individual from performing either a particular job or a narrow range of jobs. *Sutton v. United Air Lines, Inc.*, ___ S.Ct. ___, 1999 WL 407488 (Jun. 22, 1999), at *14; *Stewart v. Happy Herman’s Cheshire Bridge, Inc.*, 117 F.3d 1278, 1285 (11th Cir. 1997);⁷ *Bolton v.*

⁷ *Stewart*, like most of the cases cited in this section of my decision, deals with a claim under the Americans with Disabilities Act (“ADA”), 42 U.S.C. §12101 *et seq.* 117 F.3d at 1285. The First Circuit has held that the standards used to determine whether the Rehabilitation Act has been violated are the same as those applied to employment discrimination actions under the ADA, citing 29 U.S.C. § 794(d), and has noted that “disability” is defined identically under the two statutory schemes. *Tardie v. Rehabilitation Hosp. of Rhode Island*, 168 F.3d 538, 542 & n.1 (1st Cir. 1999). Accordingly, case law interpreting the ADA definition of disability is applicable to the term as it is used in the Rehabilitation Act. *See also Tyndall v. National Educ. Ctrs., Inc.*, 31 F.3d 209, 213 n. 1 (4th Cir. 1994) (using Rehabilitation Act case law to interpret ADA definition of “qualified individual with handicap”).

Scrivner, Inc., 36 F.3d 939, 944 (10th Cir. 1994). Here, the plaintiff has not alleged that her impairment “substantially limit[s] [her] employment generally.” *Weiler v. Household Fin. Corp.*, 101 F.3d 519, 524 (7th Cir. 1996). At most, she has alleged that her impairment prevents her from returning to work at any location within the shipyard where she believes she might encounter the other employee or employees whom she believes to be responsible for the harassment she allegedly suffered. Debilitating stress, when connected only with a particular job or particular other employee, does not limit an employee in a range of jobs. *Krocka v. Bransfield*, 969 F. Supp. 1073, 1083 (N.D.Ill. 1997). If a plaintiff is in fact capable of performing other jobs, then she is not substantially limited in her ability to work and thus not disabled. *Soileau v. Guilford of Maine, Inc.*, 928 F. Supp. 37, 49 (D. Me. 1996), *aff’d* 105 F.3d 12 (1st Cir. 1997). *See also Dewitt v. Carsten*, 941 F. Supp. 1232, 1236 (N.D.Ga. 1996) (condition making it impossible for plaintiff to work in a jail not a disability under the ADA). The plaintiff has failed to show that she is disabled within the meaning of the Rehabilitation Act.

Under these circumstances, it is unnecessary to consider the remaining elements of a disability discrimination claim under either section 2302 or section 7702. The defendant is entitled to summary judgment on that portion of Count II that raises a disability claim.

C. Count III

Count III of the complaint alleges that the plaintiff’s employment was terminated in retaliation for her filing of an EEO complaint. Complaint ¶ 34. The defendant contends that he is entitled to summary judgment on this count because the testimony of the individual who made the decision to terminate the plaintiff’s employment — that he was not influenced by her EEO complaint

— is undisputed and because the time lapse between the filing of that complaint and the date of the termination is too long to allow an inference of a nexus between the two events. Defendant’s Memorandum at 25-27.

The complaint alleges retaliation in violation of “5 U.S.C. 2302,” Complaint ¶ 34, presumably 5 U.S.C. § 2302(b)(9)(A), which provides in relevant part:

Any employee who has authority to take, direct others to take, recommend, or approve any personnel action, shall not, with respect to such authority —

* * *

(9) take or fail to take, or threaten to take or fail to take, any personnel action against any employee or applicant for employment because of —

(A) the exercise of any appeal, complaint, or grievance right granted by any law, rule, or regulation

The plaintiff refers to this claim in her memorandum of law as one asserted under Title VII, specifically 42 U.S.C. § 2000e-3(a). Plaintiff’s Memorandum at 17. This apparent discrepancy has no practical effect, however, because the elements of a prima facie claim under either statute are the same.

To establish a prima facie case of retaliation, [a plaintiff] must show that: (1) she engaged in protected conduct under Title VII . . . ; (2) she suffered an adverse employment action; and (3) a causal connection existed between the protected conduct and the adverse action.

Fennell v. First Step Designs, Ltd., 83 F.3d 526, 535 (1st Cir. 1996) (Title VII).

A plaintiff alleging reprisal under 5 U.S.C. § 2302(b)(9)

has the burden of proving that: (1) [s]he was engaged in a protected activity; (2) [s]he was subsequently treated by the Agency in an adverse manner; (3) the Agency had actual or constructive knowledge that [she] engaged in a protected activity; and (4), there was a genuine nexus between the protected activity and [her] removal.

Moore v. Defense Logistics Agency, 670 F.Supp. 800, 806-07 (N.D.Ill. 1987).

Here, the plaintiff filed an informal EEO complaint on January 5, 1995 and a formal, written complaint on March 10, 1995. The adverse personnel action was initiated by a notice of proposed termination dated August 19, 1996, followed by the submission of additional information by the plaintiff and a medical examination, and completed by a notice of termination dated December 19, 1996. The defendant does not dispute that the filing of an EEO complaint is a protected activity, that the plaintiff suffered an adverse employment action, or that the shipyard had knowledge of the filing of the complaint. He contends only that the plaintiff cannot satisfy the final element of this claim.

The plaintiff asserts that “her termination was not the only adverse employment action. There is evidence on the record that Tom Ducharme opposed any good faith effort to find another job for Plaintiff.” Plaintiff’s Memorandum at 17. Apparently, the plaintiff considers Ducharme’s December 1995 offer of light duty work away from the shop where she had been working to be an adverse employment action. *Id.* at 18-19. In this circuit,

“[t]ypically, 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). “Determining whether an action is materially adverse necessarily requires a *case-by-case* inquiry. Moreover, the inquiry must be cast in objective terms. Work places are rarely idyllic retreats, and the mere fact that an employee is displeased by an employer’s act or omission does not elevate that act or omission to the level of a materially adverse employment action.” *Id.*

Simas v. First Citizens’ Fed. Credit Union, 170 F.3d 37, 49 (1st Cir. 1999) (Title VII retaliation claim). *See also Hernandez-Torres v. Intercontinental Trading, Inc.*, 158 F.3d 43, 47 (1st Cir. 1998) (listing possible adverse employment actions under Title VII); *Boone v. Goldin*, ___ F.3d ___, 1999

WL 308606 (4th Cir. May 17, 1999), at * 1 (typical requirements for showing adverse employment action under Title VII are discharge, demotion, decrease in pay or benefits, loss of job title or supervisory responsibility, or reduced opportunities for promotion). The plaintiff has offered no evidence beyond her own conclusory allegation to support a finding that the order that she report to light duty work was an adverse employment action. Accordingly, I will consider only her termination with respect to the retaliation claim.

The defendant contends that Michael Cannon, the shipyard official who made the decision to terminate the plaintiff's employment, testified that her EEO activity had no impact on his decision, Defendant's SMF ¶¶ 75-76, and that this evidence is uncontradicted in the record, requiring the entry of summary judgment in his favor on the retaliation claim, *see Moore*, 670 F.Supp. at 807 (uncontradicted evidence that supervisor did not make alleged statement supports finding that plaintiff did not establish causal nexus between protected activity and removal). However, the portion of the record cited for this point by the defendant does not support it.⁸ Accordingly, this contention cannot provide the basis for entry of summary judgment.

The defendant also relies on the lapse of time between the filing of the plaintiff's EEO complaint and her termination to establish the lack of a causal nexus between the two events. At the most, this period was twenty-three and one-half months (from the filing of the informal complaint on January 5, 1995 to the termination on December 19, 1996) and, at the least, 17 months (from the filing of the formal written complaint on March 10, 1995 to the notice of proposed separation on August 19, 1996). I conclude that the filing of the informal EEO complaint is the date from which

⁸ It appears that the supporting evidence may be present on page 122 of the transcript of Cannon's testimony before the administrative law judge. *See* Tr. at 121. However, the defendant has neither cited to that page of the transcript nor provided it to the court.

the elapsed time should be calculated, since it is clear that the plaintiff informed her superior that she would file the complaint even before she did so, and an investigation including interviews with many supervisory personnel began immediately thereafter. Using the date of the notice of proposed separation, without deciding whether it or the date of actual separation is in fact the appropriate date to be used, in order to give the plaintiff the benefit of inferences to be drawn from the facts as required when considering a motion for summary judgment, the elapsed time for purposes of this analysis is therefore nineteen and one-half months.

The defendant relies on case law holding that lapses from four months to two years between the protected activity and the adverse employment action are too long to support an inference of a causal nexus. Defendant's Memorandum at 25-26. Not surprisingly, the plaintiff counters with citations to two cases in which lapses of two years and four years were held not to be dispositive. Plaintiff's Memorandum at 18. However, the plaintiff's citations are to cases from the Third Circuit and the Eastern District of Pennsylvania. Decisions of the First Circuit control in this case. In *Mesnick v. General Elec. Co.*, 950 F.2d 816 (1st Cir. 1991) (Age Discrimination in Employment Act; retaliation claim encompasses same elements as Title VII retaliation claim), the First Circuit held that the passage of nine months between the employee's filing of charges with the EEOC and his firing (and a lapse of eighteen months between his first informal complaint of discrimination and his firing) "suggests the absence of a causal connection between the statutorily protected conduct and the adverse employment action." *Id.* at 828 (upholding entry of summary judgment for the defendant). Earlier, in *Oliver v. Digital Equip. Corp.*, 846 F.2d 103 (1st Cir. 1988), the First Circuit held that a gap of twenty-one months between the filing of an EEOC complaint and the plaintiff's discharge was insufficient to serve as indirect proof of a causal connection under Title VII. *Id.* at

110-11 (upholding summary judgment).

Here, the plaintiff offers no direct proof of a causal connection between the filing of either of her EEO complaints and the termination of her employment. In addition to arguing that the lapse of time between these events is “not dispositive,” she contends that a causal connection “may” be established if a reasonable jury could find that Cannon “made no independent investigation as to termination, but merely rubber stamped a recommendation based on discriminatory motive.” Plaintiff’s Memorandum at 18. She does not suggest what evidence is present in the record indicating that Cannon made no investigation, that he adopted a recommendation, whose recommendation he adopted, or that the recommendation was based on a discriminatory motive. This conclusory statement is not the showing of specific facts demonstrating the existence of a trialworthy issue that is required of the nonmoving party on summary judgment. *National Amusements*, 43 F.3d at 735. The plaintiff, who bears the burden of proof with respect to the causal nexus element of a claim of retaliation, *Mesnick*, 950 F.2d at 828, has not demonstrated the existence of a disputed issue of material fact on this point, *Johnson v. University of Wisconsin-Eau Claire*, 70 F.3d 469, 479 (7th Cir. 1995) (in order to demonstrate causal link, plaintiff must show that employer would not have taken adverse action but for plaintiff’s protected activity).

While the lapse of time, standing alone, may not always serve to refute an allegation of causal nexus between protected activity and adverse employment action when there is other evidence of such a nexus, *see, e.g., Davidson v. Midelfort Clinic, Ltd.*, 133 F.3d 499, 511 (7th Cir. 1998), in this case the plaintiff has included no evidence in the summary judgment record of the existence of such a nexus. Accordingly, bearing in mind the First Circuit’s holdings that a twenty-one month lapse and a nine-month lapse may serve as evidence of the lack of such a nexus, *see also Johnson*, 70 F.3d

at 480 (substantial time lapse is “counter-evidence of any causal connection”), I conclude that the defendant is entitled to summary judgment on Count III.

IV. Conclusion

For the foregoing reasons, the defendant’s motion for summary judgment is **GRANTED** as to Count III and that portion of Count II that is based on alleged discrimination on the basis of disability or handicap, and otherwise **DENIED**.

Dated this 14th day of July, 1999.

David M. Cohen
United States Magistrate Judge