



*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 relevant facts are appropriately supported in the parties' respective statements of material facts filed in connection with the pending motion. The plaintiff was employed as a full-time associate for the night receiving crew at the Wal-Mart store in Falmouth, Maine from on or about October 14, 1998 until December 21, 1998. Defendant's Statement of Material Facts as to Which There is No Genuine Issue of Material Fact ("Defendant's SMF") (Docket No. 12) ¶¶ 1-2; Plaintiff's Opposing Statement of Material Facts and Accompanying Factual Statement ("Plaintiff's Responsive SMF") (Docket No. 14) ¶¶ 1-2. While she was so employed by Wal-Mart the plaintiff was also a full-time student taking classes during the day at the University of Southern Maine. *Id.* ¶ 9.

During the period of the plaintiff's employment, Bruce Wiggins was an assistant manager who supervised the night receiving crew and was the plaintiff's immediate supervisor. *Id.* ¶¶ 26-27.<sup>2</sup> The store manager at this time was Daniel Waldman. *Id.* ¶ 38. The ultimate decision to fire an employee is made by the store manager. *Id.* ¶ 37. October through December is the busiest time for retail sales at the Falmouth Wal-Mart. *Id.* ¶ 31.

On several occasions during the period of her employment the plaintiff called in sick, indicating that she could not come to work because she had bladder/urinary tract infections. *Id.* ¶ 10. Wiggins characterizes the plaintiff's attendance as "terrible." *Id.* ¶ 28.<sup>3</sup> The plaintiff believes that she missed sixteen or fewer scheduled days of work during the ten weeks that she was employed by Wal-Mart. *Id.* ¶ 29.<sup>4</sup> Wiggins fired the plaintiff on a preliminary basis twice due to problems with attendance and tardiness before she was finally terminated. *Id.* ¶ 34.<sup>5</sup> After each "preliminary" firing, Wiggins rehired the plaintiff on the same day. Plaintiff's Statement of Material Fact ("Plaintiff's SMF"), included in Plaintiff's Responsive SMF, ¶ V18; Defendant's Reply to Plaintiff's Statement of

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<sup>2</sup> In her response to paragraph 26 of the defendant's statement of material fact, and in her response to many other paragraphs of that document, the plaintiff admits the factual allegations and purports to add an extensive "qualification." That qualification is not responsive to the initial factual allegation and is not appropriate for inclusion in an opposing statement of material facts. The opportunity to "qualify" a response provided by the local rule is not an opportunity to place before the court additional factual allegations to which the moving party will have no opportunity to respond. The factual allegations included in the purported qualification should instead be presented in the separate statement of additional facts contemplated by Local Rule 56(c).

<sup>3</sup> The plaintiff admits that Wiggins so testified at his deposition, but then "qualifies" her admission with an argument that Wiggins' testimony is not credible. Plaintiff's Responsive SMF at 21. An objection rather than a qualification would be the appropriate means of raising this issue, but of course credibility cannot be determined at the summary judgment stage of any proceeding. In any event, the summary judgment record establishes that Wiggins was in the best possible position to observe the plaintiff's work attendance directly. The facts that he erred in reporting her total hours for one two-week period of her employment and signed a letter of recommendation for the plaintiff do not make his testimony about her overall attendance inherently unreliable.

<sup>4</sup> The defendant has submitted a significant amount of detail concerning the hours it contends that the plaintiff actually did work. Defendant's SMF ¶¶ 13-25, 30. The authority cited for this information is the affidavit of Marie Irma McGuinness, which is Exhibit A to Defendant's SMF. The plaintiff has objected to all of these paragraphs of the defendant's statement of material facts on the grounds, *inter alia*, of lack of foundation and hearsay. The defendant did not respond to these objections in the materials submitted with its reply memorandum. Ms. McGuinness's affidavit does not provide the information required to take the factual assertions made outside the hearsay rule, *see* Fed. R. Evid. 803(6), and accordingly the plaintiff's objection appears to be well taken. The court cannot consider the material included in the McGuinness affidavit. *See* Fed. R. Civ. P. 56(e).

<sup>5</sup> The plaintiff's opposing statement of material facts admits only that "Wiggins fired Vieira twice on a 'preliminary' basis." Plaintiff's Responsive SMF ¶ 34. However, she does not respond to the allegation that this was "due to attendance/tardiness." Defendant's  
(continued on next page)

Material Facts (“Defendant’s Responsive SMF”) (Docket No. 18), ¶ V18. The plaintiff testified at her deposition that she made an oral complaint to Wiggins in late November 1998 about conduct of coworkers that she found objectionable, including: (i) comments made to her by a coworker named Harold about how the plaintiff looked in jeans, using a sexual device, prostitution, and swinging from chandeliers; (ii) Harold making hooting calls near the plaintiff; and (iii) a different coworker wearing a “Hooters” t-shirt to work. Defendant’s SMF ¶¶ 39-40; Plaintiff’s Responsive SMF ¶¶ 39-40.

The plaintiff testified that she complained to Wiggins about Harold again on December 12, 1998, after she asked Wiggins to sign a reference letter that she indicated she would use for graduate school applications. *Id.* ¶ 41. She testified that Wiggins at that meeting referred her to Waldman, the store manager, and arranged for her to meet with Waldman on Friday, December 18, 1998. *Id.* The letter signed by Wiggins states:

To whom it may concern. Kristine Vieira has been working with us for about three months know [sic]. Although she seemed to start off a little slow she has improved greatly as of late. I would contribute [sic] the slow start to being knew [sic] to this type of work. I would consider Kristine a great asset to what ever company she may go to.

Exh. 3 to Deposition of Heather N. Simmons (“Simmons Dep.”). The plaintiff testified that she met with Waldman on December 18 and told him about the issues she had discussed with Wiggins; he told her to put her complaints in writing. Deposition of Kristine Mary Vieira (“Plaintiff’s Deposition”) at 138-42.

Before the plaintiff was terminated, Wiggins spoke to Heather Simmons, an assistant manager, about attendance and productivity problems he was having with the plaintiff. Simmons Dep. at 63-64.

He also had conversations with Waldman about these attendance and productivity problems.<sup>6</sup>

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SMF ¶ 34. Accordingly, that allegation is deemed admitted to the extent that it is supported by the citation to the record given in the defendant’s statement of material facts. Local Rule 56(e). The allegation is so supported. Deposition of Henry McDaniel at 45-47.

<sup>6</sup> The plaintiff objects to this assertion in the defendant’s statement of material facts on the grounds of hearsay. Plaintiff’s Responsive (*continued on next page*)

Affidavit of Daniel Waldman, Exh. C to Defendant's SMF, ¶ 4.<sup>7</sup> Wiggins wrote a memorandum dated December 16, 1998 that includes statements about hours worked by Vieira. Plaintiff's SMF ¶ V28; Defendant's Responsive SMF ¶ V28; Exh. 2 to Deposition of Bruce A. Wiggins. The statement included in this memorandum that Vieira worked 17.8 hours for the period from November 7 to November 20, 1998, Exh. 2 to Deposition of Bruce A. Wiggins at [6], is inconsistent with the plaintiff's paycheck stub for the same period, which shows 37.52 hours worked, Exh. 3 to Deposition of Bruce A. Wiggins.

Simmons was asked to sit in on the meeting between Waldman and the plaintiff on December 21, 1998. Plaintiff's SMF ¶ V30; Defendant's Responsive SMF ¶ V30. The exit interview paperwork was filled out and on Waldman's desk before the plaintiff arrived for this meeting. Simmons Dep. at 71, 87. At that meeting, the plaintiff provided a written list of complaints about inappropriate conduct in the workplace. Plaintiff's SMF ¶ V30; Defendant's Responsive SMF ¶ V30; Defendant's SMF ¶ 50; Plaintiff's Responsive SMF ¶ 50. Waldman discussed the following reasons for termination of the plaintiff's employment: attendance, productivity and not being able to get along with coworkers. Plaintiff's SMF ¶ V32; Defendant's Responsive SMF ¶ V32; Simmons Dep. at 79. During the meeting, the plaintiff told Waldman that Wiggins had written a letter of recommendation for her and that she had provided Wiggins with medical documentation concerning her absences. Plaintiff's SMF ¶ V33; Defendant's Responsive SMF ¶ V33. Simmons wrote a statement about what happened at the exit interview immediately after the meeting ended at Waldman's request. Defendant's SMF ¶ 59; Plaintiff's Responsive SMF ¶ 59; Simmons Dep. Exh. 2.

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SMF ¶ 44. However, Simmons' testimony is not offered for the truth of the matter asserted by Wiggins and accordingly is not hearsay. For the same reason, the plaintiff's contention that "[t]he statement calls for a credibility determination on the truthfulness of Wiggins," *id.*, apparently offered as a qualification, is also incorrect. Finally, the plaintiff offers no citation to the record to support her denial of this factual assertion by the defendant.

<sup>7</sup> The plaintiff denies this assertion. Plaintiff's Responsive SMF ¶ 47. However, the citation offered to support the denial, a reference (*continued on next page*)

The plaintiff received copies of Wal-Mart's anti-discrimination policies addressing sexual harassment and inappropriate behavior and was aware of the policies against harassment in the Wal-Mart employee handbook. Defendant's SMF ¶ 65; Plaintiff's Responsive SMF ¶ 65. She received training when she was hired and saw posters addressing sexual harassment in the store's break room. *Id.* She was familiar with the Wal-Mart policies on attendance and punctuality. *Id.* ¶ 66. She understood that Wal-Mart associates are considered probationary employees for their first 90 days of employment. *Id.* ¶ 70.

### **III. Discussion**

#### **A. Sexual Harassment and Discrimination**

Counts I and II of the complaint allege violations of Title VII of the Civil Rights Act of 1964, specifically 42 U.S.C. §§ 2000e-2000e-17, and the Maine Human Rights Act, 5 M.R.S.A. §§ 4571-72A, due to discrimination based on her gender. Complaint ¶¶ 16-17, 19-20. The defendant contends, Defendant's Motion for Summary Judgment, etc. ("Motion") (Docket No. 11) at 9, and the plaintiff does not contest,<sup>8</sup> that this case is one in which the applicable terms of the federal and state statutes are so similar that the two claims may be analyzed on the same basis. *See Forrest v. Stinson Seafood Co.*, 990 F. Supp. 41, 43-44 (D. Me. 1998). I agree. The plaintiff makes clear in her memorandum of law submitted in opposition to the motion for summary judgment that she bases her claim solely on the alleged existence of a hostile work environment. Plaintiff Kristine Vieira's Memorandum of Law in Opposition to Defendant Wal-Mart Stores, Inc.'s Motion for Summary Judgment ("Plaintiff's Opposition"), submitted with Plaintiff Kristine Vieira's Objection to Defendant

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to her response to paragraph 45 of the defendant's statement of material facts, has nothing to do with the factual allegations in paragraph 47 of the defendant's statement of material facts.

<sup>8</sup> Indeed, the plaintiff does not discuss her substantive state-law claim or cite Maine case law in support of her position in the memorandum of law she has submitted in support of her opposition to the motion for summary judgment.

Wal-Mart Stores, Inc.’s Motion for Summary Judgment (Docket No. 13), at 10-14. The following discussion is accordingly limited to that claim.

The Supreme Court has outlined the tests a plaintiff must meet to succeed in a hostile work environment claim: (1) that she (or he) is a member of a protected class; (2) that she was subjected to unwelcome sexual harassment; (3) that the harassment was based upon sex; (4) that the harassment was sufficiently severe or pervasive so as to alter the conditions of plaintiff’s employment and create an abusive work environment; (5) that sexually objectionable conduct was both objectively and subjectively offensive, such that a reasonable person would find it hostile or abusive and the victim in fact did perceive it to be so; and (6) that some basis for employer liability has been established.

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In hostile environment cases, the fourth and fifth elements are typically the most important. They must be determined by the fact-finder in light of the record as a whole and the totality of the circumstances. Several factors typically should be considered in making this determination: “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.” *See Faragher [v. City of Boca Raton]*, 524 U.S. [775,] 787-88 [1998].

*O’Rourke v. City of Providence*, 235 F.3d 713, 728 (1st Cir. 2001) (other internal punctuation and citations omitted). “[S]imple teasing, offhand comments, and isolated incidents (unless extremely serious) will not amount to discriminatory changes in the terms and conditions of employment.” *Faragher*, 524 U.S. at 788 (internal punctuation and citation omitted). “Conduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment — an environment that a reasonable person would find hostile or abusive — is beyond Title VII’s purview.” *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993).

It is important first to determine which of the factual allegations included in the plaintiff’s statement of material facts concerning conduct that she contends created a hostile work environment may be considered by the court. In addition to the conduct of the fellow employee named Harold and the wearing by another employee of a Hooters t-shirt, noted earlier, the plaintiff alleges that Wiggins

told two male employees who were late for a meeting “Come on ladies, let’s get a move on,” Plaintiff’s SMF ¶ V7, Defendant’s Responsive SMF ¶ V7; an assistant manager in training referred to the task of catching an escaped bird as a “man’s job,” *id.* ¶ V8, and co-workers discussed French kissing in detail “within full view” of Wiggins, *id.* ¶ 9.<sup>9</sup> The plaintiff includes other factual allegations in her statement of material facts, Plaintiff’s SMF ¶¶ V11-V13, V24, but there is no allegation that these incidents either involved conduct of supervisory employees, for which Wal-Mart might be vicariously liable despite the fact that the plaintiff did not report it, *see O’Rourke*, 235 F.3d at 736, or that the plaintiff reported the conduct that involved non-supervisory fellow employees, which conduct cannot create liability for an employer in the absence of a showing that the employer knew or should have known about the conduct, *see id.* Accordingly, only the incidents involving Harold, the Hooters t-shirts, Wiggins’ comment, the comment of the assistant manager in training, and the remarks about French kissing<sup>10</sup> may be considered here.

The defendant first argues that “most” of the conduct described by the plaintiff was not directed at her and therefore cannot provide the basis for recovery, citing *Bowen v. Department of Human Servs.*, 606 A.2d 1051 (Me. 1992). Motion at 11. All of the incidents involving Harold clearly involved conduct directed at the plaintiff, and it is a reasonable inference that the remark of the assistant manager in training was also directed at the plaintiff. In any event, the Law Court in *Bowen* merely rejects one of several incidents cited by the plaintiff as evidence of sexual harassment because the vulgar language in question was neither used in her presence nor “directed at her because she was

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<sup>9</sup> The defendant’s denials of the factual allegations in paragraphs 8 and 9 in its reply to the plaintiff’s statement of material facts are not responsive. The fact that Wiggins denies that the plaintiff ever told him about these incidents is not a denial of the allegation that they in fact occurred.

<sup>10</sup> I consider the allegations concerning the conversation about French kissing even though there is no allegation that Wiggins was actually aware of the remarks or the fact that Vieira considered them offensive, because it may possibly be a reasonable inference to conclude that Wiggins overheard remarks made “within full view” of him. Plaintiff’s SMF ¶ V9.

a woman.” 606 A.2d at 1054. Here, the conduct at issue that was not directed at the plaintiff is alleged to have occurred in her presence, so the language in the *Bowen* opinion is inapposite.

The defendant next contends that the plaintiff has not established that she found the conduct at issue unwelcome, the second element of the *O’Rourke* standard, because she does not allege that she so indicated to her co-workers at the time the conduct took place. Motion at 11-12. The defendant cites no authority for this gloss on the standard, and I am aware of none. Such a requirement could easily deter many claims in situations in which the victim is subjected to intimidation and threats; such a result is not contemplated by either the federal or the state statute. The requirement that the employer be made aware of the offensive conduct, or that the plaintiff show that the employer should reasonably have been aware of it, is sufficient in this context.

The defendant’s argument concerning the fourth element of the *O’Rourke* test has more merit. None of the incidents properly before the court can reasonably be characterized as physically threatening or humiliating to the plaintiff. With the exception of the alleged statements by Harold, the evidence involves single, unrelated incidents of conduct that the plaintiff found offensive, none of which, whether considered alone or in total, can properly be deemed severe. The reported remarks of Harold brand him as failing to treat the plaintiff with sensitivity, tact or delicacy, using coarse language and being a boor, but that does not create an actionable hostile work environment. *Baker v. Department of Attorney Gen.*, 2000 WL 762083 (D. Me. May 4, 2000), at \* 8 (quoting *Minor v. Ivy Tech State College*, 174 F.3d 855, 858 (7th Cir. 1999)). Equally important is the fact that the plaintiff has offered no evidence in the summary judgment record to suggest that the incidents of which she complains unreasonably interfered with her work performance. Wiggins’ failure to act on the plaintiff’s complaint concerning Harold is certainly objectionable, but neither standing alone nor in combination with the other incidents before the court does it constitute sufficient evidence to allow a

jury to find that sexual harassment was so pervasive when the plaintiff was working at the Falmouth Wal-Mart store that it altered the conditions of her employment and created an objectively hostile or abusive working environment. *See generally Cowan v. Prudential Ins. Co. of Am.*, 141 F.3d 751, 756-58 (7th Cir. 1998) (describing factual allegations found insufficient to allow hostile environment sexual harassment claim to go to jury).

Because I determine that the defendant is entitled to summary judgment on Counts I and II under the *O'Rourke* standard, I do not reach the defendant's alternative argument that it has established as a matter of law the affirmative defense described in *Faragher*. Motion at 15-16.

### **B. Retaliation**

Counts III and IV of the complaint allege unlawful retaliation under Title VII and the Maine Human Rights Act. Complaint ¶¶ 21-24. Again, both claims are governed by the same legal standard for purposes of this motion. *Fennell v. First Step Designs, Ltd.*, 83 F.3d 526, 535 (1st Cir. 1996); *Bishop v. Bell Atlantic Corp.*, 81 F. Supp.2d 84, 90 n.6 (D. Me. 1999).

The only act of retaliation apparently at issue in this case is the plaintiff's discharge on December 21, 1998, although it is impossible to tell from the complaint and unclear from the plaintiff's cursory discussion of the issue in her memorandum of law. Plaintiff's Opposition at 14-15.

In order to establish a claim of retaliatory discharge, the plaintiff must show that:

- (1) she engaged in a protected activity as an employee, (2) she was subsequently discharged from employment, and (3) there was a causal connection between the protected activity and the discharge.

*Hoepfner v. Crotched Mountain Rehabilitation Ctr., Inc.*, 31 F.3d 9, 14 (1st Cir. 1994).

The plaintiff offers no direct evidence of the defendant's retaliatory animus. Therefore, "the *McDonnell Douglas* burden-shifting framework is used to allocate and order the burdens of producing evidence." *Fennell*, 83 F.3d at 535. Once a prima facie showing of the elements of the claim has

been made, the burden shifts to the defendant to articulate a legitimate, non-retaliatory reason for the discharge. *Id.* If the defendant does so, “the ultimate burden falls on the plaintiff to show that the proffered legitimate reason is in fact a pretext and that the job action was the result of the defendant’s retaliatory animus.” *Id.*

The defendant contends that the plaintiff cannot establish either the first or the third elements of this claim. Motion at 17-18. While essentially agreeing that the reporting of perceived sexual harassment is a protected activity, the defendant apparently claims that the plaintiff’s reports to Wiggins and Waldman before December 21, 1998 were insufficiently specific to constitute protected conduct. *Id.* at 17. The defendant cites no authority in support of this interpretation of applicable law.

Since the plaintiff’s prima facie burden is not onerous, *Fennell*, 83 F.3d at 535, and even complaints that prove to be without merit are protected against retaliation, *Higgins v. New Balance Athletic Shoe, Inc.*, 194 F.3d 252, 261-62 (1st Cir. 1999), I conclude for the purposes of the pending motion that the plaintiff’s complaints, as set forth in her statement of material facts, were sufficient to constitute protected activity. With respect to the third element of the claim, the defendant merely states in conclusory fashion that “the evidence shows that there was no causal connection whatsoever between the basis for the firing and her complaints.” Motion at 17. The issue at this point does not involve “the basis for the firing,” but rather requires the showing of a causal connection between the firing and the protected activity. Again, the plaintiff’s prima facie burden at this point is not onerous, and a plaintiff may meet that burden “by demonstrating, among other things, that her termination occurred shortly after her protected conduct, the report of harassment.” *Fennell*, 83 F.3d at 535. Here, the plaintiff was discharged less than a month after she complained to Wiggins and on the next business day after she complained to Waldman. This is sufficient evidence of a causal connection for purposes of summary judgment.

The defendant devotes most of its effort with respect to the retaliation claims to the argument that it has met its burden of producing evidence of a legitimate non-discriminatory reason for the discharge — the reasons given by Waldman during the exit interview. Motion at 17-18. The defendant provides no evidence to support tardiness and inability to get along with co-workers as reasons for the discharge of the plaintiff, nor does the defendant discuss these reasons in its motion or its reply memorandum. However, the evidence does support excessive absence during the plaintiff's probationary employment period as a reason for the discharge. Even without the specific data included in the McGuinness affidavit, the record shows that Wiggins thought the plaintiff's attendance was "terrible" and that he had "temporarily" fired and rehired the plaintiff twice "due to problems with attendance." This is sufficient to demonstrate a legitimate non-discriminatory reason for the termination of the plaintiff's employment on December 21, 1998.

Accordingly, the burden returns to the plaintiff to show that the proffered reason was in fact a pretext and the termination was motivated by retaliatory animus. The plaintiff does not address this point directly in her memorandum of law, but refers to the facts that Wiggins signed her letter of recommendation, which stated that she had "improved greatly as of late;" Wiggins rehired her after "preliminarily" firing her;<sup>11</sup> and Waldman terminated her immediately after receiving her written list of charges; and contends that "[t]he evidence on this record is overwhelming that Wal-Mart's General Manager was ill equipped, underhanded, 'chuckled,' and 'made big eyes' when it was over." Plaintiff's Opposition at 14-15. The fact that the plaintiff was terminated immediately after turning in her written list of complaints is not evidence of pretext or retaliatory animus, because the undisputed evidence is that the termination paperwork had been prepared before the exit interview began and

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<sup>11</sup> Specifically, the plaintiff argues that "[o]ne does not rehire someone who is not productive." Plaintiff's Opposition at 14. As noted above, productivity is not the focus of the defendant's argument with respect to the existence of a legitimate, non-discriminatory reason for the termination.

therefore before the list was submitted. The plaintiff's characterization of Waldman is not evidence, let alone evidence of pretext. Wiggins' signing of the letter of recommendation and "re-hiring" of the plaintiff are not evidence of retaliatory animus. The fact that Simmons testified that Waldman chuckled and "made big eyes" after the exit interview, Simmons Dep. at 48, all that is left of the plaintiff's argument, is far too slender a thread from which to hang a claim of pretext.

Interpreting the evidence properly made part of the summary judgment record with the benefit of all reasonable inferences in favor of the plaintiff's position, I conclude that the defendant is entitled to summary judgment on Counts III and IV of the complaint.

### **C. Defamation**

The plaintiff alleges defamation in Count VIII of her complaint. The defendant seeks summary judgment on this count, which is brought under Maine law. Apparently, the plaintiff testified at her deposition that the basis for her defamation claim is the content of her exit interview form, Motion at 19, and the defendant initially argued that this document could not provide the basis for such a claim. However, in her opposition to the motion, the plaintiff states only that her

“defamation claim arises in part out of statements contained in a memo from Bruce Wiggins to Dan Waldman,” and that “[a]mong other things, the memo asserts that Kristine only worked 17.5 hours in a pay period. In fact, Kristine’s pay stub belied that charge and indicated that she worked 37.5 hours.” Plaintiff’s Opposition at 17. What else the defamation claim arises out of is never specified, nor are the “other things” that the memo allegedly misstates ever identified. Issues mentioned in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived under these circumstances. *Graham v. United States*, 753 F. Supp. 994, 1000 (D. Me. 1990). Therefore, I will consider only the allegations concerning the memorandum from Wiggins to Waldman and only the statement concerning the hours worked by the plaintiff.

Under Maine law, the elements of a claim of defamation are the following:

- 1) a false and defamatory statement concerning another;
- 2) an unprivileged publication to a third party;
- 3) fault amounting at least to negligence on the part of the publisher;
- 4) either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication.

*Rippett v. Bemis*, 672 A.2d 82, 86 (Me. 1996). The problem for the plaintiff here is that the publisher of the allegedly false and defamatory statement that she identifies is Wiggins, not the defendant, Wal-Mart. In the case upon which she relies, *Farrell v. Kramer*, 193 A.2d 560 (Me. 1963), the defendant is the physician alleged to have made a false statement about the plaintiff to the hospital that terminated the plaintiff’s employment, not the hospital itself. *See also Lester v. Powers*, 596 A.2d 65 (Me. 1991) (defendant in defamation action is person who made statement to college committee that recommended plaintiff not be granted tenure, not college or committee). With respect to the only document at issue, the only proper defendant would be Wiggins, who has not been named. There is no need to consider the defendant’s contention that any communications that might otherwise constitute defamation are privileged. Motion at 19-20. The defendant is entitled to summary judgment on Count VIII.

#### D. Punitive Damages

If the court adopts the recommendations set forth in this opinion, the plaintiff's demand for punitive damages will be moot. There is no need to address the defendant's arguments on this issue under the circumstances.

#### IV. Conclusion

For the foregoing reasons, 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, within ten (10) days after being served with a copy thereof. A responsive memorandum 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.*

Date this 18th day of April, 2001.

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David M. Cohen  
United States Magistrate Judge

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