UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

YVONNE J. MORALES f/k/a Javier Morales,	:	
Plaintiff,	:	
v.	:	Civ No. 3:06CV01430(AWT)
ATP HEALTH & BEAUTY CARE, INC.,	:	
Defendant.	:	

RULING ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Yvonne J. Morales, f/k/a Javier Morales ("Morales"), brings this action against ATP Health & Beauty Care Inc. ("ATP"), setting forth claims for sex discrimination in violation of 42 U.S.C. § 2000e et seq. ("Title VII") and the Connecticut Fair Employment Practices Act, Conn. Gen. Stat. § 46a-60 et seq. ("CFEPA") and for retaliation against her for exercising her rights under Title VII and CFEPA. The defendant has moved for summary judgment on all claims. For the reasons set forth below, its motion is being granted.

I. FACTUAL BACKGROUND

Morales is a male-to-female transgender woman. Although Morales is biologically male, she identifies and presents herself as a heterosexual female who dates heterosexual men. She does not self-identify as a homosexual and does not see herself as a man.

On June 17, 2004, ATP hired Morales to work as a machine operator at its manufacturing plant in Stamford, Connecticut. Lizette Rosado-Martinez ("Rosado-Martinez"), ATP's Human Resources Manager, was aware of Morales' transgendered status at the time she was hired.

A. Morales' Complaints of Discrimination in the Decorating Department

Morales initially worked on an assembly line in the Decorating Department ("Deco"), where she removed defective jars and packed the remaining jars into boxes. Morales' immediate supervisor in Deco was Omar Lopez ("Lopez"). After working in Deco for some time, Morales felt that Lopez was discriminating against her.

"ATP's Personnel and Benefits Guide" sets forth the company's policies on discrimination and harassment. Employees who believe that they are being discriminated against or harassed are encouraged to make a report to their supervisor. Supervisors are responsible for acting promptly when they become aware of inappropriate or offensive behavior. If the problem is not resolved by the supervisor, or if the employee believes that the supervisor has treated him or her in a discriminatory manner, the employee is advised to report the problem to the Human Resources representative. Then, an investigation would be conducted to determine whether disciplinary action would be appropriate. At ATP, complaints of discrimination were handled by Rosado-

Martinez. However, ATP had no written policies or procedures for the investigation of complaints of discrimination.

Morales met with Rosado-Martinez to complain about what she viewed as discriminatory behavior by Lopez. At the meeting, Morales told Rosado-Martinez that Lopez placed defective jars into her boxes and ignored her when she requested assistance.[1] Morales also stated that Lopez was homophobic. In response to Morales' complaints, Rosado-Martinez stated that she would contact Lopez in an effort to resolve the problem. Morales was initially satisfied with Rosado-Martinez's response when she left her office.

However, Morales continued to have difficulties with Lopez. According to Morales, Lopez would not allow her to switch stations with her co-workers. Lopez would also scream at her for working too slowly. In addition, Lopez screamed at Morales for returning late to her work station after lunch one day, even though Morales states that she timely returned to work and only briefly left her station to get a drink of water.

Approximately a month after the first meeting with Rosado-Martinez, Morales had a another meeting to complain about Lopez and Fernando Malave ("Malave"), who worked as a technician in Deco. Rosado-Martinez called in Felix Rivera ("Rivera"), a

[1] Morales claims that Lopez placed defective jars into her boxes because Lopez emphasized quantity over quality, and that he wanted Morales to pack as many jars as possible.

manager at ATP, to hear Morales' complaints. According to Morales, Rivera did not pay attention and left the office before she finished describing her complaints. Morales told Rosado-Martinez that Lopez screamed at another employee when she switched positions with her. According to Morales, a third employee who witnessed the event told Rosado-Martinez that Morales was telling the truth. At Morales' request, Rosado-Martinez called Lopez and Malave into her office. With Lopez and Malave present, Morales stated that Lopez would scream at her and other employees and ignore her when she asked for help fixing the machines. Morales stated that Lopez was discriminating against her and harassing her. Morales also stated that another employee at ATP had told her that Lopez said that "he was going to get rid of those faggots." (Def.'s L.R. 56(a)(1) Statement (Doc. No. 24), Ex. A at 120). Lopez and Malave denied Morales' allegations. At that point, Morales threatened to punch them in the face if they continued acting in the same manner. Rosado-Martinez stated that ATP would be monitoring the behavior of Lopez and Malave and concluded the meeting. Again, Morales stated that she was satisfied with Rosado-Martinez's response. However, Morales told Rosado-Martinez that she would sue the company if she had to complain about harassment again.[2]

[2] According to Morales, in addition to these meetings, Rosado-Martinez would come onto the production floor approximately once a month, and Morales would tell her that Lopez was treating her differently from the other employees.

After this second meeting, Morales began working overtime under a different supervisor in another department. Morales stated that Lopez stopped asking her if she wanted to work overtime in Deco and instead gave the extra hours to other workers. Also, Morales stated that after the meeting, Rosado-Martinez told her "to be careful with Omar and Felix. They are trying to fire you." (Id. at 130).

B. Morales' Attendance Problems

At the start of her employment with ATP, Morales received a copy of "ATP's Personnel and Benefits Guide," which contained its policies on attendance and punctuality. Pursuant to ATP's policy on unexcused absences, an employee may receive a verbal reprimand after the first offense and a written reprimand after the second offense. The employee may be terminated after a management review for the third offense. Employees may also be subject to disciplinary actions for tardiness. Morales understood that her job required her "[t]o be punctual, to work hard, and be responsible." (Id. at 48).

Morales received verbal warnings about her attendance problems. On August 24, 2004, Morales received a written warning for failing to show up to work the previous Monday without notice. On October 1, 2004, Morales received a written warning for abandoning her work station without telling her supervisor in

order to look for her missing dog.[3] On December 28, 2004, Morales received a written warning for not going to work on December 23 or December 28. That notice also stated that Morales failed to show up for work without giving notice to her employer on December 27. It further stated that Morales' attendance must improve, that she would be suspended for three days, and that she might be terminated if such an incident were to occur again.

On April 18, 2005, Rivera and Rosado-Martinez decided to terminate Morales' employment because of her attendance problems. However, Rosado-Martinez eventually reconsidered this decision. Then, instead of terminating Morales, she decided to transfer her to the Molding Department ("Molding"), where she would be under a different supervisor. Morales maintained her level of seniority. Morales received a raise after being transferred to Molding.[4]

C. Morales' Complaints of Discrimination in the Molding Department

Ignacio Magnana ("Magnana") oversaw Morales' shift in Molding. Morales claims that Magnana behaved in an inappropriate

---

[3] Morales claimed that she was taking her lunch break when she learned that the dog had been found and that she expected to be able to retrieve the dog and return to work within the hour allotted for lunch. When Morales learned that she would be returning late to work, she called another ATP employee, Raphael Sanchez, and asked him to inform Lopez that she would be late.

[4] ATP hourly employees are given raises on a group-wide basis once approved by ATP's compensation committee.

manner and made offensive comments about her on five occasions.[5] First, after Morales had been in Molding for a month, Magnana told Morales, "Damn, you have a big pussy," on a day when Morales wore tight jeans to work. (Id. at 157). Second, approximately a month later, Magnana was standing with several men, and he asked Morales which of them was most attractive to her. Morales responded that none of them were attractive to her and told them that "all together you are not enough men to do one that I like." (Id. at 158). The men then began laughing. Third, approximately two weeks later, Magnana asked Morales if her ovaries hurt as she was holding her stomach walking to the restroom. Fourth, approximately a month after that incident, Magnana told Morales, "Yvonne, my dick is curved. If I stick it up your ass, I will take shit out of it." (Id. at 162). Fifth, when Morales showed a picture of herself when she was twelve years old to a co-worker, Magnana indicated that he would not "fool around" with Morales now but that he probably would have done so when Morales was a boy. (Id. at 164). Morales found the first, third, and fourth comments by Magnana discussed above to be offensive. In addition to these five comments, Morales avers that "Magnana would regularly sneer at me and regularly yell at me for the

[5] Morales admits that she also behaved inappropriately at times but states that none of her actions were offensive. For example, Morales admits taking excess plastic from a machine used to make beauty products packaging and molding the residue into a fake penis, and taping papers with jokes onto her co-workers' backs.

smallest reasons." (Pl.'s Aff. (Doc. No. 36) at ¶ 7). Magnana did not make any other comments to Morales from June to October 2005, and Morales did not complain about any of the comments made by Magnana until she was at the meeting at which her employment with ATP was terminated.

Morales also believed that Migdalia Pagan ("Pagan"), a team leader in Molding, was discriminating against her. Pagan was present for the first, third, and fifth comments made by Magnana. In addition, another employee told Morales that Pagan said that "she was going to get that faggot fired." (Def.'s Ex. A at 176). Morales also heard Pagan say, "I don't have a problem with faggots...because I have one cousin -- he's a faggot." (Pl.'s Mem. Opp. (Doc. No. 35), Morales Dep. at 248). Morales told her "[t]hat's not an appropriate word to say to a person." (Id.). Morales also states that Pagan was a "backstabber" and a "hypocrite" but did not treat her any differently from others. (Def.'s Ex. A at 182).

D. Termination of Morales' Employment

Morales' attendance problems continued in Molding. On August 24, 2005, Morales received a written warning after missing two days of work. On September 26, 2005, Morales received another written warning for failing to come to work on September 23, 2005. The notice reads: "Mr. Morales is frequently absent from work, without an excuse. He was previously warned." (Def.'s

Ex. A at D36). It also states that failure to improve will result in termination. After receiving this warning, Morales missed another day of work without notifying her employer.

On October 14, 2005, Morales was called into Rosado-Martinez's office. When Morales went into the meeting, she knew that she would be terminated because of her violations of the attendance policy. Morales provided Rosado-Martinez with a letter that she wrote on October 10, 2005. In the letter, Morales states that, on October 7, 2005, Magnana yelled at her in front of another employee when Morales informed him that her machine stopped working. The letter further states: "I also talked about offensive behavior against me by my supervisor in a [sic] past and confronted other people who were spreading gossip about my sexual orientation. All this are [sic] making things impossible for me to do my job and I been feeling discriminated, feeling forced to leave (quit my job)." (Pl.'s Mem. Opp., Morales Dep., Ex. 20 at 2). Rosado-Martinez said that she would show Morales' letter to her boss, although Morales did not know who her boss was. In addition, Rosado-Martinez told Morales that she would talk to another supervisor named Edith about transferring Morales to her department. Edith agreed to allow Morales to work for her. Rosado-Martinez then stepped out of the meeting with Morales to talk to her boss. However, when Rosado-Martinez returned from meeting with her boss, she told Morales

that her employment was terminated for her violation of the attendance policy. Rosado-Martinez apologized to Morales and told her that she did the best she could. Morales acknowledges that her attendance problems were, in part, a reason for her termination. Morales also believes that she was terminated because of the comments being made about her. After being terminated from ATP, Morales was diagnosed with severe depression, for which she sought treatment.

According to Dana Deardoff ("Deardoff"), ATP's Legal Services Manager, the company's business practices require the human resources manager to report all complaints of discrimination to senior management. Deardoff did not become aware of Morales' complaints of discrimination until after Morales' employment was terminated.

II. LEGAL STANDARD

A motion for summary judgment may not be granted unless the court determines that there is no genuine issue of material fact to be tried and that the facts as to which there is no such issue warrant judgment for the moving party as a matter of law. Fed. R. Civ. P. 56(c). See Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986); Gallo v. Prudential Residential Servs., 22 F.3d 1219, 1223 (2d Cir. 1994). Rule 56(c) "mandates the entry of summary judgment . . . against a party who fails to make a showing sufficient to establish the existence of an element

essential to that party's case, and on which that party will bear the burden of proof at trial." See Celotex Corp., 477 U.S. at 322.

When ruling on a motion for summary judgment, the court must respect the province of the jury. The court, therefore, may not try issues of fact. See, e.g., Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986); Donahue v. Windsor Locks Bd. of Fire Comm'rs, 834 F.2d 54, 58 (2d Cir. 1987); Heyman v. Commerce & Indus. Ins. Co., 524 F.2d 1317, 1319-20 (2d Cir. 1975). It is well-established that "[c]redibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of the judge." Anderson, 477 U.S. at 255. Thus, the trial court's task is "carefully limited to discerning whether there are any genuine issues of material fact to be tried, not to deciding them. Its duty, in short, is confined . . . to issue-finding; it does not extend to issue-resolution." Gallo, 22 F.3d at 1224.

Summary judgment is inappropriate only if the issue to be resolved is both genuine and related to a material fact. Therefore, the mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment. An issue is "genuine . . . if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Anderson, 477 U.S. at 248

(internal quotation marks omitted). A material fact is one that would "affect the outcome of the suit under the governing law." Id. As the Court observed in Anderson: "[T]he materiality determination rests on the substantive law, [and] it is the substantive law's identification of which facts are critical and which facts are irrelevant that governs." Id. Thus, only those facts that must be decided in order to resolve a claim or defense will prevent summary judgment from being granted. When confronted with an asserted factual dispute, the court must examine the elements of the claims and defenses at issue on the motion to determine whether a resolution of that dispute could affect the disposition of any of those claims or defenses. Immaterial or minor facts will not prevent summary judgment. See Howard v. Gleason Corp., 901 F.2d 1154, 1159 (2d Cir. 1990).

When reviewing the evidence on a motion for summary judgment, the court must "assess the record in the light most favorable to the non-movant and . . . draw all reasonable inferences in its favor." Weinstock v. Columbia Univ., 224 F.3d 33, 41 (2d Cir. 2000) (quoting Delaware & Hudson Ry. Co. v. Consol. Rail Corp., 902 F.2d 174, 177 (2d Cir. 1990)). Because credibility is not an issue on summary judgment, the nonmovant's evidence must be accepted as true for purposes of the motion. Nonetheless, the inferences drawn in favor of the nonmovant must be supported by the evidence. "[M]ere speculation and

conjecture" is insufficient to defeat a motion for summary judgment. Stern v. Trustees of Columbia Univ., 131 F.3d 305, 315 (2d Cir. 1997) (quoting Western World Ins. Co. v. Stack Oil, Inc., 922 F.2d 118, 121 (2d. Cir. 1990)). Moreover, the "mere existence of a scintilla of evidence in support of the [nonmovant's] position" will be insufficient; there must be evidence on which a jury could "reasonably find" for the nonmovant. Anderson, 477 U.S. at 252.

Finally, the nonmoving party cannot simply rest on the allegations in its pleadings since the essence of summary judgment is to go beyond the pleadings to determine if a genuine issue of material fact exists. See Celotex Corp., 477 U.S. at 324. "Although the moving party bears the initial burden of establishing that there are no genuine issues of material fact," Weinstock, 224 F.3d at 41, if the movant demonstrates an absence of such issues, a limited burden of production shifts to the nonmovant, which must "demonstrate more than some metaphysical doubt as to the material facts, . . . [and] must come forward with specific facts showing that there is a genuine issue for trial." Aslanidis v. United States Lines, Inc., 7 F.3d 1067, 1072 (2d Cir. 1993)(quotation marks, citations and emphasis omitted). Furthermore, "unsupported allegations do not create a material issue of fact." Weinstock, 224 F.3d at 41. If the nonmovant fails to meet this burden, summary judgment should be

granted. The question then becomes: is there sufficient evidence to reasonably expect that a jury could return a verdict in favor of the nonmoving party. See Anderson, 477 U.S. at 248, 251.

III. DISCUSSION

A. Disparate Treatment and Retaliation Claims

Based on the record here, the defendant is entitled to summary judgment on the plaintiff's disparate treatment claim. The plaintiff has failed to establish the elements of a prima facie case for disparate treatment under Title VII and CFEPA. Morales cannot establish that her job performance was satisfactory in light of her well-documented violations of ATP's attendance policy. See Hendrics v. National Cleaning Contractors, Inc., 1998 WL 26188 at *3 (S.D.N.Y. 1998) ("Excessive absenteeism has been repeatedly cited by courts as evidence of lack of satisfactory job performance."). Also, Morales cannot establish that the termination of her employment occurred under conditions giving rise to an inference of discrimination. First, Morales has not produced any evidence that suggests a nexus between allegedly discriminatory conduct by her supervisors and the decision to terminate her employment. Second, Rosado-Martinez, the person who ultimately informed Morales that she was being terminated, was the same individual who hired Morales knowing of her transgendered status. See

Carlton v. Mystic Transp., Inc., 202 F.3d 129, 132 (2d Cir. 2000) (internal citations and quotation marks omitted) ("When the same actor hires a person already within the protected class, and then later fires that same person, it is difficult to impute to her an invidious motivation that would be inconsistent with the decision to hire...Case law teaches that where the termination occurs within a relatively short time after the hiring there is a strong inference that discrimination was not a motivating factor in the employment decision."). The evidence supports only the conclusion that the final decision to terminate Morales was motivated by a legitimate, non-discriminatory reason, i.e. Morales' numerous violations of ATP's attendance policies.[6]

Morales has also failed to respond to the defendant's arguments for summary judgment on her retaliation claim under Title VII and CFEPA, and the only evidence in the record reflects that the defendant should also prevail on the plaintiff's retaliation claim. Assuming arguendo that Morales could establish that she participated in a protected activity and that the defendant knew of the protected activity, Morales has not offered evidence of a causal connection between her complaints of discrimination and any adverse employment action. There is no

[6] In addition, the plaintiff does not address her disparate treatment claim under Title VII and CFEPA in her opposition to the motion for summary judgment. Thus, it appears that she has conceded that the defendant should prevail on this claim. See Albert v. City of Hartford, 529 F.Supp. 2d 311, 328-29 (D. Conn. 2007) (collecting cases).

evidence that Rosado-Martinez or any other person involved in the decision to terminate Morales' employment was motivated by retaliatory animus.

B. Hostile Work Environment Claim

Title VII makes it an "unlawful employment practice for an employer ... to discriminate against any individual ... because of such individual's race, color, religion, sex, or national origin." Desert Palace, Inc. v. Costa, 539 U.S. 90, 92-93 (2003) (citing 42 U.S.C. § 2000e-2(a)(1)). In order to establish a hostile work environment claim under Title VII, a plaintiff must first show that "the workplace is permeated with discriminatory intimidation, ridicule, and insult, that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment." Harris v. Forklift Sys., Inc., 510 U.S. 17, 21 (1993). A plaintiff must show "not only that [he] subjectively perceived the environment to be abusive, but also that the environment was objectively hostile and abusive." Demoret v. Zegarelli, 451 F.3d 140, 149 (2d Cir. 2006). In determining whether a hostile work environment exists, the court looks to several factors, including "the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." Harris, 510 U.S. at 23. "Isolated

incidents or episodic conduct will not support a hostile work environment claim." Richardson v. NYS Dep't. Corr. Serv., 180 F.3d 426, 437 (2d Cir. 1999). "Rather, the plaintiff must demonstrate either that a single incident was extraordinarily severe, or that a series of incidents were sufficiently continuous and concerted to have altered the conditions of [his] working environment." Cruz v. Coach Stores, Inc., 202 F.3d 560 (2d Cir. 2000) (internal quotation marks omitted).

Second, a plaintiff "must demonstrate a specific basis for imputing the conduct creating the hostile work environment to the employer." Feingold v. New York, 366 F.3d 138, 149 (2d Cir. 2004). Where, as here, the harassment is perpetrated by a supervisor with immediate or successively higher authority over the employee, "the employer is presumed to be absolutely liable." Distasio v. Perkin Elmer Corp., 157 F.3d 55, 63 (2d Cir. 1998). However, the employer may still raise the Faragher-Ellerth affirmative defense, which "comprises two elements: that (1) the employer exercised reasonable care to prevent and correct promptly any [discriminatory] harassing behavior, and (2) the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise." Ferraro v. Kellwood Co., 440 F.3d 96, 101 (2d Cir. 2006) (internal citations and quotation marks omitted). This affirmative defense can be raised "only if one of

two further elements is met: either (1) the employee's supervisor took no tangible employment action, which involves an official company act, against the employee; or (2) any tangible employment action taken against the employee was not part of the supervisor's discriminatory harassment." Id.[7] "Otherwise, the employer is strictly liable for the supervisor's misconduct." Id.[8]

As a threshold matter, in order to set forth a hostile work environment under Title VII, Morales must demonstrate that she suffered discrimination because of her membership in a protected class. See Brown v. Henderson, 257 F.3d 246, 252 (2d Cir. 2001) ("[i]t is axiomatic that mistreatment at work ... is actionable

---

[7] "A tangible employment action constitutes a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits." Burlington Industries, Inc. v. Ellerth, 524 U.S. 742, 761 (1998).

[8] When the harassment is perpetrated by a co-worker rather than a supervisor, "the employer will be held liable only for its own negligence." Distasio, 157 F.3d at 63. In such cases, "an employer will be liable if the plaintiff demonstrates that the employer either provided no reasonable avenue for complaint or knew of the harassment but did nothing about it." Perry v. Ethan Allen, Inc., 115 F.3d 143, 149 (2d Cir. 1997) (internal citation and quotation marks omitted). Knowledge will be imputed to an employer when: "(A) the official is at a sufficiently high level in the company's management hierarchy to qualify as a proxy for the company; or (B) the official is charged with a duty to act on the knowledge and stop the harassment; or (C) the official is charged with a duty to inform the company of the harassment. Id. at 636-37 (citations omitted)." Torres v. Pisano, 116 F.3d 625, 636-37 (2d Cir. 1997) (citations omitted).

under Title VII only when it occurs because of an employee's sex, or other protected characteristic."). In this case, Morales relies on "the 'gender stereotyping' theory of Title VII liability according to which individuals who fail or refuse to comply with socially accepted gender roles are members of a protected class." Dawson v. Bumble & Bumble, 398 F.3d 211, 218 (2d Cir. 2005). Under this theory, "[o]ne can fail to conform to gender stereotypes in two ways: (1) through behavior or (2) through appearance." Id. at 221.

With respect to Morales' claims that she suffered discrimination and harassment while working in the Deco Department, Morales has failed to produce any evidence that the alleged discrimination and harassment occurred because of her failure or refusal to conform to gender stereotypes. Morales complained that Lopez placed defective jars in her boxes, ignored her when she needed assistance, prevented her from switching stations, and frequently yelled at her on the production floor. Morales stated that Lopez was "homophobic" and that another employee told her that Lopez said that "he was going to get rid of those faggots." Morales provided no other reason for Lopez's conduct and did not offer any other evidence to explain it. At most, Morales' complaints about Lopez's conduct amount to allegations that she was discriminated against based on her sexual orientation. Such complaints of discrimination are not

legally cognizable under Title VII because the statute does not recognize homosexuals as a protected class. See Simonton v. Runyon, 232 F.3d 33, 35 (2d Cir. 2000) ("Title VII does not prohibit harassment or discrimination because of sexual orientation."); Dawson, 398 F.3d at 218 ("a gender stereotyping claim should not be used to bootstrap protection for sexual orientation into Title VII.") (internal quotation marks omitted). Although Morales claims that Lopez used the term "faggot" to refer to both homosexual and transgendered employees, she still fails to offer evidence sufficient to support a conclusion that Lopez, or any other employee in the Deco Department, engaged in discriminatory conduct because of Morales' membership in a protected class.

Morales' allegations of harassment in the Molding Department, however, could be construed as asserting claims of discrimination based on both sexual orientation and gender, i.e. failure to comply with socially accepted gender roles. Morales claims that Magnana regularly screamed at her for "the smallest reasons" and made several inappropriate comments to her. Morales states that Magnana (1) told her that she had "a big pussy" on a day when she wore tight jeans to work; (2) asked her which of the men with whom Magnana was standing was most attractive to her; (3) asked her if her ovaries hurt as she was holding her stomach while walking to the restroom; (4) told Morales that "[his] dick

is curved" and "if [he sticks] it up [Morales'] ass, [he] will take shit out of it"; and (5) told Morales that she would not "fool around" with Morales as a female but probably would have done so when she was a boy. Morales also stated that Pagan was present for the first, third, and fifth comments. In addition, another employee told Morales that Pagan said that "she was going to get that faggot fired," and Morales has heard Pagan used the word "faggot" in reference to a homosexual man. The comments allegedly made by Pagan and the second and fourth comments made by Magnana appear to be directed at Morales' sexual orientation, and therefore, they are not actionable under Title VII. However, the first, third, and fifth comments appear to be directed at Morales' failure to conform to societal stereotypes about how men should appear, and therefore, Morales has produced evidence of membership in a protected class with respect to her claim of harassment and discrimination, based on these comments by Magnana.

Nevertheless, the plaintiff has failed to create a genuine issue of material fact as to whether the harassment she suffered solely on account of her failure to conform to gender stereotypes was sufficiently severe or pervasive to alter the conditions of her employment and create an abusive working environment. Morales has produced evidence that she frequently complained about harassment by her supervisors, that she threatened to bring

a lawsuit against ATP if the harassment continued, that she considered leaving ATP because of the harassment, and that she suffered from anxiety and depression. However, Morales' subjective perceptions of the hostility of her working environment at ATP did not derive solely from the discriminatory conduct Morales experienced because of her sex. The three comments by Magnana arguably directed at Morales' failure to conform to gender stereotypes constitute the only evidence produced by Morales that would support a conclusion that she suffered discrimination on that basis. Morales testified in her deposition that she found two of these three comments made by Magnana to be offensive.[9] She has not produced any other evidence of discriminatory intimidation, ridicule, or insults based on her membership in a protected class during her approximately 18 months of employment with ATP. Therefore, Morales cannot demonstrate that the incidents of discriminatory conduct were sufficiently severe or pervasive to alter the conditions of her working environment. See Faragher v. City of Boca Raton, 524 U.S. 775, (1998) (internal citations and quotation marks omitted) ("Properly applied, [the standards for judging hostility in the workplace] will filter out complaints

[9] Morales testified that she found the first, third, and fourth comments made by Magnana to be offensive. The fourth comment, however, was not directed at Morales' failure to conform to gender stereotypes. Morales never reported any of these comments to Rosado-Martinez prior to her final meeting with her.

attacking the ordinary tribulations of the workplace, such as the sporadic use of abusive language, gender-related jokes, and occasional teasing...We have made it clear that conduct must be extreme to amount to a change in the terms and conditions of employment...").

Morales argues that the discriminatory harassment she suffered was not limited to the offensive comments made by Magnana. Morales avers that "Magnana would regularly sneer at me and regularly yell at me for the smallest reasons." In her letter to Rosado-Martinez, Morales also states that Magnana screamed at her in front of another employee in violation of company policy when her machine stopped working. The Second Circuit has stated that "[f]acially neutral incidents may be included, of course, among the totality of the circumstances that courts consider in any hostile work environment claim, so long as a reasonable fact-finder could conclude that they were, in fact, based on sex." Alfano v. Costello, 294 F.3d 365, 378 (2d Cir. 2001). In this case, Morales has failed to produce evidence to support an inference that Magnana's yelling and sneering at Morales was motivated by discriminatory animus. With one exception, Morales does not provide any details about the circumstances under which Magnana yelled at her. With respect to the incident where Magnana screamed at Morales when her machine stopped working, Morales has not offered evidence from which a

reasonable fact-finder could infer that Magnana's actions were motivated by gender-based animus. Because Morales has failed to produce evidence of a linkage or correlation to the claimed ground of discrimination, these other incidents do not support her contention that she was subjected to a hostile work environment because of her sex. See Alfano, 294 F.3d at 378 ("It is therefore important in hostile work environment cases to exclude from consideration personnel decisions that lack a linkage or correlation to the claimed ground of discrimination."); Figueroa v. City of New York, 118 Fed.Appx. 524 (2d Cir. 2004) (upholding grant of summary judgment where the plaintiff's allegations of gender discrimination did not meet the threshold for frequency and severity and where the plaintiff failed to show the required linkage between sex-neutral incidents and discriminatory animus); Manessis v. New York City Dept. of Transp., 2003 WL 289969 (S.D.N.Y. 2003) ("...the record establishes that the two arguably discriminatory comments, both isolated, relatively mild and insufficient in themselves to create a hostile work environment, cannot support an inference that the other eight incidents were motivated by discriminatory animus."). Thus, Morales has failed to satisfy the first element of her hostile work environment claim.

Assuming arguendo that Morales has created a genuine issue of material fact as to whether there was a hostile work

environment, the court turns to the second element of her claim, i.e. whether the conduct creating the hostile work environment can be imputed to the employer. Since the discriminatory harassment was perpetrated by Morales' supervisor, ATP is presumed to be absolutely liable. However, ATP has raised the Faragher-Ellerth affirmative defense, which is available in this case because Magnana did not take any tangible employment action against Morales.

With respect to the first element of this defense, ATP has produced evidence demonstrating that it exercised reasonable care to prevent and correct promptly any harassing behavior and Morales has failed to create a genuine issue of fact as to this point. First, ATP provided Morales with a copy of its "Personnel and Benefits Guide," which described the company's anti-harassment policy that was in effect during the period of the Morales' employment. That policy prohibited harassment on the basis of, inter alia, an individual's gender. It emphasized that offensive behavior, including harassment, would not be tolerated at ATP. It also provided a procedure for employees to complain about harassment to a supervisor or to an HR representative. See Ferraro v. Kellwood, 440 F.3d at 102 ("An employer may demonstrate the exercise of reasonable care, required by the first element, by showing the existence of an antiharassment policy during the period of the plaintiff's employment, although

that fact alone is not always dispositive."). Morales utilized these procedures when she brought complaints of discriminatory conduct by Lopez and Malave to Rosado-Martinez's attention. Rosado-Martinez held a meeting with Morales, Lopez, and Malave to discuss Morales' allegations of discrimination. She indicated that the company would be monitoring the behavior of Lopez and Malave. Morales stated that she was initially satisfied with the manner in which Rosado-Martinez handled the situation. When Morales' complaints of discrimination and harassment by Lopez persisted, Rosado-Martinez transferred Morales to another department. Morales contends that when she was transferred to the Molding Department, she continued to be subjected to discrimination and harassment, this time by Magnana. However, she never reported any complaints about Magnana to Rosado-Martinez until she was called into Rosado-Martinez's office for the final termination meeting. Rosado-Martinez again attempted to locate work for Morales with a different supervisor, but the decision was ultimately made to terminate Morales' employment because of her well-documented history of violations of ATP's attendance policies.[10] For these reasons, the only conclusion

[10] While working in the Deco Department, Morales received a verbal warning about her attendance and two written warnings for failing to show up for work without first notifying her employer. She also received a written warning for abandoning her work station. When she was transferred to the Molding Department, Morales received two more written warnings for missing work. The last of these warnings explicitly stated that Morales was

supported by the evidence is that ATP exercised reasonable care to prevent and correct promptly any harassing behavior by its employees.

Second, ATP has also satisfied its burden with respect to the second element of the Faragher-Ellerth defense and Morales has failed to create a genuine issue of fact as to this point. "The defendant bears the ultimate burden of persuasion on this element, but it may carry that burden by first introducing evidence that the plaintiff failed to avail herself of the defendant's complaint procedure and then relying on the absence or inadequacy of the plaintiff's justification for that failure." Ferraro, 440 F.3d at 103. With respect to her complaints of discrimination and harassment by Magnana, it is undisputed that Morales failed to avail herself of ATP's complaint procedure until her final meeting with Rosado-Martinez, at which point even Morales realized she would be terminated for her attendance violations. Morales conceded that she had been satisfied with the manner in which Rosado-Martinez handled her complaints about Lopez and Malave while she was working in the Deco Department. In addition, Rosado-Martinez had demonstrated a willingness to accommodate Morales by transferring her to another department under a different supervisor. Morales does not provide a

---

frequently absent from work without excuse and warned her of possible termination. After receiving this warning, Morales missed another day of work. Morales concedes that she was frequently absent from work.

reasonable justification for her failure to avail herself of ATP's complaint procedure when she was working in the Molding Department. Therefore, the court concludes that Morales' failure to use the complaint procedure was unreasonable and that the ATP has also met its burden with respect to the second element of the Faragher-Ellerth defense.

In her opposition to the motion for summary judgment, Morales contends that ATP's responses to her complaints were inadequate. In support of this argument, Morales relies heavily on Distasio v. Perkin Elmer Corp., 157 F.3d 55 (2d Cir. 1998), a case in which the court considered when harassing conduct by a co-worker, which created a hostile work environment for an employee, can be imputed to an employer. In such a case, the court held that an employer will be liable if the plaintiff "can demonstrate that the company either provided no reasonable avenue for complaint or knew of the harassment but did nothing about it." Distasio, 157 F.3d at 63 (internal quotation marks and citation omitted). In Distasio, the Second Circuit held that knowledge of the harassment was imputed to the employer because the company's sexual harassment policy explicitly stated that the company is considered to have direct knowledge of a complaint once an employee complains to a supervisor or HR representative and because supervisors had a responsibility under the company's express policy to relay sexual harassment complaints to the

company. The court also stated that "[w]hile the fact that a complaint was unreported may be relevant in considering whether an employer had knowledge of the alleged conduct, an employer is not necessarily insulated from Title VII liability simply because a plaintiff does not invoke her employer's internal grievance procedure if the failure to report is attributable to the conduct of the employer or its agent." Id. at 64. On the issue of whether the employer's response was reasonable, the court noted that the supervisor's only response to Distasio's complaint was to speak with the co-worker who harassed him. The supervisor "did not follow company policy that required him to report Distasio's complaints to Human Resources," and the court concluded that "[t]his failure to comply with the company's own reporting requirements is evidence tending to show that the company's response was inadequate." Id. at 65.

Morales argues that the facts of her case are similar to those presented in Distasio. In her opposition, Morales contends that she "was so demoralized and depressed by the continuing harassment without any action on the part of ATP that she gave up pressing her complaints." (Pl's Mem. Opp. at 15). Morales also contends that, although she was initially satisfied with Rosado-Martinez's response to her complaints, the harassment she was experiencing only became worse after she complained. She argues that, like the supervisor in Distasio, Rosado-Martinez's only

response to her complaints was to speak with the people who harassed her. She contends that Rosado-Martinez did not follow the company's policy requiring her to report Morales' complaints to senior management, as evidenced by the fact that one of her supervisors, Dana Deardoff, was never informed of Morales' complaints until after Morales' termination.

As an initial matter, the court in Distasio was analyzing whether the harassing conduct of a co-worker could be imputed to an employer. In this case, the employer is presumed liable because Magnana was Morales' supervisor, and the court is analyzing the separate issue of whether the employer can raise the Faragher-Ellerth affirmative defense to the plaintiff's claim. In addition, Distasio is distinguishable in other respects. First, unlike the policy considered in Distasio, ATP's policy on harassment does not expressly state that complaints brought to the human resources manager must be relayed to her supervisors. Although Deardoff testified that the company's business practices require the human resources manager to report all complaints of discrimination to senior management, such business practices are not contained in any written policy promulgated by the company. Second, contrary to Morales' contention, Rosado-Martinez did more than just speak with her supervisors in response to her complaints. Rosado-Martinez transferred Morales to a different department where she would not

be supervised by Lopez. Although Morales notes that she was transferred and Lopez was not, there is no evidence to support the contention that the decision to transfer Morales was not an adequate remedy for the alleged harassment by Lopez. Morales contends that the harassment persisted under Magnana's supervision, but Morales made no complaints about Magnana until the final meeting with Rosado-Martinez. Third, unlike Distasio, where the plaintiff's supervisor allegedly told her not to say anything about her co-worker's conduct, Morales has not produced any evidence to show that her failure to report her claims at an earlier time was caused by the conduct of ATP or its agent. Morales eventually drafted a letter to Rosado-Martinez on October 10, 2005, which voiced her concern about harassment by Magnana. This letter, however, was not given to Rosado-Martinez until October 14. According to Morales, Rosado-Martinez then showed his letter to her supervisor before Morales was terminated for violating ATP's policies on attendance. Although Deardoff was not notified of Morales' complaints until after her termination, there is no evidence that all employee complaints of discrimination had to be reported to Deardoff. For these reasons, the court finds unpersuasive Morales' argument that there is evidence that would support a conclusion that ATP's

response to her complaints of discrimination was inadequate.[11]

Accordingly, the court concludes that (1) there is no genuine issue of material fact as to whether a hostile work environment existed and (2) that the defendant has established the Faragher-Ellerth affirmative defense as a matter of law. Therefore, ATP's motion for summary judgment is being granted with respect to Morales' Title VII hostile work environment claim.

Morales also brings a hostile work environment claim under CFEPA. CFEPA claims are evaluated using the same framework as an Title VII claims. See Brittell v. Dept. of Corr., 247 Conn. 148, 164 (1998) ("Although the language of [Title VII] and that of [CFEPA] differ slightly, it is clear that the intent of the legislature ... was to make the Connecticut statute coextensive with the federal [statute]."). However, unlike Title VII, CFEPA also prohibits discrimination in employment based on an individual's sexual orientation. See Conn. Gen. Stat. § 46a-81c.

---

[11] Morales also cites to Brunson v. Bayer Corp., 237 F.Supp.2d 192 (D.Conn. 2002), a case in which the plaintiff alleged sexual harassment by a co-worker. In denying summary judgment in that case, the court held that a genuine issue of material fact existed as to whether knowledge of the harassment could be imputed to the employer where the plaintiff notified two production floor supervisors of the harassment and they failed to report the harassment to management in accordance with the company's handbook and business practices, thereby failing to adequately respond to the plaintiff's complaints. For the reasons set forth above, Brunson is also distinguishable from this case.

Thus, Morales may use evidence of harassment based on her sexual orientation, in addition to evidence of harassment based on her failure to conform to gender stereotypes, to support her hostile work environment claim under CFEPA. See Cruz v. Coach Stores, 202 F.3d 560, 572 (2d Cir. 2000) ("Given the evidence of both race-based and sex-based hostility, a jury could find that [a manager's] racial harassment exacerbated the effect of his sexually threatening behavior and vice versa."); Feingold, 366 F.3d 138, 151 ("while [the plaintiff] has not alleged sufficient facts to make out a hostile work environment claim based solely on race, his allegations of racial animosity can nevertheless be considered by a trier-of-fact when evaluating [the plaintiff's] religion-based claim.").

Morales has failed to produce sufficient admissible evidence to support a hostile work environment claim based solely on her sexual orientation. Morales has produced her opinion that Lopez was "homophobic" and the double hearsay statements by Lopez and Pagan. Assuming arguendo that Morales has produced admissible evidence of harassment based on her sexual orientation, and that such evidence could be aggregated with the evidence of harassment based on her sex to support a hostile work environment claim,[12]

[12] Both of these propositions are dubious. First, as noted above, the evidence adduced by Morales to support the contention that she was discriminated against on the basis of her sexual orientation is likely inadmissible. Also, the Second Circuit has noted that "[a] question remains as to whether a plaintiff may aggregate evidence of racial and sexual harassment to support a

Morales' claim under CFEPA fails because ATP has established the Faragher-Ellerth affirmative defense as a matter of law. See Brittell, 247 Conn. at 167, n. 30 (recognizing the availability of the Faragher-Ellerth affirmative defense under Connecticut law). Therefore, ATP's motion for summary judgment is also being granted with respect to Morales' CFEPA hostile work environment claim.

IV. CONCLUSION

For the reasons set forth above, defendant ATP Health & Beauty Care, Inc.'s Motion for Summary Judgment (Doc. No. 36) is hereby GRANTED.

The Clerk shall enter judgment in favor of the defendant on all counts and close this case.

It is so ordered.

Dated this 18th day of August 2008 at Hartford, Connecticut.

_____/s/_AWT_____
Alvin W. Thompson
United States District Judge

---

hostile work environment claim where neither charge could survive on its own." Cruz, 202 F.3d at 572, n. 7. Because the court in Cruz concluded that the plaintiff "adduced sufficient evidence to support independent racial and sexual harassment claims," it did not reach this issue. Id.