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BY ECF

January 13, 2017

Catherine O'Hagan Wolfe-Clerk of Court
United States Court of Appeals for the Second Circuit
Thurgood Marshall U.S. Courthouse
40 Foley Square
New York, NY 10007

Re: Christiansen v. Omnicom, et. al. #16-748cv

Dear Ms. Wolfe:

I submit this Fed. R. App. 28(J) letter on behalf of Appellant Matthew Christiansen regarding recent cases related to his brief on the issue of whether Title VII protects sexual orientation. The cases affirming that are *EEOC v. Scott Medical Health Center*, No. 16-225, 2016 WL 6569233 (W.D. Pa. Nov. 4, 2016) and *Boutillier v. Hartford Pub. Schs*, 2016 U.S. Dist. LEXIS 159093, 100 Empl. Prac. Dec. (CCH) P45,686 (D. Conn. Nov. 17, 2016) (**Exhibits A and B**).

In *Scott Medical Health Center,* the court found that "but for" the employee's sex he would not have been discriminated against because sexual orientation is a subset of sex. It analyzed *Price Waterhouse* and found that sex stereotyping discrimination is the same "discriminatory evil" as sexual orientation discrimination. The discrimination comes from the view of the harasser/employer that always starts with the sex of the victim/employee. The Court identified recent Federal cases holding that Title VII protects sexual orientation and explained that Congressional inaction to amend the definition of "sex" to include sexual orientation does not negate a court's interpretative process.

In *Boutillier*, the court found that the ordinary meaning of sex should be taken to its logical conclusion to include sexual orientation. It explained that Congressional inaction to amend the word sex does not negate that "the existing legislation already incorporated the offered change. *Pension Ben. Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 650 (1990). In resolving *Simonton v. Runyon,* 232 F.3d 33, 36 (2d Cir. 2000) holding that Title VII does not protect sexual orientation, the District Court explained that since *Simonton* this Circuit empowered employees to bring virtually similar associational Title VII claims by alleging race discrimination in *Holcomb v. Iona College*, 521 F.3d 130, 139 (2d Cir. 2008). *Holcomb*, 2006 U.S. Dist. LEXIS 50437, 2006 WL 1982764 at *9. *Boutillier* found that:

"The logic is inescapable: If interracial association discrimination is held to be "because of the employee's *own* race," so ought sexual orientation discrimination be held to be because of the employee's *own* sex. Holcomb and Simonton are not legitimately distinguishable." at *Boutillier*, at 27.

Very truly yours,
LAW OFFICES OF SUSAN CHANA LASK

SUSAN CHANA LASK

United States EEOC v. Scott Med. Health Ctr., P.C.

United States District Court for the Western District of Pennsylvania

November 4, 2016, Decided; November 4, 2016, Filed

Civil Action No. 16-225

Reporter
2016 U.S. Dist. LEXIS 153744 *; 100 Empl. Prac. Dec. (CCH) P45,675

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Plaintiff, v. ***SCOTT*** ***MEDICAL*** HEALTH ***CENTER***, P.C., Defendant.

Core Terms

sex, harassment, ***sexual orientation***, ***sexual***, Charges, male, stereotyping, notice, alleges, subjected, hostile, reasonable investigation, work environment, argues, sex discrimination, employees, offensive, comments, evil

Counsel: **[*1]** For U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Plaintiff: Deborah A. Kane, LEAD ATTORNEY, United States Equal Employment Opportunity Commission, Pittsburgh, PA; Ronald L. Phillips, U.S. Equal Employment Opportunity Commission - Baltimore Fie, Baltimore, MD.

For ***SCOTT*** ***MEDICAL*** HEALTH ***CENTER***, P.C., Defendant: Charles H. Saul, LEAD ATTORNEY, Margolis Edelstein, Pittsburgh, PA; Kyle T. McGee, LEAD ATTORNEY, MARGOLIS EDELSTEIN, Pittsburgh, PA.

For AMERICAN CIVIL LIBERTIES UNION OF PENNSYLVANIA, ACLU of Pennsylvania, Amicus: Sara Rose, LEAD ATTORNEY: ACLU, Pittsburgh, PA.

For AMERICAN CIVIL LIBERTIES UNION, AMERICAN CIVIL LIBERTIES UNION OF PENNSYLVANIA, 9TO5 NATIONAL ASSOCIATION OF WORKING WOMEN, CALIFORNIA WOMENS LAW ***CENTER***, A BETTER BALANCE, EQUAL RIGHTS ADVOCATES, FEMINIST MAJORITY FOUNDATION, GENDER JUSTICE, LEGAL VOICE, NATIONAL WOMENS LAW ***CENTER*** SOUTHWEST WOMENS LAW ***CENTER***, WOMENS LAW ***CENTER*** OF MARYLAND, WOMEN'S LAW PROJECT WESTERN PENNSYLVANIA, Amici: Ria Tabacco Mar, LEAD ATTORNEY, PRO HAC VICE, American Civil Liberties Union, New York, NY; Lenora Lapidus, PRO HAC VICE, American Civil Liberties Union, New York, NY.

For LAMBDA LEGAL DEFENSE AND EDUCATION FUND, Amicus: Gregory R. Nevins, **[*2]** LEAD ATTORNEY, PRO HAC VICE, Lambda Legal, Atlanta, GA; Omar Gonzalez-Pagan, LEAD ATTORNEY, PRO HAC VICE, Lambda Legal Defense and Education Fund, Inc., New York, NY; Tracie L. Palmer, LEAD ATTORNEY, Kline & Specter, PC, Philadelphia, PA; David C. Williams, PRO HAC VICE, Kline & Specter, P.C., Philadelphia, PA.

Judges: Cathy Bissoon, United States District Judge.

Opinion by: Cathy Bissoon

Opinion

MEMORANDUM ORDER

The United States Equal Employment Opportunity Commission ("the EEOC" or "the Commission") brings this action pursuant to *Title VII of the Civil Rights Act of 1964* ("Title VII") on behalf of Dale Baxley, a gay male employed and allegedly constructively discharged by ***Scott*** ***Medical*** Health ***Center***, P.C., ("Defendant"), due to an allegedly sexually hostile work environment perpetuated by Defendant's telemarking manager, Robert McClendon. See generally, Compl. (Doc. 1). Defendant moves to dismiss Plaintiff's Complaint on two grounds -- first, that pursuant to *Federal Rule of Civil Procedure 12(b)(1)*, the "Court lacks jurisdiction to hear this matter due to Plaintiff's failure to comply with the procedural requirements of Title VII," (Def's Mot. (Doc. 11) at ¶ 2), and second, that pursuant to *Federal Rule of Civil Procedure 12(b)(6)*, Plaintiff has failed to establish a claim on which relief **[*3]** can be granted because, Defendant argues, Title VII does not protect discrimination on the basis of ***sexual orientation***. Id. at ¶ 10. For the reasons below, Defendant's Motion to Dismiss will be denied.

I. MEMORANDUM

BACKGROUND

From mid-July until on or about August 19, 2013, Dale Baxley was employed by Defendant in a telemarketing position. (Doc. 1) at ¶ 11(a) and (g). At all times relevant to the Complaint, Robert McClendon was Defendant's telemarketing manager. Id. at ¶ 11(b). The Commission alleges that, through Mr. McClendon's discriminatory behavior, Defendant "engaged in sex discrimination against Baxley by subjecting him to a continuing course of unwelcome and offensive harassment because of his sex." Id. at ¶ 11(c). Furthermore, Plaintiff alleges, the "harassment was of sufficient severity and/or pervasiveness to create a hostile work environment because of [Mr. Baxley's] sex." Id.

Specifically, the Complaint alleges Mr. McClendon "routinely made unwelcome and offensive comments about [Mr.] Baxley, including but not limited to regularly calling him 'fag,' 'faggot,' 'fucking faggot,' and 'queer,' and making statements such as 'fucking queer can't do your job.'" Id. at ¶ 11(d). Plaintiff **[*4]** alleges these type of harassing comments were made "at least three to four times a week." Id. Additionally, according to the allegations in the Complaint, "upon learning that [Mr.] Baxley is gay and had a male partner ..., [Mr.] McClendon made highly offensive statements to [Mr.] Baxley about [Mr.] Baxley's relationship with the partner such as saying, 'I always wondered how you fags have sex,' 'I don't understand how you fucking fags have sex,' and 'Who's the butch and who is the bitch?'" Id. at ¶ 11(e).

On March 1, 2016, the EEOC instituted this action following an investigation of charges of discrimination brought by five of Mr. Baxley's female former co-workers (the "Charges"). Id. at ¶ 6. In those Charges, the employees alleged they had been subjected to discrimination because of sex. Specifically, the Charges allege that Mr. McClendon subjected the "Complainants to ***sexual*** harassment and unwanted touching so frequently and severely that it created a hostile and offensive work environment and resulted in adverse employment decisions being taken against them." Fullard EEOC Charge, (Doc. 12-1) at ¶ 9; see also Griffie, Mackie, Wieczorek and Eber EEOC Charges (Docs. 12-2-12-5).

During **[*5]** the course of the EEOC's investigation of these Charges, it learned that this alleged harassment extended to Mr. Baxley, and learned of Mr. Baxley's allegation of constructive discharge. (Doc. 1) at ¶ 6. On July 22, 2015, the Commission issued Letters of Determination to Defendant "finding reasonable cause to believe that Title VII was violated" with regards to the Charging parties, and also stating:

> Investigation also revealed that [Mr.] McClendon harassed a male employee because of sex, specifically and repeatedly referring to the male employee as a "faggot," and repeatedly asking about the employee's ***sexual*** experiences and preferences. The investigation revealed that [Mr.] McClendon targeted this male employee because he did not conform to what [Mr.] McClendon believed was acceptable or expected behavior for a male because of his association with members of the same sex rather than the opposite sex. The harassment created a work environment that was both subjectively and objectively hostile and intolerable because of sex, male. The male employee complained about [Mr.] McClendon's conduct directly to the President/Chief Executive Officer, who shrugged it off and took no action at **[*6]** all to stop the harassment, which continued. [Defendant's] failure to engage in prompt and effective action in response to the ongoing harassment resulted in the male employee's constructive discharge when he quit in August 2013.

Fullard Determination, (Doc. 12-6) at 2; see also Griffie, Mackie, Wieczorek and Eber Determination Letters (Docs. 12-7-12-10). The EEOC then provided Defendant an opportunity to remedy the discriminatory practices described in the Letter of Determination. (Doc. 1) at ¶ 8. According to the Complaint, the EEOC was unable to reach a conciliation agreement with Defendant that the EEOC found acceptable. Id. at ¶ 9. On September 15, 2015, the EEOC issued to Defendant a Notice of Failure of Conciliation. Id. at ¶ 10. This lawsuit followed.

ANALYSIS

Defendant's first basis for urging the Court to dismiss Plaintiff's case relates to what Defendant believes are the EEOC's procedural deficiencies in bringing this suit — deficiencies, Defendant argues, that render the Court unable to hear the dispute for want of subject matter jurisdiction. See Def.'s Br. (Doc. 12) at 4-11. Defendant argues that the EEOC can only litigate claims that have been subjected to the full administrative **[*7]** process required by Title VII and that the EEOC did not abide by the proper process in this case. As part of that procedural deficiency, Defendant argues, the EEOC's

suit is untimely.

The Supreme Court has clarified that the "EEOC is not acting as a proxy for discrimination victims but instead acts on its own authority to vindicate the public interest in eliminating workplace discrimination." *EEOC v. Waffle House, Inc., 534 U.S. 279, 286-88, 296, 122 S. Ct. 754, 151 L. Ed. 2d 755 (2002)*. Title VII establishes a number of preconditions that must occur in order for the Commission to bring a lawsuit on its own behalf. *42 U.S.C. § 2000e-5(b), (f)(1)*. First, the EEOC must receive a charge filed on behalf of an employee alleging workplace discrimination. Id. Next, the EEOC must provide notice of the charge to the employer. Id. Then, the EEOC must conduct an investigation into the charge. Id. After its investigation, the EEOC must make a reasonable cause determination. Id. And finally, if the EEOC determines reasonable cause exists, it must engage in conciliation efforts. Id. Only once all of these preconditions have been met can the EEOC file suit. Id. The EEOC has completed each of these prerequisites in the instant case. (Doc. 1) at ¶¶ 6-10.

Defendant would have this Court apply an interpretation of Title VII **[*8]** that imposes identical procedural requirements on the EEOC suing in its own name as the statute imposes on private plaintiffs. The statute does not support such a reading.[1] See *EEOC v Caterpillar, Inc., 409 F.3d 831 (7th Cir. 2005)*; *EEOC v. General Electric Co., 532 F.2d 359 (4th Cir. 1976)*; *EEOC v. Hearst Corp., Seattle Post-Intelligencer Div., 553 F.2d 579 (9th Cir. 1976)*; *EEOC v. Huttig Sash & Door Co., 511 F.2d 453 (5th Cir. 1975)*.

Rather, the case law clearly provides that the EEOC's authority is defined by the "reasonable investigation" standard. See *EEOC v. Kronos, 620 F.3d 287, 297 (3d Cir. 2010)* ("Once the EEOC begins an investigation, it is not required to ignore facts that support additional claims of discrimination if it uncovers such evidence during the course of a reasonable investigation of the charge.") (citing *Gen. Tel. Co. of the N.W., Inc. v. EEOC, 446 U.S. 318, 331, 100 S. Ct. 1698, 64 L. Ed. 2d 319 (1980)* ("Any violations that the EEOC ascertains in the course of a reasonable investigation of the charging party's complaint are actionable.") and *EEOC v. General Electric, Co., 532 F.2d 359, 364-65 (4th Cir. 1976)* ("[T]he original charge is sufficient to support action by the EEOC ... for any discrimination stated in the charge itself or developed in the course of a reasonable investigation of that charge..."). Here, the EEOC learned of Mr. McClendon's alleged harassment of Mr. Baxley in the course of its "reasonable investigation" into charges of discrimination and harassment brought by his co-workers.

Defendant argues that the EEOC must file a new charge on behalf of a claimant when the allegations raised in the original charge are different from the alleged wrongdoing the EEOC has uncovered **[*10]** through its investigation, "such as racial discrimination claims discovered in the course of investigating a disability discrimination charge." (Doc. 38) at 7. Defendant misses the mark. Mr. Baxley's claims do *not* involve a different type of discrimination. The EEOC alleges that Mr. McClendon discriminated against and harassed Mr. Baxley "because of sex." The original charges that led to the EEOC's investigation alleged the very same. That the precise form of the sex discrimination and/or harassment may have differed from individual to individual does not alter this conclusion.

Defendant also argues that the EEOC did not file its Complaint within the appropriate timeframe. (Doc. 12) at 13-16. Defendant further contends that, due to the delay, it had insufficient notice of the investigation into Mr. McClendon's discrimination of Mr. Baxley and that it "was denied fundamental fairness, as it did not receive prompt notice, and it was not given an opportunity to gather and preserve evidence in anticipation of potential court action." (Doc. 12) at 16. The Commission

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[1] To the contrary, the Court of Appeals for the Seventh Circuit has explained:

> The difference between the two classes of case is that exhaustion of administrative remedies is an issue when the suit is brought by a private party but not when the Commission is the plaintiff. Were the private party permitted to add claims that had not been presented in the administrative charge filed with the EEOC, the Commission's informal procedures for resolving discrimination charges ... would be by-passed, in derogation of the statutory scheme. That is not an issue when the EEOC itself is the plaintiff, which is why a suit by the EEOC is not confined "to claims typified by those of the charging party," and why Caterpillar is mistaken to think that the EEOC's complaint must be closely related to the charge that kicked off the Commission's investigation. "Any violations that the EEOC ascertains in the course of a reasonable investigation of the charging party's complaint are actionable." The charge incites the investigation, **[*9]** but if the investigation turns up additional violations the Commission can add them to its suit.

EEOC v Caterpillar, Inc., 409 F.3d 831, 832-33 (7th Cir. 2005) (internal citations omitted).

responds by noting that the only timeframe discussed in the statute applies to private litigants, not the EEOC itself. See **[*11]** Pl.'s Br. (Doc. 16) at 24-25.[2]

The Court agrees with the EEOC that there is no relevant statute of limitations when the EEOC sues in its own name. See *Occidental Life Ins. Co. v. EEOC, 432 U.S. 355, 97 S. Ct. 2447, 53 L. Ed. 2d 402 (1977)* (finding no time limitation imposed on the EEOC when filing a suit on its own behalf in an action where the EEOC filed suit approximately three years after the initial Charge and five months after conciliation efforts failed). As discussed, the only preconditions to the EEOC filing suit are those five that are discussed above. The EEOC has alleged sufficient facts in its Complaint that establish it has fully complied with those statutory prerequisites.

Moreover, Defendant's contention that it had insufficient notice of the EEOC's investigation into Mr. McClendon's alleged harassment of Mr. Baxley is belied by the facts asserted by the Commission. The Commission responds that, not only did the EEOC put Defendant on notice regarding the potential for a suit related to Mr. Baxley in its reasonable cause determination letters, but the EEOC's investigator requested Mr. Baxley's personnel file in connection with **[*12]** the investigation, met with Defendant's Chief Executive Officer to ask questions about Mr. Baxley's complaints, and informed Defendant's counsel that additional victims, including Mr. Baxley, had been uncovered during the course of the investigation and provided those names. See Rodia Declaration (Doc. 16-2) at ¶¶ 6-9 ("I specifically informed Mr. Saul that I was recommending that the cause of the finding include harassment of Mr. Baxley because of his sex in violation of Title VII.") Assuming *arguendo* that Title VII imposes notice requirements beyond the statutory prerequisites (and the Court notes that Defendant has provided no authority that it does), the Court views the notice alleged here to be more than sufficient to alert Defendant to the likelihood of a suit on behalf of Mr. Baxley.[3]

Accordingly, Defendant's Motion to Dismiss on the ground that this Court lacks subject matter jurisdiction will be denied.

Defendant additionally asks the Court to dismiss Plaintiff's Complaint for failure **[*13]** to state a cause of action, arguing that Title VII does not prohibit discrimination based on ***sexual orientation***. (Doc. 12) at 17. Defendant cites *Bibby v. Philadelphia Coca-Cola Bottling, Co., 260 F.3d 257 (3d Cir. 2001)* and *Prowel v. Wise Business Forms, Inc., 579 F.3d 285 (3d Cir. 2009)* in support of its position, arguing the Court of Appeals for the Third Circuit has consistently held Title VII cannot be extended in this fashion. (Doc. 12) at 17. The EEOC responds that "[t]he lack of an express reference to ***sexual orientation*** in the statutory text is not controlling." (Doc. 16) at 5. The EEOC puts forth what it sees to be three lines of analysis to demonstrate why Title VII covers the type of ***sexual*** harassment that Mr. Baxley was subjected to in this matter:

> (1) [Mr.] Baxley was targeted because he is a male, for had he been female instead of a male, he would not have been subject to discrimination for his intimate relationships with men; (2) [Mr.] Baxley was targeted and harassed because of his intimate association with someone of the same sex, which necessarily takes Baxley's sex into account; and (3) [Mr.] Baxley was targeted because he did not conform to his harasser's concepts of what a man should be or do.

Id. The Court views this as the same argument articulated in three different ways, with the singular question **[*14]** being whether, but for Mr. Baxley's sex,[4] would he have been subjected to this discrimination or harassment. The answer, based on these allegations, is no.

The Court holds Title VII's "because of sex" provision prohibits discrimination on the basis of ***sexual orientation***. Accordingly, the EEOC's Complaint stating that Mr. Baxley was discriminated against for being gay properly states a claim for relief. The Court sees no meaningful difference between ***sexual orientation*** discrimination and discrimination "because of sex."

The Supreme Court has consistently applied a broad interpretation of the "because of sex" language in Title VII. Incremental changes have over time broadened the

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[2] The Court's citations to Plaintiff's briefing reference the ECF Docket page number rather than the page number on the document itself.

[3] It also should be noted that, to the extent that any notice is required — and the Court is not persuaded that it is — the amount of notice provided to Defendant is an issue of fact, in any event.

[4] The Court, fully acknowledging the terms "sex" and "gender" are meaningfully different, for the purposes of this Memorandum Order, will use the terms interchangeably, noting that much of the precedent interpreting this provision of Title VII similarly conflates the two terms.

scope of Title VII's protections of sex discrimination in the workplace. See *Newport News Shipbuilding and Dry Dock Co. v. EEOC, 462 U.S. 669, 682, 103 S. Ct. 2622, 77 L. Ed. 2d 89 (1983)* ("Male as well as female employees are protected against discrimination."); *Meritor Savings Bank, FSB v. Vinson, 477 U.S. 57, 66, 106 S. Ct. 2399, 91 L. Ed. 2d 49 (1986)* ("[P]laintiff may establish a violation of Title VII by proving that discrimination based on sex **[*15]** has created a hostile or abusive work environment"); *Oncale v. Sundowner Offshore Services, Inc., 523 U.S. 75, 82, 118 S. Ct. 998, 140 L. Ed. 2d 201 (1998)* ("[W]e conclude that sex discrimination consisting of same-sex ***sexual*** harassment is actionable under Title VII."); *Price Waterhouse v. Hopkins, 490 U.S. 228, 250, 109 S. Ct. 1775, 104 L. Ed. 2d 268 (1989)* ("In the specific context of sex stereotyping, an employer who acts on the basis of a belief that a women cannot be aggressive, or that she must not be, has acted on the basis of gender."); see also *Smith v. City of Salem, Ohio, 378 F.3d 566 (6th Cir. 2004)* (applying Title VII's prohibition on sex stereotyping to harassment of a transgender individual).

In Oncale, the Supreme Court acknowledged that while same sex-harassment likely was not contemplated by Congress when enacting Title VII, it is nonetheless covered under the "because of sex" provision. *523 U.S. at 79-82*. "[S]tatutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed." *Id. at 79*; see also *Harris v. Forklift Systems, Inc., 510 U.S. 17, 25, 114 S. Ct. 367, 126 L. Ed. 2d 295 (1993) (GINSBURG, J., concurring)* ("The critical issue, Title VII's text indicates, is whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed.").

The Supreme Court's decision in Price Waterhouse, informs and controls the instant **[*16]** analysis.[5] In Price Waterhouse, the Supreme Court evaluated whether Price Waterhouse acted impermissibly in denying promotion to Ann Hopkins because she was too "macho." *490 U.S. at 235*. Ms. Hopkins was told that in order to attain partner status she needed to "walk more femininely, talk more femininely, dress more femininely, wear make-up, have [her] hair styled, and wear jewelry." Id. Put simply, Ms. Hopkins did not conform to the partnership's expectations of what a woman should be. As the Supreme Court noted, "if an employee's flawed interpersonal skills can be corrected by a soft-hued suit or a new shade of lipstick, perhaps it is the employee's sex and not her interpersonal skills that has drawn the criticism." *Id. at 256*. Thus:

> We are beyond the day when an employer could evaluate employees by assuming or insisting that [employees] matched the stereotype associated with their group, for "'[i]n forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes.'"

Id. at 251 (citing *Los Angeles Dept. of Water and Power v. Manhart, 435 U.S. 702, 707, n. 13, 98 S. Ct. 1370, 55 L. Ed. 2d 657 (1978)*).

There is no more obvious form of sex stereotyping than making a determination that a person should conform to heterosexuality. As the EEOC states, "[d]iscriminating against a person because of the sex of that person's romantic partner necessarily involves stereotypes about 'proper' roles in ***sexual*** relationships — that men are and should only be sexually attracted to women, not men." (Doc. 16) at 11-12. This discriminatory evil is more than reasonably **[*18]** comparable to the evil identified by the Supreme Court in Price Waterhouse. Indeed, the Court finds discrimination on the basis of ***sexual orientation*** is, at its very core, sex stereotyping plain and simple; there is no line separating the two. Contra *Prowel, 579 F.3d at 291* ("[T]he line between ***sexual orientation*** discrimination and discrimination "because of sex" can be difficult to draw."). It is, in the view of the undersigned, a distinction without a

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[5] The Court also finds compelling EEOC and *amici curiae*'s arguments that the same standard and reasoning that **[*17]** applies when examining cases involving interracial associations also applies in this context. See e.g., *Floyd v. Amite Cnty. Sch. Dist., 581 F.3d 244, 249 (5th Cir. 2009)* ("This court has recognized that ***§ 1981*** and *Title VII* prohibit discrimination against an employee on the basis of a personal relationship between the employee and a person of a different race."); *Holcomb v. Iona Coll., 521 F.3d 130, 138 (2d. Cir. 2008)* (same); *Parr v. Woodmen of World Life Ins. Co., 791 F.2d 888, 892 (11th Cir. 1986)* (same); see also *Price Waterhouse, 490 at 243, n.9* (noting that Title VII "on its face treats each of the enumerated categories exactly the same"). That this rationale is not discussed more fully in no way implies that the Court rejects this line of reasoning. The opposite is true. Only because the Court finds the sex stereotyping rationale sufficiently compelling and dispositive, does it not examine fully the "association" line of cases and how they would apply here.

difference. Forcing an employee to fit into a gendered expectation — whether that expectation involves physical traits, clothing, mannerisms or ***sexual*** attraction—constitutes sex stereotyping and, under Price Waterhouse, violates Title VII. Simply put, Mr. McClendon's alleged conduct toward Mr. Baxley "stemmed from an impermissibly cabined view of the proper behavior" of men. *Price Waterhouse, 490 U.S. at 236-37*.

Moreover, and for reasons discussed more fully *infra*, the Court does not view Bibby as dispositive. C.f. *Bibby, 260 F.3d at 261* ("Title VII does not prohibit discrimination on the basis of ***sexual orientation***."). As noted by the EEOC, the Court of Appeals in Bibby was not presented with the same arguments or analytical framework as that put forth by the EEOC in this case. (Doc. 16) at 20. The Bibby plaintiff did **[*19]** not make any argument that ***sexual orientation*** discrimination is sex stereotyping. See generally Brief for Appellant, 2001 WL 34117874. Additionally, the Plaintiff in Bibby failed to raise the question of how the impact of interracial association case law could impact the analysis of a ***sexual orientation*** discrimination case. Id. "In other words, it appears that in Bibby all parties simply assumed there was a legal distinction between discrimination "because of sex" and ***sexual orientation*** discrimination." (Doc. 16) at 20.

Additionally, since the publications of Bibby and Prowel, district courts throughout the country have endorsed an interpretation of Title VII that includes a prohibition on discrimination based on ***sexual orientation***. See *Isaacs v. Felder Services, LLC, 143 F. Supp. 3d 1190, 2015 WL 6560655, *1193 (M.D. Ala. 2015)* (holding claims of ***sexual orientation***-based discrimination cognizable under Title VII); *Terveer v. Billington, 34 F. Supp. 3d 100 (D.D.C. 2014)* (same); *Heller v. Columbia Edgewater Country Club, 195 F. Supp. 2d 1212, 1222 (D. Or. 2002)* ("Nothing in Title VII suggests that Congress intended to confine the benefits of that statute to heterosexual employees alone."); see also *Videckis v. Pepperdine Univ., 150 F. Supp. 3d 1151, 2015 WL 8916764 (C.D. Cal. 2015)* (finding sex discrimination necessarily includes ***sexual orientation*** discrimination under Title IX).

Furthermore, there have been significant intervening legal developments that call into question how the Court evaluated **[*20]** Title VII in Bibby. First, the principles of statutory interpretation relied on by the Court of Appeals in Bibby have since been revisited and revised, rendering suspect Bibby's statutory analysis. Bibby relied heavily on Congressional inaction on the Employment Non-Discrimination Act, which would have explicitly covered ***sexual orientation*** discrimination, as a means of justifying its ultimate conclusion that Title VII does not cover ***sexual orientation*** discrimination. However, subsequent Third Circuit decisions have questioned the value of reliance on Congressional inaction. See *In re Visteon Corp., 612 F.3d 210, 230 (3d Cir. 2010)* ("Evidence of congressional inaction is generally entitled to minimal weight in the interpretive process.") But, perhaps more importantly, much of the Title VII precedent relied on by the Court of Appeals in Bibby either predated Price Waterhouse or contained little to no analysis, merely accepting as a given that Title VII did not cover ***sexual orientation*** discrimination. See generally *Bibby 260 F.3d at 261*.

The Supreme Court's recent opinion legalizing gay marriage demonstrates a growing recognition of the illegality of discrimination on the basis of ***sexual orientation***. See *Obergefell v. Hodges, 135 S.Ct. 2584, 2590, 192 L. Ed. 2d 609 (2015)* ("[N]ew insights and societal understandings can reveal unjustified **[*21]** inequality within our most fundamental institutions that once passed unnoticed and unchallenged."). That someone can be subjected to a barrage of insults, humiliation, hostility and/or changes to the terms and conditions of their employment, based upon nothing more than the aggressor's view of what it means to be a man or a woman, is exactly the evil Title VII was designed to eradicate. Because this Court concludes that discrimination on the basis of ***sexual orientation*** is a subset of ***sexual*** stereotyping and thus covered by Title VII's prohibitions on discrimination "because of sex," Defendant's Motion to Dismiss on the ground that the EEOC's Complaint fails to state a claim for which relief can be granted will be denied.[6]

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[6] Moreover, the Court would be remiss to ignore the very ***sexual*** nature of several of the comments allegedly made by Mr. McClendon to Mr. Baxley. Even leaving everything discussed above aside, these comments are of the type that routinely have been found to give rise to actionable ***sexual*** harassment claims under Title VII. See *Andrews v. City of Phila., 895 F.2d 1469, 1482 n. 3 (3d Cir.1990)* ("the intent to discriminate on the basis of sex in cases involving ... sexually derogatory language [ ] should be recognized as a matter of course."); **[*22]** *Steiner v. Showboat Operating Co., 25 F.3d 1459, 1463 (9th Cir. 1994)* (finding comments that were "sexually explicit, offensive, highly derogatory, and publicly made" created an impermissibly hostile work environment under Title VII).

II. ORDER

For the reasons stated above, Defendant's Motion to Dismiss (Doc. 11) is DENIED.

IT IS SO ORDERED.

November 4, 2016

/s/ Cathy Bissoon

Cathy Bissoon

United States District Judge

End of Document

Boutillier v. Hartford Pub. Schs

United States District Court for the District of Connecticut

November 17, 2016, Decided; November 17, 2016, Filed

3:13-cv-01303-WWE

Reporter
2016 U.S. Dist. LEXIS 159093 *; 100 Empl. Prac. Dec. (CCH) P45,686

LISA BOUTILLIER, Plaintiff, v. HARTFORD PUBLIC SCHOOLS, Defendant.

Subsequent History: As Corrected November 21, 2016

Prior History: ***Boutillier*** *v. Hartford Pub. Sch., 2014 U.S. Dist. LEXIS 134919 (D. Conn., Sept. 25, 2014)*

Core Terms

sexual orientation, sex, disability, discriminated, school year, asserts, summary judgment, contends, teachers, alleges, stereotyping, impairment, employees, hostile, retaliation, conditions, gender, adverse employment action, constructive discharge, classroom, notified, hostile work environment, union representative, medical leave, individuals, interracial, harassment, genuinely, pregnancy, claimant

Case Summary

Overview
HOLDINGS: [1]-Based on the court's determination that Title VII protected individuals who were discriminated against because of their sexual orientation, plaintiff adequately established a right to protection under Title VII; [2]-Title VII and Connecticut Fair Employment Practices Act (CFEPA) hostile work environment claims survived because whether plaintiff was subjected to offensive acts or statements based on her sex was a material factual issue genuinely in dispute; [3]-Plaintiff created a triable issue as to whether her work conditions were intolerable; [4]-ADAAA and CFEPA discrimination claims failed, as she did not establish that she was disabled under either statute; [5]-Title VII and CFEPA retaliation claims survived, as plaintiff's complaints to an assistant principal qualified as protected activity and her assignment to a newly created position was effectively a demotion.

Outcome
The court granted defendant's motion for summary judgment in part and denied it in part.

LexisNexis® Headnotes

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Genuine Disputes

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Legal Entitlement

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Materiality of Facts

HN1 A motion for summary judgment will be granted where there is no genuine issue as to any material fact and it is clear that the moving party is entitled to judgment as a matter of law. Only when reasonable minds could not differ as to the import of the evidence is summary judgment proper.

Civil Procedure > ... > Summary Judgment > Burdens of Proof > Movant Persuasion & Proof

HN2 On a motion for summary judgment, the burden is on the moving party to demonstrate the absence of any material factual issue genuinely in dispute.

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Appropriateness

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Genuine Disputes

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Materiality of Facts

HN3 In determining whether a genuine factual issue exists, a court must resolve all ambiguities and draw all reasonable inferences against the moving party.

Civil Procedure > ... > Summary Judgment > Burdens of

Proof > Nonmovant Persuasion & Proof

Civil Procedure > ... > Summary Judgment > Evidentiary Considerations > Absence of Essential Element

Civil Procedure > ... > Summary Judgment > Evidentiary Considerations > Scintilla Rule

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Appropriateness

HN4 If a nonmoving party has failed to make a sufficient showing on an essential element of his case with respect to which he has the burden of proof, then summary judgment is appropriate. If the nonmoving party submits evidence which is merely colorable, legally sufficient opposition to the motion for summary judgment is not met.

Labor & Employment Law > Discrimination > Title VII Discrimination > Scope & Definitions

HN5 Title VII protects a limited class of persons from discrimination. Protection is limited to individuals who are discriminated against on the basis of race, color, religion, sex, or national origin. *42 U.S.C.S. § 2000e-2(a)(1), (2)*.

Governments > Legislation > Interpretation

HN6 It is a fundamental canon of statutory construction that, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning.

Governments > Legislation > Interpretation

Labor & Employment Law > ... > Gender & Sex Discrimination > Scope & Definitions > Sexual Orientation

Labor & Employment Law > Discrimination > Title VII Discrimination > Scope & Definitions

HN7 The Second Circuit has reasoned that although the legislative history on whether sexual orientation should be included in the category of sex is scant, because numerous bills have attempted to extend Title VII protection to sexual orientation, Congress did not intend to include sexual orientation protections in Title VII's current form. But under this rationale, had Congress failed to amend Title VII in 1978, pregnancy based discrimination (or the hypothetical prostate cancer based discrimination) would not constitute discrimination based on sex. Such reasoning is unpersuasive because Congress's intent as it exists now or existed in the recent past is not an accurate gauge of its intent as it existed over fifty years ago.

Labor & Employment Law > ... > Gender & Sex Discrimination > Scope & Definitions > Sexual Orientation

Governments > Legislation > Interpretation

Labor & Employment Law > Discrimination > Title VII Discrimination > Scope & Definitions

HN8 Acknowledging that the legislative history on whether sexual orientation should be included in the category of sex under Title VII is slight, it is difficult to glean the absence of prior intention merely from subsequent efforts by Congress to reenforce statutory civil rights protections. The failed efforts by Congress to explicitly include sexual orientation as a new, stand alone category of protected individuals under Title VII does not mandate the conclusion that sexual orientation based discrimination is not covered by the existing prohibition on sex based discrimination.

Governments > Legislation > Interpretation

HN9 The United States Supreme Court has warned that subsequent legislative history is a hazardous basis for inferring the intent of an earlier Congress. It is a particularly dangerous ground on which to rest an interpretation of a prior statute when it concerns a proposal that does not become law. Congressional inaction lacks persuasive significance because several equally tenable inferences may be drawn from such inaction, including the inference that the existing legislation already incorporated the offered change.

Governments > Legislation > Interpretation

Labor & Employment Law > Discrimination > Title VII Discrimination > Scope & Definitions

Labor & Employment Law > ... > Gender & Sex Discrimination > Scope & Definitions > Sexual Orientation

HN10 Straightforward statutory interpretation and logic dictate that sexual orientation cannot be extricated from sex; the two are necessarily intertwined in a manner that, when viewed under the Title VII paradigm set forth by the United States Supreme Court, place sexual orientation discrimination within the penumbra of sex discrimination.

Labor & Employment Law > ... > Gender & Sex Discrimination > Scope & Definitions > Sexual Orientation

Labor & Employment Law > Discrimination > Title VII Discrimination > Scope & Definitions

HN11 The United States District Court for the District of Connecticut finds that Title VII protects individuals who

are discriminated against on the basis of sex because of their sexual orientation.

Labor & Employment Law > ... > Retaliation > Elements > Adverse Employment Actions

Labor & Employment Law > ... > Retaliation > Elements > Causation

Labor & Employment Law > ... > Retaliation > Elements > Protected Activities

Labor & Employment Law > Discrimination > Disparate Treatment > Evidence

Business & Corporate Compliance > ... > Labor & Employment Law > Discrimination > Harassment

HN12 The analysis of discrimination and retaliation claims under the Connecticut Fair Employment Practices Act (CFEPA) is the same as under Title VII. A plaintiff must establish that (1) she was subjected to offensive acts or statements based on her protected category; (2) the acts or statements were unwelcome and had not been invited or solicited directly or indirectly by her own acts or statements; (3) the acts or statements resulted in a work environment that was so permeated with discriminatory intimidation, ridicule or insult that those acts or statements materially altered the condition of her employment; (4) a reasonable person would have found the workplace to be hostile or abusive; and (5) that she believed the workplace to be hostile or abusive.

Labor & Employment Law > ... > Disparate Treatment > Evidence > Circumstantial & Direct Evidence

Business & Corporate Compliance > ... > Labor & Employment Law > Discrimination > Harassment

HN13 In order to determine whether an environment is hostile or abusive, a court must look at all of the circumstances, including, (1) the frequency of the discriminatory conduct; (2) its severity; (3) whether it is physically threatening or humiliating, or a mere offensive utterance; and (4) whether it unreasonably interferes with an employee's work performance. Title VII is violated when 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.

Labor & Employment Law > Wrongful Termination > Constructive Discharge

HN14 Adverse employment actions include discharge from employment. Such a discharge may be either an actual termination of the plaintiff's employment by the employer or a constructive discharge.

Labor & Employment Law > Wrongful Termination > Constructive Discharge > Burdens of Proof

HN15 An employee is constructively discharged where an employer intentionally creates a work atmosphere so intolerable that she is forced to quit involuntarily. The Second Circuit has not insisted on proof of specific intent by employers, but a plaintiff must demonstrate that the employer's actions were deliberate. An employee must also demonstrate that the work conditions were intolerable.

Labor & Employment Law > Wrongful Termination > Constructive Discharge > Burdens of Proof

HN16 Intolerable working conditions is based on an objective standard of whether a reasonable person in the employee's position would have felt compelled to resign. An employee's subjective opinion that his or her working conditions are intolerable is not sufficient to establish constructive discharge.

Labor & Employment Law > ... > Constructive Discharge > Statutory Application > Title VII of the Civil Rights Act of 1964

Labor & Employment Law > ... > Constructive Discharge > Statutory Application > Americans With Disabilities Act

Labor & Employment Law > Wrongful Termination > Public Policy

HN17 The public policy exception to the general rule allowing unfettered termination of an at-will employment relationship is a narrow one, and courts should not lightly intervene to impair the exercise of managerial discretion or to foment unwarranted litigation. In any case, a plaintiff's claim will be precluded by virtue of the existence of statutory remedies such as Title VII and the *Americans with Disabilities Act*, as amended.

Labor & Employment Law > ... > Evidence > Burdens of Proof > Employee Burdens of Proof

HN18 To make out a prima facie case under the Americans with Disabilities Act (ADA), a plaintiff must establish that (1) her employer is subject to the ADA; (2) she was disabled within the meaning of the ADA; (3) she was otherwise qualified to perform the essential functions of her job, with or without reasonable

accommodation; and (4) she suffered adverse employment action because of his disability.

Labor & Employment Law > ... > Scope & Definitions > Disabilities Under ADA > Records of Impairments

Labor & Employment Law > ... > Scope & Definitions > Disabilities Under ADA > Regarded With Impairments

Labor & Employment Law > ... > Disabilities Under ADA > Mental & Physical Impairments > Substantial Limitations

HN19 The definition of disability under the Connecticut Fair Employment Practices Act (CFEPA) is broader than under the *Americans with Disabilities Act*, as amended (ADAAA). The ADAAA defines "disability" as: (A) a physical or mental impairment that substantially limits one or more major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment. *42 U.S.C.S. § 12102(1)*.

Labor & Employment Law > ... > Disabilities Under ADA > Mental & Physical Impairments > Substantial Limitations

HN20 The Second Circuit has determined that a temporary impairment lasting only a few months is, by itself, too short in duration to be substantially limiting for purposes of *42 U.S.C.S. § 12102(1)*. While the Second Circuit has explicitly deferred consideration of whether a temporary impairment is per se unprotected under the Americans with Disabilities Act (ADA), it has stated that an impairment of seven months, by itself, was too short to qualify as a disability.

Labor & Employment Law > ... > Disabilities Under ADA > Mental & Physical Impairments > Substantial Limitations

Labor & Employment Law > ... > Disabilities Under ADA > Mental & Physical Impairments > Mental & Physical Impairments

Labor & Employment Law > ... > Disabilities Under ADA > Mental & Physical Impairments > Major Life Activities

HN21 The Connecticut Fair Employment Practices Act (CFEPA) definition of physical disability is broader than the *Americans with Disabilities Act*, as amended (ADAAA) definition because it does not require that a plaintiff's impairment substantially limit major life activities. The CFEPA defines physical disability as any chronic physical handicap, infirmity or impairment, whether congenital or resulting from bodily injury, organic processes or changes or from illness, including, but not limited to, epilepsy, deafness or hearing impairment or reliance on a wheelchair or other remedial appliance or device. *Conn. Gen. Stat. § 46a-51(15)*. Although merely a summary order, the Second Circuit analyzed the meaning of "chronic" under the CFEPA in Caruso, noting that the Connecticut Superior Court has defined "chronic" to mean of long duration, or characterized by slowly progressive symptoms distinguished from acute.

Labor & Employment Law > ... > Retaliation > Elements > Adverse Employment Actions

Labor & Employment Law > ... > Retaliation > Elements > Causation

Labor & Employment Law > ... > Retaliation > Elements > Protected Activities

HN22 In order to establish a prima facie case of retaliation under Title VII, a plaintiff must show (1) that she participated in a protected activity, (2) that her participation was known to her employer, (3) that her employer thereafter subjected her to a materially adverse employment action, and (4) that there was a causal connection between the protected activity and the adverse employment action. Plaintiff must show that the retaliation was a "but-for" cause of the employer's adverse action. Connecticut Fair Employment Practices Act (CFEPA) retaliation claims follow a similar analysis.

Labor & Employment Law > Discrimination > Retaliation > Burdens of Proof

Labor & Employment Law > ... > Retaliation > Elements > Adverse Employment Actions

Labor & Employment Law > ... > Retaliation > Elements > Causation

Labor & Employment Law > ... > Retaliation > Elements > Protected Activities

HN23 At the summary judgment stage, once an employee demonstrates a minimal amount of evidence to support the elements of a retaliation claim, the burden shifts to the employer to proffer a legitimate non-retaliatory reason for its actions. If the employer produces such evidence, the employee must, in order to avoid summary judgment, point to evidence sufficient to permit an inference that the employer's proffered non-retaliatory reason is pretext for retaliation. First, plaintiff is only required to have a good faith, reasonable belief

that she was opposing an unlawful employment practice to have engaged in protective activity. The law protects employees in the filing of formal charges of discrimination as well as in the making of informal protests of discrimination, including making complaints to management. Second, for a retaliation claim, retaliatory acts need not bear on the terms or conditions of employment so long as the employer's actions could dissuade a reasonable employee from making or supporting a charge of discrimination. Moreover, in determining whether conduct amounts to an adverse employment action, the alleged acts of retaliation need to be considered both separately and in the aggregate, as even minor acts of retaliation can be sufficiently substantial in gross as to be actionable.

Labor & Employment
Law > ... > Remedies > Damages > Punitive Damages

HN24 Punitive damages are not permitted under Title VII and the Connecticut Fair Employment Practices Act (CFEPA).

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For Hartford Public Schools, Defendant: Melinda B. Kaufmann, LEAD ATTORNEY, Pullman & Comley - Htfd, Hartford, CT.

Judges: WARREN W. EGINTON, SENIOR UNITED STATES DISTRICT JUDGE.

Opinion by: WARREN W. EGINTON

Opinion

MEMORANDUM OF DECISION ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

In this action, plaintiff ***Lisa Boutillier*** alleges that defendant Hartford Public Schools discriminated and retaliated against her based on her sexual orientation and physical disability in violation of the *Connecticut Fair Employment Practices Act* ("CFEPA") (Counts I-III); discriminated against her based on her sexual orientation in violation of *Title VII* (Count IV); discriminated against her based on her disability in violation of the *Americans with Disabilities Act*, as amended (Count V); and constructively discharged her in violation of Connecticut law (Count VI).

Defendant has moved for summary judgment on all claims. For the following reasons, defendant's motion will be granted in part and denied in part.

BACKGROUND

The following facts are gleaned from the parties' statements of fact, affidavits, deposition transcripts, **[*2]** and other exhibit documentation.

Plaintiff commenced employment with the Hartford Board of Education at the Noah Webster Microsociety Magnet School ("Noah Webster") at the start of the 2006-2007 school year. She was recommended for hire to a sixth grade mathematics position by then principal Dee Cole. Within a few days of starting, plaintiff was moved to a fourth grade position. Days later, plaintiff was again moved to a kindergarten position, where she taught during the 2006-2007 school year. Cole was plaintiff's direct supervisor.

Cole also recommended plaintiff's spouse, Ginene Branch, for hire at Noah Webster.

On the last day of staff development before the 2006-2007 school year began, Cole informed plaintiff that Noah Webster was overstaffed. Cole gave Branch and plaintiff the choice as to which one wanted to stay at Noah Webster and which one wanted to move to a fourth grade science position at Hooker Elementary School. Plaintiff contends that Cole called plaintiff and Branch into her office with both of their resumes in front of her and saw that they went to the same art school, moved together, and taught at the same schools for almost 30 years, implicating Cole's knowledge of **[*3]** their relationship. Cole admits that it was unusual to allow two teachers to decide between themselves who would stay and who would go. Moreover, plaintiff asserts that it was well known among staff and parents at Noah Webster that she was gay and that Branch and plaintiff were a couple. When asked at deposition about knowledge of plaintiff's relationship with Branch, Cole responded: "I never learned that. I didn't know that. That was never part of any knowledge that I knew, nor did I care to know." However, vice principal Vernice Duke, who worked alongside Cole for three years, stated in October 2012 that, "[plaintiff's] relationship with Ginene is not a problem and is known to everyone at the school. This has not been an issue with her peers nor with administration."

Branch chose to move to Hooker, and plaintiff stayed at Noah Webster. Plaintiff asserts that Cole told Branch that she would have first rights to return to Noah

Webster when a position became available, but Cole maintains that she merely told Branch that she was welcome to apply for future available positions.

Plaintiff spoke to her union representative, Sue Frazer, concerned that she had been "outed" as gay by another **[*4]** teacher. Plaintiff asserts that Frazer warned her to 'watch her back.'

Shortly after Branch left the school, a position opened at Noah Webster. When plaintiff approached Cole about the possibility of Branch filling the position, plaintiff alleges that Cole became very angry and stated, "Don't you tell me who to hire." Cole disputes making an agreement for Branch's return and testified, "That's not how it works anyway." Branch never returned to Noah Webster.

Plaintiff contends that Cole knew she was gay at the start of the 2006-2007 school year. At the end of that year, Cole rated plaintiff as "excellent" in her evaluation. Nevertheless, plaintiff maintains that Cole's treatment of her caused her to stop speaking at staff meetings. Another teacher's statement, taken as part of a subsequent internal investigation, corroborates plaintiff's perception of abrupt treatment at staff meetings.

For the 2007-2008 school year, plaintiff moved to teaching first grade. Plaintiff questioned the placement of a difficult student in her classroom because she had endured a similarly difficult student in her classroom the year before. Plaintiff asserts that Cole became angry and berated plaintiff in front **[*5]** of other staff.

Plaintiff alleges that when parents were upset that the bulk of behavioral problem students were placed in plaintiff's classroom, Cole accused her of improperly communicating to parents about other students' behavioral problems. Plaintiff denied sharing information and reported that the concerned parents were "room mothers" who were regularly present in the classroom. Cole allegedly announced to plaintiff that, "If you do anything that I consider to be unprofessional, it will be grounds for immediate dismissal."

At a meeting among Cole, plaintiff, and union representative Sue Frazer, Cole allegedly stated, "[Plaintiff] is an outstanding educator and outstanding first grade teacher. This is personal."

Cole rated plaintiff as "competent," the second highest rating for the 2007-2008 and 2008-2009 school years.

During the 2008-2009 school year, plaintiff was given a verbal warning for sharing confidential student information with parents; plaintiff denies doing so and testified that she was falsely accused. Plaintiff alleges that in November 2008, Cole screamed at plaintiff and refused to hear her explanation after an incident involving a student who repeatedly hit plaintiff, **[*6]** leaving her badly bruised. Cole wrote up a warning document about the student, but plaintiff asserts that she did not see the document until she reviewed her personnel file years later.

The parties disagree about how many times plaintiff applied for alternative positions during her tenure. She was not hired for any alternative positions to which she applied.

Vernice Duke assumed the part-time assistant principal position and became plaintiff's evaluator at Noah Webster at the start of the 2009-2010 school year. Duke evaluated plaintiff as "competent" for the 2009-2010 school year and noted no areas of weakness in plaintiff's teaching. The evaluation did designate several areas for growth and improvement.

Plaintiff alleges that during the summer of 2010, she and Branch encountered Duke, who upon seeing their wedding rings made a "nasty" face, indicative of disapproval. In response to this accusation, Duke stated that, "I had just gotten back from knee surgery. If I had any facial expressions not to their liking, it could have been from being in pain after having a knee replacement. I don't even think that to this date [October 23, 2012], I have even seen their wedding bands."

Defendant **[*7]** asserts that plaintiff was awarded tenure as of August 28, 2010, but plaintiff responds that despite the regular practice of notifying teachers in writing upon granting of tenure, she was never notified in writing and has no information on how or when tenure was awarded.

Duke rated plaintiff as "competent" for the 2010-2011 school year.

Plaintiff asserts that during a performance evaluation meeting she confronted and accused Duke of discriminating against her because of her sexual orientation. Duke denies this. Duke's statement, taken as part of the district's internal investigation, provides, "I have never had a conversation about [plaintiff's] sexual preferences with plaintiff." Yet, remarkably, as part of that same statement, Duke provides:

> [Plaintiff] said to me that she usually does not tell people about her situation. Then she went on to explain that her significant other was a female. This

> conversation took place during her second year of working with me. I said to her that this had nothing to do with the performance of her job and that she was entitled to a private life just [like] everyone else. To go even further, [plaintiff] introduced me to [her spouse, Branch,] at some point. **[*8]**

In August 2011, prior to the start of the school year, plaintiff suffered a medical issue that resulted in absence for the first half of the school year. Plaintiff contends that after notifying the district of her need for treatment for an embolism and a hysterectomy, Cole misled parents by telling them that plaintiff would not be returning to teach at Noah Webster, citing a "personnel matter" rather than informing the parents that plaintiff was on approved medical leave. A parent of one of plaintiff's students submitted an affidavit indicating the same. The parent was surprised to subsequently learn that plaintiff was ill, as from the parent's perspective, Cole had implied that there was a "disciplinary reason" for plaintiff's absence.

During her absence, plaintiff alleges that Duke called her at home, demanding to know her medical status and what medications she was taking. Plaintiff proffers that after she complained to Elaine Bonfiglio in human resources, Duke's calls stopped, but plaintiff maintains that Duke chastised her about her plans to return to Noah Webster with the risk of falling ill in front of the students.

Despite the fact that plaintiff's doctor only once extended plaintiff's **[*9]** medical leave, Cole complained at deposition that "plaintiff was coming back several times and didn't come back. . . . Again, coming back, not coming back, coming back, not coming back."

Teacher Jen Wight was reassigned from her resource position to take over plaintiff's classroom in plaintiff's absence. Plaintiff returned to work in January 2012. As some point prior to plaintiff's return, Wight also went on medical leave. Plaintiff protests that despite her seniority and despite the fact that the class was originally assigned to her, Wight was given priority upon return in January and remained in the first grade position for the remainder of the 2011-2012 school year. Plaintiff was assigned a resource reading position for first and second grade students. Plaintiff testified that upon her return, Cole's assistant, Iris Febles-Martinez, told plaintiff that she had been "replaced" by Cole and was therefore not entitled to receive teacher dollar cards and teaching supplies.

Plaintiff contends that the resource reading position was created upon her return; it required her to create new curriculum and travel around the school even though plaintiff's doctor had notified Cole in writing that plaintiff **[*10]** "has been suffering from profound fatigue and decreased activity tolerance (ex: climbing one flight of stairs can cause her shortness of breath which requires a few minutes to recover)." The letter continues: "Though her medical conditions are gradually stabilizing, her activity level and endurance are very much limited but certainly improving—slowly."

On February 7, 2012, after an allegedly heated meeting with Duke, which concluded with Duke yelling at plaintiff to get her backpack out of Duke's sight, plaintiff collapsed to the ground and was taken by ambulance to the hospital.

Plaintiff requested and received 20 paid sick days from the teacher sick bank. On her request for sick bank leave she stated that she had collapsed due to "severe fatigue, exhaustion and syncope ... [which was] the direct result of the pulmonary embolism that I had developed in August 2011."

Plaintiff returned to work on March 12, 2012, in accordance with her medical clearance.

Upon plaintiff's return to work on March 12, 2012, she was placed in a kindergarten classroom to cover for a teacher who was absent due to injury.

On May 25, 2012, plaintiff had car trouble and called out for a personal day. Plaintiff contends **[*11]** that Duke called her at home demanding that she report to work. Plaintiff rented a car and drove to school. Plaintiff reported Duke's call to her union representative. Duke asserts that she called plaintiff at home out of mere courtesy to prevent plaintiff from missing out on her paycheck.

On May 30, 2012, plaintiff requested permission from Duke to leave school grounds to run an errand at a nearby store. Duke granted plaintiff permission but reminded her of her obligation to "sign out." A third party, Ms. Carreiro, was in Duke's office at the time and provided a statement about the incident, describing Duke's manner as abrupt with plaintiff to an extent that Carreiro became "very uncomfortable." Carreiro also reported that Duke's unprofessional treatment of plaintiff was unique. The school's executive assistant later informed Duke that plaintiff neglected to sign out. Plaintiff testified that she decided to forgo the errand, as the school cafeteria stocked the item she sought. Nevertheless, Cole and Duke met with plaintiff that

same afternoon. Plaintiff asserts that upon arrival to Cole's office, she was informed that she was to be disciplined for failure to sign out before leaving **[*12]** school grounds. She alleges that after she attempted to explain that she did not sign out because she did not leave the building, Cole and Duke began screaming at her. When plaintiff asked for a union representative, plaintiff contends that she was told to shut up and sit down. Defendant asserts that the primary purpose of the meeting was to inform plaintiff that she would be assigned, as requested, to teach second grade.

Plaintiff became ill after the meeting. The school nurse contacted Duke to inform her of the medical emergency and called 911. The paramedics along with Duke and Cole met plaintiff in the school gymnasium. Plaintiff was transported from the school by ambulance. She did not return for the final weeks of the 2011-2012 school year.

Plaintiff testified that neither her sister nor her spouse were informed of her medical emergency. Branch, plaintiff's spouse, affirmed the lack of notification. Nevertheless, Duke reported that "family members were contacted." None have been identified. Cole claims that she purposefully waited for Branch to arrive at school after plaintiff was taken by the ambulance so that Branch could collect plaintiff's belongings, but no one asserts that **[*13]** Branch was ever summoned. Moreover, plaintiff contends that she was not notified by the school that she was apparently ineligible for health insurance benefits because of *FMLA* hours-worked requirements.

After learning that her physician had been told that she was no longer employed and had no health insurance, plaintiff went to the human resources office, where she asserts that she was handed a letter explaining that her health insurance would expire on July 1, 2012. Branch then demanded that the district add plaintiff to her health benefits as her spouse. This request was granted. Plaintiff contends that defendant has failed to produce records as to its policy on eliminating health insurance for teachers out on medical leave.

Plaintiff's primary care physician, Rashma Jhunja, MD, and psychologist, Marc J. Mann, PhD, began notifying the school district of the negative impacts on plaintiff's health due to the allegedly hostile work environment created by Cole and Duke. No evidence has been produced to suggest that the school district investigated the reports of hostile work environment as described by Dr. Jhunja or Dr. Mann.

On June 21, 2012, subsequent to receiving a medical note for **[*14]** plaintiff's leave of absence, the district sent plaintiff a letter asking whether she was claiming to have a disability under the ADA or Connecticut law. The same day, defendant sent plaintiff a copy of the harassment policy and a harassment report form.

On July 17, 2012, plaintiff filed an internal harassment complaint against Duke and Cole.

On July 19, 2012, the district received medical documentation which stated: "Though ***Lisa*** has had decreased endurance and has been limited in her activities through her prolonged recovery period, as of the present time she is medically cleared to resume her work in full capacity with her baseline level of activity and endurance."

Plaintiff met with a district investigator regarding her complaint, where she read a prepared statement, but she declined to continue meeting with the investigator after retaining counsel. Plaintiff's counsel indicated to the district by letter dated September 12, 2012, that plaintiff had fulfilled her obligations under the district's Harassment Policy.

On September 21, 2012, plaintiff filed a complaint with the Connecticut Commission on Human Rights and Opportunities.

The district's investigator took statements from other **[*15]** teachers at Noah Webster, which indicated that Cole and Duke treated plaintiff with greater antagonism as compared to other teachers without apparent justification. Moreover, Sue Frazier, as part of her statement, offered that: "We have had other gay staff members leave our school during Ms. Coles' tenure as our principal. At one time or another, ALL of them expressed to me, as their building rep, that they felt that Ms. Cole treated them unfairly." (emphasis original).

On March 5, 2013, after completing its investigation, the Central Harassment Team concluded that it could not "substantiate harassment" and so notified the parties.

Cole left Noah Webster at the end of the 2011-2012 school year when she was promoted to Executive Director of Early Literacy. Plaintiff had no further contact with Cole.

Jay Mihalko became principal of Noah Webster at the start of the 2012-2013 school year, during which plaintiff was assigned to teach second grade. Mihalko also became plaintiff's evaluator.

Despite filing complaints against Cole and Duke, and

despite the fact that Mihalko, not Duke, was plaintiff's evaluator and supervisor, plaintiff contends that Duke continued to publicly humiliate her by **[*16]** reprimanding her in front of parents. Plaintiff submitted an email dated November 21, 2012, from a parent concerning one such incident. It states in relevant part: "I saw you in the lobby getting 'reprimanded?' from Duke- Oh boy! Give me a break..."

In July 2013, Mihalko requested that human resources transfer plaintiff from a second grade position to a first grade position, but plaintiff denies that she was ever so informed; she points out that defendant's evidence of the transfer was neither produced in discovery nor produced when defendant contested plaintiff's unemployment benefits claim. Plaintiff alleges that she learned of the transfer from an email from Duke to the entire first grade team and from other teachers' emails, rather than from written notice as required by the union contract.

Plaintiff asserts that she learned through Duke and other teachers' emails that she would be under Duke's supervision as part of Duke's team. Moreover, plaintiff's new classroom would be parallel from Duke's office. Plaintiff asserts that she contacted union representative Joshua Hall upon learning that she was being "welcomed back to Duke's team," but that Hall informed her that he did not think **[*17]** he could stop the transfer. Plaintiff contends that her therapist advised her that she should not continue to work in such a hostile environment.

On August 19, 2013, plaintiff resigned her employment with the district. Plaintiff neither spoke with Mihalko nor requested a change to a different school building prior to her resignation. She contends that, in consultation with her medical providers and union representatives, a request for change in buildings was futile based on her prior failed attempts to transfer, the proximity of the upcoming school year, and the apparent finality of the decision to place plaintiff in a first grade classroom under the supervision of Duke — despite plaintiff's formal complaint against Duke.

Plaintiff applied for unemployment compensation. On September 19, 2013, the administrator of Connecticut's Unemployment Compensation Department ruled that plaintiff's separation from employment did not disqualify her for unemployment compensation because plaintiff had quit with good cause attributable to the employer. However, the district appealed the administrator's determination on September 27, 2013, contending that plaintiff had quit without good cause and should **[*18]** be denied compensation. The appeals referee concluded:

> The claimant testified that she resigned rather than accept the change in assignment because, the assignment put her under the direct report of vice principal, [Duke]. Testimony from both parties confirm that as of the date of the change of assignment, the claimant had pending litigation involving [Duke], that involved incidents in the course of employment. In addition, the claimant suffers from extreme stress and anxiety related to her dealings with [Duke]. Medical documentation from physician, Rashma Jhunja, states that it was recommended that the claimant not return to that working environment, due to the stress and anxiety. The evidence establishes that the change in conditions had an adverse effect on the claimant. A remedy was futile for the claimant because the change in position was done without prior notice to allow for an alternative to be explored. The record reveals that the claimant became aware of the change in position just a few weeks prior to the start of the school year.

On November 4, 2013, the Employment Security Appeals Division affirmed the administrator's determination to award benefits and dismissed the district's **[*19]** appeal.

DISCUSSION

HN1 A motion for summary judgment will be granted where there is no genuine issue as to any material fact and it is clear that the moving party is entitled to judgment as a matter of law. *Celotex Corp. v. Catrett, 477 U.S. 317, 322, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)*. "Only when reasonable minds could not differ as to the import of the evidence is summary judgment proper." *Bryant v. Maffucci, 923 F.2d 979, 982 (2d Cir.)*, cert. denied, *502 U.S. 849, 112 S. Ct. 152, 116 L. Ed. 2d 117 (1991)*.

HN2 The burden is on the moving party to demonstrate the absence of any material factual issue genuinely in dispute. *American International Group, Inc. v. London American International Corp., 664 F.2d 348, 351 (2d Cir. 1981)*. ***HN3*** In determining whether a genuine factual issue exists, the court must resolve all ambiguities and draw all reasonable inferences against the moving party. *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)*.

HN4 If a nonmoving party has failed to make a sufficient showing on an essential element of his case with

respect to which he has the burden of proof, then summary judgment is appropriate. *Celotex Corp., 477 U.S. at 323*. If the nonmoving party submits evidence which is "merely colorable," legally sufficient opposition to the motion for summary judgment is not met. *Anderson, 477 U.S. at 249*.

The Court will address defendant's various summary judgment arguments in the order they were set forth in the motion papers.

A. Sexual Orientation Discrimination under *Title VII*

Plaintiff asserts that defendant violated her rights under *Title VII* by discriminating against **[*20]** her and sexually stereotyping her during her employment. Defendant argues that sexual orientation is not a protected category under *Title VII*.

HN5 Title VII protects a limited class of persons from discrimination. Protection is limited to individuals who are discriminated against on the basis of race, color, religion, sex, or national origin. *42 U.S.C. § 2000e-2(a)(1),(2)*; *Kiley v. American Soc. for Prevention of Cruelty to Animals, 296 Fed. Appx. 107, 109 (2d Cir. 2008)*.

HN6 "It is a fundamental canon of statutory construction that, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning." *Sandifer v. U.S Steel Corp., 134 S. Ct. 870, 876, 187 L. Ed. 2d 729 (2014)*.

Early interpretations of *Title VII*'s sex discrimination provisions reached illogical conclusions based on a supposed traditional concept of discrimination, which, for example, determined that discrimination based on pregnancy was not discrimination based on sex. See *General Elec. Co. V. Gilbert, 429 U.S. 125, 145-46, 97 S. Ct. 401, 50 L. Ed. 2d 343 (1976)*. In 1978, Congress passed the *Pregnancy Discrimination Act* to overturn *Gilbert*, but the soundness of Gilbert's reasoning, or lack thereof, did not rise and fall based on Congress's efforts. That is, *Gilbert* and other similar decisions that imposed incongruous traditional norms were misguided in their interpretations regardless of whether Congress had been able to overrule them. See, e.g., *Barnes v. Train, 1974 U.S. Dist. LEXIS 7212, 1974 WL 10628, *1 (D.D.C. August 9, 1974)* ("The substance of plaintiff's **[*21]** complaint is that she was discriminated against, not because she was a woman, but because she refused to engage in a sexual affair with her supervisor."), rev'd sub nom. *Barnes v. Costle, 561 F.2d 983, 990, 183 U.S. App. D.C. 90 (D.C. Cir. 1977)* ("Put another way, she became the target of her superior's sexual desires because she was a woman, and was asked to bow to his demands as the price for holding her job."). Decisions like the district court's in Barnes and the Supreme Court's in Gilbert, were discordant not because they chose what are now unpopular normative judgments, but because they failed to take the ordinary meaning of the Act's text to its logical conclusions. In his dissent in Gilbert, Justice Brennan illuminated the fallacy of the majority's holding when he wrote: "[T]he company has devised a policy that, but for pregnancy, offers protection for all risks, even those that are 'unique to' men or heavily male dominated." *Gilbert, 429 U.S. at 160*. The converse of the majority's decision, and equally absurd, would be to hold that an exclusion in coverage for prostate cancer does not discriminate against men based on sex. Such conclusions represent a fundamental failure of ordinary interpretation.

HN7 The Second Circuit has reasoned that although the legislative history on whether **[*22]** sexual orientation should be included in the category of sex is "scant," because numerous bills have attempted to extend *Title VII* protection to sexual orientation, Congress did not intend to include sexual orientation protections in *Title VII*'s current form. See *Kiley, 296 Fed. Appx. at 109*. But under this rationale, had Congress failed to amend *Title VII* in 1978, pregnancy based discrimination (or the hypothetical prostate cancer based discrimination) would not constitute discrimination based on sex. Such reasoning is unpersuasive because Congress's intent as it exists now or existed in the recent past is not an accurate gauge of its intent as it existed over fifty years ago. Indeed, when Congress amended *Title VII* in 1978 to overturn Gilbert, the House Report stated: "It is the Committee's view that the dissenting Justices correctly interpreted the Act." H.R. Rep. No. 95-948, 95th Cong., 2d Sess. 2 (1978), Legislative History of the *Pregnancy Discrimination Act* of 1978; see also *Newport News Shipbuilding and Dry Dock Co. v. E.E.O.C., 462 U.S. 669, 679, 103 S. Ct. 2622, 77 L. Ed. 2d 89 (1983)* ("Proponents of the bill repeatedly emphasized that the Supreme Court had erroneously interpreted Congressional intent and that amending legislation was necessary to reestablish the principles of *Title VII* law as they had been understood **[*23]** prior to the Gilbert decision.").

HN8 Acknowledging that the legislative history on whether sexual orientation should be included in the category of sex under *Title VII* is slight, it is difficult to glean the absence of prior intention merely from

subsequent efforts by Congress to reenforce statutory civil rights protections.[1] The failed efforts by Congress to explicitly include sexual orientation as a new, stand alone category of protected individuals under *Title VII* does not mandate the conclusion that sexual orientation based discrimination is not covered by the existing prohibition on sex based discrimination.

HN9 The Supreme Court has warned against such reliance:

> [S]ubsequent legislative history is a hazardous basis for inferring the intent of an earlier Congress. It is a particularly dangerous ground on which to rest an interpretation of a prior statute when it concerns, as it does here, a proposal that does not become law. Congressional inaction lacks persuasive significance because several equally tenable inferences may be drawn from such inaction, *including the* ***[*24]*** *inference that the existing legislation already incorporated the offered change*.

Pension Ben. Guar. Corp. v. LTV Corp., 496 U.S. 633, 650, 110 S. Ct. 2668, 110 L. Ed. 2d 579 (1990) (emphasis added, internal quotation and citation omitted).

Moreover, ***HN10*** straightforward statutory interpretation and logic dictate that sexual orientation cannot be extricated from sex; the two are necessarily intertwined in a manner that, when viewed under the *Title VII* paradigm set forth by the Supreme Court, place sexual orientation discrimination within the penumbra of sex discrimination.

In 1976, the Supreme Court held: "When Congress makes it unlawful for an employer to discriminate because of sex without further explanation of its meaning, we should not readily infer that it meant something different from what the concept of discrimination has traditionally meant[.]" *Gilbert, 429 U.S. at 145*. However, "[w]hen Congress amended *Title VII* in 1978, it unambiguously expressed its disapproval of both the holding and the reasoning of the Court in the Gilbert decision." *Newport News 462 U.S. at 678*.

In Newport News, the petitioner's plan provided pregnancy related benefits to female employees but provided less favorable pregnancy benefits for spouses of male employees. *462 U.S. at 671-72*. The Supreme Court held that: "Under the proper test petitioner's plan is unlawful, because the protection **[*25]** it affords to married male employees is less comprehensive than the protection it affords to married female employees." *Id. at 676*. The proper, straightforward test asks not whether the discrimination falls within the concept of what discrimination has traditionally meant, but whether the employer has discriminated on the basis of sex. See id.

Presuming that an employer has discriminated against an individual with respect to compensation, terms, conditions, or privileges of employment, because of such individual's sexual orientation, that employer has necessarily considered both the sex of the partner *and* the sex of the individual. Under the proper test as enunciated in Newport News, such treatment would be unlawful because, for example, the protection afforded to female employees with female partners is less comprehensive than the protection afforded to male employees with female partners.

Nevertheless, based on "our well-settled precedent that 'sex' refers to membership in a class delineated by gender [not sexual orientation,]" the Second Circuit in Simonton v. Runyon held that *Title VII* does not proscribe discrimination because of sexual orientation. *232 F.3d 33, 36 (2000)*. But since Simonton, the Second Circuit **[*26]** has empowered employees to bring virtually identical associational *Title VII* claims in the context of race discrimination. See *Holcomb v. Iona College, 521 F.3d 130, 139 (2d Cir. 2008)*.

> The reason is simple: where an employee is subjected to adverse action because an employer disapproves of interracial association, the employee suffers discrimination because of the employee's *own* race. All the district judges in this circuit to consider the question, including the district court in this case, have reached that conclusion. *Holcomb, 2006 U.S. Dist. LEXIS 50437, 2006 WL 1982764 at *9*; *Rosenblatt v. Bivona & Cohen, P.C., 946 F.Supp. 298, 300(S.D.N.Y.1996)* ("Plaintiff has alleged discrimination as a result of his marriage to a black woman. Had he been black, his marriage would not have been interracial. Therefore, inherent in his complaint is the assertion that he has suffered racial discrimination based on his own race."); *Whitney v. Greater N.Y. Corp. of Seventh-Day Adventists, 401 F.Supp. 1363, 1366 (S.D.N.Y.1975)*. The Fifth, Sixth, and Eleventh Circuits agree. *Deffenbaugh-Williams v. Wal-Mart*

[1] "Admittedly, we have little legislative history to guide us in interpreting the Act's prohibition against discrimination based on sex." *Simonton v. Runyon, 232 F.3d 33, 35 (2d Cir. 2000)*.

> Stores, Inc., 156 F.3d 581, 589 (5th Cir.1998), vacated in part on other grounds by Williams v. Wal-Mart Stores, Inc., 182 F.3d 333 (5th Cir.1999) ("Title VII prohibits discrimination in employment premised on an interracial relationship."); Tetro v. Elliott Popham Pontiac, Oldsmobile, Buick & GMC Trucks, Inc., 173 F.3d 988, 994-95 (6th Cir.1999) (holding Title VII applicable to allegation that employee suffered discrimination because he had a biracial daughter); Parr v. Woodmen of the World Life Ins. Co., 791 F.2d 888, 892 (11th Cir.1986) ("Where a plaintiff claims discrimination based upon an interracial marriage or association, he alleges, by definition, that he has been discriminated **[*27]** against because of his race.").
>
> Accordingly, we find that Holcomb, in claiming that he suffered an adverse employment action because of his interracial marriage, has alleged discrimination as a result of his membership in a protected class under Title VII.

Id. at 139.

The logic is inescapable: If interracial association discrimination is held to be "because of the employee's *own* race," so ought sexual orientation discrimination be held to be because of the employee's *own* sex. Holcomb and Simonton are not legitimately distinguishable. If Title VII protects individuals who are discriminated against on the basis of race because of interracial association (it does), it should similarly protect individuals who are discriminated against on the basis of sex because of sexual orientation — which could otherwise be named "intrasexual association."

As Holcomb and Simonton cannot be legitimately reconciled, given that Holcomb is more recent, more consistent with general principles of statutory construction, and more agreeable to reason, ***HN11*** the Court finds that Title VII protects individuals who are discriminated against on the basis of sex because of their sexual orientation.

The Supreme Court's holding in Price **[*28]** Waterhouse v. Hopkins bolsters the Court's position. See 490 U.S. 228, 251, 109 S. Ct. 1775, 104 L. Ed. 2d 268 (1989). There, the Court held that sex stereotyping could constitute discrimination based on sex:

> As for the legal relevance of sex stereotyping, we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group, for in forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes.

Id. Indeed, stereotypes concerning sexual orientation are probably the most prominent of all sex related stereotypes, which can lead to discrimination based on what the Second Circuit refers to interchangeably as gender non-conformity. "That is, individual employees who face adverse employment actions as a result of their employer's animus toward their exhibition of behavior considered to be stereotypically inappropriate for their gender may have a claim under Title VII." Dawson v. Bumble & Bumble, 398 F.3d 211, 218 (2d Cir. 2005).

Nevertheless, the Second Circuit has maintained the position that although, based on Price Waterhouse, a plaintiff may properly allege discrimination based on sex stereotyping, **[*29]** "a plaintiff may not use a gender stereotyping claim to bootstrap protection for sexual orientation into Title VII." Kiley, 296 Fed. Appx. at 107. In other words, sexual orientation discrimination must be excluded from the equation when determining whether allegations or evidence of gender non-conformity discrimination are sufficient. Such balancing is inherently unmanageable, as homosexuality is the ultimate gender non-conformity, the prototypical sex stereotyping animus.

The Seventh Circuit recently highlighted the inconsistent state of the law:

> The cases as they stand do, however, create a paradoxical legal landscape in which a person can be married on Saturday and then fired on Monday for just that act. For although federal law now guarantees anyone the right to marry another person of the same gender, Title VII, to the extent it does not reach sexual orientation discrimination, also allows employers to fire that employee for doing so. From an employee's perspective, the right to marriage might not feel like a real right if she can be fired for exercising it. Many citizens would be surprised to learn that under federal law any private employer can summon an employee into his office and state, "You are a hard-working **[*30]** employee and have added much value to my company, but I am firing you because you are gay."

Hively v. Ivy Tech Community College, South Bend, 830 F.3d 698, 714 (7th Cir. 2016) (reh'g granted).

Similarly paradoxical is the upshot of the proscription against "bootstrapping" under the light of Price Waterhouse. Essentially, employers are prohibited from discriminating against employees for exhibiting stereotypical gay behavior, yet, at the same time, employers are free to discriminate against employees for actually being gay.

> Moreover, the truth of this scenario would also apply to perceived sexual orientation. And so, for example, an employer who merely has a hunch that an employee is gay can terminate that employee for being gay whether or not she actually is. And even if the employer is wrong about the sexual orientation of the non-gay employee, the employee has no recourse under *Title VII* as the discharge still would be based on sexual orientation.

Hively, 830 F.3d at 714-15.

Again, reconciliation of Simonton and Price Waterhouse produces untenable results. This reenforces the Court's decision to follow the lead of the Second Circuit's *Holcomb* opinion by interpreting the ordinary meaning of sex under *Title VII* to include sexual orientation, thereby obviating the need to parse sexuality from gender **[*31]** norms.[2] The EEOC has adopted this view as part of its Strategic Enforcement Plan. See Robyn Dupont and Nichole Davis, Gender Identity and Sexual Orientation Coverage under Title VII, The Digest of Equal Employment Opportunity Law, Volume XXVI, No. 1 (August 2015).[3] The Seventh Circuit agreed to a full rehearing in *Hively*, and the Second Circuit is likely to provide guidance on its position shortly in the case of *Christiansen v. Omnicom Group, Inc., 167 F. Supp. 3d 598 (S.D.N.Y. 2016)*. That decision may ultimately decide the fate of plaintiff's *Title VII* claims. In the meantime, summary judgment will be denied. Plaintiff has adequately established a right to protection under *Title VII*.

B. Hostile Work Environment under *Title VII* and the CFEPA

HN12 The analysis of discrimination and retaliation claims under the CFEPA is the same as under *Title VII*. *Kaytor v. Electric Boat Corp., 609 F.3d 537, 556 (2d Cir. 2010)*.

Plaintiff asserts that she has sufficient evidence to establish that (1) she was subjected to offensive acts **[*32]** or statements based on her protected category; (2) the acts or statements were unwelcome and had not been invited or solicited directly or indirectly by her own acts or statements; (3) the acts or statements resulted in a work environment that was so permeated with discriminatory intimidation, ridicule or insult that those acts or statements materially altered the condition of her employment; (4) a reasonable person would have found the workplace to be hostile or abusive; and (5) that she believed the workplace to be hostile or abusive. See *Harris v. Forklift Systems, Inc., 510 U.S. 17, 114 S. Ct. 367, 126 L. Ed. 2d 295 (1993)*; *Alfano v. Costello, 294 F. 3d 365 (2d Cir. 2002)*.

Defendant argues that plaintiff cannot establish the first, third, and fourth of the above requirements.

Resolving all ambiguities and drawing all reasonable inferences against defendant, whether plaintiff was subjected to offensive acts or statements based on her sex is a material factual issue genuinely in dispute. Plaintiff's testimony indicates that hostility was responsive to Cole and Duke learning that plaintiff was a gay woman. Plaintiff complained that she was targeted by Cole and Duke because she was gay. There is evidence that former gay teachers had made similar complaints to a union representative. Other teachers and staff witnessed **[*33]** unprovoked negative treatment of plaintiff (Frazer, Carreiro, Nance, Gale). Parents also observed poor treatment (Smith, Cieri). Finally, plaintiff's primary care physician and psychologist alerted school administrators to the damage allegedly inflicted upon plaintiff based on the hostile work environment. A reasonable jury could find that Cole's and Duke's testimony about their knowledge of plaintiff's sexual orientation undermines their credibility.

HN13 In order to determine whether an environment is hostile or abusive, a court must look at all of the circumstances, including, (1) the frequency of the discriminatory conduct; (2) its severity; (3) whether it is physically threatening or humiliating, or a mere offensive

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[2] "When utilized by an avowedly homosexual plaintiff, however, gender stereotyping claims can easily present problems for an adjudicator. This is for the simple reason that stereotypical notions about how men and women should behave will often necessarily blur into ideas about heterosexuality and homosexuality." *Dawson, 398 F.3d at 218*.

[3] *https://www.eeoc.gov/federal/digest/xxvi-1.cfm#article*

utterance; and (4) whether it unreasonably interferes with an employee's work performance. *Harris v. Forklift Systems, Inc., 510 U.S. 17, 23, 114 S. Ct. 367, 126 L. Ed. 2d 295 (1993)*. *Title VII* is violated when 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. *Id. at 21*.

Whether alleged discriminatory intimidation materially altered the condition of plaintiff's employment is also genuinely in dispute. Plaintiff **[*34]** maintains that defendant's hostile conduct was frequent and severe. Indeed, plaintiff twice collapsed at school and required transport by ambulance to the hospital. Defendant apparently failed to notify plaintiff's wife and family of those emergencies, despite requests for such notice. Plaintiff missed time from work, including time that was unpaid. After returning from medical leave, defendant assigned plaintiff to a newly created position that required her to walk about the school building, whose elevator was inoperable — this despite doctors' notes that plaintiff was suffering from profound fatigue and decreased activity tolerance. Finally, plaintiff contends that her doctors' notes concerning a hostile work environment were essentially ignored by defendant. Genuine issues of material fact exist as to whether defendant adequately investigated and corrected plaintiff's reports of sexual harassment by supervisors.

The Court also finds a triable issue of fact as to whether a reasonable person would have found the workplace to be hostile or abusive.

C. Disparate Treatment Based on Sexual Orientation under *Title VII* and the CFEPA

Defendant argues that plaintiff has failed to establish any **[*35]** legally cognizable adverse employment actions that would establish disparate treatment and that she cannot demonstrate that defendant's legitimate business reasons were pretext for discrimination. Defendant further contends that plaintiff failed to exhaust her administrative remedies, as she failed to file a complaint with the Connecticut Commission on Human Rights and Opportunities ("CHRO") within the required time frame.

Plaintiff responds that "[t]he issuance of a right to sue letter, although not constituting an open license to litigate any claim of discrimination against an employer, does permit a court to consider claims of discrimination reasonably related to the allegations in the complaint filed with the EEOC, including new acts occurring during the pendency of the charge before the EEOC." *Kirkland v. Buffalo Bd. of Ed., 622 F.2d 1066, 1068 (2d Cir. 1980)*. Resolving all ambiguities in plaintiff's favor, the Court finds that plaintiff has proffered sufficient evidence of a continuing course of conduct reasonably related to the allegations in plaintiff's complaint to the EEOC. Essentially, plaintiff contends that defendant continually discriminated against her based on her sexual orientation until she was forced to resign, at the advice of her doctors. **[*36]**

Plaintiff's complaint alleges that she was constructively discharged. ***HN14*** "Adverse employment actions include discharge from employment. Such a discharge may be either an actual termination of the plaintiff's employment by the employer or a constructive discharge." *Fitzgerald v. Henderson, 251 F.3d 345, 357 (2d Cir. 2001)*.

HN15 An employee is constructively discharged where an employer intentionally creates a work atmosphere so intolerable that she is forced to quit involuntarily. *Petrosino v. Bell Atlantic, 385 F.3d 210, 229 (2d Cir. 2004)*. The Second Circuit has not insisted on proof of specific intent by employers, but a plaintiff must demonstrate that the employer's actions were deliberate. *Id. at 229-30*. An employee must also demonstrate that the work conditions were intolerable. Id.

Here, Connecticut's Unemployment Compensation Department ruled that plaintiff had quit with good cause attributable to the employer. Whether defendant's actions were deliberate is an issue of material fact genuinely in dispute, and will depend significantly on credibility determinations. For example, evidence that defendant told parents, without basis, that plaintiff would not be returning to Noah Webster could be indicative of deliberate actions aimed at her permanent removal.

HN16 "Intolerable working conditions is based on an objective standard **[*37]** of whether a reasonable person in the employee's position would have felt compelled to resign. An employee's subjective opinion that his or her working conditions are intolerable is not sufficient to establish constructive discharge." *Murphy v. Beavex, Inc., 544 F. Supp.2d 139, 153 (D. Conn. 2008)*.

Here, plaintiff received medical recommendation from her physician that she not return to her working environment at Noah Webster due to the adverse health effects of the stress and anxiety created by defendant's alleged hostility. Under an objective standard, plaintiff has sufficiently created a triable issue as to whether her work conditions were intolerable.

Finally, the Court finds that plaintiff has presented sufficient evidence to allow a jury to determine whether defendant's supposed legitimate business reasons were pretext for discrimination.

D. Constructive Discharge Claim

Plaintiff's complaint lists "constructive discharge" as a stand alone claim (Count VI). Defendant argues that constructive discharge is not a legally cognizable claim on its own, but rather a legal fiction under which an employee's voluntary resignation may be deemed a termination by the employer.

Plaintiff responds that this Court has already ruled that Plaintiff's Constructive **[*38]** Discharge claim may be construed as a claim for wrongful termination in violation of public policy under *Morris v. Hartford Courant, 200 Conn. 676, 678-81, 513 A.2d 66(1986)*.

HN17 "[T]he public policy exception to the general rule allowing unfettered termination of an at-will employment relationship is a narrow one[,] and [] courts should not lightly intervene to impair the exercise of managerial discretion or to foment unwarranted litigation." *Burnham v. Karl and Gelb, P.C., 252 Conn. 153, 165, 745 A.2d 178 (2000)*. In any case, plaintiff's claim is precluded by virtue of the existence of statutory remedies under *Title VII*, the CFEPA and the ADAAA. See *id. at 159-60* ("The cases which have established a tort or contract remedy for employees discharged for reasons violative of public policy have relied upon the fact that in the context of their case the employee was *otherwise without remedy* and that permitting the discharge to go unredressed would leave a valuable social policy to go unvindicated.") (emphasis original). Accordingly, summary judgment will be granted in favor of defendant on plaintiff's stand-alone constructive discharge claim (Count VI).

E. Discrimination based on Disability under the ADAAA and the CFEPA

Plaintiff alleges that defendant discriminated against her based on her physical disability in violation of the ADAAA and the CFEPA **[*39]** (Counts II and V).

HN18 To make out a prima facie case under the ADA, a plaintiff must establish that (1) her employer is subject to the ADA; (2) she was disabled within the meaning of the ADA; (3) she was otherwise qualified to perform the essential functions of her job, with or without reasonable accommodation; and (4) she suffered adverse employment action because of his disability. *Giordano v. City of New York, 274 F.3d 740, 747 (2d Cir. 2001)*. See also *Curry v. Allan S. Goodman, Inc., 286 Conn. 390, 426, 944 A.2d 925 (2008)* (adopting similar standard under the CFEPA). ***HN19*** The definition of disability under the CFEPA is broader than under the ADAAA. See *Beason v. United Technologies Corp., 337 F.3d 271, 278 (2d Cir. 2003)*.

The ADAAA defines "disability" as: "(A) a physical or mental impairment that substantially limits one or more major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment." *42 U.S.C. § 12102(1)*.

Defendant argues that plaintiff has failed to establish that she is disabled as defined under the ADAAA and the CFEPA, as temporary impairments generally do not qualify. See *Palmieri v. City of Hartford, 947 F. Supp. 2d 187, 198-99 (D. Conn. 2013)*. Plaintiff responds that she has offered sufficient medical evidence to establish that she was disabled in that she was medically prohibited from work on "repeated occasions," as well as restricted in work after being medically released back to Noah Webster. Her **[*40]** medical records document three occasions (surgery and two episodes of fainting at work) that necessitated medical leave. The Court does not question the legitimacy of plaintiff's medical issues or her need for leave. Nevertheless, surgery for distinct, unrelated medical issues accompanied by two fainting episodes does not amount to disability under the ADAAA.

> ***HN20*** [T]he Second Circuit has determined that, "A 'temporary impairment' lasting only a few months is, 'by itself, too short in duration ... to be substantially limiting.'" *De La Rosa v. Potter, 427 Fed.Appx. 28, 29 (2d Cir. 2011)* (quoting *Adams v. Citizens Advice Bureau, 187 F.3d 315, 316-17 (2d Cir. 1999)*. While this Circuit has explicitly deferred consideration of whether a temporary impairment is per se unprotected under the ADA (*see* *Adams, 187 F.3d at 317*), this Circuit has stated that an impairment of seven months, by itself, was too short to qualify as a disability. *See* *Colwell v. Suffolk County Police Dep't, 158 F.3d 635, 646 (2d Cir. 1998)* (superseded by statute on other grounds).

Id. at 198-99.

Here, plaintiff's impairments were relatively brief and she does not appear to suffer residual limitations that substantially limit her ability to work or engage in other

life activities. Plaintiff does not contend that she is so limited, nor does she argue that she was regarded as having such an impairment. Rather, "[h]er disability began in August 2011 and . . . [h]er physician **[*41]** permitted her to return to work in January 2012." Pl.'s Mem. at 15 [ECF No. 52]. Plaintiff was "cleared to resume her work in full capacity" on July 19, 2012.

HN21 The CFEPA definition of physical disability is broader than the ADAAA definition because it does not require that a plaintiff's impairment substantially limit major life activities. See *Beason, 337 F.3d at 278*. The CFEPA defines physical disability as "any chronic physical handicap, infirmity or impairment, whether congenital or resulting from bodily injury, organic processes or changes or from illness, including, but not limited to, epilepsy, deafness or hearing impairment or reliance on a wheelchair or other remedial appliance or device[.]" *Conn. Gen. Stat. § 46a-51(15)*. Although merely a summary order, the Second Circuit analyzed the meaning of "chronic" under the CFEPA in *Caruso v. Siemens Business Systs., Inc., 56 Fed. Appx. 536, 537 (2d Cir. 2003)*:

> The Connecticut Superior Court has defined "chronic" to mean "of long duration, or characterized by slowly progressive symptoms ... distinguished from acute." *Shaw v. Greenwich Anesthesiology Associates, P.C., 137 F.Supp.2d 48, 65 (D. Conn.2001)* (citing *Gilman Bros. v. Conn. Comm'n on Human Rights & Opportunities, CV 950536075, 1997 Conn. Super. LEXIS 1311, 1997 WL 275578, at *4 (Conn.Super.Ct. May 13, 1997))*. This is consistent with the dictionary definition of "chronic," which provides: "Of diseases, etc.: Lasting a long time, long-continued, lingering, inveterate."* *Oxford English Dictionary* (2d ed.1989).

Id.

For example, in *Gomez v. Laidlaw Transit, Inc., 455 F. Supp. 2d 81, 88 (D. Conn. 2006)*, the court held **[*42]** that a reasonable jury could find the employee's asthma to be chronic where she had the asthma since childhood, exhibited severe symptoms during her tenure with her employer, and continued to suffer at the time of litigation. Id. In contrast, although she required significant medical leave, plaintiff's surgeries and fainting episodes were acute in nature and caused by discrete events — some allegedly attributable to defendant. Plaintiff has not argued or demonstrated that her embolism or hysterectomy lead to other disabilities.She does not suffer a chronic physical infirmity. Rather, she had several serious medical events within a single school year. These conditions did not develop and worsen over time but appeared rapidly; they were prototypical acute conditions that were resolved to the extent that plaintiff could work in full capacity by the summer of 2012. Accordingly, summary judgment will be granted in favor of defendant on plaintiff's ADAAA and CFEPA disability discrimination claims.

F. Hostile Work Environment under the ADAAA

Likewise, summary judgment will be granted in favor of defendant on plaintiff's ADAAA hostile work environment claim based on insufficient evidence of **[*43]** disability.

G. Retaliation under *Title VII*, the CFEPA

HN22 In order to establish a *prima facie* case of retaliation under *Title VII*, plaintiff must show (1) that she participated in a protected activity, (2) that her participation was known to her employer, (3) that her employer thereafter subjected her to a materially adverse employment action, and (4) that there was a causal connection between the protected activity and the adverse employment action. See *Kaytor v. Electric Boat Corp., 609 F.3d 537, 552 (2d Cir. 2010)*. Plaintiff must show that the retaliation was a "but-for" cause of the employer's adverse action. *Vega v. Hempstead Union Free School Dist., 801 F.3d 72, 90-91 (2d Cir. 2015)*. CFEPA retaliation claims follow a similar analysis. *Marini v. Costco Wholesale Corp., 64 F. Supp. 3d 317, 332 (D. Conn. 2014)*.

Defendant argues that plaintiff cannot satisfy the fourth element as to causal connection between her protected activity and adverse employment actions.

HN23 At the summary judgment stage, once the employee demonstrates a minimal amount of evidence to support the elements of the claim, the burden shifts to the employer to proffer a legitimate non-retaliatory reason for its actions. If the employer produces such evidence, the employee must, in order to avoid summary judgment, point to evidence sufficient to permit an inference that the employer's proffered non-retaliatory reason is pretext for **[*44]** retaliation. *Id. at 552-53*.

First, plaintiff is only required to have a good faith, reasonable belief that she was opposing an unlawful employment practice to have engaged in protective activity. See *McMenemy v. City of Rochester, 241 F.3d 279, 285 (2d Cir. 2001)*. "The law protects employees in

the filing of formal charges of discrimination as well as in the making of informal protests of discrimination, including making complaints to management[.]" *Gregory v. Daly, 243 F.3d 687, 700-01*. Accordingly, plaintiff's alleged complaints made to assistant principal Duke, if accepted, could qualify as protected activity.

Second, for a retaliation claim, retaliatory acts need not bear on the terms or conditions of employment so long as the employer's actions could dissuade a reasonable employee from making or supporting a charge of discrimination. See *Vogel v. CA, Inc., 2016 U.S. App. LEXIS 19226, 2016 WL 6242916, at *2 (2d Cir. October 25, 2016)*. Moreover, "in determining whether conduct amounts to an adverse employment action, the alleged acts of retaliation need to be considered both separately and in the aggregate, as even minor acts of retaliation can be sufficiently 'substantial in gross' as to be actionable." *Hicks v. Baines, 593 F.3d 159, 165 (2d Cir. 2010)*.

The Court concludes that plaintiff's deposition testimony is sufficient to defeat summary judgment on her retaliation claims. See *Kaytor, 609 F.3d at 554-55*. Indeed, plaintiff asserts that in addition to enduring **[*45]** hostility and false accusations, she was misinformed about employment and health coverage status, repeatedly reassigned, and eventually forced to seek medical treatment as the tirade of unwarranted, public reprimands continued. Despite receiving letters from plaintiff's treating physicians concerning the allegedly hostile environment, defendant allegedly ignored those medical reports. There is evidence from which a rational fact finder could infer that plaintiff's assignment to the newly created resource reading position was effectively a demotion, and a jury could find, as did the Connecticut Employment Security Appeals Division, that her eventual discharge was attributable to her employer.

Plaintiff has pointed to evidence sufficient to permit an inference that defendant's proffered non-retaliatory reasons are pretext for retaliation.

Finally, defendant contends that plaintiff's complaint neglected to allege retaliation under *Title VII*, but the first paragraph of plaintiff's second amended complaint alleges violations of *Title VII* "with respect to discrimination, hostile work environment and retaliation[.]" Accordingly, summary judgment will be denied as to plaintiff's sex based retaliation **[*46]** claims under *Title VII* and the CFEPA.

H. Punitive Damages against a Municipality under *Title VII* and the CFEPA

Plaintiff concedes that ***HN24*** punitive damages are not permitted under *Title VII* and the CFEPA.

CONCLUSION

For the foregoing reasons, defendant's motion for summary judgment [ECF No. 43] is GRANTED in part and DENIED in part. Summary judgment is granted as to plaintiff's claims of disability discrimination, retaliation, and hostile environment under the ADAAA and the CFEPA, and as to plaintiff's common law claim for constructive discharge and punitive damages. All other claims remain.

Dated this 17th day of November, 2016, at Bridgeport, Connecticut.

/s/ Warren W. Eginton

WARREN W. EGINTON

SENIOR UNITED STATES DISTRICT JUDGE

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