IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
ALBANY DIVISION

DEFENDANT'S
BRIEF IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT

Now comes defendant , (hereinafter , and files this its brief in support of its Motion for Summary Judgment and shows the Court the following:

PART I FACTS AND BACKGROUND

Plaintiff's complaint against alleges she is entitled to damages and injunctive relief based on allegations of sexual discrimination and/or harassment pursuant to Title VII of the Civil Rights Act of 1964 as amended and discrimination and/or harassment under the Americans With Disabilities Act.

The undisputed facts show plaintiff was hired by defendant in April of 1998 to work on the scales (weighing trucks in and out, doing paperwork, filing and dispatching) and to perform light cleaning chores around the office at defendant's **Deposition of Nutt at pp. 18-20; Deposition of pp. 6, 14; Deposition of at p. 11.** Betty Turner, a co-employee, was assigned similar job duties as the plaintiff. **Deposition of p. 20; Deposition of p.7.** Approximately one

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year after her employment began, plaintiff began to complain of back pain allegedly exacerbated by the cleaning duties assigned her. At some point after August 8, 2001, plaintiff presented to defendant a physician's excuse, signed by , dated August 8, 2001, indicating plaintiff was restricted from bending, sweeping and vacuuming, and was limited to lifting no more than ten pounds. **Deposition of pp. 27, 39-46 and Defendant's Exhibit "1" attached thereto; Deposition of pp. 7-8.** In response to the physician's excuse, defendant accommodated plaintiff by not requiring her to bend, lift more than ten pounds, sweep or vacuum. **Deposition of p. 29; Deposition of pp. 7, 14-15; Deposition of at pp. 14-15.** Plaintiff testified under oath she had been physically able to handle whatever duties had been assigned to her up until the afternoon of April 24, 2002, when she was asked to clean the windows in the front office. **Deposition of at p. 28.** Plaintiff never presented any documentation to defendant showing she was physically unable to or restricted from washing windows until sometime after she had already quit her employment. **Deposition of pp. 45-46; Deposition of at p. 15.**

April 24, 2002 was Secretary's Day. As a gift for the occasion to the female office staff, the office manager, paid for a professional massage therapist to come to defendant's office to offer neck massages to the female staff. Said massages were purely voluntary, and all female office workers present that day but for plaintiff partook of the offer. **Deposition of at pp. 32-33, 36, 118-119; Deposition of pp. 8-10; Deposition of pp. 12-14.** No one associated with defendant ever advised plaintiff her decision to accept or decline the offer of the neck massage would in any way affect her employment status with defendant. **Deposition of p. 36, 50, 119; Deposition of**

at pp. 8, 23. Plaintiff testified under oath she was satisfied with her job up until April 24, 2002, and testified her decision to forego accepting a neck massage on that date is the reason she is no longer employed with defendant. **Deposition of pp. 28-29, 34-36, 38, 50, 93, 101, 124.**

Later in the afternoon on April 24, 2002, plaintiff was in a meeting with the plant manager, regarding her cleaning duties, at which time she was asked by Ms. to clean the windows in the office. A squeegee was available for her use which would eliminate any need to bend to accomplish that task. Plaintiff advised that she did not believe she was physically able to clean the windows, at which point Ms. advised plaintiff she would either have to undertake the task or would have to work it out with the co-employee who had similar duties. Plaintiff became upset at that point, indicating she wanted to take her accumulated vacation days, at which point she got a trash bag, began collecting all of her personal items in the area of the scales and left the premises. **Deposition of pp. 30-31, 34-36, 49, 86-87, 116-117; Deposition of at pp. 11, 14-15, 18-19, 21,-22; Deposition of at pp. 9-10, 19-20.** A day or two after April 24, 2002, plaintiff telephoned secretary in the front office, to tell her to advise the payroll secretary, put all of her vacation pay in her last check and that she would turn in her keys when she got that check. reported that conversation to **Affidavit of ¶4.** After being told about the conversation between plaintiff and telephoned plaintiff to ask her if she would be returning to work and was told by plaintiff that she would not be returning. As a result of that conversation, a separation notice was prepared indicating plaintiff had resigned her employment and was provided to plaintiff. **Deposition of p. 49; Deposition of pp. 20-21.** Plaintiff never requested that anyone associated with defendant amend her separation notice to

indicate she had not resigned and never told anyone associated with defendant that she wanted to return to her job. **Deposition of p. 49.** No one associated with defendant ever told plaintiff she was being fired or terminated from her job for any reason. **Deposition of at pp. 30-31, 47-49, 99-100; Deposition of at pp. 20-21.** Plaintiff was not fired, terminated or laid off by defendant but instead simply quit her job. **Deposition of p. 97.**

At all relevant times during plaintiff's employment with defendant, defendant had in effect a sexual harassment and sex discrimination prevention policy which plaintiff acknowledged by signing same on April 8, 1998. Said policy has instructions for employees on procedures for reporting sexual harassment. Plaintiff was aware of persons she could contact if she felt she was a victim of any type of harassment. **Deposition of at pp. 55-56, 78, 118 and defendant's Exhibit "3" attached thereto.** As of April 24, 2002, plaintiff had never made any report or claim of sexual or disability harassment to anyone associated with defendant other than mentioning to on a couple of occasions about dirty jokes allegedly told by was no longer an employee of defendant at the time these jokes were allegedly told, and was not plaintiff's supervisor. Plaintiff testified she did not complain to either about these jokes, admitted neither of them made any sexual threats or advances toward her, and admitted their conduct had no bearing on her decision to quit her job for her employer on April 24, 2002, as she testified she was happy with her job until that day. **Deposition of at pp. 56-61, 68-75, 77-78, 80-82, 95-98.** Plaintiff herself had on occasion exhibited off-color cartoons at her work station which she had received from friends or family on the computer. **Deposition of at pp. 62-66 and defendant's Exhibit "4" attached thereto.**

In summary, plaintiff testified she was happy with her job and in all likelihood would still be employed by defendant but for the fact that she refused to accept the gift of a neck massage offered as part of Secretary's Day. She alleges the offer of the neck massage by a professional massage therapist constitutes sexual harassment. **Deposition of at pp. 28-29, 34-36, 38, 50, 93, 101, 124.**

PART II STANDARD FOR GRANT OF SUMMARY JUDGMENT

Pursuant to Rule 56(c) of the Federal Rules of Civil Procedure, summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." To prevail on a motion for summary judgment, a defendant must demonstrate that the plaintiff is unable to make a sufficient showing on at least one essential element of plaintiff's case with respect to which the plaintiff bears the burden of proof. Celotex Corp. v. Catrett, 477 U.S.316, 322-24 (1986). Moreover, once a defendant's motion for summary judgment has been filed and properly supported, a plaintiff may not rest on mere allegations, but must provide significant probative evidence supporting the element of plaintiff's case in question. Id.; see Anderson v. Liberty Lobby, Inc., 477 U.S.242, 249 (1986). "The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff." Anderson, 477 U.S. at 252. If the plaintiff is unable to provide such evidence, the defendant is entitled to judgment as a matter of law. Celotex, 477 U.S. at 322-24; Anderson, 477 U.S. at 249. The Eleventh Circuit Court of Appeals has noted in applying the standards that "[s]ummary judgments are not rare in employment discrimination cases." Earley v. Champion Int'l Corp., 907 F.2d 1077, 1081 (11th Cir. 1990).

PART III ARGUMENT AND CITATION OF AUTHORITIES

A. PLAINTIFF'S RESIGNATION FROM HER EMPLOYMENT DOES NOT CONSTITUTE AN ACTIONABLE CONSTRUCTIVE DISCHARGE.

Plaintiff testified under oath she had been physically able to handle whatever duties had been assigned to her until April 24, 2002, and she was happy and satisfied with her job up until that date, the date she testified "everything changed" as a result of her decision to forego accepting a neck massage offered to the female office staff as a gift for Secretary's Day. At a meeting later that afternoon about her cleaning duties, plaintiff became upset and requested she be allowed to take her accumulated vacation days. While taking her vacation, she telephoned , a secretary in the front office, to tell her to advise the payroll secretary, to put all of her vacation pay in her last check and that she would turn in her keys when she got that check. , the Office Manager, was told of that conversation and then telephoned plaintiff to inquire whether she would be returning to work and was told by plaintiff that she would not be returning. As a result of that conversation, a separation notice was prepared indicating plaintiff had resigned and was provided to her. Plaintiff never advised anyone associated with defendant that her separation notice did not reflect the true facts or needed to be corrected, and she was never told by anyone associated with defendant that she was being fired or terminated from her job for any reason. The simple truth is that plaintiff, who admittedly was quite satisfied with her job up until April 24, 2002, became upset that day and quit.

Plaintiff can not as a matter of law prevail on any claim of sexual or disability harassment or claim based on termination for discriminatory reasons when the facts show she simply quit her job because she got mad at her employer on one particular day. An essential element of any cause of action plaintiff might be alleging is that her former employer made an adverse decision which

affected the terms of her employment, see e.g. 42 U.C.S. § 12112(a); Rossbach v. City of Miami, 371 F. 3d 1354, 1356-57(11th Cir. 2004), or allowed the creation of a discriminatorily abusive working environment. See e.g. Hulsey v. Pride Restaurants, LLC, 367 F. 3d 1238, 1244 (11th Cir. 2004); Mendoza v. Borden, Inc., 195 F3d 1238, 1244-1245 (11th Cir. 1999)(en banc). As plaintiff was neither demoted or fired by her employer, plaintiff must prove she was constructively discharged due to an abusive working environment. "A constructive discharge occurs when a discriminatory employer imposes working conditions that are 'so intolerable that a reasonable person in [the employee's] position would have been compelled to resign.'" Fitz v. Pugmire Lincoln-Mercury, Inc., 348 F.3d 974, 977 (11th Cir. 2003). The plaintiff's working conditions in this case are certainly no worse than those outlined in Fitz; in fact, plaintiff's working conditions were arguably better, as she admitted she loved her job until April 24, 2002, the date she stormed off the premises.

This Court must ask whether a reasonable jury could conclude that the working conditions experienced by Nutt were so intolerable as to compel a reasonable person to resign. Plaintiff has failed to present any proof of same. Her employer's offer of a voluntary neck massage by a licensed professional massage therapist as a gift for Secretary's Day in no way constitutes harassment, sexual or otherwise. Plaintiff has offered no proof the neck massage was in any way sexual in nature. Furthermore, the record is devoid of any evidence that acceptance or refusal of the neck massage offered as a gift for Secretary's Day had any favorable or adverse consequence on anyone's job. **Deposition of at pp. 36, 50, 119; deposition of at pp. 8, 23.** The one-time offering of a neck massage by a licensed massage therapist– the very crux of plaintiff's allegation that she was sexually harassed while employed -- in no way creates any genuine issue as to whether plaintiff was laboring under "intolerable working conditions."

Similarly, no reasonable juror could conclude that a request that plaintiff clean the office windows with a squeegee imposed intolerable working conditions on plaintiff. Plaintiff's job duties when hired included light office cleaning. **Deposition of at pp. 18-20; deposition of at pp. 6, 14; deposition of at p. 11.** The other employee who worked the scales, also had similar cleaning responsibilities. **Deposition of at p. 20; deposition of at p. 7.** Defendant had in the past accommodated plaintiff's alleged inability to bend, sweep or vacuum or lift anything over ten pounds as requested by the physician treating her for low back complaints. **Deposition of at p. 29.** Plaintiff testified she was physically capable of performing any task asked of her up until April 24, 2002. **Deposition of at p. 28.** The request that plaintiff clean the office windows that day with a squeegee was not in violation of any physician's recommendations of which defendant was aware. **Deposition of at pp. 45-46; deposition of at p. 15.** Without requesting any accommodation in this instance, the facts show plaintiff simply became upset when asked to clean the office windows with a squeegee and requested she be allowed to take her vacation days, a break from which she chose not to return. Requesting an employee hired to do light cleaning to clean the office windows with a squeegee in no way constitutes an intolerable working condition for that employee.

Finally, plaintiff alleges a former employee and a current employee who was not her supervisor told off-color jokes of a sexual nature in her presence in response to which she made a couple of complaints to the office manager, (denies having received any complaints from plaintiff, **deposition of at pp. 19-20**); however, plaintiff testified these "jokes" had nothing to do with her leaving her job. **Deposition of at pp. 81-82.** Again, she reported she was satisfied with job until April 24, 2002. **Deposition of**

at pp. 28-29, 50, 93, 101. Plaintiff has not presented any evidence that anyone who would be considered her supervisor condoned the jokes. Plaintiff herself from time to time exhibited off-color cartoons at her work station. **Deposition of at pp. 62-66 and Defendant's Exhibit 4 attached thereto.**

Viewing the facts in a light most favorable to plaintiff, this Court can readily see no reasonable jury could find the evidence in this case paints a picture of intolerable working conditions such that a reasonable person would have been felt compelled to resign. See Fitz v. Pugmire, 348 F.3d at 979. As the evidence shows plaintiff voluntarily terminated her employment with defendant without being under duress to do so other than that which was self-induced, defendant is entitled to summary judgment on all claims alleged by plaintiff.

B. THE PLAINTIFF WAS NOT "DISABLED" FOR PURPOSES OF THE AMERICANS WITH DISABILITIES ACT, AND, AS SUCH, SHE HAS FAILED TO ESTABLISH A PRIMA FACIE CASE OF DISABILITY DISCRIMINATION OR OF DISABILITY-BASED WORKPLACE HARASSMENT UNDER THE AMERICANS WITH DISABILITIES ACT.

To the extent plaintiff is alleging she is a victim of discrimination pursuant to the provisions of The American With Disabilities Act (hereinafter "ADA") the plaintiff bears the burden of establishing a prima facie case of discrimination under the ADA by showing (1) she was disabled as defined under the ADA; (2) she was qualified to perform the essential functions of the job, with or without reasonable accommodations; and (3) because of such disability the employer terminated her employment. Hilburn v. Murata Elecs. North America, 181 F.3d 1220, 1226 (11th Cir. 1999). If the plaintiff establishes a prima facie case of discrimination under the ADA, the defendant then bears the burden of producing a legitimate non-discriminatory reason for the adverse employment

action. Hilburn, 181 F.3d at 1226 (burden-shifting analysis of Title VII employment discrimination actions is applicable to ADA claims). See also Berman v. Orkin Exterminating Co. 160 F.3d 697, 701-02 (11th Cir. 1998). If the defendant produces a legitimate reason, the plaintiff then bears the burden of persuading the Court that the reason was merely a pretext for the employment action. Berman, 160 F.3d at 702. The plaintiff's rebuttal must be "**concrete evidence** in the form of **specific facts** which show that the defendant's reason is merely pretext. Mere conclusory allegations and assertions will not suffice." Earley v. Champion Int'l. Corp., 907 F.2d at 1081 (emphasis added).

Those circuits which have recognized a cause of action for disability-based workplace harassment under the ADA have generally treated such claims as a similar to those alleged under Title VII. See e.g. Gowesky v. Singing River Hospital System, 321 F. 3d 503, 509 (5th Cir. 2003); Shaver v. Independent Stave Company, 350 F. 3d 716, 719 (8th Cir. 2003); Fox v. General Motors Corp., 247 F. 3d 169, 172 (4th Cir. 2001) Silk v. City of Chicago, 194 F.3d 788, 803-804 (7th Cir. 1999). To succeed, a plaintiff must demonstrate (1) she belongs to a protected group; (2) she was subject to unwelcome harassment; (3) the harassment complained of was based on her disability or disabilities; (4) the harassment complained of affected a term, condition, or privilege of employment; and (5) the employer knew or should have known of the harassment and failed to take prompt, remedial action. Gowesky, 321 F.3d at 509. "The legal standard for workplace harassment . . . is high. For workplace abuse to rise to the level of an actionable offense, the disability-based harassment must be sufficiently pervasive or severe to alter the condition of employment and create an abusive working environment." Id.

A common element of both a claim of disability discrimination and a claim of disability-based workplace harassment is that the plaintiff be "disabled" within the meaning of the ADA. Id. at 508. As stated in Subsection A above, defendant is entitled to summary judgment because

plaintiff has offered no proof she suffered an adverse employment decision because of a disability as defined under the ADA. Plaintiff was not fired for any real or perceived disability, she simply quit. However, defendant also shows plaintiff is unable to meet her burden of proving she would be considered "disabled" for purposes of the ADA. Under the terms of the ADA, one is considered to have a disability if he or she (1) has a physical or mental impairment which substantially limits one or more of that person's major life activities, (2) has a record of such impairment, or (3) is regarded as having such an impairment. 42 U.S.C. § 12102(2). A physical impairment alone does not necessarily constitute a disability for purposes of the ADA. Hilburn, 181 F.3d at 1226. An impairment rises to the level of a disability only when it substantially limits one or more of the individual major life activities. Toyota Motor Mfg., Ky., Inc. V. Williams, 534 U.S. 184, 122 S. Ct. 681, 151 L.Ed.2d 615 (2002); 42 U.S.C. § 12102(2)(A); 29 C.F.R. Pt. 1630, App. § 1630.2(j); Hilburn, at 1227. "Major life activities are those basic activities that the average person in the general population can perform with little or no difficulty." McCollaugh v. Atlanta Beverage Co., 929 F.Supp 1489, 1496 (N.D. Ga. 1996).

The plaintiff cannot meet the criteria of showing she has an impairment that rises to the level of a disability for purposes of the ADA, as she denied under oath having any impairment that substantially limited her in one of her life's major activities. Plaintiff alleges she has two physical impairments (1) a hearing impairment for which she uses a hearing aid, and (2) a low back condition. Plaintiff testified her hearing impairment had nothing to do with her decision to quit her job, as she testified she was physically able to do her job and was satisfied with her job at all times up until April 24, 2002. **Deposition of at pp. 22-23, 28.** The evidence with regard to her low back condition likewise shows that condition did not substantially limit her ability to work or any other major life activity. She was able to perform the physical duties required of her at all times up

until April 24, 2002, **deposition of at p. 28**, when she decided to take her accumulated vacation days, during which period she decided not to return to her job. The evidence shows the employer had no notice that plaintiff was physically restricted from undertaking the task of cleaning the windows and also shows plaintiff made no request for an accommodation when asked to so. The inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working. 29 C.F.R. § 1630.2(j)(3)(I); Carruthers v. BSA Advertising, Inc., 357 F.3d 1213, 1216 (11th Cir. 2004). The Supreme Court in Toyota Motor held in order for an impairment to the ability to perform manual tasks to qualify as a "disability" for purposes of the ADA, "the critical inquiry is whether the impairment (a) prevents or severely restricts the performance of (b) activities of 'central importance to most people's daily lives.'" Carruthers, 357 F. 3d at 1217, quoting Toyota Motors, 534 U.S. at 198, 122 S. Ct. at 691. The impairment must also have a permanent or long-term impact. Id. Plaintiff has the burden of introducing medical evidence that she has a permanent or long-term condition which would be considered disabling for purposed of the ADA but has not done so. In fact, plaintiff failed to name any medical expert witness by the deadline imposed by the Court's scheduling and discovery order, so no such evidence or testimony will be forthcoming.

Just as the carpal tunnel syndrome in Toyota Motors and the bilateral hand strain/sprain in Carruthers did not rise to the level of a disability for purposes of the ADA, plaintiff's low back condition does not rise to the level of a disability for purposes of the ADA. Plaintiff has presented no evidence showing her low back condition prevented her from performing the activities of central importance to most people's daily lives or that it prevented her from performing the essential tasks of her job. There is no evidence said condition is permanent. Plaintiff was physically able to do all of her assigned tasks until she quit her employment on April 24, 2002. Based on the evidence at

hand, defendant is entitled to summary judgment on plaintiff's claim for disability discrimination, as plaintiff has offered no proof of the first and third prongs of prima facie case she must show, and it is entitled to summary judgment on any claim for disability-based workplace harassment, as plaintiff has offered no proof of any of the prongs necessary to establish a prima facie case.

C. PLAINTIFF HAS NOT ESTABLISHED A PRIMA FACIE CASE OF SEXUAL HARASSMENT TO SET FORTH A CAUSE OF ACTION PURSUANT TO TITLE VII OF THE CIVIL RIGHTS ACT OF 1964, AS AMENDED.

To prove sexual harassment under Title VII, a plaintiff must show (1) that she belongs to a protected group; (2) that she has been subjected to unwelcome sexual harassment; (3) that the harassment was based on her sex; (4) that the harassment was sufficiently severe or pervasive to alter the terms and conditions of employment and create a discriminatorily abusive working environment; and (5) that a basis for holding the employer liable exists. Hulsey v. Pride Restaurants, LLC, 367 F. 3d 1238, 1244 (11th Cir. 2004). Defendant asserts plaintiff can only meet her burden of proving the first of the five factors. While she is female and thus a member of a protected group, the offer of a voluntary neck massage by a licensed massage therapist as gift for Secretary's Day does qualify as either sexual in nature or as unwelcome harassment. The one time incident was neither sufficiently severe or pervasive to alter the terms and conditions of employment (there was no consequence if one accepted or declined the gift), nor is there any evidence the Secretary's Day gift created a discriminatorily abusive working environment. Finally there exists no basis for holding her employer liable.

With regard to last prong or factor, sexual harassment in the workplace can alter the terms and conditions of employment in either of two ways. Hulsey, 367 F. 3d at 1246. One way is if the employee's refusal to submit to a supervisor's sexual demands results in a tangible employment

action being taken against her. The facts do not support any such allegation. The offer of a neck massage by a licensed massage therapist as a gift to all the female office staff as a Secretary's Day gift can not be considered a "sexual demand" on plaintiff by her supervisor, assuming was considered her supervisor. Furthermore, there is no evidence any supervisor of plaintiff took any adverse action against her as a result of her decision to decline the gift for personal reasons.

The second way for sexual harassment to violate Title VII is if it is sufficiently severe and pervasive to effectively result in a change in the terms and conditions of employment, even though the employee is not discharged, demoted or reassigned. This is hostile work environment harassment. Regardless of who is the harasser in this type of action, the employer may have an affirmative defense to any liability for hostile environment by establishing the employee failed to take prompt advantage of the employer's system for reporting and preventing harassment. Hulsey, 367 F.3d at 1245, quoting Faragher v. City of Boca Raton, 524 U.S. 775, 807-08, 118 F.Ct. 2275, 2293, 141 L.Ed. 2d 662 (1998) and Burlington Industries, Inc. v. Ellerth, 524 U.S. 742, 765, 118 F.Ct. 2257, 2270, 141 L.Ed. 2d 633 (1998). "To be actionable under Title VII, a hostile work environment must be both 'objectively and subjectively offensive, one that a reasonable person would find hostile and abusive, and one that a victim in fact did perceive to be so.'" Hulsey, 367 F.3d at 1247, quoting Faragher, 524 U.S. at 787, 118 F.Ct. at 2283. "In assessing whether harassment is objectively severe and pervasive, the courts typically look to: (1) the frequency of the conduct; (2) the severity of the conduct; (3) whether the conduct was physically threatening and humiliating or just a mere utterance; and (4) whether the conduct unreasonably interferes with the employee's work performance." Hulsey, 367 F.3d at 1247-1248. In considering these factors, the 11th Circuit employs a totality of the circumstances approach. Id.

Plaintiff in this case has not presented any evidence from which a reasonable jury could find the offer of the neck massage constituted sexual harassment, much less that said incident was subjectively or objectively severe and pervasive. Other than being offered a neck massage on Secretary's Day, the only allegation of sexual harassment made by plaintiff was the off-color jokes allegedly told in her presence by two individuals, one of whom was not even an employee at the time and the other who was not her supervisor however, plaintiff testified the conduct of those gentlemen had nothing to do with the reason she was no longer employed with defendant. **Deposition of at pp. 81-82.** She admitted she was not physically threatened or humiliated by any off-color jokes she may have heard. **Deposition of at pp. 60-61.** According to plaintiff, the sole reason she is no longer employed is her refusal to accept the gift of the neck massage offered on Secretary's Day. As said gift was not a sexual demand – no proof as been offered showing the neck massage was in any fashion sexual in nature – nor was there any consequence to her employment by virtue of her acceptance or rejection of the gift, plaintiff cannot meet her burden of establishing a prima facie case of sexual harassment under Title VII. Defendant is entitled to summary judgment on plaintiff's claim based on Title VII of the Civil Rights Act of 1964 as amended.

D. PLAINTIFF FAILED TO AVAIL HERSELF OF DEFENDANT'S INTERNAL REPORTING PROCEDURES FOR ALLEGATIONS OF SEXUAL OR DISABILITY HARASSMENT, AND, AS SUCH IS NOT ENTITLED TO ANY RECOVERY BASED ON A HOSTILE WORKPLACE ENVIRONMENT THEORY.

At all relevant times during plaintiff's employment, defendant had in effect a sexual harassment and sex discrimination prevention policy about which plaintiff had actual knowledge.

Plaintiff acknowledged her knowledge about the policy when she signed a statement of acknowledgment on April 8, 1998. Said policy has instructions for employees on procedures for reporting harassment, and plaintiff acknowledged under oath knowing there were persons in the corporate office she could contact if she felt she had been the victim of harassment or discrimination. **Deposition of at pp. 55-56, 78, 188 and Defendant's Exhibit 3 attached thereto.**

Prior to April 24, 2002, the day she took her vacation days from which she did not return, plaintiff never made any report of any harassment based on her sex or any disability, real or perceived, to anyone associated with defendant. Plaintiff alleges she told on a couple of occasions about the off-color jokes allegedly told in her presence by **deposition of at pp. 56, 68-69, 78**, an allegation denied by **deposition of at pp. 19-20**, however, the facts show plaintiff never made any effort to follow the company's reporting policy, assuming she really believed she had been improperly harassed, until after she already told she was not returning to her job. **Deposition of at p. 78.**

An employer is shielded from liability based upon a hostile workplace environment theory when it maintains effective anti-harassment policies and reporting procedures which an allegedly aggrieved employee fails to utilize – the "Faragher-Ellerth defense." Faragher, 524 U.S. at 808, 118 S. Ct. at 2293; Ellerth, 524 U.S. at 765, 118 S. Ct. at 2270; Hulsey, 367 F. 3d at 1246. The facts clearly show defendant had appropriate procedures for reporting any allegations of harassment, **defendant's Exhibit 3 to deposition of** and plaintiff was aware of the reporting procedures and failed to utilize them if in fact she truly felt she was being harassed on the basis of her sex or disability, real or perceived; accordingly, plaintiff is not entitled to any recovery based on a hostile workplace environment theory.

PART IV. CONCLUSION

Based on the above argument and citation of authority, defendant respectfully requests the Court grant its motion for summary judgment and dismiss the captioned action as a matter law.

This 1st day of October, 2004.

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CERTIFICATE OF SERVICE

This is to certify that I have this date served a copy of the within and foregoing document upon all other parties of record by depositing same in the United States mail in envelopes with adequate postage thereon, addressed as follows:

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This 1st day of October, 2004