UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

LEANNA WHEELER,	***)***	
	)	
Plaintiff	***)***	
	)	
v.	***)***	***Docket No. 03-265-P-H***
	)	
OLYMPIA SPORTS CENTER, INC.,	***)***	
	)	
Defendant	***)***	

MEMORANDUM DECISION ON MOTIONS TO EXCLUDE AND TO STRIKE AND RECOMMENDED DECISION ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

The plaintiff, Leanna Wheeler, moves to strike one of the affirmative defenses asserted by the defendant, Olympia Sports Center, Inc., and certain evidence supporting the statement of material facts submitted by the defendant in support of its motion for summary judgment in this action alleging employment discrimination. The defendant moves to exclude an expert witness designated by the plaintiff. I grant one of the motions to strike and grant the motion to exclude. I recommend that the court grant the motion for summary judgment in part.

I. Motion to Strike Affirmative Defense

The defendant has asserted an affirmative defense based on *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998). Answer (Docket No. 4) at 2 (Seventh Affirmative Defense). The plaintiff asks the court to strike this defense because, she asserts, the defendant did not provide timely discovery with respect to the defense. Plaintiff's Motion to Strike Defendant's Faragher Affirmative Defense ("*Faragher* Motion")

(Docket No. 28) at 1. She cites no authority in her initial memorandum in support of the motion but does refer to Fed. R. Civ. P. 37 in her reply memorandum. Plaintiff's Reply to Defendant's Objection to Plaintiff's Motion to Strike ("*Faragher* Reply") (Docket No. 36) at 6-7.

> In two cases decided in 1998 — *Faragher v. City of Boca Raton*, 524 U.S. 775 . . . (1998); *Burlington Industries v. Ellerth*, 524 U.S. 742 . . . (1998) — the Supreme Court itself devised a special framework for imposing vicarious liability on employers in cases involving harassment by supervisors. . . . The common language, identical in both opinions, follows:
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> > An employer is subject to vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over the employee. When no tangible employment action is taken, a defending employer may raise an affirmative defense to liability or damages, subject to proof by a preponderance of the evidence . . . . The defense comprises two necessary elements: (a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.

Reed v. MBNA Mktg. Sys., Inc., 333 F.3d 27, 32 (1st Cir. 2003) (other citations omitted).

According to the plaintiff, on November 13, 2003 she served interrogatories on the defendant in which she asked, *inter alia*, whether the defendant had ever received notice that Darnell Austin, the former employee whom the plaintiff contends sexually harassed her, had possibly engaged in "improper conduct" or sexual harassment against any of the defendant's employees and for the names and addresses of any females who had been supervised by Austin. *Faragher* Motion at 2-4. The defendant limited its response to the period during which it employed the plaintiff. *Id*. Counsel for the plaintiff asked counsel for the defendant by letters dated June 1, 2004 and July 1, 2004 for a response that covered the entire period of Austin's employment, but "did not receive a supplemental response." *Id*. at 4. During the deposition of the defendant's human resources manager on July 20, 2004 counsel for the plaintiff learned for the first time that

a complaint of sexual harassment had been made against Austin in 2000 by one of four females whom he supervised at that time. *Id*. at 4-5. An incident report concerning this claim was produced by the defendant on July 23, 2004.[1] *Id*. at 5. The plaintiff contends that this evidence is "extremely relevant" to the *Faragher* defense and that its delayed production was so prejudicial to the plaintiff that the defendant must be barred from presenting the defense. *Id*. at 7.

The defendant's motion for summary judgment, which relies on the *Faragher* defense among other arguments, was filed on July 27, 2004. Docket. The motion to strike the defense was filed on August 16, 2004. *Id*. At no time after the July 20, 2004 deposition did the plaintiff bring to the court's attention this alleged discovery violation.

Assuming *arguendo* that evidence of the defendant's actions with respect to a previous complaint about the alleged harassing supervisor involving a different employee is in fact relevant to a *Faragher* defense, *but see Dedner v. Oklahoma*, 42 F.Supp.2d 1254, 1259-60 (E.D. Okla. 1999) (discussing first element of defense in terms of complaint of plaintiff at issue and rejecting argument concerning defendant's conduct with respect to earlier complaint by different employee), the plaintiff is not entitled to the relief that she seeks in this motion. First, the plaintiff admits that she received on June 16, 2004 in the defendant's response to her request for production of documents, *Faragher* Reply at 7 n.4, a copy of a reprimand issued to Austin on April 25, 2000 resulting from the claim at issue. That document, Exh. 1 to Defendant's Objection to Plaintiff's Motion to Strike, etc. (Docket No. 32), certainly put counsel for the plaintiff on notice that an incident relevant to the interrogatories at issue had occurred in 2000. Yet counsel did not pursue this issue or bring the possible discovery violation to the attention of the court until two months later,

[1] Contrary to the plaintiff's assertion that the incident report shows that "at least four females . . . had accused [Austin] of (*continued on next page*)

after the discovery deadline had passed and after the defendant had filed its motion for summary judgment, and then only in the form of a motion to strike. This unexplained delay weakens the plaintiff's position.

Next, Rule 37 provides very specific means to deal with discovery violations, which are regularly employed by this court. In this district, counsel who believe that a discovery violation has occurred are expected to discuss the matter with opposing counsel and then, if agreement cannot be reached, to request a discovery conference with the court. *See* Fed. R. Civ. P. 37(a)(2)(B), (c); Local Rule 26(b). Neither happened in this case. Instead, counsel for the plaintiff apparently made a tactical decision to attempt to use the alleged violation to obtain a harsh sanction without first making use of alternative available remedies. Under Rule 37, the sanction of prohibiting a party from pursuing a particular defense as a result of a discovery violation is specifically provided only where a party violates an order to provide discovery. Fed. R. Civ. P. 37(b)(2). Here, the plaintiff never sought an order compelling the discovery at issue. While the sanction sought by the plaintiff is not precluded by the terms of Rule 37, it is not justified under these circumstances. The plaintiff should have brought the alleged failure promptly to the court's attention. She could have requested an extension of the discovery deadline as a reasonable remedy for the alleged failure. She chose not to do so. She may not now be heard to complain of prejudice that she could have avoided. *See Brandt v. Vulcan, Inc.*, 30 F.3d 752, 756-57 (7th Cir. 1994) (upholding refusal to impose sanctions for alleged failure to provide complete discovery when issue first raised during trial).

The motion to strike the *Faragher* affirmative defense is denied.

II. Motion to Exclude Testimony

sexual assault," *Faragher* Motion at 5, the report shows that only one individual made such an accusation in connection with a party that took place after work hours and outside of work premises. Exh. 4 to *Faragher* Motion at [1].

The defendant asks the court to exclude the testimony of Curtis Baggett, designated by the plaintiff as an expert witness. Motion in Limine to Exclude the Testimony of Curtis Baggett ("Baggett Motion") (Docket No. 25). It contends that Baggett's proposed testimony, to the effect that the signature on a birthday card is not that of the plaintiff and was a "feeble, amateurish" forgery, Plaintiff's Opposition to Defendant's Motion in Limine to Exclude the Testimony of Curtis Baggett ("Baggett Opposition") (Docket No. 29) at 2, is "unfounded and unreliable," and that Baggett lacks the expertise so to testify, Baggett Motion at 1, 2-4.

The plaintiff's designation of Baggett provides, under the heading "SUBSTANCE OF OPINION" as follows;

> Mr. Baggett is a handwriting expert. He has reviewed the birthday card allegedly sent to Mr. Austin from the Plaintiff. Based on his review of the card and Ms. Wheeler's handwriting, it is his opinion that Ms. Wheeler did not write the birthday card.

Plaintiff's Expert Disclosure, Exh. C to Baggett Motion, at [1]. Under the heading "BASIS OF OPINION," the disclosure states:

> Mr. Baggett's opinion is based upon his review of the Christmas [sic] card and Plaintiff's own handwriting. Ms. [sic] Baggett's opinions are further based upon his experience in the field of handwriting and the current state of knowledge.

Id. A resume attached to the disclosure presents conclusory statements asserting, *inter alia*, that Baggett is "a qualified Expert Document Examiner" who has "examined documents and/or testified" in court cases in several states and countries. *Id*. at [4]. The only relevant training listed on the resume is "Document Examiner Training, Military Police-United States Army" in 1960. *Id*. In an attached sworn statement Baggett asserts that he was certified in 1983 as a "master handwriting analyst" and in 1987 as a "questioned document examiner" by Dr. Ray Walker, "a leading authority in the field of handwriting analysis and

document examination." *Id*. at [5]. Baggett also asserts that he has taught handwriting analysis classes "for over 20 years in approximately twenty states." *Id*. In a "Questioned Document Examiner Letter," Baggett states that he has examined four documents with the plaintiff's handwriting and signatures and "a questioned document identified herein as 'Q1,'" apparently a birthday card, and that "[i]t is my professional expert opinion that Leanne Wheeler was not the author of the birthday card . . . ." Exh. D to Baggett Motion. The plaintiff does not take issue with the defendant's assertion that Baggett did not have access to the original birthday card. Baggett Motion at 6.

In *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993), the Supreme Court directed a trial court faced with a challenged proffer of expert scientific testimony to determine

> whether the expert is proposing to testify to (1) scientific knowledge that (2) will assist the trier of fact to understand or determine a fact in issue. This entails a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts in issue.
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> Ordinarily, a key question to be answered in determining whether a theory or technique is scientific knowledge that will assist the trier of fact will be whether it can be (and has been) tested.
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> Another pertinent consideration is whether the theory or technique has been subjected to peer review and publication.
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> * * *
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> Additionally, in the case of a particular scientific technique, the court ordinarily should consider the known or potential rate of error, and the existence and maintenance of standards controlling the technique's operation.

509 U.S. at 592-94 (citations omitted). Here, Baggett offers no details about his methodology, beyond "comparing" the handwriting on several documents. This is insufficient to allow the court to determine whether his methodology could be tested, has been subjected to peer review, or is in accordance with

applicable standards.[2] Any individual, with no training or experience whatsoever, could "compare" the handwriting on different documents and reach a conclusion. That would not be a scientific examination. Baggett's presentation does not begin to meet the indicia of reliability found sufficient in *United States v. Mooney*, 315 F.3d 54, 62 (1st Cir. 2002), where the handwriting expert testified that he used the same methodology employed by other forensic document examiners, which had been subject to peer review through published journals in the field and had been tested with one study concluding that certified document examiners had a potential rate of error of 6.5%. The expert was certified by the American Board of Forensic Document Examiners, he submitted to proficiency tests twice a year and all of his work was reviewed and confirmed by at least one other document examiner, *id*., all credentials that are absent from Baggett's resume. In addition, Ray Walker, the individual identified by Baggett as the source of his certification, was as of 1992, well after the certifications, not himself a member of the American Board of Forensic Document Examiners and a federal district court's decision not to qualify him as a handwriting expert was upheld on appeal. *United States v. Bourgeois*, 950 F.2d 980, 986-87 (5th Cir. 1992).[3]

The defendant's motion to exclude Baggett's testimony is granted.

III. Motion to Strike Errata Sheet

The plaintiff moves to strike an errata sheet submitted by a witness, Michael Kendall, after the conclusion of his deposition, which is cited in support of several paragraphs in the defendant's statement of

[2] The plaintiff asserts that Baggett acted "[i]n accordance with his practice, and his years of experience using equipment in his lab to amplify and measure the handwriting." Baggett Opposition at 2. Nothing in the documents provided by Baggett support this statement. He does list "[t]he equipment in my lab normally used for examination," Exh. C to Baggett Motion at [5], but nowhere does he state that he used any of this equipment in reaching his conclusion in this case, let alone how he used it.

[3] As of 1999, Baggett apparently worked "primarily in real estate and financial planning," conducting occasional weight loss and stress management seminars, although he also represented himself as a graphologist. *Brown v. State*, 1999 WL 61858 (Tex. App. Feb. 9, 1999), at *8 (finding no error in prosecutor's characterization of Baggett as "charlatan"). At that time, he also falsely testified that he had been designated by the court as an expert witness. *Id*.

material facts. Plaintiff's Motion to Strike the Errata Sheet of Michael Kendall ("Kendall Motion") (Docket No. 37) at 1. The defendant responds that motions to strike are not explicitly authorized by the Federal Rules of Civil Procedure other than Rule 12(f), which does not apply by its terms to an errata sheet; it therefore concludes that the motion should be denied. Defendant's Objection to Plaintiff's Motion to Strike, etc. ("Kendall Opposition") (Docket No. 39) at 1-2. It contends in the alternative that the errata sheet was "properly filed" and that it merely clarified confusing testimony rather than changed testimony. *Id.* at 2-5.

The defendant cites no authority in support of its first argument. It is clear that, however the issue is brought to the court's attention, a court may disregard statements in an affidavit that contradict clear answers given previously to unambiguous questions, if no satisfactory explanation of the change is given. *Colantuoni v. Alfred Calcagni & Sons, Inc.*, 44 F.3d 1, 4-5 (1st Cir. 1994). The means by which this issue is brought to the court's attention makes little difference, so long as the method chosen is not forbidden by procedural rule or case law. I am not aware of any such prohibition of the use of a motion to strike. The defendant's first argument is without merit.

Rule 30(e) provides, in relevant part:

> If requested by the deponent or a party before completion of the deposition, the deponent shall have 30 days after being notified by the officer that the transcript . . . is available in which to review the transcript . . . and, if there are changes in form or substance, to sign a statement reciting such changes and the reasons given by the deponent for making them. The officer shall indicate in the certificate prescribed by subdivision (f)(1) whether any review was requested and, if so, shall append any changes made by the deponent during the period allowed.

Fed. R. Civ. P. 30(e). The transcript of Kendall's deposition filed with the plaintiff's opposition to the motion for summary judgment includes a certificate that states, *inter alia*: "I further certify that any and all

changes in form or substance which the deponent has made, along with any statement of the reasons given by the deponent for making them, have been entered on the deposition by the officer." Deposition of Michael S. Kendall ("Kendall Dep.") (Exh. 5 to Plaintiff's Separate Statement of Undisputed Facts ("Plaintiff's SMF") (Exh. 2 to Plaintiff's Memorandum in Opposition to Defendant's Motion for Summary Judgment ("Opposition") (Docket No. 27)) at 25. No errata sheet is attached, and none of the changes listed on the errata sheet submitted by the defendant, Errata Sheet, Deposition of Michael S. Kendall (Exh. 2 to Defendant's Reply Statement of Material Facts ("Defendant's Responsive SMF") (Docket No. 34)), appears in the transcript. The deposition was taken on May 14, 2004, Kendall Dep. cover sheet, and the certificate is dated May 28, 2004, *id*. at 25. I therefore can only conclude that Kendall did not request an opportunity to review the transcript, because the 30-day period prescribed by Rule 30(e) for review had not expired.[4] The errata sheet is unsigned and undated but is accompanied by a signature page dated July 7, 2004. Signature Page (Exh. 2 to Defendant's Responsive SMF). This is more than 30 days after the court reporter signed the certificate that accompanies the transcript.

The defendant avers, in its memorandum but not in any sworn statement, that the deposition transcript was sent to its counsel on May 28, 2004, and that its counsel sent the transcript to Kendall on June 3, 2004. Kendall Opposition at 2. It then contends that the fact that Kendall did not sign the errata sheet until 34 days later should be overlooked because the court reporter signed the certificate "before Kendall had even the opportunity to review the deposition." *Id*. This argument is significant for what it does not say: that Kendall or either party requested, at the time of the deposition, that he be given an opportunity

[4] The plaintiff contends that the court reporter "submitted a certificate indicating that the deponent had made no changes to the deposition. (Exhibit 1)." Kendall Motion at 3. No exhibit was submitted with the motion, and this is not an accurate characterization of the certificate that accompanies the deposition transcript, which is quoted above.

to review the transcript. In the absence of any evidence to that effect, the inartful phrasing of the certificate cannot save the defendant from the consequences of this oversight.

Even if that were not the case, the defendant admits that Kendall did not sign the errata sheet within 30 days after being notified that the transcript was ready for his review. Contrary to the defendant's conclusory argument that "a four-day delay [as the defendant counts the elapsed days] does not warrant that the errata be stricken altogether," *id*., several courts have held errata executed after the expiration of the 30-day time limit may be stricken for that reason alone, *e.g.*, *Davidson Hotel Co. v. St. Paul Fire & Marine Ins. Co.*, 136 F.Supp.2d 901, 914 (W.D. Tenn. 2001) (70 days); *Porter v. Hamilton Beach/Proctor-Silex, Inc.*, 2003 WL 21946595 (W.D. Tenn. July 28, 2003), at *4 (42 days); *Tanay v. St. Barnabas Hosp.*, 2001 WL 262695 (S.D.N.Y. Mar. 15, 2002), at *3- *4 (45 days); *Erickson v. Larson-Juhl, Inc.*, 2000 WL 34237514 (W.D. Wis. Dec. 27, 2000), at *8 (52 days). The motion to strike is granted. Any entries in the parties' statements of material facts based on Kendall's errata sheet will be stricken.[5] This result makes it unnecessary to consider the defendant's arguments that the changes are not contradictory and that *Colantuoni* does not apply to the testimony of a "non-management" employee of a party. Kendall Opposition at 4-5.

IV. Motion for Summary Judgment

A. Summary Judgment Standard

Summary judgment is appropriate only if the record shows "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c).

[5] The defendant contends, without citation to authority or developed argument, that the plaintiff should be estopped from arguing that the errata sheet should be stricken because she cites it "without reservation" in her reply to the defendant's statement of material facts. Kendall Opposition at 3 n.1. This argument, as presented, is deemed waived. *Graham v. United States*, 753 F. Supp. 994, 1000 (D. Me. 1990). In any event, I strike any entry in either party's statements of material
(*continued on next page*)

"In this regard, 'material' means that a contested fact has the potential to change the outcome of the suit under the governing law if the dispute over it is resolved favorably to the nonmovant. By like token, 'genuine' means that 'the evidence about the fact is such that a reasonable jury could resolve the point in favor of the nonmoving party.'" *Navarro v. Pfizer Corp*., 261 F.3d 90, 93-94 (1st Cir. 2001) (quoting *McCarthy v. Northwest Airlines, Inc.*, 56 F.3d 313, 315 (1st Cir. 1995)). The party moving for summary judgment must demonstrate an absence of evidence to support the nonmoving party's case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). In determining whether this burden is met, the court must view the record in the light most favorable to the nonmoving party and give that party the benefit of all reasonable inferences in its favor. *Nicolo v. Philip Morris, Inc.*, 201 F.3d 29, 33 (1st Cir. 2000). Once the moving party has made a preliminary showing that no genuine issue of material fact exists, the nonmovant must "produce specific facts, in suitable evidentiary form, to establish the presence of a trialworthy issue." *Triangle Trading Co. v. Robroy Indus., Inc.*, 200 F.3d 1, 2 (1st Cir. 1999) (citation and internal punctuation omitted); Fed. R. Civ. P. 56(e). "As to any essential factual element of its claim on which the nonmovant would bear the burden of proof at trial, its failure to come forward with sufficient evidence to generate a trialworthy issue warrants summary judgment to the moving party." *In re Spigel*, 260 F.3d 27, 31 (1st Cir. 2001) (citation and internal punctuation omitted).

B. Factual Background

The following undisputed material facts are appropriately presented in the parties' statements of materials facts submitted pursuant to this court's Local Rule 56.

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facts that relies on the errata sheet as authority.

The plaintiff began to work with the defendant in June 2002 as a laborer. Defendant's Statement of Material Facts ("Defendant's SMF") (Exh. 1 to Defendant's Motion for Summary Judgment ("Motion") (Docket No. 24)) ¶ 1; Plaintiff Reply to Defendant's Statement of Material Facts ("Plaintiff's Responsive SMF") (Docket No. 30)[6] ¶ 1. She was placed in the receiving department in September 2002. *Id*. ¶ 2. Darnell Austin was the plaintiff's supervisor in the receiving department. *Id*. ¶ 3. In December 2002, after the Christmas season, the plaintiff was transferred to the merchandise returns department, where her supervisor was Andrea Kalmar. *Id*. ¶¶ 4-5.

The defendant maintains a written policy against sexual harassment, which was in force during the plaintiff's employment. *Id*. ¶ 11. The plaintiff read and signed this policy. *Id*. ¶ 13. The policy states, *inter alia*: "Individuals who believe they have been subjected to sexual harassment by Co-workers, Supervisors or non-employees working on Company property, should bring their concern to the attention of their immediate Supervisor and/or the Personnel Manager." *Id*. ¶ 14. The plaintiff understood that she was to go to management if she witnessed sexual harassment. *Id*. ¶ 15. She was aware that the defendant had an open door policy so that she could always walk in on senior management and tell them her concerns. *Id*. ¶ 17.

The plaintiff testified that, after she had worked in the receiving department for a couple of weeks, Austin started to ask her personal questions, tell her that they should go out for drinks and brush her buttocks with the back of his hand. Plaintiff's SMF[7] ¶¶ 5-6; Defendant's Responsive SMF ¶¶ 5-6. She told Austin to stop several times. *Id*. ¶ 6. Austin spoke of oral sex. *Id*. ¶ 7. He told the plaintiff that in order to become a group leader she would have to sleep with him. *Id*. ¶ 9. She refused. *Id.* On one

[6] This document is identical to Exhibit 1 to Opposition .

occasion, when the plaintiff asked Austin for a new task he told her to get on her knees. *Id*. ¶ 10. Austin constantly stuck his tongue out and wiggled it at the plaintiff. *Id*. ¶¶ 11, 14. Austin told the plaintiff that he wanted to have a sexual relationship with her and made sexually offensive remarks. *Id*. ¶¶ 16-23.

The plaintiff spoke to Mike Kendall when he was a new management employee about some of Austin's actions. *Id*. ¶¶ 24, 30-32. The plaintiff did not know at this time that Kendall was a supervisor or manager. Defendant's Responsive SMF ¶ 24; Deposition of Leanna Wheeler (attached to Exh. 1 to Motion) at 62 ("I talked to Mike Kendall about it but I didn't know he was even in management."). Kendall worked in the shipping department when he was originally hired. Plaintiff's SMF ¶ 26; Defendant's Responsive SMF ¶ 26. He later went to the receiving department. *Id*.

On or before January 29, 2003 the plaintiff told Kalmar about the harassment by Austin. *Id*. ¶ 35. Kalmar told the plaintiff that she would not lose her job for coming forward. Defendant's SMF ¶ 24; Plaintiff's Responsive SMF ¶ 24. Kalmar reported the plaintiff's accusations to the distribution center operations manager, even though the plaintiff had asked her not to notify upper management. *Id*. ¶¶ 25-26. On January 29, 2003 Thomas Meschinelli, the defendant's human resources manager, met with Matt Miller, Austin's supervisor, and Kevin Kennie, personnel specialist, about the allegations. *Id*. ¶¶ 16, 28-29. Miller and Kennie suggested that the plaintiff go home early, with pay, because she seemed upset. *Id*. ¶ 30. The plaintiff did so. *Id*. That afternoon management contacted the plaintiff and asked her to put her accusations in writing and to return at 3:00 p.m. to discuss the matter. *Id*. ¶ 31. The plaintiff did so. *Id*. ¶ 32.

[7] This document is identical to Docket No. 31.

At the meeting, the plaintiff was informed that there would be an immediate investigation. *Id*. ¶ 33. She was told that management would take the matter seriously, that they were there to protect her, that the defendant had a strong policy against sexual harassment, that she could stay home with pay and that she would be contacted as soon as management found something. *Id*. ¶¶ 34-35. After the plaintiff left, Meschinelli, Miller and Paul Fitzpatrick met with Austin. *Id*. ¶ 36. Austin denied the charges. *Id*. ¶ 37.[8] At the conclusion of the meeting, management decided to suspend Austin without pay while they investigated the plaintiff's accusations. *Id*. ¶ 39.

Miller contacted the plaintiff in an effort to set up another meeting on January 31. *Id*. ¶ 43. On January 30, the plaintiff's attorney sent the defendant a letter informing management that she would not attend the January 31 meeting. *Id*. ¶ 44. The plaintiff did not attend the January 31 meeting nor did she return to work for the defendant. *Id*. ¶ 45. Management advised the plaintiff that her job was still open if she wanted it. *Id*.¶ 47.

The defendant terminated Austin on February 3, 2003. *Id*. ¶ 41. He was terminated because he had received a prior warning about fraternizing with coworkers and he had failed to inform upper management that he had received gifts from the plaintiff. *Id*. ¶ 42. On February 10, 2003 the plaintiff decided not to return to work at the defendant and her attorney sent the defendant a letter notifying it of that decision. *Id*. ¶ 48. The plaintiff assumed that she would be treated poorly if she returned to work. *Id*. ¶ 50.

C. Discussion

[8] The plaintiff objects to this paragraph of the defendant's statement of material facts as hearsay. Plaintiff's Responsive SMF ¶ 37. However, this assertion is not a statement offered to prove the truth of the matter asserted — that Austin did not in fact do what the plaintiff said he had done — and so is not hearsay. Fed. R. Civ. P. 801(c).

The complaint alleges the existence of a hostile working environment and *quid pro quo* sexual harassment under federal and state law. Complaint (Docket No. 1) ¶¶ 27-48. For purposes of analysis of the motion for summary judgment, the claims asserted under the Maine Human Rights Act (Counts II and IV) will be treated in the same manner as the claims asserted under 42 U.S.C. § 2000e *et seq*. ("Title VII"). *Forrest v. Stinson Seafood Co.*, 990 F. Supp. 41, 43-44 (D. Me. 1998).

The defendant contends that it is entitled to summary judgment on the plaintiff's claims of *quid pro quo* sexual harassment (Counts III and IV) because there is no evidence that a tangible employment action resulted from her refusal to submit to Austin's alleged requests. Motion at 13-14. It asserts that it is entitled to summary judgment on the hostile-environment claims (Counts I and II) because the evidence establishes the elements of the *Faragher* defense and because Austin's alleged behavior was not sufficiently severe and pervasive to have created a hostile environment. *Id*. at 5-13.

The plaintiff does not respond to the defendant's argument concerning Counts III and IV. The court must nevertheless consider the motion for summary judgment on those counts on its merits. *Redman v. FDIC*, 794 F. Supp. 20, 21-22 (D. Me. 1992).

> *Quid pro quo* harassment obtains when a supervisor conditions the granting of an economic or other job benefit upon the receipt of sexual favors from a subordinate, *or* punishes that subordinate for refusing to comply. It is the essence of *quid pro quo* harassment that the employee was subjected to unwelcome sexual advances by a supervisor and her reaction to these advances affected tangible aspects of her compensation, terms, conditions, or privileges of employment.

Chamberlin v. 101 Realty, Inc., 915 F.2d 777, 783 (1st Cir. 1990) (citation and internal punctuation omitted). The plaintiff has provided evidence that Austin was her supervisor, Plaintiff's SMF ¶ 4, and that Austin conditioned the granting of a job benefit upon the receipt of sexual favors from her, *id*. ¶ 9, but has not provided any evidence that would allow a reasonable factfinder to conclude that her refusal to comply

affected any tangible aspect of her compensation, terms, conditions or privileges of employment. *See Hernández Loring v. Universidad Metropolitana*, 186 F.Supp.2d 81, 86 (D.P.R. 2002). Accordingly, the defendant is entitled to summary judgment on Counts III and IV.

With respect to the hostile environment claim, the defendant first contends that it has established the *Faragher* affirmative defense as a matter of law. Motion at 5-11. The plaintiff does not argue that a tangible employment action was taken against her, so the *Faragher* defense is available. *Reed*, 333 F.3d at 32. To establish the defense, the employer must prove two things: (i) that it exercised reasonable care to prevent and correct promptly any sexually harassing behavior and (ii) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer. *Id.*

The evidence relevant to the first element of the defense includes the undisputed facts that the defendant had a written policy against sexual harassment in effect at the relevant time, which the plaintiff had read and signed, directing employees to report perceived sexual harassment to their immediate supervisors or the personnel manager. Defendant's SMF ¶¶ 11, 13-14; Plaintiff's Responsive SMF ¶¶ 11, 13-14. The plaintiff knew that she was to go to management if she witnessed sexual harassment and that the defendant had an open door policy so that she could always report her concerns to senior management employees. *Id*. ¶¶ 15, 17. The plaintiff contends that a reasonable factfinder could conclude that the defendant failed to exercise reasonable care based on the April 2000 report alleging sexual harassment by Austin outside the workplace and on the alleged failure of Kendall to take action to remedy the alleged harassment when the plaintiff told him about it. Opposition at 8-9.

Contrary to the plaintiff's assertion, the defendant does not "admit[] that it did not take any action to respond to" the 2000 complaint. *Id*. at 8. The plaintiff's own statement of material facts includes the

undisputed assertion that "[a]s a result of the incident, Austin received a letter advising him that he could not date employees under his supervision." Plaintiff's SMF ¶ 42; Defendant's Responsive SMF ¶ 42. The defendant also offers evidence that it investigated the incident by speaking with two of the employees involved and with Austin. Defendant's Responsive SMF ¶ 41. This single incident occurred more than two years before the alleged events giving rise to this action. "[T]he law only requires an employer's efforts to prevent and remedy harassment be reasonable, not clairvoyant." *Reed v. MBNA Mktg. Sys., Inc.*, 231 F.Supp.2d 363, 373 (D. Me. 2002). While summary judgment may be appropriate even where there have been prior complaints of sexual harassment against a supervisor, *id*. at 374, there is simply not enough information in the summary judgment record to allow the court to make a determination on this question as a matter of law. Based on this record, I cannot conclude that the defendant has established that it meets the first prong of the *Faragher* defense. The factfinder must resolve this question.

This conclusion makes it unnecessary to address the second element of the *Faragher* defense for purposes of the summary judgment motion, but I note that the plaintiff's reliance on her "report" to Kendall at some time before she spoke to Kalmar with respect to that element, Opposition at 8-9, is misplaced. It is undisputed that the plaintiff did not believe that Kendall was a supervisor or manager when she spoke with him about Austin's actions. She therefore could not have intended to report Austin's conduct to her employer by discussing it with Kendall. She cannot be allowed after the fact to take advantage of his possible status as a supervisor at the time as evidence that she took advantage of corrective opportunities provided by the defendant. On this element of the *Faragher* defense, the only question for the factfinder at trial should be whether the plaintiff's report to Kalmar, accompanied by a request that Kalmar not inform management, Defendant's SMF ¶ 26; Plaintiff's Responsive SMF ¶ 26, constituted a failure, by its timing, its content, or both, to take advantage of those opportunities.

The defendant also asserts that it is entitled to summary judgment on the hostile environment claim because the plaintiff "has failed to show that the alleged harassment was sufficiently severe and pervasive to prevail on her hostile work environment claim." Motion at 11. The plaintiff must show that the harassment was sufficiently severe or pervasive to alter the conditions of her employment. *Paquin v. MBNA Mktg. Sys., Inc.*, 233 F.Supp.2d 58, 63 (D. Me. 2002).

> [T]he question whether the environment is objectively hostile or abusive must be answered by reference to all the circumstances, including the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance.

Id. (citation and internal quotation marks omitted) (five instances of inappropriate behavior over period of four months found insufficient to avoid summary judgment). The defendant characterizes the incidents reported by the plaintiff as "only . . . distasteful comments." Motion at 12. Giving the plaintiff's allegations the benefit of all reasonable inferences in her favor, as required at this stage of the proceedings, the plaintiff has alleged more than mere distasteful comments. Plaintiff's SMF ¶¶ 5-11, 12-23, 34. The allegations include repeated touching after the plaintiff told Austin to stop, *id*. ¶¶ 6, 8 and constantly making sexually suggestive gestures and remarks, *id*. ¶¶ 14, 19-20. This is more activity than was at issue in *Paquin*. Some of the reported remarks could reasonably be perceived as humiliating. The evidence is sufficient, although barely, to allow a reasonable factfinder to conclude that Austin made the plaintiff's work environment so hostile or pervasive that it would interfere with a reasonable employee's work performance. The defendant is not entitled to summary judgment on this basis.

V. Conclusion

For the foregoing reasons, the plaintiff's motion to strike the affirmative defense (Docket No. 28) is **DENIED**; the defendant's motion to exclude the testimony of Curtis Baggett (Docket No. 25) is

GRANTED; and the plaintiff's motion to strike the errata sheet of Michael Kimball (Docket No. 37) is **GRANTED**. I recommend that the defendant's motion for summary judgment be **GRANTED** as to Counts III and IV and otherwise **DENIED**.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum and request for oral argument before the district judge, if any is sought, within ten (10) days after being served with a copy thereof. A responsive memorandum and any request for oral argument before the district judge shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated this 12th day of October, 2004.

/s/ David M. Cohen
David M. Cohen
United States Magistrate Judge

Plaintiff

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V.

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