

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

**NANCY MATHERS,**

**v.**

**SHERWIN-WILLIAMS COMPANY,  
Inc.,**

**CIVIL ACTION**

**NO. 97-5138**

**MEMORANDUM**

BRODERICK, J.

MARCH 27, 2000

Presently before this Court is Plaintiff Nancy Mathers' motion to remove the above-captioned case from civil suspense and to vacate an arbitration award, Defendant Sherwin Williams' response thereto and corresponding motion to remove the case from civil suspense and confirm that arbitration award, as well as Plaintiff's motion for Summary Judgment arguing for vacation of the arbitration award, and Defendant's response thereto. For the following reasons, the Court will deny Plaintiff's motion to vacate the arbitration award, deny Plaintiff's motion for summary judgment, remove the case from civil suspense, and grant Defendant's motion to confirm the arbitration award.

**Background**

Plaintiff originally commenced this action against her former employer, Sherwin-Williams Company ("SW"), in August 1997, pursuant to Title VII of the Civil Rights Act of 1964, as amended by the Civil Rights Act of 1991, 42 U.S.C. § 2000e et seq., and the Pennsylvania Human Relations Act, 43 P.S. § 951 et seq. SW thereafter filed a Motion to Compel Arbitration on the basis of its Problem Resolution Procedures as published in its

Employee Handbook, which provided for final and binding arbitration as the ultimate step to resolving such disputes. In an Order dated January 23, 1998, this Court granted SW's motion to compel arbitration of Mathers' claims. The Court also issued an Order staying the action pending the arbitration and placing the matter in civil suspense. Subsequent to this Order, SW and Mathers, who was represented by counsel, negotiated a detailed arbitration agreement which formulated the following issue to be presented to the arbitrator: "whether Sherwin-Williams created an objectively hostile or abusive work environment within the meaning of Title VII and the Pennsylvania Human Relations Act sufficient to warrant Nancy Mathers' resignation from the Company, i.e. whether Sherwin-Williams constructively discharged Nancy Mathers / if so, what shall the remedy be?" The parties also selected Carol A. Mager, Esq., (the "Arbitrator"), from a panel of qualified arbitrators presented by the American Arbitration Association to serve as the adjudicator. An arbitration hearing was conducted before the Arbitrator on October 8, 9, and 27, 1998 and April 7, 1999.

### Facts

The following undisputed facts are taken from Plaintiff's brief, as well as her testimony at the arbitration. Plaintiff's claims arise from an incident which occurred on January 20, 1997 while Plaintiff, then employed as a Retail Marketing Manager for SW's Eastern Division in Malvern, Pennsylvania, was attending the company's annual national sales meeting in Nashville, Tennessee. Plaintiff, along with approximately 75 other SW managers and executives, attended a session held for members of the Eastern Division sales force. One of the presenters at this session was George McCarthy, a Vice-President for Corporate Accounts for the Paint Stores Group of SW based in Cleveland, who was to give a presentation on a new national sales

program. Plaintiff knew McCarthy from meetings each had attended approximately three or four times a year, when McCarthy had worked in the Southeast Division several years before. (Arb. Tr. at 74-75.) McCarthy opened his presentation to the Eastern Division with the following remarks:

I thought I would recognize a lot of faces, but I don't because there has been a lot of change. Those I do recognize though are looking old. Nancy, you're looking really rough. Kind of hard. Nancy you always used to want me. Do you still want me?

(Pl.'s Br. at 2.)

Immediately after this statement was made, but as McCarthy continued with his presentation, Eastern Division Vice-President of Human Resources Don Katen, and Eastern Division President James Renshaw left the room. After McCarthy's presentation concluded, Renshaw approached McCarthy and spoke with him. McCarthy then immediately walked over to Plaintiff and apologized for his remarks. (Arb. Tr. at 83.) While the meeting broke for lunch, Don Katen approached Plaintiff to inform her that Renshaw would make an apology to her in front of all the meeting participants. (Arb. Tr. at 89.) When the meeting reconvened, Renshaw publicly apologized to Plaintiff on behalf of McCarthy and SW, and spoke of the need to treat people with "respect and dignity." Renshaw labeled McCarthy's comments "unfortunate" and also stated "George had been down south too long and had cotton between his ears." (Arb. Tr. at 91, 203.)

On January 21, the day after the meeting, Tom Hopkins, the Senior Vice-President for Human Resources of the Paint Stores Group, McCarthy's division, contacted Plaintiff to arrange a meeting for the next day to talk about McCarthy's comments. (Arb. Tr. at 94.) Also on that day, Plaintiff had a conversation with Vice-President Katen who told her that McCarthy, along with approximately 75 other employees, would be recognized for his sales performance of the

past year at a gathering of all the company's sales divisions which was to occur that evening. (Arb. Tr. at 97, 210.) Hopkins also spoke with Plaintiff regarding this recognition. Plaintiff testified: "He asked me if it happened, how would I feel. I told him that I didn't make their management decision for them, but it would be disturbing. He just wanted me to be aware that it could happen and didn't want me to be basically blindsided by the whole thing." (Arb. Tr. at 98.) Plaintiff never expressed her view to Katen, Hopkins or anyone else at SW, that McCarthy shouldn't have gotten the sales recognition. (Arb. Tr. at 102.)

Plaintiff met with Vice- President Hopkins on the morning of January 22 to discuss McCarthy's comments. (Arb. Tr. at 105.) Hopkins informed Plaintiff that McCarthy wanted to meet with her and apologize again. He also told her that McCarthy would be disciplined for his remarks. (Arb. Tr. at 105-106.) Hopkins made plans to speak with Plaintiff again in the following weeks and sought her opinion on ways to bring closure to the situation, including her thoughts about a public letter of apology to be sent to all those in attendance at the January 20 meeting. (Arb. Tr. at 107, 231.) Plaintiff later told Katen that she believed such an apology would simply republish the incident and make matters worse. (Arb. Tr. at 232.) Plaintiff also testified that she spoke with Dick Wilson, Senior Vice-President of Marketing and Merchandising for the Paint Stores Group and McCarthy's immediate supervisor, on January 22: "Wilson excused himself, broke away from a group of people he was talking to and came over to me and said, 'I'm really sorry this happened. I just want you to know that no matter what happens, I personally will be disciplining George McCarthy.'" (Arb. Tr. at 107-108.) On March 3, 1997, Wilson sent to McCarthy a letter of reprimand, which was also placed in McCarthy's personnel file. (Pl.'s Ex. 10.) This letter stated, in part:

The Sherwin-Williams Company and I find your conduct and comments to be unacceptable and as a result, this letter confirms the following disciplinary actions: 1) Any future incidents of a similar nature will result in additional, immediate disciplinary action, up to and including termination. 2) In your next performance appraisal, your rating will reflect these comments, as will your merit increase, if any. Additionally, your actions will be taken into account when consideration is given to incentive compensation to which you may have otherwise been entitled, if any. 3) As part of on-going management skills training, you will be required to attend additional training to improve your awareness of issues related to your conduct.

(Pl.'s Ex. 10.)

Plaintiff met again with Vice-President Hopkins and Vice-President Katen on January 29, 1997 in Malvern. Plaintiff told them that she was still feeling upset about McCarthy's remarks. (Arb. Tr. at 110.) Plaintiff testified that Hopkins told her SW wanted to handle the matter as an employee relations problem and work to get both Plaintiff and McCarthy "back on track as two productive employees." Plaintiff further testified "He [Hopkins] then said if I felt it was anything other than that, then it would have to be part of the problem resolution procedure." (Arb. Tr. at 110-111.) Plaintiff did not voice any disagreement with SW's handling of the matter. (Arb. Tr. at 131.) Hopkins reiterated that McCarthy would be disciplined although he probably wouldn't be terminated. (Arb. Tr. at 112.) Plaintiff testified that she never suggested to anyone that McCarthy be terminated. (Arb. Tr. at 107.) Plaintiff also informed Hopkins that she was seeing a counselor as a result of the January 20th incident, and Hopkins responded that SW would pay for any counseling she received. (Arb. Tr. at 112.) Katen also gave Plaintiff an Employee Complaint Form to fill out. (Arb. Tr. at 114) Plaintiff, after stating her discomfort with the form, asked if she could simply write out her own narrative of the incident. (Arb. Tr. at 115-116.) Plaintiff was told this was acceptable and shortly thereafter sent a written account of the January 20th incident to Vice-President Hopkins. (Arb. Tr. at 116.)

Plaintiff testified that after this meeting, she began to consider leaving SW:

I didn't think that this was seriously being considered as anything other than employee relations, and I didn't think that employee relations was where there could be any resolution to this. I had been concerned about his getting the vice president of the year recognition and the message that it sent to the people that were at the meeting on the 20th, that sat there and witnessed that, that I could then work with from that point on. I was concerned that this would always be between us and always part of who I was in the organization.

(Arb. Tr. at 132-133.)

Plaintiff never personally communicated these thoughts to anyone at SW. (Arb. Tr. at 133.) On February 4, 1997, Vice-President Hopkins sent a letter to Plaintiff stating the corrective actions SW planned to take in order to resolve the situation. These actions included discipline of McCarthy, McCarthy sending a letter of apology to Plaintiff as well as to all those in attendance at the January 20th meeting, SW's payment for Plaintiff's counseling sessions and SW's offer to mediate discussions between Plaintiff and McCarthy in an effort to re-establish their working relationship. Hopkins' letter stated in part:

I want to again be sure that you understand that Sherwin-Williams does not, and will not condone Mr. McCarthy's remarks. They were inappropriate, thoughtless, and in poor taste. . . Secondly, in speaking with Mr. Blondman, [Plaintiff's attorney] I learned that you are considering leaving Sherwin-Williams. . . I want to assure you that we do not want you to leave and that we value your work and contribution to the Eastern Division and Paint Stores Group. Your professional support of the Marketing area is needed and truly appreciated. While this type of incident is regrettable, our goal is to work through this matter satisfactorily.

(Pl.'s Ex. 5.)

On February 7, 1997 Plaintiff was given a written letter of apology from McCarthy as well as a letter from McCarthy to be sent to all those in attendance at the January 20 meeting which read in part: "Please allow me to apologize for the remarks which I made during the break-out session in Nashville. Nancy Mathers and I have always had a purely professional relationship

and any inference to the contrary was inappropriate and lacking in common sense.” (Pl.’s Ex. 7.) Plaintiff again expressed her reluctance to having an apology letter sent to all those in attendance at the January 20th meeting, fearing it would “republish this whole thing again.” (Arb. Tr. at 138-139.) The letter was therefore not distributed. (Arb. Tr. at 498.)

On February 17, Plaintiff received a memo from Vice-President Hopkins asking if there was anything else that should be considered in his review of the situation involving McCarthy. (Arb. Tr. at 511-514.) The letter stated in part:

Nancy, I want to emphasize to you that it is essential for the Company to have all the relevant facts so that it may determine the appropriate course of action. As a result, if there is ‘something else’ other than the information you have conveyed concerning the incident in Nashville, please bring it to my attention immediately. If this information pertains to sexual harassment, you should complete the attached Harassment Complaint form. If this information pertains to something other than sexual harassment, you should complete the attached Employee Complaint form pursuant to the Problem Resolution Procedures. If you continue to have concerns about using these forms, at the very minimum, provide the relevant information to me on a plain sheet of paper.

(Pl.’s Ex. 13.)

Regarding McCarthy’s proposed apology letter to be sent to all those in attendance at the January 20th meeting, Hopkins wrote:

While we believed that the letter of apology would help remedy the situation, . . . in light of the reservations you have expressed, the letter will not be sent. If, however, you do want the letter to be sent, or if you have some suggestions for modifications in the letter that may alleviate your concerns, please advise me... I again want to assure you that we value your work and contribution to the Eastern Division and Paint Stores Group, and I believe that we can resolve this unfortunate incident...

(Pl.’s Ex. 13.)

Plaintiff responded to Vice-President Hopkins in a letter dated February 19, 1997 that “all relevant facts have been brought to the attention of the company” and that “after

consideration, I am advising you that you may distribute the [McCarthy apology] letter if you want, even though I do not view it as a remedy.” (Pl.’s Ex. 14.) Plaintiff never related to anyone at the company her concern that an apology should also come from SW. (Arb. Tr. at 540.) On February 24, 1997, Plaintiff submitted her letter of resignation stating in part “I have concluded that the actions of George McCarthy at the national sales meeting in Nashville Tennessee, and the company’s inadequate response to that conduct have created a situation where my working conditions have become so unpleasant and intolerable that I cannot remain with the company.” (Pl.’s Ex. 15.) Plaintiff testified, “I came to the conclusion by that date that based on what had happened, that the company wasn’t taking this seriously as sexual harassment.” (Arb. Tr. at 147.) Plaintiff further testified that she never made any demands of SW, regarding ways to remedy the harm done to her by McCarthy’s comments. (Arb. Tr. at 548-550.)

Plaintiff was asked by her immediate supervisor Max Schaffer and by Vice-President Katen to reconsider her decision to resign. (Arb. Tr. at 550-552.) Plaintiff testified that Katen asked her “What would it take to get me to stay?” Plaintiff responded there was nothing that would change her decision. (Arb. Tr. at 553.) On February 25, James Macatee, President of the Paint Stores Division, sent Plaintiff a letter, hand-delivered by Katen, explaining SW’s actions with regard to the incident and urging her to reconsider her resignation. (Pl.’s Ex. 8.) On February 28, 1997, Eastern Division President James Renshaw sent out a letter addressed to all of the participants of the January 20, 1997 meeting which stated:

I want to take this opportunity to remind each of you- again- that the Eastern Division and the Sherwin-Williams Company does not condone the type of inappropriate comments made by George McCarthy in the introduction of his presentation at our January 20, 1997 meeting in Nashville. George has acknowledged that his comments were thoughtless and inappropriate and he has

apologized for his remarks. The Company has taken disciplinary action against George.  
(Pl.'s Ex. 11.)

The letter also enclosed copies of the EEOC and SW's sexual harassment policies, stating "Please be advised that the company takes violations of these policies very seriously, and responds to such violations with appropriate disciplinary action, up to and inclusive of termination." (Pl.'s Ex. 11.) Plaintiff testified that she was able to perform her job "adequately" after McCarthy's comment. (Arb. Tr. at 511.) Plaintiff's last day of employment at SW was March 7, 1997. (Arb. Tr. at 561.)

#### Arbitrator's Decision

After hearing Plaintiff's case-in-chief, the Arbitrator issued an Interim Opinion on January 24, 1999. In this opinion, the Arbitrator granted SW's motion to dismiss Plaintiff's constructive discharge claim. After reviewing case law on the necessary elements to establish a constructive discharge claim, the Arbitrator concluded that the "harassing act itself, as well and (sic) the investigation and her subsequent treatment by the company was insufficiently severe to justify Ms. Mathers' decision to resign." (Pl.'s Ex. 1 at 3.) In so ruling, the Arbitrator emphasized the prompt and public apology given by SW's Eastern Division President Renshaw to the meeting participants who heard McCarthy's remarks, and Plaintiff's failure and continued refusal to tell SW what actions she believed it should take to mitigate the damage done by McCarthy. The Arbitrator also found that the evidence was "weak at best" that the audience formed any suspicion that Mathers and McCarthy had anything more than a professional relationship. The Arbitrator concluded that there was little evidence that Plaintiff's ability to

perform her job was adversely affected. Further, the Arbitrator concluded that “[t]he nature of the original offending act itself, singular but severe, does not naturally lend itself to a belief that Ms. Mathers was compelled to quit as quickly as she did, rather than waiting to see how the situation developed. She would not have been required to work on a daily or even weekly basis with the harasser.” (Pl.’s Ex. 1 at 5.) The Arbitrator further granted SW’s motion to exclude Plaintiff’s proffered expert, Michelle Paludi, finding that the expert’s testimony would be of no assistance because Paludi’s conclusions and opinions were not based on legitimate research or empirical data. (Pl.’s Ex. 1 at 2.) Finally, the Arbitrator denied SW’s motion to dismiss Plaintiff’s sexual harassment claim/hostile environment claim, stating that Plaintiff was entitled to proceed with this claim. (Pl.’s Ex. 1 at 5.)

After an additional day of testimony, the Arbitrator, on July 13, 1999, issued an award granting judgment in favor of SW and dismissing Plaintiff’s remaining sexual harassment/hostile environment claim. Although the Arbitrator credited Plaintiff’s testimony and found that McCarthy was a supervisory employee whose acts could trigger automatic liability for SW, the Arbitrator concluded that no tangible employment action, i.e. no significant change in employment status, was taken against Plaintiff, and therefore, SW could not be held automatically liable for McCarthy’s remarks. (Pl.’s Ex. 2 at 6.) Further, the Arbitrator concluded that, as a matter of law, McCarthy’s comment, in the context in which it occurred and was subsequently addressed by SW, was not severe enough to have resulted in a hostile work environment. (Pl.’s Ex. 2 at 8.) Finally, the Arbitrator found that it was unnecessary to rule on SW’s asserted affirmative defense because Plaintiff failed to prove a claim of hostile environment sexual harassment. (Pl.’s Ex. 2 at 8.)

## Standard of Review

Plaintiff now seeks to vacate the arbitration award pursuant to the Federal Arbitration Act, (the “FAA”) 9 U.S.C. § 10. In enacting the FAA, Congress declared “a national policy favoring arbitration.” Southland Corp. v. Keating, 465 U.S. 1, 10 (1984); Great Western Mortgage Corp. v. Peacock, 110 F.3d 222, 230 (3d Cir. 1997); Seus v. John Nuveen & Co., 146 F.3d 175, 187 (3d Cir. 1998). Thus, the FAA empowers a district court to vacate an arbitration award only in the following limited circumstances:

- (a) In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration-
- (1) Where the award was procured by corruption, fraud, or undue means.
  - (2) Where there was evident partiality or corruption in the arbitrators, or either of them.
  - (3) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or any other misbehavior by which the rights of any party have been prejudiced.
  - (4) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

9 U.S.C. § 10.

No claim has been made by Plaintiff in this case that the award should be vacated for any of the above-mentioned reasons. In addition to the vacation grounds set forth in the FAA, there exists a judicially created ground for vacating an arbitration award. The Supreme Court has stated that arbitration awards can be vacated if they are in “manifest disregard of the law.” First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 942 (1995); see also Cole v. Burns International Security Services, 105 F.3d 1465, 1486 (D.C. Cir. 1997). Plaintiff contends the arbitration award should be vacated on this basis.

As the Circuit Court for the District of Columbia noted in Cole, although this standard has not been defined by the Court, the circuits have adopted various formulations. See Cole, 105 F.3d at 1486-87. The Second Circuit, in Carte Blanche (Singapore) Pte., Ltd. v. Carte Blanche Intern., Ltd., 888 F.2d 260 (2d Cir. 1989), stated that “[m]anifest disregard of the law . . . refers to error which was obvious and capable of being readily and instantly perceived by average person [who] qualifies to serve as arbitrator; doctrine implies that arbitrator appreciates existence of clearly governing legal principle but decides to ignore or pay no attention to it.” In this particular case, it makes little difference whether this Court accepts the liberal interpretation of the Second Circuit or whether this Court applies a stricter interpretation of the manifest disregard of the law standard, in view of the fact that the Arbitrator in this case, in arriving at her conclusions and findings, has considered and applied the prevailing federal law relevant to Plaintiff’s claims.

The arbitration agreement drafted by the parties also includes a provision regarding judicial review which states: “Any proceeding pursuant to this Agreement shall be an arbitration proceeding subject to interpretation and enforcement under the Federal Arbitration Act . . . The Award may be appealed, vacated, modified or corrected only on the grounds specified by applicable law.” (Def.’s Ex. 1 at 15.) The Supreme Court has repeatedly endorsed the resolution of federal statutory claims through the arbitration process. Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 26 (1991); Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614 (1985); see also Seus, 146 F.3d at 182 (Third Circuit holding Title VII claims may be subject to compulsory arbitration pursuant to an arbitration agreement between employee and employer). There is no question in this case that Plaintiff’s claims against SW were subject to

arbitration pursuant to SW's Employee Handbook. In fact, as this Court's Order of January 22, 1998 states that, Plaintiff did not object to Defendant's motion to compel arbitration of her claims against SW but rather "agrees to submit those claims to arbitration pursuant to the Defendant's Problem Resolution Procedures as published in the Defendant's Employee Handbook. . ."

Although it is clear that statutory claims may be the subject of an arbitration agreement, enforceable pursuant to the FAA, the Supreme Court has recognized that "by agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum." Gilmer, 500 U.S. at 26. Therefore, judicial review is available to insure that arbitral decisions are not in manifest disregard of federal laws such as Title VII. Seus, 146 F.3d at 187; Kaplan v. First Options of Chicago, Inc., 19 F.3d 1503, 1520 (3d Cir. 1994).

### Analysis

Plaintiff argues that the Arbitrator's Award "is contradictory to, substantially departs from and manifestly disregards" Title VII. (Pl.'s Mot. to Vac. at 4-5.) This Court finds that the Arbitrator's award is not contradictory to, and does not substantially depart from or manifestly disregard Title VII. It is clear that the Arbitrator's rejection of Plaintiff's constructive discharge and sexual harassment/hostile environment claims did not manifestly disregard, and in fact were quite consistent with, current Title VII law as recently espoused by the Supreme Court and the Third Circuit. The Court will address the Arbitrator's handling of each claim in turn.

#### 1. Constructive Discharge

In order to establish a constructive discharge claim, the Third Circuit has stated that a

plaintiff must demonstrate that an employer allowed discriminatory conditions in the workplace “so intolerable that a reasonable person would be forced to resign.” Gross v. Exxon Office Systems Co., 747 F.2d 885, 887 (3d Cir. 1984); Connors v. Chrysler Financial Corp., 160 F.3d 971, 973 (3d Cir. 1998). In Connors, the Third Circuit also made clear that a plaintiff’s subjective view of unfair conditions was insufficient to establish a constructive discharge claim. “Intolerability is not established by showing . . . that the employee subjectively felt compelled to resign . . . Rather intolerability is assessed by the objective standard of whether a reasonable person in the employee’s position would have felt compelled to resign, --that is, whether he would have had no choice but to resign.” Connors at 976. In addition to meeting this objective standard, a plaintiff must also usually show that she attempted to explore alternatives before deciding to resign. Id. at 975; see also Clowes v. Allegheny Valley Hosp., 991 F.2d 1159, 1161 (3d Cir. 1993).

Upon hearing Plaintiff’s case-in-chief, the Arbitrator concluded that the offending incident, although severe, should not have led a reasonable person to feel compelled to resign. (Pl.’s Ex. 1 at 5.) Several relevant facts support the Arbitrator’s conclusion. Among the most significant are the following: 1) that Renshaw, the Eastern Division President, promptly addressed the group that heard the remarks and apologized to Plaintiff on behalf of the company, 2) the continued efforts by the company, as have been detailed above, to rectify the situation, 3) that Plaintiff would not have been required to work with, or even see McCarthy, on any kind of regular basis, 4) that Plaintiff was repeatedly told by high level SW executives how highly she was valued by the company, and, 5) that Plaintiff testified that she continued to do her job adequately in the weeks after the incident occurred. In light of these facts, the Arbitrator’s

decision that a reasonable person in Plaintiff's position would not have felt compelled to resign was quite consistent with Title VII constructive discharge law. Plaintiff offers no meaningful argument to the contrary, regardless of the impropriety of McCarthy's comments. As the Third Circuit stated in Clowes, "it is clear that unfair and unwarranted treatment is by no means the same as constructive discharge." Id. at 1162. Plaintiff has failed to show that the Arbitrator's dismissal of her constructive discharge claim was in manifest disregard of the law.

## 2. Sexual Harassment/Hostile Work Environment

The Supreme Court has held that an employer is automatically liable for an actionable hostile environment created by supervisory or managerial employees if such discrimination rises to the level of a tangible adverse employment action. Faragher v. City of Boca Raton, 524 U.S. 775, 806 (1998); Burlington Industries, Inc. v. Ellerth, 524 U.S. 742, 765 (1998). A tangible employment action is defined as "a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits. Ellerth, 524 U.S. at 761. See also Durham v. Evans, 166 F.3d 139, 153-154 (3d Cir. 1999) (recognizing loss of office, dismissal of secretary, taking of files, and significant lapse of assignments as tangible adverse employment actions). Although the Arbitrator found that McCarthy was a supervisory employee whose acts would trigger automatic liability under Faragher and Ellerth, she concluded that Plaintiff failed to establish that a tangible employment action was taken against her. (Pl.'s Ex. 2 at 6.) "I find that Mathers' proffered evidence on this point- that she expected that it would be more difficult for her to do her job as a result of the public nature of McCarthy's statement and the subsequent actions and inactions of respondent - is insufficient to establish tangible job detriment." (Pl.'s Ex. at 6.) SW,

therefore, could not be held strictly liable for McCarthy's remarks under the Faragher/Ellerth automatic liability standard. Plaintiff now contends that the Arbitrator erred in not holding SW strictly liable for McCarthy's remarks. However, Plaintiff fails to point to any adverse employment action which was taken against her. The Arbitrator found that Plaintiff suffered no tangible employment action, and thus correctly concluded that SW could not be held strictly liable for McCarthy's remarks.

Even though the Arbitrator concluded McCarthy's acts could not trigger automatic liability, Plaintiff could still make a claim of sexual harassment by showing that the conduct at issue was "so severe or pervasive as to alter the conditions of employment and create an abusive working environment." Faragher, 524 U.S. at 786. The Arbitrator went on to discuss the five factor test required by a plaintiff to make a hostile work environment claim under Title VII, which was laid out by the Third Circuit in Andrews v. City of Philadelphia, 895 F.2d 1469, 1482 (3d Cir. 1990). The Third Circuit established the following necessary components to make such a claim: "(1) the employee suffered intentional discrimination because of [her] sex, (2) the discrimination was pervasive and regular; (3) the discrimination detrimentally affected the plaintiff; (4) the discrimination would detrimentally affect a reasonable person of the same sex in that position; and (5) the existence of respondeat superior liability." The third factor requires a subjective showing of harm; the fourth requires an objective showing. Id. at 1483. This objective factor "is the more critical for it is here that the finder of fact must actually determine whether the work environment is sexually hostile." Id. The Supreme Court has also instructed that the issue of whether an environment is hostile should be determined by examining the surrounding circumstances, such as: "the frequency of the discriminatory conduct; its severity;

whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." Harris v. Forklift Systems, Inc., 510 U.S. 17, 23 (1993).

Though crediting Plaintiff's testimony, the Arbitrator concluded that Plaintiff failed to meet the objective prong of the Andrews test. The Arbitrator stated that she had "not been convinced by the evidence that a reasonable person would have found this one-time comment, in the context in which it occurred and as it was subsequently addressed by respondent, to be severe and pervasive enough to have resulted in a hostile or abusive work environment; as a matter of law, I find that it was not severe or pervasive." (Pl.'s Ex. 2 at 8.) In light of the surrounding circumstances, including the fact that McCarthy's remarks on January 20, 1997 represented one isolated incident which the Arbitrator found to be quickly addressed and investigated by SW, (Pl.'s Ex. 2 at 9-10), this Court has no basis on which to conclude that the Arbitrator manifestly disregarded the law by rejecting Plaintiff's hostile environment claim. The Arbitrator's finding that the effects of McCarthy's comment did not rise to the level required to establish a hostile work environment is fully supported by the record and is consistent with the Supreme Court's recent interpretations of Title VII. The Supreme Court, in discussing its hostile work environment jurisprudence, recently stated: "We have never held that workplace harassment, even harassment between men and women, is automatically discrimination because of sex merely because the words used have sexual content or connotations . . . Conduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment-- an environment that a reasonable person would find hostile or abusive-- is beyond Title VII's purview." Oncale v. Sundowner Offshore Services, Inc., 523 U.S. 75, 80-81 (1998). It is clear that, in view of all

the surrounding circumstances, the Arbitrator's conclusion that Plaintiff had not met her burden with respect to her hostile environment claim is consistent with Title VII law. In both Ellerth and Faragher, the Supreme Court formulated an affirmative defense for employers in hostile environment cases where an employee has suffered no tangible job consequences as a result of a supervisor's actions. The employer must demonstrate: "(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." Ellerth, 524 U.S. at 765; Faragher, 524 U.S. at 807. Although the Arbitrator found it wasn't necessary to rule on SW's affirmative defense because Plaintiff had not proved her claim of hostile environment sexual harassment, the Arbitrator nevertheless reviewed the evidence with regard to SW's affirmative defense. The Arbitrator reviewed SW's actions in response to McCarthy's remarks, including the immediate public apology to Plaintiff made by Division President Renshaw, the prompt commencement of an investigation, the reprimand of McCarthy, the offer to pay for Plaintiff's counseling, and the distribution of a letter to all those participants of the January 20 meeting stating that McCarthy's comments were "thoughtless and inappropriate," and that McCarthy had been disciplined for his conduct. This letter also attached a copy of SW's sexual harassment policy. Based upon this evidence, the Arbitrator clearly could have concluded that SW met its burden with respect to the first prong of the Faragher/Ellerth affirmative defense. Moreover, Plaintiff's numerous refusals in the face of SW's requests for her to provide input as to how SW could rectify the situation, as well as her initial refusal to let McCarthy's apology letter, (Pl.'s Ex. 7), be sent to those in attendance at the January 20th meeting could be seen, as the Arbitrator

stated, “as [an] unreasonable failure to take full advantage of the corrective opportunities provided by the Company.” (Pl.’s Ex. 2 at 11.)

As has heretofore been pointed out, in order to set aside an arbitration award the district court is required to find that the arbitrator manifestly disregarded the law. This Court therefore does not consider the evidence de novo or make its own findings of fact. See U.S. Postal Service v. National Association of Letter Carriers, A.F.L.-C.I.O., 839 F.2d 146, 149 (3d Cir. 1988) (“Courts are prohibited from second-guessing the arbitrator’s fact-finding as long as the arbitrator . . . is acting within the scope of his authority. . .”) There is no question here that the Arbitrator acted within the scope of her authority in making her factual findings. The Arbitrator’s disposition of Plaintiff’s constructive discharge and hostile environment/sexual harassment claims is fully consistent with federal law. This Court will therefore deny Plaintiff’s motions to vacate the arbitration award, and will grant Defendant’s motion to remove this case from civil suspense and confirm the arbitration award. An appropriate Order follows.

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

**NANCY MATHERS,**

**v.**

**SHERWIN-WILLIAMS COMPANY,  
Inc.,**

**CIVIL ACTION**

**NO. 97-5138**

**ORDER**

**AND NOW**, this 27th day of March, 2000, the Court having considered Plaintiff Nancy Mathers' Motion to Remove the above-captioned case from the civil suspense file and to Vacate the Arbitration Award as well as her Motion for Summary Judgment on that issue and Defendant Sherwin-Williams' responses thereto and Motion to remove the above-captioned case from the civil suspense file and Confirm the Arbitration Award; for the reasons stated in the Court's accompanying Memorandum of this date;

**IT IS ORDERED:** that Plaintiff's motion to remove from civil suspense and to vacate the arbitration award (document #18) is **DENIED**;

**IT IS FURTHER ORDERED:** that Plaintiff's motion for summary judgment to vacate the arbitration award (document # 21) is **DENIED**;

**IT IS FURTHER ORDERED:** that Defendant's motion to remove this case from the civil suspense file and confirm the Arbitration Award issued by Carol Mager, Esq. (document # 22) is **GRANTED** .

---

**Raymond J. Broderick, J.**