

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

GERALDINE SOFIA,	:	
Plaintiff,	:	
	:	
v.	:	CIVIL ACTION
	:	
PATRICK MCWILLIAMS and	:	NO. 01-5394
SAM’S CLUB, Inc.	:	
Defendants.	:	
	:	
	:	
	:	

Memorandum and Order

YOHN, J. March ____, 2003

Geraldine Sofia (“plaintiff”) is suing her former employer, Sam’s Club, Inc., and one of its employees, Patrick McWilliams (“McWilliams”), for: (1) sexual harassment in violation of Title VII of the Civil Rights Act of 1964 (Count I); (2) assault and battery (Counts II and IV); and (3) intentional infliction of emotional distress (Count III and IV).¹ Currently pending before the court is defendants’ combined motion for summary judgment on all claims. For the reasons explained below, I will deny in part and grant in part defendants’ motion. Specifically, I will grant the motion and enter judgment for defendant McWilliams on plaintiff’s federal sexual harassment claim and her state assault claim. I will also grant defendants’ motion and enter judgment for defendant Sam’s Club on both of plaintiff’s state law claims. I will deny the balance of defendants’ motion. As a result, the remaining viable claims will be plaintiff’s Title VII claims against defendant Sam’s Club and her state law claims of battery and

¹ In plaintiff’s complaint, it appears that Count IV is a claim against defendant Sam’s Club for assault and battery and intentional infliction of emotional distress, based on its vicarious liability for the actions of its employee, defendant McWilliams. However, because plaintiff asserted these state tort claims against defendant Sam’s Club in Counts II and III, Count IV is redundant, not a claim in and of itself, and serves only the purpose of clarifying the theory upon which plaintiff is pursuing defendant Sam’s Club. Accordingly, I will treat Counts II and III as inclusive of Count IV.

intentional infliction of emotional distress against defendant McWilliams.

BACKGROUND

The following facts are undisputed. Plaintiff began working for defendant Sam's Club in Pleasantville, New Jersey in October of 1997. Pl. Ans. to Stmt. of Undisp. F. ¶ 1.² In July of 1999, she began working in the marketing department, where she remained until she quit her job in June of 2000. *Id.* ¶ 1. During the entire time of her employment at defendant Sam's Club, plaintiff was paid hourly. Dep. of Sofia at 30, 33, 47. While working in the marketing department, plaintiff was "certified" to work in eight different areas of the store, including the meat department. Pl. Mem. In. Oppos. at 2.

In October of 1999, defendant McWilliams began working at the same Pleasantville Sam's Club store as manager of the meat department. Pl. Ans. to Stmt. of Undisp. F. ¶ 2. As a manager, defendant McWilliams was salaried, rather than paid by the hour. Dep. of McWilliams at 43. Rodney Snyder, plaintiff's then boyfriend and now husband, worked directly under defendant McWilliams as a meat cutter. Dep. of Sofia at 58, 62. As a manager, defendant McWilliams could order plaintiff to work in his department under his supervision as a meat "wrapper," which he did two to three times per week. *Id.* ¶ 12.³ He also had the authority, which he exercised on several occasions, to order plaintiff, as a member of the risk control team to help with forklift activities. *Id.* at 14.

While plaintiff worked in the marketing department, Mark Rowe was the manager of that

² From October of 1998 until April of 1998, plaintiff worked part-time as a cashier. Dep. of Sofia at 28-32. Between April of 1998 and July of 1999, plaintiff worked full-time in the meat department as a meat wrapper. *Id.* at 32-39.

³ Although defendants assert that defendant McWilliams did not have the authority to assign plaintiff work, they cite only to her deposition where she states that he could not assign her work in the marketing department, as she was specifically asked by defendants' counsel. Def. Stmt. of Undisp. F. ¶ 12 (citing Dep. of Sofia at 66). Defendants nowhere dispute that defendant McWilliams could and did assign plaintiff work in the meat department where he was manager and as a spotter when he was operating the forklift.

department. Pl. Ans. to Stmt. of Undisp. F. ¶ 11. Between October 1999 and about February 2000, John Starner was the general manager of the Pleasantville store. *Id.* ¶ 9. Robert Cutwright replaced him as general manager in February of 2000. *Id.* ¶ 10. Like defendant McWilliams' position, these management positions are also salaried. Dep. of McNair at 7 (distinguishing between two categories of employees: managers and hourly). According to plaintiff, Cutwright and defendant McWilliams went to lunch together "frequently," and the latter returned from those excursions smelling of alcohol. Dep. of Sofia at 92-94; Pl. Affid. ¶ d.

The following is plaintiff's version of disputed facts.⁴ On several occasions, defendant McWilliams sexually harassed her by making offensive sexual comments and propositioning her. Soon after defendant McWilliams was hired, in either October or November of 1999, he called plaintiff into his office. Dep. of Sofia at 68, 70. Once there, he asked her to be his girlfriend, which she refused. *Id.* However, this was not the end of defendant McWilliams' propositioning. One day soon after this first incident, defendant McWilliams told plaintiff, in Spanish, to "suck my dick." *Id.* at 72. Plaintiff asserts that two Spanish-speaking employees overheard this comment.⁵ On more than five other occasions, defendant McWilliams propositioned plaintiff in various offensive ways. *Id.* at 101. At times, he said to plaintiff "how about a blow job?" *Id.* at 105. In such moments, plaintiff just walked away from the defendant. *Id.* at 106.

On one occasion, immediately after plaintiff exited a bathroom, defendant McWilliams grabbed her by the hand and pulled her into his office. Once there, he asked her "if [she] wanted to do

⁴ On a motion for summary judgment, where a fact is in dispute, the court must apply the non-moving party's version as true. See *infra* Standard of Review.

⁵ One of those employees, Angel Garcia, translated the comment for plaintiff. Dep. of Sofia at 72, 74-75. In his deposition, Garcia testified that he did not hear the exact comment that defendant McWilliams spoke to plaintiff in Spanish. Dep. of Garcia at 20.

a quickie.” *Id.* at 101-02. As usual, plaintiff just walked away from him. *Id.* In addition to these sexual propositions, defendant McWilliams made offensive sexual comments directed at plaintiff.

At least two such instances occurred when plaintiff was ordered by defendant McWilliams to work as his spotter while he operated a forklift. One of these times, plaintiff commented that she had a headache. Defendant McWilliams responded by saying that “it was from [her] head banging up against [her] headboard all night long.” *Id.* at 83. Another employee present, Michael Bruckler,⁶ responded to defendant McWilliams by saying “Yo, Pat, that’s not right” to which the defendant allegedly just laughed. *Id.* at 86. Bruckler turned to plaintiff and said “let it go.” *Id.* The team leader of the marketing department, Cindy Ayers,⁷ also overheard this comment. Dep. of Ayers at 27-30. On another occasion of spotting with Bruckler and defendant McWilliams, the latter “said he bet in high school [plaintiff] spent a lot of time in the dark room with all the boys.” Dep. of Sofia at 89.

In order to avoid harassment by defendant McWilliams, plaintiff avoided taking breaks which might afford defendant the opportunity to make sexual comments to, or to proposition, her. For the same reason, whenever defendant McWilliams came into the marketing office and no one but plaintiff was present, she would leave. *Id.* at 107-08. As a result of defendant’s alleged harassment, plaintiff could not concentrate and it affected her work performance. *Id.* She reports feeling “very nervous,” “very depressed,” “very upset,” and that she “would cry.” *Id.* at 167-68.⁸ Ayers, the team leader of plaintiff’s department, confirmed that she noticed on at least one occasion near the end of plaintiff’s tenure at the Pleasantville store that plaintiff seemed upset. Dep. of Ayers at 47-48. To cope with her

⁶ Bruckler is team leader of the meat department. Dep. of Sofia at 71.

⁷ As a team leader, like Bruckler, Ayers is paid hourly. Dep. of Ayers at 9.

⁸ Although not entirely clear from her deposition, it appears that plaintiff experienced this emotional distress as a result of both the harassment and the loss of her job. Dep. of Sofia at 111, 166-69.

distress, plaintiff saw her family doctor, Dr. Kaplan, two times. At the second visit, which occurred after plaintiff left Sam's Club, Dr. Kaplan prescribed her an anti-depressant called Ativan. Dep. of Sofia at 111, 166-67. Plaintiff asserts that she stopped ingesting the anti-depressant after a day or two because it made her "deathly sick." *Id.* at 167. Dr. Kaplan suggested counseling, however, plaintiff did not pursue it. *Id.* at 168.

Defendant McWilliams denies making these alleged comments and propositions. Dep. of McWilliams at 17-18. When asked if he had anything for which he should apologize to plaintiff, he responded "[j]ust for kidding around too much at times, yeah." *Id.* at 19.

The following facts regarding defendant Sam's Club's policy on harassment and plaintiff's reporting of the alleged harassment are undisputed. When she first began working for defendant Sam's Club, plaintiff received an associate handbook explaining that the store did not tolerate sexual harassment. Pl. Ans. to Stmt. of Undisp. F. at 3. Plaintiff was also shown a videotape as part of her orientation which instructed that sexual harassment is against the law and not tolerated by defendant Sam's Club. *Id.* at 5. Plaintiff knew that employees who felt that they were being harassed should report it to a manager. *Id.* at 6. Relevant portions of the applicable harassment policy instructs:

Associates who are subjected to conduct prohibited under this policy are encouraged to report their complaint to any salaried member of management. Prompt action will be taken and no retaliation will occur against the associate.

....

Definitions . . .

Examples of conduct which may . . . constitute sexual harassment, include:

- Explicit sexual propositions
- Sexual innuendos
- Suggestive comments or question about sexual activities
- Sexually oriented "kidding", "teasing" or, "practical jokes"

...

- Foul or obscene language or gestures

...

Confidentiality . . .

Information will be revealed to only those individuals having need to know in order to facilitate then investigation or resolution.

Investigating Complaints

All complaints must be investigated throughly and promptly.⁹

. . . .

An Associate terminated for a violation of this policy will not be eligible for rehire.

. . . .

Pl. Ex. C. at 1-3, 5.

After the alleged offensive Spanish comment, before Christmas of 1999, plaintiff approached the then store manager, John Starner, and told him that she needed to speak with him because she was having a problem with one of the managers. Dep. of Sofia at 78-9. Plaintiff did not indicate that her problem involved sexual harassment. *Id* at 79. Starner said he was very busy, was on the phone, and that he would get back to her. *Id.* He never did.

Plaintiff tried again. A month or two after her first attempt to report her problem to Starner, she approached him again in February of 2000. This time, she told him she was having problems with a manager, defendant McWilliams, because he “wouldn’t stop with his comments.” *Id.* at 81. Plaintiff told Starner that the comments were offensive, but she did not specifically say they were sexual in nature. *Id.* at 82. She also asked Starner to “please go talk to [defendant McWilliams].” *Id.* He never did; Starner left the store approximately a week after this conversation with plaintiff. *Id.*

In February or March of 2000, plaintiff called marketing department manager Mark Rowe, her

⁹ It next outlines a very detailed and comprehensive list of steps that must be followed to effectuate an adequate investigation, including reporting the harassment allegation to the Facility Manager and District Manager/Director of Operations, requiring that it be investigated by one of them or the Regional Personnel Manager, listing all of the determinations that must be made in the course of such an investigation, explaining which parties and witnesses must be interviewed to constitute the requisite thoroughness, requiring evaluations of all the evidence, and importantly, ordering copies of all written statements to be forwarded to the Regional Personnel Manager or People Director, with originals maintained at the facility. Pl. Ex. C. at 5.

direct supervisor and informed him that defendant McWilliams “wouldn’t leave [her] alone, he was making sexual comments, [she] didn’t like it.” *Id.* at 117. Rowe responded by asking “what do you want to do about it, do you want to take it to the home office . . .?” She replied “[N]o, Mark, I don’t want any trouble with Pat, I just want you to be aware of it.” *Id.* However, the next day, one of the marketing sales representatives, James Smith, approached plaintiff and said “whatever you said yesterday nobody believes you, let it go.” *Id.* at 126-27.

Then, in either April or May of 2000, directly after defendant McWilliams allegedly made a comment to plaintiff about a “blow job,” she went to Rowe again because she “just couldn’t take it anymore.” *Id.* at 121-22. At this point, she informed Rowe that “Pat just made another comment, please talk to him.” She said “tell him to leave me alone, I don’t want any trouble . . .”. *Id.* at 122-23. Immediately thereafter, Rowe spoke with defendant McWilliams. About ten minutes after plaintiff’s discussion with Rowe, the defendant approached plaintiff and apologized. *Id.* at 127-28. Plaintiff cannot remember if there were comments from defendant McWilliams after this incident. She “avoided him as much as possible. Not to give him the opportunity to have a comment.” *Id.* at 129-30.

At either the end of May or the beginning of June, plaintiff met with Robert Cutwright, who had replaced John Starner as the store manager, about a merit raise, which she alleges Starner had promised her. *Id.* at 16. At this meeting, Cutwright told her that her work performance “sucked.” *Id.* at 130-31. He said supervisors reported that she had a negative attitude, and as a result, was difficult to work with. Dep. of Cutwright at 49-50; *see* Dep. of Sofia at 114 (stating that Cutwright told her “no other manager wants to work with [her]”). However, when asked at his deposition which supervisors reported such information, the only one he could cite was Cindy Ayers, the team leader of the membership department. Dep. of Cutwright at 49-50. Yet, Ayers stated that she had no reason to negatively evaluate plaintiff, nor did she have knowledge of any supervisor having any reason to so

evaluate her. Dep. of Ayers at 14, 56. To the contrary, she referred to plaintiff as a “hard worker” and posited that plaintiff had the potential to become a team leader of one of the departments. *Id.* at 15, 46.

After this denial of her promised merit raise, plaintiff contested Cutwright’s explanation for the denial.¹⁰ She then informed him that she was having personal problems; she said “I’m tired of managers asking me to suck their dick” at which point Cutwright shut the door, and asked plaintiff to tell him to what and to whom she was referring. *Id.* at 131. After she relayed the pattern of harassment, Cutwright said that he would conduct an investigation. Plaintiff avers that she did not want defendant McWilliams fired, she just didn’t want him to make “any more comments, just to leave [her] alone.” *Id.* at 132.

Following this discussion, plaintiff was out of work with the flu. *Id.* at 134. Defendant McWilliams was suspended pending an investigation. *Id.* at 143. When plaintiff returned, the bakery manager, Laura Cordory, asked her to write a statement about the harassment. *Id.* at 134. As requested, she provided a list of witnesses to some of the incidents. On the same day that she wrote her statement, plaintiff gave her two weeks notice. She asserts that her career was ruined and that she refused to work anymore with defendant McWilliams. *Id.* at 136-37, 143. Plaintiff had hoped to advance to a management position. *Id.* at 163. Additionally, she has explained that she did not want to work with Cutwright because of his false evaluation of her. *Id.* at 145-46. According to plaintiff, “Bob [Cutwright] was just like Pat.” *Id.* at 145.¹¹ Soon after plaintiff quit, Cutwright called her and told her

¹⁰ Although not clear from plaintiff’s version of the facts, at oral argument before this court on March 13, 2003, plaintiff, through her counsel, agreed that it was not until after the denial of the merit raise that she raised the issue of defendant McWilliams’ sexual comments.

¹¹ Defense counsel pursued follow-up questions to clarify plaintiff’s statement:

- A: “I just didn’t like Pat [McWilliams] and - - Bob [Cutwright].”
Q: Is that because he said your work performance sucked?
A: Yes. Why would you go back to a place that didn’t want you there . . .”

defendant McWilliams had been terminated. *Id* at 144.

On June 8, 2000, Cutwright informed defendant McWilliams that plaintiff had accused him of sexual harassment, for which he was being investigated. Dep. of McWilliams at 18-19, 31. On June 10, 2000, Cutwright went to his home and told him he was terminated for “making inappropriate comments.” Defendant McWilliams told Cutwright that he did not make any inappropriate comments. *Id.* at 32. McWilliams then set up a meeting with Craig McNair, defendant Sam’s Club’s director of operations for region fifteen.¹² Dep. of McWilliams at 35-36. At this meeting, McNair told McWilliams that he could re-apply to defendant Sam’s Club. *Id.* Defendant McWilliams’ exit interview, apparently completed by Cutwright, characterized the reason for termination as “other” and clarified it as “inappropriate comments.” The section entitled “rehire” was explicitly checked as “yes.” Pl. Ex. B. McNair confirmed that such characterization rendered McWilliams “rehirable” by Sam’s Club. Dep. of McNair at 14.

About four months after his termination, defendant McWilliams did reapply and was rehired by another Sam’s Club store, located in Deptford, New Jersey. Confirming the harassment policy of defendant Sam’s Club, as quoted above, regarding the rehire of employees who have been terminated for violating the policy, the general manager of the Deptford store, Dawn Blackburn explained that “if they were terminated on sexual harassment, it would be a no hirable offense. If they were terminated on inappropriate conduct, it is rehirable after 90 days.” Dep. of Blackburn at 14.

Furthermore, defendant Sam Club’s regional personnel manager of the Northeastern Division,¹³

Dep. of Sofia at 145.

¹² This region included all of Maryland, Southern New Jersey, and Southern Pennsylvania. Dep. of McWilliams at 37.

¹³ This included New York, Maine, New Jersey, Pennsylvania, Delaware, and Kentucky. Dep. of Powell at 7.

Arvetta Watson Powell, explained that the “rehire” section of the exit interview was required so that it could be coded into defendant Sam’s Club’s computer system. Dep. of Powell at 12. She listed several examples of conduct that was non-rehirable, including theft and “foul language which is profanity.” *Id* at 17-18. Although she cannot remember specifically the details of the situation involving plaintiff and defendant McWilliams, she admitted that she made the ultimate decision to terminate defendant and to specify “inappropriate comments” as the reason. *Id.* at 36-37.¹⁴

STANDARD OF REVIEW

Either party to a lawsuit may file a motion for summary judgment, and it will be granted only “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 judgment as a matter of law.” Fed. R. Civ. Pro. 56(c). “Facts that could alter the outcome are ‘material,’ and disputes are ‘genuine’ if evidence exists from which a rational person could conclude that the position of the person with the burden of proof on the disputed issue is correct.” *Ideal Dairy Farms, Inc. v. John Lebatt, LTD.*, 90 F.3d 737, 743 (3d Cir. 1996) (citation omitted). In addition, “[s]ummary judgment may not be granted . . . if there is a disagreement over what inferences can be reasonably drawn from the facts even if the facts are undisputed.” *Ideal Dairy*, 90 F.3d at 744 (citation omitted). The moving party bears the initial burden of showing that there is no genuine issue of material fact. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986).

When a court evaluates a motion for summary judgment, “[t]he evidence of the non-movant is to be believed.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). Additionally, “all justifiable inferences are to be drawn in [the non-movant’s] favor.” *Id.* At the same time, “an

¹⁴ At oral argument, plaintiff’s counsel asserted that the final “decision” by this higher official was merely a rubber stamp of approval based on an initial decision by Cutwright.

inference based upon a speculation or conjecture does not create a material factual dispute sufficient to defeat entry of summary judgment.” *Robertson v. Allied Signal, Inc.*, 914 F.2d 360, 382 n.12 (3d Cir. 1990). The non-movant must show more than “[t]he mere existence of a scintilla of evidence” for elements on which he bears the burden of production. *Anderson*, 477 U.S. at 252. Thus, “[w]here the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no ‘genuine issue for trial.’” *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (citations omitted).

DISCUSSION

I. Title VII Claim Against Individual Defendant McWilliams

Because Title VII of the Civil Rights Act of 1964¹⁵ does not subject individuals to liability for sexual harassment, I will grant judgment as a matter of law to defendant McWilliams on these claims. As defendants posit, and plaintiff concurs, the Third Circuit has concluded that “Congress did not intend to hold individual employees liable under Title VII.” *Sheridan v. E.I. Dupont de Numours & Co.*, 100 F.3d 1061, 1078 (3d. Cir. 1996) (quoted in Mot. for Sum. J. at 6 and Oppos. to Sum. J. at 15); *see also Dici v. Commonwealth of Pennsylvania*, 91 F.2d 542, 552 (3d. Cir. 1996) (affirming grant of summary judgment as to Title VII claims against individual employees based on this rule of *Sheridan*). The court cannot discern any legal basis for permitting this claim against this individual defendant, nor does plaintiff suggest that any exists. Therefore, I will grant defendants’ motion for summary

¹⁵ The statute reads, in relevant part:

It shall be an unlawful employment practice for an employer . . . to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin.

42 U.S.C. § 2000(e)-2(a) (West 1994).

judgment on this claim against defendant McWilliams.

II. Title VII Claim Against Defendant Sam's Club

The parties agree as to the requisite elements for sustaining a Title VII claim against an employer such as defendant Sam's Club. A Title VII plaintiff must demonstrate that: (1) she suffered intentional discrimination because of her sex; (2) the discrimination was pervasive and regular; (3) it detrimentally affected the plaintiff; (4) it would detrimentally affect a reasonable person of the same sex in that position; and (5) there is a basis for vicarious (or *respondeat superior*) liability. *Cardenas v. Massey*, 269 F.3d 251, 260 (3d Cir. 2001); *Andrews v. City of Philadelphia*, 895 F.2d 1469, 1482 (3d Cir. 1990). As defendants challenge only the fifth requirement, that is the only one that I will address in deciding their motion for summary judgment.¹⁶

The Supreme Court dramatically impacted the law of employer liability under Title VII for the sexual harassment committed by supervisors when it issued its dyadic opinions resolving the companion cases of *Faragher v. Boca Raton*, 524 U.S. 775, and *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998). In deciding these two cases, the Court reconciled inconsistent caselaw from courts of appeals and clarified its own prior holdings on this issue. It distinguished between the two general theories under which an employer may be liable for its employee's harassing conduct under Title VII, namely the employer's own negligence or through vicarious liability. Guided by agency

¹⁶ Although defendants in their brief seek to confine plaintiff's civil rights claim to a hostile work environment claim thereby excluding a *quid pro quo* claim, this distinction is not relevant to the issues discussed herein. As the Supreme Court explained, "[w]hen we assume discrimination can be proved, however, the factors discussed below, and not the categories *quid pro quo* and hostile work environment, will be controlling on the issue of vicarious liability." *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 754 (1998); see also *Hurley v. Atlantic City Police Dep't.*, 174 F.3d 95, 133 (3d Cir. 1999) (Cowen, J., concurring) ("As the Court [in *Ellerth*] made clear, for the purposes of determining employer liability, the categories of *quid pro quo* and hostile work environment are not controlling.").

principles,¹⁷ the Court explained that “an employer can be liable . . . where its own negligence is a cause of the harassment. . . . Negligence sets a minimum standard for employer liability under Title VII; but [plaintiff] seeks to invoke the more stringent standard of vicarious liability.” *Ellerth*, 524 U.S. at 759. The Court then proceeded to clarify and apply the proper analysis for an employer’s vicarious liability, an option available where the alleged harasser was plaintiff’s supervisor.¹⁸

Plaintiff has asserted a Title VII claim against defendant Sam’s Club for supervisory harassment, claiming that defendant McWilliams was her supervisor, premised on a theory of vicarious

¹⁷ Specifically, the Court quoted § 219(2) of the Restatement of Agency (Second), which delineates the circumstances in which a master may be held liable for a servant’s actions. *Ellerth*, 524 U.S. at 758. The Court quoted, *inter alia*, the following provision:

A master is not subject to liability for the torts of his servants acting outside the scope of their employment, unless:

. . .

(b) the master was negligent . . ., or . . .

(d) the servant purported to act or speak on behalf of the principal and there was reliance upon apparent authority, or he was aided in accomplishing the tort by the existence of the agency relation.

Id.

The Court explained that “[s]ubsections (b) and (d) are possible grounds for imposing employer liability on account of a supervisor’s acts.” *Id.*

¹⁸ As a result, the Court established the law only for employer liability based upon supervisory harassment and left unchanged the Third Circuit’s law on employer liability based on an employer’s own negligence. *Compare, e.g., Durham Life Insurance Co. v. Evans*, 166 F.3d 139, 154-55 (3d Cir. 1999) (analyzing employer liability based on supervisory harassment, as recently delineated by Supreme Court, as including vicarious liability) *with, e.g., Andrews v. City of Philadelphia*, 895 F.2d 1469, 1486 (3d Cir. 1990) (applying employer liability based on theory of negligence); *see also Jackson v. T & N Van Service*, 86 F. Supp. 2d 497, 501-03 (E.D. Pa. 2000) (explaining this result); *Glickstein v. Neshaminy Sch. Dist.*, 1999 WL 58578, at *8-11 (E.D. Pa. Jan. 26, 1999) (same); *Kent v. Henderson*, 77 F. Supp. 2d 628, 632-33 (E.D. Pa. 1999) (same).

liability.¹⁹ Accordingly, the first issue I must consider is whether the alleged harasser, defendant McWilliams, was plaintiff's supervisor or merely her co-employee.

A. Defendant McWilliams: Supervisor or Co-Employee?

Although neither the Supreme Court nor the Third Circuit has delineated a precise test for determining whether a given employee has sufficient supervisory power to be deemed a supervisor for purposes of Title VII, there is substantial guidance. Because plaintiff has presented evidence from which a reasonable juror could conclude that defendant McWilliams had sufficient supervisory powers over plaintiff to qualify him as her supervisor, this is a genuine issue of material fact which precludes summary judgment.

Drawing the line between co-employee and supervisor is a fact-intensive inquiry in which the fact-finder must analyze the defendant employee's power over the plaintiff's work situation. *See, e.g., Jackson*, 86 F. Supp. 2d at 501-03; *Kent*, 77 F. Supp. 2d at 632-34; *Glickstein*, 1999 WL 58578, at *12-13. Importantly, "complete authority to act on the employer's behalf without the agreement of others is not necessary to meet Title VII's agency standard for supervisory liability." *Durham Life Insurance Co.*, 166 F.3d at 154-55.

The most obvious supervisory powers include the power "to hire and fire, and to set work schedules and pay rates" Falling in line with the Court's decision in *Faragher* and *Ellerth*, the Equal Employment Opportunity Commission ("EEOC") issued new guidelines to aid in this determination. The agency explains that: "[a]n individual qualifies as an employee's 'supervisor' if: a. the individual has authority to undertake or recommend tangible employment decisions affecting the

¹⁹ At oral argument before this court on March 13, 2003, plaintiff through her counsel, conceded that she is only proceeding on a claim of supervisory harassment, to the exclusion of coworker harassment; consequently, should the jury decide that defendant McWilliams was not plaintiff's supervisor, judgment will necessarily be entered for defendant Sam's Club on plaintiff's Title VII claim against her employer.

employee; *or* b. The individual has authority to direct the employee’s daily work activities.” EEOC Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors, Following Section 615 of the Compliance Manual; (www.eeoc.gov/docs.harassment.html) (last updated June 21, 1999); *see also* *Kent*, 77 F. Supp. 2d at 633 (applying this guidance from the EEOC to the facts before it).

Applying these standards here, plaintiff presents evidence by way of her sworn affidavit from which a reasonable juror could conclude that defendant McWilliams was her supervisor for purposes of Title VII employer liability. Although defendant McWilliams was manager of the meat department and plaintiff primarily worked in the marketing department, he could, and in fact did, order plaintiff to act as a spotter in forklift areas. On such occasions, he directed plaintiff where to stand and what to do. Pl. Affid. ¶ b.²⁰ In addition, this defendant had the authority, which he exercised two to three times per week, to “come into the marketing department and specifically tell [her] to go to the meat department to perform tasks under his direction.” *Id.* ¶ c. Plaintiff further explained that the store manager, Bob Cutwright, informed her that defendant “McWilliams would, as part of his duties of meat manager, discuss the nature and quality of [her] work, which [she] did under [his] direction.” *Id.* ¶ d. Moreover, plaintiff explained that although acting alone, defendant McWilliams could not fire her, as she had truthfully testified in her deposition, his influence as a department manager could cause her firing. *Id.*²¹

²⁰ In fact, according to plaintiff’s allegations, initially in her deposition and confirmed in her affidavit, at least two occasions of sexual harassment occurred during such instances in which defendant McWilliams had ordered her to work in this capacity. Pl. Affid. ¶ b. As will be explained *supra* in section II, this supports the employer’s vicarious liability because the authority that defendant McWilliams was granted, the authority to order plaintiff to come work with him in the forklift areas, aided his harassment.

²¹ Specifically, plaintiff stated that she:

know[s] of at least two instances where a department manager caused the firing of an hourly worker who was not in that manager’s department.

Finally, plaintiff averred that, according to previous store manager John Starnier, in order to obtain a merit raise, her “entire performance at Sam’s Club would be evaluated.” *Id.* ¶ f. By virtue of defendant McWilliams’ supervision over plaintiff when he ordered her to work with him, he had the opportunity to submit written and verbal comments to the store manager that would be among the materials considered in her evaluations for a merit raise. *Id.*²²

Accordingly, based on these facts, defendant McWilliams could directly recommend adverse job consequences for plaintiff, and such recommendations carried weight due to his managerial position. Although he likely could not effectuate such consequences acting alone, such absolute authority is not required to conclude that one is a supervisor for purposes of Title VII. This defendant could negatively evaluate plaintiff, thereby adversely influencing her opportunity for merit raises.

Such firings were effected when the departmental manager, who was not the direct supervisor of the hourly worker, went to the store manager’s office, told the store manger that the employee should be fired, and the store manager rubber-stamped his approval for the firing of the employee which took place immediately.

Pl. Affid. ¶ e.

²² Defendants assert that this court should disregard plaintiff’s sworn affidavit because it is inconsistent with her prior deposition testimony. Reply to Pl. Opp. at 1-2 (citing *Hackman v. Valley Fair*, 932 F.2d 239, 241 (3d. Cir. 1991) for this proposition). Although correct as to the law, defendants are mistaken as to its application here. There is nothing inconsistent between plaintiff’s affidavit and her deposition testimony. In her deposition, plaintiff admits that defendant McWilliams, as manager of the meat department, was not her direct manager and had no control over her pay rate or which days she worked. Dep. of Sofia at 152-54; Reply to Pl. Opp. at 2. In her affidavit, she explains the domains of her work situations in which defendant McWilliams did have control or influence. Specifically, she explains that he could and did order her to work in his department, that he could and did order her to act as a safety spotter in the forklift areas, and that as a department manager he could submit verbal or written evaluations of her, thereby influencing her job security and promotional prospects. Pl. Affid. at 1-4. None of this contradicts her responses to defendants’ questions at her deposition. The deposition taken by defense attorneys elicited the domains in which defendant McWilliams’ authority was lacking, whereas plaintiff’s affidavit demonstrates the domains in which his authority existed.

Furthermore, he could, and did, direct her daily work activity. Consequently, whether defendant McWilliams was plaintiff's supervisor for purposes of Title VII analysis is a genuine issue of material fact for the jury.

B. Vicarious Liability Based on Supervisor's Sexual Harassment

In *Ellerth/Faragher*, the Supreme Court held that “[a]n 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.” *Ellerth*, 524 U.S. at 765; *Faragher*, 524 U.S. at 807. In order to hold an employer vicariously liable for the sexual harassment of one of its supervisors, it must be shown that the supervisor “was aided in accomplishing the tort by the existence of the agency relation.” *Ellerth*, 524 U.S. at 759 (quoting § 219(2)(d) of the Restatement (Second) of Agency).²³

“The aided in the agency relation standard . . . requires the existence of something more than the employment relation itself.”²⁴ *Id.* at 760. In an attempt to find the middle ground between automatic employer liability and Title VII's policy of encouraging employer prevention and employee activism, the *Ellerth/Faragher* Court fashioned a dichotomous rule, consisting of two analytical paths; the appropriate path in a given case depends on whether the supervisor's harassment resulted in a

²³ The Supreme Court also discussed vicarious agency liability based on conduct that is “within the scope of employment.” *Ellerth*, 524 U.S. at 755-757. After reviewing the application of this concept to sexual harassment, however, the Court concluded that “[t]he general rule is that sexual harassment by a supervisor is not conduct within the scope of employment.” *Id.* at 757.

²⁴ The Court recognized that “in a sense, most workplace tortfeasors are aided in accomplishing their tortious objective by the existence of the agency relation: Proximity and regular contact may afford a captive pool of potential victims.” *Ellerth*, 524 U.S. at 760. Accordingly, the Court warned, “[w]ere this to satisfy the aided in the agency relation standard, an employer would be subject to vicarious liability not only for all supervisory harassment, but also for all co-worker harassment, a result enforced by neither the EEOC nor any court of appeals to have considered the issue.” *Id.*

“tangible employment action.” *Ellerth*, 524 U.S. at 765; *Faragher*, 524 U.S. at 807.

As the law now stands, “[w]hen 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.” *Id.* Conversely, “[n]o affirmative defense is available . . . when the supervisor’s harassment culminates in a tangible employment action . . .” *Ellerth*, 524 U.S. at 765; *Faragher*, 524 U.S. at 808. Consequently, the court must consider whether defendant McWilliams subjected plaintiff to a tangible employment action.

1. Tangible Employment Action

There exists a genuine issue of material fact whether plaintiff suffered a tangible employment action that would preclude the availability of the affirmative defense. A tangible employment action is 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. There are two alleged events in this case that a reasonable juror could conclude constitute such employment actions.

First, plaintiff alleges that she was denied a merit raise that she had been promised by the former store manager, John Starner. Pl. Oppos. to Sum. J. at 1. She asserted in her complaint that she was “denied promotions and/or raises which were due her as part of a retaliatory effort with respect to her claims of sexual harassment.” Compl. ¶ 14. Plaintiff further explained how the act of denying her the promised merit raise related to the alleged sexual harassment by defendant McWilliams. According to plaintiff, in order to obtain a merit raise, her entire performance would be evaluated. Because defendant McWilliams “supervised [her] . . . he always had the ability to make written comments about [her] job performance, which . . . would go into [her] personnel file and be considered when [plaintiff] was evaluated by the store manager for a merit raise.” Pl. Affid. ¶ f. In addition,

defendant McWilliams could “discuss the nature and quality of [her] work with [the store manager] and managers of various departments.” *Id.* ¶ d. Plaintiff also posits some evidence that the reason provided by the new store manager, Robert Cutwright, for denying her the promised merit raise, was false or mistaken.²⁵ A rational juror could reasonably infer that the combination of plaintiff’s discouragement of defendant McWilliams’ sexual comments and propositions, his opportunity to adversely affect plaintiff’s chance for a merit raise, and the absence of an adequate alternative explanation for its denial, is sufficient circumstantial evidence to prove that plaintiff suffered an adverse employment action at the hands of her alleged harassing supervisor.

Defendants argue that (1) the denial of a merit raise does not constitute a tangible employment action because it is a raise above and beyond a normal raise given through an annual evaluation process,²⁶ and (2) even if such denial does constitute a tangible employment action, plaintiff has no evidence linking the denial to the alleged sexual harassment by defendant McWilliams. As to their first point, the Supreme Court has recognized that denial of a raise is a tangible employment action.

²⁵ Specifically, when plaintiff deposed new store manager Cutwright, the following was elicited:

- Q: Can you recall anything negative that you may have learned about Gerrie Sofia . . . ?
- A: I recall statements from her supervisors, but I don’t remember which ones, about her being negative and complaining a lot, but I can’t recall who it was. . .
- Q: Do you know who it was that said it to you?
- A: I would have to say it would have to have been Cindy Ayers, her marketing team leader.

Despite this averment, when deposed, Cindy Ayers stated that she never negatively evaluated plaintiff’s attitude or work, nor had any knowledge of anyone else so evaluating plaintiff. Dep. of Ayers at 14-15.

²⁶ Defendants failed to raise this argument in their motion for summary judgment; however, they raised it at oral argument before this court.

Ellerth, 524 U.S. at 761. The Court did not distinguish among types of raises. I find no reason consistent with the existing law on this issue, nor does plaintiff posit one, to distinguish between an annual raise and a merit raise of this type. Like denial of a normal raise, it “inflicts direct economic harm.” *Id.* If denial of a normal annual raise for the wrong reasons is “significant” enough to constitute a tangible employment action, I see no reason why denial of a merit raise for those same wrong reasons is less “significant.” In both instances, the harassment results in preventing a positive economic change in the victim’s employment situation.²⁷

As to defendants’ second argument, plaintiff’s minimal evidence must be viewed in light of the summary judgment standard. Plaintiff presents evidence from which a rational juror could infer that defendant McWilliams misrepresented to Cutwright a negative evaluation of plaintiff, thereby effectuating the denial of her promised merit raise. Although minimal, and quite possibly insufficient to convince a jury, plaintiff’s evidence is more than a scintilla, and thus sufficient to survive summary judgment.

Moreover, I find no case, nor do defendants cite any, that has held that in order to find a tangible employment action, the final decision to take that action must be taken with full knowledge that it is an invalid and/or retaliatory action; the lynchpin of the tangible employment action doctrine is the fact that the harm inflicted upon the employee is effectuated through the agency relation; this justifies employer liability. *Id.* at 761-62; *Durham Life Insur. Co. v. Evans*, 166 F.3d 139, 152 (3d. Cir. 1999). Therefore, if a supervisor effectuates a tangible employment action for an employee, even if he

²⁷ Additionally, the Third Circuit has recognized a variety of actions as constituting tangible employment actions, including causing an employee’s files to be missing and taking away an employee’s private office. *Durham Life Insur. Co. v. Evans*, 166 F.3d 139, 153-54 (3d Cir. 1999); see also *Glickstein v. Neshaminy Sch. Dist.*, 1999 WL 58578, at *14 (holding that plaintiff’s assertion that she was assigned extra work and less desirable work was sufficient to constitute a tangible employment action). Denial of a merit raise seems at least as substantial as these and even more directly economic.

does so through another more empowered manager or supervisor, this should be sufficient to find a tangible employment action.

Even if this court were to decide that the denial of a merit raise above and beyond a regular annual raise does not constitute a tangible employment action, this would not end this inquiry because plaintiff points to another action that a rational juror could decide was a tangible employment action. Plaintiff has asserted that she was constructively discharged. Our court of appeals has explicitly decided to leave unanswered the question of whether constructive discharge is a tangible employment action for purposes of Title VII because it was unnecessary to resolve this issue in the case before it. *See Cardenas v. Massey*, 269 F.3d 251, 267 n. 10 (3d Cir. 2001) (“There appears to be some disagreement on whether constructive discharge constitutes a tangible employment action. . . . We leave this issue to the District Court in the first instance.”).²⁸ In contrast, however, this court must decide the question remanded to the district court in *Cadenas* to afford the present plaintiff notice regarding her options for trial.

Based on the Third Circuit’s discussion of this issue, as well as the decisions of our sister courts, I conclude that constructive discharge, if proven, constitutes a tangible employment action for purposes of applying the *Ellerth/Faragher* analysis to Title VII employer liability. In *Durham Life Insur. Co. v. Evans*, in response to defendant’s argument, our court of appeals stated that “[u]nder [defendant]’s theory, any substantial adverse action . . . would not be a tangible adverse employment

²⁸ The Third Circuit explained that “[e]ven if the alleged hostile environment had not culminated in a tangible employment action, summary judgment for [defendant] based on the *Ellerth/Faragher* defense . . . would be premature. There are factual issues outstanding as to the reasonableness of the parties’ respective actions.” Thus, even if the court had decided as a matter of law that constructive discharge does not constitute a tangible employment action, then the affirmative defense is available, which involves the adequateness of defendant’s procedures and the reasonableness of plaintiff’s actions, which were genuine issues of material fact proper for jury determination. The same is true in the present case.

action if it led the affected employee to quit before [it] took effect. This is contrary to Title VII doctrine, which recognizes a constructive discharge under such circumstances. 166 F.3d 139, 153 (1999) (quoted in *Cardenas*, 269 F.3d at 267 n. 10). In addition, district courts in our circuit that have been compelled to decide this issue have recognized that tangible employment action includes constructive discharge. *Hawk v. Americold Logistics LLC*, 2003 WL 929221, at *8 (E.D. Pa. Mar. 6, 2003); *Clarkson v. Pennsylvania State Police*, 2000 WL 1513773, at *7 (E.D. Pa. Oct. 10, 2000); *Jackson v. T & N Van Service*, 86 F. Supp. 2d 497, 501-03 (E.D. Pa. 2000).²⁹ Following the guidance of the Third Circuit, I conclude the same.

Our court of appeals has held that constructive discharge requires “‘conditions of discrimination’ so intolerable that a reasonable person would have resigned.” *Konstantopoulos v. Westvaco Corp.*, 112 F.3d 710, 718-19 (3d Cir. 1997) (quoting *Goss v. Exxon Office Sys. Co.*, 747 F.2d 885, 888 (3d Cir. 1984)); *see also Gray v. York Newspapers Inc.*, 957 F.2d 1070, 1079 (3d Cir. 1992) (“whether the conduct complained of would have the foreseeable result that working conditions would be so unpleasant or difficult that a reasonable person in the employee’s shoes would resign”) (citations omitted). Plaintiff has provided evidence that engenders a genuine issue of material fact bearing on this issue.

First, plaintiff was allegedly repeatedly subjected to sexual harassment by a departmental manager, defendant McWilliams. Dep. of Sofia at 68, 70, 72, 83, 89, 101, 105. Second, this pattern of harassment affected her daily work-life in that she was compelled to avoid breaks and leave the marketing department office whenever defendant entered and she was there alone, in order to avoid his

²⁹ Like the *Clarkson* plaintiff, although constructive discharge can be brought as a separate claim, the plaintiff here appears to allege it only as a tangible employment action for purposes of the *Ellerth/Faragher* analysis. 2000 WL 1513773, at *7. Consequently, this issue will only be submitted to the jury in the context of showing a tangible employment action and not as a separate claim.

sexual harassment. *Id.* at 107-108. Third, plaintiff was denied a merit raise, promised to her by the former store manager, a denial allegedly effectuated by the negative false evaluation of her by a harassing supervisor. See *supra*, this section, at 17-18. Fourth, plaintiff believed that the denial of the merit raise would affect any chance for her future promotion. Dep. of Sofia at 136-37, 143, 145-46,163. Fifth, plaintiff suffered adverse emotional consequences. The harassment precluded her ability to concentrate and perform at work. Dep. of Sofia at 107-08. She even visited her family doctor on two occasions and took an anti-depressant, albeit very briefly, to cope with the negative emotional consequences. Dep. of Sofia at 111. For these reasons, a rational juror could conclude that these factors rendered plaintiff's employment at defendant Sam's Club intolerable.³⁰

Because plaintiff has presented slightly more than a scintilla of evidence as to whether she

³⁰ On this issue, defendants rely heavily on the position that when the harassing conduct ceases, there can be no finding of constructive discharge. Mot. for Sum. J. at 21-25. This argument is misplaced because, contrary to defendants' declaration otherwise, this fact is in dispute. Mot. for Sum. J. at 23 ("It is undisputed that once she reported the conduct to Rowe, McWilliams' comments stopped. Certainly by the time she used the open door policy to tell Cutwright about the harassment, McWilliams was not making offensive comments."). In fact, plaintiff explicitly denied that defendant McWilliams' offensive sexual comments ceased as a result of being confronted by supervisor Rowe. Pl. Ans. to Stmt. of Undisp. F. ¶ 37 ("Denied as stated."). In contrast, in her deposition, plaintiff explained that after the confrontation and apology she "just avoided him as much as possible. Not to give him the opportunity to have a comment." Dep. of Sofia at 129-30. In response to the direct question of whether there were comments from the defendant after she spoke with a supervisor, she answered that she could not "remember". *Id.* at 130. Defendants' attempt to couch plaintiff's coping response, of constantly monitoring her physical proximity to defendant out of fear for continued sexual harassment, as proof that the intervention had been adequate and the harassment had ceased, is an issue for jury consideration. Moreover, plaintiff alleges that there is more to her constructive discharge than simply the harassment itself; importantly, she claims it also involves the alleged false negative evaluation of her and the resulting denial of a merit raise that might have seriously harmed plaintiff's future at Sam's Club under Cutwright's leadership. Accordingly, the issue of constructive discharge as a tangible employment action is one for the jury even though plaintiff's evidence in support of it may be far from overwhelming.

In addition, although defendants' focus on the fact that defendant McWilliams was terminated, this does not bear on whether there was a constructive discharge of plaintiff because this did not occur until after plaintiff quit. Mot. for Sum. J. at 4.

suffered a tangible employment action at the hands of the alleged harassing supervisor, defendant McWilliams, either through the unfounded denial of a merit raise or constructive discharge,³¹ there is a genuine issue of material fact for trial. If the jury determines that either of these actions constituted a tangible employment action, there is a basis for vicarious liability against defendant Sam's Club. Conversely, should the jury determine that neither of these actions was proven by plaintiff at trial, then vicarious liability will turn on the affirmative defense available to Sam's Club as articulated in *Ellerth/Faragher*.

2. Defendant Sam's Club's Affirmative Defense

Although disputable, I conclude that defendant Sam's Club has sufficiently raised the applicable affirmative defense.³² The affirmative defense consists of two required 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." *Ellerth*, 524 U.S. at 765; *Faragher*, 524 U.S. at 807.

³¹ Plaintiff also suggests that a defendants' tangible employment action against her included action taken against her significant other, now husband, Rodney Snyder, who worked in defendant McWilliams' department and thus was subject to his immediate control. I do not need to address the relevance of such an allegation because I have concluded that there is sufficient evidence of direct action against plaintiff herself for this issue to go to the jury.

³² Defendant Sam's Club, colloquially, has put all of its eggs in one basket by insisting on the position that defendant McWilliams was not plaintiff's supervisor for purposes of defendant Sam's Club's liability under Title VII. As a result, defendant fails to present the affirmative defense in the context of defendant Sam's Club vicarious liability for supervisory harassment because they have wholly ignored this possible theory of liability. However, defendant posits argument that includes the elements of the two-prong affirmative defense. Although the sufficiency of defendants' raising of this affirmative defense is questionable, if I were to decide that it was insufficient, I would grant defendants leave to amend in order to clarify their raising of this defense; therefore, in the interest of efficiency, I conclude that they have sufficiently done so in their motion for summary judgment.

As to the first prong of the affirmative defense, defendants assert that because Sam's Club's intervention succeeded in ending the harassment, it cannot be liable. Mot. for Sum. J. at 15. As to the second prong, defendants posit that plaintiff was unreasonable in failing to avail herself of the proper procedures established at Sam's Club for addressing sexual harassment, which also precludes the employer's liability. *Id.* at 14. As to the first point, whether defendant Sam's Club took action that ended the harassment is a fact in dispute. Taking plaintiff's allegations as true, the adverse effects of the harassment did not end until plaintiff quit her job at Sam's Club; the damage to her reputation effectuated through the denial of the merit raise and the resulting harm to her future at Sam's Club, if proved, were not addressed by her employer. Additionally, plaintiff highlights the defendant employer's violation of its own policy regarding sexually harassing employees by qualifying defendant McWilliams as "reirable" and for eventually rehiring him. Opp. to Sum. J. at 21. As such, there remain genuine issues of fact bearing on the first element of defendants' affirmative defense.

As to the second issue, the reasonableness of plaintiff's actions with regard to utilizing her employer's sexual harassment policy, there are arguments and facts supporting both parties' positions. For instance, plaintiff, as instructed by defendant Sam's Club harassment policy, twice approached store manager Starner about the harassment. The first time, December of 1999, she informed Starner that she was having a problem with one of the managers, yet was not granted an opportunity to explain because Starner claimed he was too busy, and then he failed to follow-up with her as he had promised. Dep. of Sofia at 78-79. Approximately two months later, in February 2000, plaintiff tried again. This time she told him that defendant McWilliams would not stop making offensive comments to her. *Id.* at 81. She pleaded with Starner to go speak with McWilliams about it, however she did not explicitly

mention that the comments were sexual in nature. *Id.* at 82.³³ However, he never did; Starner left the Pleasantville store approximately one week after this conversation with plaintiff. *Id.*

When this failed, she went to her direct supervisor, Mark Rowe, and told him about the harassment; this time, plaintiff explained explicitly that it was sexual in nature. *Id.* at 117. However, she also asked him not to say anything because she did not want “trouble.” *Id.* After this conversation with Rowe, another employee, James Smith, approached her and told her that no one believed her. *Id.* at 126-27. Finally, when plaintiff allegedly could no longer endure the harassment, she again approached Rowe and asked him to act upon his knowledge of the harassment. These actions by plaintiff, although arguably not indicative of one taking full advantage of defendant Sam’s Club policy, could nonetheless be found reasonable by a rational juror in light of the responses of plaintiff’s supervisors and reaction of a fellow co-worker. I will not weigh this competing evidence to determine if plaintiff’s actions were reasonable because its existence establishes a genuine issue of fact for a jury to resolve.

Having concluded that there are genuine issues of material fact as to defendant Sam’s Club’s vicarious liability, summary judgment must be denied.

³³ At oral argument, defense counsel argued that as a matter of law plaintiff did not reasonably take advantage of defendant Sam’s Club harassment procedure on the two occasions that she spoke with Starner because she did not mention the sexual nature of the offensive comments. In support of this position, defendant Sam’s Club cited two cases, a binding Third Circuit opinion, *Kunin v. Sears Roebuck & Co.*, 175 F.3d 289 (3d Cir. 1999), and a persuasive opinion of one of our sister courts, *Sicalides v. Pathmark Stores, Inc.*, 2000 WL 760439 (E.D. Pa. June 12, 2000). Defendants reliance is misplaced. The principle addressed in these cases is whether a plaintiff, as a matter of law, must inform a supervisor that the harassment was sexual in order to establish the requisite *knowledge for proving an employer’s negligence*, not whether a plaintiff must do so, as a matter of law, for her actions to be found *reasonable under the second prong of the affirmative defense to vicarious liability*. *Kunin*, 175 F.3d at 294; *Sicalides*, 2000 WL 760439, at 8. Notably, defendant Sam’s Club properly contextualized this rule of *Kunin* in its motion for summary judgment where it presented it within its section on the “knowledge prong” of the negligence theory of liability. Mot. for Sum. J. at 10-12, 16-18.

III. State Law Claims

This court will apply New Jersey law in addressing plaintiff's state law claims without conducting a complete, typically cumbersome, choice-of-law analysis, for several reasons. First, the parties impliedly agree that New Jersey law applies to plaintiff's state law claims in this case because they base their arguments exclusively on New Jersey law. Mot. for Sum. J. at 25-29; Oppos. to Sum. J. at 22-23. Second, because of this agreement, the parties have not briefed the choice-of-law issue. Third, it is likely that choice of law would not impact the result in resolving the pending issues. *See Williams v. Stone*, 109 F.3d 8909, 893 (3d Cir. 1997) ("where the laws of two jurisdictions would produce the same result on the particular issue presented, . . . the Court should avoid the choice-of-law question). Fourth, there is no readily perceivable reason to apply another state's law.³⁴ *See J.B. Hunt Transport, Inc. v. U.S.F. Distribution Serv's, Inc.*, 2002 WL 31045152, at *4 (E.D. Pa. Sept. 10, 2002) ("Therefore, because the parties agree that New Jersey law applies, and this state appears to have the sufficient contacts and an important interest in seeing the appropriate party maintain responsibility for [torts] occurring in its state, the Court will apply that state's law without undergoing a complex choice of law analysis.") Therefore, I will apply New Jersey law in deciding the motion for summary judgment on plaintiff's state law claims.

A. Defendant Sam's Club: Vicarious Liability³⁵

Defendants assert that even if there is a genuine issue of material fact as to defendant McWilliams' liability for plaintiff's state tort claims, defendant Sam's Club is not vicariously liable, as

³⁴ All parties are citizens of New Jersey. The individual parties reside in New Jersey. All events relevant to the case occurred in New Jersey.

³⁵ Although ambiguous, I interpret Count IV of plaintiff's complaint, which asserts a claim for vicarious liability against Sam's Club, as an averment that defendant Sam's Club is liable for the state law torts of its employee, defendant McWilliams, separate and independent of its potential vicarious liability under Title VII.

a matter of law, for its employee's violative conduct. I agree.

Consistent with common law agency doctrine, in New Jersey, “an employer is liable to a third party for the torts of one of its employees if that employee is acting within the scope of his or her employment.” *Abbamont v. Piscataway Township Bd. of Educ.*, 650 A.2d 958, 963 (N.J. 1994) (citing *Di Cosala v. Kay*, 450 A.2d 508 (N.J. 1982) and *Gilborges v. Wallace*, 396 A.2d 338 (N.J. 1978); see also *O’Toole v. Carr*, 2003 WL 354972, at *2 (N.J. 2003) (reaffirming this traditional standard and rejecting another). “[A]n employee’s conduct falls within the scope of employment if: (a) it is the kind he is employed to perform; (b) it occurs substantially within the authorized time and space limits; [and] (c) it is actuated, at least in part, by a purpose to serve the master.” *Carter v. Reynolds*, 2003 WL 356008, at * 4 (N.J. 2003). In contrast, an employee’s conduct “is not within the scope of employment if it is different in kind from that authorized, far beyond the authorized time or space limits, or too little actuated by a purpose to serve the master.” *Id.*

In light of these standards, defendant Sam’s Club cannot be vicariously liable for defendant McWilliams’ intentional torts. Plaintiff does not even aver, much less present evidence, that defendant McWilliams was employed by defendant Sam’s Club to inflict emotional distress or assault and battery on employees or even that his conduct in this regard served the purpose of his employer.³⁶ Accordingly, I will grant summary judgment for defendant Sam’s Club on plaintiff’s state law claims.

B. Defendant McWilliams: Direct Liability

1. Assault and Battery

Defendant McWilliams argues that there is insufficient evidence of assault and battery such that

³⁶ This result as to the state law claims mirrors the general rule under Title VII that an employee’s sexual harassment is not within the scope of employment. It is for this reason that the Supreme Court clarified that in almost all Title VII cases, an employer’s vicarious liability must be premised on the “aided by the agency relationship” theory. See *supra* section II.B.

summary judgment should be entered in his favor on these claims. I agree in part and disagree in part with his position. I conclude that there is sufficient evidence to create a genuine issue of material fact as to battery but not as to assault.

Assault and battery are twin state tort claims. Under New Jersey law, one is liable for assault if “(a) he acts intending to cause harmful or offensive contact with the person of the other . . . or an imminent apprehension of such contact, and (b) the other is thereby put in such imminent apprehension.” *Wigginton v. Servidio*, 734 A.2d 798, 806 (N.J. Super. Ct. App. Div. 1999) (quoting Restatement (Second) of Torts § 21 (1965)). Relatedly, battery refers to contact actually effectuated, specifically it is “an unauthorized invasion of the plaintiff’s person, even if harmless Any non-consensual touching is a battery.” *Russo Farms, Inc. v. Vineland Board of Education*, 675 A.2d 1077, 1087 (N.J. 1996) (quoting *Perna v. Pirozzi*, 457 A.2d 431 (N.J. 1983)).

By her silence, plaintiff concedes that she does not have a valid claim for assault. In her opposition brief, plaintiff ignored completely the assault claim challenged by defendants. I find no evidence in the present record that plaintiff was ever placed in apprehension by defendant McWilliams that he would physically contact her or that he intended to place her in such apprehension.³⁷

Conversely, whether defendant McWilliams committed a battery against plaintiff is an issue for jury determination. According to plaintiff, on one occasion, defendant McWilliams grabbed plaintiff by the hand and pulled her into his office. Mot. for Sum. J. at 28. A reasonable juror could decide that such contact was non-consensual thereby constituting a battery. Consequently, I will deny summary

³⁷ Plaintiff’s apprehension, no matter how reasonable and intentional, that McWilliams would verbally sexually harass her does not constitute assault. As the definition of assault demonstrates, the intended apprehension must be as to contact, i.e., physical touching.

With respect to the one instance in which defendant McWilliams allegedly grabbed plaintiff by the hand and forced her into his office to proposition her, plaintiff has not alleged that she was in apprehension of that physical contact. Apprehension is the essence of civil assault.

judgment on plaintiff's battery claim.

2. Intentional Infliction of Emotional Distress

In New Jersey, intentional infliction of emotion distress occurs when “[o]ne who by extreme and outrageous conduct causes severe emotional distress to another. . .” *Buckley v. Trenton Savings Fund Society*, 544 A.2d 857, 863 (N.J. 1988).³⁸ Plaintiff has the burden of proving four elements: (1) the “defendant’s conduct must be extreme and outrageous”; (2) he “must intend both to do the act and produce emotional distress” or he must “act recklessly in deliberate disregard of a high degree of probability that emotional distress will follow”; (3) these actions “must have been the proximate cause of the plaintiff’s emotional distress”; and (4) “the emotional distress suffered by the plaintiff must be so severe that no reasonable man could be expected to endure it.” *Id.* [citations omitted]. Defendants challenge both the first and fourth elements.

As to the first element, New Jersey has concluded that harassing conduct occurring in the workplace, in contrast to harassment by a stranger on the street, can take on a more outrageous or offensive character, especially when of a sexual or racial nature. *Taylor*, 706 A.2d at 699 (citing study indicating this effect); *Wigginton*, 734 A.2d at 807 (recognizing this distinction and applying it to reverse lower court’s dismissal of plaintiff’s claim for intentional infliction of emotional distress).³⁹ In

³⁸ Under New Jersey law, “[t]he severity of emotional distress raises questions of both law and fact. Thus the court decides whether as a matter of law such emotional distress can be found, and the jury decides whether it has in fact been proved.” *Buckley v. Trenton Savings Fund Society*, 544 A.2d 857, 864 (N.J. 1988).

³⁹ The *Taylor* court explained “that the power dynamics of the workplace contribute to the extremity and the outrageousness of defendant’s conduct.” 706 A.2d at 511. Moreover, this effect has the potential to be magnified when the offender is a plaintiff’s supervisor; “[w]hen one in a position of authority over another has allegedly made a [harassing comment], this abusive conduct gives added impetus to the claim of outrageous behavior.” *Id.* at 512 [citation omitted].

Taylor, the highest court in New Jersey held that one racial slur uttered in the workplace by a supervisor was sufficient to reach the jury on the issue of the outrageousness of defendant's conduct. 706 A.2d at 512. However, the *Taylor* court also acknowledged that "liability clearly does not extend to mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities." *Taylor*, 706 A.2d at 694 [citations omitted].

Like the racial slur uttered by the supervisor in *Taylor*, I conclude the alleged repeated sexual suggestions and comments made by defendant McWilliams to plaintiff cannot reasonably be held as a matter of law to be "trivialities." *Id.* As in *Taylor*, here plaintiff alleges sexual harassment by a supervisor in her workplace. Furthermore, plaintiff alleges many more instances of offending conduct than the solitary instance in *Taylor*. Specifically, the suggestions and actions by one of plaintiff's supervisors, defendant McWilliams, for instance telling plaintiff to "suck my dick" or pulling her by her arm into his office to request "a quickie," might well be found by rational jurors to be extreme and outrageous.

As to the fourth element of intentional infliction of emotional distress, the extent of plaintiff's emotional distress, this is a closer issue, yet I conclude that under New Jersey law, it too is one properly reserved for the jury. As the New Jersey Supreme Court has ruled, "when the intentional conduct is directed at plaintiff, he or she need not prove any physical injury." *Buckley*, 544 A.2d at 864. Plaintiff alleges, and there is evidence, of emotional distress resulting from defendant McWilliams' harassment. Although the severity of the distress is questionable, this is a question for the jury.

Plaintiff asserts that the alleged harassment by defendant McWilliams made her "very nervous," "very depressed," and "very upset," such that she "would cry." Dep. of Sofia at 167-68. She was so affected that she went twice to her family doctor, Dr. Kaplan, specifically to address these emotional symptoms. *Id.* at 166-67. The second time that she visited Dr. Kaplan, he prescribed her an anti-

depressant by the name of Ativan. *Id.* at 167. Plaintiff stopped taking it after one or two days, however, because it made her “deathly sick.” *Id.* at 167. Although Dr. Kaplan suggested that she pursue counseling, plaintiff did not. *Id.* at 168. According to plaintiff, her symptoms continued even after she left Sam’s Club. *Id.* at 168.

A case comparable to the present case is *Wigginton v. Servidio*, which also involved sexual harassment of an employee by a supervisor. 734 A.2d at 807. In that case, the court held that it was sufficient to render plaintiff’s emotional distress an issue for the jury based on “plaintiff testif[ying] to the severity of her reaction which was verified by the observations of [her doctors].” *Id.* That plaintiff had testified to being upset, having difficulties in her personal relationships, and suffering nausea and diarrhea. *Id.* at 123-24. The referring doctor described her as “distraught,” while the clinical social worker referred to her as “distressed, frightened, and depressed.” *Id.* at 124. After the first appointment with the latter, she did not return for her second scheduled appointment. *Id.* Although it is unclear in the present case whether plaintiff would have her family doctor testify as to her emotional condition at trial, the purpose of which is to confirm plaintiff’s testimony, such an issue is one of credibility for a jury to consider. Cindy Ayers, plaintiff’s team leader, confirmed in her deposition that at least once it was obvious to her that plaintiff was upset near the end of her time at Sam’s Club. Dep. of Ayers at 47-48. As for plaintiff’s alleged injuries, they are comparable to the *Wigginton* plaintiff, and thus are properly reserved for jury consideration.

Defendants rely on the case of *Aly v. Garcia* as a factually analogous case in which the New Jersey appellate court held that two plaintiffs’ showing of emotional distress was insufficient as a matter of law. 754 A.2d 1232, 1237 (2000). In that case, however, the plaintiff was not harassed in the workplace; in contrast, she was harassed by a landlord. *Id.* at 1234. This distinction is of particular import under New Jersey law which recognizes workplace harassment as affecting the analysis of an

intentional infliction of emotional distress claim. Furthermore, the *Aly* court emphasized the fact that plaintiff did not seek medical assistance, another important distinction between the plaintiff in that case and the plaintiffs in both *Wigginton* and the present case. *Id.* at 1238. Because I find the present case to be more analogous to *Wigginton* than to *Aly*, New Jersey law informs us that this issue is one or trial.

As there are genuine issues of material fact regarding these two requisite elements of intentional infliction of emotional distress, under New Jersey law,⁴⁰ summary judgment would be inappropriate.

CONCLUSION

For the reasons explained above, I will grant in part and deny in part defendants' combined motion for summary judgment. With respect to plaintiff's Title VII claims, I will grant the motion as to defendant McWilliams because this statute does not support individual liability; thus judgment will be entered in his favor on this claim. I will deny the motion, however, as to defendant Sam's Club's liability because there are genuine issues of fact that impact its potential for liability under Title VII.

With respect to plaintiff's state law claims, I will grant the motion as to defendant Sam's Club because defendant McWilliams was not acting in the scope of his employment when he allegedly harassed plaintiff; therefore, there is no basis for vicarious liability on these claims. Accordingly, judgment in favor of Sam's Club will be entered on each of these claims. With respect to the assault

⁴⁰ Additionally, although it might be difficult for plaintiff to meet her burden on each of these elements, New Jersey law indicates a preference for leaving these determinations for the judgment of a properly instructed jury whenever there is evidence of offensive conduct and some emotional distress. *See, e.g., Taylor*, 706 A.2d at 699-701 (leaving it to jury to decide if single racial slur was sufficiently outrageous to cause person of plaintiff's position severe emotional distress); *Wigginton*, 734 A.2d at 807 (leaving it to a jury to decide whether verbal sexual harassment was sufficient for intentional infliction of emotional distress). Recognizing that submitting such a varied spectrum of factual scenarios to juries risks results that are inconsistent with the law, the *Wigginton* court counseled that "[s]ubmitting the issue to the factfinder with a careful instruction that defendants are not held liable when a hypersensitive plaintiff suffers severe emotional trauma from conduct that would not seriously harm most people serves the interest of justice to a greater degree than a dismissal at the close of proofs . . ." 734 A.2d at 807 (citing *Taylor*, 706 A.2d 685).

claim against defendant McWilliams, I will grant the motion because there is no genuine issue of material fact to be resolved as there is no evidence of assault; consequently, judgment will be entered in his favor on this claim. Conversely, I will deny defendants' motion as to the remaining state law claims, battery and intentional infliction of emotional distress, against individual defendant McWilliams because there are genuine issues of material fact for jury consideration.

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

GERALDINE SOFIA,	:	
	:	
Plaintiff,	:	
	:	
v.	:	CIVIL ACTION
	:	
PATRICK WILLIAMS AND	:	NO. 01-5394
SAM'S CLUB, Inc.	:	
	:	
Defendants.	:	

ORDER

And now on this _____ day of March, 2003, upon consideration of defendants' memorandum of law in support of their motion for summary judgment (Doc. #10) and plaintiff's memorandum of law in opposition thereto (Doc. #13), defendants' reply memorandum (Doc. #15), and each submission's supporting documentation, it is hereby **ORDERED** that defendants' motion for summary judgment, pursuant to Rule 56(c), is **GRANTED** in part and **DENIED** in part as follows:

1. Judgment is **ENTERED** for defendant McWilliams on the Title VII and assault claims.
2. Judgment is **ENTERED** for defendant Sam's Club on the state law claims, assault and battery and intentional infliction of emotional distress.
3. The balance of the motion is **DENIED**.

William H. Yohn, Jr., Judge