

1 UNITED STATES COURT OF APPEALS

2 FOR THE SECOND CIRCUIT

3  
4 August Term 2004

5 (Argued: December 17, 2004

Decided: June 14, 2005)

6 Docket No. 03-9242-cv

7  
8 GRETA FAIRBROTHER,

9 *Plaintiff-Appellant,*

10 —v.—

11 PAMELA MORRISON, CHIEF OF HUMAN RESOURCE OPERATIONS, I/O, AND JO-ANNE LIBERA,  
12 MATERIAL WITNESS,

13 *Defendants,*

14 STATE OF CONNECTICUT, DEPARTMENT OF MENTAL HEALTH AND ADDICTION SERVICES,

15 *Defendant-Appellee.*  
16

17 B e f o r e :

18 NEWMAN, POOLER, and KATZMANN, *Circuit Judges.*  
19

20 The plaintiff-appellant appeals from the district court's grant of judgment as a matter of  
21 law to the defendants under Fed. R. Civ. P. 50 on her hostile work environment and retaliation  
22 claims. We conclude that judgment as a matter of law was inappropriate as to the hostile work  
23 environment claim because 1) the plaintiff-appellant alleged harassment sufficiently severe or  
24 pervasive to alter the conditions of her employment and a sufficient basis for imputing the  
25 offending conduct to her employer, and 2) the defendants were not entitled to judgment as a  
26 matter of law based on an affirmative defense as to which they bore the burden of proof. We  
27 conclude that judgment as a matter of law was appropriate as to the plaintiff-appellant's retaliation

claim, due to her failure to allege an adverse employment action. Accordingly, we REVERSE in part and AFFIRM in part.

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KATZMANN, Circuit Judge:

At trial, Greta Fairbrother presented significant evidence of sexual harassment that was sharply disputed by her employer, the State of Connecticut’s Department of Mental Health and Addiction Services (“DMHAS”) and the other defendants. The jury returned a unanimous verdict in Fairbrother’s favor on her claims of both sexually hostile work environment harassment under Title VII and retaliation under Title VII. The district court, however, granted the defendants’ motion for judgment as a matter of law on both claims. We affirm the grant of judgment as a matter of law on Fairbrother’s retaliation claim, but reverse the district court’s order with respect to Fairbrother’s hostile work environment claim.

## BACKGROUND

We present first the evidence generally supporting Fairbrother’s case, followed by that generally supporting the defendants’ case. We then summarize briefly the procedural history.

1     A. Fairbrother's Case

2             Unless otherwise noted, the following facts are either undisputed, or based on  
3     Fairbrother's testimony or other evidence introduced by Fairbrother at trial.

4             Fairbrother began working for the State of Connecticut in September 1983, and, as of  
5     March 1996, worked for the state's Whiting Forensic Institute ("Whiting"), a division of  
6     DMHAS, which serves as a maximum-security facility for the criminally insane. At Whiting,  
7     Fairbrother worked as a Forensic Treatment Specialist, and in that capacity, provided care and  
8     treatment to Whiting's patients.

9             Whiting is divided into six units, and Forensic Treatment Specialists are assigned to work  
10    on specific units during one of three specific shifts. After working on Whiting's Unit Five for  
11    approximately two years, Fairbrother transferred to Unit One in 1998. The transfer appealed to  
12    her because it enabled her to move from the third to the second shift. Fairbrother was the only  
13    female working the second shift on Unit One. She reported to William Boisvert, the lead Forensic  
14    Treatment Specialist for the unit.<sup>1</sup>

15            According to Fairbrother, Unit One was permeated with hostility toward her, and much of  
16    it was of a sexual nature. This was particularly true after the fall of 1999, once the Head Nurse, to  
17    whom Boisvert reported, left the unit.<sup>2</sup> Boisvert and the other Forensic Treatment Specialists

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<sup>1</sup> Under Whiting's organization, Forensic Treatment Specialists reported to a lead Forensic Treatment Specialist for the unit, the lead Forensic Treatment Specialist reported to a Head Nurse, and the Head Nurse reported to a Nurse Supervisor.

<sup>2</sup> Although Fairbrother testified that she felt generalized "hostility" from Unit One's male employees as soon as she began working there, her situation became more uncomfortable after the fall of 1999.

1 would not answer her questions or give her messages when people called for her, and when  
2 patients would inquire concerning her whereabouts, her colleagues would not tell them where she  
3 was. Pornographic magazines were kept in the staff office and the staff bathrooms, and her male  
4 co-workers would often show her pictures from these magazines and ask her impression. At any  
5 given time, “probably two or three” sexually explicit jokes were posted on the office bulletin  
6 board. When Fairbrother brought coffee to her colleagues, she was asked “something to the  
7 effect” of “Where’s your French maid outfit?” or “Why isn’t it on you?”. Fairbrother’s male  
8 colleagues talked about “sex that they had with their wives,” and asked Fairbrother about her  
9 sexual practices. Boisvert and several of her co-workers, including Forensic Treatment  
10 Specialists Chris Colavito, Jacques Ouimette, and James Young, would often call her a “bitch”  
11 and a “whore.” The discussions concerning sex lives and referring to Fairbrother as a “bitch”  
12 happened almost every day. Fairbrother was called a “whore” between ten and fifteen times.

13 Because Boisvert was Fairbrother’s supervisor, and the extent of a supervisor’s  
14 involvement in harassment may affect the employer’s liability, Boisvert’s participation level may  
15 be relevant. Fairbrother testified that Boisvert caused the hostile work environment she faced,  
16 stating that the treatment she received was “all at his instigation.” When she complained to  
17 Boisvert about the presence of pornographic magazines, he “said something to the effect, I’ve  
18 been here eighteen, nineteen, however many years, and I’m not going to stop doing or you’re not  
19 going to prevent me from, you know, running the unit the way I want to run it.” After this  
20 conversation with Boisvert, the hostility worsened. Boisvert interrupted a meeting between  
21 Fairbrother and the new Head Nurse to insist that Fairbrother be removed from the unit.

1 In mid-February 2000, Fairbrother was taking a break outside in the courtyard when  
2 another employee came out with a ruler to measure the snow on the ground. Fairbrother testified  
3 that, from in the staff office, Colavito yelled at the employee with the ruler, "I hope it's as much  
4 or as long as your d-i-c-k," and that Unit One Head Nurse Tammi Brown laughed at Colavito's  
5 comment.

6 Fairbrother testified about several instances in which she lodged complaints concerning  
7 her treatment. In October or November 1999, she complained to Boisvert "about materials and  
8 the talk on the unit." According to Fairbrother, matters only worsened. In November 1999, she  
9 complained to Al Davis, her Nurse Supervisor, about the sexually hostile work environment she  
10 was facing, providing him with specific examples of what was occurring. Fairbrother approached  
11 Davis again a few weeks later because the situation was "getting increasingly worse." Although  
12 Davis promised to set up a meeting to address her concerns, none had been arranged as of mid-  
13 February. Apparently, this delay was due in part to intervening vacation schedules of both Davis  
14 and Fairbrother.

15 The day after the incident involving the ruler, Fairbrother also met with a Nurse  
16 Supervisor to complain that she had found Colavito's statement offensive. At that meeting,  
17 Fairbrother declined to file a "write-up" that would have referred the matter to the personnel  
18 department, but she reiterated her request for staff meetings concerning the hostility she was  
19 facing. At this point, staff meetings involving Fairbrother, Boisvert, and other Unit One  
20 employees were arranged. Unfortunately, Fairbrother testified, these meetings degenerated into a  
21 "circus" at which her colleagues impugned her integrity and criticized her work performance.

1           An incident on February 13, 2000, in which Fairbrother is alleged to have assaulted Ian  
2 Walker, a co-worker,<sup>3</sup> is relevant to Fairbrother's case because it may help to establish when she  
3 put Pamela Morrison, a Personnel Director, on notice of her claims. Morrison testified that she  
4 learned about the incident in "late February or early March," and began an investigation. When  
5 asked about her meeting with Morrison to discuss the incident, Fairbrother stated, "I discussed  
6 everything, the whole situation to her and we went back — I went back to my unit." Fairbrother  
7 also testified about a telephone conversation with Morrison before a May 9, 2000 "prediscipline  
8 hearing" relating to the incident.<sup>4</sup> In that conversation, Fairbrother gave Morrison "all the  
9 background information of what's been happening on the unit since the fall of '99," including  
10 "[h]ostilities, the magazines, the name calling, the accusations." At the prediscipline hearing,  
11 Fairbrother discussed the hostile work environment she claimed she faced.

12           Fairbrother also introduced evidence supporting her claim of retaliation. She testified that,  
13 as she was leaving the hearing, Morrison told her, "If you drop your suits, I'll drop mine."  
14 Fairbrother declined the alleged offer, filing a complaint with the Connecticut Commission on  
15 Human Rights & Opportunities ("CHRO") on May 18, 2000, alleging violations of Title VII, the  
16 Civil Rights Act of 1991, and certain Connecticut statutes. This complaint described "hostility"  
17 on the unit, the prevalence of "dirty jokes" and "sexual comments" on the unit, and the presence

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<sup>3</sup> See *infra*.

<sup>4</sup> This hearing is also referred to in the record as a *Loudermill* hearing. Such a hearing is held to determine "whether there are reasonable grounds to believe that the charges against the employee are true and support the proposed action." *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 546 (1985).

1 of "Playboy magazines on the unit." After filing this charge, Fairbrother was removed from Unit  
2 One and assigned to "float[] the building," working in different units as needed. She was told,  
3 however, never to enter Unit One. In October 2000, Fairbrother amended her complaint with  
4 CHRO, adding a charge of retaliation and alleging that other pornographic magazines, including  
5 *Hustler*, *Fox*, and *Gallery*, were present at Whiting.

6 In June 2000, Fairbrother ceased going to work on account of back pain which she  
7 attributed to an injury sustained some years earlier. DMHAS initially contested liability for her  
8 worker's compensation claim, but eventually, the Department paid the claim. In September 2000,  
9 Fairbrother was given an appraisal with an overall rating of "Unsatisfactory." Fairbrother had  
10 never received an "Unsatisfactory" rating in the past.

#### 11 12 B. The Defendants' Case

13 Unless otherwise noted, the following facts are either undisputed, or based on evidence put  
14 forth at trial by the defendants.

15 The defendants maintained that most, if not all, of the events that Fairbrother claimed  
16 created a hostile work environment never took place; their case was effectively built around an  
17 attack on Fairbrother's credibility. To support their position, the defendants called several of  
18 Fairbrother's co-workers and supervisors to testify at trial. William Boisvert, for example, denied  
19 ever having called Fairbrother a "bitch" or a "whore," said that he had never heard any other staff  
20 member call her these names, and added that if he had heard such names being used, he "would  
21 have stopped it right then and there." Boisvert also stated that, although Forensic Treatment

1 Specialists would routinely encounter pornography because patients sometimes possessed it, the  
2 staff would not leave such material lying around for Fairbrother or others to see.

3 Forensic Treatment Specialist Ronald Jursch testified that, contrary to Fairbrother's  
4 assertion that Fairbrother would make coffee and bring it to the staff, she would make coffee for  
5 only one other staff person "and exclude everybody else." Jursch stated that he never called  
6 Fairbrother a bitch or a whore, that he never heard anyone else call Fairbrother a "bitch" or  
7 "whore," or suggest to her that she wear a French maid outfit. Jursch also asserted that he never  
8 saw pornography lying out in the open, and that none of the male employees would talk about  
9 their sex lives.

10 Forensic Treatment Specialist Ian Walker testified that he never heard Boisvert call  
11 Fairbrother "bitch" or "whore," and never saw pornographic magazines left out in the open, nor  
12 did he hear Whiting employees discussing their sex lives. Forensic Treatment Specialist James  
13 Young testified that he never heard other employees making sexual comments around Fairbrother,  
14 never called her "bitch" or "whore," and never talked about his sex life with his co-workers.

15 Unit One Head Nurse Tammi Brown denied that Colavito ever made the sexual comment  
16 about the employee with the ruler. One female Forensic Treatment Specialist denied ever having  
17 seen pornography in the bathrooms, on the walls, or lying out in the open. Another testified that  
18 in her eighteen years at Whiting, she encountered pornographic magazines only once, and that  
19 they were promptly removed.

20 Lieutenant Steven Caron, a police officer at Whiting, testified that he would conduct  
21 monthly "environmental rounds" where he and others inspected every room in a unit, including

1 the staff areas. Caron said that he had never seen pornographic materials lying around the staff  
2 areas or the staff bathrooms, nor had he seen pornographic material posted on the walls. Caron  
3 did acknowledge, however, that another officer had found a *Playboy* magazine in a staff bathroom  
4 in Unit Two in 2000.

5 The defense argued that Fairbrother's motive to lie stemmed from the incident in which  
6 Fairbrother is alleged to have assaulted Ian Walker. On February 13, 2000, Young and Walker  
7 responded to a call for help in restraining a patient—also known as a “code.” Subsequently, they  
8 sat together in the staff room and discussed the episode with Brown. Fairbrother was also in the  
9 staff room at that time. According to Walker and Brown, while they were discussing the restraint  
10 episode, Fairbrother approached Walker and grabbed his groin, saying, in Brown's words, “Well,  
11 if I was there, this is what I would have done.” Brown stated that Fairbrother then laughed and  
12 left the room. Fairbrother described what took place as follows: “[Walker] mentioned another  
13 female [Forensic Treatment Specialist] that responded to the code and said something to effect,  
14 well, she can't fight, she's useless. And, in turn, I said in a joking manner, Well, you don't have  
15 to know how to fight. All you have to do is this.” According to Fairbrother, she then moved her  
16 hands toward Walker's crotch area, but did not grab him. Her hand “could have brushed his  
17 pants, but that was it.”

18 Counsel for the defendants argued during his summation that Fairbrother's anger over  
19 being disciplined for the incident involving Walker led her to fabricate her sexual harassment  
20 claims.

21 Title VII law permits defendants under certain circumstances to avoid liability based on

1 the reasonable care they take to prevent sexual harassment. Although this argument was not a  
2 significant component of the defendants' case to the jury, they did introduce evidence at trial that  
3 they now argue supports such a defense. The defendants introduced at trial DMHAS's written  
4 sexual harassment policy along with flyers and informational materials to assist potential  
5 complainants. The policy is laid out in a "Commissioner's Policy Statement" that defines sexual  
6 harassment to include, *inter alia*, "any conduct of a sexual nature when . . . such conduct has the  
7 purpose or effect of substantially interfering with an individual's work performance or creating an  
8 intimidating, hostile or offensive work environment." The policy statement specifies that "[a]ll  
9 complaints alleging sexual harassment should be made in writing to the facility Affirmative  
10 Action Officer or in the absence of a facility Affirmative Action Officer, to the facility Personnel  
11 Director, for investigation."

12 Morrison offered examples of how DMHAS responds to sexual harassment complaints.  
13 Morrison testified that, upon receiving a complaint concerning obscenities on a kitchen bulletin  
14 board, she immediately went to the kitchen in question, and found that the only obscene material  
15 had already been removed. After Fairbrother filed her CHRO complaint in May 2000, Morrison  
16 "interviewed members of the unit regarding specific allegations which Ms. Fairbrother had made  
17 in her complaint." When Morrison received Fairbrother's amended CHRO complaint in October  
18 2000 containing more detailed allegations about pornography on the premises at Whiting,  
19 Morrison called the Whiting police and ordered an investigation of the staff areas and bathrooms  
20 that turned up no pornography.

21 The defendants argue that Fairbrother failed to take advantage of these resources by failing

1 to notify them in a timely manner of the precise nature of her hostile work environment claims.  
2 Davis testified that when Fairbrother first came to him in the fall of 1999, she described only  
3 “personality conflicts,” identified no specific examples of mistreatment, and stated that “she could  
4 work the problems out on the unit.” Boisvert stated that she never complained to him about  
5 pornography, the French maid outfit, or a sexually hostile work environment. Morrison testified  
6 that, other than an April letter from Fairbrother’s attorney, to which she responded, “Please give  
7 me more details,” the first time she heard Fairbrother’s allegation that the workplace was  
8 permeated with sexually explicit material was when she received the amended CHRO complaint  
9 in October of 2000. Morrison also stated that, while the investigation into the incident with  
10 Walker was ongoing, Morrison “told [Fairbrother] how to submit any complaints of hostile work  
11 environment to me and the Affirmative Action Office, and she did not do so.”

12 On the retaliation issue, the defendants put forth evidence justifying the allegedly negative  
13 employment consequences that Fairbrother claimed to have suffered after she filed her complaint.  
14 Morrison testified that Fairbrother was transferred out of Unit One both because “if the allegations  
15 were true, we didn’t want her working in an environment where she was continually subjected to  
16 those circumstances,” and because “[i]f not corroborated, we didn’t want more unsubstantiated  
17 allegations against any co-workers.” The defense attributes Fairbrother’s unsatisfactory rating to  
18 her behavior during the Ian Walker incident and the resulting fifteen-day suspension. The  
19 defendants point out that Fairbrother acknowledged at trial that she had not lost any wages,  
20 retirement credits, or benefits, and had been able to pursue and work overtime.

1     C.     Procedural History

2             At the end of the four-day trial, the jury on March 17, 2003 returned a unanimous verdict  
3     in favor of Fairbrother on both the hostile work environment and retaliation claims. The jury  
4     awarded Fairbrother \$20,000 to compensate her for her “damages” generally, without designating  
5     the damages stemming from her sexually hostile work environment claim and those stemming  
6     from her retaliation claim. The defendants subsequently moved for judgment as a matter of law or  
7     a new trial. On October 29, 2003, the district court granted the defendants’ motion for judgment  
8     as a matter of law as to both claims. *Fairbrother v. Connecticut*, 306 F.Supp.2d 154, 175  
9     (D.Conn. 2003). Accordingly, the district court did not rule on the defendants’ motion for a new  
10    trial. Fairbrother filed this appeal in November 2003.

11  
12                             **DISCUSSION**

13    A.     Legal Standards in Reviewing a Grant of Judgment as a Matter of Law

14             Judgment as a matter of law in jury trials is provided for in Federal Rule of Civil  
15    Procedure 50. It may be granted against a party with respect to “a claim or defense that cannot . . .  
16    be maintained or defeated without a favorable finding” on an issue for which “there is no legally  
17    sufficient evidentiary basis for a reasonable jury to find for that party on that issue.” Fed. R. Civ.  
18    P. 50(a)(1). This circuit has stated that judgment as a matter of law “may only be granted if there  
19    exists ‘such a complete absence of evidence supporting the verdict that the jury’s findings could  
20    only have been the result of sheer surmise and conjecture,’ or the evidence in favor of the movant  
21    is so overwhelming ‘that reasonable and fair minded [persons] could not arrive at a verdict against

1 [it].” *Luciano v. Olsten Corp.*, 110 F.3d 210, 214 (2d Cir. 1997) (quoting *Cruz v. Local Union*  
2 *No. 3*, 34 F.3d 1148, 1154 (2d Cir. 1994)) (alterations in original). The motion should be granted  
3 “only if [the court] can conclude that, with credibility assessments made against the moving party  
4 and all inferences drawn against the moving party, a reasonable juror would have been compelled  
5 to accept the view of the moving party.” *Piesco v. Koch*, 12 F.3d 332, 343 (2d Cir. 1993). The  
6 court cannot assess the weight of conflicting evidence, pass on the credibility of witnesses, or  
7 substitute its judgment for that of the jury.” *Tolbert v. Queens College*, 242 F.3d 58, 70 (2d Cir.  
8 2001) (quoting *Smith v. Lightning Bolt Productions, Inc.*, 861 F.2d 363, 367 (2d Cir. 1988)).

9 A court of appeals reviews “a district court’s grant of a motion for judgment as a matter of  
10 law *de novo*,” viewing “the evidence in a light most favorable to the non-movant, granting that  
11 party every reasonable inference that the jury might have drawn in its favor.” *Schlaifer Nance &*  
12 *Co. v. Estate of Warhol*, 119 F.3d 91, 98 (2d Cir. 1997).

#### 14 B. Judgment as a Matter of Law on Fairbrother’s Hostile Work Environment Claim

##### 15 *Background Law*

16 A Title VII hostile work environment claim requires a showing that “the harassment was  
17 ‘sufficiently severe or pervasive to alter the conditions of the victim’s employment and create an  
18 abusive working environment.’” *Alfano v. Costello*, 294 F.3d 365, 373 (2d Cir. 2002) (quoting  
19 *Perry v. Ethan Allen, Inc.*, 115 F.3d 143, 149 (2d Cir. 1997)). “The plaintiff must show that the  
20 workplace was so severely permeated with discriminatory intimidation, ridicule, and insult that  
21 the terms and conditions of her employment were thereby altered.” *Id.* Proving such a claim

1 “involves showing both ‘objective and subjective elements: the misconduct shown must be severe  
2 or pervasive enough to create an objectively hostile or abusive work environment, and the victim  
3 must also subjectively perceive that environment to be abusive.’” *Feingold v. New York State*,  
4 366 F.3d 138, 150 (2d Cir. 2004) (quoting *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993)).

5 In addition, the plaintiff must show that a specific basis exists for imputing the  
6 objectionable conduct to the employer. “Where an employee is the victim of sexual harassment,  
7 including harassment in the form of a hostile work environment, by non-supervisory co-workers,  
8 an employer’s vicarious liability depends on the plaintiff showing that the employer knew (or  
9 reasonably should have known) about the harassment but failed to take appropriate remedial  
10 action.” *Petrosino v. Bell Atlantic*, 385 F.3d 210, 225 (2d Cir. 2004). According to two 1998  
11 Supreme Court cases, *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998), and *Faragher v.*  
12 *City of Boca Raton*, 524 U.S. 775 (1998), this inquiry differs where the harassment is attributed  
13 not to non-supervisory co-workers but to a supervisor with immediate or successively higher  
14 authority over the employee. *Burlington Indus.*, 524 U.S. at 765; *Faragher*, 524 U.S. at 807. In  
15 that circumstance, “a court looks first to whether the supervisor’s behavior ‘culminate[d] in a  
16 tangible employment action’ against the employee.” *Petrosino*, 385 F.3d at 225 (quoting  
17 *Burlington Indus.*, 524 U.S. at 765) (alteration in original). If it did, “the employer will, *ipso*  
18 *facto*, be vicariously liable.” *Mack v. Otis Elevator Co.*, 326 F.3d 116, 124 (2d Cir. 2003). If no  
19 such tangible employment action is present, however, an employer will still be liable for a hostile  
20 work environment created by a supervisor unless the employer successfully establishes an  
21 affirmative defense. *Petrosino*, 385 F.3d at 225. That defense requires the employer to show that

1 (a) it “exercised reasonable care to prevent and correct promptly any sexually harassing behavior,”  
2 and (b) “the plaintiff employee unreasonably failed to take advantage of any preventive or  
3 corrective opportunities provided by the employer or to avoid harm otherwise.” *Burlington*  
4 *Indus.*, 524 U.S. at 765.

5  
6 *Analysis*

7 The district court concluded that “Fairbrother has failed to provide any substantive  
8 evidence that the terms of her employment were altered, that a term, condition, or privilege of her  
9 employment was affected, or that anyone unreasonably interfered with her work performance.”  
10 *Fairbrother*, 306 F.Supp.2d at 174 (quotation marks omitted) (citing *Harris*, 510 U.S. at 21,  
11 *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 65 (1986)). In support of this determination, the  
12 district court noted that Fairbrother was still employed at Whiting and had lost no compensation  
13 or benefits, and further observed that “not one of the 500 employees at Whiting came forward to  
14 corroborate Fairbrother’s claims.” *Id.* at 174 n.12. In addition, the district court concluded that  
15 Fairbrother had not shown “any reason for imputing the alleged hostile work environment to  
16 DMHAS.” *Id.* at 174. Critical to this conclusion was the district court’s finding that Fairbrother  
17 “**never** reported her allegations of sexual harassment, permeating pornography, being called a  
18 ‘whore’ or a ‘bitch,’ or a sexually hostile environment to **anyone**, including her supervisors, her  
19 co-workers, the Department of Human Resources, the Affirmative Action Office, or anyone in the  
20 administration of Whiting or DMHAS.” *Id.* at 174-75 (emphasis in original). Based on these  
21 conclusions, the district court found “that Fairbrother’s version of the alleged facts is insufficient

1 to permit a reasonable jury to have found that she had been subjected to a sexually hostile work  
2 environment.” *Id.* at 175.

3 We note, at the outset, that the district court opinion devoted significant attention to  
4 evidence that, if relevant at all, appears to bear primarily on Fairbrother’s credibility. The district  
5 court delved into testimony suggesting that Fairbrother fabricated a story—unrelated to her hostile  
6 work environment claim—about how a patient called her “bitch,” *id.* at 159 n.3, and observed that  
7 Fairbrother initially alleged merely gender-neutral “hostility,” and only alleged a sexually hostile  
8 work environment after the incident involving Ian Walker. *Id.* at 157, 174. The district court  
9 noted that “[e]very male co-worker who testified was vehement in his denial of any of the  
10 misconduct allegedly attributed to him,” *id.* at 170, and discussed at length the defense witnesses’  
11 testimony concerning workplace conditions. *Id.* at 170-72. Fairbrother’s failure to allege  
12 wrongdoing by her “best friend,” Forensic Treatment Specialist David Phelps, *id.* at 157, and  
13 Boisvert’s testimony that Fairbrother once gave Phelps a “provocative” massage, *id.* at 170, were  
14 also of interest to the district court. Elsewhere, the district court opinion dwelled on aspects of  
15 Fairbrother’s competence—such as instances in which she allegedly agitated the patients—that  
16 were never asserted as a basis for any adverse action against her. *Id.* at 158-59.

17 The district court’s focus on this evidence, and its ultimate conclusion that “Fairbrother’s  
18 version of the alleged facts is insufficient to permit a reasonable jury to have found that she had  
19 been subjected to a sexually hostile work environment,” *id.* at 175, suggest a determination that a  
20 jury could not deem Fairbrother credible. However, a motion for judgment as a matter of law  
21 must be considered “with credibility assessments made *against* the moving party.” *Piesco v.*

1 *Koch*, 12 F.3d 332, 343 (2d Cir. 1993) (emphasis added). Indeed, it is difficult to understand how  
2 the district court reached its conclusion without engaging in “weighing the credibility of the  
3 witnesses or otherwise considering the weight of the evidence,” a task expressly prohibited when  
4 considering judgment as a matter of law. *Cruz v. Local Union No. 3, Int’l Bhd. of Elec. Workers*,  
5 34 F.3d 1148, 1155 (2d Cir. 1994) (quoting *Simblest v. Maynard*, 427 F.2d 1, 4 (2d Cir. 1970)).  
6 The district court erred to the extent it determined that Fairbrother’s allegations were not to be  
7 believed.

8 The district court also erred in determining that Fairbrother “failed to provide any  
9 substantive evidence that the terms of her employment were altered.” *Fairbrother*, 306 F.Supp.2d  
10 at 174. The district court based this conclusion on Fairbrother’s inability to show that she was  
11 terminated or lost compensation as a result of sexual harassment. *Id.* However, it is fundamental  
12 to a hostile work environment claim that the terms of the plaintiff’s employment are alleged to  
13 have been altered not by any change in benefits or employment status, but rather by  
14 “discriminatory intimidation, ridicule and insult that is sufficiently severe or pervasive.”  
15 *Dawson v. County of Westchester*, 373 F.3d 265, 272 (2d Cir. 2004) (quoting *Harris*, 510 U.S. at  
16 21).

17 Here we believe a jury could reasonably find such severe or pervasive workplace hostility.  
18 Fairbrother testified to the following. For a period of several months, she was called “bitch”  
19 almost daily, and called “whore” ten to fifteen times. Her male colleagues routinely talked about  
20 their sexual activities and asked Fairbrother about hers. She was asked why she was not wearing  
21 a French maid outfit. Pornography was left in the staff bathrooms and the staff office where team

1 meetings were held. Her male colleagues would also show her these pornographic materials and  
2 ask her impression of them. At any given time, there were at least two or three sexually offensive  
3 jokes posted on the staff office bulletin boards. A co-worker once yelled out to another a  
4 comment concerning the size of the other worker's private parts. When she complained about the  
5 pornography, her supervisor told her "you're not going to prevent me from . . . running the unit  
6 the way I want to run it." Moreover, these events made Fairbrother and her patients "anxious,"  
7 thereby creating a potentially dangerous work environment.

8         These circumstances are egregious enough to permit a reasonable juror to conclude that  
9 the conditions of Fairbrother's employment were altered because the hostile work environment  
10 she faced undermined her ability to perform her job. *See Dawson*, 373 F.3d at 274 (2d Cir. 2003)  
11 (stating that the "crucial question" in a hostile work environment case is "whether the workplace  
12 atmosphere, considered as a whole, undermined plaintiffs' ability to perform their jobs");  
13 *Whidbee v. Garzarelli Food Specialties, Inc.*, 223 F.3d 62, 70 (2d Cir. 2000) (rejecting district  
14 court's test of whether plaintiff's circumstances were "unendurable" or "intolerable" and stating  
15 "the test is whether the harassment is of such quality or quantity that a reasonable employee would  
16 find the conditions of her employment *altered for the worse*" (quotation marks omitted)).  
17 Certainly, the circumstances alleged by Fairbrother are consistent with—indeed, similar  
18 to—circumstances in cases where this court has vacated grants of summary judgment or judgment  
19 as a matter of law in the past. In *Dawson*, we vacated a grant of summary judgment in favor of  
20 the defendants on a hostile work environment claim based on demeaning materials and comments  
21 in a prison environment. *Dawson*, 373 F.3d at 267. We held that a hostile work environment

1 could be found to exist where two letters drafted by prison inmates containing sexually explicit  
2 references to female corrections officers were disseminated by male officers, who subjected  
3 female officers to inappropriate comments stemming from the letters. *Id.* at 268-70. In *Whidbee*,  
4 we vacated a grant of summary judgment on a hostile work environment claim where employees  
5 at a restaurant were subjected to racially offensive comments during a three-month period.  
6 *Whidbee*, 223 F.3d at 66-67. In *Leopold v. Baccarat, Inc.*, 174 F.3d 261 (2d Cir. 1999)  
7 (hereinafter “*Leopold I*”), we reversed a grant of judgment as a matter of law on a hostile work  
8 environment claim where the plaintiff’s supervisor had made several derogatory comments with  
9 sexual overtones.<sup>5</sup> *Id.* at 264-65. The treatment alleged here is comparable in its intimidating and  
10 belittling quality.

11 DMHAS argues the opposite: that courts have upheld the dismissal of hostile work  
12 environment claims based on incidents that were equally or more offensive than those recounted  
13 by Fairbrother. DMHAS cites only one Second Circuit case in support of this assertion, *Quinn v.*  
14 *Green Tree Credit Corp.*, 159 F.3d 759 (2d Cir. 1998). However, that case involved only two  
15 actionable incidents of alleged hostile treatment: a comment about the plaintiff’s body, and  
16 brushing the plaintiff’s breasts with some papers. *Id.* at 768. The court determined that those two  
17 events were “sufficiently isolated and discrete that a trier of fact could not reasonably conclude

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<sup>5</sup> In *Leopold I*, the evidence of a hostile work environment consisted entirely of the plaintiff’s own testimony that her supervisor repeatedly threatened to fire saleswomen and replace them with “young and sexy” hires, once told saleswomen that they were “nothing but a bunch of pussies,” stated that he “love[d] it when women fight,” told the plaintiff that she was in “good shape” given her age, and commented that one of the plaintiff’s co-workers was successful because she flirted with male customers. *Leopold I*, 174 F.3d at 265-66.

1 that they pervaded Quinn’s work environment.” *Id.* *Quinn* is clearly inapposite, because  
2 Fairbrother has alleged significantly more sustained and enduring patterns of hostile conduct,  
3 which, if true, could be found to have permeated her work environment.

4 For all the aforementioned reasons, we thus conclude that Fairbrother’s allegations  
5 sufficed to permit a reasonable juror to determine that her conditions of employment were altered.

6 The district court apparently rendered an alternative ruling that, even if the sexually  
7 explicit material and behavior confronting Fairbrother did alter the conditions of her employment,  
8 the defendants were still entitled to judgment as a matter of law because no specific basis existed  
9 for imputing the objectionable conduct to the employer. We respectfully disagree.

10 As noted *supra*, a plaintiff can impute conduct that creates a hostile work environment to  
11 the employer in different ways depending on whether the conduct was carried out by the  
12 plaintiff’s supervisor or by non-supervisory co-workers. Here, if Fairbrother’s testimony was to  
13 be believed, the harassment was created by both her co-workers and her supervisor. Under such  
14 circumstances, courts analyze whether employer liability can be established under either test. *See*  
15 *Haugerud v. Amery Sch. Dist.*, 259 F.3d 678, 696-700 (7th Cir. 2001); *Nichols v. Azteca Rest.*  
16 *Enters., Inc.*, 256 F.3d 864, 875-77 (9th Cir. 2001).

17 To establish employer liability for the role her co-workers played in creating a hostile  
18 work environment, Fairbrother must show “that the employer ‘failed to provide a reasonable  
19 avenue for complaint or . . . knew, or in the exercise of reasonable care should have known, about  
20 the harassment yet failed to take appropriate remedial action.’” *Howley v. Town of Stratford*, 217  
21 F.3d 141, 154 (2d Cir. 2000) (quoting *Richardson v. N.Y. State Dep’t of Corr. Serv.*, 180 F.3d

1 426, 441 (2d Cir. 2000)). Fairbrother testified that on multiple occasions, she complained to  
2 different officials at Whiting about her treatment. Initially, she complained to Boisvert, her  
3 supervisor, telling him “about materials and talk on the unit.” In November 1999, she complained  
4 to Davis, her Nurse Supervisor, about the sexually hostile work environment she was facing,  
5 providing him with specific examples of “what was going on.” She testified that she informed  
6 Morrison, whom she identified as a Personnel Director, of the “[h]ostilities, the magazines, the  
7 name calling, the accusations,” in a conversation *before* the prediscipline hearing on May 9, 2000.  
8 In addition, Fairbrother testified that, in a meeting in which Morrison wished to discuss the Ian  
9 Walker incident—the investigation of which was commenced in late February or early  
10 March—Fairbrother “discussed everything, the whole situation.” According to Fairbrother, none  
11 of these complaints spurred meaningful action by her employer, other than a series of staff  
12 meetings that were delayed by several months and that ultimately were not at all constructive or  
13 remedial. To be sure, Boisvert, Davis, and Morrison all denied that Fairbrother had put them on  
14 notice of her hostile work environment claims. However, if a juror credited Fairbrother’s  
15 testimony over theirs, that juror could have reasonably determined that DMHAS, in the exercise  
16 of reasonable care, knew or should have known about the co-worker harassment faced by  
17 Fairbrother, yet failed to take appropriate remedial action.

18 There was also reason for the jury to impute liability based on the participation of  
19 Fairbrother’s supervisor. Fairbrother claimed that Boisvert created the hostile work environment,  
20 testifying that he called her “whore” and “bitch,” would not answer her questions or give her  
21 phone messages when people called, insisted in her presence that she be removed from the unit,

1 and instigated the hostile conduct toward her generally. An employer is presumptively liable for a  
2 hostile work environment created by a supervisor. *See Faragher*, 524 U.S. at 807; *Burlington*  
3 *Indus.*, 524 U.S. at 765; *Leopold v. Baccarat*, 239 F.3d 243, 245 (2d Cir. 2001) (hereinafter  
4 “*Leopold II*”). However, if the employer takes no tangible employment action in connection with  
5 the harassment, the employer has available an affirmative defense.<sup>6</sup> *See Faragher*, 524 U.S. at  
6 807; *Burlington Indus.*, 524 U.S. at 765; *Leopold II*, 239 F.3d at 245. Again, that “defense  
7 comprises two necessary elements: (a) that the employer exercised reasonable care to prevent and  
8 correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably  
9 failed to take advantage of any preventive or corrective opportunities provided by the employer or  
10 to avoid harm otherwise.” *Faragher*, 524 U.S. at 807; *Burlington Indus.*, 524 U.S. at 765.

11 This aspect of the *Burlington Industries/Faragher* analysis is an affirmative defense on  
12 which the employer bears the burden of proof. *See Fitzgerald v. Henderson*, 251 F.3d 345, 357  
13 (2d Cir. 2001). A party faces a significantly heightened standard to obtain judgment as a matter of  
14 law on an issue as to which that party bears the burden of proof. “It is rare that the party having  
15 the burden of proof on an issue at trial is entitled to a directed verdict.” *Granite Computer*  
16 *Leasing Corp. v. Travelers Indem. Co.*, 894 F.2d 547, 551 (2d Cir. 1990). Indeed, “[a] verdict

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<sup>6</sup> In our discussion of Fairbrother’s retaliation claim, we conclude that she failed as a matter of law to show an adverse employment action sufficient to sustain that claim. *See infra*. We need not and do not decide, however, whether a “tangible employment action” under *Burlington Industries* and *Faragher* is different from an “adverse employment action” as that term is understood in the employment discrimination case law. Because we reject the defendants’ *Burlington Industries/Faragher* affirmative defense on other grounds, we assume for purposes of our analysis that the defendants took no tangible employment action against Fairbrother.

1 should be directed in such instances only if the evidence in favor of the movant is so  
2 overwhelming that the jury could rationally reach no other result.” *Id.* See also *Yurman Design,*  
3 *Inc. v. PAJ, Inc.*, 262 F.3d 101, 109 (2d Cir. 2001); 9 *Moore’s Federal Practice* § 50.05 (2004)  
4 (“[G]ranting judgment as a matter of law for a party who bears the burden of proof is an extreme  
5 step that may be taken only when the evidence favoring the movant is so one-sided that, absent  
6 adequate evidentiary response by the nonmovant, it could not be disbelieved by a reasonable  
7 jury.”).

8 The defendants clearly failed to attain this high standard on the second component of the  
9 affirmative defense, which requires demonstrating “that the plaintiff employee unreasonably failed  
10 to take advantage of any preventive or corrective opportunities provided by the employer or to  
11 avoid harm otherwise.” *Faragher*, 524 U.S. at 807; *Burlington Indus.*, 524 U.S. at 765. Again,  
12 DMHAS’s written policy stated that an employee was to contact an Affirmative Action Officer or  
13 a Personnel Director at the “facility”—i.e., at Whiting.

14 Because the defendants bore the burden of proof on this issue, at the very least, DMHAS  
15 would have had to identify all of the Affirmative Action Officers and Personnel Directors to  
16 whom Fairbrother might have complained, and show conclusively that she did not. See *Leopold*  
17 *II*, 239 F.3d at 246 (stating that to obtain summary judgment based on the *Burlington*  
18 *Industries/Faragher* affirmative defense, a defendant must “satisf[y] its initial burden of  
19 demonstrating that an employee has completely failed to avail herself of the complaint  
20 procedure”). This they did not do. The defendants introduced no affirmative evidence that  
21 Fairbrother failed to complain to an Affirmative Action Officer. Presumably, such evidence

1 would have been available, in the form of that office's records, or the testimony of the Affirmative  
2 Action Officers to whom Fairbrother might have complained. Fairbrother herself acknowledged  
3 that she did not complain to the Affirmative Action Office in November 1999, testifying that at  
4 that time, she wanted to "maintain it on the unit." She also acknowledged that she did not file any  
5 "formal complaints" prior to the incident involving Ian Walker, which took place in mid-February  
6 2000. This, of course, leaves open the possibility that she filed a "formal complaint" after mid-  
7 February 2000 and before mid-May 2000, when she filed her complaint with the Connecticut  
8 Commission on Human Rights & Opportunities. Fairbrother's testimony also does not foreclose  
9 the possibility that she put a Personnel Director or an Affirmative Action Officer on notice of her  
10 claims through informal conversations, such as the ones she had with Morrison.

11 The defendants did offer the testimony of Morrison, a Personnel Director. When Morrison  
12 was asked whether Fairbrother's October complaint was the first mention of "magazines and a  
13 hostile work environment," Morrison responded, "Yes, it is," and she gave similar testimony in  
14 response to other questions. Morrison testified that, other than an April letter from Fairbrother's  
15 attorney, the first time she "heard Ms. Fairbrother's allegation that the workplace was permeated  
16 with sexually-explicit material" was when she received "the amended CHRO complaint in  
17 October of 2000." Morrison also stated that, while the investigation into the incident involving  
18 Walker was ongoing, Morrison "told [Fairbrother] how to submit any complaints of hostile work  
19 environment to me and the Affirmative Action Office, and she did not do so." The defendants did  
20 not establish how Morrison, a Personnel Director and apparently not part of the Affirmative  
21 Action Office, would have personal knowledge concerning whether or not Fairbrother filed a

1 complaint there.

2 Even if we were to overlook the defendants' failure to establish that Fairbrother never  
3 complained to an Affirmative Action Officer, and if we were to conclude that Morrison was the  
4 only Personnel Director to whom Fairbrother was supposed to complain, we would have to accept  
5 the possibility that the jury could have simply disbelieved Morrison, a defendant in this action.  
6 Essentially, we would be left with Morrison's testimony that Fairbrother did not inform her of a  
7 hostile work environment before October 2000 against Fairbrother's testimony that she did. We  
8 cannot conclude on this record that the defendants' evidence is so "overwhelming" that the jury  
9 could rationally reach no other result. *Granite Computer*, 894 F.2d at 551. To do so would  
10 necessarily entail weighing the credibility of the witnesses, something we are expressly prohibited  
11 from doing on judgment as a matter of law. *Cruz*, 34 F.3d at 1155. For these reasons, the district  
12 court was mistaken to the extent it relied on the *Burlington Industries/Faragher* affirmative  
13 defense to conclude that liability could not be imputed to DMHAS for the hostile work  
14 environment created by Boisvert.

15 We note that the incompleteness of the defendants' evidence that Fairbrother failed to put  
16 her employer on notice of sexual harassment is not surprising, given that this argument was not  
17 the thrust of the defendants' case. Their primary argument, as evidenced by their choice of  
18 witnesses and their summation to the jury, was that Fairbrother was fabricating the events  
19 constituting her hostile work environment claim. Only now that the jury has clearly rejected that

1 argument do they seriously press their claim that liability should not be imputed to DMHAS.<sup>7</sup>  
2 However, they have simply failed to identify the evidence necessary to sustain judgment as a  
3 matter of law on this issue, one as to which they bear the burden of proof.

4 For these reasons, judgment as a matter of law in favor of the defendants on the issue of a  
5 sexually hostile work environment was not appropriate, and we reverse this aspect of the district  
6 court's ruling.

7 On remand, the district court may consider whether to grant the defendant's motion for a  
8 new trial on the hostile work environment claim under Fed. R. Civ. P. 59(a). *See Otero v.*  
9 *Bridgeport Hous. Auth.*, 297 F.3d 142, 154 (2d Cir. 2002); *United States v. Landau*, 155 F.3d 93,  
10 104 (2d Cir. 1998).

11  
12 C. Judgment as a Matter of Law on Fairbrother's Retaliation Claim

13 The district court also granted judgment as a matter of law to the defendants on

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<sup>7</sup> Indeed, the defendants placed such a low priority on this argument that they failed to insure that the district court gave the jury proper instructions concerning the *Burlington Industries/Faragher* defense. The district court instructed the jury that "an employer is presumed absolutely liable when the harasser is the victim's supervisor," but did not instruct the jury that under such circumstances, if the employer takes no tangible employment action in connection with the harassment, the employer has available an affirmative defense based on the reasonable care taken to prevent harassment and the plaintiff's unreasonable failure to take advantage of such measures. *See Faragher*, 524 U.S. at 807; *Burlington Indus.*, 524 U.S. at 765. At oral argument, counsel for DMHAS acknowledged that the jury instructions did not explain the *Burlington Industries/Faragher* affirmative defense, and acknowledged that he "probably" did not object to this omission. We see no evidence in the record that the defendants made such an objection. Essentially, the defendants, having failed to give the jury the opportunity to grant them a verdict based on this affirmative defense, ask the courts to rectify their error. Particularly in light of the incompleteness of the evidence they offer on this issue, we cannot grant them this relief.

1 Fairbrother’s retaliation claim, concluding that the evidence did not support a finding of an  
2 adverse employment action.<sup>8</sup> *Fairbrother*, 306 F.Supp.2d at 166.

3 An adverse employment action is a “‘materially adverse change’ in the terms and  
4 conditions of employment.” *Sanders v. N.Y. City Human Res. Admin.*, 361 F.3d 749, 755 (2d Cir.  
5 2004) (quoting *Richardson*, 180 F.3d at 446). We have stated that such an action “is one which is  
6 ‘more disruptive than a mere inconvenience or an alteration of job responsibilities.’” *Terry v.*  
7 *Ashcroft*, 336 F.3d 128, 138 (2d Cir. 2003) (quoting *Galabya v. N.Y. City Bd. of Educ.*, 202 F.3d  
8 636, 640 (2d Cir. 2000)). “Examples of materially adverse changes include ‘termination of  
9 employment, a demotion evidenced by a decrease in wage or salary, a less distinguished title, a  
10 material loss of benefits, significantly diminished material responsibilities, or other indices . . .  
11 unique to a particular situation.” *Id.* (quoting *Galabya*, 202 F.3d at 640).

12 After she filed a discrimination complaint in May 2000, Fairbrother was transferred out of

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<sup>8</sup> The district court’s opinion stated that the lack of an adverse employment action meant that Fairbrother had not made out a “prima facie case” of discrimination. *Fairbrother*, 306 F.Supp.2d at 166. However, Supreme Court and Second Circuit case law make clear that once a Title VII case has been “fully tried on the merits, [a court] need not determine whether [the plaintiff] established a prima facie case.” *Coffey v. Dobbs Int’l Servs., Inc.*, 170 F.3d 323, 326 (2d Cir. 1999). *Coffey* relied on *United States Postal Service Board of Governors v. Aikens*, 460 U.S. 711 (1983), in which the Supreme Court stated that once a case is tried on the merits, “the defendant has done everything that would be required of him if the plaintiff had properly made out a prima facie case,” and consequently, “whether the plaintiff really did so is no longer relevant.” *Id.* at 715. However, in addition to being a requirement of a prima facie case, an adverse employment action is a necessary component of any claim of retaliatory discrimination. See *Weeks v. N.Y. State Div. of Parole*, 273 F.3d 76, 85 (2d Cir. 2001) (“An adverse employment action is a requisite of a claim alleging disparate treatment or retaliation.”); *Grant v. Bethlehem Steel Corp.*, 622 F.2d 43, 46 (2d Cir. 1980). For this reason, we analyze whether the district court was correct when it concluded that the evidence did not support finding an adverse employment action.

1 Unit One, and given “float[ing]” responsibilities in all the other units. Her work as a floater did  
2 not involve any material difference from her work in Unit One. Although she was prohibited  
3 from entering Unit One—a measure that seems a reasonable response to her complaint of sexual  
4 harassment in that unit—this only required her to walk a short distance out of her way  
5 occasionally. Moreover, Fairbrother acknowledges that she did not lose wages, retirement credits,  
6 benefits, or overtime opportunities due to this transfer. Without a real change in the conditions of  
7 employment, a transfer is only “a mere inconvenience or an alteration of job responsibilities,” and  
8 hence not “materially adverse.” *Galabya*, 202 F.3d at 640. Fairbrother testified that she suffered  
9 emotional losses due to this shift. However, “[i]f a transfer is truly lateral and involves no  
10 significant changes in an employee’s conditions of employment, the fact that the employee views  
11 the transfer either positively or negatively does not of itself render the denial or receipt of the  
12 transfer [an] adverse employment action.” *Williams v. R.H. Donnelley, Corp.*, 368 F.3d 123, 128  
13 (2d Cir. 2004) (quoting *Sanchez v. Denver Pub. Sch.*, 164 F.3d 527, 532-33 n.6 (10th Cir. 1998))  
14 (alterations in original).

15 The department initially contested Fairbrother’s application for worker’s compensation  
16 due to a back injury. However, her claim was eventually paid. Thus, the department’s handling  
17 of her application was not a material loss of benefits.

18 In September 2000, Fairbrother received an appraisal with an overall rating of  
19 “Unsatisfactory.” This evaluation was followed by a positive evaluation the next year, and  
20 Fairbrother does not assert that the “unsatisfactory” evaluation negatively altered her  
21 compensation, benefits, or job title. In *Weeks v. New York State Division of Parole*, 273 F.3d 76

1 (2d Cir. 2001), this court held that a notice informing an employee of incompetence and a  
2 “counseling memo” concerning the employee’s conduct, without any allegation of negative  
3 ramifications for the plaintiff’s job conditions, could not constitute an adverse employment action.  
4 *Id.* at 86. The court explained that “a criticism of an employee (which is part of training and  
5 necessary to allow employees to develop, improve and avoid discipline) is not an adverse  
6 employment action.” *Id.* Similarly, in *Jenkins v. Board of Education*, 64 Fed. Appx. 801 (2d Cir.  
7 2003), this court rejected a claim of an adverse employment action based on an “unsatisfactory”  
8 evaluation that was either threatened or actually received, because “there is no evidence that  
9 Plaintiff-Appellant suffered a diminution in salary or benefits.” *Id.* at 804. *See also Sanders v.*  
10 *N.Y. City Human Res. Admin.*, 361 F.3d 749, 756 (2d Cir. 2004) (holding that jury could  
11 reasonably find that a negative evaluation was not an adverse employment action where plaintiff  
12 had offered no proof that the “evaluation had any effect on the terms and conditions of her  
13 employment”); *Richardson*, 180 F.3d at 443-44 (rejecting claim of adverse employment action  
14 based on two reviews that characterized the plaintiff’s performance as “average” rather than  
15 “excellent”).

16 In response, Fairbrother relies primarily on *Treglia v. Town of Manlius*, 313 F.3d 713 (2d  
17 Cir. 2002), in which the plaintiff had received a negative performance evaluation, and this court  
18 vacated the district court’s grant of summary judgment to the defendant on the plaintiff’s  
19 retaliation claim. *Id.* at 717, 724. In that case, the negative employment evaluation was part of a  
20 panoply of evidence that the plaintiff suffered truly adverse consequences, including three internal  
21 investigations, an involuntary transfer to an administrative, non-enforcement position, assignment

1 to front-desk responsibilities full-time, assignment to the night shift in front of less senior officers,  
2 involuntary placement on disability leave, and being passed over for promotion to sergeant in  
3 favor of an officer with lower exam scores. *Id.* at 717-18. Consequently, *Treglia* does not afford  
4 a sufficient basis for Fairbrother’s contention that the September 2000 evaluation constituted an  
5 adverse employment action.

6 Thus, we conclude that the September 2000 evaluation does not support her claim of an  
7 adverse employment action.

8 For all of these reasons, there is no legally sufficient evidentiary basis for a reasonable jury  
9 to find for Fairbrother on the issue of an adverse employment action.<sup>9</sup> The district court thus  
10 properly granted judgment as a matter of law to the defendants on Fairbrother’s retaliation claim.

11  
12 D. The Damages Award

13 The jury awarded Fairbrother \$20,000 in damages in response to an interrogatory that  
14 asked, “What amount of money do you award Ms. Fairbrother to compensate her for her  
15 damages?”. In supplemental briefing to this court, the parties outlined their views concerning  
16 how to allocate this award if the district court’s judgment were reversed on one claim but not the  
17 other. Fairbrother argues that she should be awarded the full \$20,000, pointing out that the

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<sup>9</sup> We note that Fairbrother waived any claim that her fifteen-day suspension without pay as punishment for the Ian Walker incident was an adverse employment action. Fairbrother apparently did not object to the district court’s instruction to the jury that she “is not alleging that her suspension was an adverse employment action.” Moreover, Fairbrother’s attorney stated during summation to the jury. “When Greta went to her Loudermill hearing, Greta admitted and she never denied that her conduct was inappropriate. We’re not contesting the 15-day suspension. We’re not asking you to award damages for the 15-day suspension . . . .”

1 defendants consented to a general verdict form that did not ask the jury to specify what portion of  
2 the damages is attributable to each claim. She asserts that this court should not speculate as to the  
3 jury's thinking, and instead rely on what we know with certainty, which is that "the jury believed  
4 plaintiff-appellant suffered damages in the amount of \$20,000." DMHAS responds that we  
5 should reduce the damage award to \$10,000. They point out that the jury specifically answered  
6 "Yes" to two separate questions, one asking whether Fairbrother was harmed due to a hostile  
7 work environment, and the other whether she was harmed due to retaliation.

8 The parties have not pointed out any trial testimony or documentary evidence regarding  
9 the amount of Fairbrother's damages stemming from either claim. In closing arguments to the  
10 jury, the only mention of damages came from Fairbrother's attorney, who initially commented  
11 that, "[t]his isn't a case about money." A final comment by her attorney arguably suggests that  
12 Fairbrother asked for damages based only on the hostile work environment claim: "We're not  
13 asking for \$1 million. \$1 million is not appropriate, but some compensation for having to put up  
14 with the sexual, the inappropriate work environment, for suffering through three years where this  
15 stigma is still attached to her."

16 Our conclusion that Fairbrother suffered no adverse employment action might weigh in  
17 favor of concluding that nearly all of the award should be associated with the hostile work  
18 environment claim. For all the reasons discussed *supra*, we believe it would have been difficult  
19 for the jury to conclude that any action taken against Fairbrother in retaliation for her protected  
20 activity caused her significant harm. Consequently, a reasonable reading of the jury's verdict  
21 might be to assume that nearly all of the \$20,000 in awarded damages is attributable to the hostile

1 work environment claim.

2           However, given the paltry record concerning damages, and the fact that the district court  
3 has not yet ruled on this issue, we conclude that the prudent course is to follow “[t]he general rule  
4 in our circuit . . . that ‘a federal appellate court does not consider an issue not passed upon  
5 below.’” *United States v. Collado*, 348 F.3d 323, 328 (2d Cir. 2003) (quoting *Robinson v. Gov’t*  
6 *of Malaysia*, 269 F.3d 133, 147 (2d Cir. 2001)). We decline to rule on this issue, and instruct the  
7 district court to consider it on remand.

## 8 9 **CONCLUSION**

10           Accordingly, that portion of the district court’s order dated October 29, 2003 granting the  
11 defendants judgment as a matter of law on Fairbrother’s sexually hostile work environment claim  
12 is REVERSED. That portion of the order granting the defendants judgment as a matter of law on  
13 Fairbrother’s retaliation claim is AFFIRMED. The case is remanded for further proceedings  
14 consistent with this opinion, including a determination by the district court on the issue of  
15 damages, and resolution of the defendant’s motion for a new trial on the hostile work environment  
16 claim under Fed. R. Civ. P. 59(a), if the defendants choose to renew that motion.