IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

SHIRLEY SELDOMRIDGE,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action No. 99-496 GMS
	)	
UNI-MARTS, INC.,	)	
	)	
Defendant.	)	

M E M O R A N D U M   A N D   O R D E R

I. INTRODUCTION

On August 3, 1999, Shirley Seldomridge ("Seldomridge") filed this employment discrimination lawsuit against her former employer, Uni-Marts, Inc. ("Uni-Marts"), under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* (1994), and the Civil Rights Act of 1991. 42 U.S.C. § 1981(a) (1994). In her complaint, Seldomridge alleges that she was sexually harassed when her supervisor stood naked before her as she was working one afternoon. As a result, Seldomridge claims that she experienced a hostile working environment and was subsequently constructively discharged from her position at Uni-Marts. Presently before the court is Uni-Marts' motion for summary judgment. After reviewing the record in the light most favorable to Seldomridge, the court concludes that she cannot establish her claims as a matter of law, and will therefore, grant Uni-Mart's motion for summary judgment.

The following sections explain the reasons for the court's decision more thoroughly.

II. FACTS

Shirley Seldomridge is a married woman who once worked at a Uni-Marts convenience store in Delaware. Seldomridge had been employed at Uni-Marts from December 5, 1997 until on or about February 11, 1998. On Friday, January 16, 1998, Seldomridge was working at the store with her supervisor, Robert A. Walsh ("Walsh"). At some time between 1 and 2 p.m. that day, Walsh told Seldomridge that he was going to go to the bathroom, but when he came out, he would be wearing "nothing but a cigarette." At first, Seldomridge thought her manager was joking, and thus, she paid his comment no mind. However, a few minutes later, she looked up and saw Walsh standing in the doorway to the storage area completely naked and "posing" approximately 36 steps away from where she was standing. According to Seldomridge, she glanced at Walsh for less than a second, promptly looked away, and stated, "Oh, my God." Walsh then ran into the bathroom of the workplace and stayed there for as long as Seldomridge remained in the store.

About ten to fifteen minutes after the incident, Seldomridge called her husband to come and pick her up from the store. Within five minutes, he arrived and took her home. She yelled to Walsh that she was leaving and that she would not be back. Later that afternoon at around three o'clock, Seldomridge says that Walsh called her at home, but she would not talk to him.

On the day of the incident, Seldomridge referred to her employee handbook and telephoned a toll-free number at the Uni-Marts headquarters to complain about the incident. She spoke to someone, described what had happened to her, and was told she would be contacted. She also called this number after Walsh called her at home. There is evidence in the record that Seldomridge received a call from Uni-Marts offices at 4:25 that afternoon.

Seldomridge also approached a New Castle County Police Officer and advised him that Walsh

had "exposed his genitals" to her. As a result, Walsh was charged with Indecent Exposure in The Second Degree in violation of Section 764(a) of Title 11 of the Delaware Code. Walsh pled guilty to the charge in March of 1998. Seldomridge further alleges that she was so upset by the incident that she consulted with a psychiatrist on the very next business day. Seldomridge states that she consulted the psychiatrist about the incident one time. The record indicates that Seldomridge had been consulting this psychiatrist since 1995 or 1996.

A. Uni-Marts' Conduct After Incident and Sexual Harassment Policy

As a result of Seldomridge's call to the toll-free number, a Uni-Marts attorney and a Uni-Marts regional manager contacted John C. Minchak ("Minchak"), a group supervisor at Uni-Marts responsible for monitoring the day-to-day operations of a group of Uni-Marts' stores. Minchak was advised to give Seldomridge time off with pay, and told to suspend Walsh until Uni-Marts completed its investigation.

Minchak attempted to contact Walsh on the evening of the incident, but did not have a chance to speak to him until some time between six and seven the next morning. At this time, Walsh admitted his actions. As a result, Minchak immediately terminated Walsh's employment with Uni-Marts.

Uni-Marts contacted Seldomridge to inform her that Walsh had been fired and that she could take time off with pay. Although it is not clear from the record, it appears that Seldomridge returned to work approximately one to two weeks after the incident. In her deposition, Seldomridge acknowledged that Uni-Marts acted appropriately in terminating Walsh. There is no evidence in the record that Walsh contacted her after his termination.

It is undisputed that Uni-Marts had a sexual harassment and discrimination policy that was

communicated to Seldomridge when she began her employment. This policy was communicated to employees through the employee handbook and a policy and procedures letter provided to each employee when hired. Seldomridge acknowledges that she received, read, and understood the company's policies by signing the acknowledgment page of the employee handbook and signing and initialing the company's policy and procedures letter. Seldomridge also acknowledges that she "called the sexual harassment number in that handbook." Thus, it is not disputed that she used the sexual harassment policy when she called the Grievance Committee to report Walsh's conduct on January 16, 1998.

The policy in effect during Seldomridge's employment was originally drafted in May of 1987. It was amended in October of 1991. The policy seeks to prevent sexual harassment and discrimination in the workplace. It clearly states that sexual harassment or discrimination will not be tolerated by Uni-Marts. The policy also sets forth a process for employees to complain and seek redress from the company in the event that an employee believes he or she is the victim of sexual harassment or is having any type of difficulty in the workplace. Specifically, the policy provides for a Grievance Committee to investigate and remedy any workplace problems.

B. Alleged Hostile Work Environment and Constructive Discharge

Before the incident, Seldomridge stated that Walsh made her uncomfortable at work by saying that he thought she was pretty, he would like to "rock her world," and by making other "stupid, off-the wall comments." The record indicates that Seldomridge never filed a grievance against Walsh for making any of these comments prior to the incident. As Seldomridge's supervisor, Walsh had the power to: set her work schedule, fire her, recommend an increase or decrease in her wages, undertake or recommend tangible employment decisions affecting her, and direct her daily activities.

There is no evidence in the record that Walsh made any negative employment decisions against Seldomridge.

After the incident, Seldomridge continued to work for Uni-Marts for approximately one month after Walsh's termination. During this time period, she alleges that she was subjected to comments by customers and a co-worker named Teddy[1] about the incident with Walsh. She stated that some customers would come into the store and make "really stupid comments." According to Seldomridge, Teddy would agree with customers by saying he did not believe that Walsh would do "anything like that." Besides Teddy, Seldomridge stated that other Uni-Marts' employees believed her. Seldomridge also stated that a customer who was friendly with Walsh did not believe her and that this customer did not want Seldomridge to wait on her. According to Seldomridge, this customer also made "smart comments behind her back." She also stated that one customer joked that he would take his clothes off, too. Seldomridge characterized the conduct by Teddy and certain customers as an "every day thing."

Seldomridge admits that she never used the phone number in the handbook to notify the Grievance Committee of the problems she was having in the store. She also admits that she never notified anyone in management at Uni-Marts about any problems in the store after the incident with Walsh. However, Seldomridge claims that the acting store manager at this time knew how she was being treated. There is no other evidence in the record supporting this claim. Within a month after returning to work, Walsh left her employment at Uni-Marts for another job at a place called the Eating Post.

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[1]Although Seldomridge states that Teddy was "hostile" to her and would not speak to her, she does not provide any specific examples.

C. Walsh's Employment At Uni-Marts

Walsh was hired by Uni-Marts on August 28, 1993. On his employment application, Walsh stated that the reason he left his prior position was "violation of co[mpany] policy." Four months after being hired by Uni-marts, Walsh was promoted to store manager. On June 2, 1995, Walsh was promoted to supervisor. In connection with that promotion, Uni-Marts conducted a search of Walsh's driving record. The record showed a number of traffic violations. As a result, a Uni-Marts manager wrote a memo remarking that "His overall [sic] seems to indicate a disregard for rules and regulations." On March 22, 1996, Walsh was demoted from Supervisor to Store Manager.

Prior to exposing himself to Seldomridge, Walsh received a score of 188 out of a possible 200. This placed him in the top category of excellent, on a Management Personnel Performance Evaluation. The worksheet contains no evaluation criteria based on anti-discrimination or harassment prevention.

Prior to his employment with Uni-Marts, Walsh had a prior criminal history.[2] In 1995, an Information was filed by the Delaware Attorney General's Office charging Walsh with three counts of indecent exposure to girls under 16 years of age. The disposition of these charges is unavailable. In 1992, Walsh was charged with Felony Unlawful Sexual Contact Second Degree and Misdemeanor Indecent Exposure First Degree (indecent exposure to a girl under 16 years of age). He pled guilty to the misdemeanor charge and the Unlawful Sexual Contact charge was dismissed. In 1985, Walsh was charged with extortion. The disposition of this charge is unavailable.[3]

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[2]This information was retrieved through a criminal records check done at Seldomridge's request by Robert Shannon, a licensed private investigator.

[3]A pre-trial services report made in the 1992 case, also indicates that 1) Walsh received six months of unsupervised probation for two counts of Lewdness in 1991, 2) Walsh pled guilty and

D. Prior Sexual Harassment Claims Against Walsh

After the incident, Seldomridge learned of a prior sexual harassment allegation against Walsh from Tina Eastlake and her husband. On or about February 3, 1997, Tina Eastlake filed a complaint with the Delaware Department of Labor ("DDOL") alleging that Walsh sexually harassed her. Eastlake was a Uni-Marts employee who worked under Walsh. According to Eastlake the alleged harassment occurred on January 30, 1997. In her complaint, Eastlake stated that she and Walsh had enjoyed a casual dating relationship that ended in November of 1996. At that time, Eastlake informed Walsh that she did not wish to see him anymore. As a result of the relationship ending, Eastlake alleged that Walsh then subjected her to unfavorable treatment. In her complaint, Eastlake stated that she had advised Uni-Marts corporate officers of Walsh's conduct, however, she was not satisfied with their attempts to resolve the matter.

In response to Eastlake's allegations, Uni-Marts conducted its own investigation of her complaints. In a letter confirming a conversation with Eastlake on January 31, 1997, Amy Hunter ("Hunter"), Associate General Counsel for Uni-Marts, informed Eastlake that the grievance committee had met on several occasions regarding her grievance against Walsh. Hunter that stated that, "[o]ur final recommendation, after a thorough investigation is as follows. We would like to offer you a transfer to the Cecilton Store as an assistant manager. We understand that this will mean a longer commute for you. Therefore, we will also offer a fifty cent per hour wage increase to cover transportation costs."

In a letter from Hunter to Eastlake dated February 10, 1997, Hunter stated "We have tried

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was fined for six counts of Indecent Exposure in 1990, and 3) Walsh was arrested in 1986 for Indecent Exposure (disposition unavailable). Outside of the report, there is no other evidence documenting these charges. Thus, it is not clear where, or even if, these incidents occurred.

for several weeks to address your concerns and come to some type of resolution." Hunter again offered Eastlake a transfer to the Cecilton store. She also offered Eastlake a full-time position in the same store, at the same pay rate, for the 11 p.m. to 7 a.m. shift. Hunter then stated that if Eastlake did not respond by February 14, 1997, the company would assume that she had resigned. In a position statement to the DDOL, Uni-Marts claimed that Walsh "felt there were some problems with Tina's job performance. Specifically, certain tasks were being left undone and paperwork was left uncompleted." The Grievance committee felt that a change in managers would not be an acceptable solution because this would have called for others to be transferred as well.

The DDOL found "no reasonable cause to believe that Uni-Marts discriminated against Eastlake with respect to her sex and that reasonable cause does not exist to believe that Uni-Marts engaged in unlawful employment practices."

III. SUMMARY JUDGMENT STANDARD

The court will grant summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Farrell v. Planters Life Save Co.*, 206 F.3d 271, 278 (3d Cir. 2000); *Knabe v. Bourty Corp.*, 114 F.3d 407, 409 n.4 (3d Cir. 1997) (both citing Fed. R. Civ. P. 56(c)). An issue is "genuine" if there is a sufficient evidentiary basis on which a reasonable jury could find for the non-moving party, *see Charlton v. Paramus Board of Educ.*, 25 F.3d 194, 197 (3d Cir. 1997), and a fact is material if it could affect the outcome of the suit under governing law. *Id.* (citations omitted). For the non-moving party to prevail on a motion for summary judgment, the party must "make a showing sufficient to establish the existence of [every] element essential to that party's case, and on which that

party will bear the burden of proof at trial." *See Knabe v. Bourty*, 114 F.3d at 409 n.4; *Newsome v. Administrative Office of the Courts of the State of New Jersey*, 103 F. Supp. 2d 807, 815 (D.N.J. 2000) (stating that a failure to prove an essential element of the nonmoving party's case necessarily renders all other facts immaterial).

In deciding a motion for summary judgment, "a court must view the facts in the light most favorable to the non-moving party and draw all inferences in that party's favor." *Knabe v. Bourty*, 114 F.3d at 409 n.4 (citing *Armbruster v. Unisys Corp.*, 32 F.3d 768, 777 (3d Cir.1994)). Moreover, it is not the province of the court to weigh the evidence and to decide the case on its merits; rather, the court shall simply determine whether there is a genuine issue for trial. *Anderson*, 477 U.S. at 249.

With these standards in mind, the court will turn to the substance of Uni-Marts' motion for summary judgment.

IV. DISCUSSION

In its briefing on the motion, Uni-Marts argues that it is entitled to summary judgment because Seldomridge cannot establish her claims for hostile work environment harassment or constructive discharge. In addition, Uni-Marts argues that Seldomridge cannot show that she is entitled to punitive damages.[4] In contrast, Seldomridge alleges that there are sufficient facts in the record from which a reasonable jury could rule in her favor on all of these issues. The court will address these issues in turn.

A. Hostile Work Environment

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[4]Uni-Marts also argues that, even assuming that a hostile work environment existed, it still has an affirmative defense to liability. However, because the court concludes that Seldomridge's hostile work environment claims fail as a matter of law, it need not address Uni-Marts' affirmative defense.

Under Title VII of the Civil Rights Act of 1964, it is unlawful for an employer 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. § 2000e-2(a)(1).[5] Although the statute mentions specific employment decisions with immediate consequences, it covers more than "terms" and "conditions" in the narrow contractual sense. *See Faragher v. City of Boca Raton*, 524 U.S. 775, 786 (1998). Thus, sexual harassment that is so "severe or pervasive" as to "'alter the conditions of [the victim's] employment and create an abusive working condition violates Title VII. *Id.* (quoting *Meritor Sav. Bank FSB v. Vinson*, 477 U.S. 57, 67 (1986)); *Kunin v. Sears Roebuck and Co.*, 175 F.3d 289, 293 (3d Cir. 1999) (stating that it is well established that a plaintiff can prove a violation of Title VII by proving that sexual harassment created a hostile or abusive work environment).

Hostile work environment harassment occurs when unwelcome sexual conduct unreasonably interferes with a person's performance or creates an intimidating, hostile, or offensive working environment. *Meritor Savs. Bank FSB v. Vinson*, 477 U.S. 57, 65 (1986). In order to fall within the purview of Title VII, the conduct in question must be severe or pervasive enough to create both an "objectively hostile or abusive work environment – an environment that a reasonable person would find hostile," and an environment the victim-employee subjectively perceives as abusive or hostile.

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[5]According to her complaint, Seldomridge filed a charge of discrimination with the DDOL on April 16, 1998 and May 8, 1998. She received a "right to sue" letter from the Equal Employment Opportunity Commission on May 6, 1999, and subsequently filed her complaint eighty-nine days later on August 3, 1999. Thus, Seldomridge has established that she complied with all of Title VII's pre-filing requirements in a timely manner. *See* 42 U.S.C. § 2000e-5(e)(1) (affording a plaintiff 180 day to file a charge of discrimination with either the appropriate state or federal agency and 90 days to file suit after receiving a right to sue letter).

See Harris v. Forklift Sys., Inc., 510 U.S. 17, 21-22, (1993).[6]

In this case, Seldomridge argues that she was subjected to a hostile work environment when Walsh exposed himself to her on January 16, 1998. In addition, Seldomridge also argues that she was subjected to a hostile work environment when she returned to work after the incident. The court will address these arguments in turn.

1. Claim Based on the January 16, 1998 Incident

In deciding a hostile work environment claim, the court must examine the totality of the circumstances, including: "the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; whether it unreasonably interferes with an employee's work performance." *Harris*, 510 U.S. at 23. In order to establish a hostile work environment claim, a plaintiff must show that:

> (1) the plaintiff suffered intentional discrimination because of their sex,
> (2) the discrimination was pervasive or regular,[7]
> (3) the discrimination detrimentally affected the plaintiff,
> (4) the discrimination would detrimentally affect a reasonable person of the same sex in that position, and
> (5) the existence of respondeat superior liability.

See Andrews v. City of Philadelphia, 895 F.2d 1469, 1482-83 (3d Cir. 1990). *See also Weston v. Pennsylvania*, No. 99-1608, 2001 WL 539470, at *3-4 (3d Cir. May 22, 2001); *Kunin v. Sears Roebuck & Co.*, 175 F.3d 289, 293 (3d Cir.1999).

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[6]The Supreme Court reaffirmed *Harris*' "severe and pervasive" test in *Faragher v. City of Boca Raton*, 524 U.S. 775, 783 (1998), and *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 724, 732, (1998).

[7]Although the *Andrews* test states that the conduct must be "severe and pervasive," the Supreme Court's decisions in *Faragher* and *Ellerth* emphasize that actionable conduct can also be severe or pervasive. *See, e.g., Pittman v. Continental Airlines, Inc.,* 35 F. Supp. 2d 434, 441 (E.D. Pa. 1999) (explaining same).

In this case, there is no dispute as to the first, third, and fifth factors of the *Andrews* test. As to the first prong, Walsh's conduct was motivated by Seldomridge's sex or gender.[8] As to the third prong, there is evidence in the record to support Seldomridge's claim that, from a subjective viewpoint, she was detrimentally affected. Specifically, Seldomridge claims that she sought the counsel of her therapist about the incident, and that she was troubled enough to immediately report the incident to the police. Finally, as to the fifth prong, because Walsh was Seldomridge's immediate supervisor, Uni-Marts would be vicariously liable for his conduct.[9] *See Burlington Industries, Inc.*

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[8]For the purposes of Title VII, "sex" and "gender" are not considered to be distinct concepts. *See Durham Life Ins. Co. v. Evans*, 166 F.3d 139, 148 (3d Cir. 1999).

[9]As the court has stated, it is clear that under the Supreme Court's decisions in *Ellerth* and *Faragher*, Uni-Marts would be vicariously liable for Walsh's conduct. However, Seldomridge also suggests that Uni-Marts is directly liable under Title VII because of its own negligence in hiring and retaining Walsh.

In *Burlington Industries, Inc. v. Ellerth,524* U.S. 742, the Supreme Court explained that an employer may be liable for a supervisor's harassing conduct either directly or indirectly. *See id.* at 758-760. An employer will be directly liable for a supervisor's harassment when the employer either intended, or negligently permitted, the tortious conduct to occur. *Id.* at 759. ("Thus, although a supervisor's sexual harassment is outside the scope of employment because the conduct was for personal motives, an employer can be liable, nonetheless, where its own negligence is a cause of the harassment."); *Dees v. Johnson Controls World Services, Inc,.* 168 F.3d 417, 421 (11th Cir. 1999) (explaining same). *See also Anderson v. Deluxe Homes of PA, Inc.,* 131 F. Supp. 2d 637, 647 n.10 (M.D. Pa. 2001) (explaining that respondeat superior liability could depend "on whose behavior is at issue, that of the supervisor or the employer itself").

The court need not address this issue, however, because it finds that Walsh's hostile work environment claim fails because the conduct was not severe enough to be actionable under Title VII. In addition, the court need not decide whether Uni-Marts was negligent in hiring Walsh because Seldomridge has failed to allege any state law claims for negligent hiring or retention. *See e.g.*, *A. R. Anthony & Sons v. All-State Investigation Sec. Agency, Inc.*, Civ. A. No. 82C-AP-18, 1983 Del. Super. LEXIS 647, at *5 (Del. Super. Ct. Sept. 27, 1983) (explaining that an employer is liable for negligent hiring when it has "reason to know or in the exercise of reasonable care should have known that an employee has an undue tendency to cause harm"). However, the court does note that Seldomridge has not cited to one case which interprets Title VII as mandating that an employer conduct a criminal background investigation into every employee. *But see e.g.*, *Bryant v. Better Business Bureau of Greater Maryland*, 923 F. Supp. 720, 752 (D. Md. 1996) (explaining that "[E]ven where the employer knows of a criminal record

v. Ellerth, 524 U.S. 742 (1998); *Faragher v. City of Boca Raton*, 524 U.S. at 777-78 ("An employer is subject to vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over the employee."). Therefore, the court will focus its inquiry on whether Walsh's conduct was sufficiently severe or pervasive and whether it would objectively detrimentally affect a reasonable person in Seldomridge's position.

Uni-Marts maintains that because Walsh's exposure to Seldomridge was a single, isolated incident, she cannot establish a hostile work environment as a matter of law. In general, an isolated incident of sexual misconduct is not actionable under Title VII. *Clark Cty. School District v. Breeden*, 121 S. Ct. 1508, 1510 (2001) (citing F*aragher*, 524 U.S. at 788); *Rush v. Scott Specialty Gases, Inc.*, 113 F.3d 476, 482 (3d Cir. 1997). In exceptional cases, however, an isolated incident may be actionable under Title VII if it is extremely serious such that it alters the terms and conditions of employment to create a hostile or abusive work environment. *See Meritor*, 477 U.S. at 67. In other words, a single incident may support a claim for hostile work environment sexual harassment if the incident is "of such a nature and occurs in such circumstances that it may reasonably be said to characterize the atmosphere in which a plaintiff must work . . . ." *LaRose v. Philadelphia Newspapers, Inc*., 21 F. Supp. 2d 492, (E.D. Pa. 1998). For example, a single incident of physical assault or offensive touching has been held to be sufficiently severe to support a hostile work environment claim. *See e.g., Grozdanich v. Leisure Hills Health Center, Inc.*, 25 F. Supp. 2d 953,

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and still hires the employee, this does not automatically make out a prima facie case of negligent hiring. Instead, it depends upon the nature of the criminal record and the surrounding circumstances.") (citations omitted). Thus, although there is evidence that Walsh had a criminal record, Seldomridge has failed to adduce any evidence which would demonstrate that Uni-Marts should have known about Walsh's background. *See id.* (granting summary judgment to defendants where a plaintiff failed to demonstrate with sufficient specificity that the defendants should have known about another employee's criminal background).

969-70 (D. Minn. 1998) (holding that a reasonable jury could find that an isolated incident of sexual assault created a hostile work environment).[10] *See also Jones v. United States Gypsum*, No. C99-3047-MWB, 2001 WL 196616, at *4 (N.D. Iowa Jan. 21, 2000) (holding that single incident of offensive touching may be severe enough to support a hostile work environment claim).

Furthermore, in determining whether a plaintiff-employee has been subjected to a hostile work environment, the court not only looks to the regularity or severity of allegedly harassing conduct, but also must look to the fourth factor of the *Andrews* test, and determine whether the conduct would detrimentally affect a reasonable person. *See Anderson v. Deluxe Homes of Pa, Inc.*, 131 F. Supp. 2d 637, 646 (E.D. Pa. 2001).[11] After all, "not all workplace conduct that may be described as harassment affects a "'term, condition or privilege of employment.'" *Kantar v. Baldwin Cooke Co.*, No. 93 C 6239, 1995 U.S. Dist. LEXIS 17330, at *10 (N.D. Ill. Nov. 13, 1995) (citing *Harris v. Forklift Systems, Inc.*, 510 U.S. 17 (1993)). The purpose of including the objective standard is to

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[10]Citing *Todd v. Ortho Biotech, Inc.*, 138 F.3d 733,736 (8th Cir. 1998) (single attempted rape at national sales meeting held sufficiently severe misconduct to be actionable); *Guess v. Bethlehem Steel Corp*., 913 F.2d 463, 464 (7th Cir.1990) (single incident where supervisor picked up plaintiff and forced her face against his crotch impliedly considered to create hostile environment); *Fall v. Indiana University Bd. of Trustees*, 12 F. Supp.2d 870, 879 (N.D. Ind.1998) (single assault, involving a groping of intimate areas, may create hostile environment).

[11]Evidence that others were harassed may serve to bolster the objective reasonableness of a plaintiff's claims. *Anderson*, 131 F. Supp. 2d at 646 (citing *West v. Philadelphia Electric Co.*, 45 F.3d 744, 757 (1995). Although there is evidence in the record concerning another complaint about Walsh, the court will not consider Tina Eastlake's allegations of harassment because Seldomridge has stated that she did not learn of Eastlake's complaints until well after the incident. *See, e.g., Hirase-Doi v. U.S. West Comms., Inc.*, 61 F.3d 777, 782 (10th Cir. 1995) (explaining that a plaintiff may rely only on evidence relating to harassment of which she was aware during her employment). In addition, considering that Eastlake's alleged *quid pro quo* harassment claim arose within the context of an affair she had with Walsh and did not involve the type of conduct at issue with Seldomridge (i.e. exposure), the court will not consider the Eastlake complaint in determining whether Seldomridge's claims are objectively reasonable.

"protect[] the employer from the hypersensitive employee [while] still serv[ing] the goal of equal opportunity by removing the walls of discrimination that deprive women of self-respecting employment." *Andrews*, 895 F.2d at 1483; *see also Gupta v. Florida Bd. of Regents*, 212 F.3d 571, 586 (11th Cir. 2000) ("But a plaintiff's subjective feelings and personal reactions are not the complete measure of whether conduct is of a nature that it interferes with job performance. If it were, the most unreasonably hypersensitive employee would be entitled to more protection than a reasonable employee, and the standard would not have an objective component.").

Even construing the evidence in the record in Seldomridge's favor, the court concludes that Walsh's brief exposure to Seldomridge was not so severe that it altered the terms and conditions of her employment.[12] In determining whether Walsh's conduct was so severe that it changed the conditions of Seldomridge's employment, the court is mindful that it must look to the totality of the circumstances. Under the totality of the circumstances of this case, the court concludes that Seldomridge's claim must fail as a matter of law. In particular, the court notes that Seldomridge thought Walsh was joking when he said he would be coming out of the bathroom wearing "nothing

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[12]Seldomridge also stated that before the incident Walsh made her uncomfortable at work by saying that he thought she was pretty, he would like to "rock her world" and by making other "stupid, off-the wall comments." Interestingly, Seldomridge does not argue that these comments contributed to her hostile work environment claim. However, even if Seldomridge did argue that Walsh's comments and the one-time incident created a hostile work environment, the court concludes that under the totality of the circumstances, Seldomridge still cannot establish an actionable claim under Title VII. It is well established that "simple teasing, offhand comments, and isolated incidents will not amount to discriminatory changes in the 'terms and conditions of employment.'" *Faragher*, 524 U.S. at 788 (citations omitted). *See e.g., Bishop v. National Railroad Passenger Corp.*, 66 F. Supp. 2d 650, 663 (E.D. Pa. 1999) (holding that staring, leering and suggestive comments were neither severe nor pervasive, nor sufficiently detrimental to create a hostile work environment); *Pittman v. Continental Airlines, Inc.*, 35 F. Supp. 2d 434, 442 (E.D. Pa. 1999) (holding that occasional encounters with graphic sexual conversation and personal questions failed to create an atmosphere that would have an "objectively detrimental effect on a reasonable person in her position").

but a cigarette." Although Seldomridge characterizes this conduct as offensive and inappropriate, she does not suggest that she felt threatened by Walsh's conduct leading up to the exposure. *See Slaughter v. Waubonsee Comm. Coll.*, No. 94 C 2525, 1995 U.S. Dist. LEXIS 14236, at *12 (N.D. Ill. Sept. 29, 1995). Also, Seldomridge stated that she only saw Walsh naked for a few seconds from about 30 feet away and Walsh immediately retreated to the store room area. Seldomridge does not allege that Walsh tried to keep her from leaving the store, or even that he tried to approach her. In addition, it is undisputed that Uni-Marts immediately and effectively dealt with Walsh's conduct. Thus, this brief incident, which Seldomridge concedes was quickly and effectively resolved, cannot be said to have unreasonably interfered with her work performance. *See Mathers v. Sherwin-Williams Co.*, Civ. A. NO. 97-5138, 2000 U.S. Dist. LEXIS 3716, at *28 (E.D. Pa. Mar. 27, 2000) (affirming an arbitrator's conclusion that the plaintiff failed to meet the objective prong of the *Andrews* test because a "reasonable person would [not] have found this one-time comment, in the context in which it occurred and as it was subsequently addressed by [the defendant], to be severe and pervasive enough to have resulted in a hostile or abusive work environment.").

In light of the evidence in the record, the court concludes that no reasonable fact finder could return a verdict for Seldomridge on her hostile work environment claim. Although Walsh's brief one-time exposure may have been offensive and inappropriate, it was not so severe or extremely serious, under the totality of the circumstances, that it altered the conditions of Seldomridge's employment. *See e.g.,Bauder v. Wackenhut Corp.*, Civ. A. 99-1232, 2000 WL 340191, at *4 (E.D. Pa. Mar. 23, 2000) (holding that a one time incident where supervisor grabbed plaintiff employee's behind did not sufficiently support a hostile work environment claim); *DeCesare v. National Passenger Railroad Corp.*, No. CNA 98-3851, 1999 WL 330258, at *3 (E.D. Pa. May 24, 1999); *Pittman,* 35 F. Supp.

2d at 442; *Bishop*, 66 F. Supp. 2d at 664; *Porta v. Dukes*, No. Civ. A 98-2721, 1998 WL 470146, at *2 (E.D. Pa. Aug. 11, 1998).[13] *See also Quinn v. Green Tree Credit Corp.*, 159 F.3d 759, 768 (2d Cir. 1998)[14] (affirming grant of summary judgment to defendant where plaintiff's hostile work environment claim was based upon a single incident of breast touching and one lewd comment).

2. Claim Based on Conduct of Co-Workers and Customers After Seldomridge Returned to Work

Seldomridge also argues that the actions of a co-worker, Teddy, and certain customers after her return to work constituted actionable sexual harassment. Again, the court looks to the factors established by the Third Circuit to determine whether Seldomridge can establish a hostile work environment claim. In particular, the court must look to see if: (1) the plaintiff suffered intentional discrimination because of their sex, (2) the discrimination was pervasive or regular, (3) the

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[13]Both *DeCesare* and *Porta* cite to several other cases where a single incident was found to be insufficient to support a hostile work environment claim. These cases include: *Koelsch v. Beltone Electronics Corp.*, 46 F.3d 705, 708 (7th Cir.1995) (finding no hostile environment existed where the company president rubbed the plaintiff's leg, grabbed her buttocks, and asked her for dates); *Saxton v. American Tel. & Tel. Co.*, 10 F.3d 526, 534-35 (7th Cir.1993) (finding that there was no hostile environment where the plaintiff's supervisor put his hand on the plaintiff's leg and kissed her until she pushed him away, and on another occasion the supervisor lurched at the plaintiff and tried to grab her); *Weiss v. Coca-Cola Bottling Co. of Chicago*, 990 F.2d 333, 337 (7th Cir.1993) (holding that there was no hostile work environment where supervisor asked the plaintiff for dates, called her a "dumb blond," put his hand on her shoulder several times, placed "I love you" signs in her work area, and attempted to kiss her); *Cooper-Nicholas v. City of Chester*, No. 95-6493, 1997 WL 799443 (E.D.Pa. Dec.30, 1997) (supervisor's sexual comments over nineteen months were not frequent or sufficiently severe to create a hostile work environment).

[14]In particular, the court in *Quinn* noted that: "Though the two incidents in question--[supervisor's] comment, apparently regarding [plaintiff's] posterior, and his use of papers held in his hand to touch her breasts--are obviously offensive and inappropriate, they are sufficiently isolated and discrete that a trier of fact could not reasonably conclude that they pervaded [plaintiff's] work environment. Nor are these incidents, together or separately, of sufficient severity to alter the conditions of [plaintiff's] employment without regard to frequency or regularity." *Id.* at 768

discrimination detrimentally affected the plaintiff, (4) the discrimination would detrimentally affect a reasonable person of the same sex in that position, and (5) the existence of respondeat superior liability. *See Andrews v. City of Philadelphia*, 895 F.2d 1469, 1482 (3d Cir. 1990).

The parties dispute whether Seldomridge can establish the first prong of the test. In particular, Uni-Marts argues that, even accepting all facts in the record as true, Seldomridge cannot establish that the conduct of Teddy and the customers was motivated by Seldomridge's sex or gender. The court agrees. While sexual overtones are not necessary to show discrimination because of the plaintiff's sex, the offending conduct must nonetheless be motivated by a plaintiff's sex or gender. *See Durham Life Ins. Co. v. Evans*, 166 F.3d at 148 (citing *Aman v. Cort Furniture Rental Corp.*, 85 F.3d 1074, 1083 (3d Cir. 1996)). After all, Title VII is not a "general civility code." *Faragher*, 524 U.S. at 788. "[O]rdinary tribulations of the workplace, such as the sporadic use of abusive language, gender-related jokes, and occasional teasing" are not actionable. *See Id.* Moreover, "Title VII is not a shield against harsh treatment in the workplace; it protects only in instances of harshness disparately distributed." *Swingle v. Henderson*, No. 99-1826 (DRD), 2001 WL 483317, at *12 (D.N.J. May 8, 2001) (quoting *Jackson v. City of Killeen*, 64 F.2d 1181, 1186 (5th Cir. 1981)). In particular, allegedly harassing conduct that is motivated by a bad working relationship, by a belief that the plaintiff has in some way acted improperly, or even by personal animosity is not actionable under Title VII. *See Koschoff v. Henderson*, 109 F. Supp. 2d 332, 345-46 (E.D. Pa. 2000). Based on the record before it, the court concludes that a reasonable jury could not find that the teasing Seldomridge suffered was motivated by her gender.[15]

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[15]Although the court will not address the second, third, and fourth factors articulated in *Andrews*, it notes that the conduct of Teddy and certain customers simply does not rise to the level of severity or pervasiveness that is required by Title VII. "A recurring point in these

In addition, Seldomridge's hostile work environment claim fails because she cannot establish respondeat superior liability. Although the Supreme Court has not address hostile work environment claims arising from the actions of a co-worker, the Third Circuit's decision in *Kunin v. Sears Roebuck and Co.*, 175 F.3d 289 (3d Cir. 1999), is controlling on this issue. *Kunin* examined the scope of respondeat superior liability for hostile work environment claims based on the actions of a co-worker. *Id.* at 290. Under *Kunin*, employer "liability exists where the defendant [employer] knew or should have known of the harassment and failed to take prompt remedial action." 175 F.3d at 293-94. In this case, Seldomridge maintains that during the time period that the alleged harassing behavior of Teddy and the customers occurred, "the manager there already knew . . . . How Teddy was acting with me, how the customers were." Seldomridge Deposition, at 111. After carefully reading through the record, this appears to be Seldomridge's sole basis for her respondeat superior claim. Because Seldomridge has admitted that she did not attempt to lodge a complaint with anyone in management at Uni-Marts, it appears that Seldomridge is arguing that Uni-Marts had constructive notice of the allegedly harassing conduct.

Under *Kunin*, an employer would have constructive notice in two situations: 1) where an employee provides a supervisor with enough information to raise the probability of sexual harassment in the minds of a reasonable employer or 2) where harassment is so pervasive and open that a reasonable employer would have had to be aware of it. *See id.* at 294 (citing *Zimmerman v. Cook County Sheriff's Dep't*, 96 F.3d 1017, 1018-19 (7th Cir. 1996)). Even construing the facts in the

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opinions is that 'simple teasing, offhand comments, and isolated incidents (unless extremely serious) will not amount to discriminatory changes in the 'terms and conditions of employment.'" *Faragher v. City of Boca Raton,* 524 U.S. 775, 788 (1998) (citations omitted). Moreover, Title VII is not "designed to protect the overly sensitive plaintiff." *See Bishop*, 66 F. Supp. 2d at 664 (citing *Harley v. McCoach*, 928 F. Supp. 533, 539 (E.D. Pa. 1996)).

record in the light most favorable to Seldomridge, the court cannot find that Uni-Marts had constructive notice of the alleged harassing conduct.

First, Seldomridge has provided no evidence in the record to show that she provided her supervisor with enough information to raise a probability of sexual harassment in the minds of a reasonable employer. In *Kunin*, the employee claimed that by asking whether "'cursing was allowed on the sales floor,'" she provided her employer with notice of sexual harassment. *Id.* There was also evidence in *Kunin* that the employee's supervisor heard rumors about "offensive language in his department but never investigated them." *Id.* The *Kunin* court held that this evidence could not establish that the employer had constructive notice of sexually harrasing behavior. *Id.* In particular, the court reasoned that because the employee's complaint did not communicate sexually offensive behavior and the evidence of rumor did not refer to gender-specific harassment, the employee had failed to establish that the employer was on constructive notice. *Id.* at 294-95. In this case, Seldomridge admits that she failed to even lodge a complaint with her supervisor about the alleged harassment. Also, as the court has already discussed, the allegedly harassing conduct was not gender specific.

As for the second type of situation that can support a finding of constructive notice, Seldomridge simply has not alleged the type of open and pervasive harassment that would put a reasonable employer on constructive notice. Seldomridge has shown, at best, that she was subjected to off-hand teasing and that one co-worker and a customer failed to "believe her" about the Walsh incident. However, she has also clearly stated that all of her other co-workers believed her (including her supervisor) and were supportive of her regarding the incident with Walsh. Moreover, as the court has already noted, Seldomridge has not shown that this harassment was motivated by her gender.

In light of these facts, Seldomridge cannot show that the conduct was so open and pervasive that a reasonable employer would have had constructive notice of a hostile working environment. *See Kunin*, 175 at 295 (holding management had little opportunity to discover the harassment because it was not open and pervasive).[16]

Thus, because Seldomridge has failed to show that there are facts in the record which would show that Uni-Marts had either actual or constructive notice of the alleged harassing conduct, Seldomridge cannot establish that Uni-Marts is liable under a respondeat superior theory regarding the conduct of her co-worker, Teddy, and certain customers.

B. Constructive Discharge

Seldomridge has also alleged that she was constructively discharged from her position at Uni-Marts.[17] In particular, Seldomridge alleges that following the Walsh incident, the harassing conduct

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[16]Moreover, it would be unreasonable to hold Uni-Marts liable for the conduct of Teddy and certain customers in light of the record. It is undisputed that Seldomridge had already used Uni-Marts' sexual harassment policy regarding the Walsh incident. Thus, Seldomridge could have easily provided Uni-Marts with actual notice. *See Bishop*, 66 F. Supp. 2d at 666-67 (holding that an employer could not be held liable for conduct of co-workers where there was a reasonable avenue for making a complaint available to the plaintiff, and the employer had no notice of co-worker's conduct).

[17]In her complaint, Seldomridge alleges that she suffered from harassment resulting in a tangible employment action. *See* D.I. 1, ¶¶39-41. When a supervisor creates a hostile work environment and takes a tangible employment action against a victimized employee, the employer is not entitled to raise an affirmative defense. *See Faragher v. City of Boca Raton*, 524 U.S. at 777-78. In this case, Seldomridge argues that she suffered a tangible employment action in that she was constructively discharged from her position at Uni-Marts. The Third Circuit has held that in certain instances, a constructive discharge can be a tangible employment action. *See Durham Life Ins. Co. v. Evans*, 166 F.3d 139, 156 (3d Cir. 1999) (declining to adopt a blanket rule that a constructive discharge constitutes a tangible employment action). Because the court has determined that Seldomridge cannot establish her hostile work environment claims, it need not address whether Uni-Marts would be entitled to assert an affirmative defense. However, the

of her co-worker Teddy and certain customers was so severe that it forced her to quit her job approximately one month after returning to work. After quitting, Seldomridge went to work at an establishment called the Eating Post.

A plaintiff who voluntarily resigns may maintain a case of constructive discharge when the employer's allegedly discriminatory conduct creates an atmosphere that is the constructive equivalent of a discharge. *See Sheridan v. E.I. DuPont de Nemours and Co.*, 100 F.3d 1061, 1075 (3d Cir. 1996) (citing *Gray v. York Newspapers, Inc*, 957 F.2d 1070, 1079 (3d Cir. 1992)). In determining if a constructive discharge has occurred the court should apply an objective test. *Id.* That is, whether "the employer knowingly permitted conditions of discrimination in employment so intolerable that a reasonable person subject to them would resign." *Id.* (quoting *Aman v. Cort Furniture Rental Corp.*, 85 F.3d 1074, 1084 (3d Cir. 1996) and *Goss v. Exxon Office Systems Co.*, 747 F.2d 885, 888 (3d Cir. 1984)). Thus, a plaintiff must demonstrate that from an objective viewpoint, the employer condoned acts of discrimination which would violate Title VII. *See Maher v. Associated Services for the Blind*, 929 F. Supp. 809, 814 (E.D. Pa. 1996). However, "the mere fact that the plaintiff feels uncomfortable or considers her working environment unduly stressful is an insufficient basis for a constructive discharge claim." *Id.* (citing *Bristow v. Daily Press, Inc.*, 770 F.2d 1251, 1255 (4th Cir. 1985)); *see also McLaughlin v. Rose Tree Media School District*, 52 F. Supp. 2d 484, 493(E.D. Pa. 1999) ("more than subjective perceptions of unfairness or harshness or a stress-filled work environment are required").

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court will still address Seldomridge's constructive discharge claim because she has also alleged, as a separate and independent cause of action, that she was constructively discharged. See D.I. 1, ¶¶35-38.

Viewing the record in the light most favorable, the court concludes that Seldomridge cannot establish that she was constructively discharged as a matter of law. First, as the court has already explained with regard to her hostile work environment claim, Seldomridge has not shown that Uni-Marts intentionally made her working conditions intolerable, or even that Uni-Marts should have been aware of the teasing. Second, it would not be reasonable in this case to assume that Seldomridge had no other option but to quit. *See Clowes v. Allegheny Valley Hosp.*, 991 F.2d 1159, 1161 (3d Cir. 1993) (explaining that "a reasonable employee will usually explore such alternative avenues thoroughly before coming to the conclusion that resignation is the only option"). In light of Seldomridge's prior use of the sexual harassment policy, it is clear that she could have again called the toll-free number that she used to complain about Walsh. Although Seldomridge alleges that she didn't know she could use the number for the purpose of complaining about her co-worker's conduct, her mistaken belief cannot negate the fact that Uni-Marts was neither aware of, nor responsible for, the conduct of her co-workers. Finally, as the court has already stated, Seldomridge's vague descriptions of the allegedly harassing conduct simply cannot be construed as "intolerable" to a reasonable person. Based on this record, no reasonable trier of fact could determine that Uni-Marts knowingly made Seldomridge's working conditions intolerable, or that her working conditions were so intolerable that a reasonable person would have been forced to quit. *See e.g., Williams v. Caruso,* 966 F. Supp. 287, 298 (D. Del. 1997) (J. Schwartz) (holding that facts in the record did not support claim that employer knowingly permitted conditions of discrimination).[18]

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[18]In her complaint, Seldomridge also alleges that she is entitled to punitive damages as a separate cause of action. D.I. 1, ¶¶ 42-43. However, 42 U.S.C. § 1981a "does not, either expressly or impliedly, create an additional, separate and independent cause of action for employment discrimination plaintiffs, but merely adds to the damages available to such plaintiffs under Title VII." *West v. Boeing Co.*, 851 F. Supp. 395, 398 (D. Kan. 1994). *See also Singh v.*

V. CONCLUSION

For the foregoing reasons, the court concludes that Uni-Marts is entitled to summary judgment because Seldomridge cannot establish her claims of hostile work environment harassment or constructive discharge as a matter of law.

For these reasons, IT IS HEREBY ORDERED, ADJUDGED, and DECREED that:

1. Pursuant to Rule 56(e) of the Federal Rules of Civil Procedure, Uni-Marts' Motion for Summary Judgment (D.I. 79) is GRANTED.
2. Summary Judgment be and hereby is ENTERED in favor of Uni-Marts and against Seldomridge on all claims in the complaint.

Date: July 10, 2001

Gregory M. Sleet
UNITED STATES DISTRICT JUDGE

Wal-Mart Stores, Inc., No. Civ. A. 98-1613, 1999 WL 374184, *8 (E.D. Pa. June 10, 1999). Thus, because Seldomridge cannot establish her Title VII claim, she is not entitled to punitive damages. *See also id.* at 399 ("section 1981a clearly 'adds to the damages available to a plaintiff who shows, under Title VII, that she was the victim of intentional discrimination in employment.'") (citing *Washington v. Garrett,* 10 F.3d 1421, 1434 (9th Cir. 1994)).