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DISTRICT OF ARIZONA
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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

DEBBIE and CONRAD)
MOSAKOWSKI,)
)
Plaintiffs,)
)
vs.)
)
PSS WORLD MEDICAL, INC.,)
)
Defendant.)

No. CIV 02-0092 PHX SLV
MEMORANDUM AND ORDER

Both Plaintiffs and Defendant have consented to the exercise of magistrate judge jurisdiction over this case, including the entry of final judgment. Before the Court is Defendant's Motion for Summary Judgment and Plaintiffs' Motion for Partial Summary Judgment. The Court heard oral argument on these motions on November 6, 2003.

Plaintiffs' complaint, as amended, includes six claims for relief: (1) a Title VII gender-based hostile work environment claim; (2) a Title VII retaliation claim; (3) a Title VII retaliation claim based specifically on an allegation of constructive discharge; (4) intentional infliction of emotional distress; (5) "negligent supervision"; (6) loss of consortium.

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1 **I. Standard for granting a motion for summary judgment**

2 Rule 56 of the Federal Rules of Civil Procedure provides
3 that summary judgment shall be entered if the pleadings,
4 depositions, affidavits, answers to interrogatories, and
5 admissions on file show that there is no genuine dispute
6 regarding the material facts of the case and the moving party
7 is entitled to a judgment as a matter of law. See Anderson v.
8 Liberty Lobby, Inc., 477 U.S. 242, 247, 106 S. Ct. 2505, 2509-
9 10 (1986).

10 The party seeking summary judgment bears the initial
11 burden of informing the court of the basis for its motion, and
12 identifying those portions of the pleadings, depositions,
13 answers to interrogatories, and admissions on file, together
14 with the affidavits, if any, which it believes demonstrate the
15 absence of any genuine issue of material fact. See Celotex
16 Corp. v. Catrett, 477 U.S. 317, 323, 106 S. Ct. 2548, 2553
17 (1986). Where the moving party has met its initial burden
18 with a properly supported motion, the party opposing the
19 motion "may not rest upon the mere allegations or denials of
20 his pleading, but ... must set forth specific facts showing
21 that there is a genuine issue for trial." Anderson, 477 U.S.
22 at 248, 106 S. Ct. at 2510.

23 The United States Supreme Court has stated that when a
24 party moving for summary judgment has carried its burden under
25 Rule 56(c), "its opponent must do more than simply show that
26 there is some metaphysical doubt as to the material facts."
27 Matsushita Elec. Indus. Co. v. Zenith Radio, 475 U.S. 574,
28 586, 587, 106 S. Ct. 1348, 1356 (1986). ("[I]f the factual

1 context renders respondents' claim implausible ... respondents
2 must come forward with more persuasive evidence to support
3 their claim than would otherwise be necessary.").

4 The Court must consider each party's motion for summary
5 judgment with all reasonable inferences favoring the nonmoving
6 party. See Baldwin v. Trailer Inns, Inc., 266 F.3d 1104, 1117
7 (9th Cir. 2001). When cross-motions for summary judgment are
8 filed, the Court must construe all inferences in favor of the
9 party against whom the motion under consideration is made.
10 See, e.g., O'Regan v. Arbitration Forums, Inc., 246 F.3d 975,
11 983 (7th Cir. 2001).

12 **II. Factual background**

13 Plaintiff Debbie Mosakowski ("Plaintiff") became an
14 employee of Defendant in 1995. In 1996 or 1997, Plaintiff
15 signed (and back-dated) employment paperwork for Defendant
16 which included, directly above Plaintiff's signature, a
17 statement of Defendant's "harassment" policy. See Defendant's
18 Statement of Facts in Support of It's Motion for Summary
19 Judgment ("DSOF"), Ex. A at 216, Ex. B; Plaintiffs' Statement
20 of Facts in Support of Their Motion for Partial Summary
21 Judgment ("PSOF"), Ex. 1 at 17. Late in the year 2000,
22 Plaintiff worked primarily with Jesus Bustos and Richard
23 Salinas; all three worked in the purchasing department of
24 Defendant's Phoenix branch. Plaintiff's direct supervisor at
25 that time was Mark Bellwood, Operations Leader of Defendant's
26 Phoenix branch. See DSOF, Ex. A at 25-27.

27 On or about February 26, 2001, Plaintiff discussed her
28 work environment with Mr. Bellwood, in what she described as

1 a "casual conversation." Id., Ex. A at 54-55. Plaintiff
2 complained to Mr. Bellwood about the use of vulgar language by
3 Plaintiff's two immediate co-workers, Mr. Salinas and Mr.
4 Bustos.¹ See PSOF, Ex. 1 at 53. Regarding her co-worker's
5 conversations, Plaintiff wanted her co-workers to "take it
6 down a thousand in her presence," because she wanted the
7 office atmosphere to be "more professional." DSOF, Ex. A at
8 54-57. Within a few days of this conversation with Plaintiff,
9 Mr. Bellwood spoke to Plaintiff's co-workers about Plaintiff's
10 comments and, according to Plaintiff's deposition testimony,
11 Mr. Salinas and Mr. Bustos ceased engaging in sexually-
12 oriented conversation in her presence. See id., Ex. A at 69-
13 71.

14 However, after Mr. Bellwood spoke to her co-workers about
15 the workplace atmosphere, Mr. Salinas and Mr. Bustos began to
16 "cold-shoulder" Plaintiff. Plaintiff stated in her
17 deposition:

18 I would walk into the room and any conversation that
19 was going on would immediately zip, and I'd, what's
20 going on, you know. And they'd nothing, nothing,
21 you know, and go back to what they were doing. So
22 I'd go to my desk, get whatever I came to get, and
23 go back on my way and hear all of it again. Well,
24 all right, maybe they were saying something I asked
25 not to hear. But, you know, come back and the - we
26 used to sit at lunch together. Used to be, hey,
27 we're going to lunch. All right, I'll be there in

24 ¹ It is unclear if Plaintiff complained to Mr. Bellwood at
25 that time about the behavior of several men who worked in the
26 warehouse or just about her immediate work area and Mr. Salinas and
27 Mr. Bustos. At her deposition, in response to the question "can
28 you identify for me the names of the people at PSS who you believe
sexually harassed you?", Plaintiff responded "Richard Salinas,
sorry, Steve Smith, Richie McWilliam, Carlos Cruz." DSOF, Ex. A at
39.

1 a minute, you know. Or they stopped asking my
2 advice on things. I mean, they just cut off all
3 conversation really.

3 Id., Ex. A at 59. Plaintiff asserts that her co-workers
4 retaliated against her for complaining about their sexually
5 offensive behavior by ceasing to speak with her and by
6 "slashing her name all over the building." Id., Ex. A at 143.

7 Plaintiff asserts that this behavior was directly related
8 to her conversation with Mr. Bellwood about her co-workers'
9 behavior. Defendant asserts that Mr. Salinas' and Mr. Bustos'
10 attitude toward Plaintiff changed for other, non-
11 discriminatory reasons.² See Defendant's Responsonse in
12 Opposition to Plaintiffs' Motion for Partial Summary Judgment.
13 Plaintiff complained to Mr. Bellwood about the "hostile"
14 environment created by Mr. Bustos and Mr. Salinas on three
15 occasions in March of 2000. See DSOF, Ex. A at 73-77.
16 Plaintiff asserts Mr. Bellwood did nothing to address her
17 complaints. See id., Ex. A at 77-78.

18 During the relevant time period, Jim Evans was
19 Defendant's Regional Leader for the Phoenix branch and Doug

21 ² Mr. Salinas states in his deposition that the "hostile
22 atmosphere" was greatly exaggerated by Plaintiff. Mr. Salinas
23 stated that the quantity of workplace conversation decreased
24 because his wife had cancer and Mr. Bustos' wife was recovering
25 from cancer, and because he and Mr. Bustos were very busy (the
26 company moved warehouses at this time), in addition to his efforts
27 to try to be "more professional," as Plaintiff had had requested.
28 Mr. Salinas also stated that his personal attitude toward Plaintiff
changed for various reasons not related to Plaintiff's complaint of
vulgar language, including the fact that Plaintiff continued to
smoke cigarettes after becoming pregnant and that Plaintiff was no
longer doing her share of the necessary work. Plaintiffs'
Statement of Facts in Support of Their Motion for Partial Summary
Judgment, Ex. 10 at 71-75, 91-93.

1 Maxwell was Defendant's Sales Leader for the Phoenix branch.
2 Plaintiff asserts that in mid-April of 2001, Mr. Evans and Mr.
3 Maxwell decided that they wanted to fire Plaintiff because she
4 was pregnant. See id., Ex. D. Plaintiff also alleges that
5 these men acted in concert with Mr. Salinas and Mr. Bustos to
6 make the work environment so hostile to Plaintiff that she
7 would quit. See id., Ex. A at 142. Plaintiff states:

8 I thought it was odd that I would announce my
9 pregnancy and two weeks later have all of this fall
10 in my lap. I never did get to the bottom of why my
11 job was suddenly in question and by whom. I could
12 no longer trust anyone. I asked for the severance
13 package, and was going to leave the company. I
14 received a phone call from Jeff Anthony, the
15 Director of Human Resources on Wednesday, April 25th
telling me he could not do the package with the
insurance. I had no choice, I am pregnant, I am now
forced to stay. . . Meetings were had with Jim Evans
and our sales force, which I was told were part of
who wanted me gone, and in that meeting Jim told
them I was deciding whether or not to stay with the
company.

16 Id., Ex. D.

17 Mr. Salinas stated in his deposition that he had heard a
18 "rumor" that Mr. Evans and Mr. Maxwell felt Plaintiff was not
19 "pulling her weight" and that they wanted to "get rid of"
20 Plaintiff. PSOF, Ex. 10 at 91-92. Mr. Salinas also stated
21 that Plaintiff told him herself how much money she was paid by
22 Defendant. See id., Ex. 10 at 93.

23 At her deposition, in response to the question "if you
24 could identify the names of the PSS employees who you believe
25 took any kind of retaliatory action against you for making a
26 complaint," Plaintiff stated: "Richard and Jesus. Richard
27 Salinas, Jesus Bustos." With further prompting, Plaintiff
28 further stated "I know that Doug [Maxwell] and Mark [Bellwood]

1 were trying to get me to leave. I don't know if their reasons
2 were for my making that complaint, but it was shortly after I
3 made my complaint." DSOF, Ex. A at 39-40. Plaintiff further
4 stated that "possibly" Mr. Maxwell and Mr. Bellwood had
5 retaliated against her, although she also stated that she did
6 not believe Mr. Maxwell knew about her complaint. See id.,
7 Ex. A at 145.

8 In late April of 2001 Plaintiff contacted the president
9 of PSS, Doug Harper, about the hostile environment at the
10 Phoenix branch purchasing department. See PSOF, Ex. 2. Mr.
11 Harper referred her complaint to Mr. Evans, Defendant's
12 Regional Leader for the area encompassing the Phoenix branch.
13 See id., Ex. 2.

14 In late May or early June of 2000, Victor Mondragon
15 temporarily replaced Mr. Bellwood as the Phoenix branch
16 Operations Leader. When Plaintiff complained about the
17 hostile environment created by Mr. Salinas and Mr. Bustos to
18 Mr. Mondragon on June 5, 2000, Mr. Mondragon allegedly offered
19 to transfer Plaintiff to another department within the
20 company, noting that she would have to take a pay decrease.
21 See DSOF, Ex. A at 98. Plaintiff refused this suggestion.
22 Mr. Mondragon referred Plaintiff's complaint to Defendant's
23 corporate Human Resources department. See id., Ex. D.
24 Plaintiff asserts that Mr. Mondragon retaliated against her by
25 "basically" supporting "whatever Richard and Jesus wanted . .
26 . by telling them that I made another complaint, you know, by
27 telling them - I think he was the one that told them I was
28

1 getting a lawyer. You know, I think he fueled the fire."
2 Id., Ex. A at 144.

3 On June 6, 2001, Plaintiff voluntarily began to work a
4 different shift to minimize contact with Mr. Bustos and Mr.
5 Salinas, which change did not involve a pay decrease.³

6 On June 16, 2001, Plaintiff filed a claim of
7 discrimination against Defendant with the EEOC. Plaintiff
8 alleged that:

9 Beginning in February 2001 and continuing, I
10 have been subjected to a sexually tainted, hostile
11 and intimidating work environment by two of my co-
12 workers, Richard Salinas and Jesus Bustos. I have
13 filed several complaints, the last being in June
14 2001. Despite my complaints to management, the
15 employer has failed to take prompt and effective
16 action. Furthermore, on April 9, 2001, I informed
17 by supervisor I was pregnant. (sic) Since that
18 time, I have been threatened with termination, being
19 placed in a lower position and my salary cut.
20 I believe I have been discriminated against because
21 of sex, female, (pregnancy), and retaliated against
22 in violation of Title VII of the Civil Rights Act of
23 1964, as amended.

24 Id., Ex. C.

25 On June 26 or 27, 2001, Defendant's Director of Human
26 Resources, Cindi Stone, contacted Plaintiff regarding her
27 complaints to Mr. Mondragon, i.e., Plaintiff's complaints
28 about the "hostile environment." See id., Ex. G.

On June 28, 2001, in response to an overture from
Defendant's Human Resources Department regarding her
complaints of a hostile atmosphere, Plaintiff stated in an
email to Ms. Stone:

³ Plaintiff stated in her deposition that having someone work
the new shift "was actually something that had been tossed around
months and months earlier . . ." DSOF, Ex. A at 99.

1 [W]e (you and I) are concentrating on the wrong
2 problem. Yes, there has been a lot of vulgar
3 activity from many people at this branch, but my
4 problem now stems from my complaint I made about
5 this. Those types of behaviors have come to a NEAR
6 stop, and I am now treated as an outcast. I truly
7 believe that the goal is to get me to quit.

8 Id., Ex. G.

9 On July 13, 2001, the Phoenix branch's new Operations
10 Leader, Bill Smith, told Plaintiff he wanted her to meet with
11 Mr. Salinas, Mr. Bustos, Mr. Mondragon, Mr. Evans, and
12 himself, to work to resolve the situation. Plaintiff stated:
13 "No way. I called my lawyer and he recommends against it. .
14 .. Bill feels we can work this out, I do not. I do not trust
15 this company any longer." Id., Ex. D.

16 In late July of 2001 Plaintiff experienced medical
17 difficulties, and her doctor determined that she needed bed
18 rest. See id., Ex. A at 132. At that time, Plaintiff
19 declined Defendant's written offer to remain off of work with
20 full pay on leave until after she delivered her baby, with a
21 guarantee that her job would be waiting for her when she was
22 ready to return and that the leave would not be counted toward
23 her FMLA entitlement. See id., Ex. A at 172-73; Ex. H.

24 In response to Plaintiff's complaints to Mr. Mondragon,
25 in late June 2001 Defendant's corporate Human Resources
26 Department began an investigation as to Plaintiff's
27 allegations of a hostile work environment. As a result of
28 this investigation, on July 30, 2001, Ms. Stone sent a letter
to Plaintiff regarding the steps taken by Defendant to address
Plaintiff's complaints. See id., Ex. I. Ms. Stone delineated
the "remedial and preventative action" taken by Defendant,

1 including "disciplinary action including management and non-
2 management employees where substantiated incidents of
3 inappropriate behavior were confirmed," and "training
4 specifically related to inappropriate behavior and sexual
5 harassment in the workplace." Id., Ex. I. Additionally, the
6 Senior Vice President of Corporate Development scheduled a
7 visit to the Phoenix branch to reiterate and reinforce the
8 company's commitment to its sexual harassment policy, and
9 Defendant "conducted sexual harassment training and offered
10 counseling to new management personnel." Id., Ex. I.
11 Defendant also "counseled employees at the branch and issued
12 PSS's World Medical, Inc.'s policy on Harassment/Unacceptable
13 Work Behavior in the Workplace . . . and informed appropriate
14 employees not to retaliate against [Plaintiff] in any manner
15 whatsoever . . ." Id., Ex. I.

16 On August 22, 2001, Defendant terminated Mr. Bellwood,
17 who had been transferred to the corporation's Bountiful, Utah,
18 facility. See PSOF, Ex. 6. On August 2, 2001, Mr. Smith and
19 Mr. Salinas received written warnings stating that they had
20 violated Defendant's policy on workplace behavior. See id.,
21 Exs. 11 & 12.⁴ Mr. Smith was suspended without pay for five
22 days. See id., Ex. 11.

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26 ⁴ Defendant sent a similar letter to a Mr. Aarsvold, who
27 evidently had instigated several of the instances of sharing
28 pornography on computers in the workplace. See PSOF, Exs. 13 & 14.

1 Plaintiff remained away from her job and applied for and
2 received short-term disability benefits from late July through
3 September 28, 2001. See DSOF, Exs. K, N, O.

4 Plaintiff stated in her deposition that in late July or
5 early August she still intended to return to work at PSS. See
6 id., Ex. A at 167. Plaintiff stated in her deposition that,
7 as of October 2001, she was not really sure whether she was
8 going back to work at PSS. See id., Ex. A at 184.⁵ Plaintiff
9 did not, evidently, communicate to Defendant any intent to not
10 return to work.

11 On October 8, 2001, Defendant sent a letter to Plaintiff
12 asserting that Plaintiff had continued to remain away from
13 work and was receiving short-term disability payments even
14 though her doctor had initially released her to return to work

15
16 ⁵ In response to the question as to whether in October 2001
17 Plaintiff intended to return to work at PSS she responded: "Not
18 really sure. I just knew I was still having the cramping and
wasn't going back at least until that stopped or the baby was
born." DSOF, Ex. A at 184.

19 Plaintiff was asked, during her deposition:

20 "[W]hat was it at that time that made your
21 working conditions so difficult? I can gather
22 from your testimony that it was the way
23 Richard and Jesus were treating you and they
24 were talking about you to people in the branch
and you felt that Jim Evans was trying to
terminate you. Is there anything else in July
[2001] you felt was making your working
conditions so difficult that you didn't want
to return?"

25 Plaintiff responded: "I was just so uncomfortable, so
devastated, I was crushed by the whole thing."

26 Counsel responded: "And by the whole thing, you're talking
about Richard and Jesus, their treatment, talking about you, Jim
Evans. Anything else?"

27 To which Plaintiff replied: "No." DSOF, Ex. A at 210.

1 on September 5. See id., Ex. O. The letter stated that,
2 because Plaintiff had "abandoned" her job by not returning to
3 work and not informing her employer that she had been released
4 to return to work, Defendant was terminating Plaintiff's
5 employment. See id., Ex. O.

6 In her deposition, Plaintiff stated that she did not have
7 any benefits reduced while she was employed at PSS, and that
8 she did not receive any poor performance evaluations. See
9 id., Ex. A at 209.

10 Plaintiff asserts in her motion for summary judgment that
11 the following acts created a sexually hostile atmosphere at
12 PSS prior to February 2001: Steve Smith, a warehouse
13 supervisor, simulated sex acts on office furniture in front of
14 Plaintiff; Mr. Smith told Plaintiff he wanted to have sex with
15 her; a co-worker, Mr. McWilliams, while massaging her neck,
16 rubbed his genitals against Plaintiff; Plaintiff's co-workers
17 downloaded and shared explicit pornography on office laptop
18 computers in Plaintiff's presence; Plaintiff's co-workers
19 engaged in sexually explicit conversation, jokes, and
20 statements regarding the sexual attractiveness and sexual
21 activity of other women in the office; Mr. Bellwood invited
22 Plaintiff and her co-workers to join him at Phoenix strip
23 bars.

24 The Court notes that in Plaintiff's affidavit of August
25 29, 2003, regarding the hostile environment, Plaintiff does
26 not reiterate that Mr. Smith said he wanted to have sex with
27 her, and Plaintiff does not reiterate that Mr. McWilliams, or
28

1 any other individual, touched her inappropriately. See PSOF,
2 Ex. 2.

3 Defendant contends that, prior to February 2001,
4 Plaintiff initiated and participated in the sexually-explicit
5 conversation and jokes at her workplace on a regular basis;
6 that, prior to February 2001, Plaintiff initiated the sharing
7 of pornography on a workplace computer; and that Plaintiff
8 encouraged the fake masturbation display by Mr. Smith on at
9 least one occasion; and that Plaintiff generally encouraged
10 the sexually-oriented comments and actions of Mr. Salinas, Mr.
11 Smith, and Mr. McWilliams. Mr. Salinas states in his
12 deposition that, prior to February of 2000, Plaintiff was a
13 "leader" regarding telling off-color jokes and "sharing the
14 porn" in the workplace. Id., Ex. 10 at 46.

15 **III. Analysis**

16 Plaintiff seeks "partial summary judgment," on the issues
17 of:

18 1. "the existence of and [Defendant's] liability for a
19 hostile work environment;"

20 2. "defendant's liability [for] plaintiffs' claim [of]
21 retaliation;"

22 3. "the inadequacy of defendant's termination of Mark
23 Bellwood as a remedial measure in its defense."

24 Defendant seeks summary judgment on all of the counts
25 presented in Plaintiffs' complaint.

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1 **A. Title VII hostile environment**

2 Plaintiff has alleged that she was subjected to gender-
3 based discrimination, i.e., a work environment hostile to
4 women, in violation of Title VII.

5 Title VII prohibits discrimination in the workplace based
6 on the employee's gender. To succeed on a hostile environment
7 claim, a female plaintiff must show that the workplace was,
8 both objectively and subjectively, hostile to women, i.e.,
9 that a reasonable female would find the environment hostile
10 and that the plaintiff subjectively perceived her environment
11 to be abusive. See Faragher v. City of Boca Raton, 524 U.S.
12 775, 787, 118 S. Ct. 2275, 2283 (1998); Harris v. Forklift
13 Sys., Inc., 510 U.S. 17, 21-22, 114 S. Ct. 367, 370-71 (1993);
14 Brooks v. City of San Mateo, 229 F.3d 917, 924 (9th Cir.
15 2000); Montero v. AGCO Corp., 192 F.3d 856, 860 (9th Cir.
16 1999). See also Stahl v. Sun Microsystems, Inc., 19 F.3d 533,
17 538 (10th Cir. 1994) ("If the nature of an employee's
18 environment, however unpleasant, is not due to her gender, she
19 has not been the victim of sex discrimination as a result of
20 that environment.").

21 To be actionable, the workplace environment must be so
22 offensive that the terms and conditions of the plaintiff's
23 employment are actually altered. See Pavon v. Swift Transp.
24 Co., Inc., 192 F.3d 902, 908 (9th Cir. 1999). A plaintiff
25 establishes that the harassment was severe enough to alter the
26 terms, conditions or privilege of employment by satisfying the
27 subjective element of her Title VII hostile environment claim.
28 See Haugerud v. Amery Sch. Dist., 259 F.3d 678, 693 (7th Cir.

1 2001) ("The requirement of subjectivity is intended to ensure
2 that the plaintiff did actually feel harassed, because 'if the
3 victim does not subjectively regard the environment as
4 abusive, the conduct has not actually altered the victim's
5 employment and there is accordingly no Title VII
6 violation.'").

7 Conduct must be extreme to amount to a change in the
8 terms and conditions of employment. To be actionable
9 under Title VII, a sexually objectionable
10 environment must be both objectively and
11 subjectively offensive, one that a reasonable person
12 would find hostile or abusive, and one that the
13 victim in fact did perceive to be so. Harassing
14 conduct need not be motivated by sexual desire to
15 support an inference of discrimination on the basis
16 of sex. The motivation can be a general hostility
17 to the presence of women in the workplace.

18 Courts are to determine whether an environment is
19 sufficiently hostile or abusive by looking at all
20 the circumstances, including the frequency of the
21 discriminatory conduct; its severity; whether it is
22 physically threatening or humiliating, or a mere
23 offensive utterance; and whether it unreasonably
24 interferes with an employee's work performance.

25 Kortan v. California Youth Auth., 217 F.3d 1104, 1110 (9th
26 Cir. 2000) (internal citations and quotations omitted).

27 Defendant contends that Plaintiff initiated or
28 participated in the creation of the allegedly gender-based
hostile environment. If Plaintiff did participate in the acts
of which she now complains, it is arguable whether the
workplace could be found to be subjectively hostile.
Additionally, the fact that Plaintiff now complains of acts
contributing to a sexually hostile environment, i.e., Mr.
McWilliams rubbing his genitals against her, and Mr. Smith's
actions, when she apparently did not complain of these events
to Mr. Bellwood and did not, apparently, include this behavior

1 in her EEOC complaint, lends credence to the theory that
2 Plaintiff did not find her work environment hostile on the
3 basis of gender-based discrimination.

4 Plaintiff seeks summary judgment on the existence of a
5 hostile work environment. Taking the facts in the light most
6 favorable to Plaintiff, the Court concludes that there is a
7 contested issue of material fact regarding Plaintiff's claim
8 of a hostile environment, i.e., whether the workplace was
9 subjectively hostile. Because there is a contested issue of
10 material fact regarding an element of this claim on which
11 Plaintiff bears the burden of proof, summary judgment in favor
12 of Plaintiff on this claim is not warranted. Cf. Cowan v.
13 Prudential Ins. Co., 141 F.3d 751, 757 (7th Cir. 1998)
14 (declining to reverse summary judgment for the defendant,
15 based on the proffered affidavit of the plaintiff's co-worker,
16 because there was insufficient evidence in the record to
17 conclude that the plaintiff found the workplace subjectively
18 hostile). See also Rennie v. Dalton, 3 F.3d 1100, 1107 (7th
19 Cir. 1993) (quoting Meritor, stating: "'The gravamen of any
20 sexual harassment claim is that the alleged sexual advances
21 were 'unwelcome' . . . [T]he question whether particular
22 conduct was indeed unwelcome presents difficult problems of
23 proof and turns largely on credibility determinations
24 committed to the trier of fact.").

25 Defendant seeks summary judgment in its favor on the
26 claim that it is liable to Plaintiff, pursuant to Title VII,
27 for the existence of the alleged gender-based hostile
28 environment. Defendant argues that it is entitled to summary

1 judgment regarding Plaintiff's Title VII claim of a hostile
2 work environment because, even allowing that the workplace was
3 subjectively and objectively hostile, Defendant contends that
4 it took prompt, adequate action to address Plaintiff's
5 complaint's of a hostile work environment, which affirmative
6 defense precludes a finding of liability pursuant to Title
7 VII.

8 Plaintiff seeks to impose vicarious liability on the part
9 of Defendant for the acts of Defendant's employees. Pursuant
10 to the United States Supreme Court's holdings in Burlington
11 Industries, Inc. v. Ellerth, 524 U.S. 742, 118 S. Ct. 2257
12 (1998), and Faragher v. City of Boca Raton, 524 U.S. 775, 118
13 S. Ct. 2275 (1998), an employer is only vicariously liable to
14 an employee for a hostile environment when a supervisor with
15 immediate or successively higher authority over the employee
16 engaged in the prohibited conduct. See Ellerth, 524 U.S. at
17 765, 118 S. Ct. at 2270; Faragher, 524 U.S. at 807, 118 S. Ct.
18 at 2292-93. Employers are not, by contrast, vicariously
19 liable for a hostile work environment created by a "mere"
20 co-worker of the plaintiff. See Mack v. Otis Elevator Co.,
21 326 F.3d 116, 123 (2d Cir.), cert. denied, 72 U.S.L.W. 3147
22 (Nov. 17, 2003)

23 An employer is subject to vicarious
24 liability to a victimized employee for an
25 actionable hostile environment created by
26 a supervisor with immediate (or
27 successively higher) authority over the
28 employee. *The employer will be strictly
liable for the hostile environment if the
supervisor takes tangible employment action
against the victim.* However, when an
employee has established a claim for
vicarious liability but where no tangible

1 employment action was taken, a defending
2 employer may raise as an affirmative
3 defense to liability or damages: "(a) that
4 the employer exercised reasonable care to
5 prevent and correct promptly any ...
6 harassing behavior, and (b) that the
7 plaintiff employee unreasonably failed to
8 take advantage of any preventive or
9 corrective opportunities provided by the
10 employer or to avoid harm otherwise." Id.
11 at 807, 118 S. Ct. at 2292-93. Where the
12 perpetrator of the harassment is merely a
13 co-employee of the victim, the employer
14 will be held directly liable if it knew or
15 should have known of the harassing conduct
16 but failed to take prompt remedial action.

17 Miller v. Kenworth of Dothan, Inc., 277 F.3d 1269, 1278 (11th
18 Cir. 2002).

19 An employer is only strictly liable for a gender-based
20 hostile work environment when that hostile environment is
21 created by the plaintiff's immediate supervisor and the
22 supervisor's gender-based animus results in an adverse
23 employment action, such as discharge, a reduction in pay or
24 other benefits, or a lost opportunity for advancement; a
25 threat of an adverse employment action is not an "adverse
26 employment action" imputing strict liability to the employer.
27 See Holly D. v. California Inst. of Tech., 339 F.3d 1158, 1170
28 (9th Cir. 2003) ("[S]uch unconditional liability attaches only
if a quid pro quo threat is implemented by some form of
sufficiently concrete employment action. An unfulfilled, or
inchoate, quid pro quo threat by a supervisor is not enough;
something more is required."). See also Mack, 326 F.3d at 124
("a tangible employment action taken by the supervisor becomes
for Title VII purposes the act of the employer.").

1 In response to the question of which PSS employees
2 created the hostile work environment, at her deposition
3 Plaintiff responded: "Richard Salinas, sorry, Steve Smith, Richie
4 McWilliam, Carlos Cruz." Taking Plaintiff's allegations in the
5 light most favorable to Plaintiff, the hostile work
6 environment was not created by any PSS "supervisory employee"
7 because none of these individuals, i.e., Mr. Salinas, Mr.
8 Smith, Mr. McWilliam, or Mr. Cruz, had immediate or
9 successively higher authority over Plaintiff.⁶ Additionally,
10 with respect to the existence of a "hostile environment," as
11 distinguished from her retaliation claim, Plaintiff does not
12 allege that she was subjected to an adverse employment action
13 by a supervisory employee and, therefore, Defendant is not
14 strictly or vicariously liable for the alleged hostile
15 environment.

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19 ⁶ Plaintiff asserts that because Mr. Smith was a manager at
20 PSS, Defendant is vicariously liable for Mr. Smith's behavior in
21 creating the hostile environment. However, the evidence before the
22 Court indicates that Mr. Smith did not have immediate or successive
23 supervisory authority over Plaintiff and, therefore, Mr. Smith's
24 actions are not those of a "supervisor" for purposes of imputing
25 liability to Defendant for a gender-based hostile environment.

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The Court notes that Mr. Bellwood was Plaintiff's direct supervisor. Mr. Bellwood's act of inviting Plaintiff and her co-workers to strip bars is not a gender-based act establishing a hostile work environment. The federal courts have concluded that, while perhaps boorish behavior, employees visiting or discussing their visits to establishments which cater to a male clientele does not create a hostile work environment. See Gupta v. Florida Bd. of Regents, 212 F.3d 571, 584 (11th Cir. 2000); Farpella-Crosby v. Horizon Health Care, 97 F.3d 803, 806 (5th Cir. 1996); Rennie v. Dalton, 3 F.3d 1100 (7th Cir. 1993); Gautney v. Amerigas Propane, Inc., 107 F. Supp. 2d 634, 644 (E.D. Pa. 2000).

1 Because the alleged hostile environment was created by
2 Plaintiff's co-workers, i.e., Mr. Smith, Mr. McWilliams, Mr.
3 Salinas, and Mr. Cruz, and because Defendant was not subjected
4 to an adverse employment action in the context of the hostile
5 environment, Defendant is entitled to assert an affirmative
6 defense to Plaintiff's claim for damages pursuant to Title
7 VII, i.e., that Defendant took prompt remedial action to
8 address discrimination of which it knew or should have known.

9 Defendant seeks summary judgment on its assertion that,
10 as a matter of law, it took prompt remedial action to end the
11 harassment. Plaintiff alleges that Defendant did not promptly
12 or adequately address Plaintiff's complaints.

13 The Court concludes that there are contested issues of
14 material fact as to whether Defendant's response to
15 Plaintiff's complaint was prompt and adequate. Therefore,
16 Defendant is not entitled to summary judgment on the issue of
17 whether Defendant is liable for any alleged hostile
18 environment because Defendant's actions constituted prompt
19 remedial action.

20 **B. Title VII retaliation**

21 To prevail on this claim, Plaintiff must establish that
22 she engaged in activity protected by Title VII, that she was
23 subjected to an adverse employment action, and that there was
24 a causal link between the protected activity and the adverse
25 employment action. See, e.g., EEOC v. Dinuba Med. Clinic, 222
26 F.3d 580, 586 (9th Cir. 2000).

27 We recently set out the peculiar dynamics of a
28 retaliation claim under Title VII in Payne v.
Norwest Corp., 113 F.3d 1079 (9th Cir. 1997). We

1 noted that a plaintiff must show (1) involvement in
2 a protected activity, (2) an adverse employment
3 action and (3) a causal link between the two.
4 . . . Among those employment decisions that can
5 constitute an adverse employment action are
6 termination, dissemination of a negative employment
7 reference, issuance of an undeserved negative
8 performance review and refusal to consider for
9 promotion. By contrast, we have held that declining
10 to hold a job open for an employee and badmouthing
11 an employee outside the job reference context do not
12 constitute adverse employment actions.

13 Brooks, 229 F.3d at 928 (emphasis added). The Ninth Circuit,
14 while adopting an "expansive view" of what constitutes an
15 "adverse employment action," Ray v. Henderson, 217 F.3d 1234,
16 1241-42 (9th Cir. 2000), has also made it clear that "only
17 non-trivial employment actions that would deter reasonable
18 employees from complaining about Title VII violations will
19 constitute actionable retaliation." Brooks, 229 F.3d at 928.
20 The Ninth Circuit Court of Appeals has concluded that an
21 action is cognizable as an adverse employment action if it is
22 "reasonably likely to deter employees from engaging in
23 protected activity." Ray, 217 F.3d at 1243.

24 The parties do not contest that Plaintiff engaged in
25 protected activity, i.e., that she complained about a sexually
26 hostile environment in the workplace. The parties do disagree
27 as to whether Plaintiff was subjected to an adverse employment
28 action as a matter of law.

Plaintiff alleges the following retaliatory acts: she
started getting bad performance reviews; her employer
disclosed information regarding her salary to her "harassers;"
Plaintiff started working a different shift to get away from
her harassers; her supervisors and co-workers started a

1 campaign to get Plaintiff fired; Mr. Mondragon offered to
2 transfer her to another position with a salary reduction.

3 Defendant contends that it is entitled to summary
4 judgment on this claim because Plaintiff's allegations are
5 insufficient to establish an adverse employment action as a
6 matter of law.

7 It is arguable whether bad performance reviews and a
8 "campaign" to get Plaintiff fired or to force her to quit, if
9 these facts are ultimately proved, would constitute adverse
10 acts or "ultimate employment decisions." See Brooks, 229 F.3d
11 at 928-29 (concluding that termination, dissemination of a
12 negative employment reference, issuance of an undeserved
13 negative performance review and refusal to consider for
14 promotion, are adverse actions, but declining to hold a job
15 open for an employee, bad-mouthing an employee outside the job
16 reference context, and transferring an employee where salary
17 is unaffected do not constitute adverse employment actions).
18 Regarding Mr. Mondragon's offer to transfer Plaintiff with a
19 reduction in pay, in the context of a Title VII retaliation
20 claim it is unclear if the "threat" of an adverse action
21 itself constitutes an adverse employment action. See Fielder
22 v. UAL Corp., 218 F.3d 973, 996 n.9 (9th Cir. 2000)
23 (Kleinfeld, J., dissenting), rev'd on other grounds by 536
24 U.S. 919 (2002). The case cited by Defendant for this
25 proposition of law, Vasquez v. County of Los Angeles, 307 F.3d
26 884 (9th Cir. 2002), has been withdrawn by the Ninth Circuit
27 Court of Appeals. See Vasquez v. County of Los Angeles, ----
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1 F.3d ----, 2003 WL 22519422 (9th Cir. Nov. 7, 2003). Compare
2 Lyons v. England, 307 F.3d 1092, 1118 (9th Cir. 2002).

3 As a matter of law, Plaintiff's voluntary transfer to a
4 different work shift without any decrease in remuneration does
5 not constitute an adverse employment action on the part of
6 Defendant. See Steiner v. Showboat Operating Co., 25 F.3d
7 1459, 1465 (9th Cir. 1994) ("[the plaintiff] first points to
8 her transfer to day shift from swing shift, as a result of her
9 letter to management stating that Trenkle was still harassing
10 her. While this action was an instance of insufficient
11 remediation . . . it was not retaliatory in nature.").
12 Additionally, Plaintiff's primary complaint regarding
13 retaliation, that her co-workers ostracized her, is not
14 actionable retaliation. See Mannatt v. Bank of America, 339
15 F.3d 792, 803 (9th Cir. 2003) (concluding that ostracism by
16 co-workers, even when encouraged by the plaintiff's
17 supervisor, does not constitute a retaliatory act); Brooks,
18 229 F.3d at 929; Roberts v. Segal Co., 125 F. Supp. 2d 545,
19 549 (D.D.C. 2000) ("The fact that plaintiff believes she was
20 getting the cold shoulder from her co-workers does not
21 constitute a materially adverse consequence or disadvantage in
22 the terms and conditions of her employment so as to establish
23 an adverse personnel action."). Compare Strother v. Southern
24 Cal. Permanente Med. Group, 79 F.3d 859, 869 (9th Cir. 1996)
25 (noting that "mere ostracism in the workplace is not enough to
26 show an adverse employment decision," but that being excluded
27 from meetings, being denied telephone access, suffering some
28 verbal and physical abuse at the hands of other doctors, being

1 denied secretarial support, and being given a more burdensome
2 work schedule, "if proven, would be sufficient to demonstrate
3 an adverse employment decisions.").

4 There are contested issues of material fact regarding
5 whether Plaintiff was subjected to an adverse employment
6 action, i.e., negative performance reviews and a "campaign" to
7 force her to quit, and whether any alleged retaliation was the
8 result of Plaintiff's complaints or for legitimate non-
9 discriminatory reasons; therefore, summary judgment on this
10 claim is not appropriate. See Ray, 217 F.3d at 1246; Brooks,
11 229 F.3d at 929 (noting that "an undeserved negative
12 performance review can constitute an adverse employment
13 decision.").

14 **C. Title VII constructive discharge**

15 Constructive discharge is an adverse employment action
16 for the purposes of establishing a retaliation claim pursuant
17 to Title VII. See Jordan v. Clark, 847 F.2d 1368, 1377 (9th
18 Cir. 1988). Constructive discharge occurs when an employer
19 intentionally creates, or knowingly permits, discriminatory
20 conditions so intolerable that they effectively force an
21 employee to resign. See Brooks, 229 F.3d at 930. The
22 standard for determining constructive discharge is an
23 objective standard, i.e., whether a reasonable employee would
24 feel compelled to quit. See id.

25 To survive summary judgment on a claim for constructive
26 discharge, the plaintiff must show that "there are issues of
27 fact as to whether a reasonable person in her position would
28 have felt that she was forced to quit because of intolerable

1 or discriminatory work conditions." Schnidrig v. Columbia
2 Mach., Inc., 80 F.3d 1406 (9th Cir. 1996).

3 In order to survive summary judgment on her
4 constructive discharge claim, [the plaintiff] must
5 show a triable issue of fact as to whether "a
6 reasonable person in [her] position would have felt
7 that [she] was forced to quit because of intolerable
8 and discriminatory working conditions." Steiner v.
9 Showboat Operating Co., 25 F.3d 1459, 1465 (9th Cir.
10 1994) (quotation marks and citation omitted)
(alterations in original). We have held that in
11 order to establish constructive discharge, a
12 plaintiff "must at least show some aggravating
13 factors, such as a continuous pattern of
14 discriminatory treatment." Thomas v. Douglas, 877
15 F.2d 1428, 1434 (9th Cir. 1989) (quotation marks and
16 citation omitted).

17 Bergene v. Salt River Project Agric. & Improvement Dist., 272
18 F.3d 1136, 1143-44 (9th Cir. 2001) (emphasis added). "Summary
19 judgment is therefore appropriate on a constructive discharge
20 claim where the 'decision to resign [was] unreasonable as a
21 matter of law.'" Lawson v. Washington, 296 F.3d 799, 805 (9th
22 Cir. 2002), quoting King v. AC & R Advertising, 65 F.3d 764,
23 767 (9th Cir. 1995).

24 Defendant contends that Plaintiff was actually fired from
25 her employment. Defendant asserts that Plaintiff was fired
26 because she failed to return to work and she was receiving
27 short-term disability payments from the employer's insurer
28 without telling her employer that she had been cleared by her
doctor to return to work.

Plaintiff raises no real argument regarding her
constructive discharge, i.e., that she did not quit her
employment but, rather, was terminated on October 8, 2001.
Plaintiff did not really contest Defendant's argument in this

1 regard during oral argument before the Court. With regard to
2 the record evidence before the Court, Plaintiff stated in her
3 deposition that, prior to receiving a termination letter from
4 Defendant, she was "not sure" whether or not she would return
5 to work, and that her decision was primarily based on the
6 status of her pregnancy, rather than her workplace conditions.
7 Therefore, the Court concludes that, as a matter of law,
8 Plaintiff was not constructively discharged from her
9 employment because at no time did Plaintiff evidently
10 determine that the working conditions at PSS were so
11 intolerable that she, much less a "reasonable" employee, would
12 feel compelled to quit. See French v. Eagle Nursing Home,
13 Inc., 973 F. Supp. 870, 877-78 (D. Minn. 1997) ("The only
14 logical conclusion that the Court can draw from [plaintiff's]
15 wish to return to [employer] is that the working conditions
16 there were in fact not intolerable.").

17 Because Plaintiff has not produced evidence that she quit
18 her employment or that she quit her employment because her
19 workplace was intolerable, Defendant is entitled to judgment
20 as a matter of law on Plaintiff's claim that she was
21 constructively discharged from her employment.

22 **D. Intentional infliction of emotional distress**

23 A federal court exercising jurisdiction over an ancillary
24 state law claim must apply the substantive law of the state in
25 which the claim is brought. See Mayview Corp. v. Rodstein,
26 620 F.2d 1347, 1357 n.7 (9th Cir. 1980).

27 Pursuant to Arizona law, the three elements required to
28 find liability based on the tort of intentional infliction of

1 emotional distress are: (1) the conduct by the defendant must
2 be extreme and outrageous; (2) the defendant must either
3 intend to cause emotional distress or recklessly disregard the
4 near certainty that such distress will result from his
5 conduct; and (3) severe emotional distress must indeed occur
6 as a result of defendant's conduct. See Watts v. Golden Age
7 Nursing Home, 127 Ariz. 255, 258, 619 P.2d 1032, 1035 (1980).

8
9 Arizona courts have refused to allow plaintiffs to
10 prevail in such claims unless defendant's conduct is
11 found to be extraordinary. "A plaintiff must show
12 that the defendant's acts were 'so outrageous in
13 character and so extreme in degree, as to go beyond
14 all possible bounds of decency, and to be regarded
15 as atrocious and utterly intolerable in a civilized
16 community.'" Mintz v. Bell Atlantic Systems Leasing,
17 183 Ariz. 550, 905 P.2d 559, 563 (Ariz. App. 1995)
18 Tempesta v. Motorola, Inc., 92 F. Supp. 2d 973, 987 (D. Ariz.
19 1999). See also Rowland v. Union Hills Country Club, 157
20 Ariz. 301, 304, 757 P.2d 105, 108 (Ct. App. 1988) (upholding
21 summary judgment for defendant on the plaintiff's claim of
22 intentional infliction of emotional distress because the
23 "conduct complained of . . . [was] not so far outside the
24 bounds of decency as to cause a reasonable person, upon
25 hearing of it, to shout, "Outrageous!").

26 In her pleadings, Plaintiff asserts that Defendant's
27 behavior in addressing her complaints of harassment was
28 sufficiently egregious that it constitutes intentional
infliction of emotional distress. At oral argument,
Plaintiff's counsel argued that Mr. McWilliams rubbing his
crotch against Plaintiff constituted "outrageous" conduct, in

1 addition to Mr. Maxwell and Mr. Evans allegedly seeking to
2 have Plaintiff fired.

3 Defendant argues that Plaintiff has failed to demonstrate
4 extreme and outrageous conduct as a matter of law.

5 Plaintiff alerted her immediate supervisor to her
6 perceptions of a sexually hostile environment and the behavior
7 of which Plaintiff complained ceased almost immediately.
8 Additionally, when Plaintiff complained to Mr. Mondragon on
9 June 6 about her co-workers' ostracism of her, he relayed this
10 complaint to the corporate Human Resource department which
11 initiated an investigation of Plaintiff's complaints within
12 three weeks. Within three months of Plaintiff's complaint to
13 Mr. Mondragon, Defendant investigated and addressed
14 Plaintiff's complaints, including retraining its employees and
15 censuring several employees.

16 The Court concludes that, as a matter of law, Defendant's
17 behavior in addressing Plaintiff's claims was not "extreme and
18 outrageous," nor does Defendant's behavior show an intent to
19 harm Plaintiff or a reckless disregard that Plaintiff would be
20 harmed. See Thomas v. Douglas, 877 F.2d 1428, 1435 (9th Cir.
21 1989); Tempesta, 92 F. Supp. 2d at 987; Spratt v. Northern
22 Auto. Corp., 958 F. Supp. 456, 461 (D. Ariz. 1996). See also
23 Mintz v. Bell Atl. Sys. Leasing Int'l, Inc., 183 Ariz. 550,
24 554, 905 P.2d 559, 563 (Ct. App. 1995) ("A plaintiff must show
25 that the defendant's acts were 'so outrageous in character and
26 so extreme in degree, as to go beyond all possible bounds of
27 decency, and to be regarded as atrocious and utterly
28 intolerable in a civilized community.'"). Mr. McWilliams'

1 behavior was apparently not so extreme or outrageous that
2 Plaintiff found it necessary to complain about his behavior
3 specifically to Mr. Bellwood at the time that she complained
4 of Mr. Bustos and Mr. Salinas' language, nor was this behavior
5 so outrageous that Plaintiff complained of it in her EEOC
6 complaint. Additionally, Plaintiff provides no evidence,
7 other than her statements in her complaint, that she
8 experienced any "severe" emotional distress as a direct result
9 of Defendant's behavior.

10 Because there are no disputed issues of material fact
11 with regard to this claim, and because, as a matter of law,
12 Defendant's conduct was not extreme and outrageous, nor
13 apparently intended to harm Plaintiff or in reckless disregard
14 of harm to Plaintiff, Defendant's are entitled to summary
15 judgment on Plaintiff's claim of intentional infliction of
16 emotional distress.

17 **E. "Negligent supervision"**

18 Plaintiff's fifth claim for relief alleges that Defendant
19 was negligent in supervising its employees, resulting in
20 "shock, mental anguish and other emotional distress" to
21 Plaintiff. First Amended Complaint at 19. As stated supra,
22 a federal court exercising jurisdiction over an ancillary
23 state law claim must apply the substantive law of the state in
24 which the claim is brought. See Mayview Corp., 620 F.2d at
25 1357 n.7.

26 Defendant asserts that Plaintiff's claim based upon
27 Defendant's alleged negligence is barred pursuant to the
28

1 exclusive remedy provisions of Arizona's workers compensation
2 statutes, which provide that:

3 A. The right to recover compensation pursuant to
4 this chapter for injuries sustained by an employee
5 or for the death of an employee is the exclusive
6 remedy against the employer or any co-employee
7 acting in the scope of his employment, and against
8 the employer's workers' compensation insurance
9 carrier or administrative service representative,
10 except as provided by § 23-906, and except that if
11 the injury is caused by the employer's wilful
12 misconduct, or in the case of a co-employee by the
13 co-employee's wilful misconduct, and the act causing
14 the injury is the personal act of the employer, or
15 in the case of a co-employee the personal act of the
16 co-employee, or if the employer is a partnership, on
17 the part of a partner, or if a corporation, on the
18 part of an elective officer of the corporation, and
19 the act indicates a wilful disregard of the life,
20 limb or bodily safety of employees, the injured
21 employee may either claim compensation or maintain
22 an action at law for damages against the person or
23 entity alleged to have engaged in the wilful
24 misconduct.

25 B. "Wilful misconduct" as used in this section means
26 an act done knowingly and purposely with the direct
27 object of injuring another.

28 Ariz. Rev. Stat. Ann. §§ 23-1022(A) & 23-1022(B) (1995 & Supp.
2003).

Plaintiff contends that there are statutory exceptions to
the exclusive remedy provision which allow Plaintiff's
negligence claim. Specifically, Plaintiff cites Arizona
Revised Statutes § 23-1043.01(B), which provides:

A mental injury, illness or condition shall not be
considered a personal injury by accident arising out
of and in the course of employment and is not
compensable pursuant to this chapter unless some
unexpected, unusual or extraordinary stress related
to the employment or some physical injury related to
the employment was a substantial contributing cause
of the mental injury, illness or condition.

Interpreting this exception to the exclusive remedy
provision the Arizona Court of Appeals has stated:

1 It is well settled that work-related injury claims
2 are generally redressed exclusively under Arizona's
3 workers' compensation scheme. A.R.S. § 23-1022.
4 . . . However, article XVIII, § 8, of the Arizona
5 Constitution allows an employee who would otherwise
6 be barred by the workers' compensation exclusivity
7 provision to sue his or her employer if the employee
8 has suffered an injury caused by the employer's
9 wilful misconduct or an injury that is "the result
10 of an act done by the employer or a person employed
11 by the employer knowingly and purposefully with the
12 direct object of injuring another, and the act
13 indicates a wilful disregard of the life, limb or
14 bodily safety of employees." This constitutional
15 guarantee is codified in § 23-1022(A), which allows
16 an injured employee to "either claim compensation or
17 maintain an action at law for damages against the
18 person or entity alleged to have engaged in the
19 wilful misconduct."

11 Gamez v. Brush Wellman, Inc., 201 Ariz. 266, 269, 34 P.3d 375,
12 378 (Ct. App. 2001).

13 The exclusive remedy provisions of Arizona's workers
14 compensation statutes do not apply when the employee's injury
15 is caused by an employer's "willful misconduct," which is
16 defined as "an act done knowingly and purposely with the
17 direct object of injuring another." Ariz. Rev. Stat. Ann. §§
18 23-1022(A) & 23-1022(B) (1995 & Supp. 2003). Even acts
19 classified as gross negligence, or wantonness amounting to
20 gross negligence, do not constitute a "willful act" under this
21 definition; the alleged negligence or wantonness must be
22 accompanied by the employer's intent to inflict injury upon
23 the employee. Cf. Diaz v. Magma Copper Co., 190 Ariz. 544,
24 551, 950 P.2d 1165, 1172 (Ct. App. 1997) (holding that the
25 defendant employer's acts did not constitute willful
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1 misconduct, even though the defendant employer ignored safety
2 hazards and delayed the access of paramedics to the employee
3 until the employee was extricated from a mine, because there
4 was no evidence that the employer's objective was to injure
5 the deceased).

7 The Arizona courts are reluctant to find that employers
8 have acted with wilful misconduct regarding even an employee's
9 physical safety:

10 Gross negligence is not sufficient to establish
11 wilful misconduct under § 23-1022. The "direct
12 object" of the employer's actions must have been to
13 "injur[e] another." § 23-1022(B); see Allen v.
14 Southwest Salt Co., 149 Ariz. 368, 718 P.2d 1021
15 (App. 1986). Generally, this means that the
16 employer's liability cannot ... be stretched to
17 include accidental injuries caused by the gross,
18 wanton, wilful, deliberate, intentional, reckless,
19 culpable, or malicious negligence, breach of
20 statute, or other misconduct of the employer short
21 of a conscious and deliberate intent directed to the
22 purpose of inflicting an injury.

23 Even if the alleged conduct goes beyond aggravated
24 negligence, and includes such elements as knowingly
25 permitting a hazardous work condition to exist,
26 knowingly ordering employees to perform an extremely
27 dangerous job, wilfully failing to furnish a safe
28 place to work, wilfully violating a safety statute,
... or withholding information about worksite
hazards, the conduct still falls short of the kind
of actual intention to injure that robs the injury
of accidental character.

24 Gamez, 201 Ariz. at 269, 34 P.3d at 378 (some internal
25 citations omitted).

27 Defendant's argument that Plaintiff's claim for negligent
28 supervision is precluded is based primarily on the conclusion

1 reached by the Arizona Court of Appeals in Irvin Investors
2 Inc. v. Superior Court, 166 Ariz. 113, 800 P.2d 979 (Ct. App.
3 1990). In Irvin Investors the Arizona Court of Appeals
4 examined the exclusivity provisions of Arizona's workers
5 compensation statutes as precluding a state court cause of
6 action for negligence against an employer. In Irvin
7 Investors, the plaintiff sued her employer alleging that she
8 suffered psychological injuries as a result of being sexually
9 molested by a coworker. The Arizona trial court denied the
10 defendant employer's motion for summary judgment as to the
11 plaintiff's claim of negligent infliction of emotional
12 distress.⁷

13
14
15 On appeal, the Arizona Court of Appeals held that the
16 plaintiff's psychological injury was a mental condition caused
17 by unexpected, unusual or extraordinary stress related to her
18 employment and, therefore, that the injury was compensable
19 under Arizona's workers compensation laws and, therefore,
20

21
22 ⁷ Irvin Investors v. Superior Court, involved an employee at
23 a fast-food restaurant who was sexually assaulted, on two
24 occasions, by a co-worker who had previously molested another
25 employee at the restaurant. Her action against the employer was
26 for the psychological injuries she suffered and was based on a
27 claim of negligent hiring and negligent retention. The Arizona
28 Court of Appeals held that Arizona's workers compensation statutes,
specifically Arizona Revised Statutes. §§ 23-906(A) and 23-1022,
precluded the employee from bringing a tort action based on
negligent hiring and negligent retention. The court stated that,
under the facts of that case, the stress to which the employee was
subjected fell into the category of unexpected, unusual, or
extraordinary.

1 presumptively precluded by the exclusive remedy provisions.
2 The Arizona Court of Appeals further concluded that the
3 plaintiff could not bring a tort action against her employer
4 for her psychological injuries unless she provided evidence of
5 intentional conduct or reckless disregard by employer. See
6 166 Ariz. at 115, 800 P.2d at 981.
7

8 Plaintiff's argument that this claim for relief should
9 not be dismissed is predicated by a decision issued prior to
10 Irvin Investors, i.e., Ford v. Revlon, in which the Arizona
11 Supreme Court concluded that a plaintiff's claim of
12 intentional infliction of emotional distress was not barred by
13 the exclusive remedy provision of Arizona Workers'
14 Compensation laws. See 153 Ariz. 38, 44, 734 P.2d 580, 586
15 (1987).
16

17 Plaintiff did not plead her sixth claim for relief as
18 negligent infliction of emotional distress, but instead
19 alleged that Defendant was negligent in supervising its
20 workplace such that Plaintiff was subjected to a hostile
21 atmosphere.⁸ The Court concludes that Plaintiff has not
22

23
24 ⁸ Plaintiff alleges that:

25 The employees and agents of PSS intentionally,
26 maliciously and in reckless disregard of Debbie's welfare
27 and rights acted in a manner so outrageous in character
28 and so extreme in degree, as to go beyond all bounds of
decency and their conduct should be regarded as atrocious
and utterly intolerable in a civilized community.
PSS officers and executives were fully aware of the
continued and on-going harassing conduct and had a duty

1 alleged facts sufficient to support a conclusion that
2 Defendant's acts were intentional conduct calculated to harm
3 Plaintiff; this claim for relief is based on an allegation of
4 negligence, rather than conduct intentionally designed to harm
5 Plaintiff, in contrast to Plaintiff's claim for relief based
6 on intentional infliction of emotional distress.
7

8 The Court concludes that Irvin Investors is more closely
9 related to the instant matter than the Ford case, because in
10 Irvin Investors the court addressed a plaintiff's claim of
11 negligent retention and negligent hiring, the same claim pled
12 by Plaintiff, while the Ford case addressed a claim of
13 intentional infliction of emotional distress, which requires
14 that the plaintiff show that the defendant's acts were
15 intentional, i.e., that the defendant's acts per se fit the
16 exception to the exclusive remedy provision of Arizona's
17

18
19 to investigate, address and prevent further such conduct
20 from occurring once Debbie had placed PSS on notice that
21 such activities were taking place.

22 PSS breached its duty to Debbie by failing to take
23 adequate and appropriate measures to prevent further
24 harassment and retaliatory actions against her after
25 receiving adequate notice of the harassing and hostile
26 work environment.

27 ***

28 The acts committed against Debbie were designed to cause
her shock and mental anguish.

The conduct of PSS constituted reckless indifference to
the protected rights of [Plaintiff] . . .

The conduct of PSS constituted wilful and wanton
disregard for the interests of [Plaintiffs].

Amended Complaint at 14-15.

1 workers compensation statutes. The cases may be reconciled to
2 stand for the proposition that a negligence claim is precluded
3 by the workers compensation statutes while a claim for
4 intentional infliction of emotional distress is not precluded.
5

6 Because, pursuant to the holding in Irvin Investors,
7 Arizona law precludes an employee from bringing a tort action
8 based on negligent hiring and negligent retention against their
9 employer, Defendant is entitled to judgment as a matter of law
10 in its favor on Plaintiff's claim of negligence.

11 **F. Loss of consortium**

12 This claim is pled by Plaintiff Conrad Mosakowski as an
13 ancillary state law claim.
14

15 Defendant states that this is a derivative claim,
16 requiring Plaintiffs to establish an underlying tort. Because
17 Plaintiffs cannot establish an underlying tort, Defendants
18 argue, Plaintiff's husband cannot prevail on a loss of
19 consortium claim.
20

21 To succeed on this claim, Plaintiffs must establish that
22 Defendant committed a tort against Plaintiff Debbie
23 Mosakowski. See Barnes v. Outlaw, 192 Ariz. 283, 286, 964
24 P.2d 484, 487 (1998) ("because loss of consortium is a
25 derivative claim . . . all elements of the underlying cause
26 must be proven"). A violation of Title VII does not support
27 a loss of consortium claim as a matter of law. See Durley v.
28

1 APAC, Inc., 236 F.3d 651, 658 (11th Cir. 2000); Smith v.
2 Auburn Univ., 201 F. Supp. 2d 1216, 1228 (M.D. Ala. 2002);
3 Chergosky v. Hodges, 975 F. Supp. 799, 801 (E.D.N.C. 1997)
4 Franz v. Kernan, 951 F. Supp. 159, 162 (E.D. Mo. 1996); Murphy
5 v. Cadillac Rubber & Plastics, Inc., 946 F. Supp. 1108, 1125
6 (W.D.N.Y. 1996).

8 Because the Court has concluded that Defendant is
9 entitled to summary judgment on Plaintiff Debbie Mosakowski's
10 claims of intentional infliction of emotional distress and
11 negligence, Defendant is entitled to summary judgment on
12 Plaintiff Conrad Mosakowski's claim of loss of consortium.
13

14 **IV. Conclusion**

15 Defendant's Motion for Summary Judgment must be granted
16 and judgment as a matter of law entered in favor of Defendant
17 with regard to all of Plaintiffs' claims for relief based on
18 intentional infliction of emotional distress, negligence, and
19 loss of consortium. Taking the facts in the light most
20 favorable to Plaintiff, Defendant's acts in addressing
21 Plaintiff's complaints were not extreme and outrageous. The
22 Court further concludes that Plaintiff's negligence-based
23 claim is barred by Arizona's workers compensation statutes'
24 exclusive remedy provisions.
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26
27 Additionally, Defendant's Motion for Summary Judgment must
28 be granted and judgment as a matter of law entered in favor of

1 Defendant with regard to Plaintiff's claim that Defendant
2 constructively discharged her as an act of retaliation in
3 violation of Title VII. Plaintiff did not quit her employment
4 and Plaintiff's own deposition statements indicate that
5 Plaintiff did not find the workplace so intolerable that she
6 could not return to work. The Court concludes that, as a
7 matter of fact, Defendant terminated Plaintiff's employment
8 because Plaintiff had in effect abandoned her job and
9 continued to receive disability benefits after her doctor had
10 released her to return to work.
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13 Defendant's Motion for Summary Judgment in its favor
14 with regard to Plaintiff's claim that Defendant is liable to
15 Plaintiff for a hostile work environment in violation of Title
16 VII must be denied because the Court concludes that there is
17 a material issue of fact regarding the adequacy of Defendant's
18 acts in addressing Plaintiff's claims regarding a hostile
19 environment. Similarly, Defendant's Motion for Summary
20 Judgment in its favor with regard to Plaintiff's claim that
21 Defendant retaliated against her for exercising a protected
22 right pursuant to Title VII must be denied because some of the
23 acts of which Plaintiff complains, if proved to be
24 retaliatory, could be found as a matter of law to be adverse
25 employment action.
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1 Plaintiffs' motion for judgment as a matter of law that
2 a hostile environment existed in violation of Title VII must
3 be denied because Plaintiff has not established as a matter of
4 undisputed fact that the workplace was subjectively hostile.
5 Additionally, Plaintiff's motion for judgment as a matter of
6 law that Defendant is liable for the existence of the alleged
7 hostile environment must be denied because there are disputed
8 issues of material fact regarding whether Defendant's acts
9 were sufficient and prompt as a matter of law. Plaintiff's
10 motion for judgment as a matter of law that Defendant is
11 liable to Plaintiff on her claim of retaliation in violation
12 of Title VII must be denied because there is a disputed issue
13 of fact regarding whether any acts taken by Defendant or its
14 agents were based on discriminatory reasons. Plaintiff's
15 motion seeking judgment as a matter of law on the "inadequacy
16 of defendant's termination of Mark Bellwood as a remedial
17 measure in its defense" must be denied because Defendant's
18 termination of Mr. Bellwood is relevant to the issue of
19 whether Defendant took prompt remedial action in response to
20 Plaintiff's claim of harassment.

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26 **THEREFORE, IT IS ORDERED THAT:**

27 1. Plaintiff's motion for partial summary judgment
28 [Docket No. 72] is **denied** in its entirety.

1 2. Defendant's motion for summary judgment [Docket No.
2 74] is **granted in part and denied in part**. Defendant's motion
3 is **granted** as to Plaintiffs' claims based upon constructive
4 discharge in violation of Title VII; and is **granted** as to
5 Plaintiffs' claims based on negligence and intentional
6 infliction of emotional distress; and is **granted** as to
7 Plaintiff Conrad Mosakowski's claim for loss of consortium.
8

9 Defendant's motion for summary judgment is **denied** as to
10 Plaintiff's claim that she was subjected to a gender-based
11 hostile work environment in violation of Title VII and **denied**
12 as to Plaintiff's claim that Defendant retaliated against her
13 for engaging in a protected activity in violation of Title
14 VII.
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16 **FURTHERMORE, IT IS ORDERED THAT,** having granted
17 Defendant's motion for summary judgment with respect to
18 Plaintiff's claim of negligence, Defendant's motion for
19 judgment on the pleadings regarding Plaintiff's negligence
20 claim [Docket No. 62] is **denied as moot**.
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24 **DATED** this 8 day of December, 2003,
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28 Stephen L. Verkamp
 United States Magistrate Judge