IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Plaintiff,

MARIA GARCIA,

Plaintiff/Intervenor

v.

NEWNAN TRADING CORPORATION,

Defendant.

CIVIL ACTION FILE NO.:
1:01-CV-1062-TWT

ORDER FOR SERVICE OF REPORT AND RECOMMENDATION

Attached is the report and recommendation of the United States Magistrate Judge made in this action in accordance with 28 U.S.C. § 636 and this Court's Local Rule 72.1C. Let the same be filed and a copy, together with a copy of this Order, be served upon counsel for the parties.

Pursuant to 28 U.S.C. § 636(b)(1), each party may file written objections, if any, to the report and recommendation **within eleven (11) days of the receipt of this Order**. Should objections be filed, they shall specify with particularity the alleged error

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or errors made (including reference by page number to the transcript if applicable) and shall be served upon the opposing party. The party filing objections will be responsible for obtaining and filing the transcript of any evidentiary hearing for review by the district court. If no objections are filed, the report and recommendation may be adopted as the opinion and order of the district court and any appellate review of factual findings will be limited to a plain error review. United States v. Slay, 714 F.2d 1093 (11th Cir. 1983), cert. denied, 464 U.S. 1050, 104 S.Ct. 729, 79 L.Ed.2d 189 (1984).

The Clerk is directed to submit the report and recommendation with objections, if any, to the district court after expiration of the above time period.

SO ORDERED, this 5th day of FEBRUARY, 2004.

Linda T. Walker

LINDA T. WALKER
UNITED STATES MAGISTRATE JUDGE

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MAGISTRATE JUDGE'S ORDER AND FINAL REPORT AND RECOMMENDATION

This case is presently before the Court on Defendant's Motion for Summary Judgment Against Plaintiff EEOC and Plaintiff Intervenor Maria Garcia and for Sanctions Against Plaintiff EEOC, filed on October 31, 2003. Docket Entries [74-1, 74-2].[1] Plaintiff EEOC and Plaintiff/Intervenor Maria Garcia (collectively "Plaintiffs")

[1]Defendant separately filed its memorandum of law in support of summary judgment, its statement of undisputed material facts, and other evidence in support of its motion. See Docket Entries [75, 76, 77]. Defendant filed an amended Statement of Undisputed Facts to include proper citations to the record on December 12, 2003,

filed a Joint Response to Defendant's Motion for Summary Judgment on December 22, 2003.[2] Docket Entry [88]. Also before the Court is Plaintiff EEOC's Motion to Strike Affidavits Purportedly Supporting Defendant's Motion for Summary Judgment and Memorandum of Law in Support Thereof, filed on December 22, 2003. Docket Entry [87]. Defendant filed a response in opposition to Plaintiff EEOC's Motion to Strike on January 9, 2004, and Plaintiff EEOC filed a reply on January 26, 2004. Docket Entries [99 and 111].

The Court also notes that on January 28, 2004, Plaintiffs filed an affidavit of Plaintiff Intervenor in support of their opposition to summary judgment, dated January 26, 2004, more than one month after filing their response to summary

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but withdrew No. 15 in a subsequent teleconference with the Court. See Docket Entries [80, 86].

The Court notes that Defendant filed a reply brief in support of its motion for summary judgment in direct defiance of the Court's order during the tele-conference held on December 17, 2003. Docket Entry [98]. Plaintiff EEOC filed objections to Defendant's reply brief noting the same. Docket Entry [108]. While Defendant points out that Local Rule 7.1C permits the filing of a reply brief, the rule also provides that "it is not necessary for the movant to file a reply brief as a routine practice." Local Rule 7.1C, N.D., Ga. Therefore, rather than strike Defendant's reply brief from the record, the Court will simply not consider Defendant's reply brief in support of its motion for summary judgment.

[2]Plaintiffs filed a separate Joint Response to Defendant's Statement of Undisputed Material Facts, as well as their own Statement of Material Facts to Which Plaintiffs Contend There Exists a Genuine Issue to be Tried. Docket Entry [90].

judgment and without leave from the Court, in violation of Local Rule 56.1A. In addition, although Plaintiff Intervenor contends in her affidavit that she was out of the country from December 6, 2003, through January 1, 2004, Defendant's Motion for Summary Judgment has been pending since October 31, 2003. The Court therefore **DIRECTS** the Clerk to **STRIKE** Plaintiff Intervenor's affidavit from the record. Docket Entry [112].

For the reasons set forth below, Plaintiff EEOC's Motion to Strike is **DENIED**. Docket Entry [87]. Further, the undersigned **RECOMMENDS** that Defendant's Motion for Summary Judgment Against Plaintiff EEOC and Plaintiff/Intervenor Garcia and for Sanctions Against Plaintiff EEOC be **GRANTED.** Docket Entries [74-1 and 74-2].

BACKGROUND

Plaintiff EEOC filed the instant lawsuit on April 24, 2001, based on a charge of discrimination filed by Plaintiff/Intervenor Maria Garcia, alleging that Defendant discriminated against its female employees as a class through the discriminatory application of a break room/restroom pass policy that only applied to the female employees, and which also resulted in the constructive discharge of some of the female employees, in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-

2(a) ("Title VII"). (See EEOC Compl., ¶¶ 7-8, Docket Entry [1]). Plaintiff EEOC also contends in its Complaint that Defendant unlawfully terminated Plaintiff Intervenor's employment in retaliation for opposing the Defendant's break room/restroom pass policy, which she in good faith believed to be unlawful sex discrimination, in violation of Title VII, 42 U.S.C. § 2000e-3(a). (EEOC Compl. ¶ 9). With consent of the parties and permission from the Court, Plaintiff Maria Garcia joined in the EEOC's action and filed an Intervenor Complaint on June 21, 2001. Docket Entry [6]. Plaintiff Intervenor alleges that Defendants instituted a restroom policy that only required women to carry a stick when going to and from the restroom during work hours, and that she was terminated in retaliation for refusing to carry the stick to go to the bathroom, all in violation of Title VII. (See Intervenor Compl. ¶¶ 5-9). On June 22, 2001, Plaintiff Intervenor filed an Amended Complaint adding a claim for hostile work environment sexual harassment in violation of Title VII. (See Amend. Intervenor Compl., Docket Entry [8]). Plaintiff Intervenor subsequently filed a motion to dismiss with prejudice her hostile work environment sexual harassment claim, which the district court granted. Docket Entries [69 and 73].

PLAINTIFF EEOC'S MOTION TO STRIKE

Plaintiff filed the instant motion to strike affidavits of Spanish-speaking

employees and a Spanish translator who translated a questionnaire to the employees-submitted by Defendant in support of its motion for summary judgment because they do not comport with the requirements of an affidavit under Rule 56(e) of the Federal Rules of Civil Procedure because the affidavits do not indicate that the affiants have personal knowledge or are competent to testify, lack specific facts admissible as evidence, are not dated, and are not notarized.[3] In response, Defendant contends that the affidavits to which Plaintiff EEOC objects are actually declarations in compliance with 28 U.S.C. § 1746, and therefore need not comply with Rule 56(e). For the following reasons, the Court finds that Plaintiff EEOC's arguments lack merit.

The declarations of Alice Ortiz, the Spanish translator, and 45 employees at a minimum, comply with the statutory requirement for Unsworn Declarations Under Penalty of Perjury. See 28 U.S.C. § 1746. Section 1746 provides, in pertinent part:

> Wherever, under any law of the United States or under any rule, regulation, order, or requirement made pursuant to law, any matter is required or permitted to be supported, evidenced, established, or proved by the sworn declaration, verification, certificate, statement, oath, or affidavit, in writing of the person making the same (other than a deposition, or an oath of office, or an oath required to be taken before a specified official other than a notary public), such matter may, with like force and effect, be supported, evidenced, established, or proved by the unsworn declaration, certificate, verification, or statement, in writing of such person which is subscribed by him, as true under penalty of perjury,

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[3]Plaintiff also makes other arguments that the Court finds are without merit.

and dated, *in substantially the following form*:

. . . .

(2) If executed within the United States, its territories, possessions, or commonwealths: "I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct. Executed on (date).

(Signature)".

28 U.S.C. § 1746 (emphasis added).

All of the declarations at issue here mirror the language provided in 28 U.S.C. § 1746, and have an execution date and signature of the affiant that appear below the following statement: "I declare under penalty of perjury that the foregoing answers are true and correct." The declarations of the employees are dated as executed on March 12, 2002. Although the declaration of Alice Ortiz, the translator, is dated as executed October, 2003, without indicating a specific day, the approximate date with the month and year is sufficient to comply with section 1746. See Pieszak v. Glendale Adventist Med. Ctr., 112 F. Supp. 2d 970, 999 (C.D. Cal. 2000).

Additionally, Ms. Ortiz states in her declaration that she is a certified State Court Interpreter through the Georgia Supreme Court, and that on March 12, 2002, she truthfully and accurately translated the questions in Defendant's questionnaire to its employees. (Ortiz Decl. ¶¶ 3, 4, 6, Docket Entry [77]). Ms. Ortiz also attached a copy

of her curriculum vitae and State of Georgia Court Interpreter certification, as well as a copy of the questionnaire that she translated. (See Ortiz Decl., Exs. 1, 2). The employees' declarations represent their responses to those questions translated to them by Ms. Ortiz. (See generally Employee Decl., Docket Entry [77]). Although Plaintiff EEOC argues that there is no evidence that the declaration "under penalty of perjury," which is written in English on the declarations, was translated into Spanish for the declarants, "[n]othing in § 1746 requires that a non-English speaking affiant provide evidence that the declaration was translated into the affiant's native language before signing it. . . .[and] such an argument would go to the weight of the declaration and not its admissibility. Collazos-Cruz v. United States, 1997 WL 377037, at *3 (6th Cir. July 3, 1997); accord Matsuda v. Wada, 101 F. Supp. 2d 1315, 1323 (D. Haw. 1999) (denying defendant's motion to strike plaintiff's declaration where defendant argued that declaration was written in English and Plaintiff could not speak English and that there was no evidence that Plaintiff's son, who translated the declaration, was a qualified legal translator or translated the declaration correctly).

Based upon the foregoing, the Court finds that the declarations submitted by Defendant have met all of the statutory requirements of section 1746 and therefore may properly be considered in support of Defendant's motion for summary judgment.

See United States v. Four Parcels of Real Property in Greene and Tuscaloosa Counties in State of Ala., 941 F.2d 1428, 1444 n.36 (11th Cir. 1991) (citations omitted). Notably, the declarations of the employees even go one step further than necessary under 28 U.S.C. § 1746 because they were also sworn to by a Notary Public. Accordingly, Plaintiff EEOC's Motion to Strike is **DENIED**.

DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND FOR SANCTIONS

Defendant has filed the instant motion for summary judgment contending that (1) the EEOC failed to conciliate the charging party's claims, and that the non-conciliated claims should be dismissed and summary judgment entered in Defendant's favor, and that Defendant is entitled to an award of attorney's fees as a sanction for the EEOC's abuse of discretion; (2) the Plaintiffs cannot make out a prima facie case of disparate treatment based on sex because the break/restroom pass policy was gender neutral and applied to both men and women and there was a legitimate business reason for the policy--to maintain productivity; (3) Plaintiff EEOC cannot make out claims of constructive discharge because it cannot show that the pass policy made the working conditions so intolerable such that a reasonable person in the position of the female employees would have been compelled to resign; (4) Plaintiffs cannot establish a prima facie claim of retaliation because Plaintiff Intervenor's opposition to the

gender-neutral pass policy was not objectively reasonable and could not have been based on a good faith belief that the Defendant was engaging in unlawful sex discrimination, and because Plaintiff Intervenor was terminated prior to engaging in protected activity; (5) Plaintiffs cannot establish that Defendant's legitimate business reason for terminating Plaintiff Intervenor- insubordination and failing to follow company policy during her probationary period of employment-was merely a pretext for unlawful retaliation; and (6) Plaintiff EEOC cannot seek class-based relief because it cannot set forth a prima facie case of sex discrimination.

In Plaintiffs' response to Defendant's motion for summary judgment, Plaintiffs contend that (1) a sanction of dismissal, or attorney's fees, or any other relief for failure to conciliate because Plaintiff EEOC acted in good faith in attempting to conciliate, conciliation failed due to Defendant's own unreasonableness; (2) Defendant subjected the female employees to disparate treatment based on their sex by implementing and enforcing a pass policy for the break room/restroom only against them and not the male employees; (3) Plaintiff Intervenor was terminated in retaliation within minutes of Plaintiff Intervenor complaining to Defendant's officials that the pass policy was unfairly applied to just women; (4) Defendant's legitimate business reason for her termination-insubordination and failure to follow a company policy during her

probationary period–was pretext for retaliation because Defendant did not terminate the other female employees who also failed to follow the policy, but only Plaintiff Intervenor because she was the only employee who adamantly complained about the policy; (5) Plaintiff EEOC can make out a prima facie case of constructive discharge because the women who had to carry the bathroom pass were subjected to obscene comments, jokes, and laughter from the male employees and management, and management refused to correct the harassing behavior thus making the work conditions intolerable; and (6) Plaintiff EEOC need not show a "pattern or practice" in order to seek class-based relief because Plaintiff EEOC can show that members of the class were disparately treated based on Defendant's discriminatory policy toward female employees.

I. STATEMENT OF FACTS

Plaintiff Intervenor began working as a cloth cutter for Defendant, an export trading company dealing in textiles and second-hand clothing, on January 26, 1998. (Defendant's Statement of Undisputed Material Facts (hereinafter ("DSUF") ¶ 1; Sheikali Dep. p. 13; Defendant's Motion for Summary Judgment (hereinafter "DMSJ"), Ex. S).[4] At the time relevant to this litigation, Charbel Baaklini was Defendant's

[4]All facts taken directly from the Defendant's Statement of Material Facts have either been admitted or remain undisputed by the Plaintiff. This Court must accept

president and oversaw the day-to-day operations at the facility, but did not work with or speak to the employees on the production floor. (Baaklini Dep. p. 9). Johan Andries ("Andre") Kok was Defendant's vice-president, and oversaw the shipping, receiving, and production numbers in the warehouse, which required walking on the production floor. (Kok Dep. pp. 6, 10). In addition, Mr. Kok supervised the four plant supervisors, including Andy Sheikali, the used clothing supervisor. (Kok Dep. p. 11). In turn, Mr. Sheikali supervised the only floor supervisor in the plant, Juan Barajas. (Sheikali Dep. pp. 17-18; Barajas Dep. p. 11). As the floor supervisor, Mr. Barajas' job was to maintain the level of production of the amount of clothing, supervising the employees, which approximately numbered between 140 and 180, and the majority of which are women. (Barajas Dep. pp. 10-11; Baaklini Dep. p. 18). Mr. Barajas did not, however, have authority to hire and fire employees. (Barajas Dep. 10).

When Plaintiff Intervenor began her employment, she filled out and signed an application along with a package of paper work. (Pl. Dep. pp. 25-26). Included in the paperwork was a form entitled, "Employee Policies and Procedures." (See Pl. Dep., Ex. 11). The first item on the this form is "probation," and provides that "[a]ll

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as admitted those facts in Defendant's statement that have not been "specifically controverted" with citation to the relevant portions of the record by the opposing party. Local Rule 56.1B(2), (3), N.D. Ga.

employees must complete a 90-day probationary period before being considered a permanent employee. N.T.C. reserves the right to terminate an employee without prior notice during this probationary period." (Pl. Dep., Ex. 11). Plaintiff, with Defendant's permission, left her employment on December 5, 1998, which was before the time in December when the plant closes for two weeks for the holidays, in order to return to Mexico. (Pl. Dep. pp. 35-36). According to Defendant, Plaintiff Intervenor did not leave with the understanding that she was coming back after the holidays, and she just outright quit. (Baaklini Dep. pp. 21-22). Further, the Employee Policies and Procedures provides:

> Any employee, regardless of length of service, who voluntarily leaves prior to [the plant's 2-week closing for the Christmas holidays] will be considered as voluntarily dismissed (quit) and will **not** be considered eligible for any vacation days. Any employee who does not return on the first day of work after the shut-down will be considered as voluntarily dismissed (quit) and will be considered for rehire only at the company's discretion.

(Pl. Dep., Ex. 11).

Around January 11, 1999, Plaintiff Intervenor returned to work for Defendant, but had to fill out another application and corresponding paperwork. (Pl. Dep. pp. 26, 35, Ex. 10). Plaintiff Intervenor testified that she understood that she had to complete a new package of paperwork because Defendant was rehiring her as "a new

employee." (Pl. Dep. p. 36; see also Sheikali Dep. p. 89). Mr. Baaklini likewise testified that Plaintiff Intervenor was rehired, but as a new employee, because she had previously quit. (Baaklini Dep. pp. 46-47; see Pl. Dep., Ex. 11). Mr. Baaklini further testified that Plaintiff Intervenor, rehired as a new employee, would have had to sign another set of documents that she had originally signed when she was first hired in January of 1998, including the Employee Policies and Procedures outlining the 90-day probationary period. (Baaklini Dep. p. 51).

Around the end of January and the beginning of February of 1999, Mr. Sheikali noticed that a large number of employees, male and female, were leaving their work stations during non-designated break times and spending twenty to twenty-five minutes in the break area, which is also where the employee restrooms are located. (DSUF ¶ 9; Sheikali Dep. pp. 26-28; Baaklini Dep. pp. 17-18). Mr. Barajas testified that he would occasionally find 10-15 people in the bathroom at one time, and that Plaintiff Intervenor, Maria Velasquez and several older employees complained that if they went to the bathroom, they would not be able to use it because there were too many people there. (Barajas Dep. pp. 22, 111-12). These extended breaks during non-designated times "caused a big problem for the production, for running the operation," and so Mr. Sheikali brought the issue to Mr. Baaklini's attention. (Sheikali Dep. p. 28; Baaklini

Dep. p. 18).

Mr. Baaklini and Mr. Sheikali discussed the breakroom problem and how to control the number of employees that go into the break area at the same time. (Sheikali Dep. pp. 26-28, 32; Baaklini Dep. pp. 17, 19). Mr. Baaklini came up with the idea of implementing a pass system, whereby an employee would need to take a pass in order to use the breakroom/restroom. (Baaklini Dep. pp. 17, 19; Sheikali Dep. pp. 28-32). The week before Defendant implemented the pass policy, Mr. Sheikali called the Georgia Department of Labor to seek advice as to whether such a policy was legally permissible. (DSUF ¶ 18). According to Mr. Sheikali, the person with whom he had spoken at the Georgia Department of Labor said that he did not see a problem with the policy but recommended that Mr. Sheikali call OSHA. (DUSF ¶ 18). Mr. Sheikali then called OSHA and was told that the policy should not be a problem but that Defendant should make sure that there were enough passes. (DUSF ¶ 18; Sheikali Dep. p. 18).

Several weeks prior to the implementation of the pass policy, Mr. Sheikali held about 3-4 meetings with the employees, one each Monday, to discuss the employees' excessive bathroom breaks and their adverse affect on production, and that if the employees did not control themselves, they "would have to ask for permission like

kids or receive a pass." (Barajas Dep. pp. 30-38). According to Mr. Barajas, Mr. Sheikali did not want to implement a pass policy. (Barajas Dep. pp. 31, 35). At first the employees were a little upset about possibly having to use a pass to go to the bathroom and some women complained. (Barajas Dep. p. 32; Hernandez Dep. pp. 21-22). According to Mr. Barajas, Plaintiff Intervenor "said some bad words," and "said that she wouldn't use [a pass] in order to use the bathroom because she didn't use the bathroom that much." (Barajas Dep. p. 32).

At the second meeting held two weeks later, Mr. Sheikali again discussed the need to increase low productivity and the need for employees to control their bathroom breaks, because he did not want to implement the pass policy. (Barajas Dep. p. 35). No one complained at that meeting and simply returned to work. (Barajas Dep. p. 36). A week later, a third meeting was held, and the bathroom situation and low production was again discussed, and Mr. Sheikali stated that if the situation was not controlled, he would implement the pass policy the following week. (Barajas Dep. p. 37). According to Mr. Barajas, everyone just laughed about having to use something to go to the restroom. (Barajas Dep. pp. 37-38).

The following week, on the morning of Monday, February 8, 1999, Mr. Sheikali held the fourth meeting for all employees to announce the new breakroom pass policy.

(DUSF ¶ 7; Sheikali Dep. p. 32; Barajas Dep. pp. 38-39). Mr. Barajas was also present at this meeting. (Sheikali Dep. pp. 32-33). At this meeting, Mr. Sheikali explained that the reason for the pass policy was the problem of too many people in the breakroom at the same time, "sitting around" and "chitchatting" during non-designated break times, which was causing a problem with productivity, which the employees needed to increase. (Sheikali Dep. p. 33-34; see also Barajas Dep. p. 31). Mr. Sheikali further explained that the employees would have to take a pass and then return it after using the bathroom, but it did not matter where the employee placed the pass. (Barajas Dep. p. 40). According to Mr. Sheikali, the employees responded by laughing or giggling in a way that was obvious that they agreed with Mr. Sheikali about what went on in the breakroom, and no one voiced objections to having to carry a pass. (Sheikali Dep. pp. 33-34). Mr. Barajas and Mr. Sheikali asked the employees if they had any questions, and nobody responded. (Barajas Dep. p. 41). Mr. Barajas also testified that while the employees did not complain at that time, they made complaints later throughout the day. (Barajas Dep. p. 40).

Plaintiff testified, however, that when Mr. Sheikali announced that the bathroom was a problem, "a lot of employees started talking. And some people said, Well. You know who is going in. Well, you know who stays in the bathroom. Talk with them,"

"them" being certain female employees. (Pl. Dep. p. 42). Another female employee, Gaudencia Hernandez, testified that Mr. Sheikali announced the new policy because many women were taking too much time in the bathroom. (Hernandez Dep. p. 20). Ms. Hernandez, however, could not recall if Mr. Sheikali stated that the pass policy would also apply to the male employees. (Hernandez Dep. p. 20). Plaintiff Intervenor also testified that the female employees voiced their opinions, and that she asked Mr. Sheikali if the pass system was going to be applied equally to the male employees. (Pl. Dep. pp. 43-44; Barajas Dep. pp. 33, 41). According to Plaintiff Intervenor, Mr. Sheikali "said no, because he didn't have any problem with the men, The problem was with the women. . . .The men don't need it because they have a stick." (Pl. Dep. p. 44; see also Rodriguez Dep. p. 37; Velasquez Dep. pp. 20, 46). Mr. Barajas testified, however, that Mr. Sheikali responded that the policy was for everybody in general. (Barajas Dep. pp. 33, 41). Further, Mr. Sheikali and Mr. Barajas both deny making or hearing such a statement or jokes about men not having to use the stick. (Sheikali Dep. p. 34; Barajas Dep. p. 33).

Maria Garcia Rodriguez also testified that Mr. Sheikali announced that only the women had to use the pass. (Rodriguez Dep. pp. 19-20, 27). Two other employees, Rosa Garcia and Refugio Ojeda, also stated that Mr. Sheikali announced that the pass

policy would apply only to women. (See Employee Decl, Docket Entry [77]). However, thirty-four employees who also attended the meeting stated that Mr. Sheikali announced that the pass policy would apply to both the men and the women. (See Employee Decl, Docket Entry [77]).[5]

By the afternoon of February 8, 1999, Defendant had put out the passes for the employees to get accustomed to using the pass, but was not planning to enforce the pass system until Wednesday. (Sheikali Dep. pp. 35-36). Defendant placed about eighteen passes throughout the plant, and were various colors of plastic, about 8-10 inches long and an inch thick, like the bottom portion of a flyswatter. (Sheikali Dep. pp. 29-30; Baaklini Dep. pp. 19; Kok Dep. pp. 19-20; Barajas Dep. pp. 22-23). In addition, Mr. Barajas kept two emergency passes for when somebody was sick and needed to use a pass frequently throughout the day. (Barajas Dep. pp. 22, 110; Rodriguez Dep. p. 36). Ms. Rosa Garcia testified that Mr. Sheikali told the employees that anyone who was not feeling well, needed a rest, or had an emergency did not

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[5]In addition, Defendant presented the declarations of three employees who stated they were not at the meeting but that Mr. Sheikali announced that the pass policy would apply to men and women, five employees who stated that Mr. Sheikali was not exactly specific, they could not remember, or they did not know whether Mr. Sheikali announced that the pass system would apply to men and/or women, and one employee who stated that Mr. Sheikali announced that the pass policy would apply only to men. (See Employee Decl, Docket Entry [77]).

have to use the pass to go the bathroom as long as they notified their supervisor. (R. Garcia Dep. p. 36). Plaintiff Intervenor testified, however, that there was only one pass in the cutter department, where she worked. (Pl. Dep. p. 47). Mr. Barajas testified that some of the employees were using the passes, but some employees complained about using the passes throughout the day, like Plaintiff Intervenor and Maria Velasquez. (Barajas Dep p. 40). Specifically, Ms. Velasquez told Mr. Barajas that she would rather not use the restroom than use the passes, to which Mr. Barajas responded by saying that he was sorry, but that it was a company policy and he had nothing to do with it. (Barajas Dep. pp. 40-41). Maria Velasquez also asked why she would have to use the pass if she did not use the bathroom much, to which Mr. Sheikali responded that in order to implement the pass policy, it had to apply to everybody, not just one person. (Barajas Dep. pp. 34, 50). Barbara Barrios also asked "why would you impose that rule if she hardly uses the restroom? Why does some people have to pay for abuses of other people? (Barajas Dep. pp. 50-51). Ms. Rodriguez, also complained, "Why is it that other people use the bathroom all the time, and she still has to use the pass?, to which Mr. Barajas responded, "I'm sorry, but it's company rule, and I inclusively have to use that rule. There's no way out." (Barajas Dep. p. 51). After lunch that day, Mr. Barajas overheard Plaintiff Intervenor in the breakroom telling people that they did not

have to go into work because they did not have to use the pass policy. (Barajas Dep. pp. 42-43).

The following morning, Tuesday, February 9, 1999, Plaintiff Intervenor approached Mr. Barajas before the start of work and told him that she would not use the pass to go to the restroom. (Barajas Dep. pp. 45, 48). Mr. Barajas responded by telling Plaintiff Intervenor that she had to use the pass because it was company policy. (Barajas Dep. p. 45). According to Mr. Barajas, Plaintiff Intervenor responded by saying that "she would have nothing to do with the [mother] fucking policy," and that "it was not worth a shit." (Barajas Dep. pp. 45-46). Mr. Barajas stood on a ramp for 3 -4 hours that day to observe how people were working and that people were going to the restroom, and observed that everyone seemed to be using the passes. (Barajas Dep. pp. 45-47). Mr. Sheikali, whose office was right above the break area, and Mr. Kok, could see the floor of the plant from their office windows and observed the employees using the passes. (Sheikali Dep. p. 22; Barajas Dep. p. 49). Later that day, Mr. Barajas spoke with Mr. Sheikali and Mr. Kok and they agreed that people were using the passes and that they had controlled the bathroom problem. (Barajas Dep. p. 49).

Some of the former female employees testified that Mr. Barajas and Mr. Sheikali watched to see if the women were carrying the stick, and that these employees testified

that at various times during and following the February 8, 2003 meeting to announce the policy, Mr. Barajas and Mr. Sheikali threatened to take away employees' bonuses or terminate them, or told them that "there would be no more work" if any employee repeatedly disobeyed the pass policy. (Hernandez Dep. pp. 14-15; see also Cervantes Dep. pp. 38, 66; Castenada Dep. pp. 13-14, 20-21; Velasquez Dep. pp. 23, 35, 37; Barrios Dep. pp. 36, 41). Both Ms. Velasquez and Plaintiff Intervenor, however, testified that they never heard anyone say that they would not receive bonuses if they did not carry the stick. (Velasquez Dep. p. 41; Pl. Dep. pp. 60, 112).

According to Mr. Barajas, Defendant held a meeting midweek to calm the employees down because Plaintiff Intervenor had confused them and was going to cause problems with regard to the pass policy. (Barajas Dep. p. 54). Mr. Barajas testified that at this meeting, Mr. Sheikali told the employees that the pass policy would remain and that everyone should use it and if they refused, that they would not get their bonuses or that if they did not like the company rules, they could leave and go home. (Barajas Dep. pp. 54-55). Mr. Sheikali, however, denied telling employees that they would lose their bonuses if they did not carry the stick, nor did he withhold any bonuses for employees who failed to comply with the pass policy. (Sheikali Dep. p. 54). Mr. Sheikali further explained that the bonuses are given weekly and "are

based on a job well done . . . .If production is well and employees do their job complete, we give an extra bonus . . . .To everyone unless an employee doesn't show up to work two or three days or . . .is behind in his production or not producing." (Sheikali Dep. pp. 54-55). Moreover, Ms. Barrios testified that Mr. Sheikali told her that she could not receive a bonus until after three months of employment (90-day probationary period), and bonuses were for those people that met the required production levels. (Barrios Dep. pp. 61-62).

In order to get to the restroom, the women had to pass by the area where the clothes are packed for shipping, where there are a lot of male employees. (Pl. Dep. pp. 50-51). Plaintiff Intervenor, as well as several former female employees, testified that they were embarrassed and felt badly about using the stick to go to the restroom because the male employees would make sexually explicit remarks or jokes to them about the bathroom pass. Plaintiff Intervenor initially testified that she did not personally hear any remarks made by the men and only knew about the remarks that some of the other female employees had told her the men said, such as, "Oh, you didn't bring the stick . . .Well, if you don't have one, I've got one here for you for replacement." (Pl. Dep. pp. 53-55). Plaintiff Intervenor also testified, however, that the employees who made these comments to each other "sort of knew each other. So they

make comments like this to each other." (Pl. Dep. p. 54). Subsequently, Plaintiff Intervenor testified that she remembered during the lunch break at her deposition that she personally heard the men make remarks such as, "if the women didn't want the stick, then why are they so long in the bathroom with the stick" and "Look at the women. They didn't want the stick and now they don't come out of the bathroom with it. What would they be doing so long in the bathroom with the stick?" (Pl. Dep. pp. 93-96).

Another female employee, Martha Castaneda, testified that the male employees made comments about the female employees spending more time in the bathroom with the stick, and she heard other women talk about the men saying that the women would leave the stick "dirty" because they were going to put the stick inside their bodies, but she did not hear those comments from the men herself. (Castaneda Dep pp. 21-22, 28-29, 63-64). In addition, Ms. Rodriguez testified that Mr. Barajas, who would be standing near the area the employees had to pass by in order to get to the breakroom, repeatedly would say things like "No, they don't want to grab this stick; but they're going to grab another one" or "Well, that stick scares you, but you go and grab another one." (Rodriguez Dep. pp. 22-23, 37-38). Ms. Rodriguez also testified that she told Mr. Sheikali about the comments that Mr. Barajas was making, but Mr.

Sheikali merely responded by saying, "What's the big deal about a little stick?" (Rodriguez Dep. p. 24). Further, Dalia Cervantes testified that the one time that she used the pass, she kept it in her pants pocket so the men would not make comments to her, and on other occasions in general she could hear the men whispering and laughing as she or other women passed by about what the women were doing with the pass in the bathroom. (Cervantes Dep. pp. 52-56, 70-71). Ms. Cervantes also testified, however, that many of the women got along with the men who were whispering and making comments and that they all would stop to talk and joke and clown around together about how the women were happy because they had the pass to take with them and how the women would want to stay at work now that they had the pass. (Cervantes Dep. pp. 57-58). Ms. Cervantes also said that she never complained to Mr. Barajas or Mr. Sheikali that the men were laughing at her because she was embarrassed. (Cervantes Dep. p. 70).

Ms. Velasquez testified that she did not use the stick to go to the restroom because the men would watch to see the women take the stick and then start laughing, which Ms. Velasquez thought was humiliating. (Velasquez Dep. pp. 27-31, 43). In addition, Ms. Hernandez testified that she observed the men laughing whenever the women used the pass to go to the restroom and that another female employee named

Rebecca told her that the men would say things like "the women liked to grab the stick to go to the bathroom," but Ms. Hernandez did not hear those comments first-hand. (Hernandez Dep. pp. 23-25, 51-53). Likewise, Ms. Rosa Garcia testified that she never saw any men make comments to the women as they went to the restroom, but that two other employees observed some of the men say to some other women as they passed by to use the restroom that "the women were going to play with the stick." (R. Garcia Dep. pp. 22-24). Moreover, Ms. Barrios testified that she did not go to the restroom during non-designated break times because she did not want to use the pass because she felt humiliated by the men laughing and staring at the women as they passed by. (Barrios Dep. pp. 44-45). Ms. Barrios also testified that on the Tuesday after the pass system was announced, she observed Mr. Barajas and Mr. Kok laughing, but she admittedly did not hear what they were saying and did not know what they were laughing about. (Barrios Dep. pp. 46-47). Plaintiff Intervenor, Ms. Rodriguez, Ms. Cervantes, Ms. Barrios, and Ms. Velasquez all testified that they never observed the men using the pass to go to the breakroom/restroom, though Ms. Velasquez also added, "[u]nless it was hidden, but I don't know." (Pl. Dep. p. 57; Rodriguez Dep. p. 39; Cervantes Dep. pp. 45-46, 66-67; Barrios Dep. p. 78; Velasquez Dep. p. 39).

Ms. Velasquez testified that she heard Mr. Sheikali and Mr. Barajas ask

employees whether they were using the stick. (Velasquez Dep. pp. 25-27). Ms. Velasquez also testified that Mr. Sheikali, Mr. Barajas, and Mr. Kok asked her why she was not using the stick. (Velasquez Dep. pp. 26, 27). Ms. Velasquez responded by telling them that she "wasn't going to be made a fool of by anyone," that Mr. Sheikali was the first one to laugh, and that "all the other men laughed because they knew perfectly well what was going on." (Velasquez Dep. pp. 27, 29-30).

On Wednesday, February 10, 1999 around 8:00 a.m., Mr. Sheikali observed Plaintiff Intervenor not using the pass to go to the breakroom and questioned Plaintiff Intervenor about it, testifying to the following exchange:

> She says I'm not going to use this F pass. I says well this system applies for everybody and you need to use the system, the pass system. She says again I'm not going to use this F system. And she said it in Spanish. And do whatever you got to do.

(Sheikali Dep. p. 37). Mr. Sheikali then told Plaintiff Intervenor that "we will give a warning." (Sheikali Dep. p. 38). Mr. Sheikali also testified that about 25 minutes later, Plaintiff Intervenor came back to go to the breakroom, without a pass, and when Mr. Sheikali again questioned Plaintiff Intervenor, she said, "I told you again I'm not going to use this F, system, this F pass. And do whatever you got to do." (Sheikali Dep. p. 38). At this point, Mr. Sheikali went to inform Mr. Baaklini about the incident with Plaintiff Intervenor. (Sheikali Dep. p. 38; Baaklini Dep. pp. 25-26). Mr. Baaklini told

Mr. Sheikali to give him a couple of minutes, and then he called Mr. Sheikali back into his office and ordered Mr. Sheikali to terminate Plaintiff Intervenor's employment because she was still a probationary employee. (Sheikali Dep. p. 38; Baaklini Dep. p. 26). Mr. Sheikali then went to the office manager, Janine Noel, to have her type a termination letter for Plaintiff Intervenor. (Sheikali Dep. pp. 38-39, 47; Baaklini Dep. p. 26).

Mr. Sheikali then called Plaintiff Intervenor to the break area and gave her the termination letter. (Sheikali Dep. p. 39). The letter provides, in pertinent part:

> We regret to inform you that your employment will be terminated today, February 10, 1999. On December 04, 1998 you quit your position with Newnan Trading Corp. And then returned on January 11, 1999 asking to be rehired. You were hired on the condition that you were placed on a 90 day probationary period. As you have not complied with the policies and procedures of Newnan Trading Corp. which you signed when you were hired, we must terminate your employment.

(Sheikali Dep., Ex. 2). Mr. Sheikali testified that he specifically explained to Plaintiff Intervenor that he was terminating her employment because she refused to use the pass system to the break area. (Sheikali Dep. p. 42). According to Mr. Sheikali, Plaintiff Intervenor grabbed the letter out of his hand, threw it at his face and said, "I'm not going to sign this F letter. All I need from you is a letter of unemployment." (Sheikali Dep. p. 39). Mr. Barajas was also present when Mr. Sheikali served Plaintiff

Intervenor with the termination letter. (Sheikali Dep. p. 42; Barajas Dep. p. 55). Mr. Barajas observed Plaintiff Intervenor rip the letter. (Barajas Dep. p. 57). Mr. Barajas also testified that he observed Plaintiff Intervenor "doing a type of dance that mimicked or made fun of [Mr. Sheikali]." (Barajas Dep. p. 56).

According to Plaintiff, however, on the morning of February 10, 1999, Mr. Barajas told Plaintiff Intervenor to go to the dining room, where there were about 11 female employees, as well as Mr. Barajas, Mr. Sheikali, and Mr. Kok. (Pl. Dep. pp. 62-64).[6] Plaintiff Intervenor testified that Mr. Sheikali lead this meeting, and stated that he was going to give those employees present a warning to sign for not using the breakroom pass. (Pl. Dep. pp. 64-65; R. Garcia Dep. pp. 34-35). According to Plaintiff Intervenor, the women at this meeting complained about using the stick because, one woman said she was pregnant and could not wait for the stick to go to the bathroom, and another woman complained that "everyone makes fun of us when we use it." (Pl. Dep. p. 65). Plaintiff also testified that she told Mr. Sheikali at this meeting that she

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[6]Plaintiffs also cite to Ms. Rodriguez's deposition testimony, but her testimony discusses meetings on Monday, February 8, 1999, and Tuesday, February 9, 1999, not Wednesday, February 10, 1999, when Plaintiff Intervenor was fired. (See Rodriguez Dep. pp. 26-28). In addition, Ms. Velasquez was not present for the meeting and "[she did not] know what actually happened in there," but testified that she could hear Mr. Shelaki raising his voice at Plaintiff Intervenor saying, "no more work." (Velasquez Dep. p. 33).

was not going to sign the warning, and would only sign it for tardiness, absenteeism, or if she had not met her production, although Mr. Sheikali did not have a piece of paper to sign at the meeting. (Pl. Dep. p. 70). When Mr. Sheikali explained to Plaintiff Intervenor that he had told her about the pass policy and that it was the rule, Plaintiff responded by telling him that she believed Defendant was violating her rights because the pass system applied only to the women and not the men. (Pl. Dep. pp. 70-71). Plaintiff continued to protest the pass policy, and the meeting ended with Mr. Sheikali dialing his cell phone and telling the employees that they could return to work. (Pl. Dep. p. 71). According to Plaintiff Intervenor, it was a few minutes before the first break, and as the employees were going on break, Mr. Sheikali yelled at her to sign a paper, punch her card, and go home because she no longer worked for Defendant. (Pl. Dep. pp. 70-71, 75, 79; see also Barrios Dep. pp. 56-57). Plaintiff Intervenor testified that Mr. Barajas and Mr. Kok were also present. (Pl. Dep. p. 76). Plaintiff Intervenor refused to sign her termination letter, and asked Mr. Sheikali for unemployment papers in order to get unemployment benefits, but Mr. Sheikali did not say anything in response. (Pl. Dep. pp. 77-79). Plaintiff Intervenor denies cursing at Mr. Sheikali when he handed her the termination letter. (Pl. Dep. p. 79). Likewise, Defendant denies that there was even a meeting with employees who were not using the pass

system on the morning of February 10, 1999, just prior to Plaintiff's termination. (Sheikali Dep. p. 40; Barajas Dep. p. 55; Baaklini Dep. pp. 26-27).

Plaintiff Intervenor did not immediately leave Defendant's premises after she was terminated, because she was hungry and wanted to stay for breakfast, she wanted to know what the termination letter, which was written in English, said before she left, and she did not have a ride home. (Pl. Dep. pp. 79, 88). A female employee in the dining room who knew some English read the letter, and told Plaintiff Intervenor that the letter stated that Plaintiff Intervenor was on probation and therefore Defendant could fire her for not liking her work. (Pl. Dep. pp. 78-79). Plaintiff Intervenor thereafter signaled to Mr. Sheikali to come down from his office in order to ask him why Defendant stated in her termination letter that Defendant did not like her work when she had worked there for a year without a problem. (Pl. Dep. pp. 79-80). Around this time, the work bell rang signaling the end of break time and people began to get up from the dining room to return to work. (Pl. Dep. p. 81). Plaintiff Intervenor testified that a female employee approached her and asked her if she was leaving, and Plaintiff Intervenor said that she was first going to talk with Mr. Sheikali about what was written in her termination letter and then she would leave. (Pl. Dep. pp. 81-82). According to Plaintiff Intervenor, the female employees stated, "Don't leave. We'll do

a work halt, a work stoppage." (Pl. Dep. p. 82). People stopped and just stood standing around and protesting the stick policy, trying to get management to get rid of the policy, prompting Mr. Sheikali to order them back to work. (Pl. Dep. p. 83; see also Barrios Dep. p. 56; Rodriguez Dep. p. 25; Cervantes Dep. pp. 71-73, 75-76; Kok Dep. pp. 24-25).

Ms. Rosa Garcia testified that when Mr. Sheikali came down from his office, those employees who stayed in the breakroom after the break wanted to speak with Mr. Sheikali about their disagreement with the pass system, and Mr. Barajas spoke on behalf of the employees to explain why they did not like the pass system. (R. Garcia Dep. p. 32). Ms. Rosa Garcia further testified that neither Plaintiff Intervenor nor anyone else organized the protest, which was also in protest of Plaintiff Intervenor's termination, and that it was impromptu. (R. Garcia Dep. pp. 34, 51, 56). Ms. Rosa Garcia further testified that some male employees were there and commented about the pass policy that it "wasn't fair that because some of the women used the bathroom that all of us should have to pay for it." (R. Garcia Dep. p. 34). Additionally, Ms. Rosa Garcia testified that Mr. Sheikali stated that the employees had to respect the new policy and that "all of the personnel had to use it," at which point Plaintiff Intervenor became very upset and kept talking and talking loudly, not letting Mr. Sheikali speak.

(R. Garcia Dep. pp. 32-33). Ms. Rosa Garcia further testified that Mr. Sheikali would say, "Please, please, let me speak, let me speak," but that Plaintiff Intervenor "would go on and go on talking very angry. You could see it. . . .[b]ut she was so angry, she wouldn't shut up. . . .[a]nd. . .[Mr. Sheikali] said to her that 'you no longer have a job.'" (R. Garcia Dep. p. 33). Ms. Rosa Garcia also testified that some of the employees were trying, unsuccessfully, to calm Plaintiff Intervenor, but Plaintiff Intervenor "kept saying that she didn't want the job. . . [that she] didn't want to be in the job anymore." (R. Garcia Dep. p. 56).

According to Mr. Sheikali, however, after he terminated Plaintiff Intervenor, he went up to his office and came back down after the bell rang to signal the end of the break, which was his normal practice. (Sheikali Dep. p. 49). When Mr. Sheikali came down, he observed that "[a] group of employees . . . had work stoppage in front of the break area and [Plaintiff Intervenor] was in the middle screaming and shouting for the employees not to go to work. And yelling we don't want to work." (Sheikali Dep. pp. 49-50). Mr. Sheikali responded by telling Plaintiff Intervenor that she was already terminated and that he expected her to leave the premises. (Sheikali Dep. p. 50). Mr. Sheikali further testified that Plaintiff Intervenor refused to leave and refused to listen to him, and Plaintiff Intervenor was "screaming and clapping and dancing" and

shouting at the employees returning to their work stations, "[c]alling them traitors in Spanish and making a big scene. Splitting the employees and causing work stoppage and halting [Defendant's] process of operation." (Sheikali Dep. p. 50). Mr. Baaklini testified that he heard loud noise and went to investigate, and observed "people dancing and like having a holiday. . . ." (Baaklini Dep. p. 27). Mr. Baaklini further testified that he called Mr. Sheikali to find out what was going on, and Mr. Sheikali informed him that Plaintiff Intervenor was threatening the employees who wanted to go back to work, calling them "traitor, don't work for [those sons of bitches] that bad word about the management. We should not listen to them." (Baaklini Dep. p. 27; see also Sheikali Dep. pp. 50-52). Mr. Baaklini also testified that Mr. Sheikali told him that Plaintiff Intervenor was trying to create a riot in the warehouse, and so Mr. Baaklini decided to send everybody home before the second break, but would pay the employees for the entire day, so that they could calm down and return to work the following day. (Baaklini Dep. p. 28).

Plaintiff Intervenor denies calling anyone traitor, or any other names, and testified that people were simply asking Mr. Sheikali to get rid of the stick policy. (Pl. Dep. p. 84). Plaintiff also testified that Mr. Sheikali told the employees to either return to work, or punch their cards and leave. (Pl. Dep. p. 85). Mr. Sheikali testified,

however, that it was not his understanding that the employees were protesting the pass policy and he did not tell anyone one to leave if they did not like the policy, or that they would lose their bonuses if they did not comply with the pass policy. (Sheikali Dep. pp. 52-54). Some people returned to work and others signed a petition to protest the stick policy. (Pl. Dep. pp. 85-87; Castenada Dep. pp. 18-19; Barrios Dep. pp. 77-78). In addition, Plaintiff Intervenor testified that Mr. Sheikali told her to leave, and that he was going to call the police, to which she responded, "Well, call them." (Pl. Dep. p. 87). Plaintiff Intervenor, however, did not leave, because she did not have a ride home. (Pl. Dep. p. 88). When Mr. Sheikali announced that the plant would shut down early, pursuant to Mr. Baaklini's direction, Plaintiff Intervenor lifted her finger to tell him that she wanted to speak with him about the signatures of the female employees. (Pl. Dep. p. 89). Plaintiff Intervenor further testified that Mr. Kok said to her, "Lady, don't talk, no check, no more money for you . . . . Maria, no mas check" and told her to shut up. (Pl. Dep. p. 89).

Ms. Castenada also testified that she and other employees were gathered near the breakroom protesting the stick policy, and Mr. Barajas told them to go back to work and that she had to use the stick if she wanted to work there, stating that "those who want to enter to work with the stick in place, that was fine. And those who did

not should punch out and there would be no more work."[7] (Castenada Dep. pp. 15-18). Ms. Castenada further testified that she told Mr. Barajas that she would not use the stick, and so she punched out and went home, but it was her understanding that Mr. Barajas had fired her because she refused to utilize the pass policy. (Castenada Dep. p. 17).

Subsequently, the employees got to vote on what object they would prefer to use as the breakroom pass. (Sheikali Dep. pp. 65-66; Baaklini Dep. pp. 33-34). Ms. Barrios testified, however, that Mr. Sheikali told her that she did not have the right to vote if she was not using the stick and because she was a new employee. (Barrios Dep. p. 61). Ms. Velasquez testified that a notebook was passed around to vote for the stick or the card, but she did not vote. (Velasquez Dep. pp. 37-38). The vote was recorded on a document dated and signed on February 12, 1999, with 7 employees voting to keep the fly swatter/stick as the pass, and 127 employees voting to change the pass to a plastic card. (Sheikali Dep. pp. 66-67, Ex. 4; Barajas Dep. pp. 70-71). Therefore, the pass was changed as soon as the new passes could be made and put out throughout the plant. (Sheikali Dep. p. 68). Pursuant to the employee vote, the passes were changed to a

[7]Ms. Castenada testified that this occurred about two weeks after the pass policy was implemented, but the events described seem to indicate this occurred during the employee protest on February 10, 1999.

card (thick paper), which got mutilated because employees put the cards in their pockets and so the pass eventually became a clipboard that had been cut in half. (DUSF ¶ 14; Sheikali Dep. p. 68). The employees also had voted for whether they wanted a representative or spokesperson to be a liaison with management, but the employees were content with their supervisor, Mr. Barajas, and voted 69 to 63 in favor of no representation. (Sheikali Dep. p. 67, Ex. 4).

Ms. Velasquez testified that she did not return to work on the following Monday because she quit due to the pass policy.[8] (Velasquez Dep. p. 38). Ms. Barrios also did not return to work after February 12, 1999, but testified that she quit because she was not going to receive a bonus until after the first three months of her employment. (Barrios Dep. pp. 60-62).

The following week, on February 19, 1999, Defendant put the breakroom pass policy in written form by Ms. Noel at Mr. Baaklini's direction, as an amendment to the employee Policies and Procedures, and was disseminated to the employees with their paychecks. (Baaklini Dep. pp. 34-37; Sheikali Dep. pp. 71-73, Ex. 5). The amendment to the policies and procedures provides:

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[8]Plaintiffs also present hearsay testimony as to other people who purportedly quit because of the pass policy. (See Pl. Dep. p. 117; Castenada Dep. p. 31; Hernandez Dep. p. 33).

> This amendment to Newnan Trading Policy and Procedures will take effect immediately on Monday, February 22, 1999.
>
> Due to the large volume of employees who are leaving their work stations for excessively long periods of time we are implementing a pass system. Any employee who wishes to leave their work station must now obtain a pass from their work area.
>
> All employees must comply with this pass system. Any employee who refuses to comply with this system will be issued a written warning which shall become part of employee's permanent file.

(Sheikali Dep., Ex. 5).

Mr. Sheikali testified that management did not formally monitor and enforce the breakroom pass policy, but if management observed someone in the break area without a pass, they questioned the employee and would give the employee a warning. (Sheikali Dep. pp. 69, 73-74). For example, both Mr. Barajas and Mr. Sheikali testified that they had stopped and given warnings to a male employee, Rafael Chavez, for going to the breakroom without a pass. (Barajas Dep. pp. 108-110; Sheikali Dep. pp. 69, 74). Specifically, Mr. Barajas testified that on one occasion, he asked Mr. Chavez why he did not have the pass, and Mr. Chavez responded by saying that he was just going to the breakroom to get something that he had forgotten, and was not going to the restroom. (Barajas Dep. p. 109). Mr. Barajas replied that it did not matter whether an employee was going to get a drink of water or going to the bathroom, they still

needed to use the pass, regardless of the reason. (Barajas Dep. p. 109). Mr. Sheikali also testified that he stopped Mr. Chavez on another occasion and questioned why he did not have a pass, and Mr. Chavez responded that he was in a hurry and that he was sorry and would use it the next time. (Sheikali Dep. p. 69). Mr. Sheikali gave Mr. Chavez a verbal warning and told Mr. Chavez that he had to use the pass or else he would receive a written warning. (Sheikali Dep. pp. 69-70).

Ms. Rodriguez testified that she quit her employment on November 26, 1999 because of the pass policy but also because Defendant's pay was very low. (Rodriguez Dep. p. 13). Ms. Rodriguez went to Mexico, and then returned and asked for her job back with Defendant around January 7, 2000, but Defendant did not hire her back. (Rodriguez Dep. p. 32). Ms. Rodriguez testified that she did not know why Defendant did not rehire her, and that she was only told that there was no work. (Rodriguez Dep. pp. 32-33). Ms. Rodriguez then testified, however, that she had previously heard Mr. Barajas say, in October or November of 1999, that the people who had signed the petition protesting the pass policy would not be rehired. (Rodriguez Dep. pp. 33, 35).

On May 19, 1999, Plaintiff Intervenor filed a Charge of Discrimination, alleging that she was discriminated against by having to use a stick to go to the restroom whereas the male employees did not have to use such a stick, and that she was

terminated in retaliation for protesting the stick/pass policy. (See DMSJ, Ex. S). Jose M. Girot, who began his employment with the EEOC on August 24, 1999, was assigned to investigate Plaintiff Intervenor's charge of discrimination six days later to investigate her allegations. (DSUF ¶ 32; Girot Dep. p. 66). Mr. Girot's on-site investigation of Defendant was his first as primary investigator, though he was accompanied by William Rantin, the Enforcement Manager for the Atlanta District Office of the EEOC. (DSUF ¶ 44; Rantin Aff. ¶¶ 2, 4, attached as Ex. 15 to Pl. Resp. to DMSJ). Mr. Girot testified that based on witness testimony that he took from male and female employees as part of his investigation, some employees, both male and female, disapproved of the pass system, some did not care, some male and female employees felt degraded about using a stick to use the restroom and refused to use it, and the men knew about the policy but were never instructed to carry the stick. (Girot Dep. pp. 100, 146-48, 190-91, 197). Mr. Girot further testified that the male employees simply refused to carry the stick. (DSUF ¶ 43). Mr. Girot admitted that Defendant's management never stated that the pass policy was different for men and women. (DSUF ¶ 45). In fact, Mr. Girot testified that Mr. Sheikali told him that the pass policy applied to both men and women. (DSUF ¶ 46). Mr. Girot thereafter drafted his Investigator's Memorandum, signed by two supervisors on February 4, 2000 and April 10, 2000,

indicating that the scope of the investigation was sex (female) discrimination and constructive discharge (forced resignation). (DSUF ¶ 48; Girot Dep., Ex. 26).

In a letter dated to Mr. Baaklini dated April 13, 2000, Mr. Girot demanded $150,000 on behalf of Plaintiff Intervenor in order to settle the case, and stated, "If you do not desire to settle immediately and disagree with the mention (sic) amount, please provide a counter offer by April 21, 2000." (DSUF ¶ 50; Girot Dep., Ex. 28). Mr. Girot does not recall giving Mr. Baaklini a break-down of the figure or if anyone explained to Mr. Baaklini how the $150,000 figure was arrived at. (DSUF ¶ 52; Girot Dep. p. 177).

On April 17, 2000, the EEOC issued a "Determination," finding that Defendant discriminated against Plaintiff Intervenor because of her sex and in retaliation for protesting the discriminatory stick policy in violation of Title VII, and that female employees as a class were disparately treated and subjected to discharge and/or constructive discharge based on their sex. (See Girot Dep., Ex. 31). A conciliation meeting was held on May 10, 2000, at which offers for settlement were discussed. (See Girot Dep., Exs. 32-33). At the conciliation, Mr. Baaklini made an offer to rehire Plaintiff Intervenor and pay her legal expenses, which Plaintiff Intervenor's counsel rejected. (See Mr. Girot Dep., Ex. 33). Mr. Baaklini then made a second counter offer for back pay in the amount of $2,060.00, which Plaintiff Intervenor's counsel rejected

and made a counter demand, a final bottom line offer of $80,000, which Defendant rejected. (See id.). On May 22, 2000, the EEOC notified Defendant that conciliation had failed, and "[n]o further efforts to conciliate this case will be made by the Commission." (See Girot Dep., Ex. 35). However, on September 10, 2000, Mr. Girot sent a letter to Mr. Baaklini indicating that the EEOC was "interested in resolving or eliminating the use of the restroom pass system which was enforced by management officials for female employees only," and that the EEOC had "identified two other females who were constructively discharged," making a demand for back pay in an "amount to be determined" as well as $75,000 - $100,000 each in punitive damages. (DSUF ¶¶ 59-60; Girot Dep., Ex. 36). Additionally, Mr. Girot asked if Mr. Baaklini was "willing to compensate other employees (male & female) who were humiliated with your restroom system?" (DSUF ¶ 61; Girot Dep., Ex. 36). Plaintiffs have no indication that Defendant responded to this demand letter. (Rantin Aff. ¶ 8). Plaintiff EEOC thereafter initiated this lawsuit on April 24, 2001. (See Compl., Docket Entry [1]).

II. CONCLUSIONS OF LAW

A. Summary Judgment Standard

A motion for summary judgment shall be granted "if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any,

show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law." FED. R. CIV. P. 56(c). The moving party has the initial burden of showing "that there are no genuine issues of material fact to be determined at trial." Mullins v. Crowell, 228 F.3d 1305, 1313 (11th Cir. 2000) (citing Clark v. Coats & Clark, Inc., 929 F.2d 604, 608 (11th Cir. 1991)). The movant must therefore "point[] out to the district court that there is an absence of evidence to support the nonmoving party's case." Celotex Corp. v. Catrett, 477 U.S. 317, 325 (1986). Once the movant has shown the non-existence of any genuine issue of material fact, the Plaintiff must then produce some evidence in support of his claim. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252 (1986); Combs v. Plantation Patterns, 106 F.3d 1519, 1526 (11th Cir. 1997). Because the requirement for summary judgment is that there are no issues of material fact, the mere existence of some alleged factual dispute will not defeat an otherwise properly supported motion for summary judgment. Anderson, 477 U.S. at 247-48. A fact is only material if it is so designated by controlling substantive law as an essential element of Plaintiff's case. Id. at 248. Likewise, an issue is not genuine if it is unsupported by evidence or if it is created by evidence that is "merely colorable" or "not significantly probative." Id. at 250. Mere conclusory allegations of discrimination or harassment are insufficient to withstand a motion for

summary judgment. Carter v. City of Miami, 870 F.2d 578, 585 (11th Cir. 1989). The nonmovant's failure to offer proof of an essential element to his case renders all facts immaterial, thus entitling the movant to judgment as a matter of law. Id. at 323. Likewise, if neither party can prove the existence or nonexistence of an essential element of a claim, summary judgment will be granted if the movant shows that the Plaintiff will be unable to meet her burden of proof at trial. Celotex Corp., 477 U.S. at 325. The Court must examine all evidence in the light most favorable to the non-moving party and resolve all reasonable doubts in his favor. Anderson, 477 U.S. at 255; Pipkins v. City of Temple Terrace, 267 F.3d 1197, 1199 (11th Cir. 2001).

B. Plaintiffs' Title VII Claims for Disparate Treatment Based on Sex

Plaintiffs contend that Defendant discriminated against the female employees on the basis of their sex, in violation of Title VII by creating a policy whereby only the female employees and not the male employees had to carry a pass to use the breakroom/restroom throughout the workday during non-designated break times. Title VII of the Civil Rights Act of 1964 prohibits an employer from "discriminat[ing] 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). In order for Plaintiffs to prevail on their

Title VII of sex discrimination claims, they must show that Defendant intentionally discriminated against them on the basis of their sex using direct evidence, statistical evidence that shows a pattern or practice of discrimination, or circumstantial evidence based on the four-pronged test outlined in McDonnell Douglas v. Green, 411 U.S. 792 (1973). See Walker v. NationsBank of Fla., N.A., 53 F.3d 1548, 1555-56 (11th Cir. 1995). See also Denney v. City of Albany, 247 F.3d 1172, 1182 (11th Cir. 2001) (citing EEOC v. Joe's Stone Crab, Inc., 220 F.3d 1263, 1286 (11th Cir. 2000)). Plaintiff attempts to utilize all three methods in this case.

Direct evidence is that which, "if believed, proves existence of a fact in issue without inference or presumption." Rojas v. Florida, 285 F.3d 1339, 1342 n.2 (11th Cir. 2002) (quoting Schoenfeld v. Babbit, 168 F.3d 1257, 1266 (11th Cir. 1999)). Blatantly discriminatory comments made by the person charged with making the adverse employment decision constitute direct evidence. Bass v. Bd. of County Comm'rs, 256 F.3d 1095, 1105 (11th Cir. 2001) (citing Damon v. Fleming Supermarkets of Fla., 196 F.3d 1354, 1358 (11th Cir. 1999); Trotter v. Bd. of Trustees of Univ. of Ala., 91 F.3d 1449, 1453-54 (11th Cir. 1996)). Conversely, "remarks by non-decisionmakers or remarks unrelated to the decisionmaking process itself are not direct evidence of discrimination." Standard v. A.B.E.L. Servs., Inc., 161 F.3d 1318, 1330 (11th Cir. 1998);

accord Trotter, 91 F.3d at 1453-54. If a plaintiff can establish a prima facie case of discrimination through direct evidence, the defendant must then prove, by a preponderance of the evidence, "that it would have made the same employment decision in the absence of discriminatory motivation." Wall v. Trust Co. of Ga., 946 F.2d 805, 809 (11th Cir. 1991). Statements by nondecision makers, or statements by decision makers unrelated to the decisional process itself," do not constitute direct evidence of discrimination. Price Waterhouse v. Hopkins, 490 U.S. 228, 277 (1989) (O'Connor, J., concurring); accord EEOC v. Alton Packaging Corp., 901 F.2d 920, 924 (11th Cir. 1990). "In other words, the evidence must indicate that the complained-of employment decision was motivated by the decisionmaker's" discrimination. Damon, 196 F.3d at 1359. See also Markel v. Bd. of Regents of Univ. of Wis. Sys, 276 F.3d 906, 910 (7th Cir. 2002) ("To rise to the level of direct evidence of discrimination, . . . isolated comments must be contemporaneous with the [adverse action] or causally related to the [applicable] decision-making process.") (alteration in original) (citations omitted).

Plaintiffs assert that they have presented direct evidence of discrimination, based on Mr. Sheikali's alleged comment that men did not "have to carry the stick because they already have one." The Court disagrees that this statement is evidence of direct discrimination. First, the statement was allegedly made by Mr. Sheikali, who

was a non-decision maker; Mr. Sheikali was merely carrying out the dictates of Defendant's President, Mr. Baaklini, who created the pass policy. (See Baaklini Dep. pp. 17, 19; Sheikali Dep. pp. 28-32). Second, for the reasons explained more fully below in the circumstantial evidence analysis, the implementation of a pass policy to use the restroom does not constitute an "adverse employment action." See generally Davis v. Town of Lake Park, 245 F.3d 1232, 1239 (11th Cir. 2001); Doe v. DeKalb County Sch. Dist., 145 F.3d 1441, 1453 (11th Cir. 1998); Wu v. Thomas, 996 F.2d 271, 274 n.3 (11th Cir. 1993). Therefore, Mr. Sheikali's alleged comment was not made contemporaneous with any adverse action and cannot be considered "direct evidence."

A plaintiff may also show intentional discrimination with circumstantial evidence, using the McDonnell Douglas/Burdine burden-shifting analysis. Under the McDonnell Douglas/Burdine framework, the plaintiff first has the burden of establishing a prima facie case of racial discrimination. See McDonnell Douglas, 411 U.S. at 802; Texas Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 253 (1981). If the plaintiff meets this burden, the burden then shifts to the defendant to articulate a legitimate, nondiscriminatory reason for the adverse employment action. McDonnell Douglas, 411 U.S. at 802; Burdine, 450 U.S. at 254; Chapman v. AI Transp., 229 F.3d 1012, 1024 (11th Cir. 2000) (en banc). This burden is one of production, not persuasion,

and is "exceedingly light." Turnes v. AmSouth Bank, N.A., 36 F.3d 1057, 1061 (11th Cir. 1994); Perryman v. Johnson Prod. Co., 698 F.2d 1138, 1141 (11th Cir. 1983). Thus, "it is sufficient if the defendant's evidence raises a genuine issue of fact as to whether it discriminated against the plaintiff." Burdine, 450 U.S. at 248; Jones v. Gerwens, 874 F.2d 1534, 1538 (11th Cir. 1989). The plaintiff will then be given an opportunity to show that the defendant's proffered nondiscriminatory reason was merely a pretext for discriminatory intent. Burdine, 450 U.S. at 253; Chapman, 229 F.3d at 1024. In order to survive summary judgment, the plaintiff must show that the defendant lacks credence or that the defendant was more likely motivated by a discriminatory reason than its proffered reason. Mayfield v. Patterson Pump Co., 101 F.3d 1371, 1376 (11th Cir. 1996). See also Reeves v. Sanderson Plumbing Prod., Inc., 530 U.S. 133, 148 (2000). Mere conclusory allegations of discrimination without more, are insufficient to raise an inference of pretext or intentional discrimination where an employer has offered extensive evidence of legitimate, non-discriminatory reasons for its actions. Mayfield, 101 F.3d at 1376.

In this case, in order to prove disparate treatment based on discriminatory application of a workplace rule, Plaintiffs must show that (1) they are members of a protected class; (2) they suffered an adverse employment action; (3) they received less

favorable treatment than employees outside of their protected class; and (4) sufficient evidence exists to infer a nexus or causal connection between sex and the disparate treatment. Anderson v. Twitchell-A Tyco Intern. Ltd. Co., 76 F. Supp. 2d 1279, 1286 (M.D. Ala. 1999) (citations omitted).

Plaintiffs contend that they may establish a prima facie case for disparate treatment by showing that Plaintiff Intervenor and other female employees (1) are members of a protected class; (2) were subjected to a rule/policy where they had to carry a stick/pass to use the restroom; and (3) employees not in the protected class were not subject to the same rule/policy. (Pl. Br. p. 24).

The Court notes that two different theories of liability are potentially available in a Title VII sex-discrimination action: disparate treatment and disparate impact. In re Pan American World Airways, Inc., 905 F.2d 1457, 1460 (11th Cir. 1990) (footnote citations omitted). In the former, the defendant may argue a bona fide occupational qualification as an affirmative defense, and in the latter, the defendant may argue the less stringent standard of business necessity as its defense. Id. at 1460-61. In addition, the disparate-treatment theory can be divided into two subtheories: facial discrimination and pretextual discrimination. Id. at 1460 (footnote citations omitted).

A plaintiff may establish liability under a disparate impact theory when a

facially neutral policy affects members of a protected class in a significantly discriminatory manner. Dothard v. Rawlinson, 433 U.S. 321, 329 (1977). However, the disparate impact theory is "not appropriate where plaintiff claims injury based on a facially discriminatory policy." Healey v. Southwood Psychiatric Hosp., 78 F.3d 128, 131 (3d Cir. 1996) (citing Reidt v. County of Trempealeau, 975 F.2d 1336, 1340 (7th Cir. 1992)). Likewise, the McDonnell Douglas/Burdine prima facie case and pretext analysis is inapt for cases involving facially discriminatory policies. See Hayes v. Shelby Memorial Hosp., 726 F.2d 1543, 1547-48 (11th Cir. 1984), rejected on other grounds by, Int'l Union, United Auto., Aerospace and Agric. Implement Workers of America, UAW v. Johnson Controls, Inc., 499 U.S. 187 (1991). See also Healey, 78 F.3d at 131-32 (citing cases).

Based on the foregoing, Plaintiffs' prima facie case is technically flawed, because they argue the pretext analysis using the McDonald Douglas framework, although they assert that the pass policy was facially discriminatory. Moreover, although Plaintiffs alternatively assert in passing that the policy was facially neutral but disparately applied, they do not argue their case under disparate impact theory. Nevertheless, the Court finds that the present case is distinguishable from the above cases, which involved policies that clearly affected the terms and conditions of

employment such as weight restrictions for airline flight attendants and using gender as a factor in scheduling shifts. Plaintiffs' formulation of the prima facie merely assumes, without discussion, that the policy in this case constitutes an "adverse employment action," which affects the terms, conditions, and privileges of employment, citing Lathem v. Department of Children and Youth Services, 172 F.3d 786 (11th Cir. 1999) and Nix v. WLCY Radio/Radhall Communications, 738 F.2d 1181 (11th Cir. 1984), for the proposition that discrimination based on "terms and conditions of employment under Title VII includes workplace rules. Notably, Lathem and Nix involved claims of unlawful *termination* (an unquestionably adverse employment action) based on a disparate application of a workplace rule or workplace misconduct. Thus, as analyzed *infra*, Plaintiffs cannot make out a prima facie case of intentional discrimination under any formulation of a prima facie case, whether using the McDonald Douglas framework or otherwise.

In applying the law to the facts of this case as argued by the Plaintiff, the first prong of the prima facie case, that the Plaintiffs–female employees-are members of a protected class, is not in dispute. There is however, a genuine issue of material fact in dispute with respect to the third and fourth prongs, in that Plaintiffs presented evidence that Defendant enacted the breakroom pass policy just for the women and

enforced it against the women, while Defendant presented evidence that the pass policy was enacted for all male and female employees due to decreased productivity as a result of excessive employee breaks during non-designated break times, and that one male employee was disciplined or reprimanded for not using the breakroom pass. That notwithstanding, the Court notes that Plaintiffs cannot establish the second prong of their prima facie case–that they suffered an adverse employment action.

An adverse employment action is an ultimate employment decision, such as discharge or failure to hire, or other conduct that "alters the employee's compensation, terms, conditions, or privileges of employment, deprives him or her of employment opportunities, or adversely affects his or her status as an employee." Gupta v. Fla. Bd. of Regents, 212 F.3d 571, 587 (11th Cir. 2000). An employee does not have to be the victim of an ultimate employment decision such as a wrongful termination or a discriminatory promotion to be the victim of an adverse employment action. Wideman v. Wal-Mart Stores, Inc., 141 F.3d 1453, 1456 (11th Cir. 1998). However, there is "some threshold level of *substantiality* that must be met for unlawful discrimination to be cognizable." Id. (emphasis added). A plaintiff must therefore show that a reasonable person would find that the action *seriously* and *materially* adversely changed the terms, conditions, and privileges of employment. Davis v.

Town of Lake Park, 245 F.3d 1232, 1239 (11th Cir. 2001); Doe v. DeKalb County Sch. Dist., 145 F.3d 1441, 1453 (11th Cir. 1998). Not "every unkind act" amounts to an adverse employment action; an employment action that imposes some *de minimis* inconvenience or alteration of responsibilities does not rise to the level of substantiality necessary to constitute an adverse employment action. See Wu v. Thomas, 996 F.2d 271, 274 n.3 (11th Cir. 1993); see also Doe, 145 F.3d at 1453.

Applying the law to the facts of this case, Plaintiffs cannot show, as a matter of law, that Defendant's breakroom pass policy constitutes an adverse employment action. Defendant presented evidence that it created and implemented the policy as a solution to its problem of employees gathering in the breakroom and restroom for extensive periods of time during non-designated break times. The policy required that an employee take the pass located in his/her department to use the breakroom, and therefore another employee within the same department would simply have to wait for the first employee to return with the pass before using the restroom. Unlike cases where courts have held that plaintiffs have actionable disparate treatment claims based on denial of access to bathrooms, Defendant's pass policy does not meet the level of "substantiality" to be cognizable under Title VII, as the policy does not adversely affect one's status as an employee, and at worst is a *de minimus*

inconvenience. See Gupta, 212 F.3d at 587; Wideman, 141 F.3d at 1456; Wu v. Thomas, 996 F.2d 271, 274 n.3 (11th Cir. 1993). Compare Kilgo v. Bowman Transp., Inc., 789 F.2d 859, 874 (11th Cir. 1986) (finding disparate treatment sex discrimination against women where defendant used various devices to discourage women from becoming over-the-road drivers, such as *refusing* to provide separate sleeping, shower and bathroom facilities for its women drivers); see also Hall v. Gus Constr. Co., Inc., 842 F.2d 1010 (8th Cir. 1988) (holding that plaintiff could make out hostile work environment sexual harassment when, among other things, defendant *refused* to give women a truck to go to town to use the bathroom and the women had to urinate in ditches with the men watching through surveying equipment and defendant's management knew about, but failed to remedy the situation); Baker v. John Morrell & Co., 220 F. Supp. 2d 1000 (N.D. Iowa 2002), amended on other grounds upon recons. by 266 F. Supp. 2d 909 (N.D. Iowa 2003) (holding that *denial of access* to the bathroom is an adverse employment action that affects the terms and conditions of employment for a disparate treatment case); but see Reeves v. Fed. Reserve Bank of Chi., 2003 WL 21361735, at *9-10 (N.D. Ill. June 12, 2003) (holding that reprimands for tardiness, restrictions on communication with co-workers, and *monitoring employee's bathroom breaks* was not actionable sex discrimination). In this case, there were even

emergency passes available for those who may be feeling ill and need to use the restroom more often throughout the day. (Barajas Dep. pp. 22, 110; Rodriguez Dep. p. 36; see also R. Garcia Dep. p. 36). Under these circumstances, as compared with cases cited above involving a complete denial of access to bathroom facilities, no reasonable person would believe that a policy requiring a pass to use the restroom *seriously* and *materially* adversely changed the terms, conditions, and privileges of employment. Davis, 245 F.3d at 1239; Doe, 145 F.3d at 1453. Thus, Plaintiffs have failed to establish a prima facie case of intentional sex discrimination.

Even if Plaintiffs could establish a prima facie case of sex discrimination, they cannot show that Defendant's reason for implementing the policy was merely a pretext to discriminate against the female employees. Defendant presented evidence that it enacted a gender-neutral pass policy in order to control the problem of too many employees spending too much time in the breakroom/restroom during non-designated break times, which some employees even complained about, and which was adversely affecting Defendant's production. (DSUF ¶ 9; Sheikali Dep. pp. 26-28; Baaklini Dep. pp. 17-18; Barajas Dep. p. 22, 111-12). Plaintiffs contend that Defendant's pass policy was merely a pretext for intentional discrimination because the pass policy only applied to female employees. Plaintiffs presented evidence that

Mr. Sheikali announced in the February 8, 1999 meeting that the pass system was only for the women because the men already had a stick of their own, and that the men did not use the stick. (See Pl. Dep. pp. 44, 57, 70-71; Rodriguez Dep. p. 19-20, 27, 37, 39; Velasquez Dep. pp. 20, 39, 46; Cervantes Dep. pp. 45-46, 66-67; Barrios Dep. p. 78). The overwhelming evidence however, shows that Defendant's pass policy was to be applied to all employees, and that male employees were also questioned and given warnings when not carrying a pass. (See DSUF ¶ 45; Barajas Dep. pp. 33-34, 41, 45, 50-51, 108-10; Sheikali Dep pp. 33, 39, 69-70, 74, Exs. 2, 5). In addition, one of Plaintiffs' witnesses testified that during the protest, the men commented that they did not think the bathroom pass policy was fair as it applied to them when the women were the ones who used the bathroom too much, and also that Mr. Sheikali said that all of the employees had to respect the policy and "all of the personnel had to use it." (R. Garcia Dep. pp. 32-33). Moreover, Defendant submitted the declarations of 37 employees, both male and female, who stated that the pass policy applied to both male and female employees. (See Employee Decl., Docket Entry [77]). Furthermore, the female employees, including Plaintiff Intervenor, who Plaintiffs contend testified that the men did not have to use the pass, merely testified that they never personally saw the men using the pass. (See Pl. Dep. p. 57; Rodriguez Dep. p. 39; Barrios Dep.

p. 78; Cervantes Dep. pp. 66-67). Indeed, Ms. Velasquez admitted that if the male employees hid the pass, she would not have known whether or not they were using the pass. (Velasquez Dep. p. 39). Also, Plaintiff EEOC's investigation revealed that some employees, both male and female employees, were unhappy about the pass policy and that the male employees simply refused to carry the pass. (DSUF ¶ 43; Girot Dep. pp. 100, 146-48, 190-91, 197).

Based upon the foregoing, Plaintiffs have, at best, arguably created a weak issue of fact when compared to Defendant's abundant and uncontroverted independent evidence that no discrimination occurred. The existence of a weak issue of fact as to whether an employer's purported legitimate nondiscriminatory reason is pretextual does not preclude granting a motion for summary judgment. See Reeves v. Sanderson Plumbing Prods., 530 U.S. 133 (2000). The Supreme Court in Reeves stated:

> Certainly there will be instances where, although the plaintiff has established a prima facie case and set forth sufficient evidence to reject the defendant's explanation, no rational factfinder could conclude that the action was discriminatory. For instance, an employer would be entitled to judgment as a matter of law if the record conclusively revealed some other, nondiscriminatory reason for the employer's decision, or if the plaintiff created only a weak issue of fact as to whether the employer's reason was untrue and there was abundant and uncontroverted independent evidence that no discrimination had occurred.

Id. at 148 (citations omitted). The appropriateness of summary judgment depends on

such factors as "the strength of the plaintiff's prima facie case, the probative value of the proof that the employer's explanation is false, and any other evidence that supports the employer's case and that properly may be considered on a motion for judgment as a matter of law." Id. at 148-49; see also id. at 150 ("[T]he standard for granting summary judgment mirrors the standard for judgment as a matter of law, such that the inquiry under each is the same." (citations and internal quotation marks omitted); accord Chapman v. AI Transp., 229 F.3d 1012, 1024-25 & n.11 (11th Cir. 2000) (en banc). Thus, summary judgment may be appropriate even in the face of some evidence of pretext because the material fact that a jury must determine in a discrimination case is not whether a defendant's explanation of its act is pretextual, but whether the act was one of intentional discrimination. The issue of "pretext" has been introduced in these cases only as a part of an analytical framework to be used by the courts in determining whether a discrimination case can go forward as a matter of law. See Nix, 738 F.2d at 1184. The Eleventh Circuit has stressed that "it is unnecessary and inappropriate to instruct the jury on [that framework]." Dudley v. Wal-Mart Stores, Inc., 166 F.3d 1317, 1322 (11th Cir. 1999). In short, while the standards developed in McDonnell Douglas and its progeny provide a valuable tool for the courts to use in analyzing a discrimination case as a matter of law, they do not make the existence of

pretext a material fact that must be reserved for a jury. Thus, because of the weak issue of fact as to pretext, Defendant is entitled to summary judgment.

Plaintiff EEOC, in seeking relief on behalf of female employees as a class, also contends that Defendant engaged in a pattern or practice of gender discrimination based on the pass policy. In order for a plaintiff to show intentional discrimination in a pattern or practice case, "the plaintiff must prove, normally through a combination of statistics and anecdotes, that discrimination is the company's 'standard operating procedure.'" EEOC v. Joe's Stone Crab, Inc., 220 F.3d 1263, 1274 (11th Cir. 2000) (quoting Int'l Brotherhood of Teamsters v. United States, 41 U.S. 324, 335-36 (1977)). "Where gross statistical disparities can be shown, they alone in a proper case may constitute prima facie proof of a pattern or practice of discrimination." Hazelwood Sch. Dist. v. United States, 433 U.S. 299, 307-08 (1977).

Plaintiff EEOC's evidence in support of its pattern or practice theory of discrimination basically consists of anecdotal evidence of eight female employees, some of whom testified that Mr. Sheikali specifically said that the pass was only for the women, and others whom testified that they never observed the men using the pass. As discussed above, Defendant presented abundant evidence that the pass policy was gender-neutral, and some of Plaintiffs' evidence even supports that. Plaintiffs'

testimony of eight female employees, some of which was inconsistent, is simply insufficient to show that discrimination was Defendant's "standard operating procedure." Accordingly, Defendant's Motion for Summary Judgment on Plaintiffs' sex/gender discrimination claims should be **GRANTED**.

C. Plaintiffs' Claims for Retaliatory Discharge of Plaintiff Intervenor

Plaintiff Intervenor claims that she was terminated in retaliation for complaining that the stick policy violated her rights because the policy only applied to women.

Title VII provides that it is "an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment" because the employee has opposed unlawful discrimination by their employer or "has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing" concerning unlawful discrimination by his employer. 42 U.S.C. § 2000e-3(a). In order to establish a prima facie case of retaliation, Plaintiff Intervenor must establish that (1) she engaged in protected activity; (2) she suffered from an adverse employment action; and (3) the adverse employment action was caused by her engaging in protected activity. See 42 U.S.C. 2000(e)(3)(a); Brochu v. City of Riviera Beach, 304 F.3d 1144, 1155 (11th Cir. 2002).

In this case, Plaintiff Intervenor was terminated after complaining about and

refusing to comply with Defendant's bathroom pass policy, thus satisfying the second and third prongs of Plaintiffs' prima facie case of retaliatory discharge of Plaintiff Intervenor. Defendant, however, challenges the first prong of Plaintiffs' prima facie case, arguing that Plaintiff Intervenor did not engage in protected activity because the pass policy was gender-neutral and therefore Plaintiff Intervenor's belief that Defendant was engaging in an unlawful employment practice was not objectively reasonable.

Title VII's opposition clause protects employees who have opposed an employment practice that has been made unlawful by Title VII. See 42 U.S.C. § 2000e-3(a); EEOC v. Total Sys. Servs., Inc., 221 F.3d 1171, 1175 (11th Cir. 2000). Although the Plaintiff need not prove the underlying charge of discrimination or show that the conduct opposed was unlawful to show that she engaged in protected opposition to discrimination, she must show that she had a reasonable, good faith belief that the discrimination existed. See Clover v. Total Sys. Servs., Inc., 176 F.3d 1346, 1351 (11th Cir. 1999); Harper v. Blockbuster Entm't Corp., 139 F.3d 1385, 1388 (11th Cir. 1998) (citing Little v. United Tech., 103 F. 3d 956, 960 (11th Cir. 1997)). The objective reasonableness of an employee's belief that her employer has engaged in an unlawful employment practice must be measured against substantive law. See id. at

1351; Little, 103 F.3d at 960 (explaining that failure to charge an employee who opposes an employment practice with substantive knowledge of the law would eviscerate the objective component of the reasonableness inquiry). Some acts of opposition listed in the EEOC compliance manual include filing an EEOC charge, threatening to file an EEOC charge, complaining to anyone about alleged discrimination, refusing to obey an order because of a reasonable belief that it is discriminatory, and requesting reasonable accommodation or religious accommodation. 591 PLI/LIT 729, 738-39 (1998).

Applying the law to the facts of this case, the Court finds that Plaintiff Intervenor did not engage in protected activity because it was not objectively reasonable to oppose Defendant's pass policy in light of the abundant evidence that the policy was gender-neutral. In addition, while Plaintiff Intervenor might have felt humiliated or degraded by having to use a pass to go to the bathroom, there were a sufficient number of passes and emergency passes and there is no evidence in the record to suggest that Plaintiff Intervenor was ever denied access to restrooms, which would have legitimized her opposition under the prevailing substantive law. See Hall v. Gus Constr. Co., Inc., 842 F.2d 1010 (8th Cir. 1988); Kilgo v. Bowman Transp., Inc., 789 F.2d 859 (11th Cir. 1986); Baker v. John Morrell & Co., 220 F. Supp. 2d 1000 (N.D. Iowa

2002), amended on other grounds upon recons. by 266 F. Supp. 2d 909 (N.D. Iowa 2003). Thus, Plaintiffs cannot make out a prima facie case of retaliation.

Even if Plaintiff could make out a prima facie case of retaliation, she cannot show that Defendant's legitimate, nondiscriminatory reason for terminating her employment was merely a pretext for unlawful retaliation. Defendant has articulated that Plaintiff Intervenor was terminated for insubordination by refusing to follow a company policy while she was still a probationary employee. Once a plaintiff establishes her prima facie case, the defendant must then come forward with "legitimate reasons for the employment action to negate the inference of retaliation." Taylor v. Runyon, 175 F.3d 861, 868 (11th Cir. 1999); Goldsmith v. City of Atmore, 996 F.2d 1155, 1163 (11th Cir. 1993). The plaintiff must then introduce "evidence, . . . which taken in the light most favorable to the non-moving party, could allow a jury to find by a preponderance of the evidence that the plaintiff has established pretext, and that the action taken was in retaliation for engaging in the protected activity." Hairston v. Gainesville Sun Publ'g Co., 9 F.3d 913 (11th Cir. 1993). The plaintiff is not required to introduce evidence beyond that introduced to establish her prima facie case. See id. at 919. In deciding whether the plaintiff can survive summary judgment when trying to indirectly prove pretext, the court must evaluate whether the plaintiff

has demonstrated such weaknesses, implausibilities, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable factfinder could find them unworthy of credence or was more likely motivated by retaliation than its proffered reason, with more than conclusory allegations of retaliation. Reeves, 530 U.S. at 148; Burdine, 450 U.S. at 253; Chapman, 229 F.3d at 1024; Mayfield, 101 F.3d at 1376.

Applying the law to the facts of this case, Plaintiffs cannot establish that Defendant's reason for terminating Plaintiff Intervenor was pretext for unlawful retaliation. Plaintiffs argue that Plaintiff Intervenor was the only one fired, and within minutes of the meeting held on February 10, 1999, to warn the female employees who were not using the stick, because she was the only one who adamantly complained about the policy. Plaintiffs also argue, without support, that "Defendant cannot avoid liability under Title VII merely because Garcia may have been a new employee." Defendant presented abundant evidence in this case that the pass policy was gender-neutral. That notwithstanding, the undisputed facts show that because Plaintiff Intervenor left her employment with Defendant before the two-week Christmas holiday season, and returned to her employment sometime after the plant reopened after the holidays, Plaintiff was rehired as a new employee and had to restart her 90-

day probationary period. (See Pl. Dep. pp. 26, 35-36, Exs. 10-11; Baaklini Dep. pp. 21-22, 46-47, 51; Sheikali Dep. p. 89). During this probationary period, Defendant has the right to terminate an employee without prior notice. (See Pl. Dep., Ex. 11). The undisputed evidence explicitly shows that Mr. Baaklini decided to terminate Plaintiff Intervenor after her continued refusal to comply with the stick policy and after he determined that she was still in her probationary period. (Baaklini Dep. pp. 25-26; Sheikali Dep. p. 38, Ex. 2). Accordingly, because Plaintiffs cannot show that Defendant's reason for Plaintiff Intervenor's termination was pretext for unlawful retaliation, Defendant's Motion for Summary Judgment should be **GRANTED** on this claim.

D. Plaintiff EEOC's Title VII Claims of Constructive Discharge on Behalf of Female Employees

Plaintiff EEOC contends that the female employees were constructively discharged from their employment due to the Defendant's breakroom pass policy because the women who carried the stick were subjected to obscene comments, jokes, and laughter by the male employees as well as management.

In order for a plaintiff to establish a constructive discharge claim, the plaintiff must show that (1) her working conditions were so intolerable that no reasonable person could be expected to endure them; (2) the intolerable working conditions were

a product of conduct that violated Title VII; (3) the Defendant was responsible for the intolerable working conditions; and (4) that she involuntarily resigned as a result of the intolerable working conditions. See Kilgore v. Thompson & Brock Mgmt., 93 F.3d 752, 754 (11th Cir. 1996); Morgan v. Ford, 6 F.3d 750, 755 (11th Cir. 1993), cert. denied, 512 U.S. 1221 (1994); Steele v. Offshore Shipbuilding, Inc., 867 F.2d 1311, 1317 (11th Cir. 1989). Plaintiff, however, has an obligation not to assume the worst or hastily jump to conclusions, and allow the employer sufficient time to remedy the allegedly intolerable situation before leaving their job. See Garner v. Wal-Mart Stores, Inc., 807 F.2d 1536, 1539 (11th Cir. 1987). Indeed, "[t]he 'threshold for establishing constructive discharge . . . is quite high,' higher than that for proving a hostile work environment." McDaniel v. Merlin Corp., 2003 WL 21685622, at *15 (N.D. Ga. June 26, 2003) (quoting Hipp v. Liberty Nat'l Life Ins. Co., 252 F.3d 1208, 1231 (11th Cir. 2001), cert. denied, 534 U.S. 1127 (2002)).

Defendant argues that working conditions do not rise to the level of intolerableness required for a reasonable person to have been compelled to resign. Applying the law to the facts of this case, the Court agrees that Plaintiff EEOC cannot make out a prima facie case for constructive discharge on behalf of the female employees who quit their jobs because of Defendant's breakroom pass policy. First,

Plaintiff EEOC presented very little, if any, non-hearsay evidence that obscene jokes and comments were made about the stick. Several of Plaintiff EEOC's witnesses testified that they only heard about such jokes and comments from other female employees, presenting triple layers of hearsay. (See Pl. Dep. pp. 53-55; Castenada Dep. pp. 21-22, 28-29, 63-64; Hernandez Dep. pp. 23-25, 51-53; R. Garcia Dep. pp. 22-24). In addition, Ms. Cervantes testified that some of the women engaged in sexual banter with the men about the stick, because "many of the women got along with this man. And they would flirt [or clown around] and joke around, and . . .sometimes they would be standing there talking with the girls." (Cervantes Dep. pp. 57-58; see also Pl. Dep. p. 54). Ms. Cervantes further testified that the women "would just sort of start laughing and say, oh, shut up, things like that." (Cervantes Dep. p. 58). Second, as previously discussed, the pass policy did not violate Title VII as it was not an adverse employment action which was substantial enough to alter the conditions of employment, and there is abundant evidence that the policy was gender-neutral. See Blevins v. Heilig-Meyers Corp., 52 F. Supp. 2d 1337, 1351 (M.D. Ala. 1998) ("Where, as here, the plaintiff has failed to prove that her employer's actions violated Title VII, she cannot prevail on a claim that those same actions caused her constructive discharge in violation of Title VII) (citations omitted). Third, requiring employees to carry a pass

in order to use the restroom is not so intolerable that a reasonable person would feel compelled to resign. Notably, Plaintiff EEOC cites no law to support its position. Fourth, some of the women who purportedly resigned because of the pass policy also testified that other reasons, such as insufficient pay or not receiving a bonus, compelled their resignation. (Barrios Dep. pp. 60-62; Rodriguez Dep. p. 13; Barajas Dep p. 121). In addition, although Ms. Velasquez resigned because of the pass policy, she testified that the men never made obscene comments to her because she did not use the stick. (Velasquez Dep. p. 31). Finally, the women acted impetuously in resigning less than a week after the policy was implemented, and did not afford Defendant the opportunity to address their complaints. (See Castenada Dep. pp. 15-18; Velasquez Dep. p. 28). Indeed, on February 12, 1999, just four days after the pass policy was first implemented, though not enforced until a day or two later, Defendant allowed the employees to vote on changing the breakroom pass from a stick to a different object, and the pass was then changed accordingly. (DSUF ¶ 14; Barajas Dep. pp. 70-71; Sheikali Dep. pp. 65-68, Ex. 4; Baaklini Dep. pp. 33-34). See Hill v. Winn-Dixie Stores, Inc., 934 F.2d 1518, 1527 (11th Cir. 1991) (holding that plaintiff's resignation after a few weeks of allegedly intolerable working conditions not reasonable, "especially in light of the short duration of time within which these events

occurred and in light of [defendant's] attempts to rectify the situation with [plaintiff] in the two weeks following the submission of her resignation); MacLean v. City of St. Petersburg, 194 F. Supp. 2d 1290, 1300 (M.D. Fla. 2002) (holding that plaintiff's resignation just one day after being told that she would have to perform additional duties, in the future, while one of her coworkers went on military duty for six months was unreasonable). Given all of these factors, especially in light of the very high threshold for a constructive discharge claim, higher even than a hostile work environment claim, Plaintiff EEOC's constructive discharge claims fall far short of being actionable, as a matter of law. Accordingly, Defendant's Motion for Summary Judgment should be **GRANTED** as to these claims.

E. Defendant's Request for Sanctions for Plaintiff EEOC's Alleged Failure to Conciliate in Good Faith

Defendant contends that it is entitled to dismissal of the non-conciliated claims and summary judgment entered in its favor, as well as an award of attorney's fees, as a sanction for Plaintiff EEOC's alleged failure to conciliate in good faith. Specifically, Defendant contends that Plaintiff EEOC did not conciliate in good faith because its investigation revealed that both male and female employees opposed the breakroom pass policy and the investigator made repeated demands for relief from Defendant for both genders, and Plaintiff EEOC only conciliated Plaintiff Intervenor's claims, and

then only mentioned the possibility of claims on behalf of other individuals four months after closing conciliation. In response, Plaintiff EEOC contends that it acted in good faith in attempting to conciliate because it conducted an investigation that lasted nearly 11 months, which resulted in a letter of determination outlining the basis for Defendant's Title VII liability as well as a demand letter, a conciliation was held one month after the letter of determination was sent to Defendant at which Defendant made a counter offer and Plaintiffs made a counter-demand, and Plaintiff EEOC attempted to reopen conciliation efforts after discovering the possibility of claims on behalf of other individuals.

Title VII provides in pertinent part:

> If after investigation, the Commission determines there is reasonable cause to believe that the charge [of discrimination] is true, the Commission shall endeavor to eliminate any such alleged unlawful employment practices by informal methods of conference, conciliation, and persuasion.

42 U.S.C. § 2000e-5(b). In order for the EEOC to satisfy this statutory conciliation requirement, the EEOC must "(1) outline to the employer the reasonable cause for its belief that Title VII has been violated; (2) offer an opportunity for voluntary compliance; and (3) respond in a reasonable and flexible manner to the reasonable attitudes of the employer." EEOC v. Asplundh Tree Expert Co., 340 F.3d 1256, 1259

(11th Cir. 2003) (citing EEOC v. Klingler Elec. Corp., 636 F.2d 104, 107 (5th Cir. 1981)). The Court should evaluate the EEOC's efforts at conciliation based on reasonableness and responsiveness in the totality of the circumstances. Id. (citing Klinger, 636 F. 2d at 107). Once the EEOC has made good faith efforts to conciliate, and upon an employer's rejection of its offer, the EEOC does not have a duty to attempt further conciliation. EEOC v. Keco Indus., Inc., 748 F.2d 1097, 1101-02 (6th Cir. 1984) (citations omitted).

Defendant essentially seems to argue that Plaintiff EEOC's efforts to conciliate this action were not made in good faith, because its investigation uncovered complaints of discrimination by male employees of Defendant having to comply with the breakroom pass policy, thus negating Title VII discrimination claims based on sex. Specifically, the EEOC investigator assigned to this case, Mr. Girot, testified that he interviewed some male employees, and he recalled that one male indicated that he was subjected to discrimination "[b]ecause he just didn't feel he should carry a stick. . . to go to the bathroom" and testified that there "could be more than one" male employee that told the investigator that they had to carry the stick. (Girot Dep. pp. 100, 189-90). Plaintiff EEOC explicitly states in its April 17, 2000 letter of determination, however, that "[m]ale workers were not required to carry the stick or subjected to intimidation

or hostile work environment." (See Girot Dep., Ex. 31). That notwithstanding, months later when Plaintiff EEOC sent Defendant a letter attempting to reopen conciliation, Plaintiff EEOC asked Defendant if it were "willing to compensate other employees (***males*** & females) who were humiliated by your restroom system?" further indicating the no Title VII discrimination on the basis of sex could have existed if the policy applied to or affected both genders. (See Girot Dep., Ex. 36) (emphasis added).

In addition, as Defendant points out, the initial $150,000 offer was based on Plaintiff Intervenor's counsel's proposed relief for Plaintiff Intervenor's damages; Plaintiff EEOC did not appear to be conciliating on behalf of other individuals at that time, even though its determination letter indicated that "females as a class were disparately treated and were subjected to discharge and/or constructive discharge due to their sex." (See Girot Dep. pp. 168, 170-75; Exs. 31, 33). Moreover, Mr. Girot testified that he does not recall if anyone ever explained to Mr. Baaklini, Defendant's president how the $150,000 amount was arrived at, or what it encompassed. (Girot Dep. p. 177; see also DMSJ, Ex. F). At the conciliation, Defendant made a counter-offer for Plaintiff Intervenor to be reinstated and paying all legal fees, but Plaintiff Intervenor rejected that counter-offer. Plaintiff Intervenor provided a damage calculation figure if an agreement could not be reached and the parties proceeded to litigation. Defendant

then made a second and final offer of back pay, which Plaintiff Intervenor also rejected, offering her own bottom line of $80,000, which Defendant rejected. (See Girot Dep., Ex. 33).

Furthermore, although Plaintiff EEOC stated in its April 17, 2000 determination letter that "the Commission will notify each aggrieved person of the right to sue for appropriate relief . . .[and] will contact each party in the near future to discuss conciliation," Plaintiff EEOC closed conciliation on May 22, 2000 based on the failed conciliation between Defendant and Plaintiff Intervenor. (See Girot Dep., Exs. 31, 33). Four months later, on September 10, 2000, Plaintiff EEOC attempted to reopen conciliation based on other aggrieved individuals, requesting back pay in an "amount to be determined" and between $75,000 and $100,000 each in punitive damages. (See Girot Dep., Exs. 35-36). Plaintiff EEOC also inquired about Defendant's willingness to compensate male employees who were "humiliated" by the bathroom pass system. (See Girot Dep., Ex. 36). Thus, what appears to be Plaintiff EEOC's first attempt to conciliate on behalf of other aggrieved individuals besides Plaintiff Intervenor did not occur until more than a year of investigation, and after Plaintiff EEOC had purportedly closed conciliation four months earlier based on the failed attempts of Defendant and Plaintiff Intervenor. Given that Plaintiff EEOC's own investigation found that there

were possibly male employees who were aggrieved by Defendant's breakroom pass policy and did not explain how it arrived at particular damage figures, the Court is not convinced that Plaintiff EEOC acted reasonably or responsively to Defendant's position in this action.

Even if Plaintiff EEOC acted in good faith to conciliate this action, Defendant may be entitled to attorney's fees under Title VII, which provides in pertinent part:

> In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee (including expert fees) as part of the costs, *and the Commission and the United States shall be liable for costs the same as a private person.*

42 U.S.C. § 2000e-5(k) (emphasis added). Specifically, a defendant may be entitled to attorney's fees under § 2000e-5(k) if "the court finds that [the] claim was frivolous, unreasonable, or groundless, or that the plaintiff continued to litigate after it clearly became so." United States v. Crosby, 59 F.3d 1133, 1137 (11th Cir. 1995) (quoting Christiansburg Garment Co. v. EEOC, 434 U.S. 412, 422 (1978)). Thus, based upon the Court's analysis of Defendant's Motion for Summary Judgment, the Court finds that Plaintiffs' claims in this action were frivolous and therefore Defendant's request for attorney's fees in its Motion for Sanctions Against Plaintiff EEOC should be **GRANTED**. Because the Court has already recommended granting Defendant's

motion for summary judgment as to all of Plaintiff EEOC's claims, Defendant's request for dismissal of the non-conciliated claims should be **DENIED AS MOOT**.

RECOMMENDATION

Based on the foregoing, the Clerk is **DIRECTED** to **STRIKE** Plaintiff Intervenor's affidavit. Docket Entry [112]. In addition, Plaintiff EEOC's Motion to Strike is **DENIED**. Docket Entry [87]. Further, the undersigned **RECOMMENDS** that Defendant's Motion for Summary Judgment Against Plaintiff EEOC and Plaintiff/Intervenor Garcia and for Sanctions Against Plaintiff EEOC be **GRANTED.** Docket Entries [74-1 and 74-2]. As there is nothing further pending in these proceedings, the Clerk is instructed to terminate the reference to the undersigned.

SO REPORTED AND RECOMMENDED, this 5th day of FEBRUARY, 2004.

Linda T. Walker

LINDA T. WALKER
UNITED STATES MAGISTRATE JUDGE