

STATE OF CONNECTICUT
OFFICE OF PUBLIC HEARINGS

October 16, 2015

Memorandum of Decision

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**CHRO No. 1030125 - Commission on Human Rights ex rel., Ronald Nathaniel Hannah,
Complainant v. Covidien, Respondent**

Procedural Background

On October 14, 2009, Ronald Nathaniel Hannah (the “complainant” or “Hannah”) filed an affidavit of illegal discriminatory practice (“affidavit” or “complaint”) with the Commission on Human Rights and Opportunities (“commission”) alleging that Covidien (“respondent”) had violated section 46a– 60(a)(1) of the Connecticut General Statutes and Title VII of the Civil Rights Act of 1964¹. Complainant alleged in the affidavit that he had been discriminated against due to his race (African American) when his acting supervisor, Marc Conte, “tore open my locked stall door,” while he was using the restroom.

On or about January 31, 2013, the commission issued a letter stating that, pursuant to its early intervention program, the complainant or his attorney requested that the commission send the case to directly to the office of public hearings (“OPH”) to commence a de novo contested case proceeding.

Representing the complainant in this matter is Attorney David A. Leff. Representing the respondent is Attorney Carmen J. DiMaria. A public hearing was conducted on April 15, 2014. Following the hearing, counsel representing the complainant and the respondent filed post-hearing briefs and reply briefs, and the record was closed.

¹ The substantive provisions of Title VII are enforced through Conn. Gen. Stat. § 46a-58(a). See footnote 5, *infra*.

Findings of Fact

The following facts based on the stipulations, pleadings, exhibits and transcripts are found relevant to this decision:²

The complainant is a black male. He began working for the respondent on March 11, 2008 as a Production Technician in the Polymer Development Division ("PDD"), located in the respondent's North Haven, Connecticut manufacturing facility. He worked in the Monomer department. The complainant worked third shift, from 11 p.m. to 7 a.m. The complainant's regular supervisor was Shawn Riccio.

Marc Conte also worked for the respondent as a third shift supervisor. Conte's normal work did not include the Monomer department where the complainant was assigned. Riccio and Conte did not supervise the same employees; they worked in different areas of the same manufacturing facility. The complainant was not one of the employees that reported to Conte; instead the complainant's regular supervisor was Riccio. Jt. Stip. ¶5. Tr. 39.

For the third shift that commenced on May 10, 2009, Conte was responsible for monitoring all of the manufacturing activities occurring in the building because Riccio was not at work that evening. The complainant worked the third shift on May 10-11, 2009. The May 10-11, 2009 shift was the only time Conte ever "supervised" the complainant. Prior to this shift, Hannah and Conte had no meaningful interaction. The two had only one brief conversation. Jt. Stip. ¶13, Tr. 18, 39 and 40. According to the complainant, before intruding on him in the bathroom, Conte had never discriminated against him. Tr. 52.

Hannah worked on the first floor of the building. Sometime during his shift (approximately between 3 a.m. and 4 a.m.), the complainant told his coworker, Luis Rivera, Production Technician for Monomer department, that he was going to the restroom. (Note - Rivera did not testify during the public hearing). The complainant did not tell Rivera which of the three men's restrooms (two on the first floor and one on the second) he was going to use.

² The parties filed factual stipulations, dated March 11, 2014; hereinafter referred to as "Jt. Stip. ¶." Respondent exhibits are referred to as "R-#." The complainant did not submit any exhibits. The complainant's reply-brief is referred to as "C-reply brief #." References to the transcript of the public hearing are referred to as "Tr. #."

Conte, while making his rounds to monitor the various production activities that were occurring in the building's various locations, approached Rivera and found him working alone the Monomer area. Conte asked Rivera why no one was there helping him. Rivera told Conte that Vernon Smith and Antonio Russell were on break and that the complainant was in the bathroom. Jt.Stip. ¶ 8, R-3.

Sometime after speaking with Rivera, Conte entered the second floor bathroom. Jt.Stip. ¶9. Conte did not know that the complainant was in that bathroom. Conte walked to the disability accessible stall and opened the door. Conte saw that a person was occupying that stall, stated "Oh, I'm sorry kid. I'm sorry kid." Complaint ¶15. Tr. 50, 58. R-3. Conte then did not use the bathroom, but instead directly exited the room. R-3. Conte did not recognize the person in the stall; he did not know that it was Hannah.

When the complainant returned to his work area, Rivera noticed that he appeared to be very upset. Hannah asked Rivera if Conte was looking for him. Rivera explained that, after Conte asked why no one was on the production floor, he told Conte that Hannah had gone to the bathroom. (The complainant testified that Rivera said Conte was looking for Hannah and that Rivera made some disparaging remarks about Conte. Tr. 45-46 and 48. There is no reliable evidence to support this testimony because Rivera was not called by the complainant as a witness to verify whether he made the comments.)

A few hours later that morning, Hannah went to Javier Lopez, Senior Lead Technician for the Monomer Department. (Note – Lopez was not called to be a witness by either party.) Lopez observed that the complainant was very angry. The complainant told Lopez that Conte had violated his privacy when he pushed open the handicapped bathroom stall door. Hannah asked Lopez to call Conte over so that Hannah could ask him about the incident. Lopez telephoned Conte and asked him to meet with the complainant and Lopez. This is when Conte first learned that the man in the stall who he had interrupted was the complainant.

Conte went over to meet with Lopez and Hannah. Once there, he attempted to shake hands with Hannah, but the complainant rebuffed the gesture. Jt.Stip. ¶12. Tr. 55-56. R-3. Conte also apologized about the mishap; he said, "Ron, I'm sorry." Jt.Stip. ¶12. R-3. During the meeting Hannah stated that Conte opening the stall door was not professional, that he should

have knocked on or checked under the door, and repeated that he felt violated. Conte stated that he didn't do anything wrong, we're all adults here," and apologized again. R-3. The complainant refused to accept Conte's apology.

As Hannah walked away, Conte said to Lopez that he needed to report the event to human resources. Conte sent an email message to Bonnie Nadler, respondent's Human Resources Assistant Manager at 6:26 a.m. R-2.

The complainant spoke with Marcia Bissell, respondent's Manager of Plant Human Resources, around 8:30 a.m. that morning. Hannah told Bissell he believed that Conte was trying to catch him sleeping or doing something wrong. The complainant told Bissell the he believed that Conte "pre-judged me; I can't take it no other way." He showed her a photograph of the closed bathroom stall door. R-3. There is no evidence that the door or stall was damaged in any way. After meeting with Bissell, the complainant was given a paid week off, while the human resources staff investigated the situation. Tr. 58.

After interviewing Hannah about the event, on the morning of May 11, 2009, Bissell engaged Nadler and Sandy DeJesus, Supervisor of Temporary Services, in efforts to investigate Hannah's concerns (Neither Nadler nor DeJesus were called as witnesses at the hearing). It is not clear from the "investigation report" which of the three interviewed Rivera or Lopez or when those interviews, respectively, occurred. R-3. At some point, Nadler spoke to Conte. R-4. "Based on its investigation, Human Resources decided that there was no discrimination or harassment committed by Conte toward the [c]omplainant." Jt. Stip. ¶15.

One week later, on May 18, 2009, DeJesus and Nadler met with the complainant. Tr. 58-59. According to Hannah, at the meeting, Nadler said, "Ron ... people here love you. You're a good worker. I've got to know when you're coming back to work." Tr. 31. Tr. 60. During the meeting, DeJesus offered the complainant the opportunity to return to his job, and he stated that he did not want to return to it. Tr. 61. R-4. Nadler next offered Hannah the option to change assignments "to a comparable position in an entirely different building on the facility campus, so he would not have to work in the same building as Conte." Jt. Stip. ¶18. R-4; Tr. 33. Tr. 64. The complainant replied that he would need time to think about the offer because he was still upset.

Jt. Stip. ¶18.³ Hannah told them that because he was upset, “I can’t project when I’ll be back.” Tr. 64.

After Nadler and DeJesus informed Hannah of the investigation results and that Conte had not been terminated in connection with the incident, Hannah told them he was disgusted with Conte and that “Mark should be fired for his actions, for singling him out and couldn’t believe that he was still employed at the company.” Jt.Stip. 16. Tr. 60. R-4.⁴

The respondent never told the complainant that he was fired and could not return to work for them. He declined the employment opportunities offered by Nadler and DeJesus on May 18, 2009. Tr. 64. Hannah unilaterally made the decision to not return to work. Jt.Stip. ¶ 19. Tr. 64-65.

Nadler offered the complainant the opportunity to use the respondent’s EAP program. Hannah declined the offer. Jt.Stip. ¶17. Tr. 63.

Complainant’s Argument

The complainant alleges that some actions of Conte and the respondent violated Conn. Gen. Stat. § 46a-60(a)(1) and § 46a-58(a), as read to enforce the substantive provisions of Title VII of the Civil Rights , as amended.⁵ The complainant asserts that he was subjected to a hostile

³ Compare - During the public hearing, the complainant testified that he said to Nadler, in response to the offer of a new assignment that “I love the department I work in. I don’t want to go in another department.” Tr. 33.

⁴ Compare - During the public hearing the complainant testified that he said to Nadler and DeJesus, “I just can’t come back and you’re telling me that nothing happened to him.” Tr. 32.

⁵ Conn. Gen. Stat. § 46a-58(a), states,

It shall be a discriminatory practice in violation of this section for any person to subject, or cause to be subjected, any other person to the deprivation of any rights, privileges or immunities, secured or protected by the Constitution or laws of this state or of the United States, on account of religion, national origin, alienage, color, race, sex, gender identity or expression, sexual orientation, blindness or physical disability.

Although section 46-58(a) has its origins in a Connecticut criminal statute dating from 1884 (that reflected what is now 42 USC § 1983), in 1975, with the passage of Public Act 75-462 (An Act

work environment because of his race. The complaint also asserts that he was constructively discharged.

Complainant's counsel submitted a post-hearing brief that cited no legal authority. Subsequently, the complainant's counsel submitted a reply-brief that cited snippets from numerous decisions, which taken collectively set forth the general principles courts utilize to determine (1) whether a hostile work environment based on some discriminatory animus has occurred and (2) whether a complainant has suffered a constructive discharge. C-reply brief, 6-9.ⁱ

Complainant's reply-brief asserts that Conte's conduct, i.e., opening the bathroom stall door, was "sufficiently severe to alter the conditions of Mr. Hannah's employment... [and] caused [him] to resign or else work in fear that if he went to relieve himself during his shift, [he] would be subjected to this exact treatment again." C-reply brief 9.

Complainant's counsel reiterated that "Conte's conduct created a discriminatorily abusive environment that was sufficiently severe to alter the conditions of employment." C-reply brief 9-10. The complainant asserts that the evidence adduced at the hearing, establishes that Conte "targeted" the complainant, ripped open the "locked toilet stall door," that "Conte was out to get" the complainant "because of his race" and "would stop at nothing" to do so. C-reply brief 9-10.

To prove that Conte harbored a discriminatory animus against African-Americans, the complainant asks the undersigned to consider the testimony offered by the complainant's two rebuttal witnesses. C-reply brief 10. Lastly, complainant's counsel argues that the respondent failed to adequately conduct an investigation into the complainant's grievance, and failed to offer Hannah a reasonable remedy. C-reply brief 10.

Concerning the Powers of the Human Rights and Opportunities Commission), the tribunal established to adjudicate complaints it received from the commission was authorized to hear such complaints that alleged a violation then section 53-34. Section 73 of Public Act No. 15-5 of the June Special Session (An Act Implementing Provisions of the State Budget for the Biennium Ending June 30, 2017, concerning General Government, Education, Health and Human Services and Bonds of the State) amended section 46a-58(a) to add "mental disability" as a protected class.

The complainant asserts that Conte's actions caused him to develop a profound fear and that he was compelled to resign because he believed that Conte would burst in on him again when he used the bathroom. C-reply brief 9. Hannah felt humiliated when Conte opened the stall door. The complainant, at some point, developed the belief that Conte was trying to catch him goofing off or sleeping on the job. C-reply brief 10.

The complainant asserts that "the hostile working environment at Covidien was so intolerable that a reasonable person in Mr. Hannah's position would have resigned. C-reply brief 13. The complainant asserts his conclusion that "Conte, his supervisor, was out to get him because of his race and [would] do anything he could to harass him – including breaking down a locked bathroom stall door." C-reply brief 13. Complainant's counsel repeats that "[i]t is reasonable to conclude that anyone in Mr. Hannah's position would have felt compelled to resign and find alternative work if faced with Mr. Conte's conduct, and Covidien's inability to address it." C-reply brief 14.

The complainant offers as proof that Conte possessed a discriminatory animus based on race, his belief that Conte had targeted him and pursued Hannah to the restroom, but did not treat white employees in a similar fashion. C-reply brief 15. Complainant's counsel then asserts that the respondent "failed to properly investigate the complaint [and] failed to remedy the situation. C-reply brief 15.

For the following reasons, I conclude that the complainant has failed to establish that the actions of the respondent support a finding that a hostile work environment existed. Additionally, I conclude that the evidence adduced at the hearing does not support the conclusion that the complainant was constructively discharged.

Hostile Work Environment and Constructive Discharge

To establish that the complainant was subjected to a hostile working environment on the basis of his or her protected status, the complainant must show "that the harassment was sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment, ... that a specific basis exists for imputing the objectionable conduct to the employer," and that the employer's action were motivated by a discriminatory animus. Grey v. City of Norwalk Board of Education, 304 F.Supp.2d 314, 326 (D.Conn.

2004)(quoting Alfano v. Costello, 294 F.3d 365, 373 (2d Cir.2002). See also Pennsylvania State Police v. Suders, 542 U.S. 129, 133-34 (2004) (“To establish hostile work environment, plaintiffs ... must show harassing behavior ‘sufficiently severe or pervasive to alter the conditions of [their] employment.... Beyond that, we hold, to establish “constructive discharge,” the plaintiff must make a further showing: She must show that the abusive working environment became so intolerable that her resignation qualified as a fitting response.”)(citations omitted).

The test to determine whether an employee has been subjected to a hostile work environment “has objective and subjective elements: the misconduct must be ‘severe or persuasive enough to create an objectively hostile or abusive work environment,’ and the victim must also subjectively perceive the environment to be abusive.... As a general rule, incidents must be more than ‘episodic; they must be sufficiently continuous and concerted in order to be deemed pervasive.’” Terry v. Ashcroft, 336 F.3d 128, 148 (citations omitted). “The court must consider “the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee’s work performance.” Grey, 304 F.Supp.2d at 326 (quoting Alfano, 294 F.3d at 373, quoting Harris v. Forklift Sys., Inc., 510 U.S. 17, 23 (1993)).

“While the standard for establishing a hostile work environment is high, we have repeatedly cautioned against setting the bar too high, noting that [w]hile a mild, isolated incident does not make a work environment hostile, the test is whether the harassment is of such quality or quantity that a reasonable employee would find the condition of her employment altered for the worse.” Terry v. Ashcroft, 336 F.3d 128, 148 (quotation marks and citations omitted).

A plaintiff alleging constructive discharge in violation of Title VII ... must establish: “(1) he or she suffered harassment or discrimination so intolerable that a reasonable person in the same position would have felt compelled to resign ...; and (2) the employee's reaction to the workplace situation - that is, his or her decision to resign - was reasonable given the totality of circumstances” Pennsylvania State Police v. Suders, 542 U.S. 129, 139, 124 (2004) (citation omitted). To prove constructive discharge, “the plaintiff must ... show that the abusive working environment became so intolerable that her resignation qualified as a fitting response.” Suders, 542 U.S., at 133-34 (2004).

“To present a prima facie case of discriminatory discharge action under Title VII, [a complainant] must show that she was either actually or constructively discharged, and that ‘the discharge occurred under circumstances giving rise to an inference of discrimination on the basis of her membership in a protected class.’ Grey v. City of Norwalk Board of Education, 304 F.Supp.2d 314, 323 (D.Conn. 2004). “Constructive discharge occurs when an employer ‘intentionally creates an intolerable work atmosphere that forces an employee to quit involuntarily.’ Grey, 304 F.Supp.2d at 324 (citing Terry v. Ashcroft, 336 F.3d 128, 152 (2d Cir.2003)). The cumulative impact of adverse conditions must be taken into account. Grey, 304 F.Supp.2d at 324 (citing Chertkova v. Conn. Gen. Life Ins. Co., 92 F.3d 81, 89 (2d Cir. 1996)).

According to the Suder Court, a constructive discharge inquiry is objective. Suder, 542 U.S., at 141 (citing See C. Weirich et al., 2002 Cumulative Supplement to Lindemann & Grossman 651-652, and n. 1 (collecting cases)). “[A] claim of constructive discharge must be supported by more than the employee's subjective opinion that the job conditions have become so intolerable that he or she was forced to resign.” Brittell v. Dep't of Correction, 247 Conn. 148, 178 (1998) (quoting Seery v. Yale–New Haven Hospital, 17 Conn.App. 532, 540 (1989)). “Unless conditions are beyond ‘ordinary’ discrimination, a complaining employee is expected to remain on the job while seeking redress.” Suder, 542 U.S., at 147 (quoting Perry v. Harris Chernin, Inc., 126 F.3d 1010, 1015 (C.A.7 1997)).

The facts must establish that a reasonable person in the employee’s position would have found the situation so intolerable as to compel resignation. Petrosino v. Bell Atlantic, 385 F.3d 210, 229 (2004). “In determining whether or not a constructive discharge has taken place, ‘the trier of fact must be satisfied that the ... working conditions would have been so difficult or unpleasant that a reasonable person in the employee’s shoes would have felt compelled to resign.’ Pena v. Brattleboro Retreat, 702 F.2d 322, 325 (2d Cir.1983). The law does not permit a finding of constructive discharge when an employee resigns under circumstances that are not intolerable.

Analysis

Applying these principles to this case, the undersigned concludes that the complainant has failed to adduce sufficient evidence to support his claim that he suffered a constructive

discharge. Neither is there evidence to support a finding that the complainant was subjected to a hostile work environment. Lastly, I conclude that the evidence does not support a finding that the Conte possessed a discriminatory animus based on race. The complaint, therefore, is dismissed in its entirety.

Discriminatory Animus

First and foremost, the complainant offered no credible evidence to support his belief that Conte, a man with whom he had only fleeting contact before the shift and with whom he was marginally acquainted, possessed a discriminatory animus and was out to get him. In fact, the complainant testified that Conte had never discriminated against him prior to opening the bathroom stall door. From the evidence adduced at the hearing, it is clear that Conte did not supervise the complainant's activities at the work location. The evidence also reveals that from March 11, 2008, when the complainant began working for the respondent, until to May 11, 2009, Conte and Hannah had only one brief conversation regarding a company at which they both previously had worked.

There is no objective evidence in the record to support the conclusion that Conte was motivated to locate the complainant and went looking for him in the restroom. The evidence reveals only that Conte happened to go to the same restroom where Hannah was and opened the unlocked stall door, not knowing that the complainant was inside. The evidence presented reveals that Conte quickly apologized and exited the bathroom because he was embarrassed that he accidentally intruded on some person, who he did not recognize, in the unlocked stall.

The complainant alleges in his affidavit that the locked door was ripped open. Although, as indicated in the notes taken by Bissell the morning after the incident, the complainant showed her a photo of the stall door completely closed, there is no evidence that the complainant showed her a photo that revealed any damage to the stall that would be caused by "ripping" or "tearing open" a "locked" door. The complainant did not introduce any photograph that he took into evidence. Tr. 55. Nor did the complainant testify that there was any damage to the stall.

Hannah offers as evidence that Conte, who did not supervise the complainant, possesses a discriminatory animus against him because of his race, unsubstantiated assertions of conversations he purportedly had with unidentified individuals, that the complainant purportedly

worked with while employed by the respondent from 1991 to 1998, and upon his return in 2008. The complainant testified that, in 2008, “everybody in the whole building was saying to me ... watch out for that guy Marc Conte. He’s a racist. He doesn’t like blacks and Hispanics.” Tr. 25. Despite the fact that such testimony is purely uncorroborated hearsay, the complainant did not produce any reliable objective evidence that Conte harbored a discriminatory animus.

The complainant also testified that Teshomo Sinclair told him that Conte was a “racist.” Sinclair was not called to be witness in complainant’s case in chief. Sinclair was called as a rebuttal witness. He was not asked by complainant’s counsel to confirm whether he made the statement that Hannah attributed to him.

Sinclair, during his testimony about his employment at Covidien from February 2008 to August 2008, claimed to have complained about Conte to an employee in respondent’s human resources department, Sandy DeJesus. Sinclair was forced to retract that accusation after respondent’s counsel played a tape recording of an interview of Sinclair conducted during the fact-finding stage of the commission’s investigative process. Sinclair’s testimony about his personal interaction with Conte was vague. Sinclair, however, did not testify that Conte ever followed him into the restroom.

The other rebuttal witness called by complainant’s counsel, Michael Greene, testified that Conte followed him to and into the bathroom “every time” he went, which was three to four times a shift during the course of his employment at Covidien. Tr. 166. Greene asserted that he worked at Covidien for a number of months (“I believe it was 2008 to closely – close to 2009”). Tr. 166. This testimony indicates that, during this period, Conte purportedly followed Greene into the bathroom 15 or more times a week (60 or more times a month), and he never complained to the respondent’s management or human resources department.⁶ Tr. 166-169. Such testimony strains credibility.

⁶ It must be noted that because both federal and state laws prohibit retaliating against an employee for filing a complaint about discriminatory conduct, the best course of action for an individual to take if they reasonably believe that he or she has been discriminated against, and does not trust that his or her employer will properly address the issue, is to file a written complaint with either the appropriate state or federal civil rights agency.

Greene testified that Conte also followed other employees, who he did not identify by name, to the bathroom. Tr. 170-171. Greene also testified that other unidentified employees lost their jobs when they filed complaints. Tr. 170. The complainant expressed similar concerns that he would be a target if he returned to work because he had complained about Conte. Tr. 33. The complainant offered no credible evidence of employees being terminated after complaining of discriminatory treatment. The undersigned is unwilling to lend any credence to these unsubstantiated accusations.

Greene testified that, although he did not report his concerns to the respondent, he told unidentified employees about Conte following and harassing him. Tr. 172-173. This accusation, too, remained uncorroborated. Complainant's counsel made no attempt to identify these unnamed employees and offered no evidence that any employee ever filed a complaint about any inappropriate conduct by Conte.

Hostile Work Environment

Assuming that complainant sincerely feels that he was subjected to a hostile work environment, I conclude, based on the evidence adduced at the hearing, that a reasonable person would not have had that reaction. It is not the duty of this tribunal to determine why the complainant reacted to this episode with so much emotion. The undersigned is tasked with reviewing the evidence to determine if there is an objective basis to conclude that a hostile work environment existed in this situation, as a matter of law. The evidence adduced at hearing, simply, does not support a finding that the complainant was subjected to a hostile work environment.

Constructive Discharge

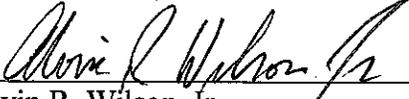
Having concluded that the complainant was not subjected to a hostile work environment, an essential precondition for a finding of constructive discharge does not exist. Additionally, the complainant refused the respondent's offer to provide him with a job in another facility on its campus, so that he would not be required to work in the same building as Conte. The

complainant's decision to turn down an alternate assignment precludes a finding of constructive discharge.

Decision and Order

In light of the foregoing, I find in favor of the respondent. It is hereby ordered, in accordance with the provisions of subdivision (4) of subsection (d) of section 46a-54-88a of the Regulations of Connecticut State Agencies, that the complaint be, and hereby is, dismissed in its entirety.

It is so ordered this 16th day of October 2015.



Alvin R. Wilson, Jr.
Presiding Human Rights Referee

Endnote i - The undersigned has reviewed each of the cases cited by the complainant. None approximate the scenario in the instant action. The cited cases involved situations where the complainant had significant interaction with those alleged to have created a hostile work environment or to have caused a constructive discharge to occur.

1. C-reply brief 6 - Patino v. Birken Mfg. Co, 304 Conn. 679, 691 (2012) (quoting Brittell v. Conn. Dept. of Correction, 247 Conn 148, 166-67 (1998)) (complainant must demonstrate that the harassing conduct "is sufficiently severe or pervasive to alter the conditions of the employment and create an abusive working environment). In Patino, the complainant was subjected to years of derogatory verbal harassment from his co-workers and he requested that his employer take corrective action);
2. C-reply brief 7 - Summa v. Hostra Univ., 708 F.3d 115, 126 (2d. Cir.2013), citing Howley v. Town of Stratford, 217 F.3d 141, 154 (2d Cir.2000), for the proposition that "a single act of harassment is sufficient to alter the conditions of employment and create an objectively hostile work environment." C-reply brief 7. Howley actually says "[W]hether an environment is 'hostile' or 'abusive' can be determined only by looking at all the circumstances. These may include the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." Howley, 217 F.3d at 154. In Howley, the complainant, a female lieutenant firefighter was subjected, in front of co-workers, to a sexually degrading tirade by a male firefighter.
3. C-reply brief 7 - Grey v. City of Norwalk Board of Education, 304 F.Supp.2d 314, 326 (D.Conn. 2004). The court set forth the following description of the considerations in a HWE case –

Demonstrating that conduct was sufficiently severe to alter the terms of the plaintiff's employment has "objective and subjective elements: the misconduct must be severe or pervasive enough to create an objectively hostile or abusive

work environment, and the victim must also subjectively perceive that environment to be abusive.” Terry, 336 F.3d at 128 (internal quotations omitted). The court must consider “the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance.” Id. (quoting Harris v. Forklift Sys., Inc., 510 U.S. 17, 23, 114 S.Ct. 367, 126 L.Ed.2d 295 (1993)).1819

As with constructive discharge, the court examines the totality of the circumstances. Id. (Emphasis added) (quoting Richardson v. New York State Dep't of Corr. Serv., 180 F.3d 426, 437 (2d Cir.1999)). While this is a case-by-case analysis, “a plaintiff alleging a hostile work environment must demonstrate either that a single incident was extraordinarily severe, or that a series of incidents were sufficiently continuous and concerted to have altered the conditions of her working environment.” Alfano, 294 F.3d at 373 (quoting Cruz v. Coach Stores, Inc., 202 F.3d 560, 570 (2d Cir.2000)) (internal quotation marks omitted). “When the workplace is permeated with discriminatory intimidation, ridicule, and insult, that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment, Title VII is violated.” Harris, 510 U.S. at 21, 114 S.Ct. 367 (internal quotations omitted).

Grey v. City of Norwalk Bd. of Educ., 304 F. Supp. 2d 314, 326-27 (D. Conn. 2004) (emphasis added).

4. C-reply brief 7 - Patterson v County of Oneida, N.Y., 375 F.3d 206, 230 (2d Cir.2004)(cited for the proposition that “a trier of fact could find a single incident involving physical assault and racial slurs to be sufficiently severe to alter the terms and conditions of employment.”). The Court of Appeals, reviewing grant of summary judgment, refused to say that the incident at issue - alleged racial remarks, accompanied by a punch to the ribs and being temporarily blinded by mace in the eyes -- as a matter of law was not sufficiently severe to create a hostile work environment. The Court of Appeals wrote –

To defeat a motion for summary judgment on a claim of racially hostile work environment, “a plaintiff must produce evidence that the workplace [wa]s permeated with discriminatory intimidation, ridicule, and insult, that [wa]s sufficiently severe or pervasive to alter the conditions of the victim's employment.” Cruz v. Coach Stores, Inc., 202 F.3d 560, 570 (2d Cir.2000) (internal quotation marks omitted). Although isolated incidents ordinarily will not rise to the level of a hostile work environment, even a single incident of sufficient severity may so alter the terms and conditions of employment as to create such an environment. See generally Faragher v. City of Boca Raton, 524 U.S. 775, 788, 118 S.Ct. 2275, 141 L.Ed.2d 662 (1998); Ferris v. Delta Air Lines, Inc., 277 F.3d 128, 136 (2d Cir.2001), cert. denied, 537 U.S. 824, 123 S.Ct. 110, 154 L.Ed.2d 34 (2002); Richardson v. New York State Department of Correctional Service, 180 F.3d at 437. The matter of whether the conduct alleged was so “severe or pervasive” as to create “an objectively hostile or abusive work environment,” Harris v. Forklift Systems, Inc., 510 U.S. 17, 21, 114 S.Ct. 367, 126 L.Ed.2d 295 (1993), is to be decided based on the totality of the circumstances, in light of such factors as the “frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance,” id. at 23, 114 S.Ct. 367. Where reasonable jurors could disagree as to

whether alleged incidents of racial insensitivity or harassment would have adversely altered the working conditions of a reasonable employee, the issue of whether a hostile work environment existed may not properly be decided as a matter of law. See, e.g., Whidbee v. Garzarelli Food Specialties, Inc., 223 F.3d at 71; Richardson v. New York State Department of Correctional Service, 180 F.3d at 439.

Patterson v. Cnty. of Oneida, N.Y., 375 F.3d 206, 227 (2d Cir. 2004)

5. C-reply brief 8 – Terry v. Ashcroft, 336 F.3d 128, 148 (2d Cir.2003), cited for the proposition that “the Second Circuit ‘has repeatedly cautioned against setting the bar too high, noting ... the test is whether the harassment is of such quality or quantity that a reasonable employee would find the conditions of her employment altered for the worse.’” The complete quote is “we have repeatedly cautioned against setting the bar too high, noting that “[w]hile a mild, isolated incident does not make a work environment hostile, the test is whether the harassment is of such quality or quantity that a reasonable employee would find the conditions of her employment altered for the worse.” (Emphasis added. Citations and quotations omitted.) In Terry, the Court of Appeals, reversing grant of summary judgment on the hostile work environment claim, noted that there was evidence that the complainant was subjected to “purposely harassment” by his supervisors “on a nearly daily basis” and it “made his work environment unusually and unnecessarily unpleasant.” Id.
6. C-reply brief 9 – Brittell v. Dept. of Correction, 247 Conn.148, 168 (2003), cited for the proposition that “it is appropriate to consider the nature and scope of an employer’s investigation when evaluating the adequacy of its response to the harassment.” The Court then stated that “[o]nce an employer has in good faith taken those measures which are both feasible and reasonable under the circumstances to combat the offensive conduct we do not think [it] can be charged with discriminating on the basis of race Whether an employer has fulfilled [its] responsibility [to take reasonable steps to remedy a discriminatory work environment] is to be determined upon the facts in each case.” Id. 168-169.
7. C-reply brief 12-13 -- Pennsylvania State Police v. Suders, 542 U.S. 129, (2004), cited for the following propositions -- (a) “An employee’s reasonable decision to resign because of unendurable working conditions is assimilated to a formal discharge for remedial purposes.” C-reply brief 12, citing Id. at 141. (b) “[T]hat to establish a constructive discharge arising from a hostile work environment claim, all that is required is a showing of (1) a hostile work environment and (2) that the working conditions were ‘so intolerable that a reasonable person in the employee’s position would have felt compelled to resign.’” C-reply brief 13, citing Id. at 146-47, 149. In upholding the Third Circuit’s reversal of the District Court’s grant of summary judgment for the respondent, the Supreme Court noted that the evidence indicated that Suder’s “three supervisors subjected [her] to a continuous barrage of sexual harassment that ceased only when she resigned from the force” Id. at 134. The Supreme Court characterizes the supervisors’ treatment of the complainant to be a long period of “a worst case harassment scenario, harassment ratcheted up to the breaking point,” that is, “an aggravated case of sexual harassment.” Id. at 147-148.