IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 21-cv-01320-PAB-KMT

OLIVIA BALLAGE,

Plaintiff,

v.

HOPE & HOME,

Defendant.

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**DEFENDANT'S REPLY IN SUPPORT OF PARTIAL MOTION TO DISMISS**

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Defendant Hope & Home submit the following Reply in Support of its Partial Motion to Dismiss ("Motion").

## INTRODUCTION

Plaintiff attempts to salvage her gender and race discrimination claims from dismissal by improperly adding additional facts (without moving to amend her Complaint) and by arguing irrelevant issues, such as arguing that "dismissing the claim due to the lack of reporting is premature and does not apply."[1] Doc. 22, pg. 4. Plaintiff does not even attempt to address the real issue raised in Defendant's Motion, which is that Plaintiff has not alleged facts sufficient to state a claim for a hostile work environment based on gender or race. Plaintiff also has not alleged facts sufficient to support the more demanding claim of constructive discharge. Instead, as discussed in Defendant's Motion, Plaintiff alleges, at most, a few isolated occurrences involving her (or other employees') gender or race, which, under the law, are simply not sufficient to state claims for

[1] It is unclear to Defendant what Plaintiff intends to argue in pages 3-4 of her Response, as it appears she is addressing an argument Defendant did not raise in its Motion.

relief. Thus, the Court should grant Defendant's Motion and dismiss Plaintiff's sex and race discrimination claims.

## ARGUMENT

### A. Plaintiff's Sex Discrimination Claim Must be Dismissed as it Does not Allege Sufficiently Severe or Pervasive Conduct, or Conduct that Would Make Working Conditions Intolerable.

As discussed in Defendant's Motion, Plaintiff's sex discrimination claim involves allegations that are insufficient as a matter of law to establish a hostile work environment.[2] In order to establish a hostile work environment based on sex, Plaintiff must show that (1) she was discriminated against because of her sex and (2) that the discrimination was sufficiently severe or pervasive such that it altered the terms or conditions of her employment and created an abusive working environment. *Delsa Brooke Sanderson v. Wyoming Highway Patrol*, 976 F.3d 1164, 1174 (10th Cir. 2020).

In her Complaint, Plaintiff alleges, at most, that her paychecks were withheld from her and others following returns from maternity leave, a Mr. Wright stared at her and other employees' breasts, looked her and other employees up and down, and made comments about her and other employees' looks. Plaintiff does not allege that the paychecks were withheld *because* she took maternity leave, nor does she state for how long the paychecks were allegedly withheld. Plaintiff did not elaborate on who else Mr. Wright "stared at," nor did she explain how many times Mr. Wright looked at her or others' breasts or provide any explanation whatsoever of the comments Mr. Wright purportedly made about Plaintiff's (and others') looks. Plaintiff also provided no

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[2] In response to Defendant's argument that Plaintiff cannot seek to assert claims of sex and race discrimination on behalf of other employees, Plaintiff concedes that she does not assert her sex or race discrimination claims on behalf of other employees. Thus, Defendant does not address such argument in this Reply.

context concerning the time frame in which such instances allegedly occurred (e.g., over months or years). Notably, "[t]he burden is on the plaintiff to frame a complaint with enough factual matter (taken as true) to suggest that [] she is entitled to relief." *Robbins v. Oklahoma,* 519 F.3d 1242, 1247 (10th Cir.2008) (internal quotations and citation omitted). If the Complaint's allegations "are so general that they encompass a wide swath of conduct, much of it innocent, then the plaintiff[] ha[s] not nudged [her] claims across the line from conceivable to plausible." *Id.* (internal quotations and citation omitted). "The allegations must be enough that, if assumed to be true, the plaintiff plausibly (not just speculatively) has a claim for relief." *Id.*

In apparent recognition of the lack of factual matter in her allegations, Plaintiff, without seeking leave to amend, uses her Response to improperly add to her threadbare allegations. Specifically, she now claims: (1) Mr. Wright "fixated on her breasts on multiple occasions,"; (2) she personally witnessed Mr. Wright look at other newly-identified employees' breasts and/or buttocks; (3) a Ms. Jennifer Swan warned Plaintiff of possible sexual advances from Mr. Wright, as he had made such advances towards Ms. Swan; and (4) Plaintiff personally witnessed Mr. Wright make a "sexual advance" (with no description of what such "sexual advance" entailed) toward a Ms. Jacqueline Thurman, who Plaintiff believed thereafter enjoyed a "relaxed schedule." Response, pg. 5.[3]

First, the Court should not consider Plaintiff's new allegations in analyzing Defendant's Motion. *Jenner v. Zavaras*, No. CIVA08CV00379-WYDBNB, 2009 WL 275780, at *5 (D. Colo. Feb. 2, 2009), *aff'd*, 339 F. App'x 879 (10th Cir. 2009) (explaining that "additional allegations []

[3] Plaintiff still does not allege that her paychecks were withheld because she took maternity leave, nor does she elaborate on how many times Mr. Wright allegedly looked at her breasts, stating only that it occurred "multiple" times.

made in response to a motion to dismiss" were not relevant "[because] [t]hey are not contained in the Complaint, which is the pleading that is under scrutiny on a motion to dismiss."). However, even if the Court does consider Plaintiff's new allegations, the added detail supports dismissal of Plaintiff's claim. As discussed in Defendant's Motion, the conduct, in the aggregate, is not sufficient to establish a hostile work environment. For example, in *Ballou v. University of Kansas Medical Ctr.,* 871 F.Supp. 1384 (D.Kan. 1994), the Court held that the conduct of a supervisor, including making advances towards plaintiff which were rejected, calling her, asking to kiss her, walking by her desk 30–40 times a day, waiting for her to arrive for work and following her into the office, repeatedly staring at her and sitting on her desk and leaning close to her, was merely offensive conduct and not sufficiently severe or pervasive to establish a hostile work environment as a matter of law. Here, the conduct Plaintiff alleges, even considering her new allegations, is substantially less offensive than that alleged in *Ballou* and other cases. *See e.g. Oliver v. Peter Kiewit & Sons/Guernsey Stone*, 106 F. App'x 672, 674 (10th Cir. 2004) (affirming dismissal of sexual harassment claim where plaintiff alleged that her male co-workers and supervisors used offensive language and made graphic jokes in her presence). Further, as discussed in Defendant's Motion, a hostile work environment claim is a "lesser included component" of the "*graver* claim of [] constructive discharge." *Green v. Brennan*, 578 U.S. 547 (2016). Because Plaintiff's allegations do not rise to the level of a hostile work environment, they necessarily cannot rise to the level necessary to state the "graver" claim of constructive discharge. *See, e.g. Hill v. Phillips 66 Co.*, No. 14-CV-102-JED-FHM, 2016 WL 3910272, at *16 (N.D. Okla. July 13, 2016) (noting that "the Tenth Circuit has found that sexually explicit and derogatory gender-based comments made repeatedly by supervisors to a Title VII plaintiff and other employees does not objectively

show that plaintiff had no other choice but to resign and holding that "even [plaintiff's supervisor's] degrading comments about women generally, which were not directed at plaintiff, cannot overcome plaintiff's high burden to establish constructive discharge under an objective standard.").

**B. Plaintiff's Race Discrimination Claim Must be Dismissed as it Does not Allege Sufficiently Severe or Pervasive Conduct, or Conduct that Would Make Working Conditions Intolerable.**

The only conduct Plaintiff alleges occurred to her due to her race was a single isolated remark that she would "play that card." She also appears to allege general awareness of three incidents directed at other persons of color – namely, failure to hire, a demand to terminate, and a termination of another person of color. As discussed in Defendant's Motion, the law is clear that the conduct alleged by Plaintiff does not create a hostile work environment, much less the graver claim of constructive discharge.

In apparent recognition of the deficiency of her pleading, Plaintiff again inappropriately alleges additional actions that occurred during her employment that she now apparently attributes to her race. Specifically, she alleges the following: "Plaintiff was promised promotion followed by a demotion, and then a promotion without a pay raise despite being asked to take on more responsibilities. Plaintiff's files were scrutinized extra. Sylvia Archuletta stated that she was asked to audit Plaintiff's files more often than other home supervisors. Supervisor, Jana Hana would ask Plaintiff to rewrite Home Supervision reports, yet supervisor Jess Engle would tell Ms. Ballage her reports were fine." Response, pg. 7. Again, as discussed above, the Court should disregard Plaintiff's new allegations.

However, even if the Court were to consider them, they are too vague to state a claim for relief. Specifically, Plaintiff does not identify any white employee who was allegedly treated better than her, nor does she set forth any facts connecting her race to the alleged decision(s) not to promote her and/or to demote her, or to any alleged increased performance scrutiny. Further, increased performance scrutiny does not create a hostile work environment, much less a constructive discharge. *See, e.g., Boyd v. Presbyterian Hosp.,* 160 F.Supp.2d 522, 541–42 (S.D.N.Y.2001) (holding that while an African–American nurse was subjected to gossip, lower performance evaluation, and intense scrutiny of her work performance that were annoying, bothersome, and stress-inducing, they did not create a hostile work environment); *Ortega v. Qwest Corp.*, 513 F. App'x 744, 745 (10th Cir. 2013) (affirming district court's dismissal of hostile work environment claim on the basis that two incidents of discipline or increased scrutiny the plaintiff has alleged did not rise to the level of pervasive or severe harassment sufficient to create a hostile work environment).

**CONCLUSION**

For the foregoing reasons, Defendant respectfully requests this Court dismiss Plaintiff's first and second claims pursuant to Federal Rule of Civil Procedure 12(b)(6).

DATED this 29th day of November, 2021.

Respectfully submitted,

*s/ Amy C. Knapp*

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**CERTIFICATE OF SERVICE (CM/ECF)**

I hereby certify that on this 29th day of November, 2021, I electronically filed the foregoing **DEFENDANT'S REPLY IN SUPPORT OF PARTIAL MOTION TO DISMISS** with the Clerk of the Court using the CM/ECF system and sent a true and correct copy of same to Plaintiff via e-mail and in the United States first class mail, postage prepaid, addressed to:

Olivia Ballage
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*s/ Barbara McCall*
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