

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MARYLAND**

MAGAN DAVIDSON-NADWODNY	:	
	:	
v.	:	
	:	
	:	Civil Action No. CCB-07-2595
WAL-MART ASSOCIATES, INC., et. al.	:	
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**MEMORANDUM**

Now pending before the court is a motion for partial dismissal filed by defendants Wal-Mart Stores East, L.P. (“Wal-Mart”), Harry Anuszewski, Sharon Sedler,<sup>1</sup> and Loretta Norkitis against plaintiff Magan Davidson-Nadwodny.<sup>2</sup> Davidson-Nadwodny, a pro se litigant, is suing the defendants for various common law torts and Title VII violations stemming from alleged workplace sexual harassment and retaliation. The issues in this motion have been fully briefed and no hearing is necessary. For the reasons stated below, the defendants’ motion will be granted in part and denied in part.

**BACKGROUND**

Magan Davidson-Nadwodny was hired by Wal-Mart as a jewelry sales associate in its Carroll Island Store on October 28, 2005. Soon after beginning work, Davidson-Nadwodny alleges that Assistant Department Manager Sharon Sedler began sexually harassing her on a regular basis by, for example, staring at her chest, glaring in a “seductive and suggestive

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<sup>1</sup> According to the defendants, Sharon Sedler has not yet been served with process.

<sup>2</sup> Plaintiff Davidson-Nadwodny filed a motion for leave to amend her original complaint, but failed to comply with Local Rule 103.6 by attaching the proposed amendments. Indeed, Davidson-Nadwodny’s motion fails to indicate how the complaint will be amended, or why leave should be granted. The motion will therefore be denied.

manner,” and inducing inappropriate physical contact. (Complaint at ¶¶ 12-17.) For fear of being discredited as a new employee, Davidson-Nadwodny claims that she was originally afraid to approach management about the harassment. Upon being offered a position at the same rate of pay in the Lawn and Garden Department of the same store, however, Davidson-Nadwodny decided to complain about the harassment to Assistant Store Manager Loretta Norkitis in January 2006. According to Davidson-Nadwodny, Norkitis appeared to be receptive to the complaints and aware of past accusations of sexual harassment committed by Sedler. (*Id.* at ¶ 27.) Norkitis agreed to transfer Davidson-Nadwodny to the Lawn and Garden Department within two weeks, and assured her that she would no longer suffer harassment. (*Id.* at ¶ 29.)

Over the following weeks, Davidson-Nadwodny alleges that Norkitis continued to delay her transfer out of the jewelry department. Davidson-Nadwodny then attempted to notify Store Manager Harry Anuszewski of the situation, but was allegedly rebuffed by Anuszewski and told to pursue the problem “through the proper chain of command.” (*Id.* at ¶¶ 35-36.) Davidson-Nadwodny again raised the issue of her transfer with Norkitis, who allegedly began poking fun at the situation, while continuing to stall any potential transfer. According to Davidson-Nadwodny the sexual harassment continued during this period, negatively affecting her health by causing “near-deathly [*sic*]” blood pressure levels. (*Id.* at ¶ 42.) Considering Wal-Mart’s inaction to be tantamount to condoning Sedler’s harassment, Davidson-Nadwodny filed a telephone complaint with the Maryland Commission on Human Relations (“MCHR”) in March 2006. (*Id.* at ¶ 43.)

Soon after Davidson-Nadwodny filed her complaint, Norkitis became an overnight Assistant Manager, with her previous position being filled by Jessica Weber. Davidson-

Nadwodny complained to Weber about the harassment, and was subsequently notified that she would be transferred to a Cashier position. Even though Davidson-Nadwodny was assured that she would remain at the same pay scale, she alleges that Wal-Mart retaliated against her by reducing her pay, before correcting the error eight weeks later. (*Id.* at ¶¶ 48-52.) Davidson-Nadwodny further claims that she was retaliated against by being either denied work breaks or given breaks only after all other employees had the opportunity to do so. Towards the end of her complaint, Davidson-Nadwodny additionally asserts that Wal-Mart retaliated against her when she injured her back at work, and the company refused to reimburse her medical expenses and forced her to undergo a drug test. (*Id.* at ¶¶ 89-108.) Davidson-Nadwodny next alleges that what was supposed to be a meeting with Anuszewski and another Assistant Store Manager to discuss the previous sexual harassment turned into a two hour interrogation “underneath a camera,” where she was questioned in an accusatory manner about the formal complaint she filed with the MCHR. As a result of this meeting, Davidson-Nadwodny suffered rapidly fluctuating blood pressure, nausea, and dizziness. (*Id.* at ¶¶ 60-62.)

Following this meeting, Davidson-Nadwodny alleges that she was wrongfully accused and rebuked for having cashed an allegedly counterfeit check during one of her shifts three weeks earlier. She insisted she be presented with the security tape of the transaction in question, and also requested a copy of the videotape of her “interrogation” with Anuszewski and the Assistant Manager. Davidson-Nadwodny was never presented with either tape, and alleges that the counterfeit check accusation was intended to be retaliatory.

According to Davidson-Nadwodny, following these events, other Wal-Mart employees began discussing the sexual harassment complaint she filed with the MCHR, often sneering,

staring, and laughing at her. Davidson-Nadwodny claims that she overheard other employees state that Anuszewski and Norkitis “had everyone convinced that, should they speak to or continue to befriend [Davidson-Nadwodny], she might file a complaint against them too.” (*Id.* at ¶ 73.) Davidson-Nadwodny states that the environment contributed to additional dizzy spells, one of which resulted in her collapsing and being sent to a hospital emergency room. The doctors attributed her episode to stress. Fearing that her continued presence at Wal-Mart would result in a stroke or heart attack, Davidson-Nadwodny tendered her written resignation on June 29, 2006.

In light of her allegations, Davidson-Nadwodny asserts eleven counts against the defendants, including for battery, sexual harassment/hostile work environment, general harassment, breach of implied employment contract, intentional misrepresentation, intentional and negligent infliction of emotional distress, defamation, invasion of privacy (false light), negligent hiring or retention, respondeat superior, and retaliation. The defendants move to dismiss some of these claims pursuant to Rule 12(b)(6).<sup>3</sup> Each count will be considered in turn.

### **ANALYSIS**

“The purpose of a Rule 12(b)(6) motion is to test the sufficiency of a complaint; importantly, a Rule 12(b)(6) motion does not resolve contests surrounding the facts, the merits of a claim, or the applicability of defenses.” *Edwards v. City of Goldsboro*, 178 F.3d 231, 243 (4th Cir. 1999) (internal quotation marks and alterations omitted). When ruling on such a motion, the court must “accept the well-pled allegations of the complaint as true,” and “construe the facts

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<sup>3</sup> The defendants do not challenge Count I (battery) and Count IX (negligent hiring or retention).

and reasonable inferences derived therefrom in the light most favorable to the plaintiff.” *Ibarra v. United States*, 120 F.3d 472, 474 (4th Cir. 1997). To survive a motion to dismiss, a complaint must “in light of the nature of the action . . . sufficiently allege[] each element of the cause of action so as to inform the opposing party of the claim and its general basis.” *Chao v. Rivendell Woods, Inc.*, 415 F.3d 342, 348 (4th Cir. 2005). Following the Supreme Court’s ruling in *Bell Atlantic Corp. v. Twombly*, 127 S.Ct. 1955, 1965 (2007), “[f]actual allegations must be enough to raise a right to relief above the speculative level, on the assumption that all the allegations in the complaint are true (even if doubtful in fact).” “Once a claim has been stated adequately, it may be supported by showing any set of facts consistent with the allegations in the complaint.” *Id.* at 1969 (quoted in *Goodman v. Praxair*, 494 F.3d 458, 466 (4th Cir. 2007)). Moreover, the “plaintiff’s obligation to provide the ‘grounds’ of his ‘entitle[ment] to relief’ requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.” *Id.* at 1964-65.

As a preliminary matter, the individual defendants challenge Counts II and XI, which assert claims of sexual harassment (hostile work environment) and retaliation, for reporting the harassment to the MCHR, respectively, against all defendants. Because there do not appear to be viable Maryland common law claims for sexual harassment and retaliation, the court will construe these counts as having been brought under Title VII of the Civil Rights Act of 1964. Title VII claims, however, may not be brought against individual supervisors or employees. *See Lissau v. Southern Food Service, Inc.*, 159 F.3d 177, 180-81 (4<sup>th</sup> Cir. 1998); *Arbabi v. Fred Meyers, Inc.*, 205 F. Supp. 2d 462, 464 (D. Md. 2002). Therefore, while Davidson-Nadwodny may bring Counts II and XI against defendant Wal-Mart, the counts will be dismissed against

individual defendants Anuszewski, Norkitis, and Sedler.

Count III asserts a claim for harassment against all defendants. Under Maryland common law, however, there does not appear to be a tort for general harassment. To the extent that this count includes allegations of battery, sexual harassment, and retaliation, the claim is already subsumed by Counts I, II, and XI. Therefore, Count III will be dismissed.

Count IV of the complaint asserts a claim for breach of implied employment contract. The crux of this claim is that Wal-Mart's promise to prevent harassment and provide a grievance filing process became a binding contractual provision between the parties. These promises were allegedly made through training videos, computerized tests, and oral statements by Wal-Mart supervisors. (Complaint at ¶ 160.) Under Maryland law, "there is abundant support for the proposition that employer policy directives regarding aspects of the employment relation become contractual obligations when, with knowledge of their existence, employees start or continue to work for the employer." *Dahl v. Brunswick Corp.*, 356 A.2d 221, 224 (Md. 1976). However, "Maryland courts have refused to find employment contracts where the publications contained only general policy statements, *MacGill v. Blue Cross of Maryland, Inc.*, 77 Md.App. 613, 551 A.2d 501 [] (1989), or where an express disclaimer was included." *Conkwright v. Westinghouse Elec. Corp.*, 739 F. Supp. 1006, 1020 (D. Md. 1990); *see also King v. Marriott Int'l, Inc.*, 520 F. Supp. 2d 748, 753 (D.S.C. 2007) (construing and applying Maryland law). Moreover, the court is unaware of any precedent recognizing an implied contract in this context based on an oral promise. Davidson-Nadwodny appears to be asserting that Wal-Mart breached its promise to prevent harassment and to provide a sound grievance filing mechanism. "Courts in Maryland, [however], as in other jurisdictions have consistently held that the provision of a[n] [informal]

grievance procedure, standing alone, does not” provide an implied contractual term. *Marrs v. Marriott Corp.*, 830 F. Supp. 274, 280 (D. Md. 1992). Therefore, because Wal-Mart’s general policy directives and provision of grievance filing procedures do not create binding contractual terms between the parties, Davidson-Nadwodny’s claim for breach of an implied contract will be dismissed.

The defendants challenge Count V, which asserts a claim for intentional misrepresentation, only as it is alleged against defendant Wal-Mart. The central allegation offered by Davidson-Nadwodny is that Wal-Mart intentionally misrepresented to her that it would provide an “open door policy” and that it “neither condones nor allows harassment of any type in the workplace.” (Complaint at ¶¶ 173, 178.) Davidson-Nadwodny claims she relied on this promise in accepting employment with Wal-Mart. To prove an intentional misrepresentation, a plaintiff must show:

(1) that the defendant made a false representation to the plaintiff, (2) that its falsity was either known to the defendant or that the representation was made with reckless indifference as to its truth, (3) that the misrepresentation was made for the purpose of defrauding the plaintiff, (4) that the plaintiff relied on the misrepresentation and had the right to rely on it, and (5) that the plaintiff suffered compensable injury resulting from the misrepresentation.

*Alleco Inc. v. Harry & Jeanette Weinberg Found.*, 665 A.2d 1038, 1047 (Md. 1995). Davidson-Nadwodny, quite simply, has not provided factual allegations to support the second and third elements of an intentional misrepresentation claim. There is no evidence to support the allegation that Wal-Mart intentionally or recklessly made false representations, or that a misrepresentation was made for the specific purpose of defrauding Davidson-Nadwodny. Count

V will therefore be dismissed against Wal-Mart.<sup>4</sup>

Davidson-Nadwodny asserts claims for intentional and negligent infliction of emotional distress in Count VI. As to the negligent infliction of emotional distress claim, this tort is not recognized in the state of Maryland, and will therefore be dismissed. To establish a claim for intentional infliction of emotional distress, Davidson-Nadwodny must show that: (1) the conduct in question was intentional or reckless; (2) the conduct was extreme and outrageous; (3) there was a causal connection between the wrongful conduct and the emotional distress; and (4) the emotional distress was severe. *Harris v. Jones*, 380 A.2d 611, 614 (Md. 1977). Recognizing that this tort “is to be used sparingly and only for opprobrious behavior that includes truly outrageous conduct,” *Kentucky Fried Chicken Nat. Mgmt. Co. v. Weathersby*, 607 A.2d 8, 11 (Md. 1992), it does not appear that Davidson-Nadwodny has pled facts sufficient to demonstrate the level of extreme and outrageous conduct causing severe emotional distress that is required to support an intentional infliction of emotional distress claim. Count VI will therefore be dismissed.

Count VII asserts a claim for defamation. “To recover for defamation under Maryland law, a plaintiff must establish that: (1) the defendant made a defamatory statement regarding the plaintiff to a third person; (2) the statement was false; (3) the defendant was legally at fault in making the statement; and (4) the plaintiff suffered harm thereby.” *Southern Volkswagen, Inc. v. Centrix Fin’l, LLC*, 357 F. Supp. 2d 837, 843 (D. Md. 2005) (quoting *Holt v. Camus*, 128 F.

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<sup>4</sup> Any allegations that Wal-Mart made false misrepresentations to the MCHR are also not properly brought under an intentional misrepresentation claim. Davidson-Nadwodny would not be able to demonstrate that she “relied on the misrepresentation and had the right to rely on it.” *Alleco Inc. v. Harry & Jeanette Weinberg Found.*, 665 A.2d 1038, 1047 (Md. 1995).

Supp. 2d 812, 815 (D. Md. 1999)). “Indeed, if a plaintiff cannot prove the falsity of a particular statement, the statement will not support an action for defamation.” *Spengler v. Sears, Roebuck & Co.*, 878 A.2d 628, 640 (2005).

Here, Davidson-Nadwodny does not specify what actual defamatory statements were made by defendants Sedler, Anuszewski, Norkitis, and Wal-Mart, and to whom the statements were made. Instead, Davidson-Nadwodny refers to “aforementioned false and defamatory statements” made by all of the defendants, with no specificity. (Complaint at ¶¶ 202- 218.) Moreover, to the extent any allegedly defamatory statements concerned Davidson-Nadwodny’s filing of a complaint with the MCHR, such statements would be factually true. Finally, because the actual content of the allegedly defamatory statements is not provided by Davidson-Nadwodny, it is difficult to discern whether the common-law qualified privilege for “communications arising out of the employer-employee relationship” applies. *See McDermott v. Hughley*, 561 A.2d 1038, 1046-47 (Md. 1989). For the foregoing reasons, the defamation claim will be dismissed.

Count VIII is an invasion of privacy (false light) claim. In order to demonstrate a claim for false light invasion of privacy, Davidson-Nadwodny must prove:

1) that the defendant gave “publicity to a matter concerning another that places the other before the public in a false light,” 2) that “the false light in which the other person was placed would be highly offensive to a reasonable person,” and 3) that “the actor had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the other would be placed.” *Bagwell v. Peninsula Regional Medical Center*, 106 Md.App. 470, 513-14, 665 A.2d 297 (Md.App.1995). A defendant is entitled to judgment as a matter of law if the facts disseminated regarding the plaintiff are true. *Id.*

*Barnhart v. Paisano Publications, LLC*, 457 F. Supp. 2d 590, 594 (D. Md. 2006). Davidson-Nadwodny, however, has not established a *prima facie* claim. As a threshold matter, Davidson-

Nadwodny has not alleged the “publicity” requirement of the first element. “To satisfy the first element, a party must demonstrate that the defendant made the disclosure of the private facts to the public at large.” *Mazer v. Safeway, Inc.*, 398 F. Supp. 2d 412, 431 (D. Md. 2005) (citing *Furman v. Sheppard*, 744 A.2d 583, 587 (Md. Ct. Spec. App. 2000)). Here, Davidson-Nadwodny alleges that some of her co-workers at Wal-Mart had knowledge of the MCHR complaint. Not only does this allegation fail to demonstrate the requisite degree of publicity, but the fact that a harassment complaint was filed with the MCHR is true. The false light invasion of privacy claim will therefore be dismissed.

Count X asserts a *respondeat superior* claim. *Respondeat superior*, however, is not a separate cause of action, but rather is a doctrine that permits the imputation of liability on a principal or employer for the act of an agent or employee. To the extent that Davidson-Nadwodny is able to assert the doctrine in an effort to impose liability on Wal-Mart for the alleged misconduct of its employees stated in the viable claims that will survive this motion to dismiss, Davidson-Nadwodny is free to do so. Count X, however, will be dismissed.

### CONCLUSION

For the foregoing reasons, Counts I and IX were unchallenged by the defendants and remain viable claims. Counts II and XI, which will be construed as arising under Title VII, may be brought against defendant Wal-Mart but will be dismissed as to the individual defendants. Count V for intentional misrepresentation will be dismissed against defendant Wal-Mart only. Counts III, IV, VI, VII, VIII, and X will be dismissed in their entirety.

A separate order follows.

June 3, 2008  
Date

/s/  
Catherine C. Blake  
United States District Judge

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**ORDER**

For the reasons stated in the accompanying Memorandum, it is hereby **ORDERED** that:

1. the defendants' motion to dismiss (docket entry no. 10) is **GRANTED** as to Counts II and XI as asserted against the individual defendants, Count V as asserted against Wal-Mart, and Counts III, IV, VI, VII, VIII, and X in their entirety; and

2. the plaintiff's motion for leave to amend the complaint (docket entry no. 16), which contains no specific proposed amendments, is **DENIED**.

A schedule for further proceedings will be set by separate order.

June 3, 2008

Date

/s/

Catherine C. Blake  
United States District Judge