

UNITED STATES DISTRICT COURT  
DISTRICT OF CONNECTICUT

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MARJORIE J. GALLIGAN, A/K/A :  
MARJORIE JOHNS-BUNCE :  
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 :  
 Plaintiff, : OPINION  
 : 3:01 CV 2092 (GLG)  
 -against- :  
 :  
 TOWN OF MANCHESTER and ROBERT :  
 YOUNG :  
 Defendants. :  
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In this lawsuit against the defendants, Town of Manchester (the Town) and Robert Young, the plaintiff, Marjorie J. Galligan, claims wrongful denial of accommodation under the Americans with Disabilities Act (ADA), violation of her due process and equal protection rights under the Fourteenth Amendment, retaliation for exercising her First Amendment right of free speech, as well as a violation of Connecticut's "whistle blower" statute, and intentional infliction of emotional distress. She asserts further a claim of breach of contract against the Town only. The defendants moved for summary judgment [**Doc. 28**] pursuant to Federal Rule of Civil Procedure 56 on all counts of the plaintiff's complaint. Oral argument on the defendants' motion was held in this Court on May 8, 2003. Finding as a matter of law that the plaintiff has failed show that there exist any genuine issues of material fact as to any of the counts in her amended complaint, and for the reasons set forth more

fully below, we GRANT the defendants' motion summary judgment in its entirety.

### **Summary Judgment Standard**

The standard for granting a motion for summary is well-established. A moving party is entitled to summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The burden of establishing that there is no genuine factual dispute rests with the moving party. *See Gallo v. Prudential Residential Servs., Ltd. P'ship*, 22 F.3d 1219, 1223 (2d Cir. 1994). "In ruling on a motion for summary judgment, the Court must resolve all ambiguities and draw all reasonable inferences in favor of plaintiff, as the non-moving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). At the same time, when a motion is made and supported as provided in Rule 56, Fed. R. Civ. P., the non-moving party may not rest upon mere allegations or denials of the moving party's pleadings, but instead must set forth specific facts showing that there is a genuine issue for trial." *Zeigler v. Town of Kent*, --- F.Supp.2d ----, 2003 WL 1969362, at \*3 (D. Conn. Apr. 27, 2003); see Fed. R. Civ. P. 56(e). In other words, the non-moving party must offer such proof as would allow a reasonable jury to return a verdict

in her favor. *Anderson*, 477 U.S. at 256; *Graham v. Long Island R.R.*, 230 F.3d 34, 38 (2d Cir. 2000). The plaintiff must assert more than conclusory statements, conjecture, or speculation to defeat summary judgment. *Opals on Ice Lingerie v. Body Lines Inc.*, 320 F.3d 362, 370 n.3 (2d Cir. 2003). "An opposing party's facts must be material and of a substantial nature, not fanciful, frivolous, gauzy, spurious, irrelevant, gossamer inferences, conjectural, speculative, nor merely suspicions." *Id.* (internal citations and quotation marks omitted). This Court's "function at this stage is to identify issues to be tried, not decide them." *Graham*, 230 F.3d at 38. "Only when reasonable minds could not differ as to the import of the evidence is summary judgment proper." *Bryant v. Maffucci*, 923 F.2d 979, 982 (2d Cir.), *cert. denied*, 502 U.S. 849 (1991).

Having set forth the legal standard that governs our resolution of the defendants' motion, we set forth now the factual background of this case.

### **Facts**

The plaintiff was a classified civil service employee of the Town at its Water Pollution and Control Authority since 1987. She held the position of Senior Administrative Secretary at the time of her departure from Town employment. During the events at issue here Robert Young was the Water and Sewer Administrator, and her immediate

supervisor.<sup>1</sup> The plaintiff received commendations several times during her tenure with the Town for her job performance. In the mid-nineties, however, the plaintiff began to suffer from depression following the death of her father and the death of a close friend. The plaintiff's absences from work apparently prompted a discussion between her and defendant Young regarding her absenteeism and a decline in her job performance. On June 25, 1996, in response to that conversation, defendant Young sent a memo to the plaintiff noting his concern about her "abnormally high amount of absences" and substandard job performance. He noted also recent improvement in her job performance and that he hoped such improvement would continue but, if she found that her personal affairs made that too difficult, he suggested that she might want to contact Human Resources to discuss a leave of absence. (Def.'s Ex. D, Memo. of June 25, 1996). Two days after this memo, the plaintiff was admitted to Manchester Memorial Hospital, where she spent four days for treatment of her depression. She was not released to return to work until September 3, 1996. Numerous other times throughout 1997 and 1998, the plaintiff missed work. For instance, she suffered carpal tunnel syndrome around June 10, 1997, and was released to resume work around August 12, 1997; on August 19, 1997 she had a concussion and missed

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<sup>1</sup>The plaintiff's job duties required her also to perform work for eight section managers within the department.

work for eight days; she had carpal tunnel surgery on one hand and was out of work from November 10, 1997 to November 18, 1997; she had surgery on the other hand and missed work from March 11, 1998 to March 25, 1998; she had bronchitis and missed work around October 18, 1998. Defendant Young sent several letters or memos to the plaintiff throughout this time period regarding her absenteeism and job performance. (Def.s' Ex. E & Comp. ¶¶ 22, 26, 27, 30, 32, 27). Finally, on November 11, 1999, the plaintiff alleges she was forced to resign her position. She filed the present lawsuit on November 9, 2001. Additional facts will be set forth as necessary.

## **Discussion**

### ***Count One - ADA Claim***

Count one of the plaintiff's amended complaint alleges that the defendants improperly denied her reasonable accommodation under the ADA. The defendants attack this claim as legally insufficient because the plaintiff failed to file a charge of discrimination with the Connecticut Commission on Human Rights and Opportunities ("CCHRO") or the Equal Employment Opportunity Commission ("EEOC") within the time period required for such a filing, resulting in her failure to comply with the exhaustion of administrative requirements of the ADA. We agree.

The ADA incorporates these requirements from Title VII. See *Doe v. Odili Technologies, Inc.*, No. 3:96CV1957, 1997 WL 317316, at

\*2 (D. Conn. May 25, 1997); *Forts v. Ward*, 621 F.2d 1210, 1215 (2d Cir. 1980) (stating that the filing of a timely charge with the EEOC is a prerequisite to the maintenance of a Title VII action in the District Court); 42 U.S.C. § 2000e-5(e)(1); 42 U.S.C. § 12117(a). When a plaintiff fails to exhaust her administrative remedies, it deprives the Federal Court of subject matter jurisdiction. See *Odili Technologies, Inc.*, 1997 WL 317316, at \* 2.

It is undisputed that the plaintiff failed to file anything with the CCHRO and EEOC prior to initiating this federal lawsuit. The plaintiff argues that this Court should excuse her failure to do so because she was mentally incapable of making such a filing. She supports this assertion by citing her four-day inpatient treatment at Manchester Memorial Hospital, followed by "many months of incapacity." (Pl.'s Mem. at 5.) The plaintiff's claim of many months of incapacity is conclusory at best. In fact, at oral argument, she augmented her already asserted conclusory allegations with more conclusory allegations. For instance, she claimed that she was "distraught" during these months of incapacity and that things "were too awful and terrible" for her to even consider filing with the EEOC and that her condition should be sufficient to excuse her failure to do so. Were we to allow this claim to go to a jury based on the porous, conclusory allegations before us, we would open the door for every plaintiff asserting an ADA claim to circumvent quite

easily its exhaustion of administrative remedies requirement by claiming merely to have been incapable of doing so. Such a ruling would ignore the express intent of Congress by effectively rendering the exhaustion requirement superfluous. That, we cannot do.<sup>2</sup>

The plaintiff argues further that her prayers for relief make a filing with the EEOC futile in that she seeks "compensatory damages in excess of \$15,000, as well as punitive damages, not reinstatement." (Comp. at 6.) There is no "futility exception" to the requirement that discrimination claimants must exhaust their administrative remedies with EEOC before filing suit in court. See *Talbot v. U.S. Foodservice, Inc.*, 191 F. Supp. 2d 637, 641 (D. Md. 2002). The plaintiff supports her claim that the ADA provides for a futility exception by citing cases that have absolutely nothing to do with the ADA. Again, were this Court to accept the plaintiff's argument, it would be tantamount to rendering null and void the ADA's exhaustion of administrative remedy requirement by encouraging plaintiffs to bypass it by carefully tailoring their demands for

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<sup>2</sup>In her brief and at oral argument, the plaintiff asserted an argument that can best be described as frivolous. If this Court understood her correctly, she attempted to persuade us that an ADA claim, when brought in conjunction with a section 1983 claim, might and should render the ADA's exhaustion requirement excusable. Though exhaustion of administrative remedies is not required for a section 1983 action, see *Patsy v. Board of Regents of State of Fla.*, 457 U.S. 496, 516 (1982), it is required for an ADA claim. We note that the plaintiff attempts to support this claim, as well as other claims, with case law having nothing to do with the arguments she asserts.

relief beyond that which the EEOC can offer.

Because the defendants have shown that there exists no genuine issue of material fact in regard to the plaintiff's ADA claim, and because the plaintiff has offered nothing more than irrelevant case-law and conclusory allegations unsupported by any evidence whatsoever that might lead a reasonable jury to find in her favor, we grant the defendants' motion for summary judgment on count one of the plaintiff's amended complaint.

***Count Two - Due Process***

The plaintiff claims that the defendants violated her rights to due process because, as a public employee, she was deprived of a protectable property interest when she was constructively discharged.

A public employee who may be discharged only for cause has a constitutionally protected property interest in her continued employment. *Hunt v. Prior*, 236 Conn. 421, 437 (1996). As a classified civil service public employee, the plaintiff could have been terminated only for just cause, an economic reduction in force, or abolition or consolidation of positions due to reorganization. (Def.'s Ex. G at 24; Comp. ¶ 6.) Therefore, she had a protectable property interest in her continued employment with the Town. See *Hunt*, 236 Conn. at 437.

The sole issue here is whether the plaintiff resigned

voluntarily or was constructively discharged. If she resigned voluntarily, her due process claim must fail. "Unless there has been a 'deprivation' by 'state action,' the question of what process is required and whether any provided could be adequate in the particular factual context is irrelevant, for the constitutional right to 'due process' is simply not implicated.... If [the employee] resigned of [her] own free will even though prompted to do so by events set in motion by [her] employer, [she] relinquished [her] property interest voluntarily and thus cannot establish that the state 'deprived' [her] of it within the meaning of the due process clause." *Geren v. Brookfield Bd. of Educ.*, No. 298605, 1992 WL 310578, at \*7 (Conn. Super. Oct. 13 1992), *aff'd*, 36 Conn. App. 282 (1994), *cert. denied*, 232 Conn. 907 (1995) (internal citations omitted); *see also Stone v. University of Maryland Medical System Corp.*, 855 F.2d 167, 172-3 (4th Cir. 1988).

"Constructive discharge of an employee occurs when an employer, rather than directly discharging an individual, intentionally creates an intolerable work atmosphere that forces an employee to quit involuntarily. Working conditions are intolerable if they are so difficult or unpleasant that a reasonable person in the employee's shoes would have felt compelled to resign." *Whidbee v. Garzarelli Food Specialties, Inc.*, 223 F.3d 62, 73 (2d Cir. 2000) (internal citations omitted); *see Neale v. Dillon*, 534 F. Supp. 1381, 1390

(E.D.N.Y.), *aff'd*, 714 F.2d 116 (2d Cir. 1982); *Seery v. Yale-New Haven Hosp.*, 17 Conn. App. 532, 540 (1989).

The plaintiff argues that she has created a genuine issue of material fact as to whether she was constructively discharged or voluntarily resigned because she has alleged that defendant Young denied her use of the company telephone for personal phone calls, "yelled" at her, refused her time off, badgered her to do personal work for him and asked her why she was not coming to work. These claims and allegations, however, cannot withstand summary judgment.

The plaintiff admits in her deposition that she used the telephone numerous times from 1996 to 1999 for personal phone calls. She claims, however, that defendant Young denied her such use "several times," and possibly other times throughout her tenure with the Town, but could not state any facts as to any of the times or events that surrounded defendant Young's denial of her phone usage. The plaintiff claims also that the defendant yelled at her "often." She foreshadows an example of this when she stated in her deposition that defendant Young was a "very moody" and "high strung individual" and that "when things upset his game plan," he did not take it very well. (Def.'s Ex. B at 145.) The plaintiff states further that he would "huff and puff" and get "exasperated" when it took her some time to find files that he wanted, prompting him to yell, "Can't you find anything around here?!" (Def.'s Ex. B at 146.) Regarding time

off, the plaintiff admitted that, although she arranged her schedule due to defendant Young's "snotty notes" and her desire to avoid "his wrath," she was never expressly denied time off. (Id.) Insofar as her allegations of defendant Young's badgering her to perform personal work for him, the plaintiff stated at oral argument that she performed only one or two such tasks, and did not provide the Court with any additional facts. Moreover, she asserts that an inquiry in and of itself as to her work attendance constituted harassment because of her mental condition.

We think it apparent that these factual allegations, as a matter of law, fall far short of creating any genuine issue of material fact because they are legally insufficient to sustain an inference that the plaintiff was constructively discharged. For example, she has presented this Court with no evidence that the defendants "intentionally" created any of the working conditions of which she complains. Nor has she asserted any factual allegations or proffered any evidence that could show that such working conditions were so intolerable that a reasonable person would have felt compelled to resign. Our decision is in conformity with other Second Circuit cases. See *Flattery v. Metromail Corp.*, --- F.3d ----, 2002 WL 1476308, (page references unavailable) (2d Cir. Jul. 11, 2002); *Kader v. Paper Software, Inc.*, 111 F.3d 337, 339-40 (2d Cir. 1997) (summary judgment proper due to lack of evidence supporting the

inference that defendant's conduct was a deliberate creation of working conditions, intolerable or otherwise); *Stetson v. NYNEX Service Co.*, 995 F.2d 355, 360 (2d Cir. 1993) (citing *Clowes v. Allegheny Valley Hospital*, 991 F.2d 1159, 1160-61 (3d Cir. 1993) (holding allegations that employee felt the quality of his work was unfairly criticized or that he was subject to hypercritical supervision fell well short of permitting an inference of constructive discharge)); *Martin v. Citibank, N.A.*, 762 F.2d 212, 221 (2d Cir. 1985) (stating that whether an employee's working conditions were difficult or unpleasant is not the standard for constructive discharge). Conversely, in claims that have survived summary judgment, sufficient facts were alleged that a defendant engaged in a pattern of harassing, baseless criticisms, *Chertkova v. Connecticut General Life Ins. Co.*, 92 F.3d 81, 84-6 (2d Cir. 1996); or threatened to discharge an employee regardless of her work performance. *Lopez v. S.B. Thomas, Inc.*, 831 F.2d 1184, 1189 (2d Cir. 1987) abrogated on other grounds, see *Adames v. Mitsubishi Bank, Ltd.*, 751 F.Supp. 1548, 1557 (E.D.N.Y. 1990); see also *Meyer v. Brown & Root Constr. Co.*, 661 F.2d 369 (5th Cir. 1981) (upholding the district court's finding of constructive discharge where a female employee who was several months pregnant quit her job when she was transferred to a warehouse job requiring possible heavy labor).

Here, the plaintiff's allegations are somewhat conclusory and

where they are not, they are simply insufficient to create a prima facie claim of constructive discharge. Therefore, the defendants are entitled to summary judgment on this count.

**Count Three - First Amendment Retaliation**

The plaintiff claims that the defendants subjected her to retaliation because she filed a union grievance against defendant Young. The First Amendment prohibits government employers from punishing its employees in retaliation for the content of their speech on matters of public importance. The plaintiff's First Amendment retaliation claim must demonstrate that: (1) her speech addressed a matter of public concern, (2) she suffered an adverse employment action, and (3) a causal connection existed between the speech and the adverse employment action, so that it can be said that her speech was a motivating factor in the determination. *Locurto v. Safir*, 264 F.3d 154, 166 (2d Cir. 2001).

It is clear from the pleadings and from oral argument that the plaintiff, as a matter of law, was not speaking out on a matter of public concern. She argues that the mere filing of a grievance with the union equated to speech touching on a matter of public concern because the union represents public employees. As she stated at oral argument, the plaintiff would like this Court to deem all employee grievances against their employers to be matters of public concern. There is no legal support for such a wide reaching assertion.

As the facts demonstrate, the plaintiff's so-called speech touches on matters wholly related to her personally and not to those of public concern. For instance, she filed a union grievance for the purposes of (1) addressing defendant Young's "harassing conduct" towards her, (2) clarifying her job duties and, (3) to request a meeting with defendant Young to discuss "her needs" of reasonable accommodation. It is patently obvious that the reasons underlying the plaintiff's grievance, all of which are inherently personal and self-serving, have nothing to do with matters of public concern.

Consequently, there exists no genuine issue of material fact as to the first element of the plaintiff's First Amendment retaliation claim<sup>3</sup> and, therefore, the defendants' are entitled to summary judgment.

#### ***Count Four - Equal Protection***

In count four, the plaintiff claims that the defendants violated her federal right of equal protection. Specifically, she claims that the defendants "singled [her] out for unfair and illegal treatment that was not applied to other similarly situated employees" because defendant Young denied her use of the telephone for personal phone calls, denied her time off, yelled at her, badgered her to do

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<sup>3</sup>We note further that the plaintiff has failed to demonstrate any genuine issues of material fact as to the second element of her claim, which requires the plaintiff to have encountered an adverse employment action and, necessarily, has failed to do the same for the third element.

personal work for him, and harassed her by asking her why she was not coming into work. We think that the plaintiff waived this claim because she did not address it specifically in her brief or at oral argument. However, to the extent that she did not waive it, we rule as follows.

Because the plaintiff's equal protection claim does not involve a class of any kind, we will assume that her claim is based on a "class of one." The Supreme Court recognizes the validity of this genre of equal protection claim noting that "successful equal protection claims [have been] brought by a 'class of one,' where the plaintiff alleges that she has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment." *Village of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000) (per curiam); see also *African Trade & Information Center, Inc. v. Abromatis*, 294 F.3d 355, 363 (2d Cir. 2002); *Zeigler v. Town of Kent*, --- F. Supp. 2d ---, No. 00CV1117, 2003 WL 1969362, at \*8 (D. Conn. Apr. 27, 2003); *Russo v. City of Hartford*, 184 F. Supp. 2d 169, 190 (D. Conn. 2002); *Presnick v. Orange*, 152 F. Supp. 2d 215, 224 (D. Conn. 2001).

Although the Second Circuit has declined to resolve the question of whether the Supreme Court's decision in *Olech* changed the requirement that malice or bad faith must be shown in order to state a valid "class of one" equal protection claim, see *Harlen Associates v. Incorporated Village of Mineola*, 273 F.3d

494, 499-500 (2d Cir. (2001); *Giordano v. City of New York*, 274 F.3d 740, 750 (2d Cir. 2001), the Second Circuit has made clear that a plaintiff . . . would be required to show that the decision was "irrational and wholly arbitrary," *Giordano*, 274 F.3d at 750 (citing *Olech*, 528 U.S. at 565), in other words, that there was "no legitimate reason for its decision." *Harlen Assocs.*, 273 F.3d at 500.

*Zeigler*, 2003 WL 1969362, at \*8.

Moreover, we are to afford governmental decisions "a strong presumption of validity." *Heller v. Doe by Doe*, 509 U.S. 312, 319 (1993). A governmental decision should be upheld if there is "any reasonably conceivable state of facts that could provide a rational basis" for the different treatment. *Id.*

Even assuming that the plaintiff was treated differently, which we are very reluctant to find in light of the scant and somewhat innocuous allegations before us, the plaintiff has not alleged any facts whatsoever that would establish that such treatment was without rational basis. In other words, she has failed to assert facts that the defendants' actions were irrational and wholly arbitrary or without legitimate reason. Therefore, summary judgment in favor of the defendants is proper here.

***Count Five - Conn. Gen. Stat. §31-51m***

The plaintiff claims that the defendants violated Conn. Gen. Stat. §31-51m, which is Connecticut's "whistle blower" protection

statute. *Campbell v. Town of Plymouth*, 74 Conn. App. 67, 71, 811 A.2d 243, 248 (2002). Section 31-51m provides that the employee "must bring a civil action within ninety days of [her] termination or ninety days of the end of the administrative process. This ninety-day limitation is, however, subject to equitable tolling." *Alston v. Banctec, Inc.*, No. CV020813684S, 2002 WL 31898249, at \*2 (Conn. Super. Dec. 12, 2002). The plaintiff admittedly failed to file this state-law claim within the time allotted for doing so. The only issue remaining, therefore, is whether she has presented to this Court any evidence, direct or circumstantial, that would serve to create a genuine issue of material fact as to whether the ninety-day limitation should be tolled. She has presented no such evidence to the Court. Consequently, no genuine issues of material fact exists regarding this claim.

**Count Six - Breach Of Contract**

The plaintiff claims further that the "Town breached its employment contract with [her] by constructively discharging [her] from her position with the [d]efendant Town."<sup>4</sup> (Comp. ¶ 66.) Because we have determined already, as a matter of law, that the

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<sup>4</sup>The plaintiff purports to bring this claim under Conn. Gen. Stat. §52-576. We note for the plaintiff that this statute sets forth the statute of limitations for contracts claims--it does not provide the basis upon which they are founded. See *John H. Kolb & Sons, Inc. v. G and L Excavating, Inc.*, 76 Conn. App. 599, --- A.2d --- (2003).

plaintiff's allegations fail to present any genuine issues of material fact regarding her claimed constructive discharge, and that on the facts presented there has been no breach of her employment contract, her breach of contract claim must also fail.

**Count Seven - Intentional Infliction of Emotional Distress**

Finally, the plaintiff claims intentional infliction of emotional distress in count seven of her amended complaint.<sup>5</sup> The Connecticut Supreme Court has delineated the boundaries of this intentional tort stating,

[l]iability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community. Generally, the case is one in which the recitation of the facts to an average member of the community would arouse his resentment against the actor, and lead him to exclaim, Outrageous! Conduct on the part of the defendant that is merely insulting or displays bad manners or results in hurt feelings is insufficient to form the basis for an action based upon intentional infliction of emotional distress.

*Carrol v. Allstate Ins. Co.*, 262 Conn. 433, 442-3 (2003) (internal citations and quotation marks omitted).

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<sup>5</sup>The plaintiff claims that this cause of action is based on Conn. Gen. Stat. §52-477. We note for the plaintiff that this statute, as its title suggests, is not the means by which to assert an intentional infliction of emotional distress claim. It is a common-law claim. See *Petyan v. Ellis*, 200 Conn. 243, 253 (1986) (recognizing the tort of intentional infliction of emotional distress).

The plaintiff asserts the same facts here that she asserted as the basis for her due process, equal protection, and breach of contract claims. As we have stated already above, the plaintiff's allegations are scant and somewhat innocuous. We cannot see how any reasonable jury could conclude that defendant Young's conduct, even if it occurred exactly as the plaintiff claims, was extreme and outrageous. See *Mayo v. Yale University*, No. CV000440145S, 2003 WL 21040666, at \*3 (Conn. Super. Apr. 16, 2003) (stating, "[w]hether a defendant's conduct is sufficient to satisfy the requirement that it be extreme and outrageous is initially a question for the court to determine. . . . Only where reasonable minds disagree does it become an issue for the jury.") While the incidents described, albeit briefly, by the plaintiff might have insulted her or hurt her feelings, or displayed bad manners on part of defendant Young, they are insufficient, as a matter of law, upon which to base a claim of intentional infliction of emotional distress. See *Carrol*, 262 Conn. at 442-3.

### **Conclusion**

Because the plaintiff has failed to allege any facts that would create a genuine issue of material fact regarding any of the claims asserted in counts one through seven of her amended complaint, we **GRANT** the defendants' motion for summary judgment [**Doc. 28**] as to all counts. The clerk is directed to enter judgment accordingly and to

close this case.

SO ORDERED.

Dated: May 19, 2003  
Waterbury, CT

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Gerard L. Goettel  
U.S.D.J.