IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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MICHAEL J. OLSEN,

Plaintiff,

v.

MARSHALL & ILSLEY CORPORATION, PAUL SCHALLER and M&I MID-STATE BANK,

Defendants.

OPINION AND ORDER

99-C-0774-C

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This is a civil action for monetary and injunctive relief brought pursuant to Title VII of the Civil Rights Act of 1964, as amended by the Civil Rights Act of 1991, 42 U.S.C. § 2000e, and under state common law. Plaintiff Michael J. Olsen contends that defendants Marshall & Ilsley Corporation and M&I Mid-State Bank terminated him because he was a male and also in retaliation for plaintiff's opposition to what he claims he perceived as the sexual harassment of another employee. In addition, plaintiff argues that defendant Paul Schaller tortiously interfered with plaintiff's employment when he gave plaintiff a poor evaluation in 1997. Jurisdiction is present for the Title VII claims under 28 U.S.C. § 1331 and for the state law claim under 28 U.S.C. § 1367.

Presently before the court is defendants' motion for summary judgment on all claims. Defendant Marshall & Ilsley Corporation contends it was improperly named as a defendant in this action because it was not named in the administrative proceedings. Alternatively, it argues that there are no "special circumstances" present that would allow Marshall & Ilsley to be liable as a parent company for the acts of its subsidiary, M&I Mid-State Bank. In regard to plaintiff's Title VII claims, defendants argue that plaintiff has failed to establish either that he has a prima facie case of sex discrimination or retaliation or that the legitimate reasons defendant M&I Mid-State Bank provided for firing him were only a pretext for discrimination. Finally, defendant Paul Schaller argues that there was no tortious interference with plaintiff's at-will employment contract because Schaller possessed a conditional privilege in giving plaintiff the evaluation that he did.

I conclude that Marshall & Ilsley Corporation was named improperly as a defendant because it did not have notice of the claim against it and did not have an opportunity to conciliate on its own behalf. Further, I conclude that no reasonable factfinder could find that plaintiff was terminated because he was a male. Plaintiff has presented no direct evidence to support his claim and is unable to show that defendants' nondiscriminatory explanation for his discharge is pretextual under the McDonnell Douglas burden-shifting test. Finally, I conclude that plaintiff has failed to establish a prima facie case for his retaliation claim, either under the

opposition clause or under the participation clause. Accordingly, defendants Marshall & Ilsley's and M&I Mid-State Bank's motion for summary judgment on the Title VII claims shall be granted. I decline to exercise supplemental jurisdiction over the remaining state law claim and will remand it to the state court.

In addition to defendants' motion for summary judgment, there is pending a motion by plaintiff to strike as untimely four affidavits that defendants filed on July 28, 2000, with their reply brief. Plaintiff argues that defendants filed their motion for summary judgment on June 5, 2000, and that under Fed. R. Civ. P.6(d) all affidavits in support of that motion were to have been submitted at the time the motion was filed. Plaintiff's motion will be denied. First, Fed. R. Civ. P 6(d) is not a rigid rule without exceptions; courts are given wide discretion to accept affidavits beyond the date the motion is filed. See, e.g, Concrete Works of Colorado, Inc. v. City and County of Denver, 36 F.3d 1513, 1523 n.9 (10th Cir. 1994) (holding district court acted properly in accepting affidavits included with reply belief that responded to issues first raised in brief of opposing party). Furthermore, this court's own Procedures to be Followed on a Motion for Summary Judgment allow a moving party to attempt to rebut facts proposed by the non-movant and to include with the rebuttal "[s]uch materials permitted by Rule 56(e) which movant may elect to serve and file in rebuttal," including affidavits. Procedures III.A.5. Therefore, to the extent that the affidavits were used to rebut plaintiff's proposed findings of

fact in opposition to defendants' motion, the affidavits will be considered. To the extent they were used in an attempt to propose new facts, they will be ignored. In this way, neither side is prejudiced; defendants are given the opportunity to respond to assertions made by plaintiff, but plaintiff is not left in the precarious position of being unable to respond to newly proposed facts.

For the purpose of deciding this motion, I find from the parties' proposed findings of fact that there is no genuine issue with respect to the following material facts.

UNDISPUTED FACTS

A. Parties

Defendant Marshall & Ilsley Corporation is a Wisconsin corporation with its principal place of business in Milwaukee, Wisconsin. Defendant M&I Mid-State Bank is a Wisconsin corporation with its principal place of business in Stevens Point, Wisconsin. Defendant Paul Schaller is an adult male residing in Mauston, Wisconsin. Plaintiff Michael J. Olsen is an adult male residing in Wisconsin Rapids, Wisconsin.

B. Plaintiff's Work History with Mid-State

Plaintiff began working for M & I People's Bank of Coloma in 1982 when he was hired

as a junior loan officer. In 1994, he was promoted to Branch Manager I at the Montello Branch after the Coloma Bank was merged into Mid-State. Robert Schmidt (President and CEO of defendant M&I Mid-State Bank), Terence Rothman (Executive Vice-President for defendant M&I Mid-State Bank in Stevens Point, WI), and William Smith (Vice President and Cashier/Controller for defendant M&I Mid-State Bank) made the decision to promote plaintiff. In early 1996, Schmidt, Rothman, and Smith promoted plaintiff again, this time to branch manager of the Mauston Bank to replace Paul Schaller, the outgoing manager, who was being promoted to a new position in which he would be responsible for overseeing several branch managers, including the one at Mauston. Although Schaller expressed concern over plaintiff's sales ability, the decision was made to promote plaintiff. As a branch manager, one of plaintiff's responsibilities was to become a "sales leader" for the branch and to meet personal sales quotas.

Before becoming Mauston Branch manager, plaintiff had achieved numerous accomplishments. In 1993, he was named "employee of the year." In 1995, as Montello Branch manager, he achieved 170 percent of his sales goals for deposits and 245 percent of his sales goals for loans. He never received an evaluation that rated him below "good" or "above average."

Plaintiff received his first evaluation as Mauston bank manager from Schaller in October 1996. Schaller gave him an overall performance rating of "good," defined as "meets and

sometimes exceeds requirements in that position." However, Schaller did note a number of criticisms in the evaluation, including plaintiff's failure to meet his personal sales goals and his need to improve his organizational skills. In an area labelled "Supervisor's Summary of Performance" Schaller wrote: "Mike has all the knowledge and ability. He is dragged down by his organizational style and attention to some matters that are not of great consequence. Very hard worker/good motivator." Also on the evaluation, in an area for plaintiff's comments, plaintiff wrote that he "recognize[d] the validity of most of the concerns raised."

In early 1997, plaintiff was asked to serve as interim manager for a period of about five to six weeks at the Tomah branch after that branch's manager was terminated. During this time, "and for some time thereafter," plaintiff's ability to make personal sales was limited because of his increased responsibilities. After the interim period was over, Schaller indicated to plaintiff that he was pleased with the way plaintiff had handled the temporary assignment of managing two branches.

In late summer or fall of 1997, employees at the Mauston branch complained to Schaller that plaintiff tried to pass customers off on them instead of handling customers himself, that in general plaintiff did not do his share of the work and that he had a poor understanding of the bank's products. In addition, other employees took issue with the state of plaintiff's office to the point that Margie Hajdas, the mortgage loan originator, was

embarrassed to refer customers to him because his office was so messy.

In response to these complaints, Schaller suggested that employees schedule a meeting with plaintiff to express their concerns directly to him. At the meeting, the employees stated that they believed plaintiff was giving them tasks to complete that were branch manager responsibilities, that his instructions were not clear and his office was cluttered, and that his management style was confusing. After listening to the employees' concerns, plaintiff indicated that he would attempt to resolve some of the concerns. In contrast to the opinions of these employees, Marybeth Neinast, the Mauston branch's investment counselor, believed that plaintiff was a good manager and supportive of his staff.

In October 1997, plaintiff received a second performance evaluation from Schaller, covering his personal and branch sales performance through June 1997. In terms of personal performance, plaintiff was at 15 percent year-to-date for retail deposits, 20 percent year-to-date for retail loans and 32 percent year-to-date for sales per day. Throughout the evaluation, Schaller stressed that plaintiff's personal goal attainment was unacceptable and that he needed to increase his personal sales (e.g.,"[Plaintiff's] sales focus and customer service skills need dramatic improvement"). Also noted were plaintiff's organizational shortcomings, particularly his messy office, frustrations that employees had over his management style, his need to be more involved in the community and his failure to focus on customer service. Schaller also

acknowledged that plaintiff "works hard." Overall, the evaluation rated plaintiff, "does not meet expectations." However, plaintiff was never told, either at his evaluation or a later date, that he would be terminated if sales did not increase. In addition to performing plaintiff's evaluation, Schaller told Smith that he had difficulty managing plaintiff and that he thought the Mauston branch would lose "good people" if plaintiff continued to work there.

By the end of the year, plaintiff had not met his personal sales goals. As of December 31, 1997, his year-to-date figures were 26.4 percent of his goal for retail deposits, 45.2 percent of his goal for new loans, and 38 percent of his goal for sales per day. However, in a sales report dated March 13, 1998, plaintiff is shown as having met 174 percent of his deposit goals and 152 percent of his loan goals for the first two months of 1998.

In March 1998, Margie Hajdas, the mortgage originator at the Mauston branch, told her boss, Todd Schlafke, that she was thinking of leaving because she still believed plaintiff was preventing her from doing her own work by passing his own responsibilities on to her.

On March 25, 1998 Schmidt, Smith and Rothman met to discuss plaintiff's performance. They decided that plaintiff would be terminated and Smith prepared a memo summarizing the reasons for the decision that read:

> 1. Failure to obtain or develop personal sales goals. Continues to maintain a low level of sales production in deposit, loan and insurance sales. 2. Staff interaction - Has alienated staff to the point of having a meeting with you direct to improve skills and intentions. 3. Unassigned staff - Has failed to understand that

> mortgage staff and non-deposit do not report to you; however, have continued to be assigned duties that relate to deposit or other areas not serviced by staff 4. Promote bank - Has not gotten into promoting bank by joining outside service clubs. Also does not willingly work with walk-in customers.

The following day, Schmidt, Smith and Rothman informed plaintiff that he was terminated. Kathy Potter, who was then the manager of the Tomah branch, was named as plaintiff's replacement. At the time of plaintiff's termination, approximately 75% of Mid-State branch managers were female.

At some point during 1997-1998, the manager of the Plover branch, a female, was experiencing a period of declining deposits for her branch. She was placed on a probationary program directed at increasing sales. When her sales did not increase, she was demoted to the position of personal banker.

C. Kathy Potter/Plaintiff's Reports

Kathy Potter, a female, was originally a personal banker at the Mauston branch, working under Paul Schaller. When the Mauston branch manager position opened up in 1996**,** Schaller recommended that the position be given to Potter. Rothman, Smith and Schmidt agreed and decided to offer her the position. When Potter declined the offer in order to take a position with another company, plaintiff was selected for the branch manager position

instead.

In January 1997, when the position for branch manager in Tomah became available, Schaller recommended to Schmidt that Potter be contacted about the opening. At the time, Potter was working as a manager of a small branch for another bank in Mauston. Mid-State decided to offer the position to Potter. She accepted the offer and returned to Mid-State in March 1997. Paul Schaller was Potter's supervisor.

While Potter was manager, the Tomah branch experienced high rates of turnover. One employee, Robin Pierce (formally Robin Pleus), the mortgage originator for the Tomah branch at this time, was unhappy with Potter as a manager. She quit in August 1997 while Potter was still there.

Soon after Potter returned, plaintiff suspected that Schaller and Potter were involved in a sexual relationship. Plaintiff believed that Schaller often spoke to Potter on the telephone "in tones that did not suggest a business conversation." In addition, Schaller and Potter began speaking to each other daily, had lunch together periodically and met in person at both the Mauston and Tomah branches. Plaintiff took three greeting cards from Schaller's desk while Schaller was out of the office and saw that they were from Potter. Plaintiff also began calling the Tomah branch "to keep track of" Potter and Schaller and believed they were meeting each other secretly because they were sometimes out of the office at the same time. Finally, plaintiff

had learned from another employee that she had seen Potter drive off with Schaller in his van. There were also rumors among the employees that Potter and Schaller were in a relationship.

Around the same time, Schaller was approached by Maribeth Neinast, the investment counselor at the Mauston Branch, and a friend of Schaller. Neinast told Schaller that she was concerned about how much time he and Potter spent together. Schaller responded to Neinast by telling her, "I have no intention of ending this relationship."

On July 31, 1997, plaintiff contacted Karen Ruch, the Human Resources Director for Mid-State, to inform her of his suspicions and his basis for them. At some point in the conversation, plaintiff believes he used the word "discrimination."

After plaintiff made the report, Ruch contacted Schmidt on August 11, 1997 to inform him what plaintiff had said. Schmidt then spoke to Schaller, telling him that a report had been made by employees who believed there was a personal relationship between Schaller and Potter. In response, Schaller stated that he and Potter were "good friends" and that if any relationship had occurred, it was purely consensual.

Ruch also informed Potter about the report. Ruch told Potter that she needed to be sure that Potter was not being sexually harassed. Like Schaller, Potter admitted that she and Schaller were good friends, but stated that no harassment was occurring. Ruch then contacted plaintiff and told him that both Potter and Schaller had denied there was a sexual relationship.

On February 27, 1998, plaintiff again contacted Ruch, informing her that Mid-State employees suspected that Schaller and Potter may have been having an "affair."

On March 26, 1998, when plaintiff was terminated, he asked whether it was because he had reported that Schaller and Potter were having an affair. Schmidt denied that plaintiff's report had influenced the decision. On the same day, Potter was offered the Mauston bank manager position. Although Schaller was consulted on both the decision to terminate plaintiff and replace him with Potter, Schmidt, Smith, and Rothman made the ultimate decisions in both instances.

D. Procedural History

Plaintiff filed a complaint with the Equal Rights Division of the Department of Industry, Labor and Human Relations of Wisconsin on May 21, 1998 as well as with the Equal Employment Opportunities Commission in Milwaukee. Plaintiff received a "Notice of Right to Sue" on July 20, 1999. Plaintiff then filed suit against defendants in Portage County Circuit Court. Defendants removed the case to this court pursuant to 28 U.S.C. § 1441.

OPINION

A. Summary Judgment Standard

Summary judgment is proper when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. See Fed. R. Civ. P. 56(c); Celotex Corp. v. Catrett, 477 U.S. 322-23 (1986). In determining whether a genuine issue of material fact exists, courts must construe all facts in the light most favorable to the non-moving party and draw all reasonable inferences in favor of that party. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986). However, in order to avoid summary judgment, the non-moving party must supply evidence sufficient to allow a reasonable jury to render a verdict in his favor. Sanchez v. Henderson, 188 F.3d 740, 743 (7th Cir. 1999). The mere existence of some alleged factual dispute is insufficient to defeat a properly supported motion for summary judgment. See Liu v. T & H Machine, Inc., 191 F.3d 790, 796 (7th Cir. 1999).

B. Title VII Claim

1. The claim against Marshall & Isley Corporation

Before the merits of plaintiff's Title VII claim can be determined, it is necessary to decide whether Marshall & Ilsley Corporation is correct when it argues that it must be dismissed from the suit because it was not named as a respondent in the administrative proceedings below. Title VII provides that an aggrieved party who has received his or her "Notice of Right to Sue" letter from the EEOC may bring a civil action "against the respondent named in the charge."

42 U.S.C. § 2000e-5(f)(1). Accordingly, the general rule is that a plaintiff cannot bring a Title VII suit against a party who was not named in the EEOC charge. See Perkins v. Silverstein, 939 F.2d 463, 471 (7th Cir. 1991). The purpose for this rule is both to insure that defendants have actual notice of a pending complaint and to provide parties charged with an opportunity to conciliate the dispute without resorting to the federal courts. See Schnellbaecher v. Baskin Clothing Co., 887 F.2d 124, 126 (7th Cir. 1989); Talley v. Leo J. Shapiro & Associates, 713 F. Supp. 254, 258 (N.D. Ill. 1989). An exception to this rule was recognized in Eggleston v. Chicago Journeymen Plumbers' Local Union No. 130, 657 F.2d 890 (7th Cir. 1981). The court stated, "where an unnamed party has been provided with adequate notice of the charge, under circumstances where the party has been given the opportunity to participate in conciliation proceedings aimed at voluntary compliance, the charge is sufficient to confer jurisdiction over that party." Id. at 905. The court explained that the broad remedial purpose of Title VII would be frustrated if plaintiffs were expected to "ascertain . . . at the time the charges were made, every separate entity which may have violated Title VII." Id. at 906. The court added that "if a party has a close relationship with a named respondent, . . . and has actual notice of the EEOC charge, . . . to the extent that the [unnamed party] could have participated in conciliation efforts, the [unnamed party] should not be heard to cry 'foul' when later made a defendant in a suit . . . ." Id. at 907 (internal quotations omitted).

Relying on Eggleston alone, plaintiff could argue that it was proper to name Marshall & Ilsley Corporation in the civil action even though it was not named in the EEOC charge. As plaintiff points out, there is a close relationship between Marshall & Ilsley Corporation and M&I Mid-State Bank and Marshall & Ilsley was involved in the conciliation process with Mid-State.

However, as defendants counter, the exception recognized in Eggleston was narrowed significantly in Schnellbaecher. In that case, the court of appeals recognized the exception, but held that the parent company could not be named as a defendant in the civil action under Title VII when only the subsidiary had been named in the original EEOC charge. See Schnellbaecher, 887 F.2d at 127. The parent company had had notice of the charges against its subsidiary and may have had an opportunity to participate in conciliation, but the parent company "did not thereby have any notice of any charges against *it*, nor did it have any opportunity to conciliate on its own behalf." Id. (Emphasis in original). Therefore, a parent company's actual notice of a claim against its subsidiary does not bring it within the exception. Rather, "the decisive factor in determining if an unnamed defendant is a proper party to a Title VII action is whether the unnamed defendant had notice that it was subject to suit." Bright v. Roadway Services, Inc., 846 F. Supp. 693 (N.D. Ill. 1994).

There are no material distinctions between Schnellbaecher and the present case.

Plaintiff attempts to distinguish Schnellbaecher by arguing that the parent company had less involvement in the administrative proceedings than Marshall & Ilsley did here. This argument fails. The material facts in Schnellbaecher and this case are the same: both involved a plaintiff that had named the subsidiary but not the parent company in the EEOC charge; both parent companies had notice of the charge against its subsidiary and an opportunity to conciliate that claim; and neither had notice of a charge against itself or an opportunity to conciliate on its own behalf.

Although the holding in Schnellbaecher may not be entirely consistent with the reasoning behind the exception recognized in Eggleston, it is Schnellbaecher that I must follow because it is the more recent decision. No decision from Court of Appeals for the Seventh Circuit has undermined the holding in Schnellbaecher or suggested a return to the more liberal approach in Eggleston.

Plaintiff urges the court to apply a four-pronged test created by the Court of Appeals for the Third Circuit and referred to by the Eggleston court. See 657 F.2d at 907-08 (citing Glus v. C.G. Murphy Co., 629 F.2d 248 (3d Cir. 1980)). However, the court made no mention of this test in Schnellbaecher. Even in Eggleston, the court did not rely on it to decide the case. Therefore, any reliance by plaintiff on the Glus test would appear to be misplaced. Accord Bright, 846 F. Supp. at 696-97 n.3.

In summary, although it may be true that Marshall & Ilsley Corporation was involved in the administrative proceedings, all of its actions were taken on behalf of its subsidiary, M & I Mid-State Bank. Under Schnellbaecher, the fact that a parent company has actual notice of a claim against its subsidiary is irrelevant. Because Marshall & Ilsley Corporation had no notice of the charge against it and had no opportunity to conciliate on its own behalf, Marshall & Ilsley Corporation was named improperly as a defendant in this case. Therefore, defendants' motion for summary judgment will be granted as it applies to Marshall & Ilsley Corporation. Furthermore, because I have decided that Marshall & Ilsley was named improperly, it is unnecessary to determine whether there are any "special circumstances" that would justify holding Marshall & Ilsley liable as parent company for the acts of M&I Mid-State Bank, its subsidiary.

2. Claims against M&I Mid-State Bank

a. Disparate treatment

Title VII prohibits employers from discharging employees "because of" their race, color, religion, sex, or national origin. See 42 U.S.C. § 2000e-2(a)(1). Plaintiff argues that Mid-State

violated this provision when it discharged him because it did so on the basis of his sex.[1] To ultimately prevail on his claim, plaintiff "must show that the basis for [his] termination was the impermissible consideration of [gender], i.e., that a person of another [gender] would not have been discharged under similar circumstances." Cowan v. Glenbrook Security Services, Inc. 123 F.3d 438, 442 (7th Cir. 1997) (internal quotations omitted).

A plaintiff pursuing a claim of wrongful discharge under Title VII can prove his or her claim in two ways. See Flores v. Preferred Technical Group, 182 F.3d 512, 514 (7th Cir. 1999). He can present direct evidence of his employer's discriminatory intent or he can rely on the indirect, burden-shifting method established in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). See id. Plaintiff has not availed himself of the direct method of proof, but rather relies solely on the indirect method. Under this approach the plaintiff "must shoulder the initial burden of establishing a prima facie case." Crim v. Board of Education of Cairo School District No.1, 147 F.3d 535, 540 (7th Cir. 1998). In a discharge case under Title VII, this is done when the plaintiff shows (1) she is a member of a protected class; (2) she was meeting her employer's legitimate expectations; (3) she was discharged; and (4) her employer

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[1] Although plaintiff asserts his Title VII claim against both Marshall & Ilsley Corporation and M&I Mid-State Bank, because I have concluded that Marshall & Ilsley was improperly named as a defendant, I will refer only to Mid-State in relation to plaintiff's claims under Title VII.

sought a replacement for her. See Flores, 182 F.3d at 515. (In regard to the fourth prong of the McDonnell Douglas test, the parties dispute what the proper standard should be. Mid-State argues that to satisfy the fourth prong, plaintiff must show that similarly situated females were given more favorable treatment. See O'Patka v. Menasha Corp., 878 F. Supp. 1202, 1206 (E.D. Wis. 1995). Plaintiff contends that he need show only that similarly situated females were given more favorable treatment *or* that he lost his job to a female. See Wallace v. SME Pharmacuticals, Inc., 103 F.3d 1394, 1397 (7th Cir. 1997). In the majority of recent decisions under Title VII in discharge cases, the court of appeals seems to have applied the standard espoused by Mid-State. See, e.g., Johnson v. Zema Systems Corp., 170 F.3d 734, 743 (7th Cir. 1999); Foster v. Arthur Andersen, LLP, 168 F.3d 1029, 1035 (7th Cir. 1999); Bragg v. Navistar International Transportation Corp., 164 F.3d 373, 376 (7th Cir. 1998); Crim, 147 F.3d at 540 n.9; Cowan, 123 F.3d at445; EEOC v. Our Lady of Resurrection Medical Center, 77 F.3d 145, 148 (7th Cir. 1996) However, "the formulation of a prima facie case is not meant to be rigid, mechanized, or ritualistic," Chandler v. Sentry, 973 F.Supp. 842 (W.D. Wis. 1997). The Court of Appeals for the Seventh Circuit has held that, in a Title VII discharge case, "normally" a plaintiff does not have to show that individuals outside the plaintiff's group were treated more favorably. Kidd v. Illinois State Police, 167 F.3d 1084, 1093 n.13 (7th Cir. 1999). Furthermore, the outcome of this case would not be affected by the choice of standard.

Therefore, I have chosen to apply the formulation that plaintiff can satisfy most easily. In cases involving a male plaintiff alleging sex discrimination, the first prong is replaced by the requirement that the plaintiff show there are "background circumstances" suggesting that discrimination may have occurred. See Mills v. Health Care Service Corp., 171 F.3d 450, 457 (7th Cir. 1999).

Before discussing whether plaintiff has established a prima facie case, Mid-State first argues that plaintiff's sex discrimination claim must fail because plaintiff was promoted and fired by the same decision makers. Citing Chiaramonte v. Fashion Bed Group, 129 F.3d 391, 399 (7th Cir. 1997), Mid-State argues that there is a "strong presumption" against discrimination in this context. Mid-State correctly asserts that it is entitled to such a presumption because it is undisputed that Schmidt, Smith and Rothman made the ultimate decisions both to promote plaintiff to Mauston bank manager and eventually to terminate him. As the court of appeals noted recently, however, the same-actor inference is "not itself evidence of nondiscrimination" and "is unlikely to be dispositive in very many cases." Zema Systems Corp, 170 F.3d at 745. The court went on to state that it had found no cases in which the same-actor inference was used as the determining factor on a summary judgment motion. See id. Mid-State cannot prevail on summary judgment by reliance on the same-actor inference alone.

It is undisputed that plaintiff has satisfied the third and fourth prongs of his prima facie case. He was discharged by Mid-State on March 26, 1998, and was replaced by Kathy Potter, a female. Mid-State argues, however, that plaintiff has not met either the first or second prongs, that is, he has not shown that there are any "background circumstances" suggesting that discrimination occurred or that plaintiff was meeting Mid-State's legitimate expectations when it fired him.

1) background circumstances

As noted, as a general rule in a Title VII suit the first prong of the prima facie requires that the plaintiff show that he is a member of a protected class. See Our Lady of Resurrection Medical Center, 77 F.3d at 148. In the Seventh Circuit, however, the requirements for establishing a prima facie case under the burden shifting test have been altered recently in cases involving a plaintiff who is not "a member of a protected minority class or female." See Mills, 171 F.3d at 454. Although the Supreme Court has long held that Title VII protects male as well as female employees from discrimination, see Oncale v. Sundowner Offshore Services, Inc., 523 U.S. 75, 78 (1998); Newport News Shipbuilding & Dry Dock Co. V EEOC, 462 U.S. 669, 682 (1983), the court of appeals concluded nevertheless that "it is the unusual employer who discriminates against [male] employees," and therefore there is nothing "inherently suspicious"

about an employer's decision to hire or promote a female over a male. Mills, 171 F.3d at 454-55, 457. Proceeding from this conclusion, the court held that in order to establish a prima facie case in a "reverse discrimination" suit, a plaintiff must be able to show that there are "background circumstances" that suggest the employer has some reason or inclination to discriminate against whites or men or that there is something "fishy" about the facts of the case at hand. See id. at 455, 457.

The court emphasized, however, that the new requirement was meant only as a minimal burden. See id. at 457 ("[T]his modified test is not to be interpreted in a constricting fashion.") Other courts applying the Mills standard have held that the bar is meant to be a low one. See Corral v. Chicago Faucet Co., No. 98 C 5812, 2000 WL 628981, *3 (N.D. Ill. 2000) (holding that nine-year-old memo indicating a female may not have been disciplined for threatening same co-worker who was alleged victim of plaintiff's harassment was sufficient to show background circumstances); Burton v. Southwestern Bell Mobile Systems, 74 F. Supp.2d 841, 847 (C.D. Ill 1999) (finding background circumstances where defendant had made statement that African-American employees could not be fired because they were protected minority). In Mills, the court concluded ultimately that the male plaintiff had succeeded in demonstrating the existence of "background circumstances" because females dominated supervisory positions in plaintiff's office and "nearly all" of the promotions for the last eight years had gone to women.

See 171 F.3d at 457.

The court of appeals suggested several example of what type of "background circumstances" are sufficient from a survey of other circuits: (1) being passed over for promotion despite superior qualifications; (2) being the only white or male employee in department where all the decision makers are outside the group; (3) the hiring authority expressed interest in hiring a woman; (4) there was a pattern of hiring women in the past. See id. at 455.

In the present case, I conclude that there are enough "background circumstances" to satisfy the first prong of the modified test, albeit by the slimmest of margins. The evidence is scant. Not only were all the decision makers male, but, as noted above, the same ones who fired plaintiff also promoted him. Furthermore, there is no evidence Mid-State had expressed interest in hiring women rather than men. However, viewing the facts in the light most favorable to plaintiff, approximately 75% of Mid-State's branch managers were women at the time of his dismissal; other branch managers who were female and experienced sales problems were not fired; and plaintiff was replaced by a woman who was chosen on the same day that plaintiff was discharged and who had less experience. Although this is far from conclusive evidence of sex discrimination, because the background circumstances requirement is not intended as a substantial burden, it is enough to show that there is something "fishy" about the

facts of the case at hand and therefore "enough to overcome the background presumption that a [] man was not subject to employment discrimination." Id.

2) legitimate expectations

In support of his contention that he was meeting Mid-State's legitimate expectations, plaintiff introduces evidence that he was meeting his sales goals when he was terminated, that employee interaction was not a problem for him and that he was involved in the community. Mid-State denies that plaintiff was meeting his expectations in any of these areas. Because plaintiff's burden is merely to produce some evidence that he was meeting Mid-State's legitimate expectations, see Zema Systems Corp, 170 F.3d at 743, and because in this case the question whether plaintiff has met Mid-State's expectations merges with the question whether Mid-State's reason are pretextual, I will assume that plaintiff has established a prima facie case and proceed to the pretext analysis. See Our Lady of Resurrection Medical Center, 77 F.3d at 149 ("[A] court may advance to an ultimate issue in a summary judgment analysis and consider the discrimination question notwithstanding a dispute over a fact necessary for a prima facie case.")

3) pretext

Once a plaintiff establishes a prima facie case, there is a presumption of discrimination

that obligates the employer to produce a nondiscriminatory reason for its decision. See Debs v. Northeastern Illinois University, 153 F.3d 390, 395 (7th Cir. 1998). Mid-State has done this. As employers often do in Title VII cases, Mid-State asserts that it was plaintiff's poor job performance that led to its decision to terminate him. Specifically, in its brief, Mid-State argues (1) plaintiff did not meet his sales goals; (2) the performance of the Mauston branch declined while plaintiff was branch manager; (3) plaintiff had problems interacting with his staff; and (4) Mid-State perceived that plaintiff was resistant to its suggestions, including those directing plaintiff to become more involved with the community for the purpose of attracting business.

Since Mid-State has provided non-discriminatory reasons for its decision to terminate plaintiff, the burden shifts back to plaintiff to show that the nondiscriminatory reasons are pretextual. See id. A plaintiff can establish pretext directly by showing that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's explanation is unworthy of credence. See Sarsha v. Sears, Roebuck & Co., 3 F.3d 1035, 1039 (7th Cir. 1993). Plaintiff has produced no direct evidence, so he must proceed under the indirect method, under which he must show that (1) the defendant's explanation has no basis in fact; (2) the explanation was not the real reason; or (3) the reason stated was insufficient to warrant the termination. See Sanchez, 188 F.3d at 746.

It is not enough for plaintiff to show that Mid-State's reasons were "mistaken, ill-considered or foolish." Jordan v. Summers, 205 F.3d 337, 343 (7th Cir. 2000). Furthermore, whether Mid-State's decision to terminate plaintiff was a fair one is not relevant to the question of pretext. See O'Connor v. DePaul University, 123 F.3d 665, 670 (7th Cir. 1997); see also Pryor v. Seyfarth, Shaw, Fairweather & Geraldson, 212 F.3d 976, 979 (7th Cir. 2000) ("Title VII is not a 'good cause' statute."). Rather, to demonstrate pretext, plaintiff must show that Mid-State is "lying in order to cover up the true reason" it fired him. Jordan, 205 F.3d at 343 (internal quotations omitted). Where a defendant has proffered more than one legitimate reason for the dismissal, the plaintiff must show that each of them is a pretext. See Crim, 147 F.3d at 541 ("[A]s long as *one* legitimate, nondiscriminatory reason would have caused the company to dismiss the plaintiff, summary judgment will be upheld.")

Plaintiff first argues that the reasons Mid-State is giving to explain its discharge of plaintiff are "conflicting and inconsistent" with those it gave to plaintiff when he was terminated and that for this reason, the court should conclude that Mid-State's explanation is pretextual. To support this position, plaintiff asserts that the only reasons for termination Mid-State gave when it discharged him were the ones provided in the termination memo. Since Mid-State is now attempting to assert additional reasons for his discharge, he argues, this shows that all of them are pretextual. Plaintiff's argument is not persuasive. First, Mid-State denies

that the reasons it provided to plaintiff regarding why it terminated him were limited to those in the memo, claiming that the memo was only a summary of the reasons it provided. Second, even assuming plaintiff is correct that he was given only those reasons in the termination memo, the fact that Mid-State is presenting *more* reasons for terminating plaintiff now than it did in the termination memo does not make these explanations "conflicting" or "inconsistent." Plaintiff has not demonstrated how any of the reasons contradict each other or how accepting one of the proffered reasons makes it more difficult to accept the others. Nor has he provided any authority for the contention that all of an employer's reasons for adverse employment action must be disbelieved if the reasons asserted in litigation are not identical to those provided to the employee in writing when he was discharged. Finally, even if Mid-State is limited to relying on the reasons provided in the memo, plaintiff has been unable to show that each of these are unbelievable.

Next, plaintiff points to his past accomplishments with Mid-State and to the strengths he continued to display to show that his termination in March 1998 was not based on poor performance. However, plaintiff's exemplary past performance sheds little light on the question whether he was performing up to his employer's expectations when he was terminated. See Fortier v. Ameritech Mobile Communications, 161 F.3d 1106, 1113 (7th Cir. 1998); Hong v. Children's Memorial Hospital, 993 F.2d 1257, 1262 (7th Cir. 1993). Also, the fact that

plaintiff remained strong in certain areas of performance does not suggest the reasons provided for termination in the memo are pretextual. See Mills v. First Federal Savings and Loan Association, 83 F.3d 833, 846 (7th Cir. 1996) ("'[T]he fact that an employee does some things well does not mean that any reason given for [her] firing is a pretext for discrimination.'") (quoting Anderson v. Stuaffer Chemical Co., 965 F.2d 397, 403 (7th Cir. 1992)).

Having disposed of plaintiff's preliminary arguments regarding pretext, I turn to the reasons proffered by Mid-State in its termination memo. The first was that plaintiff failed "to obtain or develop personal sales goals." It is undisputed that plaintiff did not meet his personal sales goals for 1997: he achieved 26.4 percent of his goal for retail deposits, 45.2 percent of his goal for new loans and 38.5 percent of his goal for sales per day.

Although there is some disagreement between the parties regarding the extent to which Mid-State emphasized to plaintiff the importance of meeting his personal sales goals, it is undisputed that Mid-State considered sales one of the most important aspects of a bank manager's job. Furthermore, plaintiff's failure to meet these goals was noted in his 1996 evaluation and stressed repeatedly in his 1997 evaluation.

Although plaintiff does not contest Mid-State's evidence concerning his failure to meet personal sales goals, he argues that Mid-State's reliance on this reason for terminating him is pretextual because his sales ability had been limited in 1997 while he was temporarily managing

two branches and because he allowed Donna Seitz, the Mauston branch personal banker, to receive credit for sales he initiated but for which she completed the paperwork. Even assuming both of these contentions are true, plaintiff still has not adduced factual evidence to show that he would have made his sales goals for 1997 without these limitations. Moreover, the fact that plaintiff perceived he had good excuses for failing to meet his sales goals is not sufficient to put into dispute Mid-State's assertion that plaintiff failed to meet them. It is not necessary for Mid-State's expectations to be reasonable in order for them to be legitimate; they only need to be honest. Coco v. Elmwood Care, Inc., 128 F.3d 1177, 1179 (7th Cir. 1997) ("[I]t is no business of a court in a discrimination case to decide whether an employee demands 'too much' of his workers."). Accepting plaintiff's contentions does not require me to conclude that plaintiff's failure to meet these goals was not an actual reason for Mid-State's decision to terminate him.

Plaintiff characterizes as pretextual Mid-State's contention that it was his poor sales ability in 1997 that prompted his dismissal because his sales performance had improved by the time he was fired. According to a sales report dated March 13, 1998, plaintiff met 174 percent of his deposit goals and 152 percent of his loan goals for the first two months of 1998. Although this report suggests that plaintiff's sales performance was improving, plaintiff's ability to show that he improved for two months is not persuasive evidence that Mid-State is being

dishonest when it says it terminated plaintiff in part for his dismal past record in personal sales. Even if I accepted that plaintiff's evidence of above average performance for two months created an issue of fact on this reason for termination proffered by Mid-State, plaintiff has failed to show there is anything pretextual about Mid-State's other proffered reasons for terminating him.

In addition to plaintiff's lackluster sales performance, the termination memo next cites plaintiff's personal problems with his staff as a reason for his termination. Plaintiff does not argue that a problem with managing staff is an insufficient reason for discharge. It is undisputed that employees at the Mauston branch complained about plaintiff both to Schaller and to plaintiff himself. In a meeting with plaintiff in fall 1997, employees stated that they believed plaintiff was giving them tasks to complete that were branch manager responsibilities, that his instructions were not clear and his office was cluttered, and that his management style was confusing. Plaintiff's 1997 evaluation indicated that members of his staff were unhappy with his performance and repeated the same concerns that had been expressed to plaintiff by the employees themselves. The evaluation adds that plaintiff's managing style "may set up to lose or frustrate good people." Schaller also told Smith about employees' frustrations with plaintiff and that he was worried they would lose "good people" if plaintiff remained at Mid-State.

In attempting to show this reason is pretextual, plaintiff first argues that to the extent Schmidt, Smith and Rothman viewed plaintiff as having problems with staff, their belief is inaccurate because Schaller was feeding them false information that biased them against plaintiff and Schaller was directing employees to complain. Plaintiff has no evidence to support this argument. Although it may have been Schaller who suggested the employees meet with plaintiff, plaintiff does not put in any facts, much less create a genuine dispute, that the underlying concerns that the employees had were contrived by Schaller. Furthermore, the question is not whether Mid-State's perception of plaintiff's managerial difficulties is accurate. Again, plaintiff must show that Schmidt, Smith and Rothman did not honestly believe plaintiff was an ineffective manager. What Schaller believed has no bearing on this determination. Plaintiff has presented no evidence showing that whatever bias Schaller may have had against him carried over to Schmidt, Smith and Rothman or that these three were merely rubber stamping a recommendation by Schaller. See Biolchini v. General Electric Co., 167 F.3d 1151, 1154 (7th Cir. 1999).

Plaintiff also relies on the affidavit of Marybeth Neinast, the investment counselor at the Mauston branch, to show that he was well-liked by his staff. In her affidavit, Neinast says she "did not have any problems with the way [plaintiff] managed the Mauston branch" and that he was "very supportive of the branch staff." Whether there was one employee who looked

favorably on plaintiff's performance, however, is not a determining factor. Neinast's affidavit does nothing to put into dispute the numerous complaints from other employees about plaintiff's performance or show that Mid-State did not honestly believe plaintiff's managerial abilities were lacking.

Plaintiff argues that this reason is merely a pretext because his staff turnover was much lower than it was for Kathy Potter while she was the branch manager at Tomah, yet no action was taken against her. This attempt to show females received favorable treatment over plaintiff fails. First, high staff turnover was never a reason asserted by Mid-State for discharging plaintiff. Therefore, any comparisons to other branch managers in this regard are irrelevant to plaintiff's claim. Additionally, plaintiff produces no evidence that Mid-State perceived Potter as having the same managerial problems as plaintiff. Although plaintiff introduced evidence that at least one employee who worked under Potter at the Tomah branch quit because of Potter, this fails to demonstrate that Mid-State perceived Potter as having the same shortcomings as plaintiff.

Although the staff meeting took place in fall 1997, plaintiff has presented no evidence that his employee relations had improved by the time he was terminated. The only indication of the quality of plaintiff's staff interaction during this time is undisputed evidence introduced by Mid-State that Margie Hajdas was threatening to leave as a result of her frustrations with

plaintiff.

Therefore, although the evidence Mid-State has presented concerning plaintiff's problems with his staff is not overwhelming, plaintiff has done little to rebut Mid-State's assertion that it honestly believed plaintiff was an ineffective manager. See Helland v. South Bend Community School Corp., 93 F.3d 327, 330 (7th Cir.1996) ("Because a Title VII claim requires intentional discrimination, the pretext inquiry focuses on whether the employer's stated reason was honest, not whether it was accurate."). Furthermore, the court of appeals has stated repeatedly that a court is not to "sit as a super-personnel department that re-examines an entity's business decisions." Debs, 153 F.3d at 396. Combined with the presumption that the same decision makers who promoted plaintiff would not later discriminate against him, this is sufficient to defeat plaintiff's attempt to show that Mid-State's reasons for terminating him are merely a pretext for discrimination. Therefore, it is unnecessary to examine the other reasons in the discharge memo.

Plaintiff has failed to carry his burden of demonstrating that Mid-State's proferred reasons for terminating him are pretextual. Accordingly, defendants' motion for summary judgment on plaintiff's Title VII disparate treatment claim shall be granted.

b. Retaliation

In addition to providing protection to victims of certain forms of job discrimination, Title VII prohibits an employer from retaliating against an employee who opposes discriminatory practices or who "has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding or hearing under this subchapter." 42 U.S.C. § 2000e-3(a). Plaintiff contends that both the opposition clause and the participation clause apply in this case because by reporting his suspicions about Kathy Potter and Paul Schaller to human resources, he was both opposing what he claims to have perceived as quid pro quo sexual harassment and participating in an investigation.

As in disparate treatment claims, a plaintiff pursuing a Title VII retaliation claim can prove his case either directly or indirectly. See Paluck v. Gooding Rubber Co., No. 99-3703, 2000 WL 1025580, *3 (7th Cir. July 26, 2000). Again, plaintiff has produced no direct evidence of discrimination, so he must proceed under the indirect method. He must establish that (1) he engaged in a statutorily-protected activity; (2) he suffered adverse employment action; and (3) there was a causal link between the protected activity and the adverse action. See Maarouf v. Walker Manufacturing Co., 210 F.3d 750, 755 (7th Cir. 2000).

1) opposition clause

Plaintiff does not allege in his brief or supporting documents that Kathy Potter actually

was the victim of unlawful sexual harassment. In order to receive protection under the opposition clause, however, it is not necessary that the practice an employee opposes actually be prohibited by the statute. Rather, so long as an employee has a sincere *and* reasonable belief that he is opposing unlawful discrimination, he is protected from adverse employment action under Title VII. See Hamner v. St. Vincent Hospital and Health Care Center, Inc., No. 99-3086, 2000 WL 1202287, *1 (7th Cir. Aug. 24, 2000).

I conclude that plaintiff was neither sincere *nor* objectively reasonable in believing he was engaging in statutorily-protected activity. Curiously, plaintiff does not argue in his brief that he had a good faith belief that Potter was being sexually harassed by Schaller, but proceeds directly to his argument that his belief was objectively reasonable. Plaintiff may not avoid this requirement simply by failing to address it.

In his proposed findings of fact, plaintiff states he made his report to Ruch because he believed Potter and Schaller's relationship may have been unwelcome on Potter's part and that her relationship with him was "in exchange for Schaller's decision to hire Potter as branch manager or to grant her favorable treatment with respect to her pay, retention, promotions or other conditions of employment." Other than this bald assertion, however, the only evidence that plaintiff has provided that suggests he believed Potter was being harassed is that he may have used the word "discrimination" in his report to Ruch. Plaintiff provides no context,

however, for his use of the word and does not even claim to have used it in regard to Potter as opposed to himself. Furthermore, it is undisputed that when plaintiff spoke to Ruch a second time in February 1998, he referred to Potter's and Schaller's relationship as an "affair." Finally, when plaintiff was told he was being terminated, he asked whether the decision was made because he had reported that Potter and Schaller were having an affair.

Perhaps most telling of plaintiff's true beliefs are plaintiff's own actions. If stopping the sexual harassment of a fellow employee had been plaintiff's true reason for being concerned about Schaller and Potter's alleged relationship, an obvious reaction by plaintiff would have been simply to *ask* Potter whether she believed she was being sexually harassed and whether there was any way he could help. But plaintiff never inquired into Potter's well-being. Instead, he searched through Schaller's desk drawers, monitored Schaller's phone calls and called Potter's branch to find out whether she was with Schaller. Although it is true that some employees would not feel comfortable confiding in a co-worker that they were the victim of harassment, plaintiff's methods of showing concern for Potter's "plight" are highly revealing of his true perception of her relationship with Schaller and his motivation for reporting it.

Therefore, plaintiff's after-the-fact claim that he believed he was reporting harassment is insufficient to show he had a good faith belief at the time. Although I cannot make credibility determinations on motions for summary judgment, plaintiff must provide at least a scintilla of

evidence to show his belief was sincere. Plaintiff has failed to do this.

Even if plaintiff did have a sincere belief that he was engaging in statutorily-protected activity, his claim would still fail because such a belief would not have been objectively reasonable. In order for a belief to be objectively reasonable, it must be based on "'the type of activity that, under some circumstances, supports a charge of sexual harassment.'" Hamner, 2000 WL 1202287, at *4 (quoting Holland v. Jefferson National Life Insurance Co., 883 F.2d 1307, 1315 (7th Cir. 1989)). Although a precise definition of sexual harassment has eluded the courts, "[t]he gravamen of any sexual harassment complaint is that the alleged sexual advances were unwelcome." Meritor Savings Bank, FSB v. Vinson, 477 U.S. 57, 68 (1986). Therefore, to have been objectively reasonable in making his report, plaintiff must have observed something in either Potter's or Schaller's behavior to indicate that sexual advances were being made and if so, they were not welcome.

To support his belief that there was a sexual relationship, plaintiff relies mostly on speculation and rumor. Neither Potter nor Schaller ever communicated to plaintiff, either directly or indirectly, that their relationship was sexual. In his own substantial "investigations," plaintiff never uncovered any evidence that sexual advances were being made. However, there is enough circumstantial evidence of such a relationship that, when it is viewed in the light most favorable to the plaintiff as it must be, I cannot say that it would have been objectively

unreasonable to believe that Potter and Schaller were involved in a sexual relationship. Even so, plaintiff never observed anything to indicate that any aspect of Schaller's and Potter's relationship was involuntary or unwelcome in any way. Plaintiff argues that simply because a victim appears to consent to sexual advances does not mean that they are welcome. Plaintiff is correct; the fact that sexual conduct is "voluntary" is not a defense to a sexual harassment claim under Title VII. See Meritor, 577 U.S. at 68. This does not mean, however, that it is reasonable to assume that all interactions between members of the opposite sex involve sexual harassment.

To support his claim that it was objectively reasonable for him to believe Schaller was harassing Potter, plaintiff provides additional evidence that I need not go into. In essence, plaintiff asserts that because Schaller was in a position of power over Potter and plaintiff perceived Potter to be in a vulnerable state, it was reasonable to conclude that Schaller was conditioning her employment on her submission to his sexual advances. However, the mere disparity between the positions of two employees does not provide the basis for a reasonable belief that sexual harassment was occurring. See Clover v. Total Systems Services, Inc., 176 F.3d 1346, 1351 (11th Cir. 1999).

Plaintiff asserts that Nichols v. Frank, 42 F.3d 503 (9th Cir. 1994), provides support for his position. He points to a concurring opinion in that case, arguing that two judges believed

that there was "substantial evidence" of quid pro quo sexual harassment where one in "a position of significant power" obtains sexual favors from an employee "in a position of significant weakness. However, nothing in Nichols, supports plaintiff's claim. First, plaintiff mischaracterizes the concurring opinion. Far from holding that the relative positions of subordinate and supervisor are conclusive evidence of sexual harassment, Judge Fernandez simply stated that in this particular case, the imbalance of power between plaintiff and her supervisor "contributed" to a finding that the supervisor had made submission to his sexual demands a condition of his employee's employment. See id. at 516 (Fernandez, J., concurring). Furthermore, such a finding was contingent on the fact that the plaintiff had given her "*unwilling* consent." Id. In Nichols, the victim had refused her supervisor's advances initially, but complied ultimately because she was afraid she would lose her job if she did not. See id. at 507. In the present case, however, there was no indication of any unwillingness on the part of Potter in her relationship with Schaller. Finally, the facts in Nichols are not like those in the present situation. Nichols was a case involving the victim herself (rather than an observer), contending that even though she had technically given her consent, her supervisor's sexual advances were still unwelcome. See id. In addition, the plaintiff was both deaf and mute and read at only a fifth grade level. See id. at 506. It is one thing to allow a victim of sexual harassment who is inherently vulnerable to assert a claim under Title VII even though she gave

her consent. It is quite another to conclude that it is reasonable for an outsider to believe sexual harassment is occurring when he observes an employee and her supervisor spending time together.

All indications from Potter of which plaintiff was aware suggested that whatever was going on between her and Schaller, the relationship was completely mutual. Never did Potter make a statement to plaintiff or suggest in any way that Potter was harassing her. Furthermore, plaintiff knew that Potter had told Ruch she and Schaller were good friends and that there was no harassment occurring.

This is not a case in which plaintiff observed an employee being harassed, but the harassment was later found not to be severe or pervasive enough in order to be actionable under Title VII. Rather, plaintiff observed nothing but consensual behavior between Potter and Schaller and concluded that sexual harassment was taking place. Plaintiff seems to be arguing, "Kathy Potter was being sexually harassed; she just didn't know it." It is not for plaintiff to decide, however, whether Potter was being harassed.

Plaintiff is unable to show that he had a sincere and reasonable belief that he was engaging in statutorily-protected behavior when he made his report to human resources. It is therefore unnecessary to determine whether there was a causal link between plaintiff's report and Mid-State's decision to fire him.

2) participation clause

Failing in his argument that his report to Ruch is protected under Title VII's opposition clause, plaintiff contends alternatively that he should be protected under the participation clause. Although plaintiff did not include this claim in his EEOC charge or complaint I will consider it because I find it is "like or reasonably related to" those contained in the charge. See Conley v. Village of Bedford Park, 215 F.3d 703, 710 (7th Cir. 2000) ("A plaintiff may pursue a claim not explicitly included in an EEOC complaint only if her allegations fall within the scope of the charges contained in the EEOC complaint . . . To determine whether the allegations in the complaint fall within the scope of the earlier EEOC charge, we must look at whether the allegations are like or reasonably related to those contained in the charge.") (Internal quotations omitted).

Unlike claims made under the opposition clause, participation clause claims do not have to be based on a reasonable belief to be protected. See, e.g., Filipovic v. K & R Express Systems, Inc., 176 F.3d 390, 398 (7th Cir. 1999). Neither is it necessary that the plaintiff be acting to enforce his own Title VII rights. Rather, protection extends to those who have "assisted" others. A plaintiff must show that he "made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter [Section 704(a)]." 42 U.S.C. § 2000e-3.

Plaintiff has failed to make this showing. First, the participation clause is meant to protect employees who take part in or otherwise assist in an *EEOC* investigation; it is only those investigations that are conducted "under" Title VII procedures. See, e.g., Laughlin v. Metropolitan Washington Airports Authority, 149 F.3d 253, 259 (4th Cir. 1998); Jeffries v. Harrison County Community Association, 615 F.2d 1025 aff'd 693 F.2d 589 (5th Cir. 1980). Here, no one ever filed a charge of sexual harassment with the EEOC or even threatened to do so.

The participation clause of § 704 has not been interpreted to require that an employee files a formal charge. See Hashimoto v. Dalton, 118 F.3d 671, 680 (9th Cir. 1997). At the very minimum, however, there must be a showing that the party alleging retaliation was attempting to enforce Title VII rights before a conclusion can be reached that a party was participating in an investigation "under this chapter." See Brower v. Runyon, 178 F.3d 1002 (8th Cir. 1999). Although plaintiff is unable to point to a case from either the United States Supreme Court or the Seventh Circuit that would support a finding that his behavior was protected under the participation clause, he argues that the clause should be "construed broadly to effectuate [Title VII's] remedial purpose." However, it is not the purpose of Title VII to promote third party interference in co-worker relationships. Rather, "[t]he participation clause is designed to ensure that Title VII protections are not undermined by retaliation against

employees who use the Title VII process." Brower, 178 F.3d at 1006. Denying protection to plaintiff under the participation clause undermines no Title VII protections. Plaintiff has not shown that he was trying to enforce Title VII or protect a co-worker from sexual harassment. Potter never once indicated that she believed she was being sexually harassed, let alone that she wanted to file charges with the EEOC. Furthermore, plaintiff produced no evidence that he thought Title VII was being violated or that he thought Potter was being subject to discrimination. Without this minimal showing, I cannot hold that plaintiff "participated" or "assisted" in an investigation held pursuant to Title VII.

Because plaintiff is unable to establish a prima facie case for his retaliation claim under the opposition clause or under the participation clause, defendants' motion for summary judgment on this claim must be granted as well.

C. Tortious Interference Claim

Finally, plaintiff argues that Paul Schaller tortiously interfered with plaintiff's employment under Wisconsin state law when Schaller gave plaintiff a negative evaluation in 1997. Because I am dismissing plaintiff's federal claims before trial, I decline to exercise supplemental jurisdiction over plaintiff's state claims. See Independent Bankers Association of America v. National Credit Union Administration, 936 F. Supp. 605, 617 (W.D. Wis. 1996)

(holding that district court is to decline to exercise supplemental jurisdiction "in all but the rarest instance" when federal claims are dismissed before trial). Neither party has shown any reason why an exception to the general rule should be made in this case. However, because this case was removed from state court, I will remand it to the Circuit Court for Portage County for resolution of the state law claim, pursuant to 28 U.S.C. § 1367(c). See Carnegie-Mellon University v. Cohill, 484 U.S. 343, 357 (1988) ("[A] district court has discretion to remand to state court a removed case involving pendent claims upon a proper determination that retaining jurisdiction over that case would be inappropriate.").

ORDER

IT IS ORDERED that:

1. Plaintiff Michael J. Olsen's motion to strike as untimely defendants' affidavits filed on July 28, 2000 is DENIED;

2. The motion of defendants Marshall & Ilsley Corporation and M&I Mid-State Bank for summary judgment is GRANTED;

3. The state law claim of plaintiff Michael J. Olsen is REMANDED to the Circuit Court for Portage County. The clerk of court is directed to enter a judgment for defendants on plaintiffs' federal claims only.

Dated this 7th day of September, 2000.

BY THE COURT:

BARBARA B. CRABB
District Judge