IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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ANDREW JAMES SCOTT,

Plaintiff,

v.

STATE OF WISCONSIN DEPARTMENT OF WORKFORCE DEVELOPMENT,

Defendant.

OPINION and ORDER

06-C-308-C

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In this civil action for monetary relief, plaintiff Andrew James Scott asserts two claims against defendant State of Wisconsin Department of Workforce Development for (1) creating a hostile work environment because of his sex and (2) retaliating against him for opposing discriminatory practices. Both of these claims are brought pursuant to Title VII of the Civil Rights Act of 1964. Jurisdiction is present. 28 U.S.C. § 1331.

Now before the court is defendant's motion for summary judgment, which will be granted because plaintiff has failed to adduce evidence from which a reasonable jury could conclude that defendant's treatment of plaintiff was sufficiently severe or pervasive to create a hostile work environment under Title VII. Further, plaintiff waived his retaliation claim

by failing to argue it in his response to defendant's motion for summary judgment.

Defendant filed a second motion titled "Motion to Disregard Portions of the Materials Submitted by Plaintiff in Oppositi[o]n to Motion for Summary Judgment," dkt. #35, which will be denied as unnecessary. In this motion and attached materials, defendant identifies portions of affidavits that it believes are inadmissible because they are conclusory, lack foundation or are irrelevant; it urges the court not to consider them. It is not entirely clear why defendant submitted such a motion, as it also presented these objections in response to specific facts proposed by plaintiff that relied on portions of the affidavits. I have taken defendant's objections into consideration in the context of determining which facts are disputed.

From the parties' proposed findings of fact, I find the following facts to be material and undisputed.

UNDISPUTED FACTS

A. Plaintiff's Employment History With Defendant

Plaintiff Andrew James Scott is a 56-year-old man who lives in Madison, Wisconsin. Defendant State of Wisconsin Department of Workforce Development is a state government agency with its principal administrative offices in Madison, Wisconsin.

In 1988, plaintiff began his work for defendant as a Food Stamp Job Search

Coordinator in the Watertown and Beaver Dam Job Services Offices. His classification at that time was "Job Service Specialist 1." Several months after plaintiff was hired, Mary Witt became the Job Services District Director for Columbia, Sauk, Jefferson and Dodge counties, which include Watertown and Beaver Dam. As the director, Witt was authorized to direct the work of her subordinates. She pressured plaintiff to do work that was outside the scope of his program funding, which put a strain on his time.

In May or June of 1990, plaintiff was reclassified as a Job Service Specialist 2 and transferred to the Madison Job Service Office. He accepted the transfer to "get away from the Supervision of Mary Witt." However, six months after plaintiff's transfer to the Madison office, Witt was appointed Madison Job Service Director. Plaintiff and others voiced their opposition to her appointment, because they believed she had a "harassing, controlling, vindictive management style."

Mary Pasholk began working at the Madison Job Service Office in 1995. She was plaintiff's direct supervisor and reported to Witt. In October 1999, plaintiff suffered from sleep apnea and requested a disability accommodation; his doctor recommended that he be allowed to take breaks from work to nap during the day. Plaintiff asked that he be allowed to drive a short distance home to nap on a flex schedule. In response, Pasholk and Witt arranged for a cot to be set up in an empty cubicle with a curtain across the doorway. This cubicle was near the paper shredder; the cubicles opposite and next to it were empty.

Plaintiff used the cot to nap on only one occasion and felt uncomfortable about doing so.

In October 2001, following a period of medical leave, plaintiff's title was Veteran's Specialist. In March 2002, plaintiff received a promotion; he was named Local Veteran's Employment Representative. From March 2002 until July 2003, plaintiff performed most of his job responsibilities satisfactorily. However, he had frequent disputes with Pasholk. (Plaintiff alleges that the disputes arose because Pasholk and Witt expected him to do work outside his project area; defendant asserts that plaintiff could not cope with stressors inherent to his position, including supervision and deadlines.)

On July 22, 2003 plaintiff went to Pasholk's office with stacks of files and asked whether they could meet in room 4 to discuss his documentation of veterans he had served. Pasholk had sent plaintiff an email 4 or 5 days earlier, in which she asked him to "completely re-do approximately a week's worth of work product . . . pertaining to the second quarter Veteran's reports and his annual evaluation." Plaintiff asked to meet in room 4 and not Pasholk's office because her office was cramped and he felt intimidated when he was in close quarters with her. Pasholk told plaintiff that it was not necessary for him to show her the documentation regarding the number of veterans he had served and that they could meet in her office. When plaintiff insisted that they meet in room 4, Pasholk asked him whether he had reserved it. When he didn't answer, she asked the question two more times and raised her voice. Plaintiff was embarrassed and walked away.

Pasholk then called to reserve the conference room, went to find plaintiff and told him that they could meet in room 4. (Plaintiff alleges that it was unnecessary to reserve the conference room, as it was open.) After they met and discussed the changes, plaintiff sent Pasholk an email, in which he stated

> Thanks for meeting with me. Your input was very helpful. I will be meeting with Wayne to get more info on the re-established outstation at the VA Hospital. I will concentrate on re-vamping the Quarterly and get the final version to you. As far as my GAR, I am about finished and will get that into you after the Quarterly is re-vamped.

On Thursday, July 31, 2003 Pasholk sent an email to plaintiff in which she asked that he complete the reports before leaving on a ten-day vacation the following day. The next morning, plaintiff sent Pasholk an email, in which he stated that he was not sure that he could meet the deadline. They exchanged another set of emails, in which Pasholk sent plaintiff a chronology of the veterans's reports and plaintiff accused Pasholk of harassment and requested medical leave for the rest of the day. Pasholk approved his request for medical leave. Plaintiff was distressed by their interaction and began sobbing at his desk. Several co-workers helped plaintiff to his car.

After plaintiff's vacation ended on August 10, 2003, he took a leave of absence until November 3, 2003. When he returned, he requested several accommodations, including that he not be required to meet alone with Pasholk. She denied this request because she felt that it was necessary to meet in person with the people she supervised. In addition to

plaintiff, Pasholk supervised 28 employees and carefully monitored their work to insure that they were carrying out their duties appropriately.

On December 12, 2003 Witt met with Wayne Anson, who was also a veteran's representative, in order to determine how plaintiff was doing at work. Plaintiff saw Witt meeting with Anson and became anxious when Anson told him about the topic of the meeting. On December 15, 2003, plaintiff met with Witt and expressed his interest in doing other work. He and Witt discussed his professional interests and job search strategies. At some point during the meeting, Witt asked why plaintiff appeared to dislike her so much. In response, he said "something to the effect" of "Oh Mary, people with my condition need to scapegoat someone." Plaintiff was upset by the meeting, left work and took leave without pay for the rest of the week.

Plaintiff returned to work on December 22, 2003, when Pasholk and Witt were on vacation. On January 5, 2004, plaintiff received a temporary work assignment with the Workforce Opportunities Tax Credit program. Plaintiff did not return to work for Witt or Pasholk. He was terminated for medical reasons in January 2006 after he had been unable to find alternative employment in the Department of Workforce Development or other state agencies.

When plaintiff left his position as Local Veterans Employment Representative at the Madison Job Service office in late 2003, there were four Local Veterans Employment

Representatives in the district, three of whom were male. In addition, there were four Disabled Veterans Outreach Program representatives, all of whom were male. Plaintiff was the only Local Veterans Employment Representative who reported to Pasholk and Witt on a daily basis.

Plaintiff believes that Witt and Pasholk treated male employees differently from female employees. When plaintiff tried to provide input at staff meetings, Witt rolled her eyes "and used other body language to demean him and signify that his comments should be dismissed as being unimportant or frivolous." He believes that she and Pasholk harassed him and "microscopically managed his employment" because he is male.

B. Other Employees' Experiences With Witt and Pasholk

Raul Reyes worked for defendant at the Madison Job Service Office under Witt's supervision for approximately eighteen months in the mid-1990s and eventually transferred out of the office "at least in part to be out from under the supervision of Mary Witt." He found her "unreasonable, rude and manipulative" and believed she treated female employees more favorably than male employees.

Gary Johanknecht worked for defendant at the Madison Job Service Office as a Local Veterans' Employment Representative under Witt's supervision for an undisclosed amount of time. He transferred out of the office "to get out from under the supervision of Mary

Witt." (Johanknecht does not identify when he worked for Witt or for how long.) He believes that Witt discriminated against men on the basis of gender and saw her "bully and embarrass people." He saw Witt treat plaintiff in an "abusive and demeaning" way at meetings. (Johanknecht does not explain what he means by this.)

William Austin worked for defendant in the Madison Job Service Office for approximately six years in the mid-to late 1990s. He transferred out of the office "to get as far as possible away from Mary Witt and his immediate supervisor, Mary Pasholk." He believed that Witt and Pasholk "microscopically managed his employment" and "were discriminating against him[] and other males in the building." On one occasion, Pasholk cancelled her approval for him to take leave to drive to a seminar in Colorado. After Austin filed a successful grievance, Pasholk required him to keep a "by the minute" log of when he was at his desk. In addition, Pasholk "wrote him up" for submitting a weekly voucher for a "meal expense due to lack of refrigeration appliances." Austin filed and won a grievance about this incident as well. Austin observed that plaintiff was "under stress from the same type of unrelenting scrutiny."

Alvin Lee Joyner worked for defendant in the Madison Job Service Office for approximately six years in the late 1980s and early to mid-1990s until he transferred out of the office and took a demotion in level "at least in part to get out from underneath the management style of Mary Witt." He found her management style "very harassing and

critical" and believed she did not like male employees. Witt pushed the veterans representatives to work on non-veteran-related matters.

Charles Borchardt worked for defendant in the Madison Job Service Office for six months in 1995, after which he transferred out of the office. One of the reasons that Borchardt transferred "was to get out from under the supervision of Mary Pasholk and Mary Witt." He believed that there was a double standard in the way Pasholk and Witt treated male and female employees and that they harassed men and discriminated against them. For example, one day, while Borchardt was staffing the front desk alone because his female co-worker Angie was absent, Witt called from her home. Borchardt was busy with other responsibilities and did not answer the phone. Witt called back several minutes later and told him "in a very angry tone" that she expected him to answer the phone within three rings every single time. She reprimanded him again the following day. Angie was never required to staff the front desk herself, was frequently absent and was known by others in the office to sleep at her desk. Borchardt is not aware of any efforts by Pasholk or Witt to discipline Angie for this behavior.

OPINION

A. Hostile Work Environment

Plaintiff contends that defendant subjected him to discrimination in the form of a

hostile work environment in violation of Title VII of the Civil Rights Act of 1964. Under Title VII, an employer may not "discriminate against any individual . . . because of such individual's . . . sex . . . ." 42 U.S.C. 2000e-2(a)(1). Title VII is violated when discrimination based on race or gender has created a hostile or abusive work environment. In order to survive summary judgment on a hostile work environment claim, a plaintiff must present evidence that: "(1) he was subject to unwelcome harassment; (2) the harassment was based on his race [or gender]; (3) the harassment was severe or pervasive so as to alter the conditions of the his work environment by creating a hostile or abusive situation; and (4) there is a basis for employer liability." Williams v. Waste Management of Illinois, 361 F.3d 1021, 1029 (7th Cir. 2004).

In this case, the threshold question is whether the "hostile conduct" described by plaintiff was sufficiently severe or pervasive to violate Title VII. This element requires evidence that the work environment was "one that a reasonable person would find hostile or abusive, and one that the victim in fact did perceive to be so." Cerros v. Steel Technologies, Inc., 288 F.3d 1040, 1045 (7th Cir. 2002). In evaluating the severity and pervasiveness of allegedly discriminatory conduct, courts consider "all the circumstances," including "the frequency of the . . . conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." Robinson v. Sappington, 351 F.3d 317, 329 (7th Cir.

2003) (quoting Harris v. Forklift Systems, Inc., 510 U.S. 17, 23 (1993)).

In his brief in opposition to defendant's motion for summary judgment, plaintiff cites three specific examples of Witt's and Pasholk's conduct toward him that he contends created a hostile work environment. First, Witt and Pasholk did not accommodate his sleep apnea in a manner he found appropriate in October 1999. Next, he alleges that Pasholk spoke sharply and unprofessionally with him and demanded unnecessarily that he revise reports before leaving on vacation in July 2003. Finally, Witt interviewed Wayne Anson, one of plaintiff's coworkers, to determine whether plaintiff was able to meet his job responsibilities after returning from a leave of absence in December 2003, which caused plaintiff to become anxious. In addition to these specific examples, plaintiff alleges generally that Witt required him to work on projects outside his funding area and rolled her eyes when he made suggestions in meetings and that Witt's and Pasholk's scrutiny of his work product was discriminatory.

Clearly, plaintiff *believed* that Witt and Pasholk's treatment of him was hostile and abusive. However, to determine whether plaintiff's claim may proceed to trial, the court must consider also whether Witt and Pasholk's conduct was objectively severe or pervasive. Evaluated from the perspective of a reasonable person, the conduct plaintiff describes is, at worst, indicative of poor management and communication skills. It was certainly appropriate for Witt and Pasholk to monitor his work, set priorities and create deadlines for

projects. And although eye-rolling and occasional shouting are not admirable behaviors for a supervisor to engage in, they do not constitute harassment. As for their alleged failure to accommodate plaintiff's sleep apnea in the manner he preferred, little need be said. It is not harassment to provide the space and opportunity for napping at work, even if plaintiff would have preferred to nap at home.

Neither Witt nor Pasholk had any physical contact with plaintiff. They did not use patently offensive words when speaking with him. Further, the limited examples of allegedly harassing behavior that plaintiff provides occurred over the period of many years and are too isolated to demonstrate that Witt and Pasholk's hostile conduct was pervasive within the meaning of Title VII. Plaintiff worked under Witt's supervision for approximately thirteen years and under Pasholk's supervision for eight years. Despite that extended working relationship, plaintiff has mustered only two specific example of hostile conduct. This is strong evidence that the behavior was not pervasive.

Even a cursory review of case law reveals that the Court of Appeals for the Seventh Circuit has approved a grant of summary judgment for a defendant employer in the face of far more offensive conduct. See, e.g., Ezell v. Potter, 400 F.3d 1041, 1044-45 (7th Cir. 2005) (finding summary judgment proper when supervisor made statements to the effect that women with children were faster carriers than men because they wanted to get home to their children and that men are lazy and "want to milk all the overtime they can get," gave

better assignments to women and subjected plaintiff to "street supervision and intense scrutiny"); Russell v. Board of Trustees of University of Illinois at Chicago, 243 F.3d 336, 343-44 (7th Cir. 2001) (finding that summary judgment for defendant employer was proper when supervisor referred to plaintiff as "grandma," stated that all intelligent women were unattractive, commented that he supervised "staff from hell," called two of plaintiff's coworkers bitches and told plaintiff's coworker that her clothes were "sleazy," she dressed "like a whore" and had been hired for her looks).

Plaintiff attempts to bolster his argument that Witt's and Pasholk's alleged harassment was pervasive and directed at men with the affidavits of five male former employees who worked under their supervision. The upshot of their statements is that they believed that one or both women were difficult to work for and "abusive" in their treatment of male employees. However, the specific examples of "discriminatory conduct" described by the other former employees are even more remote and tenuous than those related to Witt and Pasholk's treatment of plaintiff himself. Austin states that Pasholk withdrew a previous approval for him to drive to conference and inappropriately reprimanded him for submitting questionable reimbursement forms. Borchardt states that Witt once yelled at him for failing to answer the phone at the reception desk within three rings and did not discipline a female coworker for more egregious rule violations.

Although harassing behavior directed at others may contribute to the creation of a

hostile work environment, when statements are "directed at someone other than the plaintiff, the impact of [such] 'second hand harassment' is obviously not as great as the impact of harassment directed at the plaintiff." Russell, 243 F.3d at 343 (quoting McPhaul v. Board of Commissioners, 226 F.3d 558, 567 (7th Cir. 2000) (internal quotations and citations omitted)); see also Ezell, 400 F.3d at 1048 ("We have characterized this 'second-hand' harassment as lesser in impact than harassment directed at the plaintiff."). Here, plaintiff has adduced evidence of three incidents of an ambiguous nature that his coworkers experienced sometime in the mid to late 1990's; this does not suggest that Witt and Pasholk were engaged in an ongoing pattern of hostile conduct towards male employees. Further, the conduct that Austin and Borchardt complain about is innocuous on its face. Therefore, the statements of the other men who were supervised by Witt or Pasholk provide no additional support for plaintiff's claim that he was subjected to severe or pervasive discriminatory conduct.

Because I have found that the conduct in which Witt and Pasholk engaged was not sufficiently severe or pervasive to create a hostile work environment in violation of Title VII, I need not consider whether this conduct was "discriminat[ion] . . . because of . . . sex." However, I do note that plaintiff has adduced no evidence that Witt's and Pasholk's behavior was motivated by gender, or even related to it. Their behavior may well have made plaintiff feel uncomfortable at work. But Title VII is not a prohibition on unpleasant

conduct in the workplace; the statute is violated only when the conduct is improperly motivated. McKenzie v. Milwaukee County, 381 F.3d 619, 624 (7th Cir. 2004) ("We have made clear that Title VII is not a general code of workplace civility, nor does it mandate admirable behavior from employers.") (internal quotation omitted). Their affidavits make clear that plaintiff and his former coworkers believe that Witt and Pasholk disliked men and treated male employees differently, yet they do not point to any specific examples in support of their assessment. Even if this belief was widely held among male employees, it is insufficient to show sex discrimination. Pilditch v. Board of Education, 3 F.3d 1113, 1119 (7th Cir. 1993) ("mere subjective beliefs []—without the backing of hard evidence—cannot prove that an action was inspired by improper motivations") (citing McMillian v. Svetanoff, 878 F.2d 186, 190 (7th Cir. 1989)).

Finally, I do not understand plaintiff's complaint to allege that he was subjected to disparate treatment because of sex, but instead only that he was subjected to a hostile work environment because of sex. However, defendant devotes substantial space to arguments related to disparate treatment in its brief in support of its motion for summary judgment. It is difficult to understand much of plaintiff's brief, but in it he appears to make no reference to a disparate treatment claim. In the unlikely event that he intended to pursue this claim as well it would have been dismissed, because he has adduced no evidence of disparate treatment because of sex, or offered any argument in response to defendant's

motion for summary judgment.

B. Retaliation

In his complaint, plaintiff asserts that he was wrongfully retaliated against for opposing discriminatory practices. Under Title VII, an employer is prohibited from taking retaliatory actions that "discriminate against" an employee because he has opposed a practice that Title VII forbids. Kampmier v. Emeritus Corp., 472 F.3d 930, 939 (7th Cir. 2007) (citing Burlington Northern & Santa Fe Railway Co. v. White, 126 S. Ct. 2405, 2410 (2006)). In its brief, defendant argues that summary judgment is proper because there is no evidence that defendant took any action in retaliation for plaintiff's opposition to discriminatory practices. Plaintiff says nothing about his retaliation claim in his response brief. In light of plaintiff's apparent abandonment of this claim, I deem it waived and will grant defendant's motion for summary judgment. Davis v. Carter, 452 F.3d 686, 691-92 (7th Cir. 2006) ("we have repeatedly recognized that perfunctory and undeveloped arguments, that are not supported by pertinent authority, are waived") (internal quotations omitted).

ORDER

IT IS ORDERED that

1. The motion for summary judgment of defendant State of Wisconsin Department of Workforce Development is GRANTED.

2. Defendant's "Motion to Disregard Portions of the Materials Submitted by Plaintiff in Oppositi[o]n to Motion for Summary Judgment," dkt. #35, is DENIED as unnecessary.

The clerk of court is directed to enter judgment for defendant and close the case.

Entered this 3rd day of April, 2007.

BY THE COURT:

/s/

BARBARA B. CRABB
District Judge