IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

TERI L. MARSH,

Plaintiff,

v. MEMORANDUM AND ORDER

STEVENS CONSTRUCTION CORPORATION, 06-C-310-S

Defendant.

Plaintiff Teri L. Marsh commenced this civil action under Title VII claiming that defendant Steven Construction Company subjected her to gender discrimination, sexual harassment and retaliation for complaining about discrimination. She further alleges that she was constructively discharged.

On December 1, 2006 defendant filed a motion for summary judgment pursuant to Rule 56, Federal Rules of Civil Procedure, submitting proposed findings of facts, conclusions of law, affidavits and a brief in support thereof. This motion has been fully briefed and is ready for decision.

On a motion for summary judgment the question is whether any genuine issue of material fact remains following the submission by both parties of affidavits and other supporting materials and, if not, whether the moving party is entitled to judgment as a matter of law. Rule 56, Federal Rules of Civil Procedure.

Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. An adverse party may not rest upon the mere allegations or denials of the pleading, but the response must set forth specific facts showing there is a genuine issue for trial. Celotex Corp. v. Catrett, 477 U.S. 317 (1986).

There is no issue for trial unless there is sufficient evidence favoring the non-moving party that a jury could return a verdict for that party. If the evidence is merely colorable or is not significantly probative, summary judgment may be granted. Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986).

FACTS

For purposes of deciding defendant's motion for summary judgment the Court finds that there is no genuine dispute as to any of the following material facts.

Plaintiff Teri Marsh is an adult female resident of Stoughton, Wisconsin. Defendant Stevens Construction Corporation (Stevens) is a commercial construction company in Madison, Wisconsin.

On or about March 29, 2004 plaintiff applied for a position with Stevens as a "laborer, flagger". On April 14, 2004 plaintiff was hired as a "General Laborer" with a starting base pay of $12.00

an hour. Plaintiff's job duties included loading and unloading materials and clean up tasks. Other male general laborers including Mr. Wolf and Mr. Lowe who were hired at the same time as plaintiff performed sweeping and cleaning tasks as did plaintiff. Plaintiff, Wolf and Lowe were hired through the YWCA "TrANS" program which provides low income women and minority men with job training and pre-apprentice work in construction.

Plaintiff could be placed at any of its 15 different job sites based upon Stevens' needs. The King Street site in Madison, Wisconsin was the preferred site because employees working there received a wage of $28.95 per hour. During her employment plaintiff worked at the King Street site, the Mautz Paint location, the Marina Condos project and the Weston Condos project but the majority of her time was spent working at the King Street site. Between April 16, 2004 and July 6, 2004 plaintiff's average hourly wage was much higher than the average wage of most of the male general laborers. Whenever plaintiff was assigned to a site other than the King Street site she complained.

Kevin Frutiger was plaintiff's supervisor at the King Street site. It is disputed whether Frutiger yelled at her and treated her more harshly than he did male employees. It is further disputed whether plaintiff "smarted off" to Frutiger and whether she was a slower worker than her male co-worker Lowe.

On or about May 3, 2004 Stevens did a concrete pour at the King Street site but plaintiff was not allowed to participate. Her male co-worker Wolf was allowed to work on the concrete pour.

Ron Weitzel was plaintiff's supervisor at the Mautz job site. On or about May 12, 2004 plaintiff complained to Weitzel about the way Frutiger was treating her.

On May 24, 2004 Hunter Bohne, Stevens General Superintendent, Scott Shanks, one of plaintiff's supervisors, and Dena Gullickson, the Human Resources Manager, met with plaintiff and spoke to her about her complaints that she was not working only at the King Street site. At this meeting plaintiff expressed her concerns about Frutiger's yelling at her. It is disputed whether at this meeting Gullickson and Hunter reprimanded plaintiff for complaining to Weitzel about Frutiger's treatment of her.

After the meeting Hunter Bohne spoke with Frutiger about plaintiff's concerns and reminded him to treat her fairly. Frutiger apologized to plaintiff for yelling at her and told her he wanted to start over.

On June 8, 2004 plaintiff states Weitzel told her that she could not do the work because the work was too tough and she did not have the muscles to do it. Weitzel denied making this statement.

On June 16, 2006 plaintiff states Weitzel created the nickname "Nipples" for her. Weitzel denied doing so. On or about June 17,

2004 plaintiff states that Weitzel suggested she take off her shirt at work because it was hot. Weitzel denied making this statement.

On June 18, 2004 plaintiff was not allowed to participate in a concrete pour at the King Street site. On June 15, 2004 plaintiff's request for overtime work was denied. On June 30, 2004 plaintiff's request to participate in a concrete pour was denied.

On July 1, 2004 plaintiff states that Weitzel told her he would rather look at her than any other employee, that he wanted to hug her and called her Nipples. Weitzel denied making these statements.

On July 6, 2004 plaintiff states that Frutiger told her that Weitzel would be lonely if she did not remain at the Mautz work site. Frutiger denies making this statement.

On July 6, 2004 plaintiff met with Dena Gullickson, Stevens' Human Resources Manager, and Hunter Bohne and complained about sexual comments made to her on the job. She told them that Ron Weitzel, her supervisor, had asked her to take a hot oil bath with him on Memorial Day weekend which she refused and gave her his cell phone number in case she changed her mind.

Plaintiff also told them that a co-worker, Hugh Bohne, told her that instead of buying a lawn mower she should "buy some sheep and butt fuck them". She also reported he had told her that she should be at his house making dinner for him in a thong.

Gullickson and Hunter Bohne told plaintiff that they would investigate her harassment claims and told her she could go home while they did so. At the time plaintiff was satisfied with this response.

In this meeting plaintiff complained that she was not working overtime or on concrete pours as were the male laborers. Ms. Gullickson checked to see whether the other new employees were working overtime hours. She found that Gregory Diebel, Jay Juve and Peter Weiss did not work overtime on Saturdays.

Immediately after the meeting Hunter Bohne went to the King Street site to investigate plaintiff's claims. He spoke with Doug Hills, superintendent, Ron Jones, foreman, George Kingsland, superintendent, Kevin Frutiger, laborer foreman and Tony Keller, assistant foreman. Hunter Bohne reminded them that Stevens did not tolerate sexual harassment and asked them if they had witnessed any inappropriate behavior directed at plaintiff. They denied witnessing any such behavior.

A day or so later Hunter Bohne met with Ron Weitzel and Hugh Bohne to ask them about their alleged comments to plaintiff. Weitzel denied making the comments and also submitted a written statement denying plaintiff's allegations. Weitzel had been employed by Stevens for 33 years and had never had any previous complaints made against him as a manager.

Hugh Bohne denied making the comment to plaintiff about cooking dinner for him in a thong. He indicated that he did make jokes about farmers and sheep but denied that they were in plaintiff's presence or directed towards her.

Doug Hills reported to Hunter Bohne that in response to another employee indicating the need for a large tool on the job, plaintiff said she "would also like a large one". Plaintiff denied making this comment. Weitzel reported that plaintiff told him dirty jokes which she denied. Plaintiff told Weitzel the story about catching her husband in the backseat of her sister's car "getting a blow job."

On July 7, 2004 plaintiff called Gullickson and told her she was resigning her job because she would not be able to face her co-workers after she had complained about them. Later that day plaintiff called Gullickson and told her that she had changed her mind and decided not to resign. Gullickson accepted plaintiff's rescission of her resignation and gave her the option of returning to work at the King Street site or a transfer to another site. Plaintiff agreed to transfer to the Weston Condos project. It is disputed whether she was forced to agree.

Dan Kast was the supervisor at the Weston Condos project. At this site plaintiff was allowed to participate in two concrete pours. Although plaintiff was allowed to work on concrete pours she was paid less than she was paid at the King Street site.

On July 22, 2004 plaintiff arrived at the Weston site to work a concrete pour. Frutiger was there. It is disputed whether during the pour he told plaintiff "to get the fuck out of here". It is also disputed whether another employee Lee Bowery told plaintiff "to get the fuck over here and rake this out you stupid fucking blonde."

On August 5, 2004 plaintiff received a written warning for attendance violations. On August 9, 2004 plaintiff walked off the job and quit. She gave various reasons for quitting, none of which included any reference to sexual harassment. She left Ms. Gullickson a voice mail stating that she was quitting at Stevens in order to return to another job.

Plaintiff did not submit another complaint through official channels after July 6, 2004.

Every Stevens employee including plaintiff is given an employee handbook which contains Stevens' anti-harassment policy. The policy states that Stevens "does not tolerate or condone harassment of any kind by employees or third parties..." The policy states that the employees should report any harassment to their supervisor, the General Superintendent or human resources but that they are free to bring the situation to the attention of any member of management with whom they are comfortable. The Open Door Policy states that if an employee fails to get a satisfactory

answer to a problem the employee can also directly address it with the President of the Company.

MEMORANDUM

Plaintiff claims that she was discriminated against on the basis of her gender. To demonstrate a *prima facie* case of gender discrimination, plaintiff must show she is a woman, that she was performing her job satisfactorily, that she suffered an adverse employment action and that the employer treated similarly situated employees more favorably. See Little v. Ill. Department of Revenue, 369 F.3d 1007, 1011 (7th Cir. 2004).

Plaintiff claims that she was treated differently than similarly situated employees because she was denied concrete pour training and overtime work. It remains disputed whether plaintiff was meeting the legitimate expectations of her employer. Plaintiff has presented some evidence that two male employees who were hired at the same time for the same position were treated more favorably. Genuine issues of fact remain as to whether plaintiff has demonstrated a *prima facie case* of gender discrimination.

Factual disputes also remain as to whether defendant articulated legitimate business reasons for its decisions or if they were pretextual for gender discrimination. Accordingly, defendant's motion for summary judgment on plaintiff's gender discrimination will be denied.

Plaintiff claims that she was subjected to a hostile work environment. Title VII prohibits sexual harassment in the work place which is defined as unwelcome sexual advances, requests for sexual favors and other verbal or physical conduct of a sexual nature. 29 C.F.R. §1604.11(a)(1985). To violate Title VII sexual harassment must be so severe or persuasive to alter the conditions of the victim's employment and create an abusive work environment. Meritor Savings Bank FSB v. Vinson, 477 U.S. 57, 67 (1986). The conduct need not be both severe and pervasive. Hostetler v. Quality Driving, Inc., 218 F.3d 798, 808 (7th Cir. 2000).

The harassment must be both objectively and subjectively offensive. The victim must have perceived the environment to be sexually offensive, and the environment must also be one that a reasonable person would find offensive. Harris v. Forklift Systems, Inc., 510 U.S. 17, 21 (1993).

Whether sexual harassment is sufficiently severe or pervasive from an objective standpoint depends on the frequency of the discriminatory 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. Harris v. Forklift Systems, Inc., 510 U.S. at 23.

The United States Court of Appeals for the Seventh Circuit discussed the conduct that establishes an objective hostile work

environment in Baskerville v. Culligan International Company, 50 F.3d 428, 430 (7th Cir. 1995) as follows:

> Drawing the line is not easy. On one side lie sexual assaults; other physical contact, whether amorous or hostile, for which there is no consent express or implied; uninvited sexual solicitations; intimidating words or acts; obscene language or gestures, pornographic pictures.(Citations omitted). On the other side lies the occasional vulgar banter, tinged with sexual innuendo, of coarse or boorish workers. (Citations omitted).

It remains disputed whether Ron Weitzel, plaintiff's supervisor, and Hunter Bohne, her co-worker, made the following comments alleged by plaintiff: that Weitzel created the nickname "Nipples" for her and asked her to take her shirt off because it was hot; told her he would rather look at her than any other employee and that he wanted to hug her. On July 6, 2004 plaintiff told Gullickson and Hunter Bohne that Weitzel had invited her to take a hot oil bath with him on Memorial Day and gave her his cell phone number; that her co-worker Hugh Bohne told her she "should buy some sheep and butt fuck them" and that "she should be at his house making dinner for him in a thong. These comments, if made, cross the line from vulgar banter to uninvited sexual solicitations and obscene language. It remains disputed whether plaintiff's work environment was objectively and subjectively hostile.

Courts have held that an employer is vicariously liable for a hostile work environment created by a supervisor. Burlington Industries, Inc. v. Ellerth, 524 U.S. 742, 765 (1998), Faragher v.

Boca Raton, 524 U.S. 775 (1998). Ron Weitzel was plaintiff's supervisor.

When no tangible employment action is taken, however, a defending employer may raise an affirmative defense to liability. The two necessary elements of the defense are that the employer exercised reasonable care to prevent and promptly correct any sexual harrassing behavior and that plaintiff unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise. No affirmative defense is available when the supervisor's harassment culminates in a tangible employment action, such as discharge, demotion or undesirable reassignment. Id., McPherson v. City of Waukegan, 379 F.3d 430, 441-442 (7th Cir. 2004).

It is disputed whether plaintiff suffered an adverse employment action. She claims she was forced to transfer to the Weston Condo projects which was a demotion because of a reduction in pay. Defendant contends she voluntarily agreed to the transfer.

Factual disputes remain concerning plaintiff's hostile work environment claims. Accordingly, defendant's motion for summary judgment on this claim will be denied.

Plaintiff also claims that she was retaliated against after she complained of the sexual harassment and because of this retaliation was constructively discharged. To succeed on her retaliation claim plaintiff must show that she engaged in

statutorily protected activity, that she was subjected to an adverse employment action and that the two events had a causal connection. Lang v. Illinois Dept. Of Children and Family Service, 361 F.3d 416, 418 (7th Cir. 2004).

Plaintiff claims that after she complained of sexual harassment on July 6, 2004 she was forced to transfer to the Weston Project where she was paid less than on the King Street site. It remains disputed whether plaintiff's transfer was voluntary. Since factual disputes remain on plaintiff's retaliation claim, defendant's motion for summary judgment on this claim will be denied.

To prevail on a constructive discharge plaintiff must show that her working conditions were so intolerable as a result of unlawful discrimination that a reasonable person would have been compelled to resign. Rabinovitz v. Pena, 89 F.3d 482, 489 (7th Cir. 1996). After plaintiff transferred to the Weston Condo site, she did not complain to any supervisor about sexual harassment or retaliatory conduct. It is disputed whether on July 22, 2004 Frutiger told her "to get the fuck out of here" and Howery told her "to get the fuck over here and rake this out you stupid fucking blonde." Had these statements been made plaintiff has failed to show her working conditions were so intolerable as a result of unlawful discrimination that a reasonable person would have been

compelled to resign. Defendant is entitled to judgment as a matter of law on plaintiff's constructive discharge claim.

Defendant's motion for summary judgment on plaintiff's constructive discharge claim will be granted. In all other respects defendant's motion for summary judgment will be denied.

ORDER

IT IS ORDERED that defendant's motion for summary judgment on plaintiff's constructive discharge claim is GRANTED.

IT IS FURTHER ORDERED that in all other respects defendant's motion for summary judgment is DENIED.

Entered this 16th day of January, 2007.

BY THE COURT:

S/

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JOHN C. SHABAZ
District Judge