IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

KELLY SCHREIBER,

Plaintiff,

v.

M&I MARSHALL & ILSLEY BANK,

Defendant.

OPINION AND ORDER

09-cv-782-slc

On October 16, 2008, plaintiff Kelly Schreiber was fired from her job as manager of defendant M&I Marshall & Ilsley Bank's branch office in Hudson, Wisconsin. Although M&I told Schreiber that it was firing her because of a pattern of complaints about her "management style," Schreiber alleges that the real reason she was fired is because three months earlier, she had complained that she was being sexually harassed by a co-worker. Schreiber is suing for damages and equitable relief under Title VII of the Civil Rights Act of 1964, as amended by the Civil Rights Act of 1991, 42 U.S.C. § 2000e-2000e-17, alleging that M&I fired her in retaliation for complaining about sexual harassment in the workplace and that M&I treated her less favorably than the male employee who harassed her. Schreiber also asserted then withdrew an intentional interference with contract claim.

Before the court is M&I's motion for summary judgment. As discussed below, I am denying M&I's motion on Schreiber's retaliation claim. Plaintiff has presented enough circumstantial evidence of retaliation to warrant a jury trial. I am denying M&I's motion on Schreiber's sex discrimination claim because M&I premised this motion on the misunderstanding that Schreiber is claiming a hostile work environment, when in fact she is claiming differential treatment based on sex.

From the parties' proposed findings, I find the following facts to be undisputed and material for the purposes of summary judgment:

FACTS

Defendant M&I Marshall & Ilsley Bank ("M&I") is a financial institution that provides financial services to clients, business and consumers. Plaintiff Kelly Schreiber began working for M&I in July 2005. Schreiber's job was to open and then manage M&I's new branch in Hudson, Wisconsin, which opened in November 2005.

Schreiber was hired and supervised by District Manager Kurt Van Roy. Van Roy oversaw 15 M&I branches in Wisconsin, including the new Hudson branch.

Terri Markstrum is Talent Strategies Manager in M&I's Human Resources Department and serves as a human resources contact for the Northwest Wisconsin M&I branches, including those under Van Roy's supervision. Markstrum's office was located in Wausau. Van Roy consulted with Markstrum about human resources issues that arose in his branches, including issues involving Schreiber.

M&I has a Terminations policy that was in effect during Schreiber's employment. According to the policy, M&I "typically follows a progressive disciplinary approach to avoid termination, which may include verbal warnings and written warnings and/or performance improvement plans." The plan provides, however, that "more serious issues may result in disciplinary steps being skipped and an employee immediately being placed on a written warning or terminated." The policy sets forth a non-exclusive list of acts that could lead to immediate termination, including gross neglect of duty, gross misconduct, theft, insubordination and

discourteous treatment of customers, internal or external. Van Roy typically followed the progressive disciplinary approach with his employees.[1]

In 2006, Van Roy began receiving negative feedback about Schreiber from various bank employees. In April 2006, Pam Schomer, bank manager at M&I's River Falls' branch, complained to Van Roy that Schreiber was participating in River Falls' Chamber of Commerce events. Schomer felt this participation was inappropriate because Schomer, not Schreiber, was the bank manager in River Falls. Sometime before this, Van Roy had told Schreiber that it was okay for her to be involved in River Falls because she had a presence in that community and might eventually be taking over the River Falls office. (Presumably, Van Roy said this because Schomer was not performing well and had been placed on a performance improvement plan.) After Schomer complained, however, Van Roy talked with Schreiber about Schomer's concerns. Schreiber agreed to discuss the matter with Schomer, after which Schreiber agreed to step down as an ambassador at River Falls' chamber events.

Also in 2006, Betty Martino, a customer service manager at M&I's Wausau Branch, told Van Roy that Schreiber was difficult to work with on operations and procedures and initially fought her on every level. Lynn Pank, head of corporate security for the region, commented negatively to Van Roy about Schreiber's interaction with Pank on security issues. Van Roy did not discuss either of these complaints with Schreiber.

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[1] M&I points to an employee named Cheryl Kempf as an example of an employee for whom progressive discipline was not followed. This is irrelevant because Kempf did not report to Van Roy. *Ellis v. UPS, Inc.*, 523 F.3d 823, 826 (7th Cir. 2008) (To be similarly situated, an employee must have been treated more favorably by the same decisionmaker).

In June 2006, Van Roy received from the human resources department a copy of an internal transfer survey completed by Ben Franko, a personal banker who had worked under Schreiber at the Hudson branch before transferring to Eau Claire. When asked in the survey whether he agreed or disagreed that Schreiber "demonstrated fair and equal treatment" and "developed cooperation and teamwork," Franko selected the response "disagrees." Franko responded "strongly disagrees" when asked whether Schreiber "gave useful and timely performance feedback" and "encouraged and listened to suggestions." Again, Van Roy did not discuss Franko's negative feedback with Schreiber, although a copy of the survey was placed in Schreiber's personnel file.

In April 2007, Van Roy gave Schreiber her performance review for 2006. Although Van Roy indicated that Schreiber was meeting or exceeding expectations in most categories, he rated her as needing improvement in the category of "Resolving personnel problems and implementing performance plans as necessary." Schreiber Dep., dkt. 17, exh. 4, at 1. On the written evaluation, Van Roy wrote that Schreiber had caused "unnecessary conflict" with Schomer over the River Falls' Chamber of Commerce issue. *Id*. at 2. He also commented that when Schreiber felt strongly about an issue or encountered an unexpected change in plans, she tended to be "aggressive in her delivery and sometimes overly so that it leaves hard feelings." *Id*. Van Roy counseled Schreiber to "take a deep breath and think about what she's going to say and how she's going to say it." *Id*.

In 2007, Van Roy continued to receive negative reports of Schreiber's communication and management skills. In approximately May 2007, he received from Markstrum a copy of a new employee survey completed by Kelly McQuitty, who had been hired in February 2007 as

a customer service representative at M&I's Hudson branch. In the survey, McQuitty indicated that she was "extremely dissatisfied" with the Hudson branch and had had a "horrible" job experience. She voiced a number of complaints about Schreiber and other staff and remarked that it was "no wonder Hudson has such a high turnover rate with the discrepancy in communication, bullying, negativity and disorganization." Schreiber Dep., dkt. 17, exh. 10. McQuitty ended up quitting in May 2007. Van Roy discussed McQuitty's complaints with Schreiber. However, Van Roy ultimately told Schreiber not to worry about it, agreeing that McQuitty was an upset employee who "had issues all around." Schreiber was not disciplined for McQuitty's complaint.

In August 2007, Van Roy received similar feedback from a different customer service representative, Kia Lee. In an exit survey sent to human resources, Lee stated that Schreiber was often "rude and not considerate of other employees' feelings." Van Roy discussed Lee's complaints with Schreiber. Schreiber told Van Roy that she believed Lee had been influenced to write her remarks by another employee named Ricki Struemke. Van Roy agreed with Schreiber's assessment and again, did not discipline Schreiber for Lee's complaint.

Van Roy also received complaints about Schreiber's communication style from her peers at the bank. In 2007, Rich O'Connor, a financial advisor, told Van Roy that Schreiber had snapped at him and was short; Steve Arntzen, a business banker, told Van Roy that he struggled with Schreiber's overall attitude toward him and the way she communicated messages to him; and Bill Kaiser, a Community Bank President, told Van Roy that he had problems working with Schreiber and that she struggled with the business answers she was given concerning some of her clients. Van Roy did not discuss any of these comments with Schreiber.

In April 2008, Van Roy reviewed Schreiber's 2007 performance. He gave her an overall score of "Meets Expectation" and rated her performance in most areas as meeting or exceeding expectations. However, Van Roy indicated that Schreiber needed improvement in the categories of "proactively managing employee retention by ensuring consistent and fair treatment of employees and building effective teams" and "consistently model[ing] inclusion-based behaviors resulting in respectful, effective working relationships with employees and customers." Schreiber Dep., dkt. 17, exh. 8, at 1. In the comments section, Van Roy wrote:

> [Schreiber's] major continuing weakness seems to be the delivery of her message. [She] has a tendency to be aggressive and unfortunately, this has shown through in regards to her co-workers and also the employees that she manages. [She] must realize that the message she sometimes delivers is appropriate, but how she delivers it is sharp and ultimately has a negative impact on the performance and relationship with the employees.

Id. at 2. Schreiber indicated that she agreed with all of Van Roy's comments and would do all she could to improve in the areas that needed employment.

Around February or March 2008, a conflict developed between Schreiber and Ricki Struemke, who worked as a lead Customer Service Representative. Struemke complained to Van Roy and Markstrum that Schreiber had given her an unfair performance evaluation and behaved unprofessionally in front of coworkers regarding Struemke's response to her performance review. In May 2008, Van Roy spoke with Schreiber about the conflict and told her that if she did not manage the Struemke situation, she would be fired. On June 21, 2008, however, Struemke was fired for performance problems. Although it is unclear from the record whether it was Schreiber or Van Roy who made the decision to fire Struemke, Van Roy admitted that he was involved in the decision and agreed with it.

After Struemke's termination, Markstrum and Schreiber had a conversation during which Schreiber asked Markstrum whether Struemke would sue M&I. Markstrum told Schreiber that Struemke would likely file a complaint, but that Schreiber should not worry about it because it was only more "drama" involving Struemke.

On Friday, July 11, 2008, Schreiber met with Van Roy and asked whether she was going to be fired. Van Roy responded that she was not, and that if she was going to be fired she would know it because she would be put on a performance improvement plan or given warnings. Schreiber then told Van Roy that she had been sexually harassed for approximately the past six months by Mike Brunner, a mortgage originator who worked at the bank. As corroboration, Schreiber provided Van Roy with gifts Brunner had given her and a copy of a letter he had written describing his romantic feelings for her. Schreiber testified at her deposition that she did not report Brunner's harassment sooner because she "wanted to deal with it on [her] own and make it stop without having to . . . get Mike in trouble." Schreiber Dep., dkt. 17, at 122.

Van Roy immediately contacted Markstrum, who in turn called Tami Pit at M&I's Corporate Human Resources Department in Milwaukee. Markstrum and Pit agreed that Schreiber and Brunner should not work together and that Brunner would be transferred to another location.

On Monday, July 14, 2008, Markstrum called Schreiber to update her on the status of M&I's investigation. Markstrum told Schreiber that M&I would be transferring Brunner to the River Falls branch, but that she (Markstrum) and Van Roy could not meet with Brunner until Friday or the following Monday. Markstrum told Schreiber that during this time, Schreiber could work from home or from the River Falls branch in order to avoid contact with Brunner.

The following day, Schreiber emailed Markstrum to ask if Markstrum and Van Roy could talk to Brunner by Thursday because there were activities planned at the branch that Schreiber wanted to attend. The next day, Van Roy responded that he might be able to leave his training seminar early, but he did not think he would make it to Hudson by Thursday. In response, Markstrum emailed Van Roy and stated that she did not think he should leave his training early unless he wanted to. She wrote: "Not to be a smart guy, but [Schreiber] waited this long to tell us, we will take care of this in a week or by Monday." Around that same date, Markstrum left a voice mail for Schreiber, reiterating that the company was acting as quickly as it could and stating that she "did not appreciate" the fact that Schreiber was insisting that the Brunner deal be resolved more quickly.[2]

On July 18, 2008, one week after receiving Schreiber's complaint, Van Roy and Markstrum met with Brunner and provided him with a final written warning instructing that he was to have no further contact with Schreiber and that any future incidents of harassment would result in immediate discharge. The warning also stated that Brunner would be transferred to the River Falls branch effective immediately. Schreiber had no further contact with Brunner after he was transferred.[3]

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[2] M&I argues that Markstrum's voice mail is inadmissible because it is not properly authenticated. Although M&I's evidentiary objection may be well-taken at this juncture (if a tad punctilious under the circumstances), I do not address it because I find that even if it were admissible, Markstrum's voice mail does not support any inference of retaliatory animus. *See infra* at 15.

[3] Schreiber claims that after she complained about Brunner, Van Roy became "standoffish" and unresponsive to her e-mails and voice mails, but she has no factual support for this claim: at her deposition, Schreiber could offer no specific examples of e-mails or phone calls that Van Roy did not return. Where the nonmoving party bears the burden of proof at trial, as Schreiber would, she must present specific facts showing a genuine issue to survive summary judgment. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24 (1986). "Rule 56 demands something more specific than the bald assertion of the general truth of a particular matter, rather it requires affidavits that cite specific concrete facts establishing the existence of truth of the matter asserted." *Drake v. Minnesota Mining and Manufacturing Co.*, 134 F.3d 878, 887 (7th Cir. 1998) (citations omitted).

Brunner was replaced by Kelly Parmeter, who had been a mortgage originator at M&I's River Falls branch. In July 2008, shortly after she began working at the Hudson branch, Parmeter called Van Roy and reported that things were not going well. According to Parmeter, the Hudson branch was an unhappy workplace and some employees did not like Schreiber's management style.[4]

On July 28, 2008, Struemke complained to M&I's Corporate Resources Department in Milwaukee regarding how Schreiber had treated her during her employment at the Hudson branch. Struemke's allegations were investigated by Scott Valdez, who found no basis to change the decision to end Struemke's employment. However, Valdez told Van Roy that he had concerns about how Schreiber handled the situation with Struemke and advised Van Roy to take a hard look at the facts surrounding the Schreiber-Struemke conflict.

On August 13, 2008, Van Roy visited the Hudson branch. He told Schreiber that the Hudson branch was becoming a problem office, that he was being pressured from the Wausau and Milwaukee offices to do something about it and that the problems needed to stop.[5] Van

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[4] Around this same time, a former employee named Samantha Sweet e-mailed Struemke, her former supervisor, and voiced a number of complaints about Schreiber. Although Van Roy has averred that he saw Sweet's letter before he terminated Schreiber, he does not specify when he saw it and M&I does not rely heavily on Sweet's complaint in its submissions. Accordingly, I have not considered this evidence in deciding the instant motion. Obviously, Sweet's complaint, to the extent Van Roy was aware of it, will be fair game at trial.

[5] Schreiber claims that after Van Roy told her that her branch was becoming a "problem" office, she told Van Roy that it was for that reason that she had waited until after the situation with Struemke was resolved before reporting Brunner. According to Schreiber, Van Roy did not deny that her harassment complaint was one of the "problems" coming from her office, but simply told her that he "didn't want to hear anything more" come from there. PPFOF, dkt. 30, ¶¶130-131. As evidentiary support for this claim, Schreiber cites Exhibit 25 from her deposition (dkt. 17-25), which is four pages of untitled, undated, unsigned typewritten notes. This evidence is inadmissible at this juncture because Schreiber was unable to lay a foundation for the document at her deposition, *see* dkt. 18, p. 146 (I note, however, that the very last paragraph of this narrative, which is the key paragraph, states that Schreiber is writing in real time,

Roy then said that he was going to go around the branch and ask the other employees how things were working with Schreiber. Van Roy talked to other employees, but did not receive any complaints about Schreiber that day.

In September 2008, Van Roy received another call from Parmeter regarding a new employee, Yvette McKenzie, who had complaints about Schreiber. Parmeter asked Van Roy if he would talk to the employee; Van Roy said he would. Parmeter told Van Roy that McKenzie was not comfortable meeting Van Roy at the branch or having Van Roy call her there because she was worried that Schreiber was monitoring her calls. Instead, McKenzie called Van Roy on October 10, 2008 from her cell phone while in her car. McKenzie told Van Roy that morale was low at the branch, that Schreiber was an "up and down" manager from whom employees did not know what to expect and that she and another employee were thinking of quitting. McKenzie also told Van Roy that Schreiber had told her that she would "go down with Ricki" if she did not cease contact with M&I's former employee, Ricki Struemke.

On October 16, 2008, without investigating McKenzie's complaint, Van Roy discharged Schreiber. Van Roy told Schreiber that she was being fired because of her management style and

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namely on August 13, 2008, so it is hard to say why she was unable to point to this during her deposition). In any event, Schreiber may not rely on her own unsworn prior statements because they inadmissible hearsay at this juncture. It seems likely however, that this document will come back into play under F.R. Ev. 801(d)(1)(B).

Which segues to Schreiber's affidavit submitted in opposition to summary judgment, in which she repeats her claim regarding the content of her August 13, 2008 conversation with Van Roy. Schreiber Aff., dkt. 32, ¶20. M&I argues that this court must disregard the affidavit because it is not properly supported and contradicts Schreiber's prior deposition testimony. I discuss this issue in the opinion section below.

her difficulty getting along with other employees, adding that he could not keep getting calls from employees who were afraid to talk to her.[6]

With the exception of a personal banker who committed fraud, Schreiber was the only employee that Van Roy terminated without first giving a written warning or performance improvement plan. Van Roy followed this approach with Pam Schomer, who was the branch manager of M&I's River Falls branch. In 2003 and 2004, Van Roy gave Schomer negative performance reviews on which he noted that she needed to improve in various areas, including "coaching effectiveness." Schomer failed to improve, and in April 2006, Van Roy placed Schomer on a Performance Improvement Plan giving her 90 days in which to bring her performance to an acceptable level.[7] After Schomer failed to do so after being granted an additional 90-day extension, Van Roy fired her. To Van Roy's knowledge, Schomer never made a complaint of sexual harassment.[8]

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[6] Schreiber claims that Van Roy also mentioned that he had received complaints from customers. *See* Plt.'s Response to DPFOF, dkt. 29, ¶¶ 287-288. However, Schreiber does not develop any argument regarding Van Roy's explanation why he was terminating her. Accordingly, I have disregarded this evidence as irrelevant.

[7] Schreiber attempts to show that, like her, Schomer had received complaints from her subordinates about her management style. As support, she relies on a June 6, 2005 letter from Marlys Mueller produced by defendant in discovery as part of Schomer's personnel file, in which Mueller accused Schomer of pitting employees against each other, barking orders and managing by intimidation. *See* PPFOF ¶¶64-72. As defendant points out, however, nothing in the document indicates to whom Mueller sent the letter or who received it. Further, when asked about the document at his deposition, Van Roy did not recall having seen it and did not even know who Mueller was. Dep. of Kurt Van Roy, dkt. 18, at 252-53. Mueller's letter is therefore insufficient to show that Schomer and Schreiber shared a "similar set of failings" so as to make them similarly situated. *Faas v. Sears, Roebuck & Co.*, 532 F.3d 633, 642 -643 (7th Cir. 2008).

[8] As defendant points out, the evidence cited by plaintiff, Exhibit 70 to Van Roy's deposition, does not state whether Schomer complained of sexual harassment. However, M&I admits that Schreiber's harassment complaint was the only complaint of sexual harassment that Van Roy ever handled. *See* dkt. 41, Def.'s Response to PPFOF, ¶93. *See also* Dep. of Kurt Van Roy, dkt. 18, at 254 (testifying that Schomer did not complain of sexual harassment).

OPINION

I. Summary Judgment Standard

Summary judgment is proper where there is no showing of a genuine issue of material fact in the pleadings, depositions, answers to interrogatories, admissions and affidavits, and where the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). "'A genuine issue of material fact arises only if sufficient evidence favoring the nonmoving party exists to permit a jury to return a verdict for that party.'" *Sides v. City of Champaign*, 496 F.3d 820, 826 (7th Cir. 2007) (quoting *Brummett v. Sinclair Broadcast Group, Inc.*, 414 F.3d 686, 692 (7th Cir. 2005)). In determining whether a genuine issue of material facts exists, the court must construe all facts in favor of the nonmoving party. *Squibb v. Memorial Medical Center*, 497 F.3d 775, 780 (7th Cir. 2007). Even so, the nonmoving party must "do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Electric Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986).

II. Retaliation

Title VII makes it an unlawful employment practice "for an employer to discriminate against any of his employees . . . because [the employee] 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); *Wyninger v. New Venture Gear, Inc.*, 361 F.3d 965, 982 (7th Cir. 2004). A plaintiff in a retaliation case may prove her claim directly with evidence suggesting that her protected activity motivated the employer's decision or indirectly by showing that the defendants' reasons for taking an adverse act are not worthy of belief, for example, by showing

that an employer treated similarly situated employees differently. *Faas v. Sears, Roebuck & Co.*, 532 F.3d 633, 641 (7th Cir. 2008). Regardless of the method of proof, the ultimate question is the same: whether a reasonable jury could find that the defendant retaliated against the plaintiff for engaging in protected activity. *Simple v. Walgreen Co.*, 511 F.3d 668, 670-71 (7th Cir. 2007). *See also Bodenstab v. County of Cook*, 569 F.3d 651, 657 (7th Cir. 2009) (although question of pretext arises only after plaintiff has established prima facie case of discrimination and employer has countered with legitimate non-discriminatory reason for adverse action, court may skip over initial burden-shifting of indirect method and focus on question of pretext); *Adelman-Reyes v. Saint Xavier Univ.*, 500 F.3d 662, 665 (7th Cir. 2007) (same). Schreiber proceeds under both methods.

The parties agree that Schreiber engaged in statutorily protected activity and suffered an adverse job action, but disagree whether the two events were causally related. To prove a causal link, Schreiber must show that her protected conduct was a substantial or motivating factor in the employer's decision; she need not show "but for" causation. *Culver v. Gorman & Co.*, 416 F.3d 540, 545 (7th Cir. 2005). Furthermore, she need not produce that rare "admission [from defendant] of discriminatory animus," *Nagle v. Village of Calumet Partk*, 554 F.3d 1106, 1114 (7th Cir. 2009), but may establish her prima facie case "by constructing a convincing mosaic of circumstantial evidence that allows a jury to infer intentional discrimination by the decision maker." *Phelan v. Cook County*, 463 F.3d 773, 779-80 (7th Cir. 2006) (internal citations omitted). Suspicious timing, ambiguous statements made by the employer, words and actions toward employees in the protected group and other "bits and pieces" from which an inference of retaliatory intent might be drawn are among the types of circumstantial evidence that

Schreiber may use to satisfy her burden. *Troupe v. May Department Stores Co.*, 20 F.3d 734, 736 (7th Cir. 1994).

M&I argues that the undisputed evidence shows that Van Roy fired Schreiber because of the repeated complaints he received about her management style and not because of her complaint about Brunner. In response, Schreiber points to pieces of evidence that she contends would allow a jury to find that her complaint played a role in her termination: 1) Van Roy's "standoffish" behavior towards her after her complaint; 2) Markstrum's "frustration" towards Schreiber in response to her request to move quickly on her harassment complaint; 3) Van Roy's remark that Hudson had become a problem location just weeks after Schreiber's harassment complaint, and his failure to deny that the "problems" included Schreiber's harassment complaint; 4) Van Roy's failure to use progressive discipline with Schreiber; and 5) M&I's differential treatment toward her compared to others who had not filed sexual harassment complaints. *Culver*, 416 F.3d at 545 (direct method of proof can be supported either with direct or circumstantial evidence).

The first two pieces of evidence drop quickly from the summary judgment analysis. As noted in the facts section, *infra* at n. 3, Schreiber has put forth no evidence to support her conclusory and subjective allegation regarding Van Roy's alleged "standoffish" behavior towards her after she complained about Brunner. As for Markstrum's alleged "frustration" with Schreiber in relation to the Brunner complaint, this at best only marginally supports an inference of retaliation. Although derogatory remarks by a non-decisionmaker can be relevant if the person provided input into the termination decision, *Gorence v. Eagle Food Ctrs., Inc.*, 242 F.3d 759, 762 (7th Cir. 2001), Markstrum's alleged remarks reflect at most that she was irritated with

Schreiber for roweling M&I to move even more quickly in response to her relatively stale complaint, not that Markstrum was angry at Schreiber for having complained at all. This is not enough to support an inference that three months later, Markstrum retaliated against Schreiber by lobbying Van Roy to fire Schreiber.

Even discounting these two pieces of evidence, however, I am satisfied that a jury could infer from the remaining "bits and pieces" that Schreiber's complaint about Brunner was one of the reasons M&I fired her, even if it wasn't the sole reason. One important piece of evidence is Van Roy's alleged failure to deny that Schreiber's harassment complaint was one of the "problems" from her office about which he "did not want to hear anything more." M&I argues that Schreiber's affidavit attesting to this fact must be stricken under the "sham affidavit" rule, asserting that it contradicts her testimony that she delayed reporting Brunner's conduct to M&I because she did not want to get Brunner in trouble. M&I also points out that Schreiber never mentioned this fact at her deposition, even though she was asked twice to describe what happened during her August 13, 2008 meeting with Van Roy. *See* Schreiber Dep., dkt. 17, at 154, 222.

It is well established that "a party may not create an issue of fact by submitting an affidavit whose conclusions contradict prior deposition or other sworn testimony." *Gates v. Caterpillar, Inc.*, 513 F.3d 680, 688 n. 5 (7th Cir. 2008). However, the rule applies to exclude newly offered evidence only when a clear contradiction exists that is otherwise unexplained. *Patton v. MFS/Sun Life financial Distributors, Inc.*, 480 F.3d 478, 488 (7th Cir. 2007) (question is whether later testimony is "plainly incredible"); *Bank of Illinois v. Allied Signal Safety Restraint*, 75 F.3d 1162, 1169-1170 (7th Cir. 1996) ("A definite distinction must be made between

discrepancies which create transparent shams and discrepancies which create an issue of credibility or go to the weight of the evidence.") (quoting *Tippens v. Celotex Corp.*, 805 F.2d 949, 953 (11th Cir. 1986)). Here, although M&I's objections to Schreiber's affidavit raise legitimate questions about its credibility, I cannot say that the affidavit is a transparent sham. Schreiber's assertion regarding her August 13, 2008 conversation with Van Roy does not directly contradict anything she said at her deposition: Schreiber may have had more than one reason for waiting to report Brunner and in any case, her affidavit relates only what she allegedly told Van Roy and his response to that statement. It does not purport to change her testimony regarding why she did not report Brunner right away. Further, although it is puzzling why Schreiber would not have mentioned this important detail when asked to describe the August 13 meeting, the new evidence does not directly *contradict* her version of events but elaborates upon it. *See Patton*, 480 F.3d at 488 (ambiguous or incomplete earlier testimony may explain change in testimony). In particular, Schreiber was never asked whether her description of her meeting with Van Roy included every detail or asked to recount every single thing that was said at that meeting. Again, this is not to deny that Schreiber's version of events reflected in her affidavit could be impeached, but this is a matter for the jury to sort out. I will not strike Schreiber's affidavit as a sham.

If true, then Van Roy's failure to deny that Schreiber's complaint of sexual harassment was a basis for his warning that he "didn't want to hear anything more" come from her office provides circumstantial support for Schrieber's claim that her harassment complaint was a motivating factor for her termination. There's more: as Schreiber points out, before she complained about Brunner, Van Roy had received a number of complaints about her

management style and abrasive personality. With the exception of Struemke, however, Van Roy did not discipline Schreiber for any of the complaints; in fact, he let several of them pass without mention.[9] Indeed, immediately before Schreiber reported Brunner, Van Roy assured her that her job was not in jeopardy and told her that if it was, she would know it because M&I would give her a warning or place her on a performance improvement plan.

Contrast this with Van Roy's treatment of Schreiber after she reported Brunner. About one month later, without discussing with Schreiber any new complaints that he had received, Van Roy told Schreiber that her office had become a "problem office," that he was being pressured by Milwaukee and Wausau to do something about it and that the problems needed to stop. Then, two months later, without giving Schreiber the formal warning or performance improvement plan that he had told her back in July would be forthcoming before she lost her job, he fired her on the basis of an employee complaint that he never investigated. Van Roy's sudden hard-line approach to Schreiber's performance after she engaged in protected activity, viewed in light of the record as a whole, supports an inference of causation. *See, e.g., Culver*, 416 F.3d at 546-547 (jury could infer causation where plaintiff was fired three days after receiving favorable performance review and assurance by employer that he harbored no desire to fire her, which was same day on which plaintiff complained of discrimination); *Fitzgerald v. Action, Inc.*, 521 F.3d 867, 875-876 (8th Cir. 2008) ("Where an employer tolerates an undesirable condition for an extended period of time, and then, shortly after the employee takes part in protected conduct, takes an adverse action in purported reliance on the long-standing undesirable

[9] Van Roy did give Schreiber a verbal warning after an incident in January 2008 when Schreiber got drunk and acted inappropriately toward Van Roy and other higher-ups at a corporate function. However, M&I does not assert that that incident played a role Schreiber's termination. Accordingly, the facts surrounding the events on January 22, 2008 are largely irrelevant at this stage.

condition, a reasonable jury can infer the adverse action is based on the protected conduct."); *Eliserio v. United Steelworkers of America Local 310*, 398 F.3d 1071, 1079-80 (8th Cir. 2005) (when employer ignored or treated as de minimis five complaints about employee but took drastic action following sixth, identical complaint, reasonable jury could infer employer's claim of reliance on sixth complaint was pretextual); *cf. Leitgen v. Franciscan Skemp Healthcare, Inc.*, ___ F.3d ___, 2011 WL 108694, 8 (7th Cir. Jan. 13, 2011) (evidence showing that plaintiff's supervisors were in process of devising method to address plaintiff's problematic behavior before she engaged in protected activity defeated plaintiff's claim of "sudden dissatisfaction" by employer after she complained).

M&I argues that the change in Van Roy's approach is explained by the fact that in the interim, Struemke had filed a complaint about Schreiber with the human resources department, Valdez had indicated to Van Roy that Schreiber did not necessarily have clean hands in the problems that arose with Struemke and Parmeter had reported that the employees at the Hudson branch were unhappy with Schreiber's management style. However, Van Roy knew before Schreiber complained of harassment that Struemke had complaints about Schreiber: Van Roy had been directly in the middle of the dispute. Indeed, M&I's insistence that Struemke's filing of a complaint was a significant turn of events seems inconsistent with Van Roy's assurance to Schreiber, *after* the Struemke blow-up, that her job was not in jeopardy, and inconsistent with Markstrum's observation that any complaint filed by Struemke would be dismissed as simply "more Ricki drama." Further, M&I does not allege any specific, new facts about Schreiber that Van Roy learned from Valdez's investigation of Struemke's complaint; all it alleges was new was that Valdez told Van Roy to take a hard look at the situation.

Considering the totality of these facts, a jury could reasonably infer that M&I's alleged reliance on the Struemke complaint is overstated.

As for Parmeter's general report about employees not liking Schreiber's management style, Van Roy did not investigate that complaint or discuss it with Schreiber before telling her that the "problems" coming out of her office needed to stop. And when Van Roy did ask around the office on August 13, 2008, he did not receive complaints from anyone. As of August 13, 2008, then, Parmenter's report was unsubstantiated.

Finally, rather than give Schreiber a written warning or place her on a performance improvement plan, as he had with his other employees, Van Roy proceeded immediately to termination. This evidence is of limited value because Schreiber has not introduced evidence showing that progressive discipline was required or that any of Van Roy's other employees had a similar history of subordinate complaints.[10] Nonetheless, when combined with the other evidence, this apparently abrupt change in Van Roy's disciplinary approach supports an inference that Schreiber's harassment complaint made a difference.

In sum, Schreiber's evidence of retaliation is sufficient to allow a jury to infer that her harassment complaint about Brunner played a role in her termination. Accordingly, M&I's motion for summary judgment on her retaliation claim must be denied.

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[10] For this reason, Schreiber could not meet her burden if she were proceeding solely under the indirect, *McDonnell-Douglas* burden-shifting method. *See, e.g., Lucas v. PyraMax Bank, FSB*, 539 F.3d 661, 666 (7th Cir. 2008) (to establish prima facie case under indirect method, plaintiff must show that similarly situated employees received more favorable treatment).

III. Sex Discrimination

M&I also moves for summary judgment on Count 1 of the complaint, which M&I understands to be a claim of hostile work environment based on Brunner's conduct. As Schreiber points out, however, nowhere in her complaint does she claim a hostile work environment. Rather, she alleges that M&I discriminated against her based on her sex by "treating her less favorably than male employees." Complaint, dkt. 3, ¶28. Because she has not and is not claiming hostile work environment, asserts Schreiber, M&I's motion must be denied.

I agree. Not only is the term"hostile environment" absent from the complaint, it is also absent from the parties' joint Rule 26(f) report. Like the complaint, the joint report refers to Schreiber's first count as a claim of discrimination based on sex. Dkt. 10, p.1. True, Schreiber included a few allegations about the harassment she allegedly suffered at the hands of Brunner in her summary judgment submissions, but nowhere does she accuse M&I of subjecting her to a hostile work environment. As for Schreiber's failure to present any other evidence of sex discrimination, she was not required to: M&I did not move for summary judgment on that claim. Accordingly, because all of M&I's arguments in support of summary judgment on count 1 are directed to a claim that Schreiber has not brought, its motion must be denied.

That said, unless Schreiber has additional evidence beyond that submitted so far, I seriously doubt that Schreiber can prove differential treatment at trial. As best I can tell, Schreiber is alleging that M&I treated her less favorably than Brunner after she reported Brunner's harassment to Van Roy because it gave her the option to work from home or from another branch office, but it allowed Brunner to stay put until Van Roy and Markstrum had the opportunity to meet with him in person and because M&I circulated a "nicer" e-mail

announcing Brunner's later departure from the bank than the e-mail it circulated after firing Schreiber. These actions do not establish the level of adversity required to sustain a sex discrimination claim. *Rhodes v Illinois Dept. of Transportation*, 359 F.3d 498, 504 (7th Cir. 2004) (whether proceeding under direct or indirect methods of proof, plaintiff in discrimination case must prove materially adverse job action). M&I did not require Schreiber to leave her office, it simply gave her the option to do so if she was uncomfortable working with Brunner, and there is no suggestion that either option caused or would have caused Schreiber to lose pay or any tangible benefits. "Not everything that makes an employee unhappy qualifies as an adverse action for Title VII." *Id*. at 505. Here, there is no evidence of adversity other than Schreiber's dissatisfaction with the options that M&I presented to her.

As for the difference in tone between Van Roy's two e-mails, even assuming Schreiber could complain of job actions that occurred *after* she was fired, this alleged difference in tone was not a "material job action." Further, it can easily explained by the fact that Schreiber was fired, while Brunner resigned, meaning that they were not similarly situated. Finally, as noted above, to prove that she and Brunner were similarly situated, Schreiber would have to show that they had a similar work record. Nothing in the record so far suggests that Brunner had the same history of employee complaints that Schreiber had.

All this being so, Schreiber may try her discrimination claim along with her retaliation claim if she wishes because after a Rule 56 motion, the next opportunity for the court to review this claim is at the close of Schreiber's case-in-chief, pursuant to Rule 50(a).

ORDER

IT IS ORDERED that Defendant M&I Marshall and Ilsley Bank's motion for summary judgment is DENIED.

Entered this 26th day of January, 2011.

BY THE COURT:

/s/

STEPHEN L. CROCKER
Magistrate Judge