IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

- -

KASEY A. ISENBERGER,

OPINION AND ORDER

Plaintiff,

10-cv-605-bbc

v.

BOMAC VETS PLUS, INC.,

Defendant.

- -

Plaintiff Kasey Isenberger is asserting claims for sexual harassment, retaliation and constructive discharge against her former employer, defendant Bomac Vets Plus, Inc., under Title VII of the Civil Rights Act. 42 U.S.C. § 2000e-2000e-17. She alleges that Raj Lall (defendant's president, chief executive officer and co-owner) made unwelcome sexual advances toward her during a business trip and that, after she complained about it, defendant did not take any remedial action, but instead decided to stop using plaintiff's weekend cleaning service. Plaintiff quit her job in the marketing department shortly after defendant informed her that she was losing the cleaning contract and that it was taking no remedial action on her complaint because its investigation was "inconclusive."

Defendant has filed a motion for summary judgment, which is ready for decision.

Dkt. #14. With respect to plaintiff's sexual harassment claim, defendant argues that Lall's alleged conduct was not sufficiently severe or pervasive to give rise to a claim under Title VII and that it is entitled to prevail on its affirmative defense because it acted reasonably in response to plaintiff's complaint and plaintiff failed to take advantage of defendant's complaint procedures and otherwise failed to "avoid harm." With respect to plaintiff's retaliation claim, defendant argues that plaintiff has not identified any actions by defendant that are sufficiently adverse and has not adduced sufficient evidence of retaliatory intent. Finally, defendant argues that plaintiff's claim for constructive discharge fails because her conditions at work were not so severe that she was forced to resign. Because I conclude that a reasonable jury could find in favor of plaintiff on each of these issues, I am denying defendant's motion for summary judgment in all respects.

From the parties' proposed findings of fact, I find the following facts to be undisputed. (With respect to many of the facts below, defendant says that it denies them, but that, "solely for the purpose of summary judgment, it will assume that they did occur." E.g., Dft.'s Resp. to. Plt.'s PFOF ¶ 11, dkt. #31.)

UNDISPUTED FACTS

Defendant Bomac Vets Plus, Inc. develops and manufactures nutritional supplements for animals. Raj Lall is defendant's president, chief executive officer and one of its owners.

His decisions are not subject to review by a board of directors or any individual.

Beginning in 1999, plaintiff Kasey Isenberger provided weekend cleaning services to defendant as an independent contractor. Other members of plaintiff's family assisted on occasion. From January 2006 to March 2009, plaintiff worked full time for defendant in its marketing department. When plaintiff became a full time employee, defendant began making payments to plaintiff's husband rather than to plaintiff for the cleaning services. (Defendant does not say why it did this, but it does not suggest that plaintiff stopped doing the cleaning herself.)

A. Plaintiff's Sexual Harassment Complaint

In February 2009, plaintiff attended the Global Pet Expo in Orlando, Florida, with Lall, Judy Kruse (plaintiff's direct supervisor), Ron Cappellieri and Punkaj Jain. After dinner at a restaurant on February 12, Lall pulled plaintiff aside. He told her they had "a special relationship" and he kissed her on the cheek. Plt.'s Dep., dkt. #27-4, at 114-15. He put his arm around her and told her how she was "like [her] mother." Id. (Plaintiff's mother testified that she had had "an affair" with Lall, Meschievitz Dep., dkt. #27-8, at 9-10; defendant says that Lall and plaintiff's mother "had a close consensual personal relationship." but it "was never sexual in nature." Dft.'s Resp. to Plt.'s PFOF ¶ 12, dkt. #31). Lall "kissed [plaintiff] on the lips and was rubbing" her "backside on [her] panty

line." Plt.'s Dep., dkt. #27-4, at 114-15. Plaintiff left to join the other employees outside on the patio by the bar. She did not leave the restaurant because she did not believe the conduct would continue.

Lall followed a few minutes later and pulled on plaintiff's arm, trying to get her to dance with him, but she refused. He again told her they had "a special relationship" and that she had "potential . . . with the company." Id. at 116. He rubbed her buttocks "in between [her] panties and [her] dress line." Id. He "pull[ed] her panties up enough to get his fingers under [her] panties." Plt.'s Decl., exh H, dkt. #26. He said, "whatever happens in Florida, stays in Florida. Ben [plaintiff's husband] would never have to know." Plt.'s Dep., dkt. #31, at 117.

Plaintiff told Lall she was uncomfortable and then mouthed to Kruse, "Don't leave me alone with him." Id. Kruse saw plaintiff and Lall "embracing like they would be in a slow dance." Kruse Dep., dkt. #27-2, at 114.

Lall asked plaintiff, "What are you going to do for me?" He began licking and kissing plaintiff's neck and fondling her buttocks. Although plaintiff tried to push Lall away, he did not stop.

Plaintiff was crying. She had an opportunity to speak to Kruse, telling her what was happening. Plaintiff did not know where the hotel was or how to get back. Kruse told plaintiff to avoid Lall.

Lall sat down next to plaintiff. He put his hands under her skirt and began "rubbing up and down [her] thigh under the table." Plt.'s Dep., dkt. #27-4, at 125. Plaintiff told Kruse they had to leave. (The witnesses at the restaurant gave different estimates regarding the time the group was outside at the restaurant patio, ranging from 30 minutes to two hours.)

Back at the hotel, plaintiff told Kruse over the course of 45 minutes to an hour what had happened. Plaintiff was upset. She said she was scared and asked Kruse not to tell anyone else about the incident.

Kruse had no training regarding what to do when an employee reported sexual harassment. (The parties dispute whether Kruse told plaintiff she did not know how to handle the situation because of Lall's position with the company.) Lall is Kruse's direct supervisor and controls her compensation.

The following day Lall told plaintiff he wanted her to go on more business trips. (The parties dispute whether Lall asked plaintiff whether she had a happy marriage and whether he tried to pressure her to go back to the same restaurant to go dancing.)

On February 19, after returning from Florida, plaintiff informed Shar Williamson about the incidents on February 12. Williamson was "the senior Human Resources manager," but she had no previous experience or training in human resources from defendant or anyone else. She did not know how to conduct a sexual harassment

investigation. It was "an awkward situation" for Williamson because Lall was her boss. Williamson Dep., dkt. #27-1, at 41.

The same day, Williamson spoke to Kruse, who confirmed that plaintiff had told her about Lall's behavior. However, Williamson testified that she did not think that Kruse "wanted to talk about it in detail"; Kruse was "very careful about what she said." Id. at 45. Kruse said that she saw plaintiff and Lall dancing together, but she did not see anything "inappropriate." Kruse Dep., dkt. #20-4, at 106-07. Williamson brought Kruse before Lall and asked her to repeat to him what she saw. (Defendant does not say why Williamson did this.) In addition, Williamson asked Kruse to write a description of what she had observed that night.

On February 20, Williamson spoke to Lall about plaintiff's complaint, but Lall does not remember the details of the conversation or how long it lasted. Williamson believes the conversation lasted 30 minutes. Lall denied that he had done anything inappropriate.

Lall directed Williamson to contact defendant's lawyer, Pamela Macal, to discuss the next steps and receive guidance about conducting the investigation. Macal directed Williamson to obtain written statements from plaintiff and anyone else present that evening. The lawyer told Williamson that she was "representing Raj [Lall] and the company." Williamson Dep., dkt. #27-1, at 72. (When Lall was asked at his deposition whether Macal or someone else at the law firm was giving him legal advice about defending against

plaintiff's claim, he refused to answer on privilege grounds.)

Williamson used a "Sexual Harassment Investigation Checklist" to guide her:

- determine the nature of a complaint before initiating a formal investigation;
- plan the investigation;
- conduct the actual investigation;
- conduct an effective interview;
- assess credibility;
- make a recommendation after completing your analysis;
- comply with the company's policies regarding documentation.

On February 24, Williamson interviewed plaintiff a second time. With advice from the lawyer, Williamson prepared a set of question and took notes on plaintiff's answers. In response to a request from Williamson, plaintiff prepared the following written statement:

> Please consider this letter my written notice of sexual harassment complaint as requested by the BVPI Policies and Procedures Handbook. The evening of February 12, 2009 while in Orlando for the Global Pet Expo Raj Lall made several unwelcomed sexual advances toward me.

In addition, Williamson prepared a more detailed written statement, using the notes from her interview with plaintiff.

Also on February 24, Williamson interviewed Cappellieri and Jain, who were also present on February 12. Both said that they had not witnessed any inappropriate behavior.

Macal spoke with Kruse separately on February 24. Macal's notes from the interview indicate that Kruse was concerned about her job.

With the exception of Lall, all witnesses provided a written statement. (Defendant does not say why Lall did not prepare a written statement.) Kruse's written statement does not include the fact that plaintiff had complained to her about Lall's conduct at the restaurant and that she saw him dancing with plaintiff in his arms.

On March 3 Williamson sent an email to Macal that included the following language:

> I have now completed my investigation complete with statements from all parties. Next step? The conclusion is clearly inconclusive. There were no witnesses to backup her story. Do I now meet with Raj and Kasey separately with the results of my investigation? Is it then put to rest?
>
> Again, thank you for your help and support.

Macal responded by e-mail later in the day on March 3:

> With respect to the investigation, I would recommend meeting separately with Raj and Kasey about your investigation. Tell them you full[y] investigated, the investigation was inconclusive, recommend to Raj to exercise caution and encourage him to keep relations with Kasey as normal as possible, advise Kasey that things will continue as normal and tell her to report any alleged issues or future harassment to you immediately, if you decide you want to have sensitive and harassment training this summer this would be the time to mention the upcoming training to both parties. I am happy to discuss those conversations with you in advance, if you have additional questions.

Williamson did not speak with plaintiff immediately. (Defendant suggests that she waited because Lall was out of the country until March 23.) On March 24, when plaintiff

asked Williamson about the status of the investigation, Williamson told plaintiff that she had completed her investigation and the result was "inconclusive." In addition, Williamson sent plaintiff an email:

> After talking with the parties involved in the company who were present on the time of the alleged incident, I am unable to reach a definite conclusion regarding what occurred. I have spoke with Raj and informed him of your concerns. As you know, Bomac Vets Plus is committed to maintaining a good working environment for all of its employees. If you have any concerns in the future, please notify me immediately, my door is always open.

Williamson does not believe that her investigation was fair to plaintiff because she is "not sure that everyone who was there felt free enough to discuss things because they were talking about their boss." Williamson Dep., dkt. #27-1, at 112-13.

Defendant's anti-harassment policy was included in its employee handbook, which plaintiff received and reviewed when she was hired. The policy prohibits sexual harassment and retaliation for filing a harassment complaint. If employees have "a complaint or problem related to [their] job," they are instructed to "[d]iscuss the matter completely with [their] immediate supervisor." If that is not successful, the next step is to "[t]ake the matter to the Company Human Resources department." Finally, "[i]f a satisfactory resolution cannot be reached," the employee should "[f]orward a copy of the written complaint to the company president or a representative designated by the president, who will discuss the problem with you and investigate the basis for your concern . . . . The decision at this step

shall be final and conclusive for all parties." Dkt. #20-8, at 9-10.

B. Plaintiff's Loss of the Cleaning Contract

Plaintiff's mother was defendant's operations manager until she took disability leave in December 2008 and was replaced by Williamson. Lall instructed Williamson to look for "ways of cutting the budget." Williamson Dep., dkt. #20-5, at 16. At that time, defendant was paying $150 a week for cleaning services. Rebidding the cleaning contract had been discussed by defendant's business team "for a couple of years." Bollman Dep., dkt. #27-5, at 21-22.

On January 2, 2009 plaintiff sent an email to Lall that included the following language: "I will share with you that with the management changes that are happening I am very concerned about my jobs at Vets Plus, especially my cleaning job. I just want to discuss the importance of that income to my family and the need for notice if there are going to be any changes with that job in the future." (The parties dispute whether Lall told plaintiff that her "cleaning job was secure" and she "had nothing to worry about." Plt.'s Dep., dkt. #27-4, at 135-36.).

On January 26, Williamson sent an email to defendant's employees in which she asked them "to think about ways that we can cut costs in production, travel, office supplies, printing, energy conservation."

Defendant's "business development team," Lall, Williamson, Kruse, Philip Bollman and Karl Wayne met on February 24, 2009, shortly after the business trip to Florida. One of the agenda items listed under Wayne's name was "[e]liminate the in house cleaning service—I think everyone can empty their own garbage cans." He does not recall including this item on the agenda and he does not remember whether he made this proposal at the meeting. Several other items listed under Wayne's name include "[r]educe the amount of samples that are given out," "[t]ry to eliminate overtime," "[r]educe the number of Marketing Request Forms that are approved/asked for from the salesmen," "[s]et a limit that each employee can spend on meals" and "[e]liminate the use of space heaters." No action was taken on these other suggestions.

In March 2009, Williamson told plaintiff that defendant was placing the cleaning contract up for bid. Neither Bollman nor Wayne recalls being part of the decision to rebid the cleaning contract. Plaintiff submitted a bid for $150 a week. A company called ServiceMaster offered a price of $56.74 a week. Wayne "provided input" to Williamson that the contract should be awarded to the lowest bidder. Wayne Dep. dkt. #20-6, at 27. Defendant chose ServiceMaster. (Various witnesses gave different accounts regarding which individuals were involved in the decision. Williamson testified that Lall was involved in the decision.)

Williamson believes that defendant put out bids for a new printing service, but she

does not recall when this occurred. Defendant did "nothing major" in the first quarter of 2009 to cut costs. Williamson Dep., dkt. #27-1, at 88.

C. Plaintiff's Resignation

On March 25, plaintiff resigned. In her letter of resignation, plaintiff wrote: "I am no longer able to work under the conditions that have developed as a result of the sexual harassment by Raj Lall."

OPINION

A. Sexual Harassment

Sexual advances in the employment context may violate Title VII when they are (1) motivated by the employee's sex; (2) not welcomed by the employee; and (3) severe or pervasive, both objectively and subjectively. In addition, a basis for employer liability must be present. Berry v. Chicago Transit Authority, 618 F.3d 688, 691 (7th Cir. 2010). Defendant does not challenge the first two elements for the purpose of its summary judgment motion, so I will assume that plaintiff satisfies them. Pourghoraishi v. Flying J, Inc., 449 F.3d 751, 765 (7th Cir. 2006) ("The party opposing summary judgment has no obligation to address grounds not raised in a motion for summary judgment."). In addition,

defendant does not argue that Title VII is inapplicable because the alleged conduct did not occur at work. Lapka v. Chertoff, 517 F.3d 974, 983 (7th Cir. 2008) ("[H]arassment does not have to take place within the physical confines of the workplace to be actionable."). Instead, defendant argues that the alleged conduct at issue was neither severe nor pervasive and that defendant cannot be held liable because it responded reasonably to plaintiff's complaint and she failed to take full advantage of its procedures and otherwise failed to "avoid harm." Because a reasonable jury could disagree with each of defendant's contentions, I am denying its motion for summary judgment as to this claim.

1. Severe or pervasive conduct

I have no difficulty concluding that defendant is not entitled to summary judgment on the asserted ground that Lall's conduct was not sufficiently severe or pervasive. Plaintiff alleges that Lall made various inappropriate comments to her, put his arm around her, pulled her, separated her from the other employees, kissed her on the lips, licked and kissed her neck, rubbed her thighs "up and down" under her skirt and rubbed and fondled her buttocks multiple times. Although this conduct may not be "pervasive" because it was limited to one evening, the nature of the conduct and the number of incidents during the short time would permit a reasonable jury to find that it was sufficiently severe. Lapka, 517 F.3d at 983 ("[W]e have repeatedly stressed that the phrase 'severe or pervasive' is disjunctive.").

As a starting point, the court of appeals has said that "touching . . . increases the severity of the situation," Worth v. Tyer, 276 F.3d 249, 268 (7th Cir. 2001), and that "unwanted physical contact falls on the more severe side." Magyar v. Saint Joseph Regional Medical Center, 544 F.3d 766, 771-72 (7th Cir. 2008). Thus, it is significant that the alleged conduct involved repeated acts of unwanted physical contact.

It is true that the court has said also that "[t]here are some forms of physical contact which, although unwelcome and uncomfortable for the person touched . . . typically will not be severe enough to be actionable in and of themselves." Hostetler v. Quality Dining, Inc., 218 F.3d 798, 808 (7th Cir. 2000). As I noted in Everson v. City of Madison, 672 F. Supp. 2d 881, 884 (W.D. Wis. 2009), "a fine line exists [under circuit case law] between touching that is sufficiently severe and touching that does not constitute sex discrimination as a matter of law."

Defendant relies primarily on Saxton v. AT&T, 10 F.3d 526, 528 (7th Cir. 1993), a case in which the court concluded that the supervisor's conduct was not sufficiently severe or pervasive when he rubbed his hand along the plaintiff's upper thigh, kissed her once and "lurched" at her "as if to grab her." In addition, defendant cites McPherson v. City of Waukegan, 379 F.3d 430, 434, 439 (7th Cir. 2004) (pulling back plaintiff's shirt once to see type of bra she was wearing insufficient), and Koelsch v. Beltone Electronics Corp., 46 F.3d 705, 706-08 (7th Cir. 1995) (one instance in which supervisor rubbed foot against plaintiff's

leg and another where he grabbed plaintiff's buttocks not sufficiently severe). See also Hilt-Dyson v. City of Chicago, 282 F.3d 456, 463-64 (7th Cir. 2002) (two instances of back rubbing not sufficiently severe); Adusumilli v. City of Chicago, 164 F.3d 353, 361-62 (7th Cir. 1998) ("four isolated incidents in which a co-worker briefly touched her arm, fingers, or buttocks" not sufficiently severe or pervasive).

However, in Saxton and the other cases the instances of physical contact were fewer, more fleeting or less invasive. Plaintiff's allegations are at least as serious as those in other cases in which the court has concluded that summary judgment is inappropriate on this element. E.g., Patton v. Keystone RV Co., 455 F.3d 812, 816-17 (7th Cir. 2006) (allegation that harasser's "hand was under [plaintiff's] shorts, on her inner thigh, and touching her underwear" was sufficiently severe); Worth, 276 F.3d at 268 (touching of plaintiff's "breast near the nipple for several seconds is severe enough"); Hostetler, 218 F.3d at 807-09 (forced kissing and attempt to remove plaintiff's bra sufficiently severe); Doe v. City of Belleville, 119 F.3d 563, 582 (7th Cir. 1997) (being grabbed by testicles is sufficiently severe).

Defendant also says that "there is absolutely no evidence suggesting that Isenberger was forced to remain at the restaurant as long as she did," Dft.'s Br., dkt. #15, at 21, but it does not explain how this is relevant to the question whether Lall subjected plaintiff to severe or pervasive harassment. To the extent defendant means to argue that sexual advances do not violate Title VII unless the harasser physically constrains the plaintiff for

an extended period of time, defendant fails to cite any authority to support such an extreme view. To the extent defendant means to argue that plaintiff's failure to leave earlier is evidence that she did not view Lall's conduct as severe, defendant is free to make that argument to the jury at trial if it believes that it would be persuasive. However, there is more than sufficient evidence from which a reasonable jury could find that plaintiff perceived Lall's conduct as both unwelcome and severe. She walked away from him multiple times, told him "no," asked co-workers for help and finally demanded to leave. She cried as she explained to Kruse what happened and remained upset after the incident was over. Under these facts, I cannot conclude as a matter of law that plaintiff forfeited her claim simply by failing to leave the restaurant earlier.

2. Employer liability

Alternatively, defendant argues that it is entitled to summary judgment on the affirmative defense laid out in Burlington Industries, Inc. v. Ellerth, 524 U.S. 742 (1998), and Faragher v. Boca Raton, 524 U.S. 775 (1998). "The defense comprises two necessary elements: (a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise." Burlington, 524 U.S. at 765.

The threshold question is whether defendant is even entitled to raise this defense. Plaintiff says it is not, because Lall's harassment resulted in two "tangible employment actions": her constructive discharge and the loss of the cleaning contract. Id. ("No affirmative defense is available . . . when the supervisor's harassment culminates in a tangible employment action, such as discharge, demotion, or undesirable reassignment."). In response, defendant says plaintiff waived this argument because her "[c]omplaint does not contain any allegation that Lall's purported behavior was connected either to a constructive discharge or 'Bomac's decision to rebid' its office cleaning requirements." Dft.'s Br., dkt. #29, at 7. However, defendant fails to explain why plaintiff should have been required to anticipate in her complaint an issue related to an affirmative defense. Xechem, Inc. v. Bristol-Myers Squibb Co., 372 F.3d 899, 901 (7th Cir. 2004) ("Complaints need not contain any information about defenses."). Defendant's argument is even more curious because it discussed in its opening brief the question whether the alleged harassment resulted in a tangible employment action, Dft.'s Br., dkt. #15, at 28, so it cannot argue plausibly that it was prejudiced or even surprised when plaintiff raised this issue in her opposition brief.

Defendant also argues that the loss of the cleaning contract is not an "employment action" because plaintiff and her family "performed office cleaning services for Bomac consistent with an independent contractor relationship" and that the decision to solicit bids from other companies was not materially adverse. Although I disagree with both arguments,

I need not discuss them in the context of this claim because, even if they are correct, defendant is not entitled to the Burlington/Farragher affirmative defense.

Harassment culminating in a tangible employment action is not the only situation in which an employer is barred from raising the affirmative defense. "Vicarious liability automatically applies when the harassing supervisor is . . . indisputably within that class of an employer organization's officials who may be treated as the organization's proxy." Johnson v. West, 218 F.3d 725, 730 (7th Cir. 2000) (internal quotations omitted). "[T]he following officials may be treated as an employer's proxy: a president, owner, proprietor, partner, corporate officer, or supervisor holding a sufficiently high position in the management hierarchy of the company for his actions to be imputed automatically to the employer." Id. (internal quotations and alterations omitted).

It is undisputed that Lall is defendant's president and CEO as well as one of its owners. He does not report to a board of directors or any individual with respect to any of his decisions. With the exception of a sole proprietor, it is difficult to think of someone who more closely reflects an official who acts as the employer's proxy. E.g., Ackel v. National Communications, Inc., 339 F.3d 376, 383 -384 (5th Cir. 2003) (president who owned only 2% stock in company could qualify as proxy); EEOC. v. Sunfire Glass, Inc., 2009 WL 976495, *10 (D. Ariz. 2009) ("As [defendant's] owner and President, McBride is its alter ego. Defendant . . . is, therefore, strictly liable for his misconduct.").

Even if defendant could raise the affirmative defense, I could not grant summary judgment on that ground because genuine issues of material fact exist with respect to both elements of the defense. Defendant says it fulfilled its duty under the law because it had an anti-sexual harassment policy and promptly investigated plaintiff's allegations. Although these are components of defendant's legal obligations, the investigation itself and the corrective measures taken must be reasonable as well. Sutherland v. Wal-Mart Stores, Inc., 632 F.3d 990, 994-95 (7th Cir. 2011) ("While promptness is a virtue, an employer must also provide an appropriate response to an employee's complaints of harassment. To avoid liability, the employer must respond in a manner reasonably likely to end the harassment.").

In this case, there are reasons to question the reasonableness of defendant's investigation and its result. To begin with, the person supposedly in charge of the investigation, Williamson, went to *Lall* to determine how she should proceed. He directed her to a lawyer, who told Williamson that she was "representing Raj [Lall] and the company." Even Williamson herself admitted that she did not believe the investigation was fair because the employees she interviewed were scared and reluctant to talk critically about their boss. This is most obvious with respect to Kruse, who admitted she was fearful for her job. She left out important facts in the statement she wrote for Williamson and stated that she did not see anything "inappropriate," even though she also said she saw Lall slow dancing with plaintiff and embracing her. At the conclusion of the investigation, neither

Williamson nor anyone else took any corrective actions. In essence, the result of the investigation was to act as if nothing had happened.

These problems with the investigation show why defendant is not entitled to an affirmative defense in this case. It is difficult to imagine how *any* investigation could be reasonable when the alleged perpetrator is the president and CEO of the company, with the authority to terminate any of his employees, including the person investigating the harassment complaint. If Williamson had concluded that plaintiff's allegations were true, what could she have done to protect plaintiff? What disciplinary actions could she have taken against Lall? Defendant does not say. Under these facts, a reasonable jury could find that the result of the investigation was a forgone conclusion even before it started.

The second element of the defense raises similar issues. Defendant faults plaintiff for failing to follow company procedure in challenging Williamson's decision, but fails to acknowledge what that procedure was. The employee handbook directs those dissatisfied with the response by human resources to forward their complaint *to the president* or someone designated by the president. In other words, the procedure would have required plaintiff to appeal to Lall himself or someone of his choosing. It is simply not plausible to argue that plaintiff "unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer" by declining to seek relief from the very person she was accusing of harassment.

Finally, defendant argues that plaintiff unreasonably failed to "avoid harm otherwise." In particular, defendant repeats its argument that plaintiff is at fault because she could have left the restaurant at any time. Defendant's argument has troubling implications because it suggests that a victim of sexual harassment could lose her claim if she retains any freedom of movement, something that is not required even to a prove sexual assault. E.g., Wis. Stat. § 940.225(3m) ("[W]hoever has sexual contact with a person without the consent of that person is guilty of a Class A misdemeanor.").

Defendant cites no cases from this circuit or the Supreme Court in support of its view. The only case it does cite, Brown v. Perry, 184 F.3d 388 (4th Cir. 1999), is not instructive because it involved an employee who voluntarily chose to go to a pub and a reggae bar and then remain alone in a hotel room with a man who had made unwelcome sexual advances toward her in the past. In contrast, this case involves a string of events occurring over the course of one evening. (According to plaintiff, Lall attempted to get her to go dancing with him the following evening, but she refused.) In light of the unexpected nature of Lall's alleged actions, the dramatic power imbalance between plaintiff and Lall, plaintiff's fear for her job and her unfamiliarity with her surroundings, a jury would not be required to find that plaintiff acted unreasonably by failing to flee the scene at the first sign of trouble.

B. Retaliation

Under 42 U.S.C. § 2000e-3(a), an employer may not retaliate against an employee because she has "opposed" a discriminatory practice, including sexual harassment. Crawford v. Metropolitan Government of Nashville and Davidson County, Tennessee, 129 S. Ct. 846, 850-51 (2009). Protected conduct may include any complaint about allegedly discriminatory behavior, even if the complaint is informal or fails to comply with the employer's complaint procedures. Casna v. City of Loves Park, 574 F.3d 420, 426-27 (7th Cir. 2009). Plaintiff contends that defendant violated § 2000e-3(a) by deciding to rebid the cleaning contract because she complained about the harassment.

Defendant does not deny that plaintiff engage in protected conduct. The two questions in dispute are whether the decision to rebid the contract is sufficiently adverse and whether plaintiff has adduced sufficient evidence of a causal connection between that decision and plaintiff's complaint.

With respect to the adversity of the decision to solicit new bids, the general question is whether defendant's action would have "dissuaded a reasonable worker from making or supporting a charge of discrimination." Burlington Northern & Santa Fe Ry. Co. v. White, 548 U.S. 53, 68 (2006). This is essentially the same standard as retaliation claims under the First Amendment. Power v. Summers, 226 F.3d 815, 820-21 (7th Cir. 2000) ("Any deprivation under color of law that is likely to deter the exercise of free speech, whether by

an employee or anyone else, is actionable."). Defendant says this standard is not met because the decision "did not adversely impact [plaintiff's] right to continue providing cleaning services to" defendant. Dft.'s Br., dkt. #29, at 21. No adverse action occurred until plaintiff lost the bid and "[t]here is no evidence to suggest that [defendant] would not have selected [plaintiff] to continue providing cleaning services had [she] submitted the least expensive bid." Id. at 22.

Defendant's argument is self-defeating because it concedes implicitly that the decision to solicit new bids would result necessarily in one of two actions: (1) plaintiff would lose the contract; or (2) plaintiff would be forced to accept a less lucrative contract. Either way, plaintiff ends up with less money in her pocket; it was only a question of how much. The court of appeals has held repeatedly that a decrease in pay is sufficiently adverse to sustain a claim for discrimination or retaliation, even when a substantial amount of money is not involved. Hilt-Dyson, 282 F.3d at 465-66 ("decrease in wage or salary" is materially adverse employment action); Power, 226 F.3d at 820 -821 ("[W]e certainly cannot say as a matter of law that denying a raise of several hundred dollars as punishment for speaking out is unlikely to deter the exercise of free speech"). See also Johnson v. Cambridge Industries, Inc., 325 F.3d 892, 899 (7th Cir. 2003) (assuming that denial of "slightly higher pay" is sufficient).

Although the decision to solicit new bids did not immediately cause plaintiff a

reduction in pay, the court of appeals has found other decisions to be materially adverse when they necessarily lead to concrete losses further down the road. Chaudhry v. Nucor Steel-Indiana, 546 F.3d 832, 838 (7th Cir. 2008) (denial of opportunity to visit customers was sufficiently adverse because it "precluded [plaintiff] from receiving a yearly raise"); Lewis v. City of Chicago, 496 F.3d 645, 652 (7th Cir. 2007) (denial of assignment was adverse employment action because plaintiff lost ability to move forward in her career and potential to earn future hours of overtime). See also Oest v. Illinois Dept. of Corrections, 240 F.3d 605, 613 (7th Cir. 2001) (suggesting that reprimand would be sufficiently adverse if discipline was "inevitable consequence" of reprimand). This view makes sense. If a supervisor makes a discriminatory decision, knowing that the ultimate result will hurt the employee, it would be contrary to the purpose of Title VII to allow the employer to escape liability for the decision simply because the harm was delayed rather than immediate.

This is similar to the rule in Staub v. Proctor Hospital, 131 S. Ct. 1186, 1192-93 (2011): "[I]f a supervisor performs an act motivated by [discriminatory] animus that is intended by the supervisor to cause an adverse employment action, and if that act is a proximate cause of the ultimate employment action, then the employer is liable." Applying the logic of Staub to this case would mean that defendant's decision to solicit bids can give rise to a claim under Title VII so long as plaintiff can show that defendant intended its decision to lead to a tangible employment action and that the decision was the proximate

cause of the action.

A reasonable jury could find that the decision to solicit bids was the proximate cause of plaintiff's loss of the contract, so I turn to the next question, which is whether plaintiff has adduced sufficient evidence of retaliatory intent. Perhaps the most salient fact supporting a causal connection is the closeness in time between plaintiff's sexual harassment complaint and the decision to solicit new bids. Martino v. MCI Communications Services, Inc., 574 F.3d 447, 453 (7th Cir. 2009) ("[S]uspicious timing and behavior . . . can be powerful categories of circumstantial evidence."); Valentino v. Village of South Chicago Heights, 575 F.3d 664, 673 (7th Cir. 2009) (relying on suspicious timing to show causation). In its briefs, defendant says that the timing is not suspicious because it was considering ways to reduce the cleaning bill even before plaintiff complained, but this is not borne out by the facts, or at least a reasonable jury could so find.

It is undisputed that defendant was considering ways to cut costs as of December 2008, but there is little concrete evidence to support the view that defendant was seriously considering changing the cleaning contract at that time. Defendant includes a proposed finding of fact that "[t]he issue of changing the cleaning contract . . . certainly came up prior to Isenberger's allegations and had been discussed by others in the Company prior to the trip to Florida." Dft.'s PFOF ¶ 47, dkt. #16. However, defendant's sole support for this proposed fact is testimony by Williamson, who simply responded affirmatively to leading

questions asked by defense counsel. Williamson Dep., dkt. #20-5, at 118. She provided no context for these discussions and did not say when they occurred or even who was involved in them. When counsel for plaintiff asked her more specific questions about when and it what context a possible change in cleaning services was discussed, Williamson said "I don't recall." Williamson Dep., dkt. #271-1, at 28.

Defendant includes another proposed finding of fact that Williamson met with defendant's accountant in January 20, 2009 "to discuss cutting costs, including the cost of the office cleaning." Dft.'s PFOF, dkt. #16, at 51. Defendant cites three pieces of evidence, but each either is inadmissible or does not support the fact. The citation to Wayne's deposition does not include any reference to the cleaning contract. Wayne Dep., dkt. #20-6, at 15. Exhibit 40 is an unsworn, undated statement prepared by Williamson, which is hearsay. Dkt. #20-8. The citation to Williamson's deposition includes a discussion of Exhibit 40, but Williamson did not swear to the accuracy of the statements in that exhibit or otherwise testify that she had a discussion about changing the cleaning contract on January 20. Williamson Dep., dkt. #20-5, at 84.

The only documentation the parties cite related to cost-cutting efforts before plaintiff complained is a January 26 email from Williamson. Although she discusses possible savings in "production, travel, office supplies, printing, energy conservation," she says nothing about cleaning services.

Defendant notes that plaintiff herself was concerned about losing the cleaning contract even before the February 12 incident, pointing to an email she sent Lall about her concerns on January 2. This is true, but the email provides little support to defendant because plaintiff said she was worried because of "management changes," not because anyone told her about budget cuts. (Williamson replaced plaintiff's mother as defendant's operations manager in December 2008.) In any event, plaintiff testified that Lall had assured her that her "cleaning job was secure" and that she "had nothing to worry about," which undermines any assertion that management intended to change the cleaning contract even before plaintiff complained. Defendant challenges plaintiff's testimony regarding Lall's statements as inadmissible under the rule against hearsay, but that is absurd. Because Lall is an agent of defendant and was speaking on a matter within the scope of his employment, his statement is not hearsay under Fed. R. Evid. 801(d)(2).

It is also undisputed that the business team had been discussing a possible rebid of the cleaning contract "for a couple of years," but this does not necessarily support defendant's argument either. Defendant fails to explain why it took no action on this suggestion for so long and then suddenly decided that it needed a change. In fact, it seems that no one on the business team remembers who came up with the idea to change the cleaning contract and who subsequently made the decision.

The first time the cleaning contract is discussed in writing as a potential cost saving

measure is February 24, several days after plaintiff came forward with her complaint. The closeness in time between these two events supports plaintiff's claim.

In the alternative, defendant cites Burks v. Wisconsin Dept. of Transporation, 464 F.3d 744, 758 (7th Cir. 2006), for the proposition that "speculation based upon suspicious timing alone . . . does not support a reasonable inference of retaliation." The court of appeals has made similar statements in other cases. E.g., Leonard v. Eastern Illinois University, 606 F.3d 428, 432-33 (7th Cir. 2010)("[S]uspicious timing alone is insufficient to support a Title VII retaliation claim."); Mobley v. Allstate Insurance Co., 531 F.3d 539, 549 (7th Cir. 2008) ("Evidence of temporal proximity, however, standing on its own, is insufficient to establish a causal connection for a claim of retaliation."). However, the court has been careful to point out that exceptions to the rule exist and that context is important. Loudermilk v. Best Pallet Co., LLC, 636 F.3d 312, 315 (7th Cir. 2011) ("Deciding when [suspicious timing alone is sufficient] cannot be resolved by a legal rule; the answer depends on context, just as an evaluation of context is essential to determine whether an employer's explanation is fishy enough to support an inference that the real reason must be discriminatory."). See also Walker v. Board of Regents of University of Wisconsin System, 300 F. Supp. 2d 836, 862 (W.D. Wis. 2004) ("[T]iming should not be viewed in isolation; it can be more or less probative depending on the facts of each case."). In particular, timing may be sufficient evidence of causation "where the adverse impact comes on the heels of the

protected activity," Casna, 574 F.3d at 427, which means that the "matters occurr[ed] within days, or at most, weeks of each other." Mobley, 531 F.3d at 549.

As noted above, a reasonable jury could find in this case that defendant decided to change the cleaning contract within a few days of plaintiff 's filing her harassment complaint. Thus, that short time span alone may be enough to defeat defendant's summary judgment motion.

In any event, other facts are suspicious as well. For example, defendant says that it changed its cleaning contract as part of a larger effort to cut costs, but it has had a difficult time identifying other steps it took. Although various proposals to save money were listed in the February 24 agenda, it is undisputed that the proposal related to cleaning services was the only one that was implemented. Defendant has pointed to no specific evidence that it made *any* other changes around the same time it changed the cleaning contract.

Also potentially suspicious is that no one seems to remember how defendant reached the decision to rebid the contract. The February 24 agenda suggests that Wayne was the source, but he does not recall including this item on the agenda and he does not remember whether he made a proposal related to the cleaning contract at the meeting. In fact, Wayne does not remember being part of the decision to rebid the cleaning contract. Bollman gave the same testimony. Williamson denied making a recommendation to change the contract and said it was a decision of the business team, including Lall.

In its proposed findings of fact, defendant says that, later in the year, it "rebid its paper products, copier and printer services and possibly its uniform contract," but it cites no documentation to support that assertion. Dft.'s PFOF ¶ 82, dkt. #16. It cites page 121 of Williamson's deposition, but she simply answered "yes" when asked whether she was "the one responsible for soliciting the bids in the printing context." Dkt. #20-5, at 121. She does not identify when this occurred or who made the decision or why. Defendant cites Wayne's deposition as well, but he said there is "[n]othing specific I can think of" when asked whether defendant rebid other contracts during the first quarter of 2009. Dkt. #20-6, at 29. He later changed his testimony to "possibly uniforms," but he did not provide specific testimony supporting that belief. Id. When asked whether paper products or office supplies were rebid, he said "It's possible." Id. at 30. The closest he came to providing testimony with any level of certainty was his statement that defendant "switched providers" for "copier and printer service" sometime in "[l]ate second quarter, early third quarter." Id. at 32. However, when asked follow up questions about the specifics of those decisions, he added qualifiers, such as "I think" and "probably" before finally admitting that Williamson would "have been the person that took the lead on that," which calls into question whether he had personal knowledge about these matters. More generally, Wayne's testimony is so equivocal that a reasonable jury would not be required to accept it. Wragg v. Village of Thornton, 604 F.3d 464, 470 (7th Cir. 2010).

In light of plaintiff's evidence of suspicious timing in combination with evidence of pretext, a reasonable jury could find that defendant chose to rebid the cleaning contract because of plaintiff's sexual harassment complaint rather as an effort to safe money. Smeigh v. Johns Manville, Inc., 643 F.3d 554, 563 (7th Cir. 2011) (suspicious timing combined with evidence of pretext may be sufficient to show retaliation). Accordingly, defendant's motion for summary judgment must be denied as to this claim.

C. Constructive Discharge

Defendant argues that plaintiff cannot prevail on her claim for constructive discharge because no further incidents of harassment occurred after plaintiff returned to work, but the standard laid out by the Supreme Court does not require additional acts of harassment; the question is whether, as a result of Lall's harassment, her working conditions were "so intolerable that a reasonable person would have felt compelled to resign." Pennsylvania State Police v. Suders, 542 U.S. 129 (2004). Plaintiff did not quit immediately, but waited for defendant to address her complaint. Boumehdi v. Plastag Holdings, LLC, 489 F.3d 781 (7th Cir. 2007) ("[I]n the ordinary case, an employee is expected to remain employed while seeking redress."). However, when Williamson informed her that no remedial action would be taken, plaintiff decided that she had to leave. Under the circumstances of this case, a jury would be entitled to find that plaintiff acted reasonably.

Plaintiff's situation is distinguishable from most other sexual harassment cases because she was seeking protection from the owner, CEO and president of a small company. When the harasser is a co-worker or even a supervisor, a reasonable solution may be simply to separate the two employees. E.g., Roby v. CWI, Inc., 579 F.3d 779, 785-86 (7th Cir. 2009) (dismissing claim for constructive discharge in part because employer "attempted to minimize [harasser's] contact with [plaintiff] as much as possible"). However, that option was not available in this case. When plaintiff learned that defendant was not taking any action on her complaint, this meant that she would be forced to work under the scrutiny of her alleged abuser indefinitely. Defendant does not suggest that there was any way plaintiff could avoid frequent interaction with Lall. Compare Yates v. Avco Corp., 819 F.2d 630, 637 (6th Cir.1987) (no claim for constructive discharge when plaintiff quit after harasser told plaintiff that he was "assigned indefinitely" to desk next to plaintiff's because harasser's statement was not true); with Geist v. Glenkirk, 2001 WL 1268574, *6 (N.D. Ill. 2001) (reasonable jury could find constructive discharge when plaintiff forced to work with someone "who had formerly stalked, threatened, and intimidated" her).

Defendant points out that Williamson told plaintiff to come to her if she continued to experience harassment, but it is not surprising that plaintiff did not find comfort in these words. What reason did plaintiff have to believe that Williamson would or even could protect her from further harm? Again, when the abuser is the owner of the company, there

is nowhere for the employee to turn. Accordingly, I conclude that plaintiff is entitled to present this claim to the jury as well.

ORDER

IT IS ORDERED that defendant Bomac Vets Plus, Inc.'s motion for summary judgment, dkt. #14, is DENIED.

Entered this 5th day of August, 2011.

BY THE COURT:

/s/

BARBARA B. CRABB
District Judge