IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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DR. ALLA WILSON,

Plaintiff,

v.

BOARD OF REGENTS OF THE UNIVERSITY OF WISCONSIN SYSTEM and GARY BENSON,

Defendants.

OPINION AND ORDER

99-C-0027-C

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In this civil action for monetary relief, plaintiff Dr. Alla Wilson alleges that she was subjected to a hostile work environment because of her gender in violation of Title VII and Title IX of the Civil Rights Act of 1964, as amended. Presently before the court are the motions of defendant Board of Regents of the University of Wisconsin System for summary judgment, to dismiss defendant Gary Benson and to strike portions of plaintiff's affidavit. Because I find that plaintiff is entitled to judgment as a matter of law, the motion of defendant Board of Regents of the University of Wisconsin System for summary judgment will be denied and plaintiff will be granted summary judgment sua sponte. Because plaintiff has never served defendant Gary

Benson with a summons or complaint as required by Fed. R. Civ. P. 4, he will be dismissed from the case.

In addition, defendant's motion to strike portions of plaintiff's affidavit will be denied because the motion does not specify any grounds on which those portions should be stricken. Defendant's "motion" contains one sentence citing three grounds for striking portions of plaintiff's affidavit: "hearsay, lack of foundation and/or competency." Defendant then attaches plaintiff's affidavit to its motion, having highlighted large portions it finds objectionable. "Arguments that are not developed in any meaningful way are waived." Central States, Southeast and Southwest Areas Pension Fund v. Midwest Motor Express, Inc., 181 F.3d 799, 808 (7th Cir. 1999); see also Finance Investment Co. (Bermuda) Ltd. v. Geberit AG, 165 F.3d 526, 528 (7th Cir. 1998); Colburn v. Trustees of Indiana University, 973 F.2d 581, 593 (7th Cir. 1992) ("[plaintiffs] cannot leave it to this court to scour the record in search of factual or legal support for this claim); Freeman United Coal Mining Co. v. Office of Workers' Compensation Programs, Benefits Review Board, 957 F.2d 302, 305 (7th Cir. 1992) (court has "no obligation to consider an issue that is merely raised, but not developed, in a party's brief").

Before reciting the undisputed facts, a comment is warranted regarding defendant's proposed findings of fact. As stated in this court's Procedure to be Followed on A Motion for Summary Judgment at section II.C., a copy of which was given to each party with the

Preliminary Pretrial Conference Order, I will take as uncontested plaintiff's proposed facts that defendant does not contest specifically with proposed facts of its own that cite to record evidence. Defendant Board of Regents of the University of Wisconsin is represented by the Attorney General of Wisconsin, a frequent litigator in this court, who should be familiar by now with this court's summary judgment procedures. The majority of defendant's responses to plaintiff's proposed findings of fact do not cite to record evidence. Instead, they tend to be limited to one word, such as "Deny. Objection. Foundation. Characterization." Def's Response to Pltf's Proposed Findings of Fact # 81, Dkt. # 44. Such responses are not adequate to put plaintiff's proposed findings of fact into dispute and therefore will be ignored.

From the facts proposed by the parties, I find the following undisputed.

UNDISPUTED FACTS

From December 1992 to May 1998, plaintiff was employed at the University of Wisconsin-Whitewater in the Department of Management in the College of Business and Economics, first as an academic staff member, then as a tenure-track assistant professor as of 1996.

Defendant Gary Benson was a tenured professor in the department who held an endowed chair and was a Wisconsin Distinguished Professor. Benson regularly communicated

through memoranda distributed to faculty mailboxes. In 1995, he began sending the dean of the department, Joseph Domitrz, threatening memoranda complaining about department issues. Benson threatened to file court actions and personnel complaints and then carried out those threats.

In the management department, only tenured faculty vote to renew non-tenure faculty appointments, to grant tenure, and to promote associate professors to full tenure. Benson was one of seven tenured faculty members who made employment and tenure decisions with regard to plaintiff. Although faculty votes are nominally only recommendations for approval by the dean or chancellor, in practice such recommendations are approved as a matter of course.

Plaintiff was hired to teach small business management. The most closely related field in the department was entrepreneurship. Benson was the sole professor in that field. Plaintiff worked more closely with Benson than with any other faculty member except the department chair. Benson and plaintiff were the only faculty members who taught small business or entrepreneurship. They submitted all course proposals in those areas. At the behest of the dean, department chair and Benson, plaintiff and Benson worked together as advisers to two student groups.

Benson took plaintiff into his confidence regarding his battles with the department and university and told her that everyone else was out to get him. In November 1996, he sent

plaintiff a note stating that he had taken her into his confidence and telling her that if she ever violated his trust, "any possibility of a working/professional relationship with you will be tanked." Plaintiff was disturbed by Benson's note because of the power disparity between them and their close working relationship.

During the spring semester of 1997, after Benson learned that plaintiff was getting a divorce and suffering some personal problems, he told plaintiff he really cared about her and found her attractive. Benson called plaintiff at home on several occasions, telling her that he found her attractive and that he was there if she needed him and wanted him. Plaintiff responded, "Thank you, but no thank you." On Valentine's Day, Benson sent flowers to plaintiff's office. In February, Benson invited plaintiff to join him on a trip to Mexico with students and other faculty members. Plaintiff declined. At the beginning of March, Benson told plaintiff in a sexually suggestive tone that going away with him would make things better for her or make her feel better or good. She declined again. Benson appeared upset at plaintiff's refusal. Benson asked plaintiff whether she found him attractive. Plaintiff responded that she was not interested in him.

In February or March of 1997, plaintiff traveled to the Far East without mentioning the trip to Benson because she believed he would be angry that she had refused to go on a trip with him but went on another trip. When plaintiff returned from her trip, Benson left her notes

indicating he was upset that she did not inform him about the trip. Shortly afterwards, Benson called plaintiff at home and asked her to have dinner with him. Plaintiff declined. Immediately afterwards, plaintiff received a copy of a memo that Benson had sent to the dean and chancellor indicating his disapproval of plaintiff's trip and criticizing her credentials.

During the next five or six weeks, Benson wrote notes to plaintiff about personal matters. In one of the notes he asked plaintiff whether she would consider it intrusive or sexual harassment if he inquired about her divorce and how she was doing. Benson stated, "I can be helpful to you." Plaintiff did not respond, hoping that Benson would understand that she did not want a personal relationship with him. Benson continued to call plaintiff at home and at work and left roses on her car on at least three occasions. Benson also gave plaintiff a photograph of himself in a swimsuit. During the semester Benson asked plaintiff to teach classes for him in his absence. Plaintiff felt compelled to agree because Benson was tenured and she was not.

Plaintiff discussed Benson's behavior with other professors in the department who had expertise in human resources, Richard Wagner and Dale Scharinger, but saw no reason to pursue a complaint procedure at that time. She told Wagner that Benson had asked her out and had suggested it was in her best interest to go out with him.

During the summer of 1997, plaintiff traveled to the Czech Republic. Benson told her

he would miss her and left another rose on her car. When the fall 1997 semester began, plaintiff tried to keep a polite distance from Benson. She did not respond to his notes to her.

On August 31, 1997, Benson sent a memorandum to Chancellor Greenhill stating that dealing with Greenhill was like shooting at a moving target and that Benson was "an expert marksman in the military." Previously Benson had distributed a memo stating that he carried a gun and was willing to use it to defend himself. In the fall of 1997, Benson sent memos to the department claiming that people were out to get him. He threatened people in the department who asked him to redo his request for a sabbatical.

The university had two threat assessments done on Benson. The first was completed in the fall of 1997 and concluded that he was a danger and that a second assessment should be done. The second concluded that he was not a danger. Campus police advised the dean and the chancellor not to be alone with Benson in the building. Faculty members were fearful or uncomfortable about being alone with Benson.

During the fall of 1997, plaintiff began to seek employment at other Wisconsin colleges and universities. Plaintiff told the chair of the department, Christine Clements, that she was trying to find work closer to Oshkosh, where the man she was dating lived.

On November 10, 1997, plaintiff met Benson when she was in the hall passing out cigars

to several people to celebrate the absence of any men in her life. That evening Benson called plaintiff at home to ask her whether the comment and gesture with the cigar were intended to signal her interest in him. Plaintiff responded that they were not. Benson asked plaintiff whether she considered him attractive. Plaintiff replied that she had no interest in him and would not consider any relationship with a fellow professor.

On November 11, 1997, plaintiff received a copy of a memo Benson had sent to the chancellor and dean, accusing plaintiff of not being on campus on Tuesdays and Thursdays and of not keeping regular office hours. At that time, Benson started making critical remarks about plaintiff at staff meetings. Plaintiff asked Benson how he knew her schedule. Benson responded that he had checked with the department secretary, but plaintiff learned that he never had done so. Plaintiff was frightened that Benson knew her whereabouts and had denounced her to the dean and chancellor when she refused to date him.

On November 11, 1997, plaintiff asked Benson to stop his behavior. Benson responded that he could do whatever he wanted and that plaintiff could not stop him. The following day Benson left plaintiff at least two messages. The first disclosed details about her performance review by the tenured faculty, indicating that it had found her research inadequate over the last year. He stated that he was in a position to help her because he was writing books and articles and starting his own publishing company. Plaintiff was disturbed by Benson's message

because reviews were to be kept confidential until revealed to her by the dean and department chair. Benson did not usually attend department meetings but he attended the meeting held to evaluate plaintiff. Benson then wrote to plaintiff indicating that he never had trouble getting published and that she should write articles with him that year. He reiterated that several faculty members had expressed concern over her lack of research. He also stated that plaintiff need only ask for his help "even though you are apparently not speaking to me now." Benson put another rose on plaintiff's windshield.

Plaintiff wanted Benson to cease personal and professional contact with her. She spoke again to Wagner, one of the professors in her department. Wagner told plaintiff she needed to talk to someone about Benson because his behavior was sexual harassment. Plaintiff told the department chair, Clements, that Benson had asked her out and was making her feel uncomfortable but that she thought she could handle it.

On November 13, 1997, plaintiff met with Dean Domitrz to inform him that Benson's memo about her office hours was in response to her refusal to date him. Plaintiff told Domitrz that she intended to pursue a complaint against Benson for sexual harassment. Domitrz responded by asking plaintiff whether she wanted to "take on" Benson and said he believed, from his own experience, that Benson would verbally attack her. On that day, plaintiff submitted an application for employment as assistant professor of business administration at

the University of Wisconsin - Green Bay.

On November 14, 1997, plaintiff met with Susan Moss, the university's assistant to the chancellor for equal employment opportunity and affirmative action. Plaintiff wanted Moss's expert opinion on whether Benson's behavior was sexual harassment. Until that time, plaintiff was unaware of the university's policies and procedures regarding sexual harassment, although both the University of Wisconsin system and the Whitewater campus have policies prohibiting sexual harassment and providing procedures for handling such complaints. Moss determined that plaintiff's complaint involved a claim of sexual harassment. Moss found the volume of Benson's attentions so out of the ordinary that she feared what else Benson might intend to do. Moss contacted the university police chief to ask her to meet with plaintiff. The police chief arranged for plaintiff to park near the building for her night classes. Moss learned from the police chief and Clements that Benson had behaved oddly in the past at one point that fall and had been determined to be a danger. Moss suggested an informal meeting among plaintiff, Benson, Clements and Domitrz. She scheduled the meeting for November 25, 1997, and sent the parties a memo on November 21, 1997. She did not identify plaintiff in the memo.

On or before November 24, 1997, Benson threatened to disseminate personal information about plaintiff and her children to the public in response to her complaint to Moss about him. Moss informed the chancellor about Benson's threat on November 24. Benson

wrote to Moss that his threats "are not threats -- this will happen on Wed. morning if necessary." Benson refused to attend the meeting and Moss suggested that plaintiff file a formal complaint.

On November 26, 1997, Chancellor Greenhill wrote to Moss, stating that he was "proceeding appropriately on the recent complaint" and that Moss should call the university system counsel, John Tallman, in regard to pending complaints concerning Benson and others at the university.

At this time, plaintiff's office was two or three doors down from Benson's. Although previously Benson had been on campus only rarely, now he paced the hall, glaring angrily at plaintiff and lurking about her office. He continued to call her, fax her and send her notes.

On December 1, 1997, plaintiff wrote to the chancellor about her fears of being near Benson and asked whether his office could be moved. Moss was concerned about Benson's proximity to plaintiff and communicated that concern to Tallman. Plaintiff was told that Benson could not be moved, but that she could be. When plaintiff moved to her new office she discovered that secretaries and department chairs had keys to that office because it was used to store equipment and supplies. Plaintiff could not work in privacy or meet with students in the office. Plaintiff decided to set up an office at home. She was fearful and constantly nauseated at the thought of encountering Benson or being on campus. Moss complained to the

chancellor that it was unfair to force plaintiff to move. The chancellor agreed that moving plaintiff to a storage area interfered with her ability to do her job.

On December 2, 1997, Benson wrote to Moss and plaintiff's attorney, accusing plaintiff of sexual harassment and warning that if she pursued her sexual harassment claim "she needs to be prepared to have her divorce brought into play and her sons [sic] attempted suicide and her daughters [sic] rape." Benson sent a copy of the memo to Moss, Chancellor Greenhill, Dean Domitrz, Department chair Clements and university counsel Tallman. Moss sent Benson a warning not to broadcast private information about plaintiff's children, who were students at the university. No one else warned Benson not to disseminate the information.

Plaintiff complained to the department chair about Benson's threats and told her that she was frightened. She believed his threats were not idle and that Benson was targeting her children. Moss asked Tallman to take some action against Benson before he disseminated the information. No such action was taken.

On December 3, 1997, Benson sent plaintiff a note stating that he had nominated her for membership in a national honor society. The same day, Benson sent plaintiff's attorney a copy of a letter he had sent to Moss, warning her that "now I will get you, along with [plaintiff]." Moss continued to investigate plaintiff's complaint, although plaintiff had not filed a written complaint. Moss found that witnesses corroborated plaintiff's complaints.

On December 5, 1997, Benson faxed plaintiff's attorney a copy of another letter to Moss, stating that if plaintiff's complaint moved forward she should be prepared "for something that will be very messy and may ultimately be very damaging . . . to Professor Wilson and her children . . . ." Moss met with Chancellor Greenhill on several occasions to show him the documents containing Benson's threats and to express her concern that things were getting out of control. Chancellor Greenhill did not recommend any action. Instead, he stated that he needed to know whether Benson's threats against Wilson were "true" before disciplining him.

On December 8, Benson sent another letter to plaintiff's attorney, Moss and acting provost Larry Davis, to which he attached a draft memo detailing private information about plaintiff's children and stating that plaintiff was the sexual aggressor. Benson stated that if plaintiff proceeded with a formal complaint, the attached memo would be distributed to college faculty, across campus and to news media throughout the state.

On December 9, plaintiff wrote to Chancellor Greenhill, complaining about Benson and "requesting that the University take the appropriate and necessary action to deal with" Benson. Neither plaintiff nor Moss received a reply to the letter.

On December 10, plaintiff filed a formal written complaint against Benson. That day, university counsel Tallman indicated that he had reviewed Benson's faxes containing threats and commented that they could be considered retaliation. He did not recommend any course

of action. Moss objected that the university was obligated to take steps to prevent harassment and retaliation. Tallman did not respond. Moss believed that no one was paying attention to her concerns.

On or about December 16, plaintiff learned that Benson had photographed her car and sent photos of it to Dean Domitrz with a note, contending that plaintiff was receiving special privileges.

As of December 20, the university had done nothing to stop Benson's behavior. Department Chair Clements knew of Benson's threats and believed he would carry them out, but did nothing to stop Benson other than speak to Dean Domitrz. No one discussed Benson's continued use of university letterhead for his threatening correspondence.

On December 22, through her own attorney, plaintiff obtained a temporary restraining order under Wisconsin's civil harassment statute prohibiting Benson from contacting her.

On January 12, 1998, Benson disseminated his memorandum across campus and to the news media. The memorandum disclosed that plaintiff had been through a difficult divorce and that her children had been hospitalized for attempted suicide and rape. Several university officials and employees told plaintiff they had received a copy of the memo. Articles about plaintiff's complaint appeared in Madison, Janesville, Milwaukee and Minneapolis newspapers and *The Chronicle of Higher Education*. Department Chair Clements interrupted one of plaintiff's

classes to tell her that a television station wanted to interview her.

Plaintiff was extraordinarily upset by the dissemination of private information about her and her children. She was medically excused from teaching in January 1998.

On January 14, 1998, Provost Davis sent a letter to Benson, warning him that if he continued to engage in harassing behavior toward plaintiff he could be subject to disciplinary action.

On January 19, 1998, Benson disseminated the memo containing personal information about plaintiff and her family again.

On January 22, 1998, through her own attorney, plaintiff obtained an injunction effective until January 22, 2000, prohibiting Benson from contacting plaintiff, publishing or disseminating anything false about her, disclosing any information about her children, writing or distributing threatening, hostile or derogatory remarks about plaintiff, intimidating or harassing plaintiff, or threatening to do any of these things. In addition, Benson is prohibited from possessing a firearm and was required to relinquish any firearms in his possession. Since that time, Benson has not contacted plaintiff although he has attempted to contact her through her attorney.

Sometime after plaintiff obtained the injunction, Benson's office was also moved.

On February 2, 1998, Chancellor Greenhill received a formal complaint from several

faculty members in the management department, alleging that Benson's conduct toward his colleagues was harassing and intimidating. The letter was drafted by Tallman and had attached to it selected pages from the preliminary injunction hearing that recited the court's findings. Chancellor Greenhill determined that the complaint against Benson was serious enough that, if the allegations were true, it might lead to his dismissal. Greenhill suspended Benson from his duties, effective February 6, 1998, and prohibited him from entering the Whitewater campus.

On February 12, 1998, Moss completed her investigation and forwarded her report to Greenhill. Moss concluded that Benson had sexually harassed plaintiff. Benson was afforded an opportunity to respond to Moss's report. At the same time, the university proceeded with its investigation of the faculty members' complaint against Benson. The investigation was completed on March 16, 1998.

Plaintiff accepted a position at the Green Bay campus on March 3, 1998, although the position paid less than her position at Whitewater. She submitted a letter of resignation to Chancellor Greenhill and Dean Domitrz on March 12, 1998, effective in May 1998. In her letter, plaintiff cited as two of the reasons for her resignation the lack of support she had received in her battles with Benson and the university's failure to help her to obtain the injunction against him.

Plaintiff became distressed when it became public knowledge that she was going to the Green Bay campus after Chancellor Greenhill announced it in the school newspaper.

On April 20, 1998, Greenhill issued a statement of charges against Benson and sought his dismissal on the basis of the faculty complaint and its investigation.

On May 14, 1998, Greenhill issued his final decision on Moss's report on plaintiff's complaint. He concluded that Benson had "interfered" with plaintiff's professional performance but that plaintiff had not been sexually harassed. Benson appealed the charges to defendant.

Benson was terminated by the defendant, effective May 14, 1999. Benson has not been served with a summons or complaint in this lawsuit.

OPINION

A. Defendant Benson

It is undisputed that defendant Benson has not been served with a summons and complaint in this case as required by Rule 4. Defendant board of regents has moved to dismiss defendant Benson from this case and plaintiff has not responded. From her lack of response, I infer that she has no objection to the motion. Accordingly, defendant Benson will be dismissed from this case.

B. Summary Judgment Standard

Summary judgment is appropriate if there are no disputed issues of material fact and the moving party is entitled to judgment as a matter of law. See Fed. R. Civ. P. 56(c); Weicherding v. Riegel, 160 F.3d 1139, 1142 (7th Cir. 1998). All evidence and inferences must be viewed in the light most favorable to the non-moving party. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 (1986). If the non-movant fails to make a showing sufficient to establish the existence of an essential element on which that party will bear the burden of proof at trial, summary judgment for the moving party is proper. See Celotex v. Catrett, 477 U.S. 317, 322 (1986).

In addition, "a district court can enter summary judgment sua sponte, or on its own motion, under certain limited circumstances" for the non-moving party. Simpson v. Merchants Recovery Bureau, Inc., 171 F.3d 546, 549 (7th Cir. 1999). A court considering such action must proceed cautiously. Generally, a court lacks the power to take this action unless the party against whom summary judgment is entered has had notice that the court was considering entering judgment and a fair opportunity to present evidence in opposition to the entry of summary judgment. See Simpson, 171 F.3d at 549. In Goldstein v. Fidelity & Guaranty Ins. Co., 86 F.3d 749 (7th Cir. 1996), the Court of Appeals for the Seventh Circuit considered

whether it was improper for the district court to have granted summary judgment sua sponte to the non-moving party on a motion for summary judgment. The court of appeals noted that the moving party was on notice that summary judgment was being considered and therefore entry of summary judgment could not have taken the moving party by surprise. In addition, the moving party and the court agreed that no genuine issues of material fact existed in the case and that resolution of the case turned on a question of law. Therefore, the court of appeals held that the district court had not acted improperly in entering summary judgment for the non-moving party. In this case, as in Goldstein, defendant as the moving party is on notice that summary judgment is being considered. Defendant submitted an extensive body of proposed findings of fact and responded to plaintiff's proposed findings of fact. Defendant also replied to plaintiff's responses to defendant's proposed findings of fact. Defendant insists there is no genuine issue of material fact that precludes the entry of summary judgment. I agree. Summary judgment will be entered for plaintiff.

C. Hostile work environment

Both Title VII and Title IX prohibit hostile environment sexual harassment and the analysis of sexual harassment claims under each statute is the same. See Davis v. Monroe County Bd. of Educ., 119 S. Ct. 1661, 1673 (1999). Title VII prohibits discrimination based

on race, gender, religion or national origin that creates a hostile or abusive work environment. See Oncale v. Sundowner Offshore Services, Inc., 118 S. Ct. 998, 1001 (1998); Harris v. Forklift Systems, Inc., 510 U.S. 17, 22 (1993); Meritor Savings Bank, FSB v. Vinson, 477 U.S. 57, 66 (1986). The Supreme Court has articulated a standard with objective and subjective components for determining whether conduct rises to the level of a Title VII violation. See Harris, 510 U.S. at 21-22. Ultimately, the conduct must be such that a reasonable person would consider the work environment hostile and abusive and the subject of the treatment must have perceived it as such. See id.; see also Ngeunjuntr v. Metropolitan Life Ins. Co., 146 F.3d 464, 467 (7th Cir. 1998).

Harassment is actionable if it is severe or pervasive enough to alter an employee's terms and conditions of employment. See Oncale, 118 S. Ct. at 1001. Although courts deciding Title VII cases have had an easier time describing this concept than applying it, one accepted guideline is that actionable harassment has two inversely related parts: severity and pervasiveness. The more pervasive the conduct, the lower the required level of severity. See Ellison v. Brady, 924 F.2d 872, 878 (9th Cir. 1991) (citing King v. Board of Regents of Univ. of Wis. System, 898 F.2d 533, 537 (7th Cir. 1990)); see also Drake v. Minnesota Mining & Manufacturing Co., 134 F.3d 878, 885 (7th Cir. 1998) (quoting McKenzie v. Illinois Dept. of Transportation, 92 F.3d 473, 480 (7th Cir. 1996)) ("isolated and innocuous incidents will not

support a hostile environment claim").

Sexual harassment claims can be divided into two different categories: "quid pro quo," which involves the demand of sexual favors in exchange for the grant or denial of job benefits, and harassment arising from a hostile work environment, which involves conduct that interferes unreasonably with an individual's work performance and creates an intimidating, hostile, or offensive work environment. See Meritor Savings, 477 U.S. at 65. In this case, plaintiff alleges only that she suffered hostile work environment sexual harassment.

Courts have not had an easy time drawing the line between the type of harassment prohibited by Title VII and behavior that is merely vulgar or offensive. The Court of Appeals for the Seventh Circuit has clarified this line by way of example, identifying illegal harassment to include sexual assault, other non-consensual physical contact, uninvited sexual solicitations, intimidating words or acts, obscene language or gestures and pornographic pictures. Falling short of Title VII's proscription is the "occasional vulgar banter, tinged with sexual innuendo, of coarse or boorish workers." Baskerville v. Culligan International Co., 50 F.3d 428, 430 (7th Cir. 1995). The Supreme Court has instructed courts to take into consideration all relevant circumstances in determining whether a work environment is hostile. See Harris, 114 S. Ct. at 371.

The relevant circumstances here are that Benson repeatedly asked plaintiff to have a

personal relationship with him despite her refusals; he left roses on her car; he gave her a picture of himself in a swimsuit; he extended her sexually suggestive travel invitations; he glared at her from outside her office when she complained; he threatened to "get" her after announcing that he carried a gun and was an excellent marksman; he accused her of sexual aggression; and he disseminated information about her daughter's rape and son's suicide attempt throughout campus and to the news media. As a result, plaintiff was frightened and humiliated. She decided to work from home and to take another job at lower pay. It is undisputed that subjectively plaintiff found her work environment hostile.

Moreover, it is difficult to imagine how such conduct could not be considered pervasive or severe enough to create an objectively hostile work environment. Physical and psychological intimidation are hostile by definition. Benson's harassment of plaintiff was so severe that it bordered on the physically dangerous. It was so pervasive that plaintiff was subject to a continuous barrage of romantic overtures and veiled and overt threats. A work environment is objectively hostile if the harassment "pollutes the victim's workplace, making it more difficult for her to do her job . . . . and to desire to stay on in her position." Steiner v. Showboat Operating Co., 25 F.3d 1459, 1463 (9th Cir. 1994). It is undisputed that Benson's conduct made it more difficult for plaintiff to do her job and to stay on in her position; in short, the conditions of her employment were altered because of her sex. Thus, her work environment was

objectively hostile. See Meritor Savings, 477 U.S. at 67.

There can be no doubt that Benson's outrageous behavior was motivated by plaintiff's sex. It was Benson's desire for a personal relationship with plaintiff and her refusal to have one with him that set his threatening behavior in motion. Although the most hostile of Benson's actions resulted from plaintiff's filing of a sexual harassment complaint rather than her refusal to date him, they all stemmed from the same source: plaintiff's refusal to respond positively to Benson's romantic overtures.

D. Benson's supervisory status

An employer's liability for hostile environment sexual harassment depends upon the status of the harasser. See Faragher v. City of Boca Raton, 118 S. Ct. 2275, 2292-93 (1998). If the harasser is a supervisor the employer is strictly liable, although the employer may raise an affirmative defense if it can show both that it exercised reasonable care to prevent and promptly correct the behavior and that the employee failed unreasonably to take advantage of any preventive or corrective opportunities provided by the employer. See Burlington Indus., Inc. v. Ellerth, 118 S. Ct. 2257, 2270 (1998); Shaw v. Autozone, Inc., 180 F.3d 806, 810-11 (7th Cir. 1999); Parkins v. Civil Constructors of Illinois, Inc., 163 F.3d 1027, 1032 (7th Cir. 1998). However, an employer is liable for a co-employee's harassment only when it has been

negligent either in discovering or remedying the harassment. See Parkins, 163 F.3d at 1032.

Defendant argues that Benson was not plaintiff's supervisor for purposes of Title VII liability. "Tile VII provides no definition of the term 'supervisor'," Parkins, 163 F.3d at 1033, and the Court of Appeals for the Seventh Circuit has not addressed the question whether tenured faculty are supervisors of nontenured faculty for such purposes, perhaps for good reason. It is the employment relationship between the harasser and the harassed rather than titles that are determinative. See id. ("We have consistently distinguished employees who are supervisors merely as a function of nomenclature from those who entrusted with actual supervisory powers."). "The essence of supervisory status is the authority to affect the terms and conditions of the victim's employment." Id. at 1034. The authority to affect the terms and conditions of employment "consists of the power to hire, fire, demote, promote transfer or discipline and employee." Id. The court of appeals has held that an employee is not a supervisor "absent the entrustment of at least some of this authority." Id.

In this case, it is clear that Benson was plaintiff's supervisor for purposes of defendant's Title VII liability. Plaintiff was in the first year of a tenure track faculty position; Benson was tenured, a Wisconsin Distinguished Professor, and holder of an endowed chair. As a tenured faculty member, Benson could and did vote on whether to hire plaintiff and to renew her

contracts before she was offered a tenure track position and on whether to offer her a tenure track position. He would have voted eventually on her tenure. Both informally and through participation in faculty meetings held to discuss plaintiff's work, he had the opportunity to influence the other six faculty members who voted on tenure and other matters affecting plaintiff's job. Indeed, because Benson was the tenured faculty member with whom plaintiff worked most closely, it is reasonable to infer (or at least would have been reasonable for plaintiff to infer) that he would have had disproportionate influence among the seven faculty members who voted on plaintiff's performance reviews and tenure decision. It is undisputed both that Benson acted uncharacteristically in attending and participating in decisions regarding plaintiff's reviews and that he acted improperly in disclosing information from her reviews to her, particularly the faculty's concern that plaintiff had not published sufficiently. Moreover, Benson attempted to leverage the faculty's alleged concern that plaintiff had not published to pressure her into working more closely with him as co-author of articles. Viewing these circumstances against the standard set by the court of appeals in Parkins, I have no doubt that Benson was plaintiff's supervisor for purposes of Title VII liability.

E. Affirmative Defenses

Because plaintiff was subject to a hostile work environment by her supervisor as a

consequence of her sex, defendant can avoid liability only if can establish both that it "exercised reasonable care to prevent and correct promptly any sexually harassing behavior" *and* that plaintiff "unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise." Faragher, 118 S. Ct. at 2283. Because defendant cannot establish that plaintiff unreasonably failed to take advantage of the preventive opportunities it offered her or that she otherwise failed to avoid harm, plaintiff is entitled to summary judgment.

It is undisputed that plaintiff availed herself of defendant's complaint system. At least as of November 13, 1997, plaintiff informed Dean Domitrz of Benson's behavior and of her desire to file a sexual harassment complaint against him. Rather than intervene with Benson on plaintiff's behalf or provide guidance about the complaint system, Dean Domitrz asked whether plaintiff wanted to "take on" Benson because he would verbally attack her. In essence, Dean Domitrz not only failed to act but discouraged plaintiff from complaining because he believed Benson would retaliate. Despite Domitrz's discouragement, plaintiff met with Susan Moss the next day and eventually filed a formal complaint against Benson. It is undisputed that even after filing her formal complaint, plaintiff (and Moss on her behalf) continued to plead with Dean Domitrz, Chancellor Greenhill and university counsel Tallman to act to prevent Benson from retaliating against plaintiff. Therefore, it is undisputed that plaintiff took

advantage of the preventive opportunities defendant offered her. Moreover, not only did plaintiff take advantage of preventive opportunities offered by defendant, she resorted to self-help by obtaining an injunction when defendant failed to take action to stop Benson from disseminating personal information about her and her children. It is clear, therefore, that defendant cannot establish that plaintiff "unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise." Faragher, 118 S. Ct. at 2283. That alone is sufficient to deprive defendant of an affirmative defense to its strict liability for the hostile work environment created by Benson as plaintiff's supervisor. See id.

In addition, although I need not decide it for purposes of determining defendant's liability, it is unlikely plaintiff could establish that it "exercised reasonable care to prevent and correct promptly any sexually harassing behavior." Faragher, 118 S. Ct. at 2283. It is true, as defendant argues, that plaintiff did not seek help from university officials before November 1997 and that Benson was banned from campus only three months later. However, within those three months plaintiff sought assistance from university officials repeatedly as Benson stepped up his campaign of harassment and intimidation. Defendant's only tangible response during that time was to move plaintiff to a storage space and change her parking spot.

Defendant argues that it was powerless to stop Benson from continuing to threaten

plaintiff and from disseminating personal information about her and her children across campus and to the media, but this argument is disingenuous at best. It is undisputed that no one with any authority over Benson warned him not to make good on his threats until after he fulfilled them; indeed, it is undisputed that no one even told Benson to stop using defendant's letterhead. Once apprised of Benson's conduct, defendant was obliged to "exercised reasonable care to prevent and correct promptly any sexually harassing behavior." Faragher, 118 S. Ct. at 2283. That three months is not a long time in the context of bureaucratic action is no defense to Title VII liability. Whether an employer acts "promptly" depends upon the nature of the harassment its employee faces, not upon the swiftness with which the employer normally proceeds to discipline its personnel. In the face of Benson's repeated and looming threats of further harassment and retaliation (threats he made not only to plaintiff but also to Moss, Domitrz and Greenhill), defendant was obliged to act immediately.

F. Retaliation

Plaintiff contends that defendant (through Benson) retaliated against her for complaining of sexual harassment. Defendant has not moved for summary judgment on plaintiff's retaliation claim and the parties have not briefed the issue. However, because defendant is strictly liable for Benson's acts and it is undisputed that some of Benson's acts were

in retaliation for plaintiff's filing a sexual harassment complaint against him, there is no impediment to deciding that defendant is liable for Benson's retaliatory acts.

To establish a prima facie case of retaliation, a plaintiff must show that (1) she engaged in statutorily protected expression; (2) she suffered an adverse action by her employer; and (3) there is a causal link between the protected expression and the adverse job action. See Dey v. Colt Const. & Development Co., 28 F.3d 1446, 1457 (7th Cir. 1994). It is undisputed that in response to plaintiff's sexual harassment complaint, Benson threatened plaintiff repeatedly and disseminated highly personal information about her and her children in a manner calculated to cause her and her children embarrassment and humiliation. Therefore, she has established a prima facie case of retaliation.

Once a plaintiff establishes a prima facie case of retaliation, the burden shifts to the defendant to produce a legitimate, nonretaliatory reason for its actions. See Parkins, 163 F.3d at 1038-39. Defendant does not attempt to justify Benson's actions (indeed, defendant has acknowledged repeatedly that Benson's actions were inexcusable). Rather, defendant argues that it should not be held vicariously liable for Benson's acts because it took prompt and appropriate action against him. As explained above, this argument is without merit. Because Benson was plaintiff's supervisor for purposes of Title VII and defendant cannot establish that plaintiff unreasonably failed to avail herself of defendants protections, defendant is strictly

liable for Benson's harassing and retaliatory acts. Defendant placed Benson in a position of authority over plaintiff and failed to act promptly enough to prevent him from harassing her and from retaliating against her for complaining about it. Defendant cannot avoid liability for its failure.

ORDER

IT IS ORDERED that:

1. Defendant Gary Benson is DISMISSED from this case; and

2. The motion of defendant Board of Regents of the University of Wisconsin System to strike portions of plaintiff Dr. Alla Wilson's affidavit is DENIED; and

3. The motion of defendant Board of Regents of the University of Wisconsin System for summary judgment is DENIED; and

4. Summary judgment is GRANTED to plaintiff. The trial scheduled for February 22, 2000, will be limited to the issue of damages.

Entered this ____________ day of January, 2000.

BY THE COURT:

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BARBARA B. CRABB
District Judge