IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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DEENA WETTSTEIN,

Plaintiff,

v.

WESTPHAL & COMPANY, INC.,

Defendant.

OPINION AND ORDER

99-C-270-C

- -

In this civil action for monetary relief, plaintiff Deena Wettstein contends that her former employer, defendant Westphal & Company, Inc., discriminated against and constructively fired her because of her sex and in retaliation for complaining about the discrimination. Jurisdiction is present. See 42 U.S.C. §§ 2000e-5(f)(1) and (3); 42 U.S.C. § 1981(a). Presently before the court is defendant's motion for summary judgment, which will be granted in part and denied in part. I find that plaintiff was not constructively discharged and that many of her claims of retaliation and discrimination are time-barred. Of those that are not time-barred, only her claim that she was denied vacation pay in retaliation for engaging in protected expression is cognizable.

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

FACTS

Plaintiff Deena Wettstein was formerly employed by defendant Westphal & Company, Inc., as an assistant controller. Defendant is a Wisconsin corporation with offices in Madison and Janesville, Wisconsin and Dubuque, Iowa. It is in the electrical contracting business.

Plaintiff was hired by defendant in 1981 as a data entry bookkeeper. She received a number of promotions and by 1993 had been promoted to the job of assistant controller. She held that position until her termination on January 17, 1997. In 1996, she was paid a base salary of $33,500. She also received an annual bonus of a varying amount. Plaintiff had her own office just down the hall from John Westphal, the company president.

Plaintiff had a written description of her duties as assistant controller. Those duties included designing the system for data processing and coordinating production of the company newsletter. In addition to those duties, plaintiff was also involved in special projects that arose from time to time. These included designing and producing a company brochure, serving on the strategic planning committee, doing market research, staffing the foremen's committee and assisting with the computer hardware and software upgrade for all of defendant's offices in 1996.

Before 1991, defendant utilized IBM mainframe minicomputers. Accounting information and other data were transferred by dedicated lines between defendant's Janesville offices and its branches in Madison and Dubuque. In 1991, with plaintiff's assistance, defendant installed a local area network computer system using Novell Netware. Most of the personal computers in the network used a DOS operating system, but some were Windows-based.

Before 1996, plaintiff considered herself a troubleshooter for the company's computer network and was the computer network administrator. Some of plaintiff's work was supervised by John Quisenberry, the company controller. Some of her work was supervised by Westphal.

In early 1996, plaintiff took several seminars for network administration involving Novell Netware software that networked personal computers using both DOS and Windows operating systems. The training fully prepared plaintiff to function as system administrator for a planned computer upgrade, the duties of which included adding or deleting users from the network, adding or deleting applications programs from the network, controlling security for the network and adding printing capabilities for different users.

In 1996, defendant began a search to upgrade its computer system. Westphal was involved deeply in the computer upgrade project. The company intended to change from using a DOS system to using a Windows 95/ Pentium processor operating system for individual

workstations. Novell Netware was used to operate defendant's network both before and after the upgrade. Defendant also intended to hook into the Internet to transmit e-mails and data. Westphal was the final decision maker on the project.

Plaintiff assisted Westphal in the computer upgrade project. She drafted an outline the hardware employees used; drafted lists of what employees would like to use; solicited bids from vendors for a new computer system; registered defendant's Internet domain name; and made recommendations and suggestions to Westphal regarding purchase options. Plaintiff suggested to Westphal that he consider using the Internet for data transfer as a less expensive alternative to using dedicated telephone lines. Plaintiff arranged for defendant to have a domain on the Internet and registered defendant's domain name. Until spring of 1996, plaintiff had responsibility for system administration of the computer systems.

Westphal considered plaintiff to be a trusted assistant and adviser. On occasion, he had asked plaintiff to let him know whether he was acting inappropriately in any situation. On one occasion, at plaintiff's suggestion, Westphal changed various comments he had written about an employee in the employee newsletter because plaintiff thought the employee might be offended.

On May 14, 1996, Westphal took a job candidate on a tour of the office. Westphal introduced the candidate to several male employees in the office but did not introduce the

candidate to any women. Westphal pointed out offices occupied by women and referred to them by their function. Westphal pointed out the area where one woman was working and said, "This is payables." He pointed to Denise Van Blaricom's area and said, "receivables and whatever." Westphal walked the candidate past plaintiff's office and said, "assistant controller." Westphal walked into John Desen's office and introduced the applicant directly to Desen and described his function. Westphal did not introduce the candidate to all the male employees in the office; he introduced the candidate selectively to certain people because he did not want the interview to be highly publicized.

Van Blaricom complained to plaintiff that Westphal had not introduced the candidate to any women. Plaintiff felt slighted also. She sent Westphal an e-mail, stating that it was "interesting" that Westphal had introduced the candidate to male employees but not female employees and that she "wonder[ed] what impression you gave to that man as you only introduced him to men in the office."

Westphal was angered by the e-mail message. His first impulse was to go into plaintiff's office and fire her, but defendant's vice-president Gary Fuchs told him to calm down. Westphal said that Fuchs was right and he would not fire her. Westphal then went to plaintiff's office and yelled at her. He told her that she should talk to him face to face rather than by e-mail and that it was his right as president to introduce the candidate to whomever he wanted. Plaintiff

told Westphal she could not speak to him in person because his office door was shut. Westphal told plaintiff she was wrong if she felt he treated women as second-class citizens. Plaintiff responded that she did feel that Westphal treated women as second-class citizens. Westphal became even angrier because he took her comment personally. He then left plaintiff's office so that he could control his temper.

That evening Fuchs called plaintiff and asked whether she would apologize to Westphal. Plaintiff responded that she had nothing for which to apologize. Fuchs warned plaintiff that Westphal might fire her. Plaintiff also spoke to Quisenberry by telephone that evening. He confirmed how angry Westphal was at plaintiff.

A few days after the argument, Westphal walked by plaintiff's office with another applicant and referred to her office as "another accounting office" rather than "assistant controller."

On May 16, 1996, plaintiff telephoned Westphal to tell him that the computer network had been down three times that day. She wanted to tell him that a computer consultant and vendor would be in the next day to look at the system, but Westphal cut her off repeatedly in mid-sentences. The next day, plaintiff came into the office on her day off to make sure the computer system was functioning. The computer system was down so plaintiff got it up and running. She then telephoned Westphal at a job site to tell him of problems with the system,

to tell him that some of the managers at the office were getting upset about it and to relay information about the system that she had obtained from the consultant. Westphal responded that he "would think about it" and then hung up. Westphal then telephoned the accounts receivables clerk to tell her to tell plaintiff to fax the information from the consultant to Westphal at the job site.

Later that morning, plaintiff called Westphal again and tried to apologize. She asked Westphal whether they could talk because she knew he was angry at her. Westphal said he did not want to talk to plaintiff about their argument because every time he thought about what plaintiff said to him he got too angry and he did not have to explain himself to her. Westphal then said that he could not talk to her then because he was too busy then but said that he would "get over it."

Plaintiff apologized to Westphal at least one more time, on July 17, 1996. She spoke with him for 45 minutes in his office about the argument. She told him how badly she felt. Westphal told plaintiff that he believed she had accused him of treating women like second-class citizens. Plaintiff responded that Westphal had treated her well and had rewarded her on the basis of merit. She told Westphal that she was afraid he would not let her work on any more special projects. Westphal responded that she should just do her job and told her she had crossed a line and there was no going back. Nevertheless, plaintiff believed that Westphal really

forgave her and accepted her apology. She believed that Westphal would try to get over his anger, that he would give her a second chance and that she and Westphal were back on friendly terms. Westphal felt he had accepted plaintiff's apology. He believed that they got along well after the meeting. However, plaintiff felt that even after the meeting things did not return to the way they had been and that some strain still existed in the relationship.

Westphal was not cordial to plaintiff until at least that fall. When plaintiff would say "Good morning" to him, he would say "Yeah" or nothing at all. Westphal went out of his way to avoid plaintiff. Plaintiff believed that other people in the office feared talking to her. Westphal did not tell anyone in the office not to talk to plaintiff and did not threaten anyone if they talked to her. Plaintiff believed Westphal had cut her out of the inner circle of managers and staff that he utilized for planning. Westphal talked to plaintiff about business matters after October 1996 and was more cordial and less hostile.

The computer upgrade project was put on hold until fall because of vacations and other priorities. Westphal did not include plaintiff in the computer upgrade project. He no longer informed her of his communications with vendors and consultants or discussed alternatives and options with her. When plaintiff tried to talk with Westphal, he said he was too busy; when she tried to write or leave messages with him, he either ignored the messages or failed to respond or responded by disparaging her work or suggestions, which he had never done before. Plaintiff

found it embarrassing when other employees would ask her about the upgrade and she could not answer.

In early July 1996, defendant hired Tom Uzun as senior project manager. Although Uzun's job description does not include computer networking responsibilities, Uzun had experience working with and setting up Windows based operating systems. Westphal completed the computer upgrade project with Uzun and Brian Lippincott, an outside consultant.

Final bids for project were sent out by Westphal on July 16, 1996, and the company purchased the equipment several days later. Lippincott installed the new computer hardware and associated software. Uzun assisted Lippincott in cabling the system together. Uzun also built a separate computer server to access the Internet. Plaintiff was not skilled enough to do this. Uzun had no knowledge of how defendant's data and other files were set up.

Westphal provided a memo to employees on August 8, 1996, informing them that the new equipment had been purchased and explaining the new hardware and software and listing work station assignments. Plaintiff did not receive a copy of the memo, but Westphal did not personally exclude her.

By August 9, 1996, plaintiff believed that she was not going to be fired from her job because of her argument with Westphal, though she also believed he would try to force her to

quit.

By approximately September 9, 1996, all of the new computer hardware and software packages were installed in defendant's offices. Westphal sent out memos to employees regarding e-mail instructions on September 12 and 20 and a memo on returning warranty cards on September 26. Thereafter he considered the upgrade completed. Although before their argument Westphal had told plaintiff he wanted her to train employees on the new computer system, after the argument he no longer wanted plaintiff to do that. Westphal sent out a memo to employees stating that training was not required and that tutorials were available on the computer.

Plaintiff was capable of continuing to assist Westphal with computer matters after the upgrade. She was trained and experienced as an advanced systems administrator on the Novell Netware network software that ran the computer network and she had extensive knowledge of defendant's operations, file and data systems and computing needs. She was perhaps the most knowledgeable employee with regard to the e-mail system and software. She had the ability and background to acquire rapidly whatever proficiency she needed on the Windows 95 operating system. She was already familiar with all of the spreadsheet and database software in use after the upgrade. The Windows-based operating systems on defendant's individual computers did not take any special or unusual expertise to install. After July 1996, Westphal relied on Uzun

for the computer hardware, software and network assistance he needed. When plaintiff suggested to Westphal using a particular method for obtaining certain information via the Internet, Westphal told her he already knew about it. Later plaintiff overheard Westphal asking Uzun about the idea she had suggested. In the fall of 1996, plaintiff e-mailed Westphal regarding some problems she had solved for employees who were having troubles with their computers.

Before their argument, Westphal had informed plaintiff that after the computer upgrade was completed, she could work on a special project developing a Web site for defendant. He had also told her that he wanted her to work on designing a tri-fold line-card brochure for defendant's service department after the computer upgrade was completed and to assist with market research. Although Westphal never told plaintiff he was dissatisfied with her work, he did not assign plaintiff to work on any of these projects. There were no definite dates or plans developed for any of these projects and none of them were begun before plaintiff terminated her employment. Development of a Web site began in October 1999, and neither the brochure or market research projects have begun yet.

Westphal excluded plaintiff from three e-mails sent to certain staff (in July, August and October 1996) detailing where he would be on certain weekends. Westphal sent out numerous e-mails that plaintiff received, but did not include her on an e-mail on October 1, 1996, because

he did not think it was necessary to coordinate his schedule with her and did not normally do so.

In 1995, with Westphal's permission and supervision, plaintiff had served as a "loaned executive" from defendant to the United Way campaign in Rock County. After the argument, plaintiff became embarrassed because she believed that Westphal would not return telephone calls to the United Way in the event that the United Way sought her services for a second year. Westphal had told plaintiff that he believed her participation in the United Way loaned executive program was good for her development as well as for the company. Westphal does not recall ever receiving a call regarding participation for a second year and would not have agreed to plaintiff's second year as a loaned executive because of the cost involved.

Until October 1996, plaintiff was the editor of defendant's newsletter. The newsletter was published every other month. Plaintiff spent 20 hours editing the newsletter. Westphal required that all drafts be approved by him before they were published. After May 1996, Westphal did not approve the drafts of the newsletter that plaintiff submitted in July and September. The company newsletter had become an increasingly low priority for the company. A newsletter had not been published between mid-1996 and late 1999. On October 2, 1996, plaintiff announced that she would no longer prepare or publish the company newsletter.

After October 2, 1996, plaintiff occupied her time with job duties listed in her job

description, such as handling payroll. She also sat in her office staring. Plaintiff considered many of the duties of her assistant controller position boring. She had spent fifty percent of her time in early 1996 on the computer upgrade project and the newsletter. Plaintiff continued to handle all data transmissions provided in her job description, but with other computer duties and her newsletter duties removed she had three or four hours of time with nothing to do on most days. Plaintiff searched for projects that would challenge her and that would catch Westphal's attention in the hope that he would change his mind and return her systems administrator duties and include her in other projects. She began to personally handle accounts payable and job-costing duties and to re-work them. When she informed Westphal about her efforts and tried to solicit his comments, he responded, "Yeah, whatever" or "Okay" and then would turn his back and walk away.

Throughout the fall of 1996, plaintiff felt increasing stress at work because of Westphal's shunning of her and because of her reduced work duties. She wanted to quit but believed it would be difficult to find another job at the same salary. She feared the consequences for her family if she lost her income. However, by October 1996, plaintiff had decided to quit. In November 1996, she developed a locking of her knees that prevented her from walking at times. On Sunday nights, she would experience headaches or sleeplessness.

Westphal and his brother, defendant's executive vice-president, were responsible each

year for deciding how much and whether to pay bonuses to defendant's employees. These decisions were to be made on December 15 each year and were based on defendant's profitability. In 1992, plaintiff's bonus was $2,000; in 1993, $1,000; in 1994, $0; in 1995, $3,000; and in 1996, $1,000. Among comparable employees in defendant's Janesville office, only plaintiff's and Quisenberry's bonus in 1996 was less than their bonuses in 1995. Company profits declined in 1996 as compared to 1995.

People did not talk to plaintiff about the office Christmas party in 1996. She may have received a memo about it but cannot recall. She always received an invitation in past years. She did not want to go to the party.

In December 1996, plaintiff learned that defendant was advertising the controller position using a blind-box classified ad in the local newspaper because defendant intended to fire Quisenberry. Quisenberry did not know he was to be fired until he learned of the ad. Quisenberry had told plaintiff that she would be one of the likely candidates for his position if he ever left and Westphal told her that she would be the natural person to be the controller. However, the position required a four-year degree in accounting. Plaintiff did not have such a degree. Westphal did not inform plaintiff that the position would be open and did not encourage her to apply for the position. Plaintiff believed that meant that Westphal would not consider her for any promotions.

On January 2, 1997, plaintiff resigned, effective January 17, 1997. On January 17, 1997, Westphal conducted an exit interview with plaintiff during which he informed her that because she had quit voluntarily, he would not pay her the approximately $2600 in vacation pay she had accrued. Plaintiff informed Westphal that it had been defendant's past practice to pay an employee's accrued vacation pay when the employee had quit voluntarily. Plaintiff gave Westphal examples of employees who quit who did receive vacation pay and Westphal gave plaintiff examples of employees who quit and did not receive vacation pay.

Defendant had no written policy regarding whether employees who quit would receive vacation pay. Westphal was not involved in writing vacation payout checks when employees quit. Westphal thought the company did not pay vacation pay to employees who quit, but believed that plaintiff and Quisenberry were the employees who would know best what defendant's past practice had been. Westphal did not attempt to find out whether past company practice was that employees who quit received vacation pay until after plaintiff quit.

Quisenberry quit upon learning he was going to be fired. Quisenberry received severance pay when he quit on January 3, 1997, but it was paid in response to his request to Westphal for vacation pay and was the exact amount that would have been due to him for vacation pay.

After plaintiff quit, Westphal decided he had been in error regarding plaintiff's vacation pay. Negotiations over plaintiff's claim to vacation pay then ensued between plaintiff's

attorney and an attorney for defendant. The parties reached a proposed settlement agreement for $2,000 but the agreement included a provision which required plaintiff to release all claims of all kinds against defendant, so plaintiff refused to sign it.

After plaintiff told Westphal that she was quitting, Westphal did not write a letter to employees in the office stating that she was leaving. He did write such a letter for Quisenberry when Quisenberry announced he was leaving. After plaintiff quit, Westphal wrote a letter of recommendation for plaintiff. Westphal's letter of recommendation stated that plaintiff had quit to spend more time with her young children. Plaintiff did not ask him to change the letter.

After she quit, plaintiff did not seek a job as a computer consultant because she did not feel qualified for such a position.

While employed with defendant, plaintiff kept notes of conduct she considered to be retaliatory. She did not record any specific incidents that occurred between August 6, 1999 and January 2, 1997, but she thought that her exclusion from computer responsibilities and rude treatment and shunning by Westphal continued through that time.

On August 15, 1997, plaintiff filed a charge against defendant with the Equal Employment Opportunity Commission and Wisconsin Department of Workforce Development, alleging that defendant engaged in sex discrimination and forced her to quit in retaliation for complaining about it.

OPINION

To succeed on a motion for summary judgment, the moving party must show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. See Celotex v. Catrett, 477 U.S. 317, 322 (1986). In employment cases, where intent and credibility are especially crucial, summary judgment standards are rigorously applied. See Sarsha v. Sears, Roebuck & Co., 3 F.3d 1035, 1038 (7th Cir. 1993). However, even in employment discrimination cases, the non-moving party must carry his burden with more than mere conclusions and allegations. Celotex, 477 U.S. 321-22.

A. Statute of Limitations

In Wisconsin, a plaintiff alleging discrimination under Title VII must file a complaint with either the Equal Employment Opportunity Commission or the Wisconsin Equal Rights Division within 300 days of the alleged discriminatory conduct. See 42 U.S.C. § 2000e-5(e); Speer v. Rand McNally & Co., 123 F.3d 658, 662 (7th Cir. 1997); Alvey v. Rayovac Corp., 922 F. Supp. 1315, 1326 (W.D. Wis. 1996). On August 15, 1997, plaintiff filed a charge against defendant with the Equal Employment Opportunity Commission and Wisconsin Department of Workforce Development. This seems to bar any claim for discriminatory conduct occurring before October 18, 1996 (300 days from August 5, 1997). However,

plaintiff argues that her claim for discriminatory compensation constitutes a "continuing violation." The continuing violation doctrine "allows a plaintiff to get relief for a time-barred act by linking it with an act that is within the limitations period." Selan v. Kiley, 969 F.2d 560, 564 (7th Cir. 1992).

The Seventh Circuit has recognized three variations of the continuing violation doctrine. See Jones v. Merchants Nat'l Bank & Trust Co., 42 F.3d 1054, 1058 (7th Cir. 1994). The first theory encompasses decisions, usually related to hiring and promotions, where the employer's decision making process takes place over long periods of time, making it difficult to recognize a discriminatory or retaliatory act on any one date. See id. The second continuing violation theory involves an employer's express, openly espoused policy that is alleged to be discriminatory or retaliatory. See id. The third theory is the "covert" continuing violation theory. It applies when an employer covertly follows a practice of discrimination over a period of time. See id. In such cases, the plaintiff can realize that she is the victim of discrimination only after a series of discrete discriminatory acts has occurred. See id. The statute of limitations begins to run when the plaintiff gains such insight. See id. (citing Moskowitz v. Trustees of Purdue University, 5 F.3d 279, 281-82 (7th Cir. 1993)). However, if the plaintiff knew, or with the exercise of reasonable diligence would have known, that any of the acts was discriminatory and harmed her, then she must file a complaint within 300 days. See id.

There are three factors for the court to consider in making this determination: "(1) whether the acts involve the same subject matter; (2) the frequency at which they occur; and (3) the degree of permanence of the alleged acts of discrimination, 'which should trigger an employee's awareness of and duty to assert his or her rights.'" Filipovic v. K & R Exp. Systems, Inc., 176 F.3d 390, 396 (7th Cir. 1999) (quoting Selan, 969 F.2d at 565). The continuing violation doctrine is applicable only if "it would have been unreasonable to expect the plaintiff to sue before the statute ran on that conduct, as in a case in which the conduct could constitute, or be recognized, as actionable harassment only in the light of events that occurred later, within the period of the statute of limitations." Galloway v. General Motors Serv. Parts Operations, 78 F.3d 1164, 1167 (7th Cir. 1996).

Plaintiff cannot fit her claims within any of the three continuing violation theories. The second theory clearly does not apply because it has not been alleged that Westphal openly espoused a retaliatory practice. Indeed, the facts indicate that Westphal never openly espoused anything; he barely spoke. Further, plaintiff herself believed Westphal when he told her that he accepted her apology and that their relationship would improve.

The first and third continuing violation theories cannot apply, because both depend on the plaintiff's inability to recognize the unlawful character of acts that took place outside the limitations period, but whose character is revealed within the limitations period. It is

undisputed -- indeed, it is plaintiff's own proposed fact -- that by August 9, 1996, plaintiff believed that Westphal was retaliating against her by making her working conditions so unpleasant that she would quit. In addition, in deposition testimony, plaintiff revealed that by October 1996, she was not only aware of Westphal's alleged unlawful acts, but also believed that they were taken in retaliation for her complaint and considered them so permanent that she "might as well" quit:

> Q. Several months before January of 1997, did you tell John Quisenberry that you were going to quit?
>
> A. Several months before?
>
> Q. Yes.
>
> A. Probably about in October I was pretty well sure that that's what I might do.
>
> Q. Why did you make the decision at that time?
>
> A. Well, that's about the time that I knew I wasn't going to not only do anything on the computers, but I wasn't going to be doing the newsletter. I had done my best in trying to apologize and things hadn't changed.

There is no dispute that plaintiff believed Westphal had removed her from the computer and newsletter projects in retaliation for her discrimination complaint. The clear implication of plaintiff's testimony is that she believed by at least October 18, 1996, that she was being retaliated against for protected expression. The three factors identified in Filipovic that courts must consider in making this determination all mitigate against plaintiff's claim: the acts involved the same subject matter, they were ongoing and plaintiff believed they were permanent. See Filipovic, 176 F.3d at 396. Therefore, neither the first nor third continuing

violation theories can apply. Because it is undisputed that plaintiff was aware of Westphal's ongoing actions and believed they were both permanent and in retaliation for her discrimination complaint at least by October 1996, her claims related to acts that occurred before October 18, 1996, are time-barred.

That leaves the following claims that are not barred: Westphal was not friendly to plaintiff and cut her out of his inner circle; plaintiff thought other people in the office were afraid to talk to her; she believed Westphal would not return calls to The United Way regarding her participation in the loaned-executive program; plaintiff's bonus was reduced in 1996 compared to 1995; employees did not discuss the office Christmas party with her; plaintiff was not considered for promotion to Quisenberry's position; she was constructively fired; Westphal did not write a letter to employees informing them that plaintiff was quitting; and Westphal denied plaintiff her accrued vacation pay. Of those claims, plaintiff's belief that Westphal would not return calls to the United Way is inadmissible. Rule 56(e) requires that affidavit testimony "shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein." Affidavit testimony that the affiant believes is true but that is not based on personal knowledge must be ignored. See Friedel v. City of Madison, 832 F.2d 965, 969-970 (7th Cir. 1987). In conformity with Rule 56, I cannot consider plaintiff's

subjective belief regarding whether Westphal would return calls to the United Way because her belief falls within the prohibition of "statements outside the affiant's personal knowledge or statements that are the result of speculation or conjecture or merely conclusory." Stagman v. Ryan, 176 F.3d 986, 995 (7th Cir. 1999).

In addressing plaintiff's remaining claims, it may seem chronologically out-of-whack to put the constructive discharge cart before the retaliation horse. However, because constructive discharge is both an independent claim with a higher standard of proof than the retaliation claim and also a part of the retaliation claim, it is most expedient to address the constructive discharge claim first.

B. Constructive Discharge

Plaintiff alleges she was constructively discharged for complaining about sex discrimination. Stating a constructive discharge claim is a two-step process. See Simpson v. Borg-Warner Automotive, 196 F.3d 873, 877 (7th Cir. 1999). First, a plaintiff needs to show that her working conditions "were so intolerable that a reasonable person would have been compelled to resign." Id. (quoting Rabinovitz v. Pena, 89 F.3d 482, 489 (7th Cir. 1996)). Second, the working conditions "'must be intolerable because of unlawful discrimination.'" Id. (quoting Drake v. Minnesota Mining & Mfg. Co., 134 F.3d 878, 886 (7th Cir. 1998)). The

first requirement is exacting: working conditions are not "intolerable" unless they are extremely severe, usually accompanied by physical danger. For example, the Court of Appeals for the Seventh Circuit has found that conditions are intolerable when the plaintiff is the subject of an escalating series of sexual remarks culminating in a physical assault and death threat. See Brooms v. Regal Tube Co., 881 F.2d 412, 423-24 (7th Cir. 1988). Also intolerable were conditions where a plaintiff's alleged sexual relationship with her supervisor led her to attempt suicide. See Snider v. Consolidation Coal Co., 973 F.2d 555, 561 (7th Cir. 1991). In addition, the court of appeals found working conditions intolerable where the plaintiff's supervisor held a gun to the plaintiff's head, took a photograph and then circulated the photograph at a company meeting, saying "this is what a nigger looks like with a gun to his head." Taylor v. Western & Southern Life Ins. Co., 966 F.2d 1188, 1199 (7th Cir. 1992).

On the other side of the line, the court of appeals has found that conditions ranging from mildly embarrassing to extremely unpleasant are not so intolerable that a reasonable person would be compelled to quit. In Simpson, 196 F.3d at 887, the court of appeals found that plaintiff's complaint of, among other things, supervisor hostility and her supervisor's delay in firing a threatening employee did not create conditions so intolerable that a reasonable person would have felt compelled to quit and did not support a claim of constructive discharge. Similarly, in Lindale v. Tokheim Corp., 145 F.3d 953, 956 (7th Cir. 1998), the court of appeals

found that an employer's failure to promote a qualified employee and the boorish behavior of her co-workers did not create intolerable working conditions for purposes of a constructive discharge claim. Again in Drake, 134 F.3d at 886-87, the court of appeals found that shunning by co-workers did not create intolerable working conditions for purposes of such a claim. In Rabinovitz, 89 F.3d at 489, the court of appeals found that conditions that included the employer's refusal to promote the plaintiff, restrictions on the type of work the plaintiff could perform and a ban on speaking to colleagues about non-work matters did not support a claim for constructive discharge. Finally, in Harriston v. Chicago Tribune Co., 992 F.2d 697, 705 (1993), the court of appeals found that conditions including arbitrary reprimands, exclusion from office activities and supervisor hostility were not intolerable for purposes of a constructive discharge claim.

There is no question that plaintiff's complaints fall on the non-actionable side of the line. She alleges she was treated rudely or shunned by Westphal; that he did not assign her (or anyone else) to the brochure design and market research projects; that he cut her out of his inner circle; that she wasn't considered for a promotion; that she received a reduced bonus; as well as a myriad of other, smaller complaints. (Other complaints, such as Westphal's refusal to pay plaintiff her accrued vacation benefits, occurred after she quit and thus cannot support her constructive discharge claim.) Although it is possible that plaintiff found these conditions

embarrassing, humiliating and unpleasant, none of the conditions alone or in combination come close to the standard of "intolerable" necessary to support a constructive discharge claim. Plaintiff was never subjected to the kind of real psychological torture or physical danger suffered by the plaintiffs in Brooms, Taylor and Snider. Instead, like the plaintiffs in Drake she was shunned; like the plaintiff in Harriston she was excluded from office activities and denied supervisorial support; like the plaintiff in Rabinovitz she was subjected to work restrictions and not promoted; like the plaintiff in Lindale she was denied the opportunity for promotion. In each of these cases, the court of appeals found that although the plaintiffs suffered working conditions that were embarrassing, humiliating and unpleasant, the conditions did not rise to such an intolerable level that a reasonable person would have felt compelled to quit and thus did not support a claim for constructive discharge. So it is in this case as well.

C. Retaliation

Plaintiff alleges that she was retaliated against for complaining about Westphal's treatment of women. To demonstrate a prima facie case of retaliation, she must establish that 1) she engaged in statutorily protected expression; 2) she suffered a materially adverse change in her working conditions; and 3) there is a causal link between the protected expression and the materially adverse change. Id. (citing Talanda v. KFC Nat'l Management Co., 140 F.3d 1090, 1095 (7th Cir. 1998)).

In this case, there is no dispute that plaintiff has satisfied the first element of a prima facie case of retaliation: her statement to Westphal that he discriminated against women is protected expression for purposes of Title VII. Plaintiff's struggle is to show that she suffered a materially adverse change in her working conditions because of her protected expression. Without a materially adverse change, retaliation is not unlawful. See Rabinovitz, 89 F.3d at 488. In other words, liability under Title VII does not turn on the retaliatory motive of the defendant unless it results in a cognizable injury to the plaintiff. See Chambers v. American Trans Air, Inc., 17 F.3d 1002, 1004 (7th Cir. 1994). "Not everything that makes an employee unhappy is an actionable adverse action." Smart v. Ball State University, 89 F.3d 437, 441 (7th Cir. 1996). Indeed, the standard for what constitutes a material adverse job action is not met easily:

> [A] materially adverse change in the terms and conditions of employment must be more disruptive than a mere inconvenience or an alteration of job responsibilities. A materially adverse change might be indicated by a termination of employment, a demotion evidenced by a decrease in wage or salary, a less distinguished title, a material loss of benefits, significantly diminished material responsibilities, or other indices that might be unique to a particular situation.

Crady v. Liberty Nat'l Bank & Trust Co., 993 F.2d 132, 136 (7th Cir. 1993).

In addition to showing that she suffered a materially adverse change in her employment, plaintiff must present evidence from which a trier of fact could reasonably conclude that the change was caused by her protected expression. Timing is often indicative of causation in the absence of direct evidence: when an adverse employment action follows on the heels of protected expression, the trier of fact may conclude there is a link between the two in the absence of evidence to the contrary. See Davidson v. Midelfort Clinic, Ltd., 133 F.3d 499, 511 (7th Cir. 1998) (when "employer's adverse action follows fairly soon after the employee's protected expression" timing can indicate causal link reflecting retaliatory animus); see also Foster v. Arthur Andersen, LLP, 168 F.3d 1029, 1034 (7th Cir. 1999); Hunt-Golliday v. Metropolitan Water Reclamation Dist. of Greater Chicago, 104 F.3d 1004, 1014 (7th Cir. 1997).

If plaintiff satisfies all of these elements, the burden of production shifts to defendants to produce a legitimate, non-retaliatory reason for their action. See Perdomo v. Browner, 67 F.3d 140, 144 (7th Cir. 1995). If defendant articulates a non-retaliatory reason, plaintiff then

assumes her original burden of proof and must establish by a preponderance of the evidence that the defendant's articulated reason is pretextual. Id. At trial, plaintiff would be required to prove both that the legitimate reason articulated by defendant is pretextual and that the real reason was unlawful retaliation. Id. at 145. To avoid summary judgment, however, plaintiff need only establish that defendant's reason is pretextual because a fact finder could infer unlawful retaliation from an employer's untruthfulness. Id. "The issue of pretext does not address the correctness or desirability of reasons offered for employment decisions. Rather it addresses the issue of whether the employer honestly believes the reasons it offers." Richter v. Hook-SupeRx, Inc., 142 F.3d 1024, 1029 (7th Cir. 1998) (quoting McCoy v. WGN Continental Broadcasting Co., 957 F.2d 368, 373 (7th Cir. 1992)). Pretext is not simply a bad or stupid reason; it is "a lie, specifically a phony reason for some action." Wolf v. Buss (America), Inc., 77 F.3d 914, 919 (7th Cir. 1996). With these standards in mind, each of defendant's alleged retaliatory acts can be analyzed.

1. Constructive discharge

Plaintiff's foremost act of alleged retaliation fits squarely within the first indicium of a materially adverse change listed in Crady: she claims she was constructively fired. However, I have already held that plaintiff's working conditions were not so intolerable that she can state

a claim for constructive discharge. Therefore, plaintiff cannot establish a prima facie case of retaliation based on her constructive discharge claim.

2. Reduced responsibilities

Plaintiff also claims that she suffered significantly reduced material responsibilities, but that claim is premised almost entirely on her reduced network administration responsibilities and exclusion from the computer upgrade and newsletter projects, claims which are time-barred. As to plaintiff's claim that she was not assigned to work on the brochure and market research projects, exclusion from those two projects alone could be not considered a significant diminution of material responsibilities. Crady, 993 F.2d at 136. Indeed, plaintiff offers no evidence regarding the amount of time she would have devoted to these projects or her level of responsibility for them. Moreover, even if exclusion from these projects could amount to a significant diminution of material responsibilities, it is undisputed that these projects never materialized either during or after plaintiff's employ, strongly suggesting that they were a low priority for defendant. Plaintiff has offered no evidence to establish a causal nexus between the fact that she did not work on these projects and her protected expression. Rather, all evidence indicates defendant simply never engaged in these projects. Therefore, plaintiff cannot establish a prima facie case of retaliation based on the fact she did not work on the brochure

and market research projects.

3. Reduced bonus

The Seventh Circuit has held that the "loss of a bonus is not an adverse employment action in a case . . . where the employee is not automatically entitled to the bonus." Rabinovitz, 89 F.3d at 488-89. Plaintiff has not alleged that she was automatically entitled to any bonus, let alone one at the same level as she received in the previous year. Indeed, it is undisputed that she received a smaller bonus in 1993 compared to 1992 and that she received no bonus at all in 1994. Moreover it is undisputed that plaintiff's immediate supervisor, Quisenberry, received a smaller bonus in 1996 compared to 1995 as well. Even if a reduced bonus were a materially adverse change (and Rabinovitz holds that it is not), plaintiff has offered no evidence of a causal nexus necessary to establish a prima facie case of retaliation between her reduced bonus and her protected expression.

4. Failure to promote

That plaintiff was not considered for a promotion does not mean that she suffered a "materially adverse *change*" in the terms and conditions of her employment for purposes of a retaliation claim. Her position remained unchanged. Plaintiff's complaint is not that she

suffered a materially adverse change but that she did not enjoy a materially advantageous change. In Crady, 993 F.2d at 136, the court of appeals held that although the plaintiff was transferred to a job with a less prestigious title, he had not suffered a materially adverse change because he "would have maintained a management-level position at the same salary level and benefits he was already receiving." In a closely related context, the court of appeals found in Lindale, 145 F.3d at 956, that the plaintiff had failed to state a claim for constructive discharge after being passed over for promotion because her working conditions had remained unchanged. Because the court of appeals held in both Crady and Lindale that unchanged working conditions cannot amount to a materially adverse change in working conditions, it is questionable whether plaintiff can establish a prima facie case of retaliation based on defendant's failure to promote her.

Moreover, because she did not apply for the position after learning of its availability, it is difficult to find the requisite causal nexus between her complaint and defendant's failure to promote her. Failure to promote is a natural consequence of failure to apply. Although it is undisputed that defendant did not inform plaintiff that it was advertising the position, it is also undisputed that defendant had not yet informed Quisenberry that he was to be terminated and so it had not announced the opening in the company. Plaintiff does not explain why she failed to apply for the position upon learning of its availability, other than to state that it was her

subjective conclusion that because she had not been informed of the opening she would not be considered for the position. Whether a trier of fact could reasonably reach the same conclusion without evidence beyond plaintiff's subjective belief is a serious question.

However, even if a trier of fact could find that defendant's failure to promote plaintiff was a materially adverse change and that it was caused by defendant's complaint so that plaintiff could establish a prima facie case of retaliation, she has offered no evidence from which a reasonable trier of fact could conclude that there is anything pretextual about defendant's proffered legitimate reason for not promoting her, which is that she lacked the four-year degree in accounting required for the position. I take as undisputed for purposes of defendant's motion that Westphal told plaintiff she was the "natural" person for the controller position. However, it is also undisputed that the previous controller, Quisenberry, had a four-year degree in accounting and that defendant's newspaper advertisement specified that requirement for the position. Plaintiff has offered no evidence that the four-year accounting degree requirement was a pretext for retaliation against her. Without such evidence of pretext, plaintiff has not carried her burden of production and her claim is not viable.

5. Denial of vacation pay

Plaintiff alleges that she was denied accrued vacation pay in retaliation for her

complaint. Defendant argues that because she was offered a settlement of this claim, the denial of pay was not materially adverse, but its argument is unpersuasive. It is undisputed that defendant offered plaintiff $2000 in settlement of her $2600 vacation pay claim (and included with the settlement a waiver of plaintiff's right to sue). Thus, in order to hold that the denial of vacation pay was not materially adverse, I would have to find that the arbitrary denial of $600 in pay was not materially adverse, but I cannot. As Crady, 993 F.2d at 136, makes clear, a decrease in salary or a material loss of benefits is a materially adverse change for purpose of stating a retaliation claim under Title VII.

In addition, defendant argues that even if the denial of vacation pay was materially adverse, it was not causally linked to plaintiff's protected expression because it was the result of Westphal's genuine misunderstanding that she was entitled to such pay because she quit as opposed to being fired. However, plaintiff has raised an implication that Westphal's misunderstanding was not entirely genuine: Quisenberry has testified that Westphal gave him his accrued vacation pay when he quit at the same time as plaintiff, although Westphal re-named it severance pay. Defendant responds that Quisenberry didn't really quit; he was allowed to quit when he discovered he was going to be fired, but defendant does not explain why Westphal then was impelled to re-name Quisenberry's vacation pay severance pay. In addition, although defendant argues that Westphal realized later he had made a mistake and

tried to make good on plaintiff's vacation pay, it does not explain why he still refused to give her the full amount to which she claims she was entitled. Given the undisputed evidence that Westphal had a chip on his shoulder regarding plaintiff and the suspicious timing of his confusion, the question turns on a credibility determination. Credibility determinations may not be made at the summary judgment stage.

Therefore, plaintiff has established a prima facie case of retaliation in regard to her vacation pay claim. Defendant's proffered legitimate reason for denying plaintiff vacation pay is that Westphal believed she was not entitled to it. Plaintiff has offered evidence that legitimately raises the question "whether the employer honestly believes the reasons it offers." Richter, 142 F.3d at 1029. Therefore, defendant's motion for summary judgment on plaintiff's vacation pay claim will be denied.

6. Other complaints

None of the other complaints plaintiff raises, such as her apparent exclusion from the office Christmas party, Westphal's failure to write a letter to the company announcing that plaintiff was quitting and Westphal's continued unfriendliness toward plaintiff come close to the standard of a materially adverse change in the conditions of her employment. There is no evidence that Westphal wanted to exclude plaintiff from the Christmas party and it is

undisputed that plaintiff did not want to attend it in any event. As for Westphal's continued unfriendliness, "a dirty look or the silent treatment" in retaliation for protected expression is "clearly not" enough to state a claim under Title VII. Sweeney v. West, 149 F.3d 550, 556 (7th Cir. 1998).

D. Discrimination

Although plaintiff states that she was also unlawfully discriminated against and constructively discharged because of her sex rather than in retaliation for her complaint, she does not offer any argument in support of that claim apart from the constructive discharge and retaliation claims that have already been addressed. To the extent that plaintiff alleges sex discrimination based on acts separate and distinct from the claims that she has raised and which have been addressed already, "arguments 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 Bd, 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."). To the extent that plaintiff argues that the same acts that she says were the result of retaliation were also because of her gender, her claim "founders on the very same rocks" as her retaliation claims and does not require separate pretext analysis. Gleason v. Mesirow Financial, Inc., 188 F.3d 1134, 1147 (7th Cir. 1997) (same pretext

analysis applies to both retaliatory discharge and discriminatory discharge claims and does not require separate analysis).

ORDER

IT IS ORDERED that defendant Westphal & Company, Inc.'s motion for summary judgment is GRANTED in part and DENIED in part. The motion is granted as to all of plaintiff Deena Wettstein's claims other than her claim that she was denied accrued vacation pay in retaliation for engaging in expression protected under Title VII.

Entered this _____ day of February, 2000.

BY THE COURT:

_____
BARBARA B. CRABB
District Judge