IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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CAROL KNAPKAVAGE,

Plaintiff,

v.

WAUSAU MEDICAL CENTER,

Defendant.

OPINION AND ORDER

99-C-779-C

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In this civil action for monetary relief, plaintiff Carol Knapkavage contends that she was subjected to a hostile work environment while employed by defendant Wausau Medical Center in violation of Title VII of the Civil Rights Act of 1964, as amended in 1991, 42 U.S.C. § 2000(e). Jurisdiction is present under 28 U.S.C. §§ 1331 and 1343 and 42 U.S.C. § 2000e-5(f). Now before the court is defendant's motion for summary judgment. Because I find that the alleged harassment was not severe or pervasive enough to alter plaintiff's terms and conditions of employment, defendant's motion for summary judgment will be granted.

A review of plaintiff's and defendant's proposed findings of fact reveals that both sides failed to comply with this court's <u>Procedures to be Followed on Motions for Summary</u>

Judgment, a copy of which was given to each party with the Preliminary Pretrial Conference Order on April 26, 2000. Rule 1 of the court procedures states that "[all] facts necessary to sustain a party's position on a motion for summary judgment must be explicitly proposed as findings of fact." Both parties have referred liberally in their briefs to "facts" that are indicative of a hostile work environment but that were never proposed as facts. Because plaintiff carries the ultimate burden of proof, this inattention to court procedures is fatal to her claim.

In making the following findings of material and undisputed fact, I have disregarded any proposals that do not comply with this court's summary judgment procedures.

FACTS

Plaintiff Carol Knapkavage was an employee of defendant Wausau Medical Center beginning on or about August 11, 1996, and ending July 3, 1997.

Plaintiff was a certified medical assistant. In that capacity, she worked with John R. Kuhn, M.D., a doctor employed by defendant, from late August 1996, through approximately June 23, 1997. During plaintiff's employment with defendant, her supervisor was Patient Services Director Karen Peterson, who oversaw her performance evaluations. Dr. Kuhn was plaintiff's supervisor for day-to-day matters. His relationship with plaintiff was more than that of a mere co-worker because of his direct oversight responsibilities.

On or about March 11, 1997, plaintiff complained to Peterson about difficulties she was having working with Dr. Kuhn. Plaintiff believed that Dr. Kuhn was a "very touchy person" and plaintiff did not like the closeness of the office. Plaintiff told Peterson that Dr. Kuhn had given her "I love you" cards and she asked Peterson whether her workstation could be moved from Dr. Kuhn's office to the nurses' station. Peterson agreed to plaintiff's request and arranged for the workstation to be moved that afternoon.

On May 22, 1997, plaintiff complained to Peterson about Dr. Kuhn during the course of her performance evaluation. Plaintiff described her concerns about Dr. Kuhn's treatment of patients and his controlling behavior toward her. Plaintiff refused Peterson's offer of a transfer, indicating that she thought she could make things work with Dr. Kuhn. Shortly after her May 22, 1997 evaluation, plaintiff asked Peterson to find someone else to work with Dr. Kuhn.

On or about June 23, 1997, plaintiff gave Peterson a 4-page, single-spaced, typewritten letter in which she complained about Dr. Kuhn and stated that she would no longer work with him. The same day, Peterson transferred plaintiff to the float pool with an assignment to the pediatrics department to insure that plaintiff would have no further contact with Dr. Kuhn. Plaintiff's rate of pay was not affected by the transfer. Plaintiff began working in pediatrics on June 25, 1997.

During her employment, plaintiff received a copy of defendant's revised personnel policies, which includes a work place and harassment policy and complaint procedure. Plaintiff never filed a complaint pursuant to the work place harassment policy or otherwise complained to defendant that she believed she was subjected to sexual harassment.

Dr. Kuhn treated plaintiff's replacement Richard Schroeder in a controlling manner similar to the way he treated plaintiff. Other employees, both male and female, received "I love you" cards from Dr. Kuhn. Schroeder's card included a mark in the shape of a cross that Schroeder understood to mean "with love in Christ." There is no evidence that Dr. Kuhn turned out the lights on Schroeder, tickled him, touched him near his breasts, rubbed his thigh or rubbed his head against Schroeder's neck.

Plaintiff's last day of work for defendant was July 3, 1997. Plaintiff resigned voluntarily from her employment with defendant.

OPINION

A. Standard of Review

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 Fed. R. Civ. P. 56(c); Celotex v. Catrett, 477 U.S. 317, 324 (1986). 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). The Seventh Circuit has recognized that courts must apply the summary judgment standard with rigor in employment discrimination cases because "motive, intent and credibility are crucial issues." Crim v. Board of Education of Cairo School Dist. No. 1, 147 F.3d 535, 540 (7th Cir. 1998). However, even in employment discrimination cases, the non-moving party must set forth specific facts sufficient to raise a genuine issue for trial, see Celotex, 477 U.S. at 324, carrying her burden with more than mere conclusions and allegations, see id. at 321-22.

B. Title VII Hostile Work Environment Claim

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., 523 U.S. 75, 78 (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, 523 U.S. at 78. Although courts 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").

It is recognized that imposition of liability under Title VII for sexual harassment in the workplace is designed to rid the workplace of gender-based words and conduct that can make the workplace "hellish," but imposing liability is not intended to "purge the workplace of vulgarity." See Baskerville v. Culligan Int'l Co., 50 F.3d 428, 430 (7th Cir. 1995). The Court of Appeals for the Seventh Circuit has provided additional guidance in drawing the line between legal and illegal conduct. On one side lie sexual assaults, other nonconsensual physical contact, uninvited sexual solicitations, intimidating words or acts, obscene language or gestures and pornographic pictures. See id. "On the other side lies the occasional vulgar banter, tinged

with sexual innuendo, of coarse or boorish workers." Id.

From an objective point of view, plaintiff has not introduced evidence from which a trier of fact could reasonably conclude that Dr. Kuhn's conduct was so severe or pervasive that it created a hostile working environment. "[I]t is established in this circuit . . . that there is a 'safe harbor for employers in cases in which the alleged harassing conduct is too tepid or intermittent or equivocal to make a reasonable person believe that she has been discriminated against on the basis of sex.'" Gleason v. Mesirow Financial, Inc., 118 F.3d 1134, 1144 (7th Cir. 1997) (quoting Galloway, 78 F.3d at 1168). That Dr. Kuhn was a "very touchy person" and that Dr. Kuhn gave plaintiff "I love you" cards is not actionable, but instead falls within the contours of "banter, tinged with sexual innuendo." Baskerville, 50 F.3d at 430. These incidents are indicative of "a merely unpleasant working environment," not "a hostile or deeply repugnant one." Id. at 431. The record establishes that Dr. Kuhn did not turn the lights out on plaintiff's male replacement Schroeder, tickle him, touch him near his breasts, rub his thigh or rub his head against Schroeder's shoulder. At the same time, the record does not show that Dr. Kuhn directed these acts toward plaintiff. Even though the facts must be viewed in the light the most favorable to the non-moving party, the court is not in a position to make plaintiff's case on her behalf. Plaintiff is responsible for establishing the facts of her case.

Although it is difficult for a court to assess "the impact of words without taking account

of gesture, inflection, the physical propinquity of speaker and hearer, the presence or absence of other persons, and other aspects of context," id., even if I assume that Dr. Kuhn intended his comments to be infused with sexual innuendo, such comments are not actionable. Dr. Kuhn may have made plaintiffs' working environment disagreeable and stressful; however, his conduct pales in comparison to the plaintiff's allegations in Galloway, 78 F.3d at 1168, that she was called a "sick bitch" repeatedly over a four-year period, which the Seventh Circuit held was not actionable harassment. Plaintiff does not allege that Dr. Kuhn threatened her, invited her to have sex or go on a date, exposed himself, showed her dirty pictures or unreasonably interfered with her performance. See Gleason, 118 F.3d at 1145 (noting importance of taking into account what alleged harasser did not do).

Ordinarily, a hostile environment discrimination claim requires a court to make two inquiries: whether the employee was subjected to impermissible harassment and whether the employer is liable for the harassing conduct. See Parkins v. Civil Constructors of Illinois, Inc., 163 F.3d 1027, 1032 (7th Cir. 1998) (stating that plaintiff must demonstrate that "there is a basis for employer liability"). An employer's liability for hostile environment sexual harassment depends upon the status of the harasser. See Faragher v. City of Boca Raton, 524 U.S. 775, 807 (1998). Because I find that plaintiff has failed to establish that Dr. Kuhn subjected her to actionable harassment, I need not decide whether he was plaintiff's supervisor

for purposes of Title VII liability.

C. Retaliation Claim

Because plaintiff withdrew her claim of retaliation in her response to defendant's motion for summary judgment, it is not necessary to address this claim.

ORDER

IT IS ORDERED that the motion of defendant Wausau Medical Center for summary judgment is GRANTED. The clerk of court is ordered to enter judgment for defendants and close this case.

Entered this 2nd day of January, 2001.

BY THE COURT:

BARBARA B. CRABB
District Judge