IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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KEA JENSEN,

Plaintiff,

v.

ASSOCIATED MILK PRODUCERS, INC.,

Defendant.

OPINION AND ORDER

00-C-586-C

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This is a civil action for monetary, declaratory and injunctive relief in which plaintiff Kea Jensen contends that defendant Associated Milk Producers, Inc. violated Title VII of the Civil Rights Act of 1964, as amended by the Civil Rights Act of 1991, 42 U.S.C. § 2000e-2(a), by subjecting her to a hostile work environment, discharging her because of her sex and retaliating against her. Presently before the court is defendant's motion for summary judgment. Defendant's motion will be granted because plaintiff has not introduced facts from which a jury could conclude that (1) she was subjected to an actionable hostile working environment; (2) similarly situated male employees were treated more favorably than she under the attendance policy; or (3) defendant retaliated against her in violation of Title VII.

As explained in this court's Procedures to be Followed on Motions for Summary

Judgment, a copy of which was given to each party with the Preliminary Pretrial Conference Order on December 13, 2000, I will take as undisputed plaintiff's proposed facts that defendant does not contest specifically with proposed facts of its own that are based on record evidence. See Procedures, III.A.1 ("The movant may serve and file . . . [n]umbered factual statements in rebuttal to factual statements made in response to movant's proposed findings of fact or to dispute new facts proposed by the nonmovant, together with appropriate citations to the record."). Many of defendant's responses to plaintiff's proposed findings of fact do not cite to record evidence or provide any explanation for why the proposed fact is in dispute, stating only that the proposal is "Denied." Dft.'s Resp. to Pltf.'s Proposed Findings of Fact ##9, 10, 11, 30, 31, 32, 35, 36, 37, 43, 52, 53, 55, 56, 72, 73, 75, 77, 78, 82, 85, 86, 87 and 91, dkt. #19. Such responses are not adequate to put plaintiff's proposed findings of fact into dispute and will be ignored. Despite defendant's failure to dispute properly many of plaintiff's proposed findings of fact, I will disregard plaintiff's proposals of fact that are more in the nature of legal conclusion than fact. For example, plaintiff's proposed finding of fact #9 states, "During her employment with AMPI, Ms. Jensen was subjected to hostile treatment stemming from discrimination based upon her sex." In order to establish a hostile work environment claim under Title VII, plaintiff needs to propose facts specifying the incidents to which she was subjected that she contends support her claim. Plaintiff's proposed finding #11 goes to the ultimate legal issue in this

case, which does not aid the court in finding the facts.

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

UNDISPUTED FACTS

A. Parties

Plaintiff Kea Jensen was employed by defendant as a third-shift sanitation worker from July 20, 1998 through November 17, 1998. Defendant Associated Milk Producers, Inc. is a cheese packaging and processing facility located in Portage, Wisconsin.

B. Hostile Work Environment Incidents

Ken Kreklow was plaintiff's supervisor and Dan Yelk was the sanitation department coordinator. Yelk had no authority to hire, fire, discipline, discharge or set wage rates. Yelk was responsible for assisting Kreklow in directing the workforce, performing Kreklow's duties in his absence and assisting in training and retraining new and existing employees. Yelk is a member of the bargaining unit represented by the union. Yelk monitored and directed the work of plaintiff, Rodney Hall, Rex Kettleson, John Vogelsand and Dave Moungey. When Yelk followed plaintiff around, he often gave her instructions on aspects of her job that she knew already. Yelk often observed plaintiff from behind the glass in Kreklow's office.

Plaintiff's duties involved removing cheese residue from equipment, food surfaces, floors and walls before the next production shift. In November 1998, plaintiff sprayed Yelk with water while she was using a pressure hose. In response, Yelk yelled at plaintiff for getting him wet and at the male employees who defended plaintiff.

On one occasion, plaintiff went into the chemical room to get work supplies. Yelk followed plaintiff into the chemical room and yelled at her, telling her that she had no right to be there and accusing her of mixing chemicals. Yelk told plaintiff that he was afraid that she was about to mix chemicals.

On another occasion, plaintiff told supervisor Kreklow that she smelled smoke. Kreklow told plaintiff that the smell was coming from one of the motors and that she should go back to work, which she did. Because plaintiff thought that there was an electrical fire, she left her station, at which point Yelk told her to "get her ass right back up" to her station.

A number of times during her employment with defendant, plaintiff told Kreklow that she had finished her work and was bored. Kreklow instructed Yelk that when plaintiff finished her work early, Yelk should ask her to clean the floor while the other employees finished their cleaning duties. Following Kreklow's instructions, Yelk required plaintiff to perform additional duties when she finished her work before the end of her shift. Yelk singled out plaintiff frequently and assigned her menial tasks if she was standing around with her co-workers. Yelk once instructed plaintiff to climb into a blender to clean out cheese

residue.

From the beginning of her employment, Yelk criticized and yelled regularly at plaintiff. Yelk also yelled regularly at male employees, Eddie Johnson, Keith Bunfert, Vince Miller and John Vogelsand.

On at least three occasions, plaintiff complained to Kreklow about Yelk's behavior. Despite plaintiff's complaints, Yelk's behavior did not improve. Plaintiff's co-worker, Rex Kettleson, told Kreklow about Yelk's conduct towards plaintiff. Kreklow's only response to the complaints was to move Yelk away from plaintiff's work area for part of one shift.

C. Absentee Policy

Plaintiff was a member of the Teamsters Union, Local 695. Defendant and the union were parties to a collective bargaining agreement that contained an attendance policy. The policy provides in relevant part:

> II. Disciplinary Policy
>
> (a) There will be no discipline for the first two absences in any rolling six month period. Thereafter:
>
> 3rd absence - Verbal Warning
> 4th absence - Written Warning
> 5th absence - Final Warning
> 6th absence - Discipline (suspension) up to and including discharge
> Termination can occur if any employee is suspended and/or receives a final written warning three (3) times in any rolling two (2) year period.

> (b) An absence is defined as any one or more consecutive work days absent. An absence of 5 or more hours in a work day is considered an absence. Late or absence of 10 minutes to 5 hours is considered a one-half absence. Fully paid time off, i.e., vacation, holiday, funeral, jury is not an absence. Lost time that qualifies for sick leave pursuant to Article VII(c) of this agreement is not an absence. Lost time qualifying under the state or federal FMLA is not an absence under the attendance policy.

Under the policy, an employee was discharged once she reached or exceeded six absences in a rolling six-month period. On September 15, 1998, plaintiff received a verbal warning following her third absence, which was a three-day absence. Plaintiff did not file a grievance to challenge the warning. On September 28, 1998, plaintiff received a written warning because she had been tardy on September 24. Plaintiff signed the warning letter and did not file a grievance with her union to challenge the discipline. On September 28, 1998, plaintiff received a final warning for failing to report to work on September 25 and September 26. Plaintiff signed the warning letter and did not file a grievance. On November 17, 1998, defendant terminated plaintiff after she failed to report to work on November 16 and 17. Plaintiff did not file a grievance to challenge her discharge. Defendant provided documentation to establish that plaintiff's discharge was warranted pursuant to the collective bargaining agreement.

From January 1, 1998 through March 31, 1999, defendant terminated 23 employees at the Portage facility for violating the attendance policy: 26 male employees and 7 female employees. In 1998, 54% of defendant's workforce was female and 47% of the employees

in the sanitation department were female. In 1998, defendant terminated six employees from the sanitation department: five male and one female.

Kevin Killiam was discharged on October 21, 1998, after he had accrued 6.5 absences. Killiam had a three-day absence that counted a as a single occurrence under the policy.

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. Hostile Work Environment

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 in 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"). The Court of Appeals for the Seventh Circuit has provided guidance in drawing the line between legal and illegal conduct under Title VII. 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 Baskerville v. Culligan Int'l Co., 50 F.3d 428, 430 (7th Cir. 1995). "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 supporting a conclusion that Yelk'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.'" Gleason v. Mesirow Financial, Inc., 118 F.3d 1134, 1144 (7th Cir. 1997) (quoting Galloway, 78 F.3d at 1168). That Yelk followed plaintiff as she worked and gave her instructions does not demonstrate that he subjected her to harassment on the basis of her sex. Yelk's position as coordinator of the sanitation department required him to monitor the department's employees, both male and female. Plaintiff does not dispute that she had told her supervisor that she was bored when she finished her work early and that, as a result, Yelk gave her

additional work to do upon completion of her assigned duties. However, she seems to argue that Yelk singled her out for menial tasks when she was standing around with her co-workers. Even if it was because plaintiff was a woman that Yelk chose her for certain assignments, such as climbing into a blender to clean it, assigning an employee additional duties (albeit ones that the employee may not have enjoyed) during her shift when she was admittedly standing around does not rise to the level of a hostile environment under Title VII.

It is not actionable that Yelk told plaintiff to "get her ass right back up" to her station when she left because of her concern about the smell of smoke; although it may have been rude, it was not sexual and there is no indication that the comment was motivated by plaintiff's gender. That Yelk yelled at plaintiff in the chemical room and after she had sprayed him with water as well as on many other occasions undoubtedly made plaintiff's working environment unpleasant, but does not raise the specter of an illegal motivation for Yelk's conduct in light of Yelk's tendency to yell at men and women. See Baskerville, 50 F.3d at 431. "Title VII does not impose liability on an employer for creating or condoning a hostile working environment unless the hostility is motivated by race, gender, or some other status that the statute protects." Heuer v. Weil-McLain, 203 F.3d 1021, 1024 (7th Cir. 2000). "Title VII does not cover the 'equal opportunity' . . . harasser, then, because such a person is not *discriminating* on the basis of sex." Holman v. Indiana, 211 F.3d 399,

403 (7th Cir. 2000).

Although Yelk made plaintiff's working environment disagreeable for her, 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 Yelk or any of her co-workers or supervisors touched her, threatened her, invited her to have sex or go on a date, exposed themselves, showed her dirty pictures or unreasonably interfered with her performance. See Gleason, 118 F.3d at 1145 (noting that it is important to take into account what alleged harasser did not do). Because Yelk's "behavior did not even reach the threshold at which it could reasonably be thought to create a hostile working environment for the plaintiff," defendant's response to plaintiff's complaints was appropriate. Baskerville, 50 F.3d at 432

Plaintiff attempts to support her hostile working environment claim with affidavits from her co-workers in which they describe their experiences working for defendant. See Dec. Jeff Scott Olson, dkt. #15. It is not relevant to plaintiff's claim whether women in general were treated unfairly by defendant if plaintiff did not observe such treatment and was unaware of the treatment. Because it is unclear how plaintiff is involved with the incidents described by plaintiff's co-workers in their affidavits, the incidents will not be considered in deciding defendant's motion for summary judgment. "[F]or alleged incidents of [discrimination] to be relevant to showing the severity or pervasiveness of the plaintiff's

hostile work environment, the plaintiff must know of them." Mason v. Southern Illinois University, 233 F.3d 1036, 1046 (7th Cir. 2000).

Ordinarily, hostile environment discrimination claims require two inquiries: whether the employee was subjected to impermissible harassment and whether the employer is liable for the harassing conduct. Consideration of the second inquiry is not necessary here because plaintiff has not introduced facts from which a jury could conclude that she was subject to actionable harassment.

C. Disparate Treatment

A plaintiff in an employment discrimination action may prove discrimination in two ways: by direct evidence and by indirect evidence. In direct evidence cases, the plaintiff offers evidence that requires the factfinder to draw no further inferences or make any presumptions that an impermissible factor was included in the employer's decision-making process. See Randle v. LaSalle Telecomm., Inc., 876 F.2d 563, 569 (7th Cir. 1989) ("[D]irect evidence, if believed by the trier of fact, will prove the particular fact in question without reliance on inference or presumption.").

Plaintiff does not contend that she has direct evidence of discrimination; instead; she argues that she has established discrimination under the familiar McDonnell Douglas burden shifting framework. See McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973).

Specifically, plaintiff argues that she has established a prima facie case under McDonnell Douglas: (1) she is in a protected class as a woman; (2) she was performing her job well enough to meet defendant's legitimate expectations; (3) she suffered an adverse employment action when she was fired; and (4) she was treated less favorably than similarly situated employees who were male. Id. If plaintiff has made such a case, defendant will be required to offer an explanation for its actions, after which plaintiff will have an opportunity to show that the explanation is a pretext for unlawful discrimination. See, e.g., Darnell v. Target Store, 16 F.3d 174, 177 (7th Cir. 1994).

Plaintiff's disparate treatment claim fails because she has failed to introduce evidence that defendant treated a male employee more favorably than it treated her when it fired her pursuant to the collective bargaining agreement's attendance policy. There is no evidence that defendant did not terminate a male employee who had accrued 6.5 or more absences within a rolling six-month period. The lack of such evidence is fatal to plaintiff's claim that she was terminated because of her sex. Plaintiff contends that even if the absentee policy was not applied to her in a discriminatory fashion, defendant discriminated against her by excusing men's absences more freely than it did women's. In support of this contention, plaintiff tries to introduce evidence about specific incidents in which her male and female co-workers missed work. However, plaintiff failed to introduce any evidence about the facts surrounding her six and a half absences; therefore, it is not possible to determine whether

she was similarly situated to the male employees to whom she wishes to compare herself. Without evidence that defendant treated men better under the absentee policy by excusing their absences more frequently that women's or by disciplining men less harshly then men, plaintiff's disparate treatment claim fails. Accordingly, defendant's motion for summary judgment will be granted.

D. Retaliation

Plaintiff contends that defendant fired her in retaliation for having complained to Kreklow about Yelk's behavior. To establish a prima facie case of retaliation, plaintiff must show that (1) she engaged in statutorily protected expression; (2) she suffered a material 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). Plaintiff failed to introduce any evidence about the timing of her complaints to Yelk in relation to her termination or who fired her and whether that person knew about her complaints. Plaintiff's retaliatory discharge claim fails because of her failure to show a causal connection between her complaints to Kreklow and her termination.

At the summary judgment stage, a plaintiff has an obligation to show the existence of facts sufficient to raise a question for the jury on all of the essential elements of her claims. See Celotex, 477 U.S. at 322. Summary judgment is appropriate if the court

concludes that "if the record at trial were identical to the record compiled in the summary judgment proceedings, the movant would be entitled to a directed verdict because no reasonable jury would bring in a verdict for the opposing party." Russell v. Acme-Evans Co., 51 F.3d 64, 69 (7th Cir. 1995). On the basis of this record, a reasonable trier of fact could not conclude that defendant fired plaintiff in retaliation for her complaints to Yelk and not because of her absences. Therefore, defendant's motion for summary judgment will be granted on plaintiff's retaliation claim.

ORDER

IT IS ORDERED that defendant Associated Milk Producers, Inc.'s motion for summary judgment is GRANTED. The clerk of court is directed to enter judgment for defendant and close this case.

Entered this 14thday of June, 2001.

BY THE COURT:

BARBARA B. CRABB
District Judge