IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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ROBERT STEINHAUER,

OPINION AND ORDER

Plaintiff,

02-C-0280-C

v.

LAURA DeGOLIER and
STATE OF WISCONSIN

Defendants.

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This is a civil action for monetary damages in which plaintiff Robert Steinhauer alleges that defendants discriminated against by terminating him from his job with the Wisconsin Conservation Corps. Plaintiff contends that defendant DeGolier violated his rights under the equal protection clause of the Fourteenth Amendment, as applicable under 42 U.S.C. § 1983, and that the state of Wisconsin violated his rights under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e.

Presently before the court is defendants' motion for summary judgment. Because plaintiff has failed to adduce direct evidence of sex discrimination or establish that defendants treated similarly situated female employees more favorably, defendants' motion

for summary judgment will be granted. Plaintiff also filed a motion for leave to supplement the record in which he wishes to propose two additional facts. Specifically, plaintiff proposes that (1) Lauren Hambrook is a member of the Wisconsin Conservation Corps board of directors and (2) that Hambrook avers that DeGolier introduced plaintiff to the board on November 9, 2000, and stated that "[plaintiff] was a great recruiter and that we're lucky to have him." The motion will be denied as moot. Even if I were to construe these additional proposed facts as undisputed, it would not affect the outcome of defendants' motion. Defendants do not allege that DeGolier fired plaintiff because he was deficient in his recruiting abilities. Rather, they allege he was fired because he was insubordinate and because DeGolier and Stevens had received complaints that he was harassing and intimidating staff. At most, plaintiff's recruiting abilities would be relevant to show pretext after he established his prima facie case, which he has failed to do.

Before I set out the undisputed facts, a word is necessary regarding plaintiff's proposed findings of fact. It is not helpful to include irrelevant, inadmissible and conclusory "facts." For example, it is not relevant that "[d]uring DeGolier's tenure as executive secretary, she denies ever performing any campaign work for Governor McCallum" and plaintiff lacks foundation for his proposal that "[t]he men in the office believe that Stevens, Decker, and DeGolier had all been through divorces and all had problems with men that they're apparently really angry about so they take their anger out on the men in the office."

See Plt.'s Proposed Findings, dkt. #25, at ¶¶ 7, 95. I have ignored many of plaintiff's proposed facts but have included a number that are only marginally relevant so as to present plaintiff's case in the light most favorable to him, the non-moving party. In addition, in the future, if plaintiff's counsel refer to proposed facts in briefs, they should cite the proposed fact and not the source of the proposed fact, so as to make it easier for the court to correlate the facts as proposed and as argued.

From the proposed findings of fact and the record, I find the following facts to be material and undisputed.

## UNDISPUTED FACTS

The state legislature created the Wisconsin Conservation Corps in 1983. The Corps employs young Wisconsin adults (between the ages of 18 and 25) throughout the state in projects concerning resource conservation and enhancement. The Corps is "administratively attached" to the Department of Workforce Development.

On February 1, 1999, Governor Tommy Thompson appointed defendant Laura DeGolier as executive secretary and executive director of the Corps. When DeGolier arrived at the Corps, she found a staff that, in her opinion, spent too much time visiting with others, making personal phone calls, surfing the Internet and reading newspapers. DeGolier decided that this would change and that any employee engaged in that kind of activity was not doing

his or her job.

In July or August 1999, DeGolier hired Rebecca Kemp as the Corps' human resource coordinator. DeGolier terminated Kemp in February 2000 during her probationary period. On an unspecified date, DeGolier told Kemp that she had had her skirts shortened in order to have her way with men in power.

In February 2000, DeGolier hired Eileen Stevens (a/k/a Elly Slaney-Bartels) as Kemp's replacement. Stevens was plaintiff's direct supervisor. She reported to DeGolier. Stevens administered human resource services to three permanent staff in the central office, three regional crew leaders and their limited-term clerical staff, one mobile crew leader, 13 project crew leaders and approximately 50 corps members statewide. Stevens was in charge of the central office in DeGolier's absence.

DeGolier approved Stevens's recommendation to hire plaintiff Robert Steinhauer as a personnel assistant 2. Plaintiff began work on June 12, 2000, and was required to serve a six-month permissive probation until December 8, 2000. Plaintiff's primary duties were assisting with employment and supervision of all Corps enrollees, including enrollee support and training. About one month after he started, plaintiff accepted the responsibility of recruitment. Plaintiff filled in for Stevens in a non-supervisory capacity when she was out of the office. Stevens never gave plaintiff written evaluations, although Department of Workforce Development procedures recommend doing so.

Larry Corsi was the projects coordinator at the Corps. He left voluntarily in mid- or late February 2001. On an unspecified date, DeGolier was upset with something Corsi had done and she told him, "I've got a couple of options. I could terminate [you] or I could put you in a box and just let you exist on your own." On more than one occasion, DeGolier told Kemp that Corsi was "a little Hitler" and she may have called him a "pompous male."

A female employee attended a "back country program" in California. The employee's boyfriend, also an employee of the Corps, went with her. After her boyfriend visited her in the back country, she left the program. DeGolier told Corsi that the female employee left because of male influence and that the boyfriend should have kept his nose out of it.

Don Hammes was the publications editor. Hammes no longer works at the Corps. DeGolier shouted at Hammes about his competency and work. According to Corsi, when Hammes made suggestions at staff meetings, DeGolier would not take him seriously. Hammes did not believe that DeGolier respected his knowledge or expertise. Hammes told Stevens that he was offended and insulted by DeGolier's comments.

DeGolier pulled plaintiff and Stevens out of a crew leader workshop to show them documents that contained complaints about a particular crew in Lake Nebagamon. Plaintiff told DeGolier that he had experience investigating workers' compensation fraud and abuse of sick leave. Stevens told plaintiff that she would be doing the Lake Nebegamon investigation. DeGolier's explanation for not allowing plaintiff to do the investigation at

Lake Nebegamon was that, as a "six-foot-five man," plaintiff would stand out like a sore thumb.

On an unspecified date, DeGolier approached plaintiff about information he was providing to an individual interested in the ranger cadet program. DeGrolier told plaintiff that this was hers to take care of despite the fact that plaintiff took information about this program on his recruiting trips.

On an unspecified date, plaintiff was scheduled to make a presentation and DeGolier hired someone from the outside to do it instead

On July 13, 2000, DeGolier and Stevens sent plaintiff and Tom Treleven, safety coordinator, on an unannounced visit to Ken McLees's crew to look into safety issues and inquire about time-off policies. After returning, plaintiff reported to Stevens that all went well. Later, in a weekly meeting, plaintiff told Stevens that he did not agree with her intention to discipline McLees and the assistant crew leader.

In the September 15, 2000 newsletter, DeGolier wrote, "[Plaintiff] is an ace recruiter. When he comes to your area, expect to work hard all day and meet lots of people. He will help you develop centers of influence that can become referral sources for you."

In the September 29, 2000 newsletter, DeGolier wrote, "[Plaintiff] has been helping with recruitment with Ken McLees in the Coulees CAP, Westby areas and with Charles Rowcliff in Amery. [Plaintiff] will be a great help in the Corps in this area."

On October 19, 2000, DeGolier and Stevens returned from a visit with Howard Bernstein, legal counsel at the Department of Workforce Development, regarding the Lake Nebagamon investigation, and plaintiff said, "I know where you were." Stevens asked how he knew and plaintiff told her that he had viewed Bernstein's calendar on the network. In DeGolier's opinion, this was none of plaintiff's business and he should have been spending his time doing the tasks assigned to him. There is no prohibition to opening up calendars that are on the network.

Stevens gave plaintiff favorable comments about his job performance. On an unspecified date, Stevens emailed plaintiff and told him what a wonderful employee she thought he was during October 2000. Specifically, in an October 27, 2000 email, Stevens told plaintiff, "If Larry [Corsi] ever was to leave, you'd be an excellent projects lead." In that same email, Stevens stated that she told DeGolier that she:

> wanted to open up the competition for the projects lead so they didn't get bashed about placing people, but I told her that I honestly believed that even in a competition, you'd come out as the top candidate with your many years of experience, plus you've been a supervisor, you have a financial background and you are an excellent people person, and I believe you could bring new sponsors in and gradually weed out the Lake Nebagamons.

Through November 3, 2000, plaintiff was performing his job in a satisfactory manner. Sometime, possibly in November 2000, DeGolier discussed plaintiff's job performance with him and told him that he was doing a stellar job of recruiting, he was getting community

interest in starting new crews and the city of Chetek was interested because of his visit to Prairie Farm High School. DeGolier categorizes plaintiff's initial work performance as satisfactory.

In a November 3, 2000 newsletter, DeGolier wrote, "[Plaintiff] does a great job selling not only the Corps to potential corps members, but also selling communities on having a WCC crew."

In early November, DeGolier told plaintiff that he should be in the Corps' recruitment video that was to be taped later that month. DeGolier believed that it would be better to have plaintiff participate. She believed that she would not be with the Corps for long because the newly elected governor would appoint another executive director. At the time DeGolier gave this video assignment to plaintiff, she thought he would successfully complete his probation. On the day of taping, plaintiff was concerned about what to say and how to present the material. DeGolier believed that he should have known what to do and how to do it because he had been recruiting from late August and had visited several schools. When DeGolier viewed the rough cut of the tape she was disappointed by plaintiff's performance. Plaintiff was nervous, camera shy and not comfortable in front of the camera. Hammes asked DeGolier to exclude plaintiff's segment from the recruitment video. DeGolier agreed and it was not included.

Michelle Purifoy began working as a "corps member" in August 1998. In July 1999,

she received a "department position." (It is unclear in what way a corps member position differs from a department position.) In May 2001, Purifoy resigned voluntarily. On an unspecified date, DeGolier leaned over to Purifoy at a conference table and said, "Stay on my side and you'll be okay."

Donna Decker (f/k/a Donna Jimenez) was a limited-term employee and the central office crew leader. Decker worked at the Corps from May 1995 until June 30, 2001. Decker discussed her divorce with DeGolier. On more than one occasion, during discussions regarding Decker's divorce, DeGolier told Decker that Decker did not need a man in her life. DeGolier referred to Decker as "weak" and told her that men prey on weak women. DeGolier often told Decker that Corsi would not be working at the Corps much longer.

On an unspecified date, Stevens began receiving complaints from Decker that plaintiff was asking "gossipy" questions and trying to "get the scoop" on things such as personal information on an unspecified former female limited-term employee. (Stevens alleges that she received complaints from Purifoy as well, but Purifoy denies making any complaints about plaintiff.)

On an unspecified date, Decker told Stevens that plaintiff had told Decker and a former limited-term employee that although Stevens might be his supervisor on paper, Stevens would never be his supervisor. Decker told DeGolier about plaintiff's statement. When Stevens confronted plaintiff about Decker's accusations, he denied making the

statement.

On an unspecified date, Decker complained to Stevens that she was caught in the middle of an email spat between Dietz and plaintiff. Decker came to Stevens's office in tears, complaining that plaintiff was pressuring her for information and that she was very uncomfortable with him and did not like being caught between plaintiff and Dietz, who was her friend.

On an unspecified date, Stevens and DeGolier asked Decker whether plaintiff had been harassing or intimidating either her or Purifoy. Stevens and DeGolier asked the same question to the person who staffed the front desk. (Although it is disputed whether plaintiff harassed or intimidated Decker and Purifoy, it is undisputed that he did not *sexually* harass them.) Decker told DeGolier that plaintiff would come into her office, which was quite small, and look over her shoulder at what she was typing on the computer. Decker complained to Stevens that she felt intimidated and cornered by plaintiff. DeGolier did not document Decker's complaint in writing.

Because Decker felt "uncomfortable" around plaintiff, DeGolier told plaintiff that Decker was too busy to help him organize the next several weeks of recruiting and that he would have to make his own travel arrangements. When DeGolier did not receive any further complaints from Decker, she assumed that the problem had been solved. Plaintiff's travel arrangements involved reserving cars and hotels, making appointments at different

sites and providing program information to each site. During the 17 days that plaintiff began making his own travel arrangements until his employment ended, he traveled at least five days. It took plaintiff "days" to make his travel arrangements. Plaintiff was unable to tend to his travel arrangements because he was doing other things for the Corps. DeGolier made her own travel arrangements.

On an unspecified date, Stevens told plaintiff not to grill or question the clerical staff for information. Plaintiff wanted Stevens to tell him about the specific allegations that were being made against him and claimed not to know what Stevens was talking about. Plaintiff said that he had told his family that things were "strange here at work and he didn't know what was going to happen." Stevens asked him why he would tell his family that and he stated that he needed to work on better projects. DeGolier and Stevens told plaintiff, Decker and Purifoy that they were not to meet with each other one-on-one in the office.

When it became apparent to Stevens that her verbal warning had not been effective, Stevens gave plaintiff the following letter on Friday, December 1, 2000:

> This letter is in reference to job duties to be performed. As you are aware from your position description you main areas of concentration are on recruitment and training for crew leaders. You are to provide back up in the absence of the HR Coordinator as directed by the HR Coordinator or the Executive Secretary. This does not include areas of finance, procurement, RAPIDS, and project issues.
>
> In regards to issues of WCC grievances and/or investigations this will remain with the HR Coordinator. Any information that needs to be shared with you or other staff will be appropriately shared on a need to know basis. Besides asking me directly,

> indications from various sources indicate that you have been inquiring about information that is confidential and not relevant to your position. Asking probing questions and researching other sources to obtain information is not an acceptable practice at WCC. Lower level staff indicated that they feel intimidated and somewhat harassed by your inquiries.
>
> Initiating conversations with others and trying to obtain information on areas not in your area of responsibility is not acceptable and you are directed to cease this behavior could [sic] result in further action being taken by WCC.

When Stevens gave plaintiff the December 1 letter, he became very angry. He told Stevens that the letter was "clear as mud" and that it "did not follow the practice that they were having him do." Plaintiff told Stevens that he wanted to know the specific allegations against him. Plaintiff did not believe Stevens when she told him that Decker and Purifoy were the employees complaining about him. He demanded a face-to-face meeting with Purifoy and Decker. Stevens denied that request. Even though Purifoy and Stevens could have filed a grievance against plaintiff, neither did so. Stevens discussed the December 1 letter with DeGolier.

On Monday, December 4, 2000, plaintiff met with Purifoy in an empty office and they discussed her dental insurance and filled out paperwork. On Stevens's return to the office, Decker told Stevens that plaintiff had met with Purifoy and that Decker was concerned that plaintiff would try to get her alone and question her as well. Stevens asked Purifoy whether she had met with plaintiff and Purifoy confirmed that they had. DeGolier never asked plaintiff for his version of the events and does not recall whether Stevens had

any conversations with him regarding this incident. That same day, Stevens met with DeGolier and told her what happened and said that she did not think she could work with plaintiff because he refused to recognize her as his supervisor, he was insubordinate, he was not a team player and Stevens saw no hope that he would change his behavior in the future. DeGolier never sat down with plaintiff and talked to him about the alleged problems of insubordination and intimidation.

When Stevens told DeGolier that she could not work with plaintiff, DeGolier decided to terminate him. On December 7, 2000, DeGolier gave plaintiff a letter of termination, which stated:

> I regret to inform you that your permissive probation with Wisconsin Conservation Corps has been terminated. This letter is official notice that your position with WCC is being terminated effective immediately.
>
> Over the last few weeks issues of concern have been discussed with you. Most recently in a letter from Elly Slaney-Bartels [Stevens] on Friday, December 1, 2000 you were asked to refrain from asking questions of a confidential matters [sic], cease probing or intimidating conversations with lower level staff that would appear to put them in an uncomfortable situation.
>
> On Monday, December 4, 2000 you chose to discuss various issues with a Program Assistant in a closed office, some questions asked where [sic] of a probing nature.
>
> You may wish to contact other State agencies as to the availability of positions that may be available and of interest to you.

According to DeGolier, she terminated plaintiff because of insubordination and reports of harassment and intimidation that she and Stevens had received from Decker and

Purifoy.

The next day, in the December 8, 2000 newsletter, DeGolier included the following quote, "Give a man a fish and he will eat for a day. Teach him how to fish and he will sit in a boat and drink beer all day." In another newsletter of an unspecified date, DeGolier included the statement, "The surest way to make a monkey out of a man is to quote him."

On January 14, 2001, DeGolier accepted Stevens's recommendation to hire Chan Voeltz, a male, to fill plaintiff's position. Voeltz completed his probation and has been an excellent employee.

DeGolier used the word "guys" occasionally to refer collectively to both men and women. From time to time, DeGolier used the phrase "good old boys club" to refer to the staff, both male and female, who operated the Corps in an old fashioned, ineffective way and who stuck together to preserve the status quo. Stevens never heard DeGolier espouse any theory that men can be controlled by females and has never received a staff complaint that DeGolier ever made such comments or that she treated females more favorably than males.

During plaintiff's tenure, DeGolier did not terminate any female employees. During DeGolier's tenure, she terminated three females (Rebecca Kemp, Atavia Fitzpatrick and Jewellester War) and one male (plaintiff) during their probationary period. These three other probationary employees did not work at the Corps at the same time as plaintiff. Since DeGolier has been executive director at the Corps, she has hired or approved

recommendations to hire 15 females and seven males in the central office. She offered a financial specialist position to a male, who declined her offer. DeGolier has approved the recommended hires of 63 male crew leaders, 21 female crew leaders and two male regional crew leaders. Also, DeGolier has promoted three male crew leaders to the level of regional or mobile crew leader.

## OPINION

Plaintiff brings his sex discrimination claims under Title VII (against defendant State of Wisconsin) and 42 U.S.C. § 1983 (against defendant DeGolier). Because the same evidentiary and burden shifting approach applies in determining whether plaintiff's sex discrimination claims under either statute has merit, these claims will be addressed together. See St. Mary's Honor Center v. Hicks, 509 U.S. 502, 506 n.1 (1993); see also Patterson v. McLean Credit Union, 491 U.S. 164, 186 (1989) (applying same framework to claims under 42 U.S.C. § 1981). In order to sustain a claim for sex discrimination, plaintiff must show that his sex was a determining factor in defendants' decision to fire him. If he bases his sex discrimination suit on a claim of disparate treatment, he must adduce proof of intentional discrimination. See Eiland v. Trinity Hospital, 150 F.3d 747, 751 (7th Cir. 1998). He may demonstrate intentional discrimination through either the direct or indirect method of proof. See id.

A. Direct Method

Under the direct method of proof in discrimination cases, a plaintiff must show either an acknowledgment of discriminatory intent by the defendant, see Lim v. Trustees of Indiana University, 297 F.3d 575, 580 (7th Cir. 2002) ("[D]irect evidence should prove the particular fact in question without reliance upon inference or presumption.") (internal quotation omitted), or circumstantial evidence that provides the basis for an inference of intentional discrimination, see Troupe v. May Department Stores, 20 F.3d 734, 736 (7th Cir. 1994). Circumstantial evidence can be (1) "suspicious timing, ambiguous statements, behavior toward or comments directed at other employees in the protected group and other bits and pieces from which an inference of discriminatory intent might be drawn"; (2) evidence that similarly situated employees were treated differently; or (3) evidence that the employee was replaced by a person not having the forbidden characteristic and that the employer's reason for the difference in treatment is a pretext for discrimination. Id. The court of appeals has held that the third type of circumstantial evidence in a direct method case is substantially the same as the evidence required under the burden-shifting approach set out in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-805 (1973). See Huff v. UARCO Inc., 122 F.3d 374 (7th Cir. 1997). To illustrate the difference between direct and indirect evidence, the court of appeals has held that stating, "I fired Judy because she was an old woman" would be direct evidence of discrimination. Gorence v. Eagle Food Centers,

Inc., 242 F.3d 759, 762 (7th Cir. 2001). However, a statement such as "old women are hard to deal with" may reveal bias or ignorance but, without more, would be only indirect evidence of discrimination. Id. "Bigotry . . . is actionable only if it results in injury to a plaintiff; there must be a real link between the bigotry and an adverse employment action." Id. (citing Miller v. American Family Mutual Ins. Co., 203 F.3d 997 (7th Cir. 2000)).

Plaintiff alleges that the following is direct evidence that DeGolier terminated plaintiff on the basis of his sex: (1) the give-a-man-a-fish and monkey-out-of-a-man quotes DeGolier inserted in the weekly newsletter; (2) DeGolier's use of the word "guys" and the phrase "good old boys club"; (3) DeGolier's reference to the male power structure at the Corps; (4) DeGolier's possible reference to Larry Corsi as a "pompous male"; (5) the disputed fact that Hammes heard "derogatory and sexist comments" exchanged among DeGolier, Decker and Stevens; (6) the disputed "anti-male" statements DeGolier made to Kemp; (7) the disputed fact that DeGolier made it very clear to plaintiff that she wanted to get rid of men on the projects team; (8) the "stripping away" of plaintiff's duties; (9) the fact that DeGolier told plaintiff that she did not want him to conduct the Lake Nebagamon investigation because he was a "six-foot-five man," who would stand out like a sore thumb; and (10) the fact that DeGolier required plaintiff to make his own travel arrangements; (11) the fact that plaintiff was scheduled to make a presentation and DeGolier hired someone from the outside to do it instead. See Plt.'s Resp., dkt. #24, at 4-7.

First, this laundry list (which has been pared down to omit conclusory allegations) is not direct evidence because it requires inferences or presumptions to conclude that sex was part of defendants' decision making process. Lim, 297 F.3d at 580. Second, to the extent that plaintiff is relying on circumstantial evidence under the direct method enunciated in Troupe, 20 F.3d at 736, he fails to link these alleged statements or actions to defendants' employment decision to terminate him. Under the direct method, it is not enough simply to allege that DeGolier had a general "anti-male" sentiment and expect the factfinder to conclude that DeGolier fired plaintiff because he is male. See Gorence, 242 F.3d at 762 ("evidence of inappropriate remarks not shown to be directly related to the employment decision may not support a direct-method-of-proof case, but, in connection with other evidence, might support a case under McDonnell Douglas"). Rather, plaintiff must link DeGolier's alleged anti-male remarks to her decision to terminate him, such as by showing that defendant made the statements contemporaneously with the adverse action or that the statements were causally related to her termination decision. Markel v. Board of Regents of the University of Wisconsin, 276 F.3d 906, 910 (7th Cir. 2002); Monaco v. Fuddruckers Inc., 1 F.3d 658, 660 (7th Cir. 1993) (remarks must be related to employment decision to overcome summary judgment in direct case). Plaintiff has failed to show or even argue that DeGolier's alleged remarks were related to or contemporaneous with his termination.

Plaintiff's only allegation that even comes close to providing an arguable link between

DeGolier's remarks and his termination is the undisputed fact that DeGolier told plaintiff that she did not want him to conduct the Lake Nebagamon investigation because he was a "six-foot-five man" and would stand out like a sore thumb. However, plaintiff focuses solely on the "man" portion of this description and ignores the "six-foot-five" adjective. Although this allegation is not enough to establish circumstantial evidence under the direct method, it may be used to support pretext using the indirect method. See Huff, 122 F.3d at 383 ("decision maker's discriminatory remarks, although unrelated to the employment decision at issue, are probative of pretext, and may be used to support a prima facie case for a plaintiff using the indirect method of proof"). Plaintiff cites the additional facts that DeGolier told plaintiff to arrange his own travel arrangements, hired someone from the outside to do a presentation in lieu of plaintiff and told plaintiff that she wanted to handle the ranger cadet program herself. Although these facts may be indicative of pretext, they do not establish sex discrimination under the direct method because plaintiff has not linked these changes in his job duties to his termination. Plaintiff has the burden of establishing the link to the employment decision and he has failed to do so. See Fuka v. Thomson Consumer Electronics, 82 F.3d 1397, 1403 (7th Cir. 1996) (in direct proof case, plaintiff must show that remarks were related to employment decision).

In addition, plaintiff should be aware that conclusory allegations do not prevent the entry of summary judgment. For example, plaintiff alleges that (1) Hammes heard

"derogatory and sexist comments loudly exchanged between DeGolier, Decker and Stevens"; (2) that "DeGolier made it very clear [to plaintiff] that she wanted to get rid of the men on the projects team"; and (3) that "DeGolier discussed men in a negative way with Decker." Plt.'s Resp., dkt. #24, at 4-5. To defeat a motion for summary judgment, plaintiff must offer specific facts, not conclusions. See Fed. R. Civ. P. 56(e) (non-moving party "must set forth specific facts showing that there is a genuine issue for trial"); Palucki v. Sears, Roebuck & Co., 879 F.2d 1568, 1572 (7th Cir. 1989) (neither party may rest on conclusory statements in affidavits). In other words, (1) Hammes must say exactly what derogatory and sexist comments DeGolier made; (2) plaintiff must allege exactly what DeGolier said that made it "very clear" to him that she wanted to get rid of men on the projects team; and (3) Decker has to tell the court exactly how DeGolier discussed men in a "negative" way.

Moreover, in many instances, plaintiff changed the substance of the averments in the affidavits when citing them in his brief or proposed findings of fact. For example, plaintiff argues in his brief that "DeGolier *told* Kemp that as a woman, she was part of a super-human group which men were not qualified to join." Plt.'s Resp., dkt. #27, at 5 (emphasis added). However, Kemp stated in her affidavit, "Ms. DeGolier *intimated* to me that as a woman she was part of a super human group which men, and specifically Ms. DeGolier's ex-husband, were not qualified to join." Aff. of Rebecca Kemp, ¶ 14, Exh. CC to Aff. of Heath Straka, dkt. #27 (emphasis added). The operative word is "intimated," which means to hint or

suggest. In other words, contrary to what plaintiff says in his brief, Kemp does not aver that DeGolier *told* her that women were part of a super-human group. In another example, plaintiff alleges in his brief that "DeGolier told Kemp that Corsi was 'led by his penis.'" Plt.'s Resp., dkt. #27, at 5. However, Kemp avers ambiguously, "Frequently, Ms. DeGolier would intimate to me, if not state expressly, that Mr. Corsi was 'led by his penis.'" Aff. of Rebecca Kemp, ¶ 7, Exh. CC to Aff. of Heath Straka, dkt. #27. This is hardly a definitive statement that DeGolier *told* Kemp that Corsi was led by his penis. Instead, it is unclear whether DeGolier stated this expressly to Kemp or whether this was something that Kemp merely inferred. Simply put, plaintiff cannot create an issue of fact by offering his or his co-worker's interpretation of DeGolier's behavior as evidence.

In any event, because plaintiff's allegations do not constitute direct evidence of sex discrimination and he fails to link his alleged circumstantial evidence directly to his termination, he must rely on the indirect method in order to survive summary judgment.

B. Indirect Method

In the absence of direct evidence, a plaintiff in Title VII or § 1983 actions must abide by the burden-shifting formula set out in McDonnell Douglas, 411 U.S. at 802-05; see also Pilditch v. Board of Education of City of Chicago, 3 F.3d 1113, 1116 (7th Cir. 1993). A plaintiff who believes he was fired from a position because of his sex can establish a prima

facie case by showing that (1) he is a member of a protected class; (2) he was qualified for the position or was meeting legitimate performance expectations; (3) he suffered an adverse employment action; and (4) his employer treated similarly situated employees outside the class more favorably. See Foster v. Arthur Andersen, LLP, 168 F.3d 1029, 1035 (7th Cir. 1999). If a plaintiff satisfies all of these elements, the burden of production shifts to the defendant to produce a legitimate, nondiscriminatory reason for its action. See Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 254 (1981); Flores v. Preferred Technical Group, 182 F.3d 512, 514 (7th Cir. 1999). If the defendant articulates a nondiscriminatory reason, it has satisfied its burden of production and the McDonnell Douglas test is no longer relevant. See Burdine, 450 U.S. at 255. The plaintiff then must establish by a preponderance of the evidence that the defendant's proffered nondiscriminatory reason is pretextual. See Burdine, 450 U.S. at 256; Flores, 182 F.3d at 514-15.

Defendants do not dispute that plaintiff satisfies the first and third prongs of his prima facie case, namely, that he is in a protected class (male) and that he suffered an adverse employment action (termination). Instead, defendants focus on the remaining two prongs, arguing that plaintiff has failed to show that he was meeting defendants' legitimate expectations and that similarly situated female employees were treated more favorably.

To meet his burden of demonstrating that another employee is similarly situated, plaintiff must show that there is someone who is directly comparable to him in all material

respects and that defendants treated that employee differently. Radue v. Kimberly-Clark Corp., 219 F.3d 612, 618 (7th Cir. 2000). Plaintiff argues that Michelle Purifoy was a similarly situated female employee, that Stevens ordered both of them not to meet one-on-one with each other and that they both defied that directive. Thus, plaintiff contends, because he was terminated for meeting with Purifoy and Purifoy was not terminated for meeting with him, he was treated differently from a similarly situated female employee. One obvious problem with plaintiff's comparison is that he was a probationary employee and Purifoy was a permanent employee. Probationary employees are similarly situated only to other probationary employees. See Radue, 219 F.3d at 617-18 (similarly situated "normally entails a showing that the two employees . . . were subject to the same standards, and had engaged in similar conduct without such differentiating or mitigating circumstances as would distinguish their conduct or their employer's treatment of them."); see also Spath v. Hayes-Wheels Int'l-Indiana, 211 F.3d 392, 397 (7th Cir. 2000) (holding that comparable employees must be similarly situated "in all respects"); Bogren v. Minnesota, 236 F.3d 399, 404 (8th Cir. 2000) (probationary state trooper not similarly situated to non-probationary state trooper); McKenna v. Weinberger, 729 F.2d 783, 789 (D.C. Cir. 1984) (female probationary employee not similarly situated to male permanent employee). Furthermore, plaintiff had received a letter of reprimand the day before he disobeyed Stevens's directive and there is no evidence in the record suggesting that Purifoy had been reprimanded, either

orally or in writing. Plaintiff points to no other similarly situated female employees. No reasonable jury could conclude that Purifoy was a similarly situated employee who was treated more favorably than plaintiff.

Plaintiff argues alternatively that Stevens, a female, absorbed his job duties and, thus, he need not make a showing of similarly situated because an inference of discrimination arises from the fact that he was constructively replaced by a worker outside the protected class. See Bellaver v. Quanex Corp., 200 F.3d 485, 495 (7th Cir. 2000). Defendants dispute this contention, arguing that Stevens recommended and DeGolier hired Chan Voeltz, a male, to replace plaintiff on January 14, 2001. In support of his contention that Stevens absorbed his job duties, plaintiff relies solely on the testimony of Donald Hammes, a co-worker and the publications editor. Specifically, Hammes answered the following questions:

> Q: And can you describe to me what happened to the other positions of the men who left?
>
> A: Let's see. So there were four in projects. Then the other position was [plaintiff's], who was kind of an assistant to Elly Stevens, the human resource director, and when the projects team was broken up, Laura [DeGolier] and Elly [Stevens] assigned some of the projects work to [plaintiff].
>
> So in addition to doing his human services type work, he was also assigned the job of training, working in training, and then he was given projects work to do also. So he kind of had three jobs all at once. And after he left, they didn't replace him. They told Chan [Voeltz], who also worked for Elly [Stevens], that he would be doing some of the projects work and some of the training work and he'd be getting out in the field

more often, and so they just never replaced him.

Q: So — and you're referring to Chan Voeltz?

A: Yeah, Chan Voeltz.

Q: Voeltz. So in this litigation the defendant or defendants have said that Chan Voeltz replaced [plaintiff]. In your opinion that is not true?

A: No, it's not.

Q: In Paragraph 12 [of Hammes's affidavit] you talk about [plaintiff].

A: At least not in the sense that Chan did the three jobs I just described. He did not do training, projects or human resource work. He was hired as far as I know to do purely human resource work kind of as an assistant to Elly [Stevens]. He was not to work in projects or training.

Aff. of Heath Straka, dkt. #27, Exh. G, at 18-19.

Although this testimony is muddled, it is clear that Hammes testified first that Voeltz was told he would be doing projects work, training work and getting out into the field. A moment later Hammes contradicts this testimony by stating that Voeltz did not do training, projects or human resource work. Then Hammes contradicts himself again by testifying that Voeltz did "purely human resource work," even though he testified a moment earlier that Voeltz did not do human resource work. Hammes qualifies his personal knowledge of Voeltz's job duties, stating that Voeltz was doing purely human resource work "as far as I know." This hedging exposes the underlying problem with Hammes's testimony. Because Hammes was a publication editor who did not supervise or hire either Voeltz or plaintiff, his

opinions are without foundation. Even construing Hammes's testimony in a light most favorable to the non-moving party, as I must at this stage of the proceedings, see Fed. R. Civ. P. 56(c); Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986), it does not create an issue of material fact because, as Hammes concedes, Voeltz was doing purely human resource work "as far as I know." One wonders why plaintiff elected not to depose Voeltz regarding his job duties, question DeGolier or Stevens about Voeltz's duties during their depositions or even submit Voeltz's position description in order to dispute defendants' contention that Voeltz was hired to replace plaintiff. In any event, at most, Hammes's testimony would establish that Voeltz did not replace plaintiff, *not* that Stevens absorbed plaintiff's job duties, which is plaintiff's contention. In other words, on the basis of Hammes's testimony, it is impossible to know who absorbed plaintiff's duties.

Because plaintiff has failed to adduce any evidence that defendants treated a similarly situated female employee more favorably so as to create a genuine issue of material fact as to this element, he has failed to meet his burden of establishing a prima facie case of sex discrimination under McDonnell Douglas. Accordingly, defendants' motion for summary judgment will be granted. As a result, it is unnecessary to determine whether plaintiff was meeting defendants' legitimate expectations.

ORDER

IT IS ORDERED that

1. Plaintiff Robert Steinhauer's motion for leave to supplement his proposed findings of fact is DENIED as moot;

2. The motion for summary judgment by defendants Laura DeGolier and the State of Wisconsin is GRANTED; and

3. The clerk of court is directed to enter judgment in favor of defendants and close this case.

Entered this 19th day of December, 2002.

BY THE COURT:

BARBARA B. CRABB
District Judge