IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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MELICHSIA BOSS,

OPINION AND ORDER

Plaintiff,

02-C-0678-C

v.

ROCK COUNTY, WISCONSIN

Defendant.

- -

This is a civil action for monetary relief in which plaintiff Melichsia Boss alleges that defendant Rock County, Wisconsin harassed her, denied her training opportunities and terminated her employment because of her race, in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e. In addition, plaintiff alleges that she was retaliated against for complaining about racially demeaning remarks and for filing a race discrimination charge with the Equal Employment Opportunity Commission. This court has jurisdiction. 28 U.S.C. § 1331.

Presently before the court is defendant's motion for summary judgment. Defendant contends that plaintiff has failed to meet her burden of showing that (1) she had been

performing her job satisfactorily; (2) any racial harassment to which she may have been subjected was so severe or pervasive that it created a hostile working environment; and (3) there was a causal link between her filing of a complaint with the EEOC and her subsequent discharge. Additionally, defendant contends that plaintiff has failed to submit any evidence to show that its asserted reason for discharging plaintiff, namely an unauthorized absence, is pretextual.

Plaintiff's hostile environment claim must fail because the harassment to which she was subject was not severe and pervasive enough to trigger Title VII protection. Her claim of disparate treatment with respect to training will not survive because she has failed to prove there was anything pretextual about defendant's assertion that lack of funds prevented it from providing training opportunities to plaintiff. Plaintiff's claim of disparate treatment with respect to her discharge cannot succeed because plaintiff has failed to adduce evidence that she was performing her job satisfactorily and that defendant treated similarly situated employees not in her protected class differently. Finally, plaintiff's claim of retaliation must fail because there is no evidence of causation and she cannot show that defendant is not telling the truth when it says that her unauthorized absence was the reason for her discharge. Accordingly, defendants' motion will be granted with respect to all of plaintiff's claims.

From the parties' proposed findings of fact, I find that the following facts are material and undisputed.

UNDISPUTED FACTS

Defendant Rock County, Wisconsin, is a municipality incorporated under Wisconsin state law. Plaintiff Melichsia Boss is an African-American who was a probationary employee of defendant from March 5, 2001 until defendant discharged her on December 19, 2001. During that time, plaintiff served as defendant's transportation program supervisor. Plaintiff has a bachelor's degree and is working towards a master's of business administration degree. All of defendant's employees are "probationary" for their first year.

It was part of plaintiff's job responsibilities to dispatch by two-way radio drivers such as James Larson, who was employed by defendant's contractor, Cooper-Wilson, Inc. After plaintiff had been on the job for two days, she reported to her direct supervisor, Joyce Lubben, that Larson had called her a "black ghetto girl" and used other racially derisive language to her and also about African-American clients. Lubben met with plaintiff to discuss her concerns on March 19, 2001. On at least two additional occasions in March and April 2001, plaintiff complained to Lubben that Larson repeatedly called her "black ghetto girl," mocked her speech by imitating certain words like "ya'll" and "fix-un" and referred to African-Americans as "them people." Lubben told plaintiff in response to one of these complaints that plaintiff's co-workers had reported the same incidents to her.

At some point, plaintiff indicated to Lubben that she wished to file a grievance and

asked her for a copy of defendant's harassment policy. Lubben referred plaintiff to the personnel handbook, which defendant's human resource analyst Amy Kingsland had given plaintiff at her March 5, 2001 orientation. Lubben also told plaintiff that only "regular" employees could file grievances. Defendant's policy defines a grievance as follows:

> A grievance is a formal complaint of a *regular* County employee regarding poor working conditions, unjust application of discipline, the unfair application of or violation of the personnel rules and regulations of the County or the department for which the employee works. The grievance procedure may also be used for formal complaints by employees or applicants alleging discrimination on the basis of race, creed, national origin, handicapping condition, sex or age.

(Emphasis added). The policy defines a "regular" employee as someone who has successfully completed the probationary period.

On April 23, 2001, Lubben sent a letter to Cooper-Wilson, demanding that their drivers stop making racially derrogatory comments. In the letter, Lubben indicated that "these types of comments are unacceptable and must be stopped immediately, or will be considered a violation of terms of the contract." Plaintiff was not subjected to racial slurs after this date.

Plaintiff asked Lubben on at least two occasions in May and June whether she could attend various workshops to improve her computer, grammar and managerial skills that some of defendant's white non-probationary employees attended. Her request was denied.

Plaintiff's position was funded from a grant from the state of Wisconsin that did not include funds for training programs, although Lubben did not tell plaintiff this at the time. The positions of the employees who attended these training programs were funded by federal grants that provided money for training. Plaintiff's duties did not require any formal training.

Defendant has developed an employee development plan to "improve the quality of service to the County, equip employees for career development within the County, and to provide a reservoir of occupational skills necessary to meet current and future employment needs." The personnel director and department heads are responsible for developing and assessing employee training programs on an as needed or as desirable basis. The personnel director is responsible for ensuring that employees receive equal consideration for appropriate training opportunities. The plan says nothing about any specific reasons for denying training to any employee.

On October 30, 2003, Lubben filed out a performance review form for plaintiff, rating her work as substandard in a number of areas. The following day, plaintiff met with Lori Pope, a human resource analyst for defendant, to discuss a number of concerns, including plaintiff's suspicion that she was hired only to prevent her predecessor, who is also African-American, from filing a discrimination suit and her belief that Lubben's negative review included unfair evaluations on tasks that had been assigned to others. Plaintiff gave Pope

a memo outlining her reasons for objecting to Lubben's evaluation.

On November 16, 2001, plaintiff filed a complaint with the Equal Employment Opportunity Commission. On November 28, 2001, Lubben provided plaintiff with a plan for improving her job performance in an effort to help her meet acceptable performance levels. Plaintiff reminded Lubben that the part-time dispatcher who usually assisted plaintiff was on a 30-day medical leave and that this would make it difficult to implement a number of the changes that Lubben had suggested.

At some point during the morning of December 18, 2001, plaintiff went to Lubben's office and informed her that there was an angry client on the phone demanding to speak to upper management. Lubben yelled, "Shut up and get out" at plaintiff. Plaintiff left the building at that time to relieve some stress. Later in the day, plaintiff left a message for defendant's human resource director, Karen Galbraith, who was out that day, describing the incident. A few hours later, Pope set up a meeting with plaintiff and Lubben to take place the following day. At that meeting, Lubben informed plaintiff of her termination and gave her a termination letter.

Defendant fired plaintiff's predecessor during her probationary period. The transportation program supervisor position is now filled by a Caucasian woman.

OPINION

Title VII makes it "an unlawful employment practice for an employer . . . to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment because of such individual's race." 42 U.S.C. § 2000e-2(a)(1). Plaintiff has made four claims under this statute: (1) that she was subject to a hostile work environment; (2) that she was denied training opportunities because of her race; (3) that she was discharged because of her race; and alternatively, (4) that she was discharged in retaliation for filing a grievance with the EEOC.

A. Hostile Work Environment

It is well established that Title VII is violated "[w]hen the workplace is permeated with discriminatory intimidation, ridicule, and insult . . . that is sufficiently severe or pervasive to alter the conditions of employment and create an abusive working environment." Harris v. Forklift Systems, Inc., 510 U.S. 17, 21 (1993). Plaintiff cannot succeed on her claim of a hostile work environment because the harassment to which she was subjected was neither discriminatory in nature nor particularly severe.

In her complaint, plaintiff contends that Lubben "abused her discretion" by calling plaintiff on October 15, 2001, demanding that she return to work despite her pregnancy complications. However, plaintiff has not proposed as a fact that Lubben even made this phone call. Even if I assume this call occurred, there is no hint of racial animus in it.

Similarly, plaintiff's assertion that certain drivers employed by defendant's independent contractor called her stupid and lazy is neither supported by admissible evidence nor suggestive of racial prejudice. Title VII prohibits harassment only when it is based on a person's membership in a protected class. 42 U.S.C. § 2000e. Therefore, even if plaintiff had made these charges of harassment the subject of proposed findings of fact, they would not be actionable under Title VII.

Plaintiff's other claim of harassment arises out of the racial slurs made by Wilson-Cooper's driver, James Larson. In the months of March and April 2001, Larson called plaintiff a "black ghetto girl," mocked her speech ("ya'll and fixun'"), and repeatedly referred to African-Americans as "them people." Plaintiff complained to Lubben on three separate occasions during March and April 2001 about these incidents. In response to one of these complaints, Lubben told plaintiff that her co-workers had reported the same incidents. The insults stopped after April 23, 2001, when Lubben contacted Cooper-Wilson about the problem.

In order to prove that harassment was sufficiently severe to implicate Title VII, a plaintiff must prove that "her work environment was both subjectively and objectively offensive; 'one that a reasonable person would find hostile or abusive, and one that the victim in fact did perceive to be so.'" Gentry v. Export Packaging Co., 238 F.3d 842, 850 (7th Cir. 2001) (quoting Faragher v. City of Boca Raton, 524 U.S. 775, 787 (1998)).

Further, the harassment must be so severe that it rises to the level of an adverse employment action. Harris, 510 U.S. at 21. In determining whether it meets this standard, "a court must consider the totality of the circumstances, including the 'frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interfere[d] with an employee's work performance." Cerros v. Steel Technologies, Inc., 288 F.3d 1040, 1046 (7th Cir. 2002) (quoting Harris, 510 U.S. at 23).

Larson made harassing comments to plaintiff repeatedly over the course of approximately one and a half months. As offensive as his comments were, however, they were not so severe and pervasive as to constitute an adverse employment action. It is deplorable to refer to African-Americans (or any other group) as "them people" and to use mocking speech, but these are not the sort of racial slurs that the courts have found to violate Title VII. See, e.g., Cerros, 288 F.3d at 1043 (use of words "spic" and "wetback" in workplace contributed to severe harassment of plaintiff); Rodgers v. Western-Southern Life Insurance Co., 12 F.3d 668, 675 (7th Cir. 1993) (holding that supervisor's use of word "nigger" contributed to hostile work environment). These slurs are objectionable and offensive, but they do not demonstrate that plaintiff's working environment was "hostile" within the meaning of the law. Plaintiff's co-worker's never engaged in similar name-calling; in fact, they reported Larson's comments to Lubben. Title VII is not a "general civility code"

for the workplace. Oncale v. Sundowner Offshore Services, Inc., 523 U.S. 75, 81 (1998).

The other circumstances also do not reveal an objectively offensive environment. Larson had no authority over plaintiff; he could not assign her additional, undesirable or demeaning tasks, demote her or fire her. Parkins v. Civil Constructors of Illinois, Inc., 163 F.3d 1027, 1032 (7th Cir. 1998) (harassment by supervisory employees more severe because they have authority); Rodgers, 12 F.3d at 675 (same). Plaintiff communicated with Larson over a two-way radio; he could not have intimidated her with physical gestures while he spoke to her. Baskerville v. Culligan International Co., 50 F.3d 428, 431 (7th Cir. 1995) (gestures and physical proximity between speaker and listener relevant to hostile environment analysis). "A handful of comments spread over months is unlikely to have so great an emotional impact as a concentrated or incessant barrage." Baskerville, 50 F.3d at 431.

Even if plaintiff had proved that Larson's comments created an actionable hostile environment, "it does not necessarily follow that her employer is liable to her." Perry v. Harris Chernin, Inc., 126 F.3d 1010, 1013 (7th Cir. 1997); Parkins, 163 F.3d at 1032. Liability requires an agency relationship between the employer and those responsible for the hostile environment. Meritor Savings Bank v. Vinson, 477 U.S. 57, 72 (1986) (Congress wanted courts to refer to law of agency in determining employer liability for hostile environment). Although plaintiff refers to Larson as her "co-worker" in her complaint, he

is not defendant's agent under the law. Larson was employed by defendant's independent contractor, Cooper-Wilson, Inc., and not by defendant. See EEOC v. Sidley Austin Brown & Wood, 315 F.3d 696, 705 (7th Cir. 2002) (citing Nationwide Mutual Insurance Co. v. Darden, 503 U.S. 318 (1992)) (distinguishing independent contractors from employees). It is doubtful that an employer could be held liable for harassment committed by an employee of an independent contractor. Berry v. Delta Airlines, Inc., 260 F.3d 803, 812 (7th Cir. 2001). In Berry, the court questioned the other circuits that would permit such liability, noting that "they would appear to be in tension with recent Supreme Court precedent." Id. (citing Burlington Industries, Inc. v. Ellerth, 524 U.S. 742, 754-60 (1998) (generally employer vicariously liable only for harassment perpetrated by its employee to the extent permitted under law of agency).

Although Larson's comments were objectionable and unfortunate, they do not trigger the protections of Title VII. Therefore, defendant's motion for summary judgment will be granted as to plaintiff's hostile environment claim.

B. Disparate Treatment

A plaintiff may prove that she was subject to disparate treatment either using the traditional approach or relying on the burden-shifting model. Haywood v. Lucent Technologies, Inc., 323 F.3d 524, 529 (7th Cir. 2003). Under the traditional approach,

"the plaintiff may show either through direct or circumstantial evidence that the employer's decision to take the adverse job action was motivated by [the plaintiff's race]." Id. Direct evidence is that "which can be interpreted as an acknowledgment of discriminatory intent by the defendant." Troupe v. May Department Stores Co., 20 F.3d 734, 736 (7th Cir. 1994). In contrast, circumstantial evidence "provides a basis for an inference of intentional discrimination." Id. Plaintiff has relied on the burden-shifting model in her briefs. I will analyze her claims accordingly.

The burden-shifting framework was set out in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). Haywood, 323 F.3d at 529; EEOC v. Our Lady of the Resurrection Medical Center, 77 F.3d 145, 148 (7th Cir. 1996). Under that model, a plaintiff must establish a prima facie case of discrimination by showing that "(1) she was a member of a protected class; (2) she was meeting her employer's legitimate expectations; (3) she suffered an adverse employment action; and (4) similarly situated employees not in the protected class were treated more favorably." Haywood, 323 F.3d at 530 (citing McDonnell Douglas, 411 US. at 802). If the plaintiff proves this much, she is entitled to "a presumption that the employer unlawfully discriminated against the employee." Our Lady, 77 F.3d at 148 (quoting St. Mary's Honor Center v. Hicks, 509 U.S. 502, 506 (1993)).

However, a defendant may rebut the presumption by coming forward with a legitimate nondiscriminatory reason for the discharge. McDonnell Douglas, 411 U.S. at

802. "The defendant need not persuade the court that it was actually motivated by the proffered reasons:" instead, the defendant need raise only a genuine issue of fact as to its motive. Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 254-55 (1981). If the defendant satisfies this standard, the plaintiff cannot succeed unless she proves that the proffered reasons were pretext. Id. Pretext means more than just a decision made in error or in bad judgment; it means a lie or a phony reason for the action. Wolf v. Buss (America), Inc., 77 F.3d 914, 919 (7th Cir. 1996). "Although the burden of production shifts under [the indirect] method, 'the burden of persuasion rests at all times on the plaintiff.'" Haywood, 323 F.3d at 531 (quoting Klein v. Trustees of Indiana Univ., 766 F.2d 275, 280 (7th Cir. 1985)).

If the plaintiff fails to adduce evidence from which a reasonable jury could find that defendant's asserted non-discriminatory reason is not the true reason for the adverse action, the plaintiff will not be able to defeat defendant's motion for summary judgment. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986) (to defeat motion for summary judgment "evidence must be such that a reasonable jury could return a verdict for the non-moving party"). I turn first to plaintiff's claim that she was denied training opportunities because of her race.

1. Denial of training opportunities

42 U.S.C. § 2000e-2(a) prohibits discrimination with respect to the terms and conditions of employment. (§ 2000e-2(d) is more explicit in its prohibitions, but plaintiff does not rely on it. Patel v. Allstate Insurance Co., 105 F.3d 365, 370 (7th Cir. 1998) (when parties' arguments regarding alleged discrimination in access to training rely on § 2000e-2(a) and not § 2000e-2(d), court should evaluate claim under § 2000e-2(a)).)

Plaintiff has relied on the burden-shifting framework of McDonnell Douglas. I need not determine whether she has made out a prima facie case because even if I assume that she has, defendant has provided a legitimate nondiscriminatory reason for refusing plaintiff's training requests and plaintiff has failed to show that defendant's reason is pretext. See Essex v. United Parcel Service, Inc., 111 F.3d 1304, 1309 (7th Cir. 1997) (court need not determine whether prima facie case established when plaintiff has failed to meet pretext burden); Patel, 105 F.3d at 371-72.

Defendant contends that it denied plaintiff's requests to attend certain training programs because her position was funded by a state grant that did not provide money for training. Plaintiff will be able to succeed only if she can show that this was not defendant's true reason. Burdine, 450 U.S. at 254-55. A plaintiff may do this by showing that (1) the defendant's asserted reason has no basis in fact; (2) the reason was insufficient to warrant the challenged action; or (3) it was not the "real" reason. Johnson v. City of Fort Wayne, Ind., 91 F.3d 922, 931 (7th Cir. 1996) (citations omitted). Plaintiff has not challenged

defendant's reason as having no basis in fact, that is, she does not contest that her position was funded by a state grant that did not include training funds. She does not argue that defendant's reason is not good enough; she does not contend that defendant must provide training for which there is no funding.

However, plaintiff argues that defendant's proffered reason was not its true reason because (1) she was not told at the time her requests were denied that no training funds were available; (2) defendant's general policy does not indicate that training may be denied for lack of funding; (3) denying an employee training is "outrageous;" and (3) similarly situated white employees were permitted to attend training sessions. Ideally, employers would explain their reasoning for business decisions that affect employees; however, Title VII does not require them to do so. Defendant's failure to explain its reason for denying plaintiff training at the time of the denial does not make it any more or less likely that the lack of funding was the true reason. The fact that plaintiff did not know the source of funding for her position or limitations on such funding does not suggest pretext.

Further, plaintiff observes that defendant has a policy stating that its strives to foster and promote employee training for a variety of reasons, but that the policy does not indicate that the absence of training funds could be a ground for denying such training. It is undisputed that the policy statement states defendant's goals for providing employees with training; however, it neither promises such training nor attempts to identify permissible

reasons for denial. Refusing to provide training for lack of funds does not deviate from this policy. Therefore, the existence of this policy is not probative evidence of pretext.

Third, plaintiff argues that it is simply "outrageous to place a person in a position where there were no [training] funds available." The parties agree that no specialized training was required for plaintiff's position. Although plaintiff argues that defendant's failure to insure that all of its employees had access to some additional training constitutes extremely poor judgment and was unfair to her, she does not suggest that this situation is so untenable that it is unbelievable. The law does not require employers to make perfect decisions or even use good judgment in making them. It requires only that they honestly believe the reason they give for their decision and that the decision not be the product of discrimination. Bahl v. Royal Indemnification Co., 115 F.3d 1283, 1291 (7th Cir. 1997). Plaintiff's argument, correct or incorrect, simply has no bearing on this inquiry. It is commendable for an employee to seek self-improvement, but an employer is not legally obligated to assist its employees in that endeavor.

Finally, plaintiff argues that similarly situated white employees were provided with the training that she was denied. If a defendant provided training to employees who were similarly situated to plaintiff in all material aspects except race, a jury could reasonably infer racial discrimination. However, the inference cannot be drawn if there are differences between the plaintiff and the other employees, meriting disparate treatment. See, e.g., Reed

v. Shepard, 939 F.2d 484, 490-91 (7th Cir. 1991) (no discriminatory inference when disparate treatment based on position (civilian jailer versus deputy sheriff) rather than gender). Defendant has a policy that all new employees must complete a year-long probationary period before they are considered "regular" employees. Plaintiff was a probationary employee at the time defendant denied her requests to attend training programs. Plaintiff's evidence reveals only that white *regular* employees were permitted to attend the training sessions. Probationary employees are not similarly situated to non-probationary employees. Borgen v. Minnesota, 236 F.3d 399, 405 (8th Cir. 2000) (evidence that white non-probationary employees treated more favorably than black probationary employee not probative evidence of racial discrimination); Ghane v. West, 148 F.3d 979, 982 (8th Cir. 1998). Cf. Logan v. Kautex Textron North America, 259 F.3d 635, 640-41 (7th Cir. 2001) (limiting comparison of probationary employee to other probationary employees in similarly situated analysis). Accordingly, no inference of racial discrimination may be drawn from this evidence.

2. Discharge

As noted above, in order to establish a prima facie case of discrimination, a plaintiff must show that "(1) she was a member of a protected class; (2) she was meeting her employer's legitimate expectations; (3) she suffered an adverse employment action; and (4)

similarly situated employees not in the protected class were treated more favorably." Haywood, 323 F.3d at 530 (citing McDonnell Douglas, 411 US. at 802). If a plaintiff fails to adduce evidence from which a reasonable jury could find in her favor on each of these elements, the defendant is entitled to summary judgment. Id. at 530-31. Defendant argues that it is entitled to summary judgment because plaintiff has failed to show that (1) she was meeting her employer's legitimate expectations and (2) similarly situated employees not in the protected class were treated more favorably. I will address these arguments in that order.

First, I must address a disagreement between the parties regarding the current status of the law regarding the satisfactory job performance requirement. In McDonnell Douglas, the Supreme Court articulated plaintiff's burden as a showing that she was "qualified" for the position. Defendant relies on an interpretation of the word "qualified" found in a decision of the Court of Appeals for the Seventh Circuit, indicating that it means that the plaintiff was performing the job satisfactorily. Kizer v. Children's Learning Center, 962 F.2d 608, 611 (7th Cir. 1992).

Plaintiff asks this court to interpret the word "qualified" to mean what the Court of Appeals for the Second Circuit has interpreted it to mean: that the plaintiff "possesses the basic skills necessary for performance of [the] job." de la Cruz v. New York City Human Resources Administration, 82 F.3d 16, 20 (2d Cir. 1996) (quoting Powell v. Syracuse University, 580 F.2d 1150, 1155 (2d Cir. 1978)). In Powell, the court of appeals derived

its interpretation from a 1977 Seventh Circuit case, Flowers v. Crouch-Walker Corp., 552 F.2d 1277 (7th Cir. 1977). However, in Flowers, the court held at most that a former employee could demonstrate "satisfactory performance" by showing "the employer's acceptance of his work without express reservation." Id. at 1283. The court did not eliminate the requirement that a plaintiff prove satisfactory job performance as part of the prima facie case. Id. at 1282 ("[s]ome showing of satisfactory performance is necessary to raise an inference of discrimination").

Because this court sits in the Seventh Circuit, I am bound by the Seventh Circuit's interpretation of the burden of proof plaintiff has met to show that she was "qualified" for her job. Accordingly, plaintiff must prove that she was performing the requirements of her job satisfactorily. Haywood. 323 F.3d at 530.

Defendant argues that plaintiff's only evidence that she was performing her job satisfactorily is her memo to Pope outlining her reasons for disagreeing with Lubben's performance review. Defendant contends that this memo is a mere self-serving affidavit with no evidentiary support. Patterson v. Chicago Association for Retarded Citizens, 150 F.3d 719, 724 (7th Cir. 1998). I agree with defendant that the averments in this memo are not admissible evidence of satisfactory job performance but for a slightly different reason. In her affidavit, plaintiff swears only that she sent this memo to Pope; she does not swear that any of the reasons she provides for disagreeing with Lubben's performance review is true. Thus,

the only evidence in the record is the fact that plaintiff sent a memo to Pope. Merely sending a memo does not rebut a negative review. Therefore, plaintiff has not satisfied this element of the prima facie case. Cf. Dey v. Colt Construction & Development Co., 28 F.3d 1446, 1460-61 (7th Cir. 1994) (employee demonstrates that employer may have acted on something other than poor performance record if employee provides "[a] detailed refutation of events which underlie the employer's negative performance assessment").

Moreover, defendant has observed correctly that plaintiff has failed to adduce any evidence that defendant treated similarly situated employees outside the protected class more favorably. The only evidence plaintiff has provided about the treatment of other probationary employees relates to her predecessor, who is also African-American. See Borgen, 236 F.3d at 405 (probationary employees not similarly situated to non-probationary employees); Ghane, 148 F.3d at 982 (same). This element of the prima facie case requires proof that an employee *outside* the protected class was treated *differently*, not that an employee *inside* the protected class was treated *similarly*.

Plaintiff notes also that she was replaced by a white woman. First, the fact that defendant hired someone outside the protected class is helpful to a plaintiff's case in a discriminatory failure to hire case and not in a discriminatory discharge case. In a discriminatory discharge case, plaintiff must show that a person not in the protected class was not *discharged* under similar conditions. Defendant says that it discharged plaintiff

because of her unauthorized absence the day before; plaintiff has not shown that her replacement (or any other probationary employee not in the protected class) took an unauthorized leave but was not discharged for it.

Although it appears that defendant may have placed plaintiff in a difficult situation, there is no evidence that non-African-American probationary employees did not face similar hardships. Without such evidence, plaintiff cannot make out a prima facie case. Because defendant has come forward with a nondiscriminatory explanation for its actions and plaintiff has failed to enter sufficient evidence to rebut the explanation, I must grant defendant's motion for summary judgment on the discriminatory discharge claim.

C. Retaliation

A plaintiff may attempt to establish a prima facie case of retaliation in one of two ways. Haywood, 323 F.3d at 531 (citing Stone v. City of Indianapolis Public Utilities Division, 281 F.3d 640, 644 (7th Cir. 2002)). Under the direct method, a plaintiff must show three things: (1) the plaintiff engaged in statutorily protected activity; (2) she suffered an adverse employment action; and (3) there is a causal link between the protected activity and the adverse action. Id. Under the indirect method, a plaintiff must show that she (1) engaged in statutorily protected activity; (2) suffered an adverse employment action; (3) performed her job according to her employer's legitimate job expectations; and (4) was

treated less favorably than similarly situated employees who did not engage in statutorily protected activity.

Because the first two elements are the same under either standard, I turn to them first. Plaintiff's statutorily protected activity was complaining about the unfair treatment she perceived and filing a complaint with the EEOC on November 16, 2001. The only complaints on the record that plaintiff made to defendant are her complaints about Larson's derogatory comments in March and April 2001 and her complaint to defendant's human resources director that Lubben had yelled at her to "shut up and get out" the day before plaintiff's termination. Plaintiff's complaint about Lubben is not statutorily protected without evidence of a discriminatory motive for the statement. No rational trier of fact could conclude that plaintiff was complaining of discriminatory treatment and not just harsh treatment. "Title VII protects an employee from 'retaliation for complaining about the types of discrimination it prohibits,'" but not from retaliation for any other kind of employee complaint. Hamm v. Weyauwega Milk Products, Inc., 332 F.3d 1058, 1066 (7th Cir. 2003) (quoting Miller v. American Family Mutual Insurance Co., 203 F.3d 997, 1007 (7th Cir. 2000)). Thus, only acts taken in retaliation for plaintiff's complaints about James Larson's comments or the filing of charges with the EEOC are actionable.

With respect to the second element, plaintiff asserts that the retaliatory adverse employment actions involved in this case are being (a) subjected to a hostile environment;

(b) given a negative performance evaluation; (c) given a performance improvement plan under conditions that made it impossible to meet the plan's standards; and (d) terminated. First, plaintiff's argument that defendant retaliated against her by creating a hostile environment fails because, as discussed above, the harassment to which she was subject was not so severe and pervasive that it created a "hostile working environment." Further, the negative performance review and the improvement plan do not satisfy the second prong of this test. Neither one standing alone is an adverse employment action. Johnson v. Cambridge Industries, Inc., 325 F.3d 892, 902 (7th Cir. 2003) (by itself, negative performance evaluation is not adverse employment action); Haugerud v. Amery School District, 259 F.3d 678, 691-92 (7th Cir. 2001) (additional responsibilities and burdens do not constitute adverse employment action). Only plaintiff's discharge satisfies the second prong. Therefore, the remaining issue is whether plaintiff has made the other showings she must make for a prima facie case that she was discharged in retaliation either for her complaints about Larson's comments or for the charge she filed with the EEOC.

1. Direct method

Plaintiff states in her response brief that "there is no question that there is a casual connection between [her] participation in the protected activity and [her discharge]." However, she does not produce any evidence to support her conclusion or attempt to explain

the basis for it. Defendant's employees made no comments suggesting that defendant was discharging plaintiff because of her complaints of discrimination. Plaintiff has not adduced any evidence that defendant even knew about her complaint with the EEOC. Finally, her discharge did not follow immediately upon her complaints about Larson or the filing of her complaint with the EEOC; the lapse of time between plaintiff's complaints and her discharge weakens the slight inference of causation that can be drawn whenever one event follows another. In any event, although temporal proximity between a complaint and an adverse action may be indicative of causation, rarely will it be sufficient in and of itself to create a triable issue. Stone, 281 F.3d at 644. Because plaintiff has failed to show causation, her claim will not succeed under the direct approach.

2. Indirect approach.

Plaintiff's claim does not necessarily fail under the indirect approach for failure to show causation. Stone, 281 F.3d at 644 (plaintiff proceeding under indirect approach "need not show even an attenuated causal link"). However, a defendant is entitled to summary judgment if it produces unrebutted evidence of a nondiscriminatory reason for its actions. Defendant asserts that it discharged plaintiff because of her unauthorized absence after Lubben yelled at her the day before. In her brief, plaintiff characterizes the absence as an early lunch; however, she has produced no evidence that she was expressly or implicitly

permitted to take her lunch break at any time she chose or that she was allowed to take her break early that particular day. (As plaintiff describes the situation in her affidavit, it appears she abandoned that the angry client on the telephone when she left work). Because plaintiff has not presented any other evidence tending to rebut defendant's assertion that it discharged her for her unauthorized absence, defendant is entitled to summary judgment. Stone, 281 F.3d at 644.

ORDER

IT IS ORDERED that the motion for summary judgment filed by defendant Rock, County, Wisconsin, on plaintiff Melichsia Boss' claims of disparate treatment, harassment and retaliation is GRANTED. The clerk of court is directed to enter judgment for defendant and close this case.

Entered this 26th day of November, 2003.

BY THE COURT:

BARBARA B. CRABB
District Judge