IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

MELODY J. CULVER,

Plaintiff, OPINION AND ORDER

v. 03-C-727-C

GORMAN & COMPANY,

Defendant.

This is a civil action for monetary and injunctive relief brought pursuant to Title VII of the Civil Rights Act of 1964, as amended by the Civil Rights Act of 1991, 42 U.S.C. § 2000e-2000e-17, and the Equal Pay Act, 29 U.S.C. § 206(d). Plaintiff Melody J. Culver contends that defendant Gorman & Company violated both statutes when it terminated her in retaliation for her threat to bring a complaint alleging what she perceived to be sex discrimination. Before the court is defendant's motion for summary judgment on both claims. Because I conclude that plaintiff has not adduced sufficient evidence from which a trier of fact could find that her protected conduct played a role in her termination, defendant's motion will be granted.

For the purpose of deciding this motion, I find from the parties' proposed findings of fact that there is no genuine issue with respect to the following material facts.

UNDISPUTED FACTS

Defendant Gorman & Company is a property management company licensed to do business in Wisconsin with its principal place of business in Madison, Wisconsin. Plaintiff Melody Culver is an adult female residing in Lomira, Wisconsin.

Plaintiff was employed by defendant as an assistant property manager from May 22, 2000 through January 10, 2002. As an assistant property manager, plaintiff was responsible for leasing apartments, responding to resident concerns, completing accounts payable and accounts receivable, processing rent applications and other administrative tasks.

From May 2000 to July 2001, plaintiff was supervised by Paula Accettura. In July 2001, Ron Schroeder became plaintiff's supervisor when Accettura left defendant to work for a different company. Schroeder increased plaintiff's work responsibilities. For example, Schroeder asked plaintiff to handle accounts payable and bank deposits for two commercial properties. In addition, plaintiff helped Schroeder learn the federal regulations that applied to one of the low-income housing units that they managed.

In fall 2001, plaintiff asked Schroeder whether she could have a salary increase because of her increased job responsibilities. Schroeder said he would talk to Joyce Weitruch, the company's controller. The raise was denied. In October 2001, plaintiff spoke with Schroeder's supervisor, Peter Jorde, about her additional responsibilities and the fact that she had not received a salary increase. Jorde responded that he would speak to

Schroeder and get back to plaintiff; if he did talk to Schroeder, he never told plaintiff about it.

Around that time, Schroeder discovered that plaintiff kept her résumé on her computer at work. When Schroeder asked her about it, plaintiff told Schroeder that her father was very ill and that she might relocate to Pennsylvania to take care of him. Plaintiff told Schroeder that she was checking out the work force in Pennsylvania. She told Schroeder that she was uncertain whether she could move because of an arrangement she had with her ex-husband concerning custody of their children. Plaintiff told Schroeder she liked working for defendant and would leave her job only if she moved to take care of her father.

Schroeder did not like the fact that plaintiff had her résumé on her work computer. However, given the circumstances of her father's illness, he merely told plaintiff to remove it from the company computer instead of taking any stricter disciplinary action against her.

On January 7, 2002, Schroeder gave plaintiff her annual performance review. He rated plaintiff as meeting or exceeding expectations in all areas of her job. Schroeder told plaintiff that she was good with residents and customer service and that he was pleased that she had improved her relationship with another employee, Bradley Harrison, with whom she had had a tense relationship in the past. However, Schroeder's review was not entirely uncritical. He told plaintiff that he was not happy that she had her résumé on the computer and that he had the impression she was looking for other jobs. On the review form,

Schroeder also noted that plaintiff needed to focus on team goals and errors and take equal credit for both and that she sometimes treated other staff members in a degrading manner. He also commented that plaintiff should stop blaming others and complaining about them, although he noted improvement in that respect.

At the end of the review, Schroeder told plaintiff that she would receive a 50-cent an hour raise. When plaintiff asked why she was getting such a small raise, Schroeder replied, "You might be leaving." Plaintiff replied that she had told Schroeder that she was not leaving. She told him that it was "not fair to give [her] only 50-cents raise because [she] might be leaving [in] six months [ ]." Schroeder responded that it was too late to make further adjustments to her salary because his budget for the coming year was already set.

Plaintiff was upset about the size of her raise. Very shortly after the meeting with Schroeder, plaintiff spoke to two male maintenance workers, Harrison and James Crim, about their respective raises. She learned that Harrison had received a $1 an hour raise. Plaintiff responded that she thought she was being treated unfairly and she told Harrison and Crim that she was thinking about getting an attorney or filing a complaint with the Equal Employment Opportunity Commission.

Shortly after speaking with Crim and Harrison, plaintiff went back to talk to Schroeder. She asked him whether she would still get her annual bonus if she were to leave the company. Schroeder responded that she would still get her bonus. At plaintiff's request, Schroeder typed a note stating that plaintiff was entitled to her full share of her 2001 bonus.

Plaintiff told Schroeder that she was going to talk to Schroeder's supervisor, Jorde, because she was not happy about her raise.

After the January 7 meeting, plaintiff called Jorde to set up a meeting to talk about her raise and the results of her review. The meeting was scheduled for January 10. At some point between January 7 and January 10, Harrison told Schroeder that plaintiff had mentioned hiring a lawyer or contacting the EEOC. Schroeder passed this information along to Jorde.

Between January 7 and January 10, plaintiff displayed a negative attitude towards Schroeder. For example, when Schroeder asked plaintiff certain work-related questions, plaintiff handed him the manual and told him to look up the answers himself. In plaintiff's view, "[she] wasn't there to train him any longer if [she] was going to be treated the way [she] was. If [Schroeder] had questions, he could look them up."

By January 10, Schroeder was ready to fire plaintiff because of her attitude and he told this to Jorde. Jorde and Schroeder decided to use the January 10 meeting to determine whether things could be worked out between plaintiff and Schroeder.

On January 10, plaintiff met with Jorde as scheduled. She complained that she thought Schroeder was treating the males on staff better than he treated her and had given her a smaller raise either because she was a woman or because she was a single mother. She also complained that Schroeder had increased some of her job responsibilities without fairly compensating her for it and at the same time had not included her in decision making as her

previous supervisor had done. Plaintiff also complained that Schroeder had made her job more difficult by forbidding her from talking to the maintenance staff about maintenance issues.

Jorde then asked Schroeder to join the meeting. Once Schroeder was present, plaintiff said to him: "I don't know why you feel you can do this to me and I don't know if you think it's because I'm a woman or because I'm a single mom and I can't tell you to stick this job. I don't know what it is, but it's not fair that you gave the guys more of a raise. It's not fair that you don't let me talk to Brad about the maintenance issues. I don't feel you have handled some of these situations correctly, and we've discussed this." In Schroeder's presence, plaintiff told Jorde that Schroeder had failed to address a leak at one of the properties they managed, which resulted in a call from the city health department. She also complained that Schroeder did not respond to resident concerns quickly enough and that he had not adequately compensated her for the additional job duties she had assumed.

Schroeder said he had heard enough and told plaintiff she was fired. Schroeder said: "We have tried this for six months and it hasn't worked out." When plaintiff asked Schroeder why he was firing her, he said there were "issues" and that he would cite them in an exit interview. No exit interview was ever held.

OPINION

A. Summary Judgment Standard

Summary judgment is proper when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. See Fed. R. Civ. P. 56(c); Celotex Corp. v. Catrett, 477 U.S. 322-23 (1986). In determining whether a genuine issue of material fact exists, courts must construe all facts in the light most favorable to the non-moving party and draw all reasonable inferences in favor of that party. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986). However, in order to avoid summary judgment, the non-moving party must supply evidence sufficient to allow a reasonable jury to render a verdict in his favor. Sanchez v. Henderson, 188 F.3d 740, 743 (7th Cir. 1999). The mere existence of some alleged factual dispute is insufficient to defeat a properly supported motion for summary judgment. See Liu v. T & H Machine, Inc., 191 F.3d 790, 796 (7th Cir. 1999).

B. Title VII Claim

In addition to its protection against various forms of discrimination, Title VII protects persons from retaliation for complaining about prohibited discrimination. Miller v. American Family Mutual Ins. Co., 203 F.3d 997, 1007 (7th Cir. 2000); 42 U.S.C. § 2000e-3(a) (prohibiting employer from discriminating against any employee "because [she] has opposed any practice made an unlawful employment practice by this subchapter, or

because [she] has made a charge . . . under this subchapter."). To impose liability on a defendant for unlawful retaliation, a plaintiff must show that 1) she engaged in protected activity under the statute; 2) she suffered an adverse employment action; and 3) there is a causal link between the protected activity and the adverse action. Haywood v. Lucent Technologies, 323 F.3d 524, 531 (7th Cir. 2003) (citing Stone v. City of Indianapolis Public Utilities Division, 281 F.3d 640, 644 (7th Cir. 2002)). (For the purposes of summary judgment, defendant concedes that plaintiff satisfies the first two elements.) To establish the requisite causal link, the plaintiff must show the protected conduct was a substantial or motivating factor in the employer's decision. Thomas v. Ragland, 2004 WL 1576492 (W.D. Wis. July 14, 2004) (citing Mt. Healthy City School District Board of Education v. Doyle, 429 U.S. 274, 287 (1977)). See also Spiegla v. Hull, 371 F.3d 928, 943 n. 10 (7th Cir. 2004) (causation analysis for retaliation cases same under First Amendment and Title VII.) In other words, the plaintiff must prove that her protected conduct was *one* of the reasons that the employer took adverse action against her. Price Waterhouse v. Hopkins, 490 U.S. 228, 250 (1989); Johnson v. Kingston, 292 F. Supp. 2d 1146, 1153-1154 (W.D. Wis. 2003). Once the plaintiff proves that an improper purpose was a motivating factor, the burden shifts to the defendant to prove by a preponderance of the evidence that the same actions would have occurred in the absence of the protected conduct. Spiegla, 371 F.3d at 943.

As the court of appeals has recognized, there is more than one way to prove a retaliation claim. Stone, 281 F.3d at 643-645. Plaintiff proceeds under what is often referred to as the "direct method," presenting evidence that she contends supports an inference that her protected expression caused her to be fired (as opposed, for example, to showing that similarly situated employees were given more favorable treatment). See id. (explaining different types of proof); Troupe v. May Department Stores Co., 20 F.3d 734,736 (7th Cir. 1994). Contrary to defendant's assertion, both direct evidence, such as an admission of guilt by the employer, and circumstantial evidence can be considered under the direct method. Rogers v. City of Chicago, 320 F.3d 748, 753 (7th Cir. 2003).

As an initial matter, I note that plaintiff appears to suggest that there is direct evidence that Schroeder fired her because she was complaining about discrimination. In her brief, plaintiff asserts that, "[a]fter learning about Culver's plan to file a sex discrimination claim Schroeder called Jorde and told him that 'Melody was talking about [filing an EEOC claim]' and that 'it would not be good for Gorman & Co. to have Melody working there.'" This statement melds two separate pieces of evidence together to suggest a causal relationship that is not supported by the record. Although Schroeder did testify at his deposition that he told Jorde about plaintiff's threat to file an EEOC claim, he did not testify that he called Jorde immediately upon learning that fact or that he told Jorde that plaintiff should not be working at defendant for that reason, as plaintiff's creative narrative suggests. Rather, Schroeder testified that he told Jorde that he was considering firing plaintiff on the

basis of what he observed to be plaintiff's poor attitude after her review. Moreover, it is not even clear from the record that it was during this conversation that he told Jorde that plaintiff had threatened to file a discrimination complaint.

Thus, as in most discrimination cases, there is no admission by defendant in this case that it fired plaintiff in retaliation for her having complained about perceived sex discrimination. Accordingly, plaintiff must rely on circumstantial evidence to prove causation. She relies primarily on suspicious timing, pointing out that Schroeder fired her just three days after she first complained of sex discrimination and within an hour of her second complaint during the January 10 meeting with Jorde. She points out that Schroeder admits that before January 7, 2002, the date on which she first complained about sex discrimination, he had no plans to terminate her and that he had rated her during her annual review as meeting or exceeding the expectations of her position. Plaintiff argues that this "highly suggestive temporal sequence" is sufficient to establish causation.

Certainly, the timing of plaintiff's termination falls into the "suspicious" category. However, the Seventh Circuit has made clear that suspicious timing alone "will rarely be sufficient in and of itself to create a triable issue." Stone, 281 F.3d at 644. Rather, it is a relevant factor that "can be more or less probative depending on the facts of each case." Walker v. Board of Regents of the University of Wisconsin System, 300 F. Supp. 2d 836, 862 (W.D. Wis. 2004). Plaintiff argues that the timing in this case is probative of

discrimination when combined with her employer's failure to identify any performance issues a mere three days before her termination.

Plaintiff's emphasis on her pre-January 7 performance is misplaced. See Staples v. Pepsi-Cola General Bottlers, Inc., 312 F.3d 294, 300 (7th Cir. 2002) (employee's performance at time of termination decision is critical to determining whether termination was discriminatory); Mills v. First Federal Sav. & Loan Ass'n, 83 F.3d 833, 846 (7th Cir. 1996) (with respect to pretext analysis, employee's satisfactory performance in some aspects of job does not necessarily undermine employer's explanation for termination). Defendant concedes that plaintiff was performing her job adequately before January 7. It asserts that its decision was based upon plaintiff's insubordinate conduct during the next three days, namely, her refusal to perform work tasks for Schroeder and her behavior during the January 10 meeting, where she criticized Schroeder in the presence of his boss, Jorde. Schroeder asserts that on the basis of plaintiff's conduct, he concluded that she would not respect his authority as her supervisor. In addition, he concluded that plaintiff was likely to leave defendant soon anyway given her obvious displeasure about her raise and his supervision, her previous discussions about leaving for Pennsylvania and her interest in making sure she would receive her bonus if she was to leave the company.

Plaintiff denies that she was insubordinate or that she was planning to quit her job. However, when it comes to showing that a defendant's stated reasons for terminating an employee are a pretext, the employee's own self-serving assertions regarding performance are

generally insufficient to create a genuine issue of material fact. Dey v. Colt Construction & Development Co., 28 F.3d 1446, 1460 (7th Cir. 1994). The issue is not whether the employer's evaluation of the employee was correct but whether it was honestly believed. Olsen v. Marshal & Ilsley Corp., 267 F.3d 597, 602 (7th Cir. 2001). The employer's explanation can be "foolish or trivial or even baseless" so long as the company "honestly believed" in the reasons it offered for the adverse employment action. Hartley v. Wisconsin Bell, Inc., 124 F.3d 887, 890 (7th Cir. 1997); see also Wade v. Lerner N.Y., Inc., 243 F.3d 319, 323 (7th Cir. 2001).

One way for an employee to create an issue of fact concerning pretext is to "specifically refut[e] facts that allegedly support the employer's claim of performance deficiencies" because those facts demonstrate "that the employer may not have honestly relied on the identified deficiencies in making its decision." Id. at 1460-61. Plaintiff refutes some of the facts that defendant cites as support for its claim that she was insubordinate. For example, she testified that she was not short with co-workers and that she did not tell Schroeder that she "wish[ed] Gorman would just fire [her]." However, these denials do not save plaintiff from the most damning evidence of insubordination, namely, her refusal to answer work-related questions for Schroeder. In plaintiff's words, "[she] wasn't there to train him any longer if [she] was going to be treated the way [she] was. If [Schroeder] had questions, he could look them up." Plaintiff can deny it all she wants, but refusing to comply with a supervisor's work request is the definition of insubordination. American

Heritage Dictionary of the English Language at 908 (4th ed. 2000) (defining "insubordinate" as "not submissive to authority"). Plaintiff also admits that she criticized Schroeder's handling of certain work-related issues while Schroeder and Jorde were both present on January 10. Finally, it is undisputed that plaintiff made it known to Schroeder that she was unhappy about her raise. In light of these admissions, plaintiff cannot show that there was no basis in fact for Schroeder's perception that plaintiff would not respect his authority as her supervisor if she stayed with the company. Hall v. Gary Community School Corporation, 298 F.3d 672 (7th Cir. 2002) (evidence that defendant had "exaggerated" plaintiff's deficiencies did not support inference of pretext); Simmons v. Chicago Board of Education, 289 F.3d 488 (7th Cir. 2002) (when one of defendant's articulated reasons for termination was plaintiff's insubordination, plaintiff could not show pretext with evidence that he "never explicitly stated that he would not comply with [his supervisor's] directive").

Plaintiff suggests that defendant cannot rely on her critical statements about Schroeder during the January 10 meeting as a basis for her termination because those statements related to plaintiff's perception that she was being compensated poorly because of her sex and were thus protected. However, not all of plaintiff's comments were related to the unfair pay issue. Plaintiff also criticized Schroeder's work as a property manager, complaining that he did not respond to resident complaints quickly enough and that he was responsible for the health department issues that had arisen at one of the properties. In light of these comments, the fact that some of plaintiff's other comments arguably related to equal

pay concerns does not undermine the veracity of Schroeder's stated belief that plaintiff was questioning his competency as a property manager and supervisor. The anti-retaliation provision of Title VII does not give employees *carte blanche* to voice their complaints of discrimination in any manner they wish. See Matima v. Celli, 228 F.3d 68, 79 (2d Cir. 2000) (way in which employee presses complaints of discrimination can be so disruptive or insubordinate that it strips away protections against retaliation), citing cases. Taking into consideration plaintiff's insubordinate behavior during the preceding three days, Schroeder could conclude reasonably from plaintiff's attacks on his job performance during the January 10 meeting that plaintiff was not merely voicing concerns about sex discrimination but rather that she would no longer respect his authority as her supervisor.

In another attempt to discredit defendant's claim that she was insubordinate at the January 10 meeting, plaintiff asserts that Jorde "testified that Culver's conduct was not out of line at all during the January 10 meeting." This mischaracterizes Jorde's testimony. At his deposition, Jorde acknowledged merely that he did not report in his *notes* from the meeting that plaintiff's conduct was out of line. He was never asked what he thought of plaintiff's conduct during the meeting. In any event, whether Jorde perceived plaintiff's complaints about Schroeder to be insubordinate is irrelevant because Jorde did not make the decision to terminate plaintiff; Schroeder did. Furthermore, Schroeder's decision was not based solely on plaintiff's conduct during the meeting, but also on her conduct during the preceding three days.

Plaintiff also denies that she "threatened to quit her job." However, even if plaintiff did not say so explicitly, it was not patently unreasonable for Schroeder to infer from plaintiff's question about getting her bonus if she was to leave the company that she was contemplating leaving and was not committed to working for defendant. That inference was even more reasonable when viewed in connection with plaintiff's obvious displeasure about her raise and Schroeder's supervision. Even if Schroeder may have underestimated plaintiff's continued commitment to her job, that does not show pretext. Pitasi v. Gartner Group, Inc., 184 F.3d 709, 718 (7th Cir. 1999) (employee cannot establish pretext by showing that employer fired her for "incorrect or poorly considered reasons").

Finally, plaintiff points out that when she asked Schroeder on January 10 why she was being terminated, he merely said that there were "issues," without mentioning insubordination. It is true than an employer's shifting explanations may support a finding of pretext. Zaccagnini v. Chas. Levy Circulating Co., 338 F.3d 672, 678 (7th Cir. 1999). However, "the explanations must actually be shifting and inconsistent to permit an inference of mendacity." Schuster v. Lucent Technologies, Inc., 327 F.3d 569, 577 (7th Cir. 2003). Here, Schroeder did not give *any* specific reason at the time of termination for his decision. The absence of a reason is different from a conflicting reason. Cf. Perfetti v. First Nat. Bank of Chicago, 950 F.2d 449, 456 (7th Cir. 1991) (no inconsistency where decision maker elaborated on details of failure-to-hire decision at trial).

In sum, the only fact to which plaintiff points as casting doubt on the honesty of Schroeder's reasons for firing her is the closeness in time between her termination and her complaints of perceived sex discrimination. Absent more, I am unable to conclude that that fact alone is sufficient to raise a triable issue of fact concerning defendant's motivation for firing plaintiff. The undisputed facts show that defendant honestly believed on the basis of plaintiff's conduct from January 7 through January 10 that she would not recognize Schroeder's authority as her supervisor. As a result, plaintiff cannot establish a claim of retaliation under either Title VII or the Equal Pay Act. See Krause v. City of La Crosse, 246 F.3d 995, 1000 (7th Cir. 2001) (treating causation element same under either statute). Because plaintiff's Equal Pay Act claim fails on causation, it is unnecessary to address defendant's contention that plaintiff's complaints did not amount to activity protected under that statute. Defendant is entitled to summary judgment on both of plaintiff's claims.

ORDER

IT IS ORDERED that the motion of defendant Gorman & Company for summary judgment is GRANTED. The clerk of court is directed to enter judgment in favor of defendant and close this case.

Entered this 23rd day of August, 2004.

BY THE COURT:

BARBARA B. CRABB
District Judge