IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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DEBRA BAKER,

OPINION AND ORDER

Plaintiff,

04-C-0157-C

v.

PRO FLOOR, INC.,

Defendant.

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This is a civil action brought pursuant to 42 U.S.C. § 1983 in which plaintiff Debra Baker is contending that defendant Pro Floor, Inc. retaliated against her for complaining about sexually offensive behavior or material in violation of Title VII, 42 U.S. C. § 2000e-3(a). Defendant denies that plaintiff was subjected to sexual harassment and denies that it terminated her in retaliation for complaining about sexual harassment.

The case is before the court on defendant's motion for summary judgment. Defendant contends that the court need not decide whether it discharged plaintiff for retaliatory reasons because plaintiff cannot make the threshold showing that she believed in good faith, both subjectively and objectively that the conduct she complained about violated

Title VII. Defendant adds that, even if the court finds that plaintiff can get over her initial hurdle, it could not find that plaintiff was terminated in retaliation for complaining about discrimination because she cannot show she was treated differently from other employees who were discharged because of downsizing. I conclude that plaintiff cannot make the preliminary showing that she had an objective and subjective good faith belief that the conduct she complained about violated Title VII. Therefore, I will grant defendant's motion for summary judgment without reaching any other argument defendant makes in support of its motion.

From the parties' proposed findings of fact, I find that the following facts are both material and undisputed when construed liberally in plaintiff's favor. In finding these facts, I have not considered plaintiff's averments in the affidavit she filed after her second deposition that contradict or patch up her deposition testimony. It is improper for a party to create false disputes of fact by means of an affidavit that contradicts her deposition testimony. Maldonado v. U.S. Bank, 186 F.3d 759, 769 (7th Cir. 1999) ("Courts generally ignore attempts to patch-up potentially damaging deposition testimony with a supplemental affidavit unless the party offers a suitable explanation— e.g., confusion, mistake or lapse in memory—for the discrepancy.") (citing Russell v. Acme-Evans Co., 51 F.3d 64, 67-68 (7th Cir.1995) (citing cases)); see also Holland v. Jefferson National Life Ins. Co. 883 F.2d 1307, 1315 n.3 (7th Cir. 1989).

## UNDISPUTED FACTS

Defendant Pro Floor, Inc. installs flooring and millwork. It hired plaintiff Debra Baker in its Madison office on April 17, 2002. At the time she was hired, plaintiff reported to Debra Odom, the office manager. When Odom left defendant's employ on July 19, 2002, plaintiff was promoted to office manager.

Ron Kling, defendant's Madison branch manager, terminated plaintiff on December 3, 2002. Kling replaced the former branch manager, Tim Buehler, in late November 2002, shortly before plaintiff was discharged. For all but the last few days of her employment, plaintiff reported to Buehler, not to Kling. Until Kling became branch manager, he spent only about two hours a day in the office and he never supervised plaintiff.

Plaintiff believes that she was discharged because she complained about a picture of a man in a Halloween costume feigning sex with a sheep. When Kling discharged plaintiff, he told her he was doing so because he and plaintiff had a "personality conflict" because she had complained about the sheep picture to defendant's regional manager, Dave Guzzo. (The parties dispute what Kling said to plaintiff and whether Kling had any say in the matter or simply carried out a decision made by Guzzo; for the purpose of deciding this motion, I am accepting plaintiff's version of these facts, which is that Kling discharged her and that he told her it was because of a personality conflict stemming from her report of the picture.)

The sheep picture was posted on the door to the warehouse, where the workforce was

all male. Plaintiff asked Buehler to remove the picture "just out of decency" and she complained to Kling "that the picture was disgusting and it needed to come down." Buehler removed the picture some time later. (The parties dispute whether he did so within hours or whether it remained up for five days; they also disagree whether the picture was posted in late October or late November. These disputes are immaterial.) Although plaintiff was a manager, she did not take down the picture herself, although no one told her that she had to leave it up. Plaintiff does not know who put the picture up.

Kling used the expression "nipply cold" in response to any statement by another employee that it was cold or chilly in the office. He usually said it to anyone standing in the office. Most of the time, the persons who heard him were women, but he also used the expression with the men in the warehouse. Kling used the word "ovaries" in place of "overages" with everyone in the office, male or female and he often told employees to "finger it out" when they had difficulty understanding something. Kling told jokes in the office but plaintiff never listened to any of them and cannot remember any jokes that he told.

After Kling started using "ovaries" for "overages," plaintiff began to think that the "finger it out" comment might refer to feeling or touching a woman sexually. She agrees that it could refer to scratching one's head, as in problem-solving. She believes that the ovaries comment was sexual harassment because only women have ovaries.

Plaintiff complained about Kling's comments to Guzzo, who said he would take them

up with Kling, but never told Kling about them. (Defendant denies that plaintiff made the complaints; for the purpose of this motion, I find that she did.) She never complained to Guzzo about the comments after September 2002.

Plaintiff liked her job with defendant, liked the people there and felt good at the end of the day. She was comfortable with her job and thought it suited her.

After plaintiff was discharged, she filed a Title VII complaint with the state's Equal Rights Division, alleging that she had been discharged in retaliation for complaining about sexual harassment in defendant's workplace.

## OPINION

To prove a claim of retaliation under Title VII, a plaintiff has a choice of methods. She can use the direct *method*, which is itself bipartite, allowing either direct or circumstantial *evidence*. Direct evidence is evidence that would allow the trier of fact to find without inference or presumption that the decision maker was motivated by retaliation when he made his adverse employment decision. Circumstantial evidence allows the jury to infer intentional retaliation by the decision maker. Rogers v. City of Chicago, 320 F.3d 748, 753 (7th Cir. 2001); Holland v. Jefferson National Life Ins. Co., 883 F.2d 1307, 1315 (7th Cir. 1989). Whichever version of the direct method plaintiff used, she would have to show that she engaged in statutorily protected activity and that defendant discharged her in retaliation

for the activity. Although plaintiff argues that a jury could infer retaliation from the temporal proximity of plaintiff's complaint about the sheep picture and her discharge by Kling, her argument fails because she does not allege facts that would suggest she had said anything to Guzzo or to Kling that would have informed them that she was complaining about harassment directed at her in particular or at women in general. (In her chronology of events in her brief, dkt. #28 at 13, she says that Kling fired her because she had told Guzzo that Kling had put up the picture; once he learned of this accusation from Guzzo, he told plaintiff she was going to have to let her go. It is as natural to infer from these facts that Kling discharged her because she had made a factually unsupported accusation against him as it is to infer that she had told him or Guzzo that she had complained that the picture constituted sexual harassment directed at her.)

Most of the time, plaintiffs lack the evidence that would allow them to use the direct method of proof. In that situation, they will try to establish illegal retaliation through the indirect method, which relies on a variation of the protean approach first articulated in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). In a retaliation case based on complaints about sex discrimination a plaintiff has to show that (1) she engaged in statutorily protected activity, such as complaining about sex discrimination; (2) she was performing her job according to her employer's legitimate expectations; (3) she suffered an adverse employment action; and (4) she was treated less favorably than similarly situated

employees who did not engage in statutorily protected conduct. Hilt-Dyson v. City of Chicago, 282 F.3d 456, 465 (7th Cir. 2002); Stone v. City of Indianapolis, 281 F.3d 640, 642 (7th Cir. 2002).

Title VII prohibits sex discrimination on the grounds of sex in working conditions. Although it makes no specific reference to sexual harassment, courts have extended its protections to that form of sex discrimination. Meritor Savings Bank, FSB v. Vinson, 477 U.S. 57, 66 (1986) (holding that plaintiff may establish a violation of Title VII by proving that discrimination based on sex has created hostile or abusive work environment and adding that "'sexual harassment which creates a hostile or offensive environment for members of one sex is every bit the arbitrary barrier to sexual equality at the workplace that racial harassment is to racial equality. Surely, a requirement that a man or woman run a gauntlet of sexual abuse in return for the privilege of being allowed to work and make a living can be as demeaning and disconcerting as the harshest of racial epithets.'" Id. (quoting Henson v. Dundee, 682 F.2d 897, 904 (1982)).

Defendant contends that plaintiff cannot make the first showing required under either method because she cannot prove that she engaged in statutorily protected activity, or put another way, that she complained about treatment that she reasonably believed was harassment directed at her because of her sex. A "good faith reasonable belief" does not require a plaintiff to show that in fact she was subjected to sexually oriented harassment.

The protections of Title VII extend to opposition to practices that do not actually violate Title VII so long as "'the plaintiff has a reasonable belief that she is challenging conduct [that violates] Title VII.'" Dey v. Colt Construction & Development Co., 28 F.3d 1446, 1458 (7th Cir. 1994) (quoting Holland, 883 F.2d at 1313. The claim of harassment need not be viable by itself. McDonnell, 84 F.3d at 259 ("It is improper to retaliate for the filing of a claim of violation of Title VII even if the claim does not have merit—provided it is not completely groundless.") (citing Dey, 28 F.3d at 1457-58; Rucker v. Higher Educational Aids Board, 669 F.2d 1179, 1182 (7th Cir.1982) ("it seems unlikely that the framers of Title VII would have wanted to encourage the filing of utterly baseless charges by employees by preventing the employers from disciplining the employees who made them")).

Although a plaintiff suing for retaliation does not have to be able to prove every aspect of a sexual harassment claim in order to prevail, it is useful to look at the requirements of such a claim in evaluating the reasonableness of the belief that the plaintiff was subject to actionable sexual harassment. If plaintiff were suing defendant for sexual harassment in violation of Title VII, she would have to establish that (1) she was subjected to unwelcome sexual harassment; (2) the harassment was based on her sex; (3) the sexual harassment unreasonably interfered with her work performance by creating an intimidating, hostile or offensive work environment that had a serious effect upon her psychological well-being; and (4) there is a basis for employer liability. McPherson v. City of Waukegan, 379

F.3d 430, 437-38 (7th Cir. 2004). (As an aside, I note the oddity of referring to *unwelcome* sexual harassment as if there were some form of *welcome* sexual harassment. The court of appeals' formulation of the test can be interpreted as a shorthand way of encompassing all the forms of activity that could amount of sexual harassment if unwelcome, such as sexual advances, requests for sexual favors, etc.)

The only objective evidence plaintiff can point to show that she was subject to actionable sexual harassment consists of the posting of a picture of a man feigning sex with a sheep and random references to nipples, fingers and ovaries by an employee who was usually in the office only two hours a day. Indeed, if one accepts her proposed fact that Kling was the one who made the decision to discharge her, she cannot point to her complaints about his random remarks as evidence of his motivation to retaliate against her because he never knew that she had complained to Guzzo about his remarks. Even if I assume that plaintiff did complain about all of these matters, that she made it known to Guzzo that her complaint was directed at behavior that was creating a workplace environment hostile to women and that Guzzo told Kling about the complaints, no reasonable jury could find that she had an objective good faith belief that Kling's comments and the picture made her workplace so hostile and abusive an environment as to alter the terms and conditions of her employment.

Looking at the situation objectively, the picture was posted in an area in which only

men worked on a regular basis. Obviously, women went into the area at times; otherwise, it is unlikely that plaintiff would have seen the picture. However, plaintiff cannot argue plausibly that the picture was directed at women or that it was intended to make the workplace hostile to them. Indeed, one could imagine a female employee posting the photograph to show her contempt for the men in the warehouse or for men in general. As for the terms she finds objectionable, they were limited to three: "finger it out," "ovaries" and "nipply cold." It is undisputed that Kling did not direct these terms exclusively to women, but used them with everyone in the workplace. Although plaintiff says that the "nipply cold" remark suggested sexually erect female nipples to her and made her wonder whether Kling was looking at her breasts, she does not allege that he ever did so. "Finger it out" could mean a variety of things other than the sexually suggestive act that came to plaintiff's mind after Kling started using the term ovaries. It could refer to counting on one's fingers, using a calculator, scratching one's head or, as defendant suggests, a term used in the flooring business for measuring with one's fingers. Plaintiff has no evidence that Kling meant it to have a sexually suggestive meaning or that he directed it to her in a sexually suggestive way. The use of the word "ovaries" for "overages" may have been loony or boorish but it cannot be characterized as harassment based on plaintiff's sex.

The Court of Appeals for the Seventh Circuit has held repeatedly that boorishness in the workplace is not the same thing as sex discrimination or sexual harassment. "The

concept of sexual harassment is designed to protect working women from the kind of male attentions that can make the workplace hellish for women. . . It is not designed to purge the workplace of vulgarity." Baskerville v. Culligan International Co. 50 F.3d 428, 430 (7th Cir. 1995). The court has noted that on one side of line between sexual harassment and boorishness are non-consensual physical contact, uninvited sexual solicitations, intimating words or acts, obscene gestures or language and pornographic pictures; "on the other side lies the occasional vulgar banter, tinged with sexual innuendo, or coarse or boorish workers." Id. The court has refused to find sexual harassment in situations involving far more serious behavior than plaintiff has alleged. In McPherson, 379 F.3d 430, for example, the court found no sexually hostile work environment despite evidence that plaintiff's supervisor would ask female employees what color bras they were wearing, ask plaintiff suggestively whether he could make a house call when she called in sick, show her outfits in Victoria's Secret catalogues and suggest that they would look good on her and even pull back her tank top to see her bra.

In Hilt-Dyson v. City of Chicago, 282 F.3d 456, 463-64 (7th Cir. 2002), the court found no harassment when a supervisor rubbed plaintiff's back, squeezed her shoulder and stared at her chest during a uniform inspection while telling her to raise her arms and open her blazer. In Patt v. Family Health Systems, Inc., 280 F.3d 749, 754 (7th Cir. 2002), it found that eight gender-related comments during the plaintiff's course of employment were

insufficient to show a sexually hostile work environment, although one remark was that "the only valuable thing to a woman is that she has breasts and a vagina." In Adusumilli v. City of Chicago, 164 F.3d 353, 361-62 (7th Cir. 1998), the court did not find sexual harassment despite plaintiff's complaints that she had been teased and that she had been the subject of ambiguous comments about bananas, rubber bands and low-neck tops, staring, attempts to make eye contact and four isolated incidents of touching by a co-worker on her arm, fingers or buttocks. In all of these cases, the court found that the limited nature and frequency of the objectionable conduct were not enough to create a hostile work environment.

In the absence of any physical contact, any sexual advances, any requests for sexual favors, any lewd remarks or gestures, any overtly sexually suggestive comments or any posting of sexually suggestive photographs or drawings in her personal work area, no reasonable person in plaintiff's situation would have viewed the kinds of comments Kling made and the one picture she saw in the warehouse as conduct that was so severe and pervasive as to produce a constructive alteration in the conditions of her employment. Oncale v. Sundowner Offshore Services, Inc., 523 U.S. 75, 81 (1998). The Supreme Court "has never held that workplace harassment . . . is automatically discrimination because of sex merely because the words used have sexual content or connotations." Id. at 80; see also Harris v. Forklift Systems, Inc., 510 U.S. 17, 23 (1993) ("A recurring point in [our] opinions is that simple teasing, offhand comments, and isolated incidents (unless extremely

serious) will not amount to discriminatory changes in the 'terms and conditions of employment.'")

Furthermore, the specific circumstances of the job, the physical arrangements of the workplace and the hierarchal positions of the victim and the alleged harasser cut against an objective view of plaintiff's workplace as hostile. Cf. Robinson v. Sappington, 351 F.3d 317, 329 (7th Cir. 2003) (holding that specific circumstances of working environment and relationship between alleged harasser and the victim are relevant considerations in evaluating hostility of workplace); Quantock v. Shared Marketing Services, Inc., 312 F.3d 899. 904 (7th Cir. 2002) (noting importance of defendant's "significant position of authority" and close working quarters); Smith v. Northwest Finance Acceptance, Inc., 129 F.3d at 1414 (commenting that "intimate office setting" of plaintiff's small office, which contained no partitions or walls, increased her humiliation and therefore severity of discriminatory conduct). Kling was in the office only two hours a day and had no supervisory authority over plaintiff until he became her supervisor in late November 2002, shortly before she was terminated.

In short, plaintiff had no objective grounds for thinking that her workplace was abusive or hostile. She has cited nothing to suggest that she was "exposed to disadvantageous terms or conditions of employment to which members of the other sex [were] not exposed." Harris, 510 U.S. at 25 (Ginsburg, J., concurring). Her testimony at her

second deposition in late October 2004 shows that she lacked subjective grounds as well. She testified that she liked her job, liked the people there, was comfortable at work and thought the job suited her. These are not the opinions of a person who has been subjected to an abusive and hostile work environment.

(In two depositions taken more than a year apart, plaintiff characterized Kling's comments and the picture as "inappropriate." She never said that they made her uncomfortable until she filed an affidavit with the court in connection with her brief in opposition to defendant's motion for summary judgment more than a month after her second deposition had been taken. Even then, she averred only that she was made uncomfortable by Kling's use of the words ovaries and nipply cold and his "dirty jokes." As I explained earlier, I am ignoring this attempt by plaintiff to "patch up" her deposition testimony. Plaintiff had two opportunities in two different depositions to say that she heard Kling tell dirty jokes or that his remarks made her feel uncomfortable. Having failed to take advantage of either opportunity, she cannot try to make a better case for herself at this late date.)

Plaintiff cannot show that she had a good faith, reasonable belief that she was subjected to unwelcome sexual harassment based on her sex that interfered unreasonably with her work performance by creating an intimidating, hostile or offensive work environment that had a serious adverse effect upon her psychological well-being. Under any

formulation of the burden plaintiff must meet, whether it is a good faith reasonable belief or a belief that is not "entirely groundless" or "utterly baseless," plaintiff falls short. She has adduced no evidence to suggest that she could meet the first prong of a retaliation claim at trial requiring her to prove that she was engaging in statutorily protected activity when she complained to Guzzo about Kling's comments and about the picture posted on the door to the warehouse. Her suit founders at this initial stage, entitling defendant to summary judgment in its favor.

ORDER

IT IS ORDERED that defendant Pro Floor, Inc.'s motion for summary judgment is GRANTED on plaintiff Debra Baker's claim of retaliation for engaging in statutorily protected behavior in violation of Title VII. The clerk of court is directed to enter judgment for defendant and close this case.

Entered this 6th day of January, 2005.

BY THE COURT:

BARBARA B. CRABB
District Judge