IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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ETHEL EMELIA MORRIS-SHAW,

Plaintiff,

v.

STORA ENSO NORTH AMERICA,

Defendant.

OPINION AND ORDER

04-C-704-C

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In this civil action for monetary relief, plaintiff Ethel Emelia Morris-Shaw, proceeding pro se, contends that she was the victim of sexual harassment, retaliation and unlawful discrimination at the hands of her former employer, defendant Stora Enso North America. Plaintiff has brought suit under 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, for sexual harassment, retaliation, and race, color, sex and national origin discrimination. Defendant has counterclaimed for breach of a severance agreement in which plaintiff waived any and all claims against defendant in exchange for $18,000 in severance pay. Jurisdiction is present. 28 U.S.C. §§ 1331, 1367.

This case is presently before the court on defendant's motion for summary judgment.

That motion will be granted with respect to all claims asserted by plaintiff and with respect to defendant's counterclaim. Plaintiff is barred from litigating her claims by the release and separation agreement she signed in October 2003. The release's unambiguous language bars her from bringing the claims in this case and she has not shown that the release is unconscionable or invalid. (Because I conclude that plaintiff's claims are barred by the release, I do not reach the question whether plaintiff's claims are barred by Title VII's 300-day limitations period.) Even if plaintiff's claims were not barred by the release or the limitations period, defendant would be entitled to summary judgment because plaintiff has failed to present any evidence from which an inference can be drawn that she was subjected to unlawful discrimination, retaliation or harassment. Finally, defendant is entitled to summary judgment on its counterclaim because it has shown that plaintiff breached the release and separation agreement by bringing this lawsuit.

Before setting out the undisputed facts, I note that plaintiff's summary judgment submissions do not comply with this court's procedures regarding summary judgment, which were given to plaintiff along with a memorandum for pro se litigants that explains the procedures in greater depth. Those procedures required plaintiff, as the party responding to the motion for summary judgment, to answer each of defendant's proposed findings of fact in separate paragraphs using the same numbers as defendant and to support her responses with citations to admissible evidence. Procedures to be Followed on Motions for

Summary Judgment II.D.1, II.E.1. Plaintiff failed on both counts. Her response to defendant's 163 proposed findings is an 11-paragraph recitation of her version of the relevant events that does not contain a single citation to admissible evidence. Plaintiff attached several documents to her response to defendant's proposed findings, but they are not admissible as evidence because plaintiff did not authenticate them. Procedures I.C.1.f (to be admissible, documentary evidence must be "shown to be true and correct, either by an affidavit or by stipulation of the parties."). Plaintiff's lack of compliance with the procedures means that her response must be disregarded in its entirety. Procedures II.E.2 ("The court will not consider any factual propositions made in response to the movant's proposed facts that are not supported properly and sufficiently by admissible evidence."). See also Metropolitan Life Ins. Co. v. Johnson, 297 F.3d 558, 562 (7th Cir. 2002) (court of appeals has "consistently and repeatedly upheld a district court's discretion to require strict compliance with its local rules governing summary judgment"). Because plaintiff failed to dispute any of defendant's proposed findings, I will accept them as undisputed. Procedures II.C ("Unless the party opposing the motion puts into dispute a fact proposed by the moving party, the court will conclude that the fact is undisputed."). From defendant's proposed findings of fact, I find the following to be material and undisputed.

UNDISPUTED FACTS

A. Parties

Plaintiff Ethel Emelia Morris-Shaw, an African-American woman of Jamaican descent, resides in Homestead, Florida. English is her native language. In October 2000, defendant Stora Enso North America, a manufacturer of paper products, hired plaintiff to work as a systems development analyst at its office in Wisconsin Rapids, Wisconsin. Before that time, plaintiff had worked for a year and a half at JD Edwards, a company that develops and markets an enterprise resource planning ("ERP") software program defendant uses to control its purchasing, inventory, production, sales and distribution activities. Plaintiff's tenure of employment with defendant lasted three years, from October 2000 to October 2003. At the time of her termination, plaintiff had obtained a bachelor's degree in chemical engineering from the University of the West Indies, a diploma in management studies from the Jamaican Institute of Management, an MBA from Colorado State University and was working towards a PhD from Kennedy-Western University.

B. Plaintiff's Job Duties and Supervisors

Plaintiff's job duties included programming, troubleshooting, writing customer applications and reports, assisting users, fixing bugs and upgrading modules using JD Edwards software. At some point during her employment, plaintiff's job title changed from systems development analyst to software engineer, but her job duties remained the same.

Gretchen Paupore, the Corporate Applications Manager in defendant's Information Technology department, was responsible for a finance project to which plaintiff was assigned after being hired. However, the finance project was abandoned shortly after plaintiff was hired and she moved to the JD Edwards Competency Center, where she was supervised by Thomas Davis, the manager of Order Entry Systems in the Information Technology department. Davis had been involved in the decision to hire plaintiff; he interviewed plaintiff over the telephone and in person before she was hired.

C. March 2002 Performance Review

On or about March 11, 2002, Davis conducted a performance review of plaintiff. He and plaintiff met in a conference room with no glass doors or glass partitions and the door closed. Davis brought plaintiff's performance review, which had already been completed, to the meeting. Plaintiff was given a rating of "succeeding." In the performance review, Davis noted that plaintiff was well-organized, understood her role as a team member and had good communication skills. He noted also that plaintiff did not help other team members, became defensive when challenged about her job performance and required close supervision for some tasks. Defendant does not have training courses for its business processes; programmers are expected to acquire that information on the job. Although plaintiff disagreed with some of Davis' comments, she signed the review without noting any

comments.

At the outset of the performance review, Davis told plaintiff, as he tells all of his subordinates, "If you disagree with the performance review, let me know and we can discuss it. If I have left something out or made an error, we can change it, as appropriate." On occasion, Davis may repeat this during the course of the performance review. During the review, plaintiff "turned down" what she perceived as Davis' implied request for sexual favors by ignoring it. After the performance review, Davis did not touch plaintiff in a manner to which she objected and defendant did not cut plaintiff's pay, transfer her or discipline her.

Defendant has a policy prohibiting sexual harassment in the workplace. It is distributed to new employees and is posted on bulletin boards throughout its facilities. In addition, plaintiff had read defendant's annual affirmative action statement, which addressed sexual harassment. On November 13, 2000, plaintiff signed defendant's equal employment opportunity harassment orientation form, which informed her of defendant's sexual harassment policy and notified her that she could report sexual harassment to her superiors or the human resources department. She understood defendant's sexual harassment policy at the time of her performance review. At no time during her employment did plaintiff file a sexual harassment complaint against Davis.

In late 2001, plaintiff and a co-worker had an argument during which the co-worker placed his hands on his private parts. Plaintiff complained to Doreen Halverson, a member

of the human resources department, and spoke with Davis about her complaint. Plaintiff and her co-worker eventually resolved their disagreement and plaintiff was not retaliated against for complaining about the co-worker's conduct.

D. Revocation of Plaintiff's Tuition Reimbursement

Defendant has a tuition reimbursement policy that reimburses employees for certain expenses they incur in taking courses at accredited educational institutions. In October 2001, plaintiff submitted paperwork to Davis concerning seven courses she wanted to take over the next two years through a "virtual" school, Kennedy-Western University. As she began to take the courses, plaintiff submitted the relevant reimbursement forms to the human resources department after Davis had approved them. On or about April 8, 2002, plaintiff received a memorandum from Scott Lipinski, a member of the human resources department, which stated that the department had mistakenly approved reimbursement for plaintiff's courses because Kennedy-Western was a non-accredited institution. The memorandum informed plaintiff that her reimbursement was revoked but that defendant would not seek repayment of the funds she had already received. Davis received a copy of the memorandum. His role in plaintiff's receipt of reimbursement was limited to verifying the accuracy of the information plaintiff submitted to the human resources department. He never had any discussions with Lipinski or any member of the human resources department

regarding the approval or revocation of plaintiff's reimbursement until it was revoked.

E. Denial of Promotion

In 2002, the position of Vice President of Information Technology became vacant. On December 4 of that year, defendant posted an opening for the position. The requirements for the position included a bachelor's degree and preferably a master's degree in management information systems or computer science, at least ten years of experience in the information systems field, including five years of managerial experience in an information technology department, and cross-cultural experience. Plaintiff applied for the position, which would have given her supervisory authority over Davis, her supervisor at the time. Four other employees of defendant applied for the position along with three individuals outside the company. At the time of her application, plaintiff was an entry level software engineer with four years of experience and a master's degree with concentrations in computer information systems and finance.

Halverson screened applicants for the position. She concluded that plaintiff was not qualified for the position because she did not have enough management experience in the information technology field and had no experience supervising a large group of employees. Seppa Toikka, defendant's Senior Vice President of Finance and Information Technology, agreed with Halverson's assessment. Halverson sent plaintiff a memorandum in which she

thanked plaintiff for her interest in the position of "Credit Analysis Manager," informed her that she had not been selected for further consideration and offered her the opportunity to be considered for future positions. The memorandum inadvertently referred to the "Credit Analysis Manager" position because Halverson had produced plaintiff's memorandum from an old memorandum. In editing the old memorandum, Halverson changed the title in the subject line but forgot to change the title in the body. The candidate selected for the position, Palmi Moller, was employed by defendant as Director of Information Technology/E-Commerce. He had a master's degree in international economics and 27 years of experience in the field of information technology, including 16 years of service with defendant and 15 years in lead, manager or director positions. The committee who selected Moller did so because he demonstrated leadership and had management experience. It did not consider the race, color, national origin, gender or prior legally protected activity of any candidate.

F. February 2003 Performance Review

On or about February 28, 2003, Davis gave plaintiff her performance review for 2002. Davis assigned her a rating of "improvement needed." He noted that plaintiff was well-organized, sought help from others when needed and had completed valuable work over the past year. However, he noted also that plaintiff needed to develop debugging skills and learn

"the configuration and structure of [defendant]'s JDE system and data." Her lack of familiarity with the system was an impediment to her team's overall performance. In addition, Davis noted that plaintiff continued to miss opportunities to use her assignments to develop a deeper understanding of the JDE system and that her depth of knowledge and design skills had not changed dramatically since her last review. As a former JD Edwards employee, plaintiff should not have needed training in JD Edwards software to perform the tasks Davis assigned to her. However, Davis offered the opportunity to attend meetings of a local JD Edwards user group to the employees under his supervision, including plaintiff. To his knowledge, plaintiff never attend one of these meetings. Finally, Davis wrote the following:

> Work has been limited to relatively straightforward, small, simple tasks; at this length of exposure to the system (2+ years) I would expect a much greater depth of understanding and ability to design solutions to business problems independently; Ethel has been left behind by her peers in this regard; without improvement in this area, potential for career growth and her value to the team are severely limited.

Plaintiff disagreed with some of Davis' comments but signed the review without noting any comments. Davis did not engage in any objectionable behavior during the review, except for "staring out of his eyes." Davis told plaintiff that there were rumors that layoffs might be occurring, that he ranked plaintiff last out of the twelve employees under his supervision and that her performance needed to improve. Plaintiff did not complain to

anyone in the human resources department about Davis's statement. (According to plaintiff, Davis told her that "when layoffs come, you will be the first to go." According to Davis, he told plaintiff that this was her second poor performance review and that her performance was not improving.)

G. Termination of Plaintiff's Employment

In late 2003, defendant decided to reduce fixed costs by 15% on a company–wide basis. Most departments had to lay off employees to save on salary and benefits. On October 7, 2003, Davis and Moller informed plaintiff that she would be losing her job and offered her a severance package.

Sixteen other employees in the Information Technology department were laid off. None were African-American or of Jamaican ancestry; 12 were male; and 15 were non-black. In selecting employees to be laid off, defendant followed the "Assessment Instrument and Process – SENA Salaried RIF 2003–2005," a process that established rules for evaluating employees and assessment criteria and identified legal principles so as to insure compliance with non-discrimination laws. Plaintiff and 11 other employees were assessed within the job group "JDE/EDI I." She was assessed by Ken Freedlund, Davis, Moller, Gretchen Paupore and Tracy Taylor-Bormann. Of the 12 employees in the JDE/EDI I job group, plaintiff and another employee received the lowest assessment scores and were selected for layoff. The

assessment team did not consider plaintiff's race, color, national origin, gender or prior protected activity.

H. Separation and Release Agreement

All of the employees who were laid off by defendant were offered the opportunity to attend a meeting to learn about their severance package, unemployment insurance and dislocated worker programs. At the meeting, Halverson discussed the severance package that was provided to plaintiff. It contained a separation letter, severance calculation, COBRA notice, an employee assistance program brochure and the severance pay plan. Halverson told the employees that the separation and release agreement covered all employment-related claims. Paragraph 10 of the agreement provided in part as follows:

> Except for a claim based upon a breach of this Agreement, Employee, on behalf of Employee and Employee's heirs and personal representatives, hereby fully releases the Released Parties (as defined below) from any and all claims, suits, debts, damages, judgments, liabilities, demands, actions or causes of action of any kind or nature whatsoever, including costs and attorneys' fees, whether the underlying facts are known or unknown, which Employee has had or now claims, pertaining to or arising out of Employee's employment with Employer, or separation therefrom, including, but not limited to, any and all claims for discrimination, harassment or retaliation, violation of public policy, breach of express or implied contract, wrongful discharge, breach of the implied covenant of good faith and fair dealing, misrepresentation, defamation, infliction of emotional distress, or any other tort, or any claim under any federal, state, county or municipal statutes, regulations or common law, including, without limitation, Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et. seq., 42 U.S.C. § 1981, the Age

> Discrimination in Employment Act, as modified by the Older Workers Benefit Protection Act, the Civil Rights Act of 1991, the Wisconsin or Federal Family and Medical Leave Act, the Americans with Disabilities Act ("ADA"), the Employee Retirement Income Security Act, the Worker Adjustment and Retraining Notification ("WARN"), the Wisconsin Plant Closing Act, the Vocational Rehabilitation Act of 1973, as amended, the Fair Labor Standards Act, as amended, and the Wisconsin Fair Employment Act, as amended.

Paragraph 11 of the agreement provided as follows:

> To the maximum extent permitted by law, Employee covenants not to sue or to institute or cause to be instituted any action in any federal, state, county or municipal agency or court against any of the Released Parties, including but not limited to, any of the claims released in Paragraph 10 of this Agreement. If Employee breaches the terms of the release and covenant not to sue, Employer shall be entitled to recover, in addition to any other relief available to Employer, its costs, including reasonable attorney's fees caused by such breach, as well as any benefits paid out under Paragraph 2(b).

Paragraph 12 provided as follows:

> Employee agrees that, if Employer initiates a claim against Employee and prevails in any respect, Employee shall pay all costs and expenses, including attorneys' fees, incurred by Employer.

Halverson never said that the release was limited to the layoff. She told the laid off employees that it covered all employment-related claims. Plaintiff consulted an attorney regarding the agreement and had the opportunity to have her questions about it answered. She read the agreement, understood it and signed it on or about October 21, 2003. Defendant paid plaintiff 18 weeks of severance pay totaling $18,108 from October 13, 2003 to February 15, 2004. Plaintiff did not revoke her execution of the separation and release

agreement.

I. EEOC Charge

On April 14, 2004, two months after receiving her final severance payment, plaintiff filed a discrimination charge with the Equal Employment Opportunity Commission, raising five issues: (1) Davis' alleged sexual harassment during the March 11, 2002 performance review; (2) revocation of plaintiff's tuition reimbursement; (3) failure to promote plaintiff to the position of Vice President of Information Technology; (4) Davis' statement predicting plaintiff's layoff at her February 28, 2003 performance review; and (5) the decision to lay off plaintiff. The EEOC informed plaintiff that many of her allegations were time-barred because they concerned events that occurred beyond the 300-day limitations period. Also, the commission informed plaintiff that it did not believe her allegations had evidentiary support. The commission issued plaintiff a right-to-sue letter, concluding that she had not produced evidence sufficient to support a finding that defendant had acted illegally in terminating her employment.

Tracy Taylor-Bormann, an employee of defendant who worked in the human resources department, conducted an internal investigation of plaintiff's allegations. She spoke with Davis, who denied sexually harassing plaintiff and explained his performance reviews. She met with other employees of defendant, none of whom had witnessed any

harassment of plaintiff or had observed Davis engaging in any discriminatory or sexually harassing behavior. None of these employees could corroborate plaintiff's allegations. Taylor-Bormann concluded that plaintiff had not been the victim of discrimination or sexual harassment.

OPINION

Adopting an "everything and the kitchen sink" approach, plaintiff has asserted claims of race, color, gender, national origin discrimination, sexual harassment and retaliation against defendant. Defendant argues that it is entitled to summary judgment on plaintiff's claims because (1) they are barred by the separation and release agreement plaintiff signed on October 21, 2003; (2) they are time-barred; (3) plaintiff has failed to set forth a prima facie case of sexual harassment, retaliation or unlawful discrimination.

A. Separation and Release Agreement

Defendant argues that plaintiff's Title VII claims are barred by the release she signed at the time she was terminated. It contends that the language in the release is broad enough to cover the claims in this lawsuit and that plaintiff signed the release knowingly, voluntarily and in exchange for more than $18,000 in severance payments. As an initial matter, I agree with defendant that the language of the release applies to plaintiff's claims in this case.

Paragraph 10 of the waiver released defendant from "any and all claims, suits . . . or causes of action of any kind or nature whatsoever . . . pertaining to or arising out of Employee's relationship with Employer, or separation therefrom, including . . . any and all claims for discrimination, harassment or retaliation." This language is broad and unambiguous. Plaintiff's argument (which is located not in her brief but in her response to defendant's proposed findings of fact) that the release is "not specific to my circumstances" misses the point entirely. The validity of a release does not turn on whether it addresses the circumstances of the employee who signs it. Releases like the one in this case are purposely written in broad, sweeping language to make clear that an employee is precluded from bringing any claim that arises out of the employment relationship or the termination of that relationship. In addition to the broad language, paragraph 10 lists Title VII as one of the statutes that plaintiff waived her right to sue under by signing the release. There can be no doubt that the release applies to plaintiff's claims in this case.

Although employees may waive their rights to sue under anti-discrimination statutes like Title VII or the ADEA, Alexander v. Gardner-Denver Co., 415 U.S. 36, 52 (1974); Pierce v. Atchison, Topeka and Santa Fe Railway Co., 65 F.3d 562, 570 (7th Cir. 1995) ("Pierce I"), they must do so knowingly and voluntarily. Pierce v. Atchison, Topeka and Santa Fe Railway Co., 110 F.3d 431, 438 (7th Cir. 1997) ("Pierce II"). When an employer raises the existence of a waiver as a defense to a discrimination claim, "the burden rests on

the plaintiff to challenge specifically his voluntary and knowing consent to the release." Pierce I, 65 F.3d at 572. Plaintiff does not argue that she did not sign the release knowingly and voluntarily. Instead, she states that the release is unconscionable. Id. (because release is a contract, employee may raise "traditional state law defenses" to its validity) Unconscionability is a contract defense in Wisconsin. E.g., Deminsky v. Arlington Plastics Machinery, 2001 WI App 287, 249 Wis. 2d 441, 638 N.W.2d 331. I need not analyze plaintiff's argument because she has not developed it, Central States, Southeast and Southwest Areas Pension Fund v. Midwest Motor Express, Inc., 181 F.3d 799, 808 (7th Cir. 1999) ("Arguments not developed in any meaningful way are waived.") and because she placed her argument in her response to defendant's proposed findings of fact and not in her brief. However, in the interest of thoroughness, I will pause briefly to consider it.

Unconscionability refers to "the absence of a meaningful choice on the part of one party, together with contract terms that are unreasonably favorable to the other party." Wisconsin Title Loans, Inc. v. Jones, 2005 WI App 86, ¶ 13, 696 N.W.2d 214 (citation omitted). As this definition implies, there are procedural and substantive components to a finding of unconscionability. "Procedural unconscionability bears upon factors related to the meeting of the minds of the parties to the contract: age, education, intelligence, business acumen and experience and relative bargaining power of the parties, whether the terms were explained to the weaker party and possibly alternative sources of supply for the goods in

question." Id. Substantive unconscionability examines the reasonableness of the terms of the contract. Discount Fabric House of Racine, Inc. v. Wisconsin Telephone Company, 117 Wis. 2d 587, 602, 345 N.W.2d 417, 425 (1984).

The undisputed facts indicate that the release was not procedurally unconscionable. At the time she signed the release, plaintiff had obtained bachelor's and master's degrees and was working towards a doctorate. She read and understood English. Although it appears that she did not negotiate the terms of the agreement, Doreen Halverson explained that the release applied to all employment-related claims. Finally, plaintiff consulted a lawyer about the release before she signed it. As for substantive unconscionability, the terms of the release are reasonable. In exchange for giving up her right to sue defendant, plaintiff received $18,108 in severance payments over a period of 18 weeks. Without further development from plaintiff, I am unable to conclude that these terms are unreasonable. Because the terms of the release plainly cover the claims asserted in this case and because plaintiff has failed to show that the release is unenforceable, defendant is entitled to summary judgment on each of plaintiff's claims. This conclusion makes it unnecessary to consider defendant's argument that plaintiff's claims are time-barred by Title VII's limitations period.

B. Merits of Plaintiff's Claims

Even if plaintiff were not barred from litigating her claims by the Separation and

Release Agreement or by Title VII's limitations period, defendant would still be entitled to summary judgment because there are no facts that suggest that plaintiff was the victim of sexual harassment or retaliation or that she was discriminated against because of her race, color, sex or national origin. The primary reason for this lack of evidence is plaintiff's failure to support her allegations with proposed findings of fact that are supported by admissible evidence.

1. Sexual harassment

Courts have long recognized that employers may be responsible for sexual harassment in the workplace under Title VII. Burlington Industries, Inc. v. Ellerth, 524 U.S. 742, 751-55 (1998). To survive summary judgment on a sexual harassment claim, an employee must introduce evidence from which an inference can be drawn that the behavior of a coworker or supervisor towards her was unwelcome, severe or pervasive and predicated on sex. Robinson v. Sappington, 351 F.3d 317, 328 (7th Cir. 2003); Reed v. Shepard, 939 F.2d 484, 491 (7th Cir. 1991). Plaintiff argues that Thomas Davis, her supervisor, sexually harassed her during two performance reviews conducted on March 11, 2002 and February 28, 2003 and at other times during her employment when he would "intensely stare out his eyes at me for several minutes." Plt.'s Br., dkt. #21, at 2. Defendant argues that Davis's conduct was not of a sexual nature and that it was not severe or pervasive enough to be

actionable under Title VII.

I agree with defendant that plaintiff has not shown that she was subjected to severe or pervasive sexual harassment. With respect to the March 11, 2002 performance review, plaintiff suggests that Davis's comment about changing her performance review if she disagreed with its contents was an implied request for sexual favors. However, it is undisputed that Davis informs all of the employees he reviews that he is willing to discuss aspects of his reviews with which the employees disagree and that he will change a performance review if it is appropriate to do so. Plaintiff may have interpreted Davis' comment as a request for sexual favors, but that is not the test for a sexual harassment claim. To be actionable under Title VII, sexual harassment must be subjectively and objectively offensive. In other words, the harassment must be severe enough for a reasonable person to consider it hostile or abusive and the employee must perceive it as such. McPherson v. City of Waukegan, 379 F.3d 430, 438 (7th Cir. 2004). In this case, it is clear that plaintiff considered Davis's comment to be sexual harassment, but the Supreme Court has held that an isolated comment susceptible to more than one reasonable interpretation is wholly insufficient to create an objectively hostile work environment. Faragher v. City of Boca Raton, 524 U.S. 775 (1998) (isolated comments or incidents, unless extremely serious, not actionable under Title VII); see also Adusumilli v. City of Chicago, 164 F.3d 353, 361-62 (7th Cir. 1998) (ambiguous comments, staring and one unwelcome touch to employee's

buttocks not objectively severe for purpose of Title VII); Baskerville v. Culligan International Co., 50 F.3d 428, 430 (7th Cir. 1995) (nine comments over seven–month period could not "reasonably be thought to add up to sexual harassment"). There is no evidence that Davis ever touched plaintiff in an inappropriate manner. (In her brief, plaintiff alleges that Davis touched her breast and exposed himself during the performance review. However, I have not considered these allegations because they were not made the subject of proposed findings of fact.) Moreover, plaintiff did not file a sexual harassment complaint against Davis after the performance review or at any other time during her employment. It is clear that she knew how to file a complaint because she had done so after an incident with a coworker in late 2001.

Although plaintiff alleges that Davis sexually harassed her at the February 28, 2003 performance review as well, the undisputed facts indicate that Davis did not engage in any objectionable behavior on that occasion. Again, plaintiff interpreted Davis's staring as sexually motivated, but this is not sufficient to support a sexual harassment claim. Finally, I have not considered plaintiff's allegation that Davis stared intensely at her on several occasions other than the two performance reviews because plaintiff did not make this allegation the subject of a proposed finding of fact; however, my conclusion that plaintiff has failed to establish a triable case of sexual harassment would not change had I considered those occasions. Because plaintiff has failed to present facts from which a jury could infer

that she was subjected to objectively severe sexual harassment, defendant is entitled to summary judgment on plaintiff's sexual harassment claim.

2. Retaliation/discrimination

Plaintiff alleges that the revocation of her tuition reimbursement, her failure to receive the promotion to Vice President of Information Technology and her termination were retaliatory acts visited upon her because she refused Davis's sexual advances. In addition, she contends that defendant discriminated against her because of her sex, race, color or national origin in taking these actions. Her allegations ring hollow, ultimately, because she has failed to present evidence to support them.

A plaintiff may establish a claim of retaliation or discrimination under the direct or indirect method of proof. To prove retaliation under the direct method, a plaintiff must show that (1) she engaged in an activity protected by Title VII; (2) she suffered an adverse employment action at the hands of her employer; and (3) a causal connection exists between the activity and the adverse action. Moser v. Indiana Department of Corrections, 406 F.3d 895, 903 (2005). Under the indirect method, plaintiff has the initial burden to present a prima facie case of retaliation by showing that (1) she engaged in a statutorily protected activity; (2) she performed according defendant's legitimate expectations; (3) she suffered a materially adverse employment action; and (4) she was treated less favorably than similarly

situated employees who did not engage in statutorily protected activity. Beamon v. Marshall & Ilsley Trust Co., 411 F.3d 854, 861-62 (7th Cir. 2005). With respect to a discrimination claim, a plaintiff proceeding under the direct method of proof "must show either 'an acknowledgment of discriminatory intent by the defendant or circumstantial evidence that provides the basis for an inference of intentional discrimination.'" Dandy v. United Parcel Service, Inc., 388 F.3d 263, 272 (7th Cir. 2004) (quoting Gorence v. Eagle Food Centers, Inc., 242 F.3d 759, 762 (7th Cir. 2001)). Under the indirect method, plaintiff must establish a prima facie case of discrimination by showing that (1) she is a member of the protected class at issue; (2) she was meeting her employer's legitimate expectations (or, with respect to a failure to promote claim, that she had the required qualifications for promotion); (3) her employer took an adverse action against her; and (4) the employer treated similarly situated employees outside the protected class more favorably. Herron v. DaimlerChrysler Corp., 388 F.3d 293, 299 (7th Cir. 2004).

a. Revocation of tuition reimbursement

The undisputed facts indicate that defendant has a reimbursement policy for employees who take courses at accredited educational institutions and that pursuant to this policy, plaintiff received reimbursement for some expenses she incurred while enrolled at Kennedy-Western University, a non-accredited "virtual" school, beginning in late 2001. In

April 2002, defendant realized that it had mistakenly approved reimbursements for plaintiff and sent her a memorandum discontinuing them. The memo stated that defendant would not seek repayment of the funds plaintiff had already received. Further, it is undisputed that Davis did not discuss the approval or discontinuance of plaintiff's reimbursements with any member of the human resources department. His role was limited to verifying the accuracy of the information plaintiff submitted to the human resources department.

From these undisputed facts, no reasonable jury could infer that defendant discriminated against plaintiff in discontinuing her educational reimbursements or that they did so in retaliation for her having turned down Davis's alleged sexual advances. Aside from the fact that the record does not show that Davis sexually harassed plaintiff, her retaliation claim fails under the direct and indirect methods of proof because she has not shown that she engaged in any statutorily protected activity. As defendant notes, plaintiff never filed a complaint with the human resources department or told Davis that she objected to his conduct. "An employer cannot retaliate when it is unaware of any complaints." Miller v. American Family Mutual Insurance Co., 203 F.3d 997, 1008 (7th Cir. 2000). Plaintiff's discrimination claim predicated on the revocation of tuition reimbursement fails as well. There is no direct or circumstantial evidence in the record that indicates that plaintiff's reimbursements were discontinued because she is a woman, because she is black or because she is a native of Jamaica. Plaintiff has failed to present a prima facie case of discrimination

because she has not shown that similarly situated individuals outside any of the protected classes invoked by plaintiff were treated more favorably. Specifically, there is no evidence that defendant continued to reimburse male, non-black or non-Jamaican employees after learning that they were enrolled at non-accredited institutions.

b. Failure to promote

According to the undisputed facts, plaintiff applied for the position of Vice President of Information Technology, a position whose requirements included a bachelor's degree and preferably a master's degree in management information systems and at least ten years of experience (five at the managerial level) in the information systems field. At the time she applied for the job, plaintiff had a master's degree with concentrations in computer information systems and finance and four years of experience. Plaintiff did not receive the job because she lacked management experience. Instead, defendant selected Palmi Moller, a candidate who had 27 years of experience in the field of information technology, 16 years of service with defendant and 15 years in managerial positions. The committee responsible for filling the position did not consider the race, color, national origin, gender or prior statutorily protected activity of any candidate.

Plaintiff contends that defendant's retaliatory and discriminatory animus in not promoting her is evident because the memorandum she received notifying her that she would

not be promoted referred to the Credit Analysis Manager position instead of the Vice President position. Plaintiff makes a mountain out of a molehill. It is undisputed that the reference to the Credit Analysis Manager position was nothing more than a clerical mistake; Doreen Halverson, the employee who sent plaintiff the memorandum, created it by editing an old memorandum and changing the title of the position in the subject line but not in the body. Plaintiff tries to make considerable hay out of the fact that Moller had a degree in international economics, not management information systems as the position required. But "[a] plaintiff cannot be permitted to manufacture a case merely by showing that the employer does not follow its employment rules with Prussian rigidity." Walker v. Abbott Laboratories, Inc., No. 04-3119, 2005 WL 1790146, at *2 (7th Cir. July 29, 2005). The committee selected Moller because he demonstrated leadership and had managerial experience.

Against these undisputed facts, plaintiff's retaliation and discrimination claims cannot stand. Once again, plaintiff has not shown that she engaged in any activity protected by Title VII to support a retaliation claim. Further, the undisputed fact that the committee charged with filling the Vice President position did not consider the race, color, national origin or gender of any candidate scuttles her discrimination claim.

c. Termination

The undisputed facts indicate that defendant terminated plaintiff's employment in October 2003 pursuant to a company-wide reduction in force. Sixteen other employees in the Information Technology department were laid off with plaintiff. To determine which employees would be laid off, defendant followed a process that established assessment criteria and evaluation guidelines and identified legal principles to be followed to insure compliance with non-discrimination laws. Plaintiff was assessed by multiple individuals, including Davis, her supervisor. Of the 12 employees in her job group, she received one of the two lowest scores. The individuals who assessed plaintiff did not consider her race, color, gender or national origin.

Much like the tuition reimbursement and failure to promote claims, plaintiff has presented no evidence from which a reasonable jury could infer that the decision to terminate her employment was retaliatory or made on the basis of any of the prohibited characteristics she identified. Plaintiff cannot withstand summary judgment on her retaliation claim because she has not shown that she engaged in any statutorily protected activity. Her discrimination claim cannot survive because it is undisputed that the individuals who decided to terminate her employment did not consider her race, color, gender or national origin in making their decision.

C. Defendant's Counterclaim

In its answer to plaintiff's complaint, defendant asserted a counterclaim for breach of the Separation and Release Agreement. This is a state law claim over which the court has supplemental jurisdiction. 28 U.S.C. § 1367. Like any other contract, the enforceability of the agreement depends in part on the existence of consideration. Goossen v. Estate of Standaert, 189 Wis. 2d 237, 247, 525 N.W.2d 314, 318 (Ct. App. 1994) (elements of enforceable contract are offer, acceptance and consideration). In this case, plaintiff received $18,108 in exchange for releasing defendant from any liability for claims arising out of the employment relationship. I have already concluded that the claims asserted by plaintiff in this case are covered by paragraph 10 of the agreement. Therefore, it is clear that plaintiff breached the agreement by bringing the present lawsuit.

As noted above, employees may validly waive their rights to sue under non-discrimination statutes like Title VII so long as the waiver is made knowingly and voluntarily. It is undisputed that plaintiff read the agreement, understood it, signed it after consulting with a lawyer and did not revoke her execution of the agreement. She does not argue that defendant coerced her into signing the agreement. In fact, plaintiff has not trieded to mount any defense to the counterclaim. Therefore, I conclude that defendant is entitled to summary judgment with respect to its counterclaim.

The only remaining question concerns defendant's damages. In its counterclaim, defendant asked for an order requiring plaintiff to repay all of the severance benefits she had

received from defendant in addition to defendant's costs and attorney fees. Ans. & Counterclaim, dkt. #8, at 8. However, in its brief, defendant states that it is seeking only nominal damages. Dft.'s Br., dkt #18, at 20. Because it is unclear what defendant means by "nominal damages," I will delay entry of judgment to give defendant an opportunity to advise the court precisely what damages it is seeking.

ORDER

IT IS ORDERED that the motion for summary judgment filed by defendant Stora Enso North America is GRANTED. Defendant may have until August 29, 2005 to provide the court a detailed itemization of the damages it is seeking. Plaintiff will have until September 5, 2005 to file objections to the amounts sought by defendant. Defendant will have until September 12, 2005 to file a reply to plaintiff's objections.

Entered this 15th day of August, 2005.

BY THE COURT:
/s/
BARBARA B. CRABB
District Judge