IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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DAVID STOCKER,

OPINION and ORDER

Plaintiff,

06-C-366-C

v.

KALAHARI DEVELOPMENT, LLC,

Defendant.

- -

This is a civil action for monetary relief, brought under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e. Plaintiff David Stocker, a former employee of defendant Kalahari Development, LLC, contends that he was subjected to discrimination because of his sex in violation of Title VII when defendant fired him on May 31, 2005. Jurisdiction is present. 28 U.S.C. § 1331.

Now before the court are defendant's motions for summary judgment and to strike portions of plaintiff's affidavit. Because plaintiff has failed to adduce sufficient evidence to allow a reasonable jury to find in his favor, defendant's motion for summary judgment will be granted.

Before turning to the undisputed facts, I will first consider defendant's motion to

strike portions of plaintiff's affidavit. In its motion, defendant asserts that ten paragraphs of plaintiff's affidavit should be stricken because they are "conclusory," "conclusory and self-serving," "lack . . . foundation" or violate the "sham affidavit" rule. With respect to the first three objections, this court's procedures regarding summary judgment state clearly that the court will disregard proposed findings of fact not supported by admissible evidence. If defendant believed any of the averments in the affidavit were inadmissible, the proper response was not to move to strike the affidavits themselves, but to dispute each of the facts proposed by plaintiff that relied on those affidavits, on the ground that the proposed facts were not supported by admissible evidence. Procedure to be Followed on Motions for Summary Judgment, I.C.1. ("[E]ach proposed finding must be supported by admissible evidence."); cf. Redwood v. Dobson, 476 F.3d 462, 471 (7th Cir. 2007) (motions to strike are not appropriate mechanism for challenging accuracy of other side's statement of facts). In determining which facts are disputed, I have taken into consideration the challenges defendant has raised to the admissibility of plaintiff's affidavit. Therefore, defendant's motion to strike these paragraphs will be denied as unnecessary.

Defendant contends that three paragraphs in plaintiff's affidavit violate the "sham affidavit" rule. It is true that "courts do not countenance the use of so-called 'sham affidavits,' which contradict prior sworn testimony, to defeat summary judgment." United States v. Funds in Amount of Thirty Thousand Six Hundred Seventy Dollars, 403 F.3d 448,

466 (7th Cir. 2005); see also Cowan v. Prudential Ins. Co. of America, 141 F.3d 751, 756 (7th Cir. 1998). However, the rule is inapplicable here, because defendant does not cite any portion of plaintiff's deposition that is inconsistent with his affidavit. Therefore, defendant's motion to strike these paragraphs will be denied as well.

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

UNDISPUTED FACTS

A. Plaintiff's Employment with Defendant

In January 2005, Mary Bonte-Spath and Kelby Linneken hired plaintiff David Stocker to be the human resources director for defendant Kalahari Development, LLC's waterpark and resort in Wisconsin Dells, Wisconsin. Bonte-Spath is a woman and has been defendant's Chief Financial Officer since May 2000. Linneken is male and was defendant's Vice President of Operations in 2005.

Plaintiff began his employment on January 24, 2005, with an annual salary of $70,000. When plaintiff was hired, the day-to-day duties of the human resources director were being performed by a woman named Ashley Bast, who had worked for defendant as a human resource generalist since February 2004. Bast had assumed these duties when the former human resources director resigned. Bonte-Spath did not believe that Bast was

qualified to conduct the high level aspects of the job or fill the position permanently.

No one criticized plaintiff's work to him while he was employed by defendant. In fact, his performance was publicly praised by Todd Nelson, defendant's owner. However, Bonte-Spath was disappointed that plaintiff did not perform several tasks that she anticipated the human resources director would perform, such as creating and implementing a comprehensive incentive bonus structure for all levels of management, taking a lead role in hiring upper level managers and coordinating the benefits and employee policies both at the Wisconsin Dells property and defendant's new property in Sandusky, Ohio.

Although Bonte-Spath and Linneken routinely solicited applications and scheduled interviews without notifying plaintiff, he assisted in the interviewing and hiring of several managers, including management candidates for the Sandusky property. In addition, plaintiff performed numerous other functions that Bonte-Spath expected. Among other things, he created an "Associates of the Month" bonus program, workers' compensation logs and graphs, a comprehensive wage compensation pay matrix, a master attendance tracking log, monthly turnover reports and a "talent acquisition guide"; assisted with opening and staffing the Kahunaville Bar & Grill; helped create a company-wide policy and procedures manual; established a ten-week guest service training program, a 24-hour employment hotline and a employee referral incentive awards program; implemented a relocation program; revised the new employee orientation program; taught a monthly supervisory

development class; and published a monthly Human Resources training bulletin.

While plaintiff worked for defendant, he regularly parked his car outside the designated employee parking area, in spite of a company policy to the contrary. His doing so annoyed Bonte-Spath, who emailed plaintiff's immediate supervisor, Steven White, on April 5, 2005, saying "Interesting that our HR Director who is the 'enforcer' of rules and policies feels he has the right not to park in the employee parking lot?? May I ask why?" Plaintiff began parking outside the employee parking area at the recommendation of Phil Wenzel, defendant's Director of Security, with White's approval. Wenzel believed that plaintiff's involvement with the termination of employees created "security issues" and that he could better monitor plaintiff's vehicle when it was parked closer to the building. Bonte-Spath has always parked in "allowable areas."

In early May 2005, plaintiff emailed White to ask whether he could take a week-long vacation in late May or early June to visit his son, who was on military leave in Italy. White had the authority to grant plaintiff's request for vacation time. In the email, plaintiff prefaced his request for vacation by stating that "he had a big favor to ask." At that time, plaintiff had accrued only thirteen hours of vacation time, but he did not mention this in the email. White responded that it would be fine. Plaintiff thanked White by email for "the understanding." Plaintiff thanked White again in person for approving the vacation, acknowledged that he had not accrued enough vacation time and stated that he did not

expect to be paid for the time he was gone. When plaintiff asked White how he should handle the paperwork, White told him not to worry about filling out paperwork.

Plaintiff took the requested one-week vacation at the end of May 2005. He was scheduled to return to work on May 30, 2005. On May 25, 2005, Bonte-Spath fired White. She did not see the email exchange between White and plaintiff until June 2, 2005, when plaintiff forwarded it to her. Defendant's policy is that any non-executive employee who wants to take vacation must fill out a "Payroll Status Change Form." Plaintiff never filled out this form and Bonte-Spath was not aware that he was going on vacation until after he left.

Before plaintiff left on his vacation, he negotiated a health insurance benefits package for Kalahari employees, a task Bonte-Spath had performed before plaintiff was hired, but expected plaintiff to perform in 2005. The existing insurance plan expired on June 1, 2005. Plaintiff believed that he would have enough time to sign the forms and return them when he returned from vacation on May 30, 2005. While plaintiff was on vacation, defendant's insurance company wrote to Bonte-Spath to advise her that defendant had not contracted for health insurance for the new year and that the existing contract was scheduled to expire within seven days. In response, Bonte-Spath "scrambled" to locate paperwork, evaluate the proposal and sign the documents. She was uncomfortable signing the paperwork without reviewing the proposal or talking to plaintiff about whether there were "unanswered

questions" about the proposal.

B. Termination Process

Sometime before plaintiff returned from his vacation, Bonte-Spath met with Nelson, defendant's owner, and Daylene Stroebe, the new general manager, and expressed her dissatisfaction with plaintiff's performance. She complained that he was not administering the health insurance benefits package, had taken an undocumented week-long vacation after only a few months of employment and that he had not been following the parking policy. Bonte-Spath stated that she did not think defendant should continue to employ plaintiff. Nelson said something to the effect of "Let's terminate him," or "Fine." Stroebe indicated that she agreed.

On May 31, 2005, Bonte-Spath met with plaintiff to inform him about the termination decision. She told plaintiff that she was firing him because he had been in Italy the prior week and she was displeased with his handling of the insurance benefits package. Later that day, Bonte-Spath prepared a two page report in which she listed the expectations she had of plaintiff, noted that he had not met these expectations, listed other behavior that he engaged in that she found "inappropriate" and described her termination meeting with him. Plaintiff did not receive any "progressive discipline" before he was fired.

On June 1, 2005, human resources generalist Bast filled out a "Payroll Status Change

Form" in which she indicated that plaintiff was terminated involuntarily for "work performance." At the bottom of the form, Bast wrote, "let go by Mary Bonte-Spath on 5/31/05."

C. Unemployment Forms

In June 2005, defendant received a form from the South Carolina Employment Security Commission regarding plaintiff's request for unemployment benefits. The form indicated that plaintiff claimed he was terminated for "lack of work" and was accompanied by a request that defendant describe the reason for plaintiff's termination. The request form provided check-boxes, one of which was "Lack of Work (No additional written explanation necessary). Cassie Fry, a human resources department employee, handled the request. After Fry learned from Bast that defendant did not intend to dispute plaintiff's receipt of unemployment benefits, she marked the box next to "Lack of Work," without discussing the decision with Bonte-Spath or Nelson. Bonte-Spath did not direct Bast or anyone else to select "Lack of Work" as the response to this request.

On April 20, 2006, defendant provided the Equal Rights Division of the Wisconsin Department of Workforce Development a chart that identified the sex and date of hire for all managers and directors who had been discharged involuntarily within the previous two years. The chart lists the reason for plaintiff's termination as "lack of work." "Work

performance" is listed as the reason for termination of other employees. Bast prepared this chart using information from personnel files, including plaintiff's. Although she understood from defendant's payroll records that plaintiff had been terminated for performance reasons, Bast listed the reason for his termination as "lack of work" in this chart because it was the same reason for termination Fry had given previously to the South Carolina Employment Security Commission. Bast did not consult with Bonte-Spath when she prepared the chart.

D. Other Employees

1. Ceece Corwin

Ceece Corwin is a woman who is the human resources director at defendant's Sandusky property. Bonte-Spath had similar oversight responsibilities with respect to Corwin and the human resources director at the Wisconsin Dells property. The Wisconsin Dells property began operations May 2000 and had policies in place by 2005. During the spring of that year, defendant was preparing to open the Sandusky property. Corwin had primary responsibility for hiring and training approximately 500 staff members. Bonte-Spath has not witnessed or received complaints about Corwin's disregard of company policies or "potentially jeopardizing" defendant's insurance status.

2. Ashley Bast

After Bonte-Spath fired plaintiff, Bast was asked to perform the day-to-day functions of the human resources director position again until defendant could find a replacement for plaintiff. (Defendant does not state who asked Bast to resume this role.) Bonte-Spath did not believe that Bast was qualified to perform all of the functions of the human resources director, but thought Bast could "keep things going on a day to day basis." When she took on these responsibilities, Bast received a raise to an annual salary of $40,000 after she began filling in for plaintiff. In the form submitted to the Equal Rights Division, defendant noted that Bast had replaced plaintiff; the form did not ask whether Bast's position was temporary or permanent and defendant did not provide this information.

3. Other terminated managers

Between May 25, 2005 and June 17, 2005, defendant fired seven managers. Six of these managers were male, including plaintiff and White. At the time plaintiff was fired, 68% of defendant's managers were male. In the form submitted to the Equal Rights Division, "Lack of Work" was the reason cited for the firing of plaintiff, White and two other male managers who were fired in this time period. In the two years before April 20, 2006, this was not the reason given for firing any other managers. In his deposition, Nelson, defendant's owner, stated that White was terminated for performance reasons.

OPINION

The only issue raise in this lawsuit is whether defendant violated plaintiff's rights under Title VII of the Civil Rights Act by terminating him because of his sex. Under Title VII, it is unlawful 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 . . . sex . . . ." 42 U.S.C. § 2000e-2(a)(1). Title VII's prohibition on sex discrimination protects male employees as well as female employees. Gore v. Indiana University, 416 F.3d 590, 592 (7th Cir. 2005). A plaintiff alleging a violation of Title VII may establish discrimination in one of two ways: by presenting a "convincing mosaic" of direct or circumstantial evidence under the direct method of proof or by utilizing the indirect, burden-shifting method set forth in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). Burks v. Wisconsin Dept. of Transportation, 464 F.3d 744, 751 (7th Cir. 2006).

A. Direct Method

Under the direct method, a plaintiff can show that his employer's termination decision was motivated by a discriminatory purpose by presenting direct evidence of discrimination, such as an outright admission from the employer, or circumstantial evidence that points directly to a discriminatory reason for the termination decision. Ptasznik v. St.

Joseph Hospital, 464 F.3d 691, 695 (7th Cir. 2006) ("[c]ircumstantial evidence must point directly to a discriminatory reason for the termination decision"). Outright admissions of discrimination are rare. Plaintiff does not suggest that any occurred in this case. Instead, he argues that he may proceed under the direct method using circumstantial evidence of discrimination.

At the outset, defendant contends that the "same actor" inference bars plaintiff from proceeding using the direct method of proving that defendant, acting through Bonte-Spath, discriminated against plaintiff because of his sex. When the same person hires and later fires an employee within a relatively short time, it can be inferred that the firing was not discriminatory. Johnson v. Zema Systems Corporation, 170 F.3d 734, 744-45 (7th Cir. 1999). The inference is not a hard and fast rule, but rather a shorthand for the common sense presumption that "it hardly makes sense to hire workers from a group one dislikes (thereby incurring the psychological costs of associating with them), only to fire them once they are on the job." Proud v. Stone, 945 F.2d 796, 797 (7th Cir. 1991). In this case, plaintiff was hired by Linneken, a man, and Bonte-Spath, a woman. Bonte-Spath made the decision to fire plaintiff, although she had the approval of her supervisor, who is male. Because the actors involved in hiring and firing plaintiff were not identical and the decision maker was female, I find that the "same actor" inference is not a bar in this case.

Therefore, it is necessary to consider whether plaintiff can utilize the direct method,

using circumstantial evidence of discrimination that would allow the trier of fact "to infer intentional discrimination by the decisionmaker." Yong-Qian Sun v. Board of Trustees, 473 F.3d 799, 812 (7th Cir. 2007) (citing Rudin v. Lincoln Land Community College, 420 F.3d 712, 720 (7th Cir. 2005)). A plaintiff proceeding by this method may succeed by presenting pieces of evidence insufficient by themselves to show discrimination, but forming in their totality a "convincing mosaic" of discrimination. Paz v. Wauconda Healthcare & Rehabilitation Center, LLC, 464 F.3d 659, 665-66 (7th Cir. 2006). However, that evidence must point directly to a discriminatory reason for the termination decision. Ptasznik, 464 F.3d at 695.

Plaintiff contends that the following circumstantial evidence is sufficient to show a "convincing mosaic" of discrimination: (1) defendant has offered alternative, contradictory reasons for his termination; (2) Bonte-Spath, a woman, took a lead role in the decision to fire him; (3) plaintiff was replaced by an undisputedly less qualified female employee; (4) defendant's progressive discipline policy was not followed; and (5) several other male managers were fired around the same time, while Corwin, a female manager, was not fired.

Beyond listing this "evidence" of direct discrimination, plaintiff did not develop his argument regarding circumstantial evidence any further. Thus, plaintiff has come close to waiving this argument altogether. Undeveloped arguments and arguments that are unsupported by pertinent authority are waived and need not be considered by the court.

See, e.g., Central States, Southeast and Southwest Areas Pension Fund, 181 F.3d 799, 808 (7th Cir. 1999) ("Arguments not developed in any meaningful way are waived."); Chambers v. American Trans Air, Inc., 17 F.3d 998, 1005 (7th Cir. 1994) (Undeveloped arguments are waived; summary judgment will not be reversed on basis of "skeletal snippets of argument"). However, plaintiff has offered just enough evidence to require consideration of his argument that he may overcome defendant's motion for summary judgment using the direct method of proving discrimination. Whether the evidence plaintiff offers is considered item by item or as a whole, it would not allow a jury to infer reasonably that he was fired because of his sex.

1. Defendant's "shifting" explanations for plaintiff's termination

First, plaintiff points to defendant's shifting explanations regarding the reasons for his termination and argues that this raises questions about the veracity of Bonte-Spath's statements that he was fired for work performance reasons. He suggests that Bonte-Spath's statements at the time she fired him contradict the written statements made to the South Carolina Employment Security Commission and the Wisconsin Department of Workforce Development. In some cases, shifting explanations for a personnel decision create doubt about its legitimacy. Culver v. Gorman, 416 F.3d 540, 549 (7th Cir. 2005) ("An inconsistent employer explanation may help to support a finding of pretext."). However, the

primary decision maker regarding plaintiff's termination was Bonte-Spath, who has not wavered from her position that she fired plaintiff for performance reasons and had no role in filling out the forms that stated that plaintiff had been terminated for lack of work. When Fry filled out the initial form indicating the reason for plaintiff's termination was "lack of work," she was responding to a form that plaintiff had filled out. Later, when Bast prepared the chart for the Wisconsin Department of Workforce Development, she referred back to the earlier form that Fry completed. In any event, whatever their beliefs were about plaintiff's termination, they are irrelevant, because Fry and Bast were not the decision makers.

2. Bonte-Spath's sex

Second, Bonte-Spath's sex is not evidence that plaintiff was subject to discrimination because of *his* sex. A person's race, sex or other status cannot be used to imply discriminatory intent. To do so would violate the spirit of the very law on which plaintiff relies, by allowing the finder of fact to generalize about an entire class of people.

3. Plaintiff's "replacement" by a unqualified woman

Next, it is undisputed that Bast, a woman, "replaced" plaintiff and was unqualified for his position. Standing alone, this might be suspicious. In context, however, it is far more

innocuous than plaintiff suggests. In the period before plaintiff began working for defendant, Bast had filled in to perform the day-to-day functions of his job, while Bonte-Spath took over the higher level functions. Bast was paid far less than plaintiff and apparently resumed her prior position when he was hired. Even after she received a raise, Bast's salary was less than 60% of plaintiff's, suggesting that she was not considered a replacement for plaintiff as a human resources director who could function at a high level.

4. Defendant's progressive discipline policy

Assuming for the purposes of this decision that defendant had a mandatory progressive discipline policy that applied to plaintiff at the time he was fired, I will assume also that Bonte-Spath failed to use defendant's progressive discipline policy when she fired plaintiff. In some contexts, such a failure is considered evidence of pretext. Pryor v. Seyfarth, Shaw, Fairweather & Geraldson, 212 F.3d 976, 980 (7th Cir. 2000) (holding that where employer's progressive disciplinary policy precluded plaintiff's firing, there was evidence of pretext). However, I am not aware of any case in which the Court of Appeals for the Seventh Circuit has found that defendant's failure to utilize a progressive discipline policy has been sufficient circumstantial evidence of discrimination for a plaintiff to defeat a motion for summary judgment using the direct method of proof. In this case, Bonte-Spath's failure to follow defendant's progressive discipline policy does not point, directly or

indirectly, to plaintiff's sex as her actual motivation for firing him.

5. The firing of other male managers

Attempting to bolster his argument that sex was a factor in his firing with statistical support, plaintiff points out that five other managers who were fired within two weeks of his termination were male. However, it is undisputed that, three weeks after plaintiff was firing, a female manager was fired as well. Thus, in the four-week period beginning on May 25, 2005, 85% of the fired managers were male, while 68% of defendant's managers were male. Given the small sample size and lack of any additional information about the other managers' performance or who was responsible for their firing, the value of such evidence is limited. Moreover, "[s]tatistical evidence is only helpful when the plaintiff faithfully compares one apple to another . . . ." Hemsworth v. Quotesmith.com, Inc., 476 F.3d 487, 491 (7th Cir. 2007). Given the lack of context regarding plaintiff's proposed statistical evidence, a meaningful comparison is impossible, which means this evidence fails to support a finding of discrimination.

B. Indirect Method

Because plaintiff has not adduced circumstantial evidence of discrimination under the direct method, I will consider whether he has made out a prima facie case under the indirect

method of proof. To prevail on a sex discrimination claim using the indirect method, a plaintiff must present evidence tending to show that: (1) he was a member of a protected class; (2) he was meeting defendant's legitimate expectations; (3) he suffered an adverse employment action; and (4) he was treated less favorably than a similarly situated individual outside of the protected class. See, e.g., Burks, 464 F.3d at 750-51. If plaintiff can make a prima facie case with respect to all elements, the burden shifts to defendant to offer a nondiscriminatory reason for its actions. Id. Once the defendant proffers such a reason, the burden shifts back to plaintiff to show that the reason is pretextual. Id.

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1. Membership in a protected class

Title VII prohibits discrimination based on sex that is aimed at both men and women. However, the Court of Appeals for the Seventh Circuit has recognized that "the conventional McDonnell Douglas framework is not very helpful for so-called reverse-discrimination cases" because most employers do not discriminate against "majority employees." Gore, 416 F.3d at 592. Therefore, instead of proceeding through the traditional first prong of the test, a male plaintiff alleging gender discrimination "must show background circumstances that demonstrate that a particular employer has reason or inclination to discriminate invidiously against [men] or evidence that there is something 'fishy' about the facts at hand." Phelan v. City of Chicago, 347 F.3d 679, 684 (7th Cir. 2003) (internal quotation omitted).

Presumably, the evidence required to show that the circumstances surrounding a reverse-discrimination plaintiff's termination were "fishy" must meet a lower threshold than that required to show discrimination directly using circumstantial evidence. Otherwise, the indirect method of proving discrimination would be entirely without value in reverse discrimination cases. However, in this case it is not dispositive whether the conditions surrounding plaintiff's termination were "fishy" because, as discussed below, plaintiff has not presented sufficient evidence of the fourth prong of the test to establish a prima facie case of discrimination. I will assume, without deciding, that the circumstances surrounding plaintiff's dismissal were sufficiently "fishy" to meet the first prong of the McDonald Douglas test.

2. Job performance

Whether plaintiff was meeting defendant's expectations is legitimately disputed. It is undisputed that plaintiff received no direct criticism of his work until he was fired, that his work was praised publicly by Nelson, defendant's owner, and that he performed many functions of his job in the short time he worked for defendant. The parties provide contradictory evidence with respect to whether plaintiff was ever given a written list of job expectations and whether he assured Bonte-Spath that he could meet these expectations. Also, they dispute whether plaintiff met Bonte-Spath's specific performance expectations.

Accordingly, I cannot conclude, as a matter of law, that plaintiff was not meeting defendant's legitimate expectations.

3. Similarly situated individuals

A person is similarly situated to the plaintiff if the person is "comparable to the plaintiff in all material respects." Crawford v. Indiana Harbor Belt R.R. Co., 461 F.3d 844 (7th Cir. 2006) (internal quotation marks omitted; alteration in original). In the course of this inquiry, the court considers all of the relevant factors, "including 'whether the employees (i) held the same job description, (ii) were subject to the same standards, (iii) were subordinate to the same supervisor, and (iv) had comparable experience, education, and other qualifications—provided the employer considered the latter factors in making the personnel decision.'" Brummett v. Sinclair Broad. Group, Inc., 414 F.3d 686, 692 (7th Cir. 2005). The Court of Appeals for the Seventh Circuit has warned that this requirement does not demand an "unyielding" or "inflexible" "near one-to-one mapping between employees" and that "[e]stablishing a prima facie case should not be such an onerous requirement." Humphries v. CBOCS West, Inc., 474 F.3d 387, 405 (7th Cir. 2007).

Plaintiff points to Corwin as his only example of a similarly situated female employee and argues that she was not subject to the same treatment as he was because she was not fired. Defendant contends that Corwin was not similarly situated because she did not

"potentially jeopardiz[e]" defendant's insurance status and no one ever complained to Bonte-Spath that she was violating company policies. This construction of "similarly situated" is overly restrictive. An individual is similarly situated to plaintiff for the purposes of Title VII analysis if she had similar failings. Ezell v. Potter, 400 F.3d 1041, 1050 (7th Cir. 2005). He need not show they are identical. Id. ("the other employee[] must have engaged in similar—not identical—conduct to qualify as similarly situated").

It is true that plaintiff and Corwin were alike is several ways: they had the same job title, were expected to work together on projects and both reported ultimately to Bonte-Spath. So far, so good. However, the element that plaintiff is missing is whether Corwin had similar failings. In response to defendant's motion for summary judgment, plaintiff has failed to adduce evidence that Corwin had *any* deficiencies in her work performance, let alone deficiencies similar to his. Nor has he identified any other female manager who had similar failings. From this record, a reasonable jury could not find that Bonte-Spath fired plaintiff but overlooked similar shortcomings of a female employee.

Perhaps recognizing this lack of evidence, plaintiff argues that it does not matter whether he is unable to identify Corwin's work performance failings, because he was not actually fired for work performance reasons. He suggests that defendant's statements to the South Carolina Employment Security Commission and the Wisconsin Department of Workforce Development that he was terminated for "lack of work" are controlling. As

discussed above, this argument is unavailing. These statements were made well after plaintiff's termination and they were made by Bast and Fry, who had no role in the decision to fire plaintiff. Bonte-Spath made the decision to fire plaintiff and she consistently cited work performance issues as the reason for her decision.

Therefore, because plaintiff has not identified any similarly situated individual outside his class who was treated more favorably than he was, plaintiff cannot establish a prima facie case of discrimination. Defendant's motion for summary judgment will be granted.

ORDER

IT IS ORDERED that:

1. The motion by defendant Kalahari Development, LLC to strike portions of plaintiff David Stocker's affidavit is DENIED.

2. Defendant's motion for summary judgment with respect to plaintiff's claim that he was terminated because of his sex in violation of Title VII of the Civil Rights Act of 1964 is GRANTED.

The clerk of court is directed to enter judgment for defendant and close this case.

Entered this 16th day of April, 2007.

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