Not To Be Published:

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
CENTRAL DIVISION

AUDRA A. McKINNEY, Plaintiff, vs. NEW COOPERATIVE, INC., BRENT BUNTE, and RAY BEENKEN, Defendants.	No. C 02-3084-MWB **MEMORANDUM OPINION AND ORDER REGARDING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT**

This action by plaintiff Audra A. McKinney involves claims pursuant to state and federal law of a sexually hostile work environment and retaliation, which allegedly resulted in McKinney's constructive discharge from her employment, against defendants NEW Cooperative, Inc. (NEW Coop), Brent Bunte, and Ray Beenken.[1] This matter comes before the court pursuant to the defendants' October 9, 2003, motion for summary judgment (docket no. 10) on all of McKinney's claims. McKinney resisted the motion for summary judgment on November 14, 2003 (docket no. 12). The defendants did not file a reply brief,

[1] More specifically, on October 2, 2002, McKinney filed suit in Iowa District Court for Webster County alleging claims against NEW Coop of a sexually hostile environment and retaliation in violation of Title VII of the Civil Rights Act, 42 U.S.C. § 2000e, and the Iowa Civil Rights Act (ICRA), IOWA CODE CH. 216 (Count I), and claims of a sexually hostile work environment and retaliation in violation of the ICRA against individual defendants Bunte and Beenken (Count II). The defendants removed McKinney's action to this federal court on November 7, 2002, and answered her complaint, denying her claims, on November 14, 2002. Thereafter, this litigation proceeded without incident requiring comment here until the defendants filed their motion for summary judgment on October 9, 2003.

nor did they respond to McKinney's Statement of Additional Facts. No party has requested oral arguments. Therefore, the defendants' motion for summary judgment is fully submitted on the written arguments and record.

As this court has explained on a number of occasions, when applying the standards of Rule 56 of the Federal Rules of Civil Procedure providing for summary judgment, the trial judge's function is not to weigh the evidence and determine the truth of the matter, but to determine whether there are genuine issues for trial. *Quick v. Donaldson Co.*, 90 F.3d 1372, 1376-77 (8th Cir. 1996); *Johnson v. Enron Corp.*, 906 F.2d 1234, 1237 (8th Cir. 1990). In reviewing the record, the court must view all of the facts in the light most favorable to the nonmoving party and give that party the benefit of all reasonable inferences that can be drawn from the facts. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986); *Quick*, 90 F.3d at 1377 (same). Procedurally, the moving party bears "the initial responsibility of informing the district court of the basis for its motion and identifying those portions of the record which show lack of a genuine issue." *Hartnagel v. Norman*, 953 F.2d 394, 395 (8th Cir. 1992) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986)); *see also Rose-Maston v. NME Hosps., Inc.*, 133 F.3d 1104, 1107 (8th Cir. 1998); *Reed v. Woodruff County, Ark.*, 7 F.3d 808, 810 (8th Cir. 1993). When the moving party has carried its burden under Rule 56(c), the party opposing summary judgment is required under Rule 56(e) to go beyond the pleadings, and by affidavits, or by the "depositions, answers to interrogatories, and admissions on file," designate "specific facts showing that there is a genuine issue for trial." FED. R. CIV. P. 56(e); *Celotex*, 477 U.S. at 324; *Rabushka ex. rel. United States v. Crane Co.*, 122 F.3d 559, 562 (8th Cir. 1997), *cert. denied*, 523 U.S. 1040 (1998); *McLaughlin v. Esselte Pendaflex Corp.*, 50 F.3d 507, 511 (8th Cir. 1995); *Beyerbach v. Sears*, 49 F.3d 1324, 1325 (8th Cir. 1995). An issue of material fact is "genuine" if it has a real basis in the record. *Hartnagel*, 953 F.2d at 394 (citing *Matsushita Elec. Indus. Co.*, 475 U.S. at 586-87). "Only disputes over facts that

might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment," *i.e.*, are "material." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); *Beyerbach*, 49 F.3d at 1326; *Hartnagel*, 953 F.2d at 394. If a party fails to make a sufficient showing of an essential element of a claim with respect to which that party has the burden of proof, then the opposing party is "entitled to judgment as a matter of law." *Celotex Corp.*, 477 U.S. at 323; *In re Temporomandibular Joint (TMJ) Implants Prod. Liab. Litig.*, 113 F.3d 1484, 1492 (8th Cir. 1997). Finally, this court has repeatedly taken note of the rule in this circuit that, because summary judgment often turns on inferences from the record, summary judgment should seldom or rarely be granted in employment discrimination cases. *See, e.g., Crawford v. Runyon*, 37 F.3d 1338, 1341 (8th Cir. 1994) (citing *Johnson v. Minnesota Historical Soc'y*, 931 F.2d 1239, 1244 (8th Cir. 1991)). The court will apply these standards to the defendants' motion for summary judgment on McKinney's claims.

However, the court must first provide sufficient factual background to the parties' dispute to put in context their arguments for and against summary judgment. The parties agree that NEW Coop is a farmer-owned feed and seed agricultural cooperative, and that, at all times pertinent to McKinney's claims, defendant Brent Bunte was the General Manager of NEW Coop, and defendant Ray Beenken was the Director of Administration. They also agree that McKinney began working for NEW Coop in September 1997, first in a "controller" position, responsible for payroll and other bookkeeping activities, then, beginning in 1999, in the newly-created position of human resources director, despite the fact that she had little prior human resources experience. In August of 1999, McKinney was allowed to reduce her hours to part-time, six hours per day, with three-quarters benefits.

Although the parties agree that McKinney had been "frustrated" with various aspects of her job and certain business and accounting practices of NEW Coop, that "frustration" is not the central issue in this lawsuit. Indeed, the issue is not even whether McKinney was

subjected to incidents of sexually inappropriate behavior during her employment with NEW Coop, but how many such incidents there were, whether those incidents were sufficiently "severe or pervasive" to constitute actionable harassment, whether NEW Coop knew or should have known of the harassment and responded adequately to it, and whether NEW Coop retaliated against McKinney for reporting conduct toward herself and others that she believed violated Title VII and the ICRA.

The defendants acknowledge that they were aware of or that McKinney complained about the following incidents: (1) comments by a member of the board of a wholly-owned subsidiary of NEW Coop at a board meeting in the summer of 1998 to the effect that McKinney would not have a cold if she didn't sleep naked; (2) comments by the former General Manager of NEW Coop casting doubt on McKinney's ability to put together a financial statement, which were relayed to McKinney by Bunte, with conduct by Bunte indicating that he shared such concerns; (3) an incident on July 26, 1999, in which a truck driver not employed by NEW Coop rubbed McKinney's belly when she was eight months pregnant; (4) a comment in July 1999 by Beenken that another female employee must have had her brains screwed out on her honeymoon, because she was making mistakes; (5) a comment by a male management employee on January 12, 2001, to the effect that McKinney must be having "PMS"; (6) comments and conduct of male employees and management personnel during a sexual harassment training seminar suggesting that they were not taking the training seriously, and comments of one employee afterwards that "he'd better watch what he says around here from now on"; and (7) a series of comments to McKinney by a truck driver, Dan Blair, during a driver safety meeting on January 24, 2001, in front of about thirty-five people, including comments like, "Audra, you just had a baby, wow, you're looking good," and "Hey, you can ride in my truck any time," to which male managerial employees did not respond at the time.

Although the defendants acknowledge that McKinney complained about these incidents, the parties dispute whether NEW Coop managerial personnel responded to these incidents and whether McKinney expressed her satisfaction with their responses. McKinney also asserts that after the incident on January 24, 2001, supervisory personnel "gossip[ed]" and "spread[] rumors" about Dan Blair's conduct at the safety meeting, instead of investigating it and making clear that such conduct was inappropriate, and that she received a telephone call from Bob Koester, a Region Manager, after the meeting joking about Blair's comments, which McKinney contends she also found very upsetting. McKinney also contends that Bunte performed only a superficial investigation of the incident involving Blair, that Blair was not compelled to follow through on Bunte's direction that he write McKinney a letter of apology, and that Blair suffered no other sanction than being barred from 1.25 hours of regular time and any overtime for one week. Although the parties agree that Bunte asked Blair if she felt any other response to Blair's conduct was required, and that McKinney responded that she would think about it, McKinney contends that she concluded at or after the meeting with Bunte about his response to Blair's harassment that she could not continue working at NEW Coop.

McKinney also details additional incidents of harassment and retaliation in her Statement of Additional Facts to which the defendants have not responded. Specifically, McKinney cites the following additional incidents of harassment: (1) complaints by Ray Beenken, after McKinney returned from pregnancy leave, about the unfairness of allowing women pregnancy leave; (2) comments by Bob Koester to McKinney, such as, "How's the best looking girl in the Fort Dodge office?" and, while on the telephone to her, statements that "[he] could tell it was [McKinney] by the sweet smell"; and (3) managerial employees making light of the incident involving Blair and failing to respond adequately to that incident. McKinney also contends that, in late 2000, in response to a questionnaire in a

human resources audit by McGladrey & Pullen, Beenken acknowledged that NEW Coop fosters and tolerates harassment and discrimination toward women.

McKinney details incidents of what she alleges was "protected conduct" upon which her retaliation claim is based, again without a response from the defendants, as including the following: (1) complaints to Beenken and Bunte that two supervisors had refused to consider a black applicant for employment; (2) complaints about harassment of Christy McGinty and Julie Mueller, and the inadequate responses of management to those complaints; (3) complaints about unequal pay for Julie Mueller as compared to male employees; (4) complaints that Mary Peterson was also being paid less than male employees with the same or less responsibility and level of job duties; (5) complaints that Mary Peterson, the only female on the list of employees to receive bonuses, was dropped from that list; (6) complaints that company cars were only provided to male employees; (7) complaints about Bunte's refusal to take information directly from female employees, and instead requiring them to provide such information through male employees; and (8) complaints about her own salary level and small wage increases as compared to male employees on the same level in the company's organizational chart.

McKinney also asserts incidents of retaliation to which she was subjected for these and other complaints of discriminatory or harassing conduct, again without response from the defendants, included the following: (1) Bunte repeatedly informing her that if she didn't like the way the company was dealing with civil rights issues, they would change her title and demote her; (2) top management failing to support her attempts to standardize evaluation forms or inform employees that management had approved changes that she was requiring; (3) management failing to inform her of serious personnel issues so that she could perform her job; and (4) management ignoring her concerns about fraud within the company or inappropriate handling of matters for tax purposes, although she contends that management responded favorably to similar concerns raised by male employees.

Ultimately, McKinney contends that retaliation consisted of forcing her constructive discharge.

McKinney contends that the circumstances at NEW Coop were such that she was prescribed and took an anti-anxiety medication while working there, but that she no longer needed such medication after her employment with NEW Coop terminated. McKinney also contends that company policy required that all complaints of harassment and discrimination be made to Bunte and Beenken, who were responsible for some of the harassing and retaliatory conduct toward her. Consequently, she felt that she was without an avenue for effective complaint. Therefore, McKinney terminated her employment with NEW Coop on January 26, 2001, by submitting a letter authored by her attorney. NEW Coop contends that McKinney voluntarily quit without giving NEW Coop a fair opportunity to correct any problems, but McKinney contends that she was constructively discharged by harassing and retaliatory conduct, the failure of management to address pervasive harassment and discrimination, including inadequate responses to her own claims, and retaliation for complaining about workplace discrimination.

Although whether or not McKinney can ultimately prove her claims of harassment and retaliation[2] may be a close question, whether or not the defendants are entitled to summary judgment is not. The defendants contend, first, that the conduct of which McKinney complains is neither so offensive, objectively or subjectively, nor so pervasive, as to constitute actionable harassment, citing, *inter alia*, *Alagna v. Smithville R-II School*

[2]The defendants assert that McKinney is also asserting a disparate treatment claim based on unequal pay. However, McKinney explains in her response to the defendants' summary judgment motion that she is not asserting a separate claim of discrimination in compensation, although she asserts, in the context of her retaliation claim, that she attempted to obtain compensation and benefits commensurate with the compensation and benefits given to men in positions with the same level of responsibility and was retaliated against for those efforts.

District, 324 F.3d 975 (8th Cir. 2003). The defendants' argument has some merit, when the incidents they acknowledge are the only ones considered. However, as pointed out in *Alagna*, the court must "examine the totality of the circumstances, including the frequency and severity of the discriminatory conduct; 'whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance.'" *Alagna*, 324 F.3d at 980 (quoting *Faragher v. City of Boca Raton*, 524 U.S. 775, 787-88 (1998)). McKinney has met her burden at summary judgment to generate genuine issues of material fact on the issue of whether or not she suffered actionable harassment in light of these considerations by pointing to evidence of incidents of harassment *in addition to* those acknowledged by the defendants. *See* FED. R. CIV. P. 56(e) (the party opposing summary judgment is required to go beyond the pleadings, and by affidavits, or by the "depositions, answers to interrogatories, and admissions on file," designate "specific facts showing that there is a genuine issue for trial"); *Celotex*, 477 U.S. at 324. Under a "totality of the circumstances" analysis, the conduct in question here is not simply "'boorish, chauvinistic, and decidedly immature,'" *see Alagna*, 324 F.3d at 980 (quoting *Duncan v. General Motors Corp.*, 300 F.3d 928, 935 (8th Cir. 2002)), but could instead be found by a reasonable jury to cross the line into actionable harassment. This is precisely the kind of employment case in which the court finds that summary judgment turns on inferences from the record, such that summary judgment is inappropriate. *See, e.g.*, *Crawford*, 37 F.3d at 1341.

Next, the defendants contend that McKinney's claim fails, because she cannot generate a genuine issue of material fact that the defendants knew or should have known of the harassment, but failed to take prompt and adequate remedial action. However, their contention focuses entirely on Bunte's response to McKinney's complaints of the harassment by Blair at the driver safety meeting on January 24, 2001. Although that response purportedly consisted of investigation and suspension of Blair within a twenty-four hour

period, the defendants' argument does not take into account all of the evidence that McKinney has generated of various other incidents of harassment as to which she contends, and her evidence suggests, she made complaints to management, but no adequate response was made. Moreover, McKinney has made a colorable claim, supported by the record, that she was not only subjected to "co-worker" harassment, to which a "knew or should have known" standard applies, but "supervisory" harassment, by persons with direct or successively higher authority over her—including Beenken and Bunte—which can invoke "vicarious" liability. *See, e.g., Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 764-65 (1998); *Faragher*, 524 U.S. at 807. Thus, summary judgment is not appropriate on McKinney's sexual harassment claim.

Nor are the defendants entitled to summary judgment on McKinney's retaliation claim. The defendants contend that this claim fails on McKinney's inability to show that she ever engaged in protected activity or that she was subjected to adverse employment action. *See, e.g., Gagnon v. Sprint Corp.*, 284 F.3d 839, 849-50 (8th Cir. 2002) (first and second elements of a *prima facie* case of retaliation). However, as recited above, McKinney has marshaled evidence that she engaged in various kinds of protected activity, including complaints about discrimination toward herself and others, and that she suffered adverse employment action in response, including failure to provide her with information necessary to do her job, failure to provide the support necessary for her to do her job, and, more importantly, threats to demote her if she persisted with complaints about civil rights violations, and constructive discharge, which is itself an adverse employment action sufficient to support a retaliation claim. *See, e.g., West v. Marion Merrell Dow, Inc.*, 54 F.3d 493, 497 (8th Cir. 1995) ("Constructive discharge, like any other discharge, is an adverse employment action that will support an action for unlawful retaliation.").

Finally, the defendants contend that McKinney was not constructively discharged as a matter of law, because she "abruptly quit" without giving the defendants an adequate

opportunity to work things out or making a request for further action against Blair. The defendants are correct that a plaintiff asserting a "constructive discharge" must show (1) that a reasonable person in the plaintiff's position would have found that the conditions of her employment were intolerable, and (2) that the defendant deliberately created intolerable working conditions with the intention of forcing the plaintiff to quit, *see, e.g. Baker v. John Morrell & Co.*, 249 F. Supp. 2d 1138, 1171 (N.D. Iowa 2003), and, more importantly here, that the plaintiff ordinarily cannot make such a showing if she abruptly quit. *See Coffman v. Tracker Marine, L.P.*, 141 F.3d 1241, 1247 (8th Cir. 1998). However, the court finds that McKinney has generated genuine issues of material fact that she was constructively discharged, not withstanding her "abrupt" departure after the harassment at the January 24, 2001, driver safety meeting. First, McKinney has pointed to evidence generating a genuine issue of material fact as to whether or not the conditions were "intolerable" and whether they were intended by the defendants to force her to quit. *See Baker*, 249 F. Supp. 2d at 1171. Moreover, McKinney's "abrupt" departure does not defeat her claim, because an employee who quits because she reasonably believes there is no chance for fair treatment has been constructively discharge. *Ogden v. Wax Works, Inc.*, 214 F.3d 999, 1008 (8th Cir. 2000). Here, McKinney has generated genuine issues of material fact that that was the situation in which she found herself, where she points to evidence that Bunte and Beenken were the persons to whom she would have had to complain, but they were also persons who had allegedly harassed and retaliated against her.

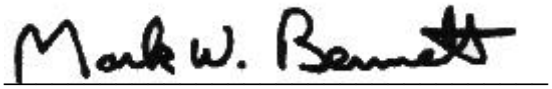
Finally, the defendants' contention that they are entitled to summary judgment on the claims against the individual defendants under the ICRA also fails as a matter of law, because the defendants rely on essentially the same arguments addressed above, with regard to Title VII claims, as to the ICRA claims. Although the defendants contend that McKinney does not allege that she was harassed by a supervisor, that contention is patently

untenable upon the record of alleged harassment and retaliation by Bunte and Beenken themselves, as persons with direct or successively higher authority over McKinney.

THEREFORE, the defendants' October 9, 2003, motion for summary judgment (docket no. 10) is **denied in its entirety**.

IT IS SO ORDERED.

DATED this 11th day of December, 2003.



MARK W. BENNETT
CHIEF JUDGE, U. S. DISTRICT COURT
NORTHERN DISTRICT OF IOWA