

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

MELISSA H. YOPP)
)
 Plaintiff,)
)
 vs.) No. 03-2539 MLV
)
 METHODIST HEALTHCARE)
)
 Defendant.)

ORDER DENYING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

This is a sexual harassment and retaliatory discharge case brought by plaintiff Melissa H. Yopp ("Yopp") under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)(1); 42 U.S.C. § 2000e-16; 42 U.S.C. § 2000e-(3)(a) *et seq.*; and the Tennessee Human Rights Act, Tenn. Code Ann. § 4-21-101 *et seq.* Before the court¹ is a motion for summary judgment filed by defendant Methodist Healthcare ("Methodist"). For the reasons that follow, the motion is denied.

BACKGROUND AND UNDISPUTED FACTS

For the purposes of this motion, the court finds that the following facts are undisputed. Plaintiff Melissa H. Yopp began her employment with Methodist on or about December 1994 working

¹ The case is before the United States Magistrate Judge pursuant to 28 U.S.C. § 636(c) and the parties' consent.

initially as a Registered Nurse in the Emergency Department.² More recently and prior to her termination on January 23, 2003, Yopp was employed as Administrative Director of Methodist's Emergency Department.

In June of 2002 and during Yopp's tenure as Administrative Director, the State of Tennessee compiled a survey in response to complaints lodged against Methodist's Emergency Department. The State requested that Yopp produce a State Action Plan to remove a "Jeopardy" rating placed on the Emergency Department by the State. In the proposed State Action Plan, Yopp requested that a staff chaplain be appointed in the Emergency Department. On June 19, 2002, Benjamin D. Killian ("Killian") was appointed as a staff chaplain for the Emergency Department.

Between June and December 2002, numerous complaints were filed with Yopp's supervisor, Denise Neely, concerning Yopp's behavior and her lack of communication and breach of trust with the staff. A Behavioral Action Plan was presented to Yopp on December 20, 2002 in regard to these complaints. The Plan called for Yopp to improve her communication and collaboration with the Emergency Department,

² Yopp was first employed by Methodist as a Registered Staff Nurse on or about June 1985. She continued intermittent employment with Methodist throughout the late 1980's and early 1990's. This cause of action is related to Yopp's employment beginning in 1994 and lasting through January of 2003.

as well as to work on developing trust within Methodist's organization. The Plan stated that "[s]hould immediate action and sustained improvements not be made, further disciplinary action up to and including termination will occur." (Behavioral Action Plan, Def.'s Mot. for Summ. J. at Ex. 3.) One month after delivering the Plan to Yopp, Methodist terminated Yopp's employment.

Subsequent to her termination, Yopp filed a charge of discrimination with the Equal Employment Opportunity Commission ("EEOC") and the Tennessee Human Rights Commission on April 11, 2003 alleging that she had been discriminated against on the basis of her sex and retaliation. (Dismissal and Notice of Rights, Compl. at Ex. B.) In her charge, Yopp stated that prior to her dismissal she had complained to the Vice President of Patient Quality and the Human Resources Manager about being sexually harassed by Killian, an Emergency Department chaplain. As a result of her charge, the EEOC issued to Yopp a Dismissal and Notice of rights to sue. Thereafter, Yopp brought this suit against Methodist in the U.S. District Court for the Western District of Tennessee.

CONTENTIONS OF THE PARTIES

Methodist moves for summary judgment on three separate bases. First, Methodist asserts that summary judgment should be granted because Yopp's claim is time-barred. Methodist claims that Yopp did not file suit until August, 28, 2003, which is one hundred

twenty-eight (128) days after the EEOC's notice of rights to sue had been issued. Yopp claims, however, that she received the notice on April 28, 2003 and timely filed suit with the court on July 23, 2003, which is clearly within the prescribed ninety-day limitation.

Methodist's second basis for summary judgment is that Yopp is unable to establish a prima facie case of hostile work environment sexual harassment because the alleged misconduct of Killian was not unwelcome and did not affect a "term, condition, or privilege" of her employment. Methodist relies on Yopp's own admission of a relationship with Killian as well as verification from independent sources to back its claim that Killian's sexual advances were not unwelcome. Yopp denies that the relationship was consensual, stating that she had "always responded to sexual advances by Benjamin Killian due to fear for her daughter's safety." (Pl.'s Resp. to Def.'s Mot. for Summ. J. at 9.)

Methodist also claims that the alleged sexual harassment was not sufficiently severe or pervasive to affect a "term, condition, or privilege" of Yopp's employment. To support her claim of hostile work environment sexual harassment, Yopp states in a sworn statement that Killian wrote a letter to her that included remarks of a sexual nature concerning her minor daughter, Stephanie Yopp. (Yopp Aff., Def.'s Mot. for Summ. J. at Ex. 1.) Methodist argues

that this letter alone does not establish a basis for a hostile work environment. Yopp disagrees, stating that Killian's comments regarding her daughter were so threatening and humiliating that they rose to a level sufficient to create a hostile work environment.

Finally, Methodist maintains that Yopp is unable to establish a prima facie case of retaliation. Methodist argues that Yopp has provided no evidence to suggest that her termination was motivated by the sexual harassment complaints she lodged against Killian. In particular, Methodist argues that the temporal proximity between Yopp's complaint and her termination was not sufficient enough to establish the causal connection required to support a prima facie case of retaliation. To support its position, Methodist indicates that there was more than a three month gap between the time Yopp complained of being sexually harassed and the time she was fired.

Yopp insists that there is a very close temporal proximity between her complaint and subsequent discharge. Yopp contends that a letter sent by her on December, 21, 2002 to The United Methodist Church reporting the conduct of Killian establishes a close proximity between a protected activity and her discharge. In addition, Yopp states in a sworn statement that she verbally renewed her complaints to her supervisor at Methodist in December of 2002. (Def.'s Mot. for Summ. J. at Ex. 1.) Yopp's supervisor,

Denise Neely, allegedly informed her at that time that if she pursued any action in court or through The United Methodist Church against Killian, her employment would be terminated. (*Id.*) Methodist denies that any person within its organization was aware of Yopp's letter of December, 21, 2002; therefore, no causal connection can be substantiated.

ANALYSIS

A. Summary Judgment Standard

Under Fed.R.Civ.P. 56(c), summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *LaPointe v. United Autoworkers Local 600*, 8 F.3d 376, 378 (6th Cir. 1993); *Osborn v. Ashland County Bd. of Alcohol, Drug Addiction and Mental Health Servs.*, 979 F.2d 1131, 1133 (6th Cir. 1992)(per curiam). The party that moves for summary judgment has the burden of showing that there are no genuine issues of material fact at issue in the case. *LaPointe*, 8 F.3d at 378. This may be accomplished by pointing out to the court that the nonmoving party lacks evidence to support an essential element of its case. *Barnhart v. Pickrel, Schaeffer & Ebeling Co.*, 12 F.3d 1382, 1389 (6th Cir. 1993).

In response, the nonmoving party must present "significant

probative evidence" to demonstrate that "there is [more than] some metaphysical doubt as to the material facts." *Moore v. Philip Morris Co.*, 8 F.3d 335, 339-40 (6th Cir. 1993). "[T]he mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986).

In deciding a motion for summary judgment, "this court must determine whether 'the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.'" *Patton v. Bearden*, 8 F.3d 343, 346 (6th Cir. 1993)(quoting *Anderson*, 477 U.S. at 251-53). The evidence, all facts, and any inferences that may permissibly be drawn from the facts must be viewed in the light most favorable to the nonmoving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). However, "[t]he mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff." *Anderson*, 477 U.S. at 252. Finally, a district court considering a motion for summary judgment may not weigh evidence or make credibility determinations. *Adams v. Metiva*, 31 F.3d 375, 378 (6th

Cir. 1994).

B. The Ninety-Day Filing Period

_____To be timely, an employment discrimination suit under Title VII must be filed within ninety days of the plaintiff's receipt of a Notice of a rights to sue from the EEOC. 42 U.S.C. §§ 2000e et seq. Failure to bring suit within the prescribed time limit is grounds for summary judgment or dismissal.

_____In its motion for summary judgment, Methodist insists, citing the complaint itself, that Yopp did not file a complaint until August 28, 2003. The complaint, however, is date-stamped filed on July 23, 2003 and the record before the court does not show any other basis for Methodist's contention that the complaint was filed on August 28, 2003. It appears to the court that Methodist has mistakenly determined the date on which Yopp filed her complaint; therefore, summary judgment on the grounds Yopp's suit is time-barred is denied.

C. Hostile Environment Sexual Harassment Prima Facie Case

To establish a prima facie case of hostile environment sexual harassment under Title VII and the Tennessee Human Rights Act, the plaintiff must show that (1)the employee is a member of the protected class, (2)the employee was subjected to unwelcome sexual harassment in the form of sexual advances, requests for sexual favors, or other verbal or physical conduct of a sexual nature,

(3)the harassment occurred because of the employee's gender, (4)the harassment created an intimidating, hostile, or offensive working environment that affected a term, condition, or privilege of employment, which impacted seriously the psychological well-being of the plaintiff, and (5)the employer knew or should have known of the harassment and failed to respond with prompt and appropriate corrective action. *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 63-68 (1986); *Rabidue v. Osceola Refining Co.*, 805 F.2d 611, 619-20 (6th Cir. 1986). Methodist takes the position that Yopp cannot establish a prima facie case because Killian's sexual misconduct was not unwelcome, nor did it affect a "term, condition, or privilege" of her employment.

"[T]he gravamen of any sexual harassment claim is that the alleged sexual advances were unwelcome." *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 68 (1986). By relying on the fact that Yopp and Killian were engaged in a consensual relationship, Methodist takes the position that Killian's sexual advances were not unwelcome. Prior consensual sexual conduct however is not a defense to a Title VII sexual harassment claim if at some point there is a clear indication that the conduct has become unwelcome. *Prichard v. Ledford*, 767 F.Supp. 1425, 1428 (E.D. Tenn. 1990). In *Prichard v. Ledford*, the employer and his employee had been engaged in a consensual relationship. The employee ended the relationship,

but the employer continued with his sexual advances. The district court held that the prior consensual relationship was no defense to the employee's Title VII claim because the alleged harassment occurred after the consensual relationship had ended. *Id.* Consequently, even if there existed a prior consensual relationship between Yopp and Killian, the trier of fact may still find that Killian's conduct was unwelcome if there is a determination that the relationship had ended prior to the alleged misconduct.

Before reaching this point however, the question arises whether a consensual relationship ever existed. Methodist relies on a letter Yopp sent to the United Methodist Church on December 21, 2002, in which Methodist claims that Yopp admitted a consensual sexual relationship with Killian. (Def.'s Mot. for Summ. J. at Ex. 10.) Yopp, in response, denies that there is any statement in this letter which indicates that Killian's sexual advances were ever welcome.

To further prove a consensual relationship, Methodist relies a letter supposedly written by Killian in December of 2001. (Def.'s Mot. for Summ. J. at Ex. 11.) This letter however is undated, unaddressed, and unsigned. Methodist claims that this letter establishes a consensual relationship because it purports to end the alleged relationship with Yopp. Yopp again denies that this letter proves a consensual relationship. Instead, she claims that

the letter only shows the thoughts of Killian.

Methodist also relies on a letter dated January 8, 2001 written by undisclosed members of the CrossRoads Church to prove a consensual relationship. (Def.'s Mot. for Summ. J. at Ex. 12.) The letter states that Killian and Yopp were engaged in an adulterous affair and that there was proof of the couple taking overnight trips together. In attacking the accuracy and credibility of this letter, Yopp points out that the letter is unsigned and that Methodist has not identified the authors of this letter to her or the court.

Furthermore, Methodist relies on independent sources to verify the existence of a consensual relationship. Wanda Rook-Peperone states in a sworn declaration, that at the bequest of Yopp, Killian drove Yopp and herself to the airport on a certain occasion. She also claims to have overheard a personal telephone conversation between Killian and Yopp. (Rook-Peperone Aff., Def.'s Mot. for Summ. J. at Ex. 13.) Rook-Peperone does not reveal the substance of that conversation, nor does she explain how the car ride relates to a personal relationship between Killian and Yopp.

Methodist also relies on a sworn statement made by Susan Earl in support of its motion for summary judgment. (Def.'s Mot. for Summ. J. at Ex. 14.) Earl, who worked with Yopp in the Emergency Department at Methodist Hospital, claims to have witnessed

affectionate kisses between Yopp and Killian at Yopp's home and at work. (*Id.*) To refute Earl's claim, Yopp offers the sworn statement of Teresa Corum. (Pl.'s Resp. to Def.'s Mot. for Summ. J. at Ex. 9.) Corum states in her sworn statement that when Killian was in Yopp's home, she only witnessed anxiety and fear from Yopp and at no time was there physical contact between them. (*Id.*)

The evidence presented by both parties creates a sufficient disagreement as to require the question of whether Killian's conduct was unwelcome to be submitted to the jury. Furthermore, if in fact there existed a prior consensual relationship, a reasonable jury could differ on whether unwelcome conduct occurred after the relationship had ended.

Because the court finds that genuine issues of material fact exist with regard to whether the misconduct was unwelcome, it is unnecessary to determine if the conduct affected a "term, condition or privilege" of Yopp's employment.

D. Prima Facie Case of Retaliation

1. Temporal Proximity

To prevail on a retaliatory discharge claim under either Title VII or the Tennessee Human Rights Act, a plaintiff must prove (1)that the plaintiff engaged in an activity protected by the statute, (2)that the defendant had knowledge of the plaintiff's exercise of protected rights, (3)that the defendant thereafter took

an employment action adverse to the plaintiff, and (4) that a causal connection existed between the protected activity and the adverse employment action. *Nguyen v. City of Cleveland*, 229 F.3d 559 (6th Cir. 2000). Methodist argues that there is no causal connection between Yopp's complaint of Killian's alleged misconduct and her termination. To validate this assertion, Methodist points out that there is not sufficient temporal proximity between the complaint and the termination date to infer a retaliatory motive to Methodist.

To establish a causal connection between her termination and the complaints lodged against Killian, Yopp "must produce sufficient evidence from which an inference could be drawn that the adverse action would not have been taken had the plaintiff not [undertaken the protected activity.]" *Id.* at 563. "Although no one factor is dispositive in establishing a causal connection, evidence that defendant treated the plaintiff differently from similarly situated employees or that the adverse action was taken shortly after the plaintiff's exercise of protected rights is relevant to causation." *Id.* When the proximity between the protected activity and the adverse employment action is "acutely near in time, that close proximity is deemed indirect evidence such as to permit an inference of retaliation to arise." *DiCarlo v. Potter*, 358 F.3d 408, 421 (6th Cir. 2004.)

Yopp states that she informed her supervisor, Denise Neely, on October 22, 2002 that Benjamin Killian had sexually harassed her. (Def.'s Mot. for Summ. J. at Ex. 1.) Yopp was not terminated until January 24, 2003. Methodist contends that the three month gap between the filing of Yopp's complaint with her supervisor, Denise Neely, and her termination is not sufficient temporal proximity to give rise to an inference of retaliation. To support its position, Methodist cites *Hafford v. Seidner*, 183 F.3d 506 (6th Cir. 1999) in which the Sixth Circuit Court of Appeals held that a period of two months between the filing of an EEOC Charge of Discrimination and being disciplined was "loose temporal proximity" and therefore insufficient to support an inference of retaliation.

Yopp claims that there was only one month between the time of her protected action and her termination. She bases her claim on a letter written on December 21, 2002 to the United Methodist Church reporting Killian's misconduct. Yopp contends in a sworn statement that she verbally renewed her complaint with Denise Neely during December 2002. Yopp further avows that Neely told her not to report Killian to The United Methodist Church or her employment would be terminated. (Def.'s Mot. for Summ. J. at Ex. 1.) If these claims are true, Yopp would likely be able to establish a claim for retaliation based on temporal proximity.

2. Legitimate, Non-Discriminatory Reason for Plaintiff's Termination

Assuming that Yopp is able to establish a prima facie case of retaliation, the burden of production shifts to Methodist to articulate a legitimate, non-discriminatory reason for terminating Yopp's employment. *McDonnall Douglas Corp. v. Green*, 411 U.S. 792 (1973). Methodist claims that Yopp was terminated because of her behavior and her lack of communication and breach of trust with the Emergency Department staff. (Def.'s Mot. for Summ. J. at Ex 4.) After receiving numerous complaints, Neely gave Yopp a Behavioral Action Plan which stated that Yopp needed to make significant improvements or face disciplinary action and possible termination. (*Id.*) In an evaluation thirty days later, Neely determined that Yopp had not met or conformed to the expectations of the Plan, and as a consequence, Yopp's employment was terminated. (*Id.*) Accordingly, it appears that Methodist could meet its burden of articulation.

The burden then shifts back to Yopp to show that Methodist's decision to terminate her was based on retaliation and "that the proffered reason was not the true reason for [Methodist's] employment decision." *McDonnall Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973). To meet this burden, Yopp avows in a sworn answer to Methodist's interrogatory that Denise Neely made statements

threatening to terminate her employment if she reported Killian's misconduct to The United Methodist Church. (Def.'s Mot. for Summ. J. at Ex. 1.) If Neely made these statements, then reasonable jurors may differ as to whether Methodist's proffered reason for terminating Yopp was in fact a fabrication. The answer to this question will hinge largely on the credibility of Yopp. Credibility determinations inherently remain with the trier of fact, not the court.

When viewing the evidence in a light most favorable to the plaintiff, this court finds that genuine issues of material fact exist with respect to whether Yopp's employment was terminated in retaliation for reporting Killian's alleged sexual misconduct.

CONCLUSION

For the reasons stated above, this court finds that Methodist Healthcare has failed to show that there are no genuine issues of material fact at issue in this case. The evidence presented in regard to hostile environment sexual harassment and retaliatory discharge demonstrates that there is a sufficient disagreement amongst the parties as to require submission of these issues to a jury. Accordingly, Methodist Healthcare's motion for summary judgment is denied.

IT IS SO ORDERED this 9th day of September, 2004.

DIANE K. VESCOVO

UNITED STATES MAGISTRATE JUDGE