IP 00-1669-C H/F Eleby v. Rumsfeld
Judge David F. Hamilton Signed on 2/19/02

NOT INTENDED FOR PUBLICATION IN PRINT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

ELEBY, GLENDA J.,	)	
	)	
Plaintiff,	)	
vs.	)	
	)	
RUMSFELD, DONALD, SECRETARY OF DEFENSE,	)	CAUSE NO. IP00-1669-C-H/F
	)	
	)	
Defendant.	)	

π Deborah E Albright
Monday Rodeheffer Jones & Albright
1915 Broad Ripple Ave
Indianapolis, IN 46220

James P Hanlon
United States Attorney's Office
10 West Market St Suite 2100
Indianapolis, IN 46204

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

GLENDA J. ELEBY,	)	
	)	
Plaintiff,	)	
	)	
v.	)	
	)	CAUSE NO. IP 00-1669-C H/F
DONALD RUMSFELD,	)	
SECRETARY OF DEFENSE,	)	
	)	
Defendant.[1]	)	

ENTRY ON DEFENDANT'S SUMMARY JUDGMENT MOTION

Plaintiff Glenda Eleby alleges that her employer, the United States Department of Defense (DOD), has violated the anti-discrimination and anti-retaliation provisions of Title VII of the Civil Rights Act of 1964. According to the usual convention, Eleby has named as defendant the Secretary of the Department, who is now Donald Rumsfeld. Eleby alleges that the DOD discriminated against her because of her race and sex by not upgrading her position from the rank of GS-5 to GS-6, by denying her the opportunity to

[1]Pursuant to Rule 25(d) of the Federal Rules of Civil Procedure, the court has substituted Donald Rumsfeld as the named defendant in this action. Rumsfeld became Secretary of Defense in January 2001, succeeding William S. Cohen.

perform certain tasks, and by not notifying her of a training session that she later learned about and attended. She also alleges that the DOD retaliated against her for making a discrimination complaint by overloading her with certain menial tasks after a secretary transferred out of her department. Eleby eventually was elevated to GS-6. After changing job tracks, she has attained the rank of GS-7.

The defendant has moved for summary judgment on Eleby's claims. The court heard oral argument on February 4, 2002. As explained below, defendant's motion is granted. Most of Eleby's discrimination allegations are time-barred under the 45-day statute of limitations that applies to federal employees' Title VII claims. Eleby's timely allegations of discrimination and retaliation are insufficient as a matter of law. Based on the undisputed record evidence, Eleby did not suffer an actionable adverse employment action during or after the short limitations period.

Summary Judgment Standard

The purpose of summary judgment is to "pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). Summary judgment is appropriate when there are no genuine issues of material fact,

leaving the moving party entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). The moving party must show there is no genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). A factual issue is material only if resolving the factual issue might change the suit's outcome under the governing law. *Clifton v. Schafer*, 969 F.2d 278, 281 (7th Cir. 1992). A factual issue is genuine only if there is sufficient evidence for a reasonable jury to return a verdict in favor of the non-moving party on the evidence presented. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); *Baucher v. Eastern Ind. Prod. Credit Ass'n*, 906 F.2d 332, 334 (7th Cir. 1990). "If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted." *Anderson*, 477 U.S. at 249-50 (citations omitted).

Although intent and credibility are often critical issues in employment discrimination cases, there is no special version of Rule 56 that applies only to such cases. See, *e.g.*, *Alexander v. Wisconsin Dep't of Health & Family Serv.*, 263 F.3d 673, 681 (7th Cir. 2001); *Wallace v. SMC Pneumatics, Inc.*, 103 F.3d 1394, 1396 (7th Cir. 1997). In an employment discrimination case, as in any case, the court must carefully view the evidence in the record in the light reasonably most favorable to the non-moving party and determine whether there is a genuine issue of material fact. See *Haugerud v. Amery School Dist.*, 259 F.3d 678, 689 (7th Cir. 2001) (same standard applies to any type of case).

Undisputed Facts

The following facts are either undisputed or reflect the record in the light reasonably most favorable to Eleby, the non-moving party.

Glenda Eleby is an African-American woman who currently works as a GS-7 contract administrator at the DCMA Raytheon Technical facility in Indianapolis.[2] Eleby has had a long relationship with the DOD. After serving in the Army and Army Reserve, Eleby joined the DOD in approximately 1979 as a secretary at Fort Benjamin Harrison in Indianapolis. In the 1980s, Eleby moved to the DCMC Allison Engine facility where she worked as a contract data control clerk and as a computer assistant.

On January 21, 1990, Eleby was given the title "procurement technician" or "procurement clerk." (According to Eleby, she was performing the duties of a procurement technician long before then.) This was a GS-5 position.[3] The DOD job description provided that a GS-5 procurement technician's "major duties" included contract administration support, office automation work (including word

[2]"DCMA" stands for "Defense Contract Management Agency." It formerly was known as "DCMC" – "Defense Contract Management Command."

[3]"GS" is the abbreviation for "General Schedule." The GS number indicates the level of pay for salaried government employees. See 5 U.S.C. § 5332.

processing, sending e-mail, and maintaining databases), distribution of mail, processing time records, scheduling, filing, and other clerical duties. Def. Ex. 2.

Eleby worked as a procurement technician on the research and development team until January 1998, when she transferred to the production team. The research and development team was responsible for a small number of large contracts. The production team handled a greater number of smaller and ongoing contracts. During times relevant to this lawsuit, Phillip Steelman was Eleby's direct supervisor on the research and development team. Jim Kappus was Eleby's direct supervisor on the production team. Lieutenant Colonel Jill Hamilton was Eleby's second-line supervisor on both teams.

The DOD had a policy of standardizing teams of employees in Indiana by skill and grade. Second Manlove Aff. ¶ 4.[4] In 1996 or 1997, Eleby became aware that some procurement technician jobs were being graded at the GS-6 level. She told Steelman that she believed her position should be upgraded from GS-5 to

[4]The defendant objected to this assertion in Eleby's statement of additional facts on the ground that it was not supported by competent record evidence. In light of Eleby's submission of a second affidavit from Richard Manlove dated November 9, 2001, the court overrules the objection. While Manlove's first affidavit did not lay a proper foundation for the conclusion he offered, the second affidavit asserts that, in his capacity as union steward, Manlove participated in meetings where DOD managers discussed the DOD's goal of standardizing employee teams in Indiana by skill and grade.

GS-6. Eleby Dep. at 68-73. She gave Steelman a job posting for a GS-6 procurement technician position at a different location. Steelman reviewed the posting and told Eleby that, although he was not a job classifier, he did not believe that she was performing duties complex enough to warrant a GS-6 ranking. *Id*. Eleby spoke to Steelman about the matter more than once. *Id*. at 76. She believed that Steelman's decision not to upgrade her position probably was based on both her race and her sex. *Id*. at 76-78. Eleby did not make a discrimination complaint at that time because she thought she would be promoted if she kept proving herself. *Id*. at 77.

In January 1998, Hamilton asked Eleby to consider a transfer to the production team. Hamilton proposed that Eleby trade positions with Arizona Wilson, another GS-5 procurement officer. Wilson also is an African-American woman. Eleby sensed that Wilson was having problems on the production team. Eleby knew that the production team as a whole was experiencing some difficulties. Eleby was approached to join the team in hopes that she would be able to help turn the team around. Eleby accepted the transfer. When Eleby began working on the production team, "everything was in chaos." *Id*. at 59-60.

Eleby alleges that she was discriminated against on the production team by the DOD's refusal to allow her to perform certain more complex tasks that she had

performed as a GS-5 procurement technician as a member of the research and development team. Following complaints by some higher-ranked men on the production team, Eleby was instructed not to process DD-250 rejects (which apparently are documents related to shipping and payment) or to address contractors' questions about contract discrepancies. She also was told to concentrate mainly on administrative and support duties, such as preparing files, distributing contracts, inputting data, faxing, and copying. See Hamilton Dep. at 65-66. Eleby was reminded that she primarily was an input clerk and that she was not supposed to be doing any type of analysis or research. Some of the duties Eleby wished to perform were assigned to higher-ranked men on the production team. Hamilton told Eleby there was no need for a GS-5 procurement technician to be performing those duties. Eleby Dep. at 97.

Eleby has identified eight men on the production team who she believes performed the duties that she should have been allowed to perform. They are Dan Lynn, a GS-9 quality assurance/contract administrator; Al Spears, a GS-9 quality assurance/industrial specialist; Phil Woodward, a GS-9 quality assurance/ industrial specialist; Jack Dillon, a GS-9 quality assurance/industrial specialist; Paul Amos, a GS-9 to GS-11 facilitator; Gary Summers, a GS-11 engineer; John Ferency, a GS-11 contract administrator; and Howard Robinson, a GS-12 administrative contracting officer. All of these men are white, except for

Robinson, who is African-American. In addition, all were classified in higher grades and different job series than Eleby was. Eleby Dep. at 89-93. Eleby believes that while she worked for the research and development team, she performed duties at the GS-6 level and higher, including some GS-12 responsibilities.

As she had with Steelman, Eleby discussed her GS-5 rank with Kappus and asked what she needed to do to get a higher grade. Kappus Dep. at 52-53. Kappus told Eleby that she would have to go elsewhere if she wanted to work as a GS-6. *Id*. at 65-66. According to Kappus, employees often have to travel to other locations to move up the ranks. *Id*. at 67. Hamilton told Eleby that her job might be eliminated and that what Hamilton needed were administrative personnel, not procurement technicians. Eleby Dep. at 117.

Eleby asserts that Kappus simply should have "accreted" her position from GS-5 to GS-6. Kappus had recommended accreting contract administrator Dan Lynn from GS-9 to GS-11. (Kappus did not have final approval of these types of decisions. See Kappus Dep. at 18.) Kappus testified that Lynn had been performing the duties of the GS-11 position for a year to a year and a half before Kappus joined the production team. See *id*. at 21-22. Kappus also recommended accreting Jack Dillon from a GS-9 quality assurance specialist position to a higher

graded industrial specialist position. Kappus needed someone to move into an industrial specialist position; Dillon volunteered. *Id*. at 16-17. While under Kappus' supervision, production team members Paul Amos and George Snider were promoted from GS-9 to GS-11 following a directive from DOD headquarters that all GS-9 quality assurance employees would be upgraded. *Id*. at 18-19. Kappus never considered upgrading Eleby to the GS-6 rank. *Id*. at 57.

On May 7, 1998, Eleby sent Kappus a letter expressing her ongoing frustration with her lack of career advancement. Pl. Ex. B. ("I see higher grade people than myself doing the work that I use to do. I am merely seeking some measure of justice, and a genuine commitment from management to offering me that same opportunities for advancement that are available to my fellow teammates.").

Later in 1998, Eleby approached the union with her concerns about the level of her duties and responsibilities on the production team. The union requested an "informal desk audit" on Eleby's position on September 15, 1998. The audit lasted about 30 to 45 minutes. John Pumphrey, a GS-12 personnel management specialist, performed the audit while Eleby and the union vice president were present. Eleby provided Pumphrey with information about her position and also told him that certain duties had been taken away from her.

Pumphrey concluded that, although Eleby was performing some additional duties that required an "amendment" to the position, "[n]one of the duties that she was performing were at a higher level that would have required action by the Commander." Def. Ex. 6. In an e-mail message, under the heading "Notes for Outbrief with John Pumphrey," Hamilton wrote: "Glenda is doing a lot of GS4 work and some GS5. She isn't doing any GS6. GS6 work is inputting DD250s and being a trusted agent which she doesn't do." See Pl. Ex. D. The union representative who attended the audit believed the audit was a "farce" because Pumphrey was not interested in hearing about the duties that had been taken away from Eleby since she had transferred to the production team. Manlove Aff. ¶ 3.

On September 18, 1998, Eleby was omitted from the distribution list of an e-mail message informing other production team members about a training opportunity. Kappus had asked his secretary to send an e-mail from him about a refresher course on the "MOCAS" database, a database on which Eleby often worked. The message stated: "I expect EVERYONE who is a member [of the production team] to be in attendance." See Pl. Ex. E. Kappus testified in his deposition that he thought the training was too basic for Eleby. Kappus Dep. at 68-69. Earlier, he had told the DOD EEO counselor that Eleby's exclusion from

the e-mail about the MOCAS training was inadvertent.[5] Pl. Ex. A. At oral argument, Eleby's counsel informed the court that Eleby ended up learning about the training from coworkers and "crashed" the session even though she had not received Kappus' e-mail about it.

Eleby is unaware of any procurement technicians who have worked for her supervisors (Steelman, Kappus, and Hamilton) who were classified higher than a GS-5. In September 1998, procurement technician Charlotte Wolfe was upgraded from GS-5 to GS-6. Wolfe is a white woman who apparently worked at Raytheon while Eleby worked at Allison Engine. Wolfe approached her supervisor about the upgrade. Her supervisor had initially denied her request for the upgrade. See Wolfe Aff.[6]

On October 1, 1998, Eleby asked to see an EEO counselor. Eleby told the EEO counselor that she believed the DOD had started discriminating against her

---

[5]The court overrules the DOD's hearsay objection to the EEO counselor's notes about the reason Kappus first gave for why Eleby did not receive the e-mail about the training. The counselor's notes are party admissions.

[6]The court sustains the DOD's objection to those portions of Wolfe's affidavit that assert that two other procurement technicians in Indianapolis had been promoted from GS-5 to GS-6 before her promotion in September 1998. Wolfe's affidavit does not identify the employees and does not indicate how she obtained information about their employment status except to say that she saw their job descriptions. Absent any other foundation, it appears that that Wolfe's assertions about the unidentified employees are based on inadmissible hearsay.

when she transferred to the production team, although the discrimination did not become apparent to her until she had several personal interactions with Kappus. Def. Ex. 12.

On December 6, 1998, Eleby received a within-grade pay increase. On February 8, 1999, she received a $250 award for training GS-6 level procurement technicians.

In early 1999, Eleby was assigned additional clerical duties, which she has described as "excessive" and "low grade." Eleby acquired these duties following the transfer of secretary Nancy Habing to a different location. Eleby Dep. at 167-68. Some of the Habing's duties also were assigned to Wilson, the other procurement technician, and to two white women who worked as secretaries. *Id*. at 168. After Eleby started performing some of Habing's duties, Hamilton criticized Eleby for not getting all of her work done.

On April 5, 1999, Eleby filed a second discrimination complaint with the EEO counselor alleging continued race and sex discrimination, as well as retaliation in the form of overly burdensome assignments that her supervisors knew she could not perform satisfactorily.

In December 1999, Eleby was upgraded to the rank of GS-6. Eleby competed for the promotion against a white female candidate. The promotion decision was made by David Kling, a new supervisor on the production team. Eleby received an annual raise of about $1,800 along with the upgrade in rank.

On July 30, 2000, Eleby accepted a contract administrator position at DCMC Raytheon Technical in Fort Wayne. With the transfer, Eleby took a voluntary downgrade from a GS-6 to GS-5, though with minimal effects on her current salary. Eleby made this change for promotional opportunities. In February 2001, Eleby returned to Indianapolis as a contract administrator at the DCMC Raytheon Technical facility. She has been promoted to the rank of GS-7. Eleby does not allege that she has been discriminated or retaliated against since her move to Fort Wayne.

Eleby does not have any evidence that her supervisors ever directed any racially or sexually derogatory comments towards her, nor does she have direct evidence of any retaliatory motive. In addition, Eleby was never downgraded, never received a bad performance evaluation, has always been rated as fully successful, and has never been disciplined.

Additional facts are included below, keeping in mind the standard for summary judgment.

Discussion

I. *Statute of Limitations*

Most of Eleby's allegations of race and sex discrimination are barred by the short 45-day statute of limitations on Title VII claims brought by federal employees. As a result, the scope of Eleby's actionable discrimination allegations is far narrower than the scope of allegations made in her complaint and in her deposition.

As a general rule, a federal employee who believes she is the victim of unlawful employment discrimination must initiate contact with an EEO counselor within 45 days after the alleged discrimination occurs. The 45-day time limit is found in 29 C.F.R. § 1614.105(a)(1) which states:

> Aggrieved persons who believe they have been discriminated against on the basis of race, color, religion, sex, national origin, age or handicap must consult a Counselor prior to filing a complaint in order to try to informally resolve the matter. (1) An aggrieved person must initiate contact with a Counselor within 45 days of the date of the matter alleged to be discriminatory or, in the case of a personnel action, within 45 days of the date of the effective action.

The Seventh Circuit has construed the 45-day deadline as a statute of limitations. See *Johnson v. Runyon*, 47 F.3d 911, 917 (7th Cir. 1995); *Rennie v. Garrett*, 896 F.2d 1057, 1062-63 (7th Cir. 1990).

Eleby first asked to see an EEO counselor on October 1, 1998. Therefore, any allegedly discriminatory conduct that occurred before August 17, 1998 presumptively is time-barred. Eleby alleges that the DOD refused to upgrade her position and took certain duties away from her long before August 17, 1998.

Eleby argues that her allegations that fall outside the 45-day limitations period are not untimely because she was not on notice that she had been harmed by the defendant's discrimination until the desk audit on September 15, 1998. She also has described the DOD's conduct as a continuing violation.

The controlling regulation recognizes an exception to the 45-day limitations period in certain circumstances, including "when the individual shows that . . . he or she did not know and reasonably should not have known that the discriminatory matter or personnel action occurred. . . ." *Johnson*, 47 F.3d at 920, citing 29 C.F.R. § 1614.105(a)(2). If the plaintiff can make such a showing, the time limit for bringing a claim is extended until "facts that would support a charge of discrimination . . . were apparent or should have been apparent to a person

with a reasonably prudent regard for his rights similarly situated to the plaintiff." *Johnson*, 47 F.3d at 920 (citations omitted).

The standard for establishing an exception to the statue of limitations under 29 C.F.R. § 1614.105(a)(2) is the same as the third continuing violation theory recognized in *Jones v. Merchants National Bank*, 42 F.3d 1054, 1058 (7th Cir. 1994); accord *Selan v. Kiley*, 969 F.2d 560, 565 (7th Cir. 1992). Under this theory, a plaintiff can show a continuing violation where an employer covertly follows a practice of discrimination over a period of time. "In such a case, the plaintiff can only realize that she is a victim of discrimination after a series of discrete acts has occurred. The limitations period begins to run when the plaintiff gains such insight." *Jones*, 42 F.3d at 1058. If the plaintiff knew or should have known that each act complained of was discriminatory and harmed her, however, the continuing violation theory does not apply and the plaintiff must sue within the relevant limitations period. *Id*.; see also *Galloway v. General Motors Service Parts Operations*, 78 F.3d 1164, 1167 (7th Cir. 1996) (plaintiff may not base her suit on conduct that occurred outside the limitations period unless it would have been unreasonable to expect her to sue before the statute of limitations had run.

Drawing all reasonable inferences in Eleby's favor, the record evidence does not support Eleby's theories for expanding the limitations period on her claims beyond August 17, 1998. Eleby knew about the most significant injury she

alleges in this lawsuit starting as early as 1996 or 1997, which is when she approached Steelman about her ranking. At that time, she already believed that the decision not to upgrade her position from GS-5 to GS-6 was probably based on her sex or her race.[7] In early 1998, sometime after her transfer to the production team, Eleby came to believe that Kappus was discriminating against her by taking duties away from her. See Def. Ex. 12 (Eleby told EEO counselor that she did not realize Kappus was discriminating against her until after several interactions with him; Eleby transferred to his team on January 19, 1998). Like Steelman, Kappus also refused to upgrade her. By May 7, 1998, almost four months after her transfer and still about three months outside the limitations period, Eleby wrote Kappus a letter seeking "justice" and "equal pay for equal work performed." See Pl. Ex. B. Eleby also wrote: "Needless to say this situation has left me feeling abused. I have been asked to express my grievance, either real or imagined, and the possible remedies that would alleviate the stress and feelings of unjust treatment that I am presently experiencing." *Id*.

---

[7]Eleby's deposition testimony about when she first believed she was being discriminated against was very clear:

> Q [. . .]I want to be very clear on this. When Mr. Steelman said he was not going to upgrade your position – I'll ask you again – did you believe your race – either your race or your sex, or both, was the reason why he wasn't going to upgrade your position:
>
> A Yes.

Eleby Dep. at 78.

In light of this evidence, Eleby's assertion that she was not subjectively aware that the DOD was discriminating her until the September 15, 1998 desk audit is not sufficient to create a fact question on the issue. See, *e.g.*, *Amadio v. Ford Motor Co.*, 238 F.3d 919, 926 (7th Cir. 2001) ("It is by now well-settled that a party may not attempt to survive a motion for summary judgment by manufacturing a factual dispute through the submission of an affidavit that contradicts prior deposition testimony."); *Shank v. William R. Hague, Inc.*, 192 F.3d 675, 683 (7th Cir. 1999) ("Although courts are expected to draw inferences in a light most favorable to the non-moving party when evaluating a motion for summary judgment, we have repeatedly indicated that courts are not required to draw every conceivable inference from the record– only those inferences that are reasonable.") (internal quotation omitted).

According to Eleby's own version of the facts, the desk audit merely confirmed what she had been complaining about since at least May 1998 – that she was being assigned at least some work below her grade level. No evidence suggests that the results of the audit could have given Eleby any new insights into her relationship with the DOD. The undisputed evidence shows that Eleby knew or reasonably should have known about the DOD's alleged discrimination long before the desk audit, and that she failed to ask to see an EEO counselor on a timely basis.

At the motion hearing, Eleby's counsel argued that limitations period on Eleby's claims should be extended because there were events within the limitations period, including the desk audit, that finally motivated Eleby to complain to an EEO counselor. However, as discussed above, the relevant inquiry is when the plaintiff first reasonably should have known she was being discriminated against. Without more, the mere fact that Eleby alleges that she experienced the effects of discriminatory decisions over a long period of time – including during the limitations period, does not entitle her to the protections of the continuing violation theory. See *Dasgupta v. University of Wisconsin Bd. of Regents*, 121 F.3d 1138, 1140 (7th Cir. 1997) ("A lingering effect of an unlawful act is not itself an unlawful act, however, so it does not revive an already time-barred illegality . . . ."); see also *Miller v. American Family Mut. Ins. Co.*, 203 F.3d 997, 1004 (7th Cir. 2000) (even though alleged discriminatory pay practice continued into limitations period, plaintiff was aware of alleged pay inequality well before then and therefore could not rely on the continuing violation theory).

A reasonable person who was subjected to the treatment alleged by Eleby, if she perceived harmful discrimination at all, would have perceived it at some point long before she finally asked to see an EEO officer on October 1, 1998. Eleby's own evidence tends to show that she was aware of what she regarded as

discrimination for at least several months, if not a few years, before she made a complaint. Eleby testified that she did not complain when she first believed she was being discriminated against because she believed that she could get the upgrade she wanted by continuing to prove herself. This self-help approach, while not unreasonable, ultimately collided with the very short limitations period on federal employees' discrimination claims. Because she did not make a timely complaint, Eleby's race and sex discrimination claims are barred by the statute of limitations to the extent Eleby bases them on the DOD's decisions not to upgrade her position and not to permit her to perform certain tasks on the production team.[8]

---

[8]Even if they were timely, Eleby's allegations of race and sex discrimination based on her rank and her duties would fail as a matter of law. Eleby has not come forward with evidence that tends to show that she was treated less favorably than similarly-situated employees. Although an employee need not prove complete identity in comparing herself to better treated employees, she must demonstrate "substantial similarity." See *Radue v. Kimberly-Clark Corp.*, 219 F.3d 612, 618 (7th Cir. 2000). Eleby has not met this standard. She has sought to compare herself to: (1) several men who were in different job series and higher grades; (2) procurement technicians at other locations with different supervisors; and (3) two secretaries who were not upgraded during the relevant period. Eleby was not similarly situated to the men who performed different jobs at two to four ranks higher than hers because the evidence before the court does not suggest that Eleby's position was substantially similar to theirs. See *Johnson v. Zema Sys. Corp.*, 170 F.3d 734, 743 (7th Cir. 1999) (where no other employee held plaintiff's exact position, the relevant comparator was the company's other mid-level manager). Eleby also was not similarly situated to procurement technicians who were upgraded by different supervisors to GS-6 before she was. See *Radue*, 219 F.3d at 618 ("Different employment decisions, concerning different employees, made by different supervisors, are seldom sufficiently comparable to establish a prima facie case of discrimination for the (continued...)

This leaves Eleby with only one timely allegation of race and sex discrimination – that she was excluded from the e-mail about MOCAS training in September 1998. In addition, Eleby's allegation that the DOD retaliated against her by assigning her certain of Nancy Habing's duties in 1999 is timely.

II. *The Merits of Eleby's Timely Allegations*

Title VII makes it an unlawful employment practice for an employer "to fail or refuse to hire or to discharge any individual, or to otherwise discriminate against any individual . . . because of such individual's race, color, religion, sex, or national origin. . . ." 42 U.S.C. § 2000e-2(a)(1). Title VII also prohibits an employer from retaliating against any employee because she has made a charge under or otherwise participated in any proceeding under the Act. 42 U.S.C. § 2000e-3(a). Because Eleby has not offered any direct evidence of race or sex discrimination or retaliation, the court analyzes her claims under the three-step pattern of proof established in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973).

---

[8](...continued)
simple reason that different supervisors may exercise their discretion differently."). In addition, Eleby has not shown substantial similarity with the two secretaries. Even if she was similarly situated to the secretaries, there could be no inference of discrimination drawn from the fact that two white secretaries also were *denied* upgrades.

Under this model, Eleby must first come forward with evidence to support a *prima facie* case. To make such a showing on her race and sex discrimination claims, Eleby must produce evidence that tends to show that (1) she is a member of a protected class; (2) she performed her job satisfactorily; (3) she suffered an adverse employment action; and (4) that the defendant treated similarly situated employees outside of her protected class more favorably. See *Stockett v. Muncie Indiana Transit System*, 221 F.3d 997, 1001 (7th Cir. 2000); *Lenoir v. Roll Coater, Inc.*, 13 F.3d 1130, 1134 (7th Cir. 1994). To make out a *prima facie* case of retaliation, Eleby must come forward with evidence tending to show: (1) that she engaged in statutorily protected activity; (2) that she suffered an adverse employment action; and (3) that the protected activity caused the employer to take the adverse action. *Russell v. Bd. of Trustees of the Univ. of Illinois at Chicago*, 243 F.3d 336, 343 (7th Cir. 2001).

The *prima facie* case is intended to identify circumstances in which a jury could infer that an employment decision, if not explained, was the product of illegal discrimination. See, *e.g.*, *Stockett*, 221 F.3d at 1001. However, if the employer can then merely articulate a legitimate,non-discriminatory reason for its decisions, that step shifts the burden of proof and persuasion back to the plaintiff to show that the employer's stated reason is a pretext, that is, a false

explanation for the decision. See *id.*; *Kulumani v. Blue Cross Blue Shield Ass'n*, 224 F.3d 681, 684 (7th Cir. 2000).

Eleby's Title VII claims fail as a matter of law because she has not come forward with evidence that tends to show that she suffered from an adverse employment action. Not every decision that negatively affects an employee falls within Title VII's purview.

The Seventh Circuit has defined "adverse employment action" broadly. *Smart v. Ball State University*, 89 F.3d 437, 441 (7th Cir. 1996); *McDonnell v. Cisneros*, 84 F.3d 256, 258-59 (7th Cir. 1996). An adverse employment action is "not limited solely to loss or reduction of pay or monetary benefits. It can encompass other forms of adversity as well." *Collins v. Illinois*, 830 F.2d 692, 703 (7th Cir. 1987). However, it is well established that "not everything that makes an employee unhappy is an actionable adverse action." *E.g., Bell v. E.P.A.*, 232 F.3d 546, 555 (7th Cir. 2000) (citations omitted). To be adverse, the action must be materially adverse, "meaning more than a mere inconvenience or an alteration of job responsibilities." *Cullom v. Brown*, 209 F. 3d 1035, 1041 (7th Cir. 2000) (internal quotations and citations omitted); see also *Crady v. Liberty Nat'l Bank & Trust Co.*, 993 F.2d 132, 136 (7th Cir. 1993) ("A materially adverse change might be indicated by a termination of employment, a demotion evidenced by a decrease

in wage or salary, a less distinguished title, a material loss of benefits, significantly diminished material responsibilities, or other indices that might be unique to a particular situation."). A serious erosion of responsibilities evidencing a qualitative change in employment can also be an adverse employment action. *Dahm v. Flynn*, 60 F.3d 253, 257 (7th Cir. 1994) (although defendant ultimately was protected by qualified immunity, summary judgment was inappropriate on the adverse employment action prong of plaintiff's Section 1983 retaliation claim where she alleged a reduction of her responsibilities accompanied by an increase in the less-skilled administrative tasks she was asked to perform).

Eleby contends that not including her on the e-mail regarding the MOCAS training in September 1998 and the reassignment of some of Habing's duties to her in 1999 were adverse employment actions. These acts are not actionable under Title VII as a matter of law because Eleby has not come forward with any evidence that they materially affected her job for the worse.

Eleby ended up attending the MOCAS training, which she found out about from other employees.[9] Whatever the fact that Kappus did not send Eleby the e-

[9]This fact was not disclosed by Eleby in the briefing and it should have been. Eleby's written representations about the MOCAS training were misleading. See Pl. Additional Material Facts ¶ 113 ("Mr. Kappus refused to allow Plaintiff to attend a training session about the MOCAS database . . . ."); Pl. Br. at (continued...)

mail about the training might show about his working relationship with her, the omission does not come close to meeting the standard for an adverse employment action under Title VII. Nothing in the record remotely suggests that Eleby suffered any negative job consequence from not receiving the e-mail. Eleby may have been upset with Kappus about it, but being omitted from an e-mail about a training session the employee ultimately attended is not comparable to termination, demotion, or any of the other serious employment actions that are actionable.

Similarly, the assignment of some of Habing's former duties to Eleby was not an adverse employment action against Eleby. Although Eleby claims that she was unable to perform her job adequately once she received the additional duties, she was not disciplined, did not receive any type of warning, and went on to receive promotions and raises. Hamilton's criticism of her for not getting all of her work done is not an act of retaliation under Title VII. See *Gawley v. Indiana University*, 276 F.3d 30, 314 (7th Cir. 2001) (criticism of report on sexual harassment complaint and distribution of report beyond chain of command were not acts of retaliation); *Rizzo v. Sheahan*, 266 F.3d 705, 718 (7th Cir. 2001) ("Although disconcerting, we find that the threats, phone calls, and

---

[9](...continued)
8 ("Plaintiff discovered she had been excluded from the training . . . .").

inconveniences Rizzo faced at work did not alter the terms or conditions of her employment such that they can be characterized as adverse employment actions.") (internal quotation omitted). No evidence shows that having to perform some of Habing's job duties was anything more than an inconvenience or alteration of Eleby's job responsibilities. See *Spearman v. Ford Motor Co.*, 231 F.3d 1080, 1086 (7th Cir. 2000) (allegedly "degrading and punitive" temporary assignment of washing windows was not an act of retaliation where employee had performed certain housekeeping duties before; the additional task was nothing more than an inconvenience or alteration of job responsibilities which did not significantly alter the terms and conditions of employment, if at all).

Conclusion

Plaintiff Eleby's Title VII discrimination and retaliation claims are insufficient as a matter of law because she has not produced any evidence that she experienced an adverse employment action during the applicable limitations period. The court therefore grants summary judgment to the defendant, the Secretary of Defense. Final judgment shall be entered.

So ordered.

Date: February 19, 2002

DAVID F. HAMILTON, JUDGE

United States District Court
Southern District of Indiana

Copies to:

Deborah E. Albright
Monday Rodeheffer Jones & Albright
1915 Broad Ripple Avenue
Indianapolis, IN 46220

James P. Hanlon
Office of the United States Attorney
10 W. Market Street
Suite 2100
Indianapolis, IN 46204