IP 99-1679-C T/K Sitar v IN Dept. of Trans. [2]
Judge John D. Tinder Signed on 5/22/02

NOT INTENDED FOR PUBLICATION IN PRINT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

SITAR, CAROLINE M, Plaintiff, vs. INDIANA DEPARTMENT OF TRANSPORTATION, Defendant.	)	CAUSE NO. IP99-1679-C-T/K

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

CAROLINE M. SITAR,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	IP 99-1679-C-T/K
	)	
INDIANA DEPARTMENT OF TRANSPORTATION,	)	
	)	
	)	
Defendant.	)	

ENTRY ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT[1]

Defendant filed this Motion for Summary Judgment. Plaintiff opposes the Motion.

This court now **GRANTS** Defendant's Motion.

I. Factual and Procedural Background[2]

[1] This Entry is a matter of public record and is being made available to the public on the court's web site, but it is not intended for commercial publication either electronically or in paper form. Although the ruling or rulings in this Entry will govern the case presently before this court, this court does not consider the discussion to be sufficiently novel or instructive to justify commercial publication of the Entry or the subsequent citation of it in other proceedings.

[2] The court took these facts from the submissions of the parties, accepting all non-disputed facts as true and construing disputed facts and all reasonable inferences therefrom in favor of Sitar. Plaintiff filed a Motion to Strike the Declaration of Raymond A. Baker and Defendant filed a Motion to Strike Plaintiff's Exhibits N–U, V(2)-V(5), DD, and EE. This court need not decide those motions because none of the disputed evidence is necessary to decide this Motion for Summary Judgment.

On October 4, 1997, Caroline M. Sitar began employment with the Indiana Department of Transportation ("INDOT") as a Highway Maintenance Worker III. She was assigned to the Westfield Unit where her direct supervisor was James Pedigo and the Sub-District Manager was Raymond Baker. The parties dispute various incidents in Sitar's first months of employment. However, because these issues are irrelevant to the issues discussed in this Entry, this court need not address the individual evidentiary disputes. These disputed issues include Sitar's attitude and use of a hand throttle on a single axis. Also, on November 11, a male coworker allegedly threw a road work sign at Sitar. On November 21, Sitar was involved in an altercation with a fellow employee, Dave Whitworth. In December, there were alleged violations by Sitar of INDOT's policy regarding the proper disposal of dead animals found along the roadside. In response to these alleged incidents, on December 12, Baker discussed the problems with Sitar and transferred her to the Tipton Unit. At the Tipton office, Sitar was required to do more clerical and officer work than she had done at Westfield.

On December 17, Sitar filed a complaint of sex discrimination against Baker and Whitworth with INDOT's Affirmative Action Office. On March 10, 1998, the results of the Affirmative Action Investigation were released. On March 20, a meeting was held between Baker and two other supervisors where Sitar's performance problems were discussed. On March 27, Baker fired Sitar, who at that time was still a probationary employee. On April 15, Sitar filed a charge with the EEOC, where she checked only the retaliation box. Under the particulars section of the charge, she stated

> On March 27, 1998, I was terminated from my position of Maintenance Worker III. Ray Baker told me that I was being terminated because I was a probationary employee and because I couldn't get along with the Westfield crew. The State Affirmative Action Office had completed an investigation of possible sex discrimination against me by him on March 10, 1998, of which he received a summary. I believe that I have been retaliated against for participating in the EEO process, in violation of Title VII of the Civil Rights Acts of 1964, as amended."

(Ex. V(1).) On October 29, 1999, Plaintiff filed suit alleging gender discrimination, sexual harassment, and retaliation. On August 14, 2000, Plaintiff filed an amended complaint. Defendant filed this Motion for Summary Judgment on August 8, 2000. Plaintiff opposes the Motion. This court now rules as follows.

II. Summary Judgment Standard

Summary judgment should be granted if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there are no genuine issues of material fact and that the moving party is entitled to a judgment as a matter of law. Fed. R. Civ. P. 56(c); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). The motion should be granted only if no reasonable jury could return a verdict for the nonmoving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). If the party opposing the motion bears the burden of proof at trial on an issue, that party can avoid summary judgment only by setting forth specific facts showing that there is a genuine issue for trial. Fed. R. Civ. P. 56(e); *see Silk v. City of Chicago*, 194 F.3d 788, 798 (7th Cir. 1999). When ruling on a motion for summary judgment, the court must construe the evidence in the light most favorable to the nonmoving party and draw all reasonable

inferences in favor of that party. *Anderson*, 477 U.S. at 255. Speculation, however, is not the source of a reasonable inference. *See Chmiel v. JC Penney Life Ins. Co.*, 158 F.3d 966, 968 (7th Cir. 1998) (noting that the court is not required to draw every conceivable inference from the record in favor of the non-movant, but only those inferences that are reasonable).

III. Title VII

Plaintiff alleges three Title VII violations: gender discrimination, a hostile work environment, and a retaliation claim. A plaintiff in an employment discrimination case may proceed under two methods of proof: the direct method and the indirect burden-shifting method established by *McDonnell Douglas Corporation v. Green*, 411 U.S. 792, 802-05 (1973). Because Sitar has presented no direct evidence of discrimination, she must satisfy the indirect, burden-shifting method of proof articulated in *McDonnell Douglas*. Title VII prohibits an employer from discriminating "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). Under the *McDonnell Douglas* approach, a plaintiff must first establish a prima facie case of discrimination. *See, e.g., Stockett v. Muncie Ind. Transit Sys*., 221 F.3d 997, 1000 (7th Cir. 2000) (citation omitted). Where a plaintiff alleges discriminatory treatment, she must demonstrate that (1) she belongs to a protected class; (2) she performed her job satisfactorily; (3) she suffered an adverse employment action; and (4) her employer treated similarly-situated employees

outside of her protected class more favorably. *Id.* at 1001 (citations omitted). If a plaintiff successfully establishes a prima facie case of discrimination, the burden shifts to the employer to come forward with a legitimate, non-discriminatory reason for the adverse employment action. *Id.* After the employer has met its burden of production, the burden shifts back to the employee to prove by a preponderance of the evidence that the employer's stated reason is merely a pretext for discrimination. *Id.* Although the *McDonnell Douglas* approach is often called a burden-shifting method of proof, "[t]he ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff." *Id.* (quoting *Texas Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 253 (1981)).

Title VII forbids not only economic or tangible discrimination, such as discharge, demotion, or undesirable assignment, but it also prohibits conduct that creates hostile work environments. *Faragher v. City of Boca Raton*, 524 U.S. 775, 786-87 (1998); *Dey v. Colt Constr. & Dev. Co.*, 28 F.3d 1446, 1453 (7th Cir. 1994). "An employer is subject to vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over the employee." *Faragher*, 524 U.S. at 807; *Wolf v. Northwest Ind. Symphony Soc'y*, 250 F.3d 1136, 1142 (7th Cir. 2001). "When the workplace is permeated with 'discriminatory intimidation, ridicule, and insult' that is 'sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment,' Title VII is violated."

Harris v. Forklift Sys., Inc., 510 U.S. 17, 21 (1993) (quoting *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 65, 67 (1986)).

In order for a plaintiff to have an actionable hostile work environment claim under Title VII, the work environment must be both objectively and subjectively hostile. *Harris*, 510 U.S. at 21-22. In other words, the environment must be one that a reasonable person in the plaintiff's position would find hostile or abusive, and one that the victim did in fact perceive to be so. *Faragher*, 524 U.S. at 786-87; *Oncale v. Sundowner Offshore Servs., Inc*., 523 U.S. 75, 80 (1998); *Dey*, 28 F.3d at 1454. This inquiry eliminates any requirement that a plaintiff demonstrate that the harassment concretely impaired his or her work performance or psychological well being, and focuses the inquiry on whether the harassment altered the terms and conditions of his or her employment. *Harris*, 510 U.S. at 21-22; *Dey*, 28 F.3d at 1454-55.

This court must examine incidents cumulatively in order to obtain a realistic view of the work environment. An objectively hostile environment is one that a reasonable person would find hostile or abusive. *Harris*, 510 U.S. at 21; *Adusumilli v. City of Chicago*, 164 F.3d 353, 361 (7th Cir. 1998). Although there is no mathematically precise test to apply to the somewhat elusive question of whether an environment is objectively hostile or abusive, appropriate factors that a court may consider include: "the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance."

Harris, 510 U.S. at 22-23. "[N]o single factor is required," and whether a work environment is "'hostile' or 'abusive' can be determined only by looking at all the circumstances." *Id*. "It is not enough that a supervisor or coworker fails to treat a female employee with sensitivity, tact, and delicacy, uses course language, or is a boor. Such failures are too commonplace in today's America, regardless of the sex of the employee to be classified as discriminatory." *Minor v. Ivy State College*, 174 F.3d 855, 858 (7th Cir. 1999). The determination of a defendant's liability under Title VII "must be made on a case-by-case basis after considering the totality of the circumstances." *Rodgers*, 12 F.3d at 674 (internal quotations and citations omitted).

Sitar also makes a claim of retaliation, contending that she was fired because she filed a sex discrimination complaint. To demonstrate a prima facie case of retaliation, a plaintiff must show that: (1) she engaged in statutorily protected activity; (2) she suffered an adverse employment action; and (3) there is a causal link between the protected activity and the adverse action. *See Sweeney v. West*, 149 F.3d 550, 555 (7th Cir. 1998)*; McClendon v. Ind. Sugars, Inc.*, 108 F.3d 789, 796 (7th Cir. 1997).

IV. Timeliness

Defendant first contends that Sitar did not commence this action within ninety days of receiving her notice of right to sue and therefore, the action is time-barred. However, after receiving Plaintiff's response, Defendant "concedes that Plaintiff filed this action within 90 days of the date she received actual notice that a right to sue letter had been

issued." (Reply in Support of Mot. for Summary J. at 2.) Therefore, this contention has been resolved in favor of the Plaintiff.

V. Relation to EEOC Charge

Defendant also contends that Sitar is limited to pursuing only her retaliation claim because her gender discrimination and sexual harassment claims were not part of the EEOC charge. In order to prevent circumvention of the EEOC's investigatory and conciliatory role, only those claims that are fairly encompassed within an EEOC charge can be the subject of a resulting lawsuit. *Chambers v. Am. Trans Air, Inc.*, 17 F.3d 998, 1003 (7th Cir. 1994); *see also McKenzie v. Ill. Dep't of Transp.*, 92 F.3d 473, 482 (7th Cir. 1996) (noting that this rule also gives the employer some warning of the conduct about which the employee is aggrieved). The standard for determining whether an EEOC charge sufficiently encompasses the allegations of a subsequent federal complaint standard "is a liberal one in order to effectuate the remedial purposes of Title VII, which itself depends on lay persons, often unschooled, to enforce its provisions." *Babrocky v. Jewel Food Co.*, 773 F.2d 857, 864 (7th Cir. 1985) (citations omitted).

The issue is whether the claims of discrimination asserted in federal court are "like or reasonably related to the allegations of the [EEOC] charge and growing out of such allegations." *Id.* (citations omitted). The *Jenkins* test requires: (1) a reasonable relationship between the allegations in the charge and the claims in the complaint and (2) that the claim in the complaint could reasonably be expected to "grow out of" an EEOC

investigation of the allegations in the charge. *See Jenkins*, 538 F.2d at 167; *Cheek v. Western & Southern Life Ins. Co.*, 31 F.3d 497, 501 (7th Cir. 1994).

In this case, the claims of gender discrimination and sexual harassment are not reasonably related to the claim of retaliation. First, the EEOC charge specifically refers to retaliation. The retaliation box is checked; the sex box is not. The particular sections give the dates of Sitar's termination and that she was "retaliated against for participating in the EEO process." Although Sitar mentions an investigation of possible sex discrimination, this is just in reference to the protected act for which she was being retaliated against. Nowhere in the charge does Sitar attempt to describe the alleged gender discrimination and sexual harassment or even mention any facts related to those acts.

The Seventh Circuit has noted that "retaliation and age discrimination claims are sufficiently dissimilar that an administrative charge of one fails to support a subsequent civil suit for the other." *Noreuil v. Peabody Coal Co.,* 96 F.3d 254, 258 (7th Cir. 1996). The same is true for allegations of sex discrimination. *Cf. Heuer v. Weil-McLain,* 203 F.3d 1021, (7th Cir. 2000) ("The charge arose out of [the harasser's] earlier creation of a hostile working environment motivated by [plaintiff's] sex, but that is too remote a connection, for otherwise every claim of retaliation for filing charges of discrimination would be a claim of discrimination, even though Title VII makes discrimination and retaliation separate wrongs.").

The Seventh Circuit has disregarded the technicalities of the EEOC form if "the factual relationship of the charges . . . is so related and intertwined in time, people, and substance that to ignore the relationship for a strict and technical application of the rule would subvert the remedial purposes of the Act." *Noreuil*, 96 F.3d at 259 (quotations and citations omitted). This is not the case here where Sitar was fired on March 27, 1998 and her complaints of sex discrimination occurred more than three months prior and described events that occurred even earlier. At the time of her firing, Sitar had been working in the Tipton Unit for three months and had not had contact with her alleged harassers who were in the Westfield Unit. Although Sitar was fired by Baker and Baker was mentioned in her original claims of sex discrimination, the facts surrounding the incidents were completely different and her complaints of sex discrimination focused on her alleged harassers, which included fellow employees on the Westfield shift, including Whitworth and Hendricks. Finally, the facts involved in the complaints were not the same. Sitar's retaliation claim involved whether an adverse employment consequence, in this case Sitar's firing, was deliberately attached to Sitar's exercise of a protected right under Title VII, the filing of her earlier discrimination claim. Sitar's sexual discrimination claims involved investigation into whether there was an objectively hostile work environment based on Sitar's sex and whether there were any adverse employment decisions based on Sitar's sex. This involved claims that a co-worker through a sign at her on November 10, 1997, that co-workers prank paged her, and of an altercation with a co-worker on November 21.

Plaintiff argues that INDOT was fully aware of Plaintiff's original claims. Although this is a concern behind the EEOC charge requirement, it is not the definitive question.[3] Rather, this court must look at whether the charge and allegations in the complaint are reasonably related and the allegations grow out of an investigation of the charge. Plaintiff also makes a "but for" argument specifically, "Had Ms. Sitar been afforded the same respect, opportunities and rights as her fellow Maintenance Worker III co-workers, she would not have filed an internal gender discrimination and harassment complaint with INDOT's Affirmative Action Office. Indeed, there is a strong factual relationship between Ms. Sitar's EEOC Charge and the claims alleged in her complaint." (Pl.'s Br. at 16.) It is clear that using a "but for" test, but for the original discrimination, Sitar would not have filed a complaint and INDOT would not have allegedly retaliated against her. But again, as discussed above, this is not the test set out by the Seventh Circuit to use in this case.

Plaintiff spends much time arguing that an investigation of the retaliation claim would necessarily uncover details of the sex discrimination. This contention only addresses the second part of the *Jenkins* test, whether the claim in the complaint could reasonably be expected to grow out of the EEOC investigation of the allegations of the charge. Also, it is not clear that the investigation of the retaliation would lead to an investigation of the merits of the sex discrimination claim. As recently noted by the Fifth Circuit, "[t]o recover on his reprisal claim [plaintiff] had to prove that [defendant] fired him because he complained to the EEOC;

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[3]Plaintiff also makes arguments concerning conciliation attempts and alleged cover-ups by INDOT that simply are not relevant to whether the allegations in the complaint were sufficiently encompassed by the EEOC charge.

he did not need to prove the underlying claim of discrimination which led to his protest." *Randel v. United States Dep't of Navy*, 157 F.3d 392, 395 (5th Cir. 1998).

Finally, courts have "looked beyond the four corners of the EEOC charge form" when "it is clear that the charging party intended the agency to investigate the allegations." *Vela v. Village of Sauk Village,* 218 F.3d 661, 664 (7th Cir. 2000). In that case the court refused to allow the plaintiff to pursue a sexual harassment claim even though she had checked the sex box on the EEOC form. The court reasoned that plaintiff's claim of sex discrimination described in the EEOC form was a claim of disparate treatment that was wholly unrelated to the sexual harassment claim in her complaint. In this case, it is fairly clear from the EEOC charge that Sitar did not intend the agency to investigate her sex discrimination claims. She gave no specific facts or details of the claims but merely mentioned that she had filed claims to support her charge of retaliation. Because Sitar's claims of gender discrimination and sexual harassment are not mentioned in the EEOC charge, do not satisfy the *Jenkins* test, and were not intended by Sitar to be investigated by the EEOC, she cannot now bring them in a suit.

VI. Retaliation Claim

Finally Defendant contends that Plaintiff must lose on the merits of her retaliation claim because she cannot show either a causal connection or pretext. Defendant first argues that Sitar cannot show a causal relationship between the filing of her first complaint and her firing because more than three months elapsed between the two events

(December 17, 1997 to March 27, 1998). In response, Plaintiff alleges that "[t]he third element of Ms. Sitar's prima facie case (causal link) is disputed and dovetails with the issue of pretext."[4] (Pl.'s Br. in Opp'n to Def.'s Mot. for Summ. J. at 19.) To establish a causal link, Sitar must show that the protected activity and the adverse action were not wholly unrelated. *Hunt-Golliday v. Metro. Water Reclamation Dist.,* 104 F.3d 1004, 1014 (7th Cir. 1997).

In this case, neither party cites to any helpful authority. In fact, neither party continues its argument on this subject in the reply briefs. Defendant relies on a case discussing an over nine-month gap between the protected act and the alleged retaliation. Plaintiff acknowledges that she "must produce facts which somehow tie the adverse decision to the her [sic] protected actions" and that speculation based on timing alone is insufficient. (Pl.s' Br. at 20.) She uses these propositions to argue that the relevant time period includes all the time of the Affirmative Action Office investigation. However, the filing of the complaint, not the investigation by a third party, was the protected activity in which Sitar engaged. Therefore, the relevant gap is still three months. In any event, Sitar's attempts to tie the protected activity to the adverse employment action are nothing more than a recitation of the Affirmative Action Office's findings and the fact that during the

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[4]Plaintiff appears to be confusing the prima facie case, which must first be established by Plaintiff, with pretext, which is a secondary step, after the prima facie case already has been established. *Lewis v. Holsum of Fort Wayne, Inc.*, 278 F.3d 706, 710 (7th Cir. 2002). In fact the Seventh Circuit has recently held that skipping ahead to a discussion of pretext without first determining whether a prima facie case has been established is not the correct course of action for district courts. *Peele v. Country Mut. Ins. Co.,* — F.3d —, No. 01-3222, 2002 WL 827179, at *5 (7th Cir. April 30, 2002).

meeting where the decision to fire Sitar was made, the findings were mentioned. From the evidence, there is no suggestion that the two were related, merely that the findings were issued and mentioned and later during the same meeting Sitar's status was discussed. There is no evidence that these issues were even part of the same conversation.

The Seventh Circuit law on the causal connection issue is fairly clear, "the mere fact that one event preceded another does nothing to prove that the first event caused the second. Rather, other circumstances must also be present which reasonably suggest that the two events are somehow related to one another." *Sauzek v. Exxon Coal USA, Inc.,* 202 F.3d 913, 918 (7th Cir. 2000). Furthermore, a three-month interval between the protected activity and the employer's adverse action is too long to support an inference of retaliation. *See Lewis v. Holsum of Fort Wayne, Inc.,* 278 F.3d 706, 711 (7th Cir. 2002); *Sauzek*, 202 F.3d at 918-19.[5] Because Plaintiff has not shown that there was a causal

[5]In her complaint, under the retaliation heading, Sitar mentions her transfer to the Tipton office, presumably as a possibly retaliatory act. However, this transfer occurred on December 12, 1997, and Sitar did not file her complaint with the Indiana Affirmative Action Office until December 17. Sitar also mentions a change of duties on December 19 to clerical, secretarial, and custodial duties. This argument too must fail because a change in job responsibilities is not an adverse employment action. *Hill-Dyson v. City of Chicago,* 282 F.3d 456, 466 (7th Cir. 2002).

connection between her protected activity[6] and the Defendant's adverse employment action, this court need not address Defendant's argument on pretext.

VII. Conclusion

For the foregoing reasons, Defendant's Motion for Summary Judgment is **GRANTED.**

ALL OF WHICH IS ORDERED this 22nd day of May 2002.

John Daniel Tinder, Judge
United States District Court

[6]In her Brief in Opposition to the Motion for Summary Judgment, Plaintiff makes special note of the fact that findings from the first investigation were issued on March 10, 1998, only seventeen days before Sitar was fired. However, as earlier discussed, the issuance of findings is not a protected activity in which Sitar participated.

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