UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,	)	
Plaintiff,	)	
- and -	)	**Case No. 03-CV-0657-CVE-PJC**
HERBERT PHILLIP WOODEND,	)	
Plaintiff-Intervenor,	)	
v.	)	
BANK OF OKLAHOMA, a National Banking Association and subsidiary of BOK FINANCIAL CORPORATION, an Oklahoma Corporation,	)	
Defendant.	)	

ORDER

Now before the Court is the Defendant's Motion for Summary Judgment (Dkt. # 56). Plaintiff Equal Employment Opportunity Commission ("EEOC") and Plaintiff-Intervenor Herbert Phillip Woodend ("Woodend") assert that, in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e *et seq*., defendant Bank of Oklahoma ("BOK") terminated Woodend's employment. In particular, plaintiffs assert that BOK terminated Woodend's employment because he supported a subordinate who claimed that she was subjected to gender harassment and a hostile work environment.

I.

BOK hired Woodend in February 2001, in connection with its decision to implement a program designed by Cohen Brown Management Consulting Group, Inc. ("Cohen Brown"). BOK created the position of Senior Vice President, Consumer Banking Sales Manager for Woodend to

act as a "champion" over the sales and service process. BOK entered into the three-year contract with Cohen Brown the following May. Four regional managers reported to Woodend, and Woodend reported to Steven Bradshaw, Executive Vice President, Consumer Banking. One of the regional managers was Heather Pellerin, a woman with whom Woodend had previously worked. Woodend told Pellerin about the position as Regional Branch and Services Manager at the Bank of Albuquerque ("BAQ"), a subsidiary of BOK Financial Corporation, and BOK hired her on June 18, 2001.

BOK claims that Pellerin's job performance was consistently unsatisfactory. Pellerin claims that she was continually subjected to gender harassment and a hostile work environment by two co-workers: John Barela, BAQ Manager of Regional Services, and Jason Anderson, BAQ Public Relations/Marketing Manager, and that she discussed these matters with Judy Luttrell, Regional Human Resources Manager at BAQ. Upon receiving complaints in late September or early October 2001 about Pellerin's unsatisfactory performance, Bradshaw asked Woodend to investigate. Pellerin denied the allegations and complained to Woodend about the situation as she perceived it. Woodend claims that he informed Bradshaw about the situation, and reported to Bradshaw that Pellerin told him that the subject "hostile work environment" came up in a conversation Pellerin had with Luttrell. Woodend also claims that he told Bradshaw of the possibility of Pellerin filing a gender discrimination lawsuit.

Bradshaw claims that, in January or February 2002, he thought about eliminating Woodend's position because Woodend's duties duplicated his own, and an "intermediary" position like Woodend's "diluted" Bradshaw's management of his lower level managers under the Cohen Brown program. Bradshaw also claims that he later communicated his concerns to Jill Hall, the Cohen

Brown Results Consultant. However, in March, he evaluated Woodend as "fully meets expectations" as part of an annual performance review. He mentioned Woodend as a possible replacement for his own position, but he actually listed Vane Lucas, Senior Vice President of Consumer Support and In-Store Banking, as his "immediate replacement candidate."

Early that same month, March 2002, Pellerin submitted a resignation letter, but she withdrew it after Bradshaw asked that she reconsider. Nonetheless, Bradshaw determined later that month to terminate Pellerin's employment, and Woodend went to Albuquerque to do so on April 3, 2002. Although Pellerin did not tell Woodend that she planned to assert a gender discrimination claim, Woodend reported to Bradshaw that Pellerin could file a gender discrimination lawsuit. Woodend claims that, on both occasions when he mentioned to Bradshaw the possibility of a lawsuit by Pellerin, he told Bradshaw that he would support Pellerin's claim. Woodend also had lunch with Larry Wagner, BOK's Senior Vice President of Human Resources, but the parties dispute whether Woodend mentioned any possible lawsuit by Pellerin at that time. In any event, Pellerin never filed a claim or lawsuit related to the alleged discrimination against her at BAQ.

Bradshaw claims that, in April 2002, he spoke with Wagner about eliminating Woodend's position, and the position was eliminated thereafter on May 7, 2002. On June 24, 2002, Woodend filed a claim with the EEOC. In December 2002, Bradshaw's superiors directed him to take over responsibility for BOK's operations in Texas, and he hired Jill Hall to become the Senior Vice President, Consumer Branch Delivery Manager, on July 1, 2003. Her duties include some of those previously performed by Woodend. On September 24, 2003, the EEOC filed this action in federal court. On November 12, 2003, Woodend moved to intervene, and was permitted to do so on December 10, 2003.

II.

Summary judgment pursuant to Fed. R. Civ. P. 56 is appropriate where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986); Anderson v. Liberty Lobby, Inc, 477 U.S. 242, 250 (1986); Kendall v. Watkins, 998 F.2d 848, 850 (10th Cir. 1993). The plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. Celotex, 477 U.S. at 317. "Summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed 'to secure the just, speedy and inexpensive determination of every action.'" Id. at 327.

"When the moving party has carried its burden under Rule 56(c), its opponent must do more than simply show that there is some metaphysical doubt as to the material facts. . . . Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no 'genuine issue for trial.'" Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586-87 (1986) (citations omitted). "The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the [trier of fact] could reasonably find for the plaintiff." Anderson, 477 U.S. at 252. In essence, the inquiry for the Court is "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." Id. at 250. In its review, the Court construes the record in the light most favorable to the party opposing summary judgment. Garratt v. Walker, 164 F.3d 1249, 1251 (10th Cir. 1998).

III.

Title VII prohibits discrimination by employers against employees in retaliation for opposing unlawful employment practices. It provides, in relevant part:

> It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment . . . because he has opposed any practice made unlawful by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

42 U.S.C. § 2000e-3(a). Plaintiffs assert that BOK terminated Woodend because he opposed what he reasonably believed to be unlawful discrimination against a subordinate female employee, Pellerin.

A prima facie case of retaliation is established under Title VII if the plaintiff shows that: (1) he engaged in protected opposition to discrimination; (2) he suffered an adverse employment action; and (3) there is a causal connection between the protected activity and the adverse employment action. E.g., Hertz v. Luzenac American, Inc., 370 F.3d 1014, 1015 (10th Cir. 2004); O'Neal v. Ferguson Constr. Co., 237 F.3d 1248, 1252 (10th Cir. 2001); Penry v. Fed. Home Loan Bank, 155 F.3d 1257, 123-64 (10th Cir. 1998). BOK's motion for summary judgment is directed primarily at the first and third elements of a prima facie case: BOK argues that Pellerin was not subjected to sexual harassment or a hostile work environment as those terms are understood in a legal sense and, thus, there was no Title VII discrimination for Woodend to oppose; BOK also argues that there is no causal connection between Woodend's termination and his alleged opposition to the alleged discrimination against Pellerin.

Based on the record, the Court seriously doubts whether Pellerin was subjected to Title VII discrimination. Pellerin admits that she was not subject to any "sexual harassment," but she

contends that she was subjected, nonetheless, to harassment due to her gender, and that she was forced to endure a "hostile work environment." Yet neither she, nor the human resources person to whom she reported, described her situation in terms which conclusively prove that she was subject to gender discrimination or a hostile work environment as prohibited by Title VII. As set forth in Penry,

> [f]or a hostile environment claim to survive a summary judgment motion, "a plaintiff must show that a rational jury could find that 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." Davis v. U.S. Postal Service, 142 F.3d 1334, 1341 (10th Cir.1998) (internal quotation marks and citations omitted). The plaintiff must produce evidence that she was the object of harassment because of her gender. Conduct that is overtly sexual may be presumed to be because of the victim's gender; however, actionable conduct is not limited to behavior motivated by sexual desire. See Oncale v. Sundowner Offshore Services, Inc., 523 U.S. 75, ----, 118 S. Ct. 998, 1002, 140 L.Ed.2d 201 (1998); Hicks v. Gates Rubber Co., 833 F.2d 1406, 1415 (10th Cir. 1987). While the plaintiff must make a showing that the environment was both objectively and subjectively hostile, she need not demonstrate psychological harm, nor is she required to show that her work suffered as a result of the harassment. See Davis, 142 F.3d at 1341.

Penry, 155 F.3d at 1261.

Pellerin characterized the alleged gender harassment as constant backbiting, "stirring up trouble" out in the field, questioning Pellerin's personnel decisions, undermining her, discrediting her in the eyes of her subordinates, deliberately fabricating information to discredit her, and falsely claiming that (1) she was missing excessive amounts of work; (2) not participating in the "rollout" of the new bank program; and (3) not visiting her branch managers. She also complained about jokes and comments that she found offensive, such as those relating to blondes or to her being a blonde, as well as foul language. She specifically described the BAQ workplace as a "good old boy

network," and she claimed that Bradshaw himself set that tone. Even if these allegations were true, none definitively qualifies as "hostile work environment" evidence as outlined in the case law above.

Nonetheless, for purposes of Woodend's retaliation claim, the question is not whether Pellerin was subjected to gender discrimination, but whether Woodend had a reasonable good faith belief that she was, and whether Bradshaw thought she might have been. An informal complaint to a superior about potential discrimination constitutes protected activity or opposition, as contemplated by Title VII. E.g., Pastran v. K-mart Corp., 210 F.3d 1201, 1205 (10th Cir. 2000). The complaint need not be made by the person subjected to the potential discrimination, but can be made the person opposed to discrimination allegedly experienced by a co-worker. See Petersen v. Utah Dept. of Corrections, 301 F.3d 1182, 118-89 (10th Cir. 2004). Woodend claims that he told Bradshaw on two occasions that Pellerin could file a claim or lawsuit of gender discrimination or hostile work environment and, if she did so, he would support her. Bradshaw disputes that Wodend mentioned anything about supporting Pellerin, although he admits the subject of hostile work environment came up. To the extent that Woodend's statements to Bradshaw about possible discrimination experienced by Pellerin constitute a complaint, he engaged in protected opposition. Whether the statements constitute a complaint is a question of fact for the jury.

More importantly, the alleged complaints, if the jury were to believe that Woodend's statements constitute complaints, signify Woodend's belief that Pellerin might have been subject to a "hostile work environment." BAQ Human Resources Manager Luttrell testified that she warned Pellerin about the difficulties Pellerin might experience as a woman in a position of power at BAQ. Pellerin claims that she often complained to Luttrell about what Pellerin perceived was harassment due to her gender. Luttrell sent an email to Wagner stating that she understood her role in relation

to Pellerin was "to protect employees from a hostile work environment." She testified that she understands the phrase to refer to an unlawful act which violates one or more federal anti-discrimination laws. After Pellerin was terminated, Luttrell again characterized Pellerin's situation as a "hostile work environment."

Luttrell made these statements despite testifying that she had never perceived any gender bias by Anderson or Barela, and neither Anderson nor Barela had any documented problems with a woman who was Pellerin's predecessor. Nonetheless, the fact that Luttrell, as well as Woodend, characterized Pellerin's work environment as hostile lends credence to Woodend's argument that he had a reasonable good faith belief that she was subjected to gender discrimination. That Pellerin never filed suit is insignificant. "Action taken against an individual in anticipation of that person engaging in a protected opposition to discrimination is no less retaliatory than action taken after the fact; consequently, we hold that this form of preemptive retaliation falls within the scope of 42 U.S.C. § 2000e-3(a)." Sauers v. Salt Lake County, 1 F.3d 1122, 1128 (10th Cir. 1993).

Defendant has presented considerable evidence to challenge Woodend's good faith belief. For example, Woodend never mentioned any concerns about a hostile work environment for Pellerin when he sent an email to Bradshaw immediately after Pellerin was terminated. Nor did he mention any such concerns to Margaret Gayle, BOK Senior Human Resource Compliance Officer, who helped Woodend prepare a severance package for Pellerin. Further, prior to accepting employment with BOK, Woodend made a similar retaliation claim against his former employer, and settlement of that claim resulted in payments to Woodend that ended in September 2001, when Woodend first suggested that Pellerin could be in an allegedly hostile work environment. Yet, these allegations go to Woodend's credibility and the weight of Woodend's evidence supporting the reasonableness

of his belief. They raise a genuine issue of material fact; they do not warrant summary judgment.

Opposition activity is protected, for the purposes of a retaliation claim, "even when it is based on a mistaken good faith belief that Title VII has been violated," Love v. RE/MAX of America, Inc., 738 F.2d 383, 385 (10th Cir. 1984), unless the mistake is unreasonable. See Clark County Sch. Dist. v. Breeden, 532 U.S. 268, 269-71 (2001). In other words "[a] plaintiff need not convince the jury that his employer had actually discriminated against him; he need only show that when he engaged in protected opposition, he had a reasonable good-faith belief that the opposed behavior was discriminatory." Hertz, 370 F.3d at 1015-16 (10th Cir. 2004) (citing Crumpacker v. Kansas Dep't. of Human Resources, 338 F.3d 1163, 1172 (10th Cir. 2003)). The record taken as a whole raises a genuine issue of material fact as to whether Woodend engaged in protected opposition to discrimination.

Further, plaintiffs have shown that Woodend suffered an adverse employment action contemporaneous with or subsequent to his alleged opposition. It is not disputed that Woodend's position was eliminated. Thus, Woodend's employment was effectively terminated. Termination of an employee's employment constitutes adverse action. E.g. Anderson v. Coors Brewing Co., 181 F.3d 1171, 1178 (10th Cir. 1999). BOK denies Woodend's employment was terminated due to protected opposition, but that argument goes to the issue of whether BOK had a legitimate, nondiscriminatory justification for taking the disputed employment action -- an issue separately analyzed if the plaintiff establishes his prima facie case.

Finally, plaintiffs have met their prima facie third element, viz., that there is a causal connection between the protected activity and the adverse employment action. "A causal connection

may be shown by 'evidence of circumstances that justify an inference of retaliatory motive, such as protected conduct closely followed by adverse action.'" O'Neal, 237 F.3d at 1253 (quoting Burrus v. United Tel. of Kan., Inc., 683 F.2d 339, 343 (10th Cir. 1982)). However, the Supreme Court has emphasized that such temporal proximity between an employer's knowledge of protected activity and an adverse employment action must be "very close." Clark County Sch. Dist. v. Breeden, 532 U.S. 268, 273 (2001) (quoting O'Neal, 237 F.3d at 1253). The Tenth Circuit has held that a one and one-half month period between the protected activity and the adverse action is sufficient. Anderson, 181 F.3d at 1179. Yet, a three-month period between employee's single request for overtime pay and her termination was insufficient to establish causal connection for purposes of FLSA retaliation claim in Richmond v. ONEOK, Inc., 120 F.3d 205, 209 (10th Cir. 1997).

Woodend claims that he informed Bradshaw about discrimination against Pellerin twice: once when he returned from Albuquerque in October 2001, and again after Pellerin's termination on April 3, 2002. Woodend's employment terminated on May 7, 2002. Plaintiffs submit that the 34-day period between Pellerin's termination and Woodend's termination is sufficient to establish a causal connection. While the time period between the October 2001 "complaint" date and Woodend's termination in May 2002 would be insufficient, that Woodend allegedly complained to Bradshaw a second time, and was terminated approximately one month later, is sufficient to establish the requisite causal connection. That Woodend allegedly complained in October 2001, prior to the dates that Bradshaw allegedly began considering the elimination of Woodend's position, also counters BOK's argument that a causal connection cannot be established. Plaintiff has presented a prima facie case of retaliation, albeit without direct evidence.

Absent direct evidence of retaliation, a retaliation claim is analyzed according to the burden-shifting framework of McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-04 (1973). E.g., Stover v. Martinez, 382 F.3d 1064, 1070-71 (10th Cir. 2004). Under this framework, once an employee presents a prima facie case of retaliation, the burden shifts to the employer to articulate a legitimate, nondiscriminatory justification for taking the disputed employment action. Id. BOK argues that it eliminated Woodend's position for reasons unrelated to Pellerin's allegations of discrimination. Specifically, Bradshaw claims that the Cohen Brown process made Woodend's position redundant, and that having Woodend as an intermediary between him and the four regional managers "diluted" his effectiveness. Plaintiff may challenge Bradshaw's credibility, but BOK has articulated a legitimate, nondiscriminatory justification for eliminating Woodend's position and terminating his employment.

Under the McDonnell Douglas framework, the burden shifts back to the employee to show that the employer's proffered reason, if legitimate and nondiscriminatory, is a pretext for discrimination. Stover, 382 F.3d at 1071. "Plaintiffs typically show pretext by revealing such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable factfinder could rationally find them unworthy of credence." Jones v. Barnhart, 349 F.3d 1260, 1266 (10th Cir. 2003) (internal quotations and citations omitted). Summary judgment in favor of the employer is warranted only if the employee has "failed to produce any evidence from which a reasonable inference could be drawn that [the employer's] proffered reasons were pretextual." Id.

Initially, the fact that Woodend was terminated approximately a month after he allegedly told Bradshaw, for the second time, about alleged discrimination against Pellerin is a factor showing

pretext as well as the causal connection element of a prima facie case. Yet, close temporal proximity, though a factor in showing pretext, "is not alone sufficient to defeat summary judgment." Annett v. Univ. of Kansas, 371 F.3d 1233, 1240 (10th Cir. 2004) (citing Pastran v. K-Mart Corp., 210 F.3d 1201, 1206 (10th Cir. 2000)). Plaintiff argues, in addition, that BOK expended a great deal of money and effort to recruit Woodend as part of its plan to implement and reinforce the principles of the Cohen Brown program, and to eventually replace Bradshaw, only to fire its "champion" of the sales and service process 15 months after he accepted the position, and two years before the end of the Cohen Brown contract. Bradshaw did not document the reason for Woodend's position elimination, as required by BOK separation/termination policy. Nor did BOK secure a release from liability from Woodend in return for his severance package, as is BOK's normal practice.

Further, Bradshaw evaluated Woodend as a possible replacement candidate who had "the right tools" to perform Bradshaw's job, while evaluating the person he listed as his "immediate replacement candidate" as only "marginally acceptable." The evidence suggests that Bradshaw also contemplated a greater role for Woodend in BOK's 2003 budget process that would begin in the Fall of 2002. In February 2002, Bradshaw offered to nominate Woodend for a "ten-month experience" in an annual program known as "Leadership Tulsa." Finally, the fact that another person was hired to take on his duties eight or nine months after he left could be indicative of pretext. Of course, that person was hired after Bradshaw was given additional responsibilities for banks in Texas, and the person he hired to assume Woodend's duties assumed other responsibilities as well. Nonetheless, the cumulative effect of these facts or allegations leads the Court to find that there is sufficient evidence of pretext to raise a genuine issue of material fact.

IV.

IT IS THEREFORE ORDERED that the Defendant's Motion for Summary Judgment (Dkt. # 56) is hereby **DENIED.**

IT IS SO ORDERED this 18th day of January, 2005.

CLAIRE V. EAGAN
UNITED STATES DISTRICT JUDGE