

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

DEBORAH NAKANO,	:	
Plaintiff,	:	
	:	
-vs-	:	Civil No. 3:98cv1366 (PCD)
	:	
PETER DOSHI &	:	
SEARS ROEBUCK & CO.,	:	
Defendants.	:	

RULING ON PLAINTIFF’S MOTION TO STRIKE AND
DEFENDANT’S MOTION FOR SUMMARY JUDGMENT

Plaintiff, Deborah Nakano, moves to strike the affidavit of Peter Davis. Defendant¹, Sears Roebuck & Co. (“Sears”), moves for summary judgment on the remaining counts of the amended complaint, Counts One and Two. For the reasons set forth herein, plaintiff’s motion to strike is denied. Defendant’s motion for summary judgment is granted.

I. JURISDICTION

This court has subject matter jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1343.

II. BACKGROUND

Defendant is a retail corporation. Plaintiff entered the employ of defendant as a salesperson in March, 1988, in Sears Brand Central Department in the division specializing in vacuums and sewing machines. Peter Doshi also worked as a salesperson alongside plaintiff. In February, 1990, plaintiff voluntarily transferred to a division within the Sears Brand Central Department that sold televisions,

¹ Peter Doshi is no longer a defendant in this action. Subsequent references to “defendant” thus are to Sears, Roebuck and Co.

considering that division to be the “top department.” In February, 1996, plaintiff voluntarily transferred back to her original division. Plaintiff spoke with Doshi prior to transfer, who informed her that the sales in that division were good.

Defendant provides a handbook to new associates that contains a “strong and clear policy prohibiting all forms of sexual harassment in the workplace” and detailing grievance procedures for those who believe they are victims of harassment. Plaintiff denies having received such a handbook when she was a new associate or that such a handbook existed prior to the relevant dates of her complaint. Defendant also claims that it supplemented the handbook with a pamphlet detailing sexual harassment policies and procedures.

On or about March 29, 1997, plaintiff gave her supervisor, Philip Gentile, a letter addressed to Charles Smith, Director of Loss Prevention, describing several comments of a sexual nature allegedly made to her by Doshi since 1989. The letter also complained of Doshi’s style as a salesman, claiming that he stole sales, was “pushy,” and was scheduled for the best hours. Plaintiff stated that others disliked Doshi’s manipulative behavior and did not want to work with him. After reading the letter, Gentile told plaintiff that “Sears takes such matters seriously, and that Sears does not tolerate any form of sexual harassment.” Defendant claims that the letter was delivered to the Ethics Office on April 8, 1997.

On April 9, 1997, Linda Bussell, District Human Resources Manager, contacted plaintiff about her complaints, informing plaintiff that it was her job to investigate sexual harassment claims and that “Sears does not tolerate any form of sexual harassment.” Plaintiff informed Bussell that Doshi’s behavior of which she complained had stopped two weeks prior because the two had “stopped

speaking completely” and that Doshi had not engaged in conduct of a sexual nature since her complaint.

Peter Davis, Store Manager, interviewed eight Sears Brand Central sales associates. Davis questioned five employees identified by plaintiff as aware of Doshi’s harassing behavior. None corroborated plaintiff’s claims of sexual harassment. Davis also spoke to three other employees who purportedly worked in the vicinity of plaintiff’s station who similarly did not corroborate the allegations of harassment. Davis also spoke with Joe Glatt, Doshi’s former manager in Brand Central, who stated he had never witnessed Doshi engage in any conduct he would consider to be sexual harassment. Tom Sciacca, an associate of Doshi’s for several years, stated in a memorandum that he had also not observed such conduct by Doshi.

On April 15, 1997, Davis allegedly met with Doshi about the complaints in the letter. Davis allegedly restated defendant’s policy on sexual harassment and reminded Doshi that compliance was mandatory. Defendant offers as proof of this meeting a letter addressed to Doshi dated April 15, 1997 detailing the same. The letter is not signed by Doshi but is signed by Davis and signed by Gentile as witness. Doshi allegedly did not want to sign the letter and was not forced to do so. Doshi prepared and submitted a letter, dated April 19, 1997, in which he acknowledged an understanding of defendant’s policy on sexual harassment, stated that he did not believe he had violated the policy, but indicated he would apologize to the extent his comments had been misconstrued.

On April 22, 1997, plaintiff complained to Gentile and Davis of a “tense atmosphere” and that Doshi was stealing customers. Davis informed Bussell of plaintiff’s concerns. Plaintiff stated that a number of other employees, past and present, had complained for years of the same sales tactics. On

May 5, 1997, Bussell telephoned plaintiff after receiving the complaint. Plaintiff told Bussell that “the harassment stopped” and Doshi was not speaking to her. During the telephone conversation, Bussell repeatedly confirmed with plaintiff that “the sexual harassment has stopped.” On May 6, 1997, Bussell wrote plaintiff a memorandum as a follow-up to their telephone conversation confirming Bussell’s understanding that sexual conversation and contact had stopped and stating that plaintiff should contact Bussell, Davis or the ethics hotline should she have further concerns.

In 1997, two team meeting were held to address teamwork concerns in plaintiff and Doshi’s division. The first was conducted by Gentile, in which he stated that the existing situation could not continue and that emphasis needed to be placed on teamwork and customer service. The second was conducted at plaintiff’s request to address proper sales techniques.

On August 19, 1997, plaintiff filed a complaint with the Connecticut Commission on Human Rights and Opportunities (“CHRO”) alleging ongoing discrimination and sexual harassment. On December 2, 1997, the CHRO concluded its investigation, finding that the harassment had stopped and that the problems in plaintiff’s division were attributable to teamwork issues.

In February, 1998, Davis resigned as Store Manager and was replaced by Dave Yeager. Yeager testified that, after familiarizing himself with the store, he became aware of a morale problem in plaintiff’s division. To alleviate the morale problem, Yeager offered both Doshi and plaintiff transfers from the department, which both declined. In April, 1999, Gentile transferred to another store. Rather than have Gentile’s replacement address the problem in plaintiff’s division, Yeager transferred Doshi, plaintiff and a third employee to separate sales divisions. Yeager transferred plaintiff to her previous television sales department.

Company records of plaintiff's hours and wages reflect the following totals. In 1994, plaintiff worked 1,010 hours and earned \$10,250.63. In 1995, plaintiff worked 1,031 hours and earned \$11,526.17. In 1996, plaintiff worked 944 hours and earned \$13,072.83. In 1997, plaintiff worked 943 hours and earned \$14,506.51. In 1998, plaintiff worked 1,105 hours and earned \$18,144.63. In 1999, plaintiff worked 1,157 hours and earned \$20,133.20.

Plaintiff filed her amended complaint on November 12, 1999. In her eight count complaint, she alleged a violation of Title VII because of a hostile work environment (Count One), violation of Title VII's anti-retaliation provision (Count Two), violation of CONN. GEN. STAT. § 46a-60(a)(1) for hostile and abusive work environment (Count Three), violation of CONN. GEN. STAT. § 46a-60(a)(4) for retaliating against plaintiff after filing her complaint (Count Four), violation of CONN. GEN. STAT. § 46a-60(a)(5) against Doshi for aiding defendant's discriminatory conduct (Count Five), violation of CONN. GEN. STAT. § 31-49 for failure to provide an environment free of mental and emotional distress (Count Six), breach of an implied contract of reasonable conditions (Count Seven) and breach of implied covenant of good faith and fair dealing (Count Eight). Counts Three, Four and Five were dismissed on June 14, 2000. On December 28, 2000, defendant was granted judgment on the pleadings for Count Six. In her memorandum of law in opposition, plaintiff now withdraws Counts Seven and Eight.

III. RULING ON PLAINTIFF'S MOTION TO STRIKE AFFIDAVIT OF PETER DAVIS

Plaintiff argues that, pursuant to FED. R. CIV. P. 26 and FED. R. CIV. P. 37(c)(1), the motion to strike the affidavit of Davis should be granted because of defendant's failure to depose and offer plaintiff the opportunity to cross-examine Davis. Defendant responds that submission of Davis's affidavit is not an "ambush," as plaintiff was notified that Davis possessed potentially discoverable

material and opted not to depose him.

On March 29, 1999, in its objections and responses to plaintiff's first set of interrogatories, defendant listed Davis as a witness it believed to have information on the issues in the lawsuit. In doing so, defendant thereby complied with the disclosure requirements of FED. R. CIV. P. 26(a)(1). *See Ecoco, Inc. v. Universal Beauty Prods., Inc.*, No. 98 C 676, 1998 WL 887072, at *2 (N.D. Ill. Dec. 11, 1998) (denying a motion to strike under similar circumstances).

Plaintiff offers *Suber v. Pitney Bowes, Inc.*, No. 98 CIV. 2914 (HB), 1999 WL 102815 (S.D.N.Y. Feb. 26, 1999), as a basis for granting her motion to strike. *Suber* involved affidavits "in apparent violation of Rule 26," *id.* at *3 n.6, whereas the present case does not. The drastic remedy of exclusion of evidence, *see Outley v. New York*, 837 F.2d 587, 590-91 (2d Cir. 1988), is therefore not appropriate. The motion to strike the affidavit is denied.

IV. RULING ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT ON COUNTS ONE AND TWO

A. Standard of Review

A party moving for summary judgment must establish that there are no genuine issues of material fact in dispute and that he is entitled to judgment as a matter of law. FED. R. CIV. P. 56(c); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). In determining whether a genuine issue has been raised, all ambiguities must be resolved and all reasonable inferences be drawn against the moving party. *United States v. Diebold, Inc.*, 369 U.S. 654, 655, 82 S. Ct. 993, 8 L. Ed. 2d 176 (1962); *Quinn v. Syracuse Model Neighborhood Corp.*, 613 F.2d 438, 445 (2d Cir. 1980). The nonmovant cannot rest on the pleadings, *Anderson*, 477 U.S. at 256, but

must supplement the pleadings with affidavits, depositions and answers to interrogatories, *Celotex Corp. v. Catrett*, 477 U.S. 317, 324, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986).

B. Title VII Hostile Work Environment Claim (Count One)

Defendant argues that summary judgment is proper on Count One because defendant cannot be held liable for sexual harassment by a coworker when it provides reasonable complaint procedures, plaintiff utilized the procedures, and the harassment complained of stopped. Defendant further argues that many of plaintiff's allegations of sexual harassment are untimely and those that are timely do not establish the existence a hostile work environment. Plaintiff responds that the lack of evidence of an investigation into plaintiff's complaint, evidence of gender discrimination in terms and conditions of employment and failure to order Doshi to attend sexual harassment training render summary judgment inappropriate.

For plaintiff to prevail on a hostile work environment claim, she must satisfy two elements. First, "that the harassment was sufficiently severe or pervasive to alter the conditions of [her] employment and create an abusive working environment." *Fitzgerald v. Henderson*, 251 F.3d 345, 356 (2d Cir. 2001). A hostile work environment is not simply offensive; it is so "severe or pervasive" that, considering all the circumstances, a reasonable person would consider the environment hostile or abusive. *Id.* at 357 (factors include, inter alia, "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" and "effect on the employee's psychological well-being"). A hostile work environment claim involves both a subjective and an objective measurement. *Leibovitz v. New York City Transit Auth.*, 252 F.3d 179, 188 (2d Cir.

2001). The plaintiff must first establish that “she personally considered the environment hostile,” *id.*, and next “that the environment rose to some objective level of hostility,” *id.* Second, a plaintiff “must show a specific basis for imputing the hostile work environment to the employer.” *Fitzgerald*, 251 F.3d at 357. Although an employer is presumed absolutely liable when the harasser is the victim’s supervisor, *Richardson v. New York State Dep’t of Corr. Serv.*, 180 F.3d 426, 441 (2d Cir. 1999), an employer will be liable when the harasser is a coworker only when the employer either did not provide “a reasonable avenue for complaint” or “knew of the harassment but did nothing about it.” *Id.* (negligence standard applies to coworker harassment). Plaintiff’s claim fails on the second element thus no statement need be made as to the merits of the first element.

The alleged harasser is Doshi, a coworker of plaintiff. Defendant is therefore liable only if complaint procedures were unreasonable or if it took no action to address sexual harassment of which it was aware. *See id.* There is no dispute that the sexual harassment ceased when plaintiff filed her letter complaint. There is also no dispute that plaintiff was contacted by several supervisors within eleven days of her complaint, that an inquiry was conducted into the complaint that consisted of interviews of a number of coworkers in the same department as plaintiff, and that defendant spoke with Doshi within seventeen days of the date of the complaint. Considering the totality of the circumstances, including the complaint, defendant’s response to the complaint, the investigation of the complaint, the remedial measures taken and the result of the remedial measures, no reasonable jury could conclude that the actions taken by defendant in response to plaintiff’s complaint were unreasonable or that defendant failed to act on plaintiff’s complaint. *See, e.g., Schiraldi v. AMPCO Sys. Parking*, 9 F. Supp. 2d 213, 221 (W.D.N.Y. 1998) (summary judgment proper when remedial measures cured

problem following counseling of harasser); *see also Howley v. Stratford*, 217 F.3d 141, 154 (2d Cir. 2000) (summary judgment improper when court did not consider totality of circumstances, sexual harassment continued after complaint and harassment impacted plaintiff's ability to work); *Hirase-Doi v. U.S. W. Communications, Inc.*, 61 F.3d 777, 786 (10th Cir. 1995) (summary judgment improper when violations continue after a series of complaints); *Morf v. Turner Bellows, Inc.*, 136 F. Supp. 2d 147, 153 (W.D.N.Y. 2001) (summary judgment improper when plaintiff complained to a number of potential supervisors for a length of time prior to employer's action on complaint); *Dobrich v. General Dynamics Corp., Elec. Boat Div.*, 40 F. Supp. 2d 90, 100-01 (D. Conn. 1999) (same). Summary judgment is therefore granted on Count One.²

C. Title VII Retaliation Claim (Count Two)

Defendant argues that summary judgment should be granted on Count Two because plaintiff's claims are time-barred as not presented in her CHRO complaint, because plaintiff cannot demonstrate an adverse action following her complaint and plaintiff's claims of Doshi "stealing sales" occurred before and after the complaint and thus cannot be considered retaliation for the complaint. Plaintiff responds that she has adduced sufficient evidence to establish genuine issues of material fact as to the retaliation claim.

² Plaintiff alleges that defendant knew of Doshi sexually harassing other employees and customers as early as 1984, three years before plaintiff first entered defendant's employ, and did not act to stop him. It is not apparent how these allegations bear on defendant's management of plaintiff's claim. *See Leibovitz*, 252 F.3d at 182 (claim resting on emotional trauma allegedly suffered due to belief that "other women in other parts of her workplace were harassed and that the defendant was not vigorously investigating those complaints" not cognizable under Title VII). Plaintiff cites to no legal authority standing for the proposition that failure to ameliorate sexual harassment in others is weighed in considerations involving the efficacy of measures taken in response to plaintiff's complaint.

Defendant first argues that plaintiff's claim of retaliation was not included in her complaint before the CHRO and is not reasonably related to her claim of discrimination, thus it is barred for failure to exhaust administrative remedies. *See Butts v. New York Dep't of Hous. Pres. & Dev.*, 990 F.2d 1397, 1401 (2d Cir.1993). It has been "held repeatedly that a complaint alleging employer retaliation against an employee who has opposed discrimination may be considered 'reasonably related' to allegations already raised with the EEOC." *Malarkey v. Texaco, Inc.*, 983 F.2d 1204, 1208 (2d Cir. 1993). The "reasonably related" rule has been construed broadly to afford redress "for most retaliatory acts arising subsequent to an EEOC filing." *Id.* at 1209. Plaintiff's claim is therefore not barred for failure to exhaust administrative remedies.

Having established subject matter jurisdiction over plaintiff's claim, it is now proper to address the merits of plaintiff's claim of retaliation. Title VII prohibits an employer from retaliating against an employee for complaints of discrimination. 42 U.S.C. § 2000e-3(a). A plaintiff may defeat a motion for summary judgment on a claim of retaliation by establishing a prima facie case of retaliation, which includes (1) employee's participation in a protected opposition or activity under Title VII; (2) employer's awareness of the participation; (3) employer's adverse action against the employee; and (4) a causal connection between the protected activity and the adverse action. *Cifra v. G.E. Co.*, 252 F.3d 205, 216 (2d Cir. 2001). If the employee establishes a prima facie case of retaliation, the employer may then offer "a legitimate, nonretaliatory reason for the challenged employment decision." *Id.* If the employer offers such a reason, the employee must then provide evidence that "would be sufficient to permit a rational factfinder to conclude that the employer's explanation is merely a pretext for impermissible retaliation." *Id.*

Plaintiff cites, as retaliatory measures, coworkers, including Doshi, whispering and pointing at her, Doshi's use of aggressive sales tactics, management openly discussing her complaint while forbidding her from doing so, and a modification of her hours to a less desirable schedule through Doshi's influence. Furthermore, plaintiff alleges that management has isolated her since she filed the complaint, has not done the same to Doshi and has solicited negative comments from customers regarding plaintiff and placed the comments in her file while not placing similar comments in Doshi's file.³

It is not apparent how plaintiff's claims of negative treatment by coworkers implicates retaliatory action by defendant. Plaintiff does not allege that defendant ordered or encouraged the conduct of her coworkers. Plaintiff alleges that Doshi had the ability to influence her scheduled hours but makes it clear that he was no more than a fellow employee.⁴ These allegations against coworkers are not actionable under Title VII unless some connection to the defendant is first established. *See Torres v. Pisano*, 116 F.3d 625, 637 (2d Cir.), *cert. denied*, 522 U.S. 997, 118 S. Ct. 563, 139 L. Ed. 2d 404 (1997) (employer's liability under Title VII is limited to actions of "management-level employees," not general employees). Nor does Title VII prohibit the failures of plaintiff's supervisors

³ It is unclear how plaintiff or her coworkers would be in a position to render opinions on the contents of the personnel files of others. "Rule 56 of the Federal Rules of Civil Procedure provides that an affidavit submitted in opposition to summary judgment shall be made on personal knowledge, [and] shall set forth such facts as would be admissible in evidence." *Weinstock v. Columbia University*, 224 F.3d 33, 44 (2d Cir. 2000). "Conclusory assertions in affidavits are generally insufficient to resolve factual disputes that would otherwise preclude summary judgment." *Allen v. Coughlin*, 64 F.3d 77, 80 (2d Cir. 1995).

⁴ Plaintiff's statement that her hours were unfavorable and caused her to work more hours is not reflected in her undisputed salary information. A review of her hourly average salary reflects a steady increase over time, so while it is true that the hours worked figure increases in recent years, she receives more compensation for the time on an hourly basis.

to make her feel welcome after her complaint is made, so long as her employer's conduct does not become actively hostile toward her. Title VII is not "a general civility code." *Bickerstaff v. Vassar Coll.*, 196 F.3d 435, 452 (2d Cir. 1999), *cert. denied*, 530 U.S. 1242, 120 S. Ct. 2688, 147 L. Ed. 2d 960 (2000).

The burden of establishing a prima facie case of retaliation is, however, de minimis. *Richardson*, 180 F.3d at 444. The circumstances surrounding plaintiff's transfer to a department other than her chosen department suffices to establish a genuine issue as to an adverse employment action taken by her employer. Similarly, there is no set time requirement between complaint and adverse action required to establish a genuine issue as to the causal connection element. *See Adeniji v. Administration for Children Servs., NYC*, 43 F. Supp. 2d 407, 433-34 (S.D.N.Y.), *aff'd*, 201 F.3d 430 (2d Cir. 1999) (providing survey of cases with varying time periods and results illustrative of fact-intensive inquiry). Plaintiff has adduced sufficient support in opposition to defendant's motion of the sustained negative climate after her complaint and her subsequent transfer to establish a genuine issue as to whether the adverse action is causally linked to her complaint. *See Cifra*, 252 F.3d at 216-17 (temporal proximity is only one manner in which causal link may be established).

By establishing a prima facie case of retaliation, plaintiff shifts the burden to defendant to articulate some legitimate, nondiscriminatory reason for the action. *Farias v. Instructional Sys., Inc.*, 259 F.3d 91, 98 (2d Cir. 2001). Defendant need not prove that the articulated reason actually motivated its decision. *Id.* Defendant states as its justification for transferring plaintiff, Doshi and a third coworker its inability to remedy the personal differences in the department. It is undisputed that the personalities in the department clashed, and it is further undisputed that, after two teamwork-building

seminars, defendant could not resolve the issues in the department. Defendant thus transferred all the personalities in conflict to separate departments, allowing none of the three to remain. Defendant's justification for the transfer satisfies its burden, thus it is "entitled to summary judgment . . . unless the plaintiff can point to evidence that reasonably supports a finding of prohibited discrimination." *Id.*

Plaintiff must therefore establish that the decision to transfer her was motivated by discriminatory retaliation. *Raniola v. Bratton*, 243 F.3d 610, 625 (2d Cir. 2001). The retaliatory motive must be a substantial or motivating factor in the decision. *Id.* A plaintiff may establish the retaliatory motive "(1) indirectly, by showing that the protected activity was followed closely by discriminatory treatment, or through other circumstantial evidence such as disparate treatment of fellow employees who engaged in similar conduct; or (2) directly, through evidence of retaliatory animus directed against the plaintiff by defendant." *Gordon v. New York City Bd. of Educ.*, 232 F.3d 111, 117 (2d Cir. 2000). Plaintiff has not established a genuine issue of material fact of retaliatory motive through either the indirect or the direct approach.

Plaintiff has not adduced sufficient evidence to establish defendant's retaliatory motive via the indirect route. Her transfer did not closely follow her sexual harassment complaint, separated by a delay of approximately two years. Nor has plaintiff established disparate treatment *by defendant* when compared to others similarly situated. Her allegations as to Doshi's behavior around women, as stated above, may not be attributed to defendant without proof of some connection between the two.

Direct proof of defendant's retaliatory motive is similarly lacking. Plaintiff offers no evidence, direct or circumstantial, that would convince a reasonable jury that her transfer was pretextual. A motion for summary judgment may not be defeated by simply alleging the requisite intent and resting on

the pleadings. *See Meiri v. Dacon*, 759 F.2d 989, 998 (2d Cir.), *cert. denied*, 474 U.S. 829, 106 S. Ct. 91, 88 L. Ed. 2d 74 (1985). There is nothing in her memorandum in opposition that creates a genuine issue of material fact as to defendant's motivation to retaliate against her. "[T]he inquiry into whether the plaintiff's sex . . . caused the conduct at issue often requires an assessment of individuals' motivations and state of mind, matters that call for a 'sparing' use of the summary judgment device because of juries' special advantages over judges in this area. . . . Nonetheless, an employment discrimination plaintiff faced with a properly supported summary judgment motion must 'do more than simply show that there is some metaphysical doubt as to the material facts' . . . She must come forth with evidence sufficient to allow a reasonable jury to find in her favor." *Brown v. Henderson*, 257 F.3d 246, 251-52 (2d Cir. 2001). Plaintiff has failed to create a genuine issue as to defendant's motivation in transferring her thus summary judgment is granted on her retaliation claim.

V. CONCLUSION

Plaintiff's motion to strike the affidavit of Peter Davis (No. 151) is **denied**. Defendant's motion for summary judgment (No. 140) is **granted**. The Clerk shall close the file.

SO ORDERED.

Dated at New Haven, Connecticut, September __, 2001.

Peter C. Dorsey
United States District Judge