

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

REBECCA B. McKNATT,)
)
 Plaintiff,)
)
 v.) Civ. No. 02-1659-SLR
)
STATE OF DELAWARE DEPARTMENT)
OF PUBLIC SAFETY,)
)
 Defendant.)

MEMORANDUM ORDER

I. INTRODUCTION

On December 3, 2002, plaintiff filed suit pursuant to Title VII of the Civil Rights Act, 42 U.S.C. § 2000 et seq., alleging claims of employment discrimination on the basis of sex, hostile work environment and retaliation. (D.I. 1) Presently before the court is defendant's motion for summary judgment. (D.I. 23) For the reasons stated below, the court finds there are genuine issues of material fact which preclude summary judgment.

II. BACKGROUND

Plaintiff was hired as a Recruit Trooper with the Delaware State Police on July 14, 1989. She presently holds the position of Senior Corporal and is assigned to the Drug Awareness Resistance Education unit.

The events giving rise to plaintiff's Title VII claims

occurred during her assignment to Troop 4 and under the command of Troop Captain Jay Lewis. Plaintiff contends that during a period from September 1995 through September 2000, she was subjected to sexual harassment and discrimination. She characterizes the work environment during her assignment to Troop 4 as hostile to women and cites examples of abusive language and other offensive conduct. She alleges that the harassment grew progressively worse and eventually reached an intolerable level, culminating in a discriminatory decision by her troop captain to deny her a promotion to the rank of senior corporal in July 2000. (D.I. 25, ex. 1)

Promotion to the position of senior corporal requires, among other things, the sponsorship of the supervising sergeant and troop captain. Plaintiff was determined to not be eligible for promotion because she did not have the support of her supervising sergeant and troop captain. Plaintiff's supervising sergeant initially supported plaintiff's promotion, but was instructed that the decision to sponsor was in the troop captain's discretion. (D.I. 24, ex. 4)

On July 10, 2000, plaintiff learned that her troop captain did not support her promotion. Plaintiff appealed that decision and met with the troop captain and two other supervisors in the unit. Allegedly, the troop captain verbally abused plaintiff during that meeting and refused to reverse his decision to not

sponsor her promotion. Plaintiff then appealed the decision. (D.I. 25, ex. A) On October 20, 2000, a State Police review committee sustained the decision of plaintiff's supervisors to not support her promotion and denied her appeal thereof. (D.I. 24, ex. 4)

Plaintiff filed an internal complaint of sexual harassment with the State Police Internal Affairs Department on July 17, 2000. Her claims were investigated and, on August 31, 2000, the Internal Affairs investigation concluded that there was not evidence to substantiate plaintiff's claims of harassment. (D.I. 24, ex. A) Plaintiff received this report on September 6, 2000.

On September 14, the State Police career development officer and the deputy director of human resources informed plaintiff that she was being ordered to attend a psychiatric evaluation to determine her fitness for duty. The decision to order the evaluation was based upon reports that she was allegedly under significant stress. (D.I. 24, ex. 4; Id., ex. 7) Plaintiff was ordered to surrender her weapons, badge, vehicle and identification. Plaintiff underwent the required evaluation on Friday, September 15, 2000. She received a favorable evaluation and returned to duty on Monday, September 17, 2000. (D.I. 25, ex. 1)

On Wednesday, September 20, 2000, plaintiff was contacted by her shift sergeant who offered her a transfer to Troop 3, which

she accepted. The transfer was based upon a recommendation from the psychiatric evaluation. Plaintiff accepted the transfer. Plaintiff received favorable evaluations while at Troop 3 and in June 2001 received a promotion to senior corporal. (Id.)

Plaintiff filed a complaint with the Delaware Department of Labor alleging sexual harassment, discrimination, hostile work environment and retaliation. This complaint was filed on October 16, 2000. The Department of Labor issued a favorable report from its investigation of plaintiff's claims on June 29, 2001, which supported plaintiff's claim of sexual harassment and retaliation. (D.I. 25 , ex. C)

Plaintiff also filed a complaint with the United States Equal Employment Opportunity Commission ("EEOC"). The EEOC issued a favorable determination on April 4, 2002, finding her claims of sexual harassment and retaliation were substantiated by evidence. (Id., ex. D)

III. STANDARD OF REVIEW

A court shall grant summary judgment only if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). The moving party bears the burden of proving that no genuine issue of material fact exists. See Matsushita Elec.

Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 n.10 (1986). “Facts that could alter the outcome are ‘material,’ and disputes are ‘genuine’ if evidence exists from which a rational person could conclude that the position of the person with the burden of proof on the disputed issue is correct.” Horowitz v. Fed. Kemper Life Assurance Co., 57 F.3d 300, 302 n.1 (3d Cir. 1995) (internal citations omitted). If the moving party has demonstrated an absence of material fact, the nonmoving party then “must come forward with ‘specific facts showing that there is a genuine issue for trial.’” Matsushita, 475 U.S. at 587 (quoting Fed. R. Civ. P. 56(e)). The court will “view the underlying facts and all reasonable inferences therefrom in the light most favorable to the party opposing the motion.” Pa. Coal Ass’n v. Babbitt, 63 F.3d 231, 236 (3d Cir. 1995). The mere existence of some evidence in support of the nonmoving party, however, will not be sufficient for denial of a motion for summary judgment; there must be enough evidence to enable a jury reasonably to find for the nonmoving party on that issue. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986). If the nonmoving party fails to make a sufficient showing on an essential element of its case with respect to which it has the burden of proof, the moving party is entitled to judgment as a matter of law. See Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). With respect to summary judgment in discrimination cases, the court’s role is “to

determine whether, upon reviewing all the facts and inferences to be drawn therefrom in the light most favorable to the plaintiff, there exists sufficient evidence to create a genuine issue of material fact as to whether the employer intentionally discriminated against the plaintiff.” Revis v. Slocomb Indus., 814 F. Supp. 1209, 1215 (D. Del. 1993) (quoting Hankins v. Temple Univ., 829 F.2d 437, 440 (3d Cir. 1987)).

IV. DISCUSSION

A. Title VII Discrimination Claim

Plaintiff contends that defendant unlawfully discriminated against her on the basis of sex with respect to the decision to not promote her in July 2000. Discrimination claims under Title VII are analyzed under the framework set forth by the United States Supreme Court in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). Plaintiff at bar must first establish a prima facie case of discrimination by proving that: (1) she is a member of a protected class; (2) she is qualified for the promotion; (3) she suffered an adverse employment action; and (4) either non-members of the protected class were treated more favorably than the plaintiff, or the circumstances of the plaintiff’s termination give rise to an inference of discrimination. Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 142 (2000). Once a prima facie case is established, the burden of production shifts to the defendant (the former

employer) to produce a legitimate nondiscriminatory reason for the adverse employment action taken against the plaintiff. Id. Because the burden of persuasion does not shift at this stage, the defendant's legitimate nondiscriminatory reason is not evaluated insofar as its credibility is concerned. Id.

Once a legitimate nondiscriminatory reason is proffered, the presumption of discrimination created by the prima facie case "disappear[s]." Id. At this point, the plaintiff must proffer sufficient evidence for the factfinder to conclude by a preponderance of the evidence that the legitimate nondiscriminatory reasons offered by the defendant were not true, but were a pretext for unlawful discrimination. "That is, the plaintiff may attempt to establish that he was the victim of intentional discrimination 'by showing that the employer's proffered explanation is unworthy of credence.'" Id. In this regard, the prima facie case and the inferences drawn therefrom may be considered at the pretext stage, as the Supreme Court has explained that "it is permissible for the trier of fact to infer the ultimate fact of discrimination from the falsity of the employer's explanation." Id. at 147. Nevertheless, the ultimate question remains whether the employer intentionally discriminated. "[P]roof that 'the employer's proffered reason is unpersuasive, or even obviously contrived, does not necessarily establish that the plaintiff's proffered reason . . . is

correct.'" Id. at 147 (quoting St. Mary's Honor Center v. Hicks, 509 U.S. 502, 524 (1993)). "In other words, '[i]t is not enough . . . to **dis**believe the employer; the factfinder must **believe** the plaintiff's explanation of intentional discrimination.'" Id. (quoting St. Mary's Honor Center v. Hicks, 509 U.S. at 519).

Defendant contends that plaintiff has failed to establish a prima facie case of discrimination because she has not established eligibility for promotion in July 2000. Defendant's argument is not credible, as the sole requirement plaintiff did not satisfy was the support of her troop captain, the very person who plaintiff contends engaged in acts of overt sexual harassment. Where the basis for ineligibility is a subjective criterion, the court must exercise greater scrutiny in its review of whether plaintiff has established a prima facie case of discrimination. See generally Roberts v. Gadsden Memorial Hosp., 835 F.2d 793, 798 (11th Cir. 1988); Atonio v. Wards Cove Packing Co., Inc., 810 F.2d 1477, 1481 (9th Cir. 1987). In this case, the supervisor is alleged to be directly responsible for permitting and causing sexual harassment of plaintiff. While defendant supports its motion with several affidavits, the court notes that not a single affidavit is from a person with personal knowledge of the facts surrounding the troop captain's conduct. The inference of discrimination is supported by the fact that plaintiff was allegedly the only member of her academy class to

not be promoted in July 2000. Defendant contends that disciplinary incidents in plaintiff's employment file support her troop captain's decision; this, however, is not the only reasonable inference from these disciplinary incidents. Some of the incidents for which plaintiff was reprimanded or disciplined suggest to the court that plaintiff was subjected to disparate treatment.¹ The most serious of the disciplinary issues involved a false arrest on February 7, 1997. Plaintiff was subsequently suspended for five days in May 1997. Nevertheless, plaintiff was promoted in July 1997 to the rank of corporal grade one. It's remarkable, therefore, that defendant now contends that the February 7, 1997 incident was a consideration in the July 2000 promotion decision. Based upon the evidence in the record that plaintiff's troop captain expressed overt bias against women in the police force and the apparent disparity between plaintiff's conduct and discipline she received, the court finds that there is a genuine issue of material fact as to whether defendant's failure to promote plaintiff was a result of sexual discrimination.

¹For example, plaintiff was reprimanded for the use of vulgar language while off duty and at her home. (D.I 24, ex. 4 at ¶ 13) Plaintiff was also reprimanded for giving a speeding ticket to an SCI van transporting prisoners to their court appearances. The SCI van was moving at 77 mph in a 55 mph zone. Apparently this reprimand was because ticketing the correctional facility van caused inter-agency difficulties. (Id. at ¶ 22)

B. Title VII Retaliation Claim

To establish a prima facie case of retaliation under Title VII, a plaintiff must establish that: (1) she engaged in protected activity; (2) defendant took adverse employment action against her; and (3) a causal link exists between the adverse employment action taken by defendant and the protected activity engaged in by plaintiff. 42 U.S.C. § 2000e-3 (2004); Kachmar v. SunGard Data Systems, Inc., 109 F.3d 173, 177 (3d Cir. 1997).

Plaintiff alleges that after filing complaints with the State Police Internal Affairs Department, she was subjected to retaliatory adverse employment action. Plaintiff alleges three separate adverse employment actions: (1) she was required to undergo a psychological examination to determine her fitness for duty; (2) her request to be transferred to the Executive Protection Unit was denied; and (3) she was denied a transfer request to the School Resource Center. Whether a particular action "constitutes retaliation depends on what a person in the plaintiff's position would reasonably understand." Dilenno v. Goodwill Industries of Mid-Eastern Pennsylvania, 162 F.3d 235, 236 (3d Cir. 1998).

Defendant contends that the psychological examination does not constitute an adverse employment action. While, in some circumstances, a medical or psychological examination is permissible, the circumstances giving rise to the mandatory

psychological exam in this case suggest that defendant's motivations were improper. Further, the affidavits filed in support of the defendant's motion in this regard contain rank hearsay insufficient to support defendant's explanation for the employment action.² Consequently, the court finds a genuine issue of material fact exists as to whether the employment action was adverse and whether it was based upon impermissible motives.

Defendant contends that the denial of plaintiff's request for a transfer to the Executive Protection Unit does not constitute an adverse employment action because then Governor-elect Ruth Ann Minner had final decision on the employment decision. Plaintiff applied for the transfer on November 15, 2000. Following the submission of her application, she alleges that the Governor-elect called her in connection with the transfer, during which time plaintiff's harassment allegations were discussed. (D.I. 25, ex. 1 at ¶ 43) Plaintiff has alleged facts which, if true, demonstrate that the Governor-elect had specific knowledge of plaintiff's complaint and that it was a basis for her decision. Consequently, the court finds there is a genuine issue of material fact as to whether the denial of plaintiff's application for transfer to the Executive Protection Unit was the result of retaliation for engaging in a protected

²The court notes that there are no affidavits or depositions filed by any individual with personal knowledge of plaintiff's conduct.

activity.

Finally, plaintiff alleges retaliation for engaging in protected activity resulted in the denial of her transfer to a School Resource Officer position. Plaintiff applied for a transfer on June 22, 2002, and was denied the transfer on August 19, 2002. Defendant contends that this employment action is too remote in time from when plaintiff engaged in protected activity for a causal link to be present. However, plaintiff applied for and was denied the position less than three months after receiving a favorable determination from the EEOC on April 5, 2002. A reasonable inference may be drawn, particularly in light of all the circumstances, that there is a nexus between plaintiff's receipt of a favorable EEOC determination and defendant's denial of her transfer request. Consequently, the court finds that there is a genuine issue of material fact as to whether defendant's failure to grant plaintiff's transfer was related to plaintiff's engagement in protected activities.

C. Title VII Hostile Work Environment Claim

To state a Title VII claim premised on a hostile work environment, plaintiff must demonstrate: (1) she suffered intentional discrimination because of her race or sex; (2) the discrimination was pervasive and regular; (3) the discrimination detrimentally affected plaintiff; (4) the discrimination would detrimentally affect a reasonable woman in that position; and (5)

the defendant is liable under a theory of respondeat superior. See Andrews v. City of Philadelphia, 895 F.2d 1469, 1482-83 (3d Cir. 1990). A prima facie showing, therefore, contains both a subjective standard (that plaintiff was in fact affected) and an objective standard (that a reasonable woman similarly situated would be affected). Id.

Defendant contends that plaintiff fails to establish a prima facie case with respect to whether the discrimination was pervasive and regular and detrimentally affected plaintiff. The subjective standard requires proof that the alleged conduct actually affected the particular plaintiff. Andrews v. City of Philadelphia, 895 F.2d 1469, 1482. This is not, however, an inquiry into the extent, if any, of plaintiff's psychological harm. See Harris v. Forklift Systems, Inc., 510 U.S. 17, 22 (1993). "So long as the environment would reasonably be perceived, and is perceived, as hostile or abusive ... there is no need for it also to be psychologically injurious." Id. (citation omitted).

Plaintiff alleges that her troop captain regularly demeaned her in the workplace, both privately and in the presence of co-workers. Some of these comments may be mere epithets and crass banter which, if viewed in isolation, would not amount to actionable conduct. When taken in context of the totality of the circumstances, however, they suggest that plaintiff's work

environment was hostile. By way of example, the troop captain allegedly declared on more than one occasion “[expletive] women in police work, what the [expletive] were they thinking?”

Although a single off color comment generally will not rise to the level of a hostile environment, the record does not suggest that Captain Lewis’s behavior was isolated. “Harassment is pervasive when ‘incidents of harassment occur either in concert or with regularity.’” Andrews, 895 F.2d at 1184 (quoting Lopez v. S.B. Thomas, Inc., 831 F.2d 1184, 1189 (2d Cir. 1987)). The court finds that plaintiff has sufficiently demonstrated evidence to support a claim of hostile work environment.

IV. CONCLUSION

At Wilmington this 23rd day of June, 2004, having reviewed defendant’s motion for summary judgment and concluding that genuine issues of material fact exist;

IT IS ORDERED that defendant’s motion for summary judgment is denied. (D.I. 23)

IT IS FURTHER ORDERED that plaintiff’s motion to strike defendant’s reply brief is **denied**. (D.I. 27)

Sue L. Robinson
United States District Judge