IP 00-1439-C T/K Matheny v. Reid Hospital
Judge John D. Tinder Signed on 3/12/02

NOT INTENDED FOR PUBLICATION IN PRINT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

MATHENY, SHENNONDOAH,	)	
	)	
Plaintiff,	)	
vs.	)	
	)	
REID HOSPITAL & HEALTH CARE SERVICES INC.,	)	CAUSE NO. IP00-1439-C-T/?
	)	
	)	
Defendant.	)	

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SOUTHERN DISTRICT OF INDIANA
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SHENNONDOAH MATHENY,	)	
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Plaintiff,	)	
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vs.	)	IP 00-1439-C-T/K
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REID HOSPITAL & HEALTH CARE SERVICES, INC.,	)	
	)	
	)	
Defendant.	)	

Entry on Defendant's Summary Judgment Motion[1]

Plaintiff, Shennondoah Matheny, sued her former employer, Defendant, Reid Hospital & Health Care Services, Inc. ("Reid"), alleging claims for sexual harassment, hostile work environment and retaliation under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e *et seq.*, and claims under the Americans with Disabilities Act and Family Medical Leave Act, as well as a state law claim for negligent retention. Defendant moved for summary judgment. The court rules as follows.

I. Summary Judgment Standard

[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 in this Entry to be sufficiently novel or instructive to justify commercial publication or the subsequent citation of it in other proceedings.

Summary judgment should be granted if "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); *see Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). In determining whether there is a genuine issue of material fact, the court views the record and draws all reasonable inferences in the light most favorable to the nonmovant. *Alexander v. Wis. Dep't Health & Human Servs.*, 263 F.3d 673, 680 (7th Cir. 2001); *Hostetler v. Quality Dining, Inc.*, 218 F.3d 798, 806 (7th Cir. 2000).

II. Background Facts[2]

Plaintiff, Shennondoah Matheny, was hired by Defendant, Reid, in December 1996, to work in its Medical Records Department. She had completed an employment application which provided, in relevant part, that she must "consent to a pre-employment physical examination which will include a drug profile and such future examinations as may be required" by Reid. Thus, she was aware that Reid could request, at any time, that she take a urinalysis drug profile ("UDP") if she was hired. Reid has a sexual harassment policy that it posted on a bulletin board in the cafeteria and disseminated to its employees on the Intranet, Reid's internal computer network on which it posts, among other things, its

[2] These facts are not disputed unless otherwise noted and are viewed in the light most favorable to Matheny, the nonmoving party. Additional facts may be set forth in the Discussion section as necessary. The parties had many disputes about the factual submissions, but the undiscussed factual disputes are not even remotely material to the issues raised by the summary judgment motion.

employment policies. Matheny accessed the policy on the Intranet and observed it in the cafeteria.

In November 1998, Matheny, then nineteen years of age, was working alone in the Department, when Dr. Ang, a physician with medical privileges at Reid who was of retirement age, placed both of his hands on her shoulders and began to massage her neck.[3] Matheny cringed and leaned forward and told him not to "ever touch [her] again" (Matheny Dep. at 85) and that she did not like it. (*Id.* at 101.) She reported this incident to her supervisor, Bessie Hogg, and the Director of Medical Records, Jennifer Ehlers. Matheny told Ehlers that she had told Ang not to touch her again, and "there was nothing that needed to be done." (Matheny Dep. at 85.) Ehlers asked Matheny if she wanted her to do anything, and Matheny responded, "no" (*id.* at 101, 141) and explained that she "handled it" (*id.* at 101.) So, Ehlers did not report or investigate Matheny's complaint about Ang.

In January 1999, Ang unlocked the doctor's entrance to the Department approximately 12 times and later reentered the Department. On some of these occasions, Matheny did not hear him enter the Department, but would catch him behind the files, watching her. She believes that Ang was spying on her.[4] On other occasions, though she

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[3] Whether he massaged her neck or shoulders makes no difference. The court accepts the version offered by Matheny in her response to Reid's motion.

[4] Reid disputes Matheny's testimony that Ang was spying on her, arguing that it is based on her speculation as to Ang's motives. Reid, however, does not dispute that Ang entered the Department and that Matheny would catch him hiding behind files, watching

did not catch Ang spying on her, she observed him leaving the Department after being unannounced. Matheny reported Ang's conduct to Hogg and informed Ehlers that Ang had been unlocking the doors. On January 26, 1999, Ehlers responded by forwarding a memo to Ang, instructing him not to unlock the doors to the Department due to security reasons. Ang complied and quit unlocking the doors.[5]

Ang visited the Department and stared at Matheny approximately 20-30 times over a nine-month period between November 1998 and July 1999. Matheny testified that Ang leered at her, looking her "up and down" and at "every inch of her body." (Matheny Dep. at 182.) On these occasions, Matheny would ask him if there was anything that he needed. Ang responded at times that he "just wanted to look at [her]" or that he liked to look at "beautiful women." (Matheny Dep. at 85-86, 88). He would stare at her for minutes at a time and stop only when she left her work area or someone else entered the Department. Matheny reported Ang's conduct to Ehlers once in March 1999. Ehlers took no action in response to Matheny's report.

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her. Drawing all reasonable inferences based on these facts in favor of Matheny, it is reasonable to believe that Ang was spying on her. Reid has not offered any legitimate purpose for Ang's presence or conduct while there. Further, Matheny's belief that Ang was spying on her also is material with respect to her subjective belief that she was being harassed by him.

[5] Matheny offers a Statement of Additional Material Fact ("AMF") 124 which asserts that after receiving Ehlers' memo of January 26, Ang continued to sexually harass Matheny. This assertion is a legal conclusion and therefore does not raise a genuine issue of material fact. In addition, even if this were not a legal conclusion, it is conclusory, which is another reason it fails to create a genuine issue. That Ang after receiving the Ehlers memo continued to engage in conduct which Matheny claims was sexually harassing is not disputed, however.

Matheny was off work on FMLA leave for the period of June 4-18, 1999. Sometime before July 20, 1999, Ang twice approached Matheny from behind, leaned his body over hers and pinned her into her chair by placing his arms around her and placing his hands on her desk,[6] positioning himself so close to her that she could feel him breathing down her neck. She reported these incidents to Hogg only after the second occurrence. The record does not reflect what action, if any, was taken by Hogg in response to Matheny's report.

On one occasion Ang approached Matheny from behind in the cafeteria and placed his hand on the middle part of her back and slid his hand down around her waist. She reacted by running away, even failing to pay for the soft drink she was purchasing in the cafeteria. Ang never touched Matheny's breasts, buttocks or vaginal area.

On July 20, 1999, Matheny told Ehlers she wanted to file a complaint against Ang for the following reasons: (1) he visited the Department too often, (2) he stood too close to her while looking over her shoulder, and (3) he stared at her. Ehlers requested her to submit a formal written complaint, identifying Ang's alleged actions and all corresponding dates. Matheny agreed to comply with this request.

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[6] This assertion comes from Reid's Statement of Material Fact ("SMF") 26, Matheny's Response to SMF 26 and Reid's reply thereto. There appears to be somewhat of a dispute over when these two incidents occurred, though when the cited portions of Matheny's deposition testimony, upon which both parties rely for substantiation, are reviewed, it is apparent that these incidents occurred "[r]ight before" Matheny complained about Ang and before August 1999. The court does not understand Matheny as claiming that Ang touched her body during these incidents; rather, she testified that he was touching the desk.

Soon after Matheny made this oral complaint, Ehlers reported it to Scott Rauch, Reid's Vice President of Human Resources. Because the complaint involved a doctor who was not a Reid employee but had privileges to practice at Reid, Rauch turned Matheny's complaint over to Reid's President, Barry MacDowell. MacDowell then conferred with Dr. Al Joseph, Chief of Medicine, about the complaint. Together, they concluded that an "Unusual Occurrence" should be filed by Reid on Matheny's behalf against Ang. Reid filed the "Unusual Occurrence" against Ang. Once this was filed, the medical staff, which consisted of doctors with privileges who were not Reid employees, became responsible for investigating and responding to the "Unusual Occurrence."

Matheny was absent from work from July 21 through July 27 and returned on July 28. On that day, Ang approached her in Reid's cafeteria, touched the middle part of her back with his hand and asked her how she was doing. Matheny did not report this incident to Reid until she submitted her written complaint concerning Ang to Ehlers on July 30, 1999.

Matheny's July 30 complaint stated that in November 1998 Ang rubbed her shoulders; in January 1999 Ang began unlocking the doors into the Department and walking through several times a night, and began staring and leering at her; in March 1999, Ang continued to stare at her and make her uncomfortable; and on July 28, 1999, Ang approached her in the cafeteria and touched her; and Ang attempted to touch her several times but she gave him a look that kept him away. When Ehlers reviewed the written complaint, she believed Matheny was "setting her up" because it alleged Ehlers had been

unresponsive to prior reports of harassment. Ehlers was upset by the allegations that she had failed to respond to Matheny's complaints.

Also on July 30, Matheny asked Hogg for a job reference because she was looking for another job because she did not want to continue working at the hospital with Dr. Ang and was not comfortable working at the hospital anymore. When she told her physician, Dr. Deitsch, about Dr. Ang's conduct, her perceived lack of a response from Reid, and the stress she was having because of it, he advised her to find another job.

On August 3, Ang came into the Department and asked Matheny why she was dressed so "conservatively." (Matheny Dep. at 171.) On August 4, Ang passed by Matheny as she was filing and told her that he "didn't want to miss coming through and seeing [her]." (Matheny Dep. at 172.) On another occasion, he commented to her that she looked like a gypsy.

On August 6, 1999, Joseph and Dr. Patrick Anderson, Chief of Staff, met with Ang and advised him of Matheny's charges against him. Ang denied the charges.

On August 7, 1999, Matheny was working in the Department and suffered a panic attack, thus becoming nervous, sweating and shaking. She called and reported to Ehlers that she "was not having a good night" and needed to leave the Department. Ehlers authorized her to leave and report to Reid's Emergency Room. Matheny went to the ER and then went home. She was off work on FMLA leave for the period of August 8 through 15, 1999.

On August 9, Matheny visited Dr. Deitsch and advised him that she could not report to work because of alleged sexual harassment in the work place. On August 10, she prepared and forwarded a letter to Reid's President, MacDowell to detail once again her allegations concerning Ang. Between August 9 and 12, Rauch attempted four times to contact Matheny at home regarding her allegations and the status of the investigation. She was aware that Rauch had left a message for her to return his calls, but she did not as she "didn't want to talk to them at all." (Matheny Dep. at 157.) Matheny called Rauch on one occasion, but neither reached him nor left him a message. Because he had not heard from her, Rauch sent her a letter on August 11, confirming his efforts to contact her and to request that she call him. Matheny did not call Rauch after receiving his letter.

On August 12, 1999, Anderson sent a letter to Ang in which he ordered Ang (1) not to enter the Department between the hours of 12:00 p.m. and 11:30 p.m. (Matheny worked the second shift), and (2) to totally refrain from any and all contact with Matheny. Anderson also advised Ang that his interaction with Reid's employees was to be "restricted to only appropriate, patient-focused, and necessary conversations and interactions." Ang was prohibited from having discussions with Reid's employees of a "non-professional, nonbusiness nature," regardless of whether such conversations were initiated by Ang or a Reid employee. (Anderson Aff., ¶¶ 10-11 & Ex. B.) Anderson also provided Ang with copies of Reid's sexual harassment policy and the medical staff bylaws, rules, and regulations relating to physician-employee interactions. Matheny had no further interactions or problems with Ang after August 12.

Matheny reported to work on August 16. Rauch met with her and her mother concerning her allegations against Ang and the status of the investigation. During the meeting, Matheny's mother asked that Matheny be transferred from the Department. Rauch made the decision not to transfer her based on, among other things, the fact that Reid could address her concerns about Ang more effectively in the Department than any other location in Reid. Matheny left work after the meeting.

On August 19, Matheny's coworker, Melissa Blevins reported to Hogg that Matheny had slurred speech on August 16. Blevins also reported that Matheny had shown her a bag of Valium[7] and Darvocet[8] that her grandfather had given her. Hogg reported her conversation with Blevins to Ehlers, who, in turn, advised Rauch of Blevins' report.

Rauch inquired of Ehlers and Hogg as to the relationship of Blevins and Matheny to make sure Blevins had no ulterior motives. Upon confirming that there was no animosity between Blevins and Matheny, Rauch decided to set up a meeting with Matheny when she came back from work.[9] Rauch and Blevins discussed that based upon Blevins's allegations, it would be appropriate to ask Matheny to do a UDP the next time she came

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[7] Valium is indicated for the management of anxiety disorders or the short-term relief of the symptoms of anxiety. Physician's Desk Reference 2814 (55th ed. 2001).

[8] Darvocet is indicated for the treatment of mild to moderate pain. Physician's Desk Reference 1709 (55th ed. 2001).

[9] This sentence is substantiated by page 105 of Rauch's deposition. Though both Rauch and Ehlers were to meet with Matheny, it remains undisputed that Rauch made the decision to ask Matheny to take a UDP.

into work. The decision to ask Matheny to take a UDP was made by Rauch.[10] Rauch and Ehlers agreed to meet with Matheny on August 24 at 4:00 p.m., and Rauch had arranged with the manager of Reid's occupational health to be available at that time to administer the UDP.

Matheny was absent from work on August 21 and 22. She returned on August 23 and worked her regularly scheduled hours without any mention of a drug test.

After Matheny reported to work on August 24, she became scared and started to cry because she believed that Ang was going to visit the Department. She was sitting on the floor in Hogg's office when Ehlers came in and saw her. Ehlers described Matheny as "very upset" and "shaky." (Ehlers Dep. at 73.) Ehlers told Matheny several times that she and Rauch wanted to meet with her. Matheny responded that she had to leave work and could not meet with them because she could not "handle it" (Ehlers Dep. at 73-74), and wanted to go home. Ehlers replied that "[w]e have to have a meeting." (Matheny Dep. at 203.) During this interaction with Ehlers, Matheny was shaking, crying, and her "whole insides just felt like mush." (Matheny Dep. at 204.) Ehlers testified that given Matheny's

[10] This assertion is substantiated by pages 115 and 149 of Rauch's deposition. He had contacted an attorney to determine the appropriate course of action to take. Matheny seems to suggest that both Ehlers and Rauch decided that she should take a UDP. The cited page from Ehlers' deposition, page 69, however, only establishes that Rauch and Ehlers discussed that it would be appropriate to ask Matheny to submit to a UDP. Ehlers does not testify that she had the authority to or decided that Matheny should take a UDP. Rauch specifically testified that Ehlers could not order a UDP. (Rauch Dep. at 115.) His testimony is unrebutted.

emotional state, the planned drug test could have been postponed until the next day and she could have gone home.[11]

Ehlers left to find Rauch and, thereafter, Hogg told Matheny she could not go home because "Jennifer [Ehlers] wants you to stay." (*Id.* at 204.) Ehlers returned with Rauch who advised Matheny that Reid had received a complaint from a coworker that she had observed Matheny with prescription drugs that she asserted belonged to her grandfather. Rauch requested at least two times that Matheny take a UDP, but she refused each time. Matheny knew that Reid could require her to submit to a UDP if it suspected her of using drugs and was aware that Reid could terminate her if she refused. Matheny yelled and screamed at Ehlers, accusing her of "doing this to [her]." (Matheny Dep. at 207.) Rauch made the decision to terminate Matheny's employment with Reid on August 24 based upon her refusal to take the UDP.

On another occasion, Rauch terminated Linda Ballenger, a Registered Nurse, because she refused to take a UDP. Ballenger had not filed any complaints of sexual harassment.

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[11] Reid disputes this statement to the extent it suggests that Ehlers could require Matheny to submit to a UDP. The court does not treat this statement as making such a suggestion. Rather, it is considered as reflecting Ehlers's perception of Matheny's emotional state at the time and as relevant with regards to Ehlers's failure to suggest to Rauch, who alone had the authority to request Matheny to submit to a UDP, to postpone the UDP to the next day.

This was not the first complaint that a female employee of Reid had made about Ang. In or about November 1995, Teresa Resetar, a Reid employee, reported to Reid that Ang had allegedly made miscellaneous inappropriate comments to her during a telephone conversation at work. Ang also allegedly winked at her on one occasion. Reid filed an Unusual Occurrence against Ang on Resetar's behalf. The medical staff investigated and, based on the results of the investigation, directed Ang to "[r]efrain from introducing non-business commentary that is openly offensive, potentially unwanted, or uninvited that may be construed to contain sexually offensive, innunendo, or other closely related subjects." (Barry MacDowell Aff. ¶ 7 & Ex. C.) The medical staff also provided Ang with a copy of its policy regarding interactions between Reid's employees and physicians.

In or about June 1998, Julie Spencer, a Registered Nurse, reported to Patient Care Coordinator, Jeanne Brummett, that Ang had allegedly touched her hair and ears and made comments about her bedroom hair, and stood too close to her. Brummett notified Rauch who instructed Brummett to direct Spencer to meet with Ang and to tell him to stop his conduct immediately. Spencer told Ang that she considered his conduct inappropriate and that he must stop engaging in such conduct immediately. Spencer reported no further problems with Ang.

Reid consistently renewed Ang's contract to practice medicine until he retired in approximately 2000 or 2001.

III. Discussion

Matheny sued Reid alleging a hostile work environment based on sexual harassment and retaliation under Title VII; failure to accommodate and discriminatory discharge under the ADA; a violation of her rights under the FMLA; and a supplemental claim for negligent retention. Reid moved for summary judgment on all claims. Matheny responded that she has sufficient evidence to raise a genuine issue of material fact as to hostile work environment, retaliatory discharge, and negligent retention. She has not opposed Reid's motion regarding the ADA or FMLA claims. Thus, the court finds that summary judgment should be granted Reid on those claims, and the discussion in this entry is limited to those claims as to which Reid maintains there is a genuine issue of material fact.

A. Hostile Work Environment

A plaintiff may prove a Title VII violation by establishing a hostile or abusive work environment based on gender. *See Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 67, (1986); *Patton v. Indianapolis Public Sch. Bd.*, 276 F.3d 334, 339 (7th Cir. 2002). To be actionable under Title VII, sexual harassment must be "'sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment.'" *Worth v. Tyer*, 276 F.3d 249, 267 (7th Cir. 2001) (quoting *Meritor*, 477 U.S. at 67 (quotation omitted)). In deciding whether sexual harassment is actionable, the court examines the totality of the circumstances including "'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.'" *Worth*, 276 F.3d at 267 (quoting *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 23 (1993)).

"'[S]imple teasing,' offhand comments, and isolated incidents (unless extremely serious) will not amount to discriminatory changes in the 'terms and conditions of employment.'" *Adusumilli v. City of Chicago*, 164 F.3d 353, 361 (7th Cir. 1998) (quoting *Faragher v. City of Boca Raton*, 524 U.S. 775, 788 (1998) (internal quotation omitted). Title VII is "not designed to purge the workplace of vulgarity," *Baskerville v. Culligan Int'l Co.*, 50 F.3d 428, 430 (7th Cir. 1995), but rather, is designed to protect workers "from the kind of . . . attentions that can make the workplace hellish. . . ." *Id.*

1. Whether the Conduct was Sufficiently Severe or Pervasive

Reid contends that Matheny cannot establish that Ang's conduct was sufficiently severe or pervasive to constitute actionable sexual harassment. Though there is both a subjective and objective component to the hostile work environment analysis, *Hostetler v. Quality Dining, Inc.*, 218 F.3d 798, 807 (7th Cir. 2000), the court understands Reid as challenging only whether a reasonable person in Matheny's position would have found her work environment hostile or offensive.

Matheny bases her hostile environment claim on the following conduct: (1) in November 1998, Ang placed both of his hands on her shoulders and began to massage her neck; (2) in January 1999, on twelve occasions Ang unlocked the doors to the

Department and spied on her; (3) approximately 20 to 30 times between November 1998 and July 1999, he stared at her for several minutes at a time, looking her "up and down" and at "every inch of her body" and at times said that he "just wanted to look at [her]" or liked to look at "beautiful women"; (4) he twice leaned his body over hers and pinned her into her chair by placing his arms around her and placing his hands on her desk; (5) he approached her from behind, placed his hand on the middle part of her back and slid his hand down around her waist; (6) he made three other comments about her appearance; and (7) attempted to touch her several times but she gave him a look that kept him away.

Even assuming that Reid challenged whether Matheny perceived her work environment as hostile and abusive, there can be little room for doubt that she did. Ang's touching of her caused her to cringe or run away; she told him not to touch her; fearing that he would come into the Department caused her to become scared and cry, and on at least one occasion, apparently prompted what she describes as an anxiety attack; she voiced complaints about Ang's conduct to her supervisors on several occasions, even filing a formal complaint against him and writing a follow-up letter to Reid's president; Matheny was looking for another job because she was so uncomfortable working around Ang; and one can't help but wonder if some of the FMLA leave taken by Matheny was due to anxiety caused, at least in part, by Ang's behavior toward her.[12]

[12] And, if Blevins' report was accurate (though no finding on that is made in this context), this seems to suggest that Matheny was self-treating anxiety, a condition surely not impacted positively by Ang's conduct.

Reid maintains that Ang's conduct was similar to conduct which the Seventh Circuit has concluded to be insufficiently severe. In *Adusumilli*, the plaintiff, an administrative assistant at a police station, claimed that she was subjected to sexual joking and comments by coworkers, several incidents in which her coworkers stared at her breasts, and unwanted physical contact including a touch on her arm between her elbow and shoulder, two instances of poking at her fingers, and one instance of poking at her buttocks. *Adusumilli*, 164 F.3d at 357. The Seventh Circuit held that the conduct was "too tepid or intermittent or equivocal to make a reasonable person believe that [the plaintiff had] been discriminated against on the basis of her sex." *Id.* at 362 (quotation omitted). In *Baskerville*, the plaintiff testified that over seven months her boss would call her "pretty girl," once made a grunting sound when she wore a leather skirt, once when she commented on how hot his office was, said it was not until she came in, once said that "all pretty girls run around naked", once called her a "tilly," explaining that he used that word for women, made three other comments tinged with sexual innuendo, and told her that he was lonely in his hotel room and all he had for company was his pillow and looked at his hand as if to suggest masturbation. 50 F.3d at 430. The Seventh Circuit held that these incidents did not constitute actionable sexual harassment. *Id.* at 430-31.

In *Saxton v. American Telephone and Telegraph Co.*, 10 F.3d 526, 534-35 (7th Cir. 1993), the plaintiff alleged a hostile work environment based on the following: her supervisor placed his hand on her thigh several times, rubbed his hand along her upper thigh once, pulled her into a doorway and kissed her for two to three seconds and lurched

at her as if to grab her. *Id.* at 528. The Seventh Circuit held that this conduct was not sufficiently severe or pervasive as to create an objectively hostile work environment. *Id.* at 534-35. And, in *Weiss v. Coca-Cola Bottling Co.*, 990 F.2d 333 (7th Cir.1993), the Seventh Circuit held there was no actionable sexual harassment where the plaintiff's supervisor on numerous occasions asked her for dates, called her a dumb blond, and put his hand on her shoulder several times; attempted to kiss her in a bar and twice tried to kiss her in the office; and placed "I love you" signs in her work area. *Id.* at 337. *Cf. Lindblom v. Challenger Day Program, Ltd.*, 37 F. Supp. 2d 1109, 1114-15 (N.D. Ill. 1999) (holding coworker's alleged conduct over the course of one year of staring at plaintiff while she was teaching, touching her knee five times, touching her shoulder ten times to get her attention, standing too close to her, questioning her about her weekend, and fondling her once at a private party was insufficient severe or pervasive to constitute actionable sexual harassment).

Though Matheny's allegations against Ang may be similar to the conduct alleged in these cases as to severity, they are dissimilar as to pervasiveness. Starting in November 1998 and continuing into August 1999: on approximately twenty to thirty occasions, he stared at her, which Matheny described as looking her "up and down" and at her whole body, and leering, and at times said things like he "just wanted to look at" her or he liked to look at "beautiful women"; he made three other comments about her appearance; on twelve occasions in January 1999, he unlocked the doors to the Department and spied on her; he massaged her neck in November 1998, placed his hand on the middle part of her

back and slid his hand down around her waist in July 1999; he attempted to touch her several other times, but she was able to keep him away; and he twice leaned his body over hers and pinned her into her chair by placing his arms around her and placing his hands on her desk. None of these incidents, when viewed as a whole, was isolated. Matheny has recounted at a minimum thirty-nine to forty-nine incidents involving Ang, all of which were directed at her.

In addition, it cannot be ignored that Ang engaged in unwelcome and inappropriate physical contact on two occasions, though not as egregious as that involved in reported cases. But a plaintiff need not be assaulted in order to have an actionable sexual harassment claim. *See Hostetler v. Quality Dining, Inc.*, 218 F.3d 798, 807 (7th Cir. 2000) ("On one side [of the line between a hostile and merely unpleasant environment] lie sexual assaults; other physical contact, whether amorous or hostile, for which there is no consent express or implied; uninvited sexual solicitations; intimidating words or acts; obscene language or gestures; pornographic pictures."); *Baskerville v. Culligan Int'l Co.*, 50 F.3d 428, 430 (7th Cir. 1995). And, there is evidence from which a reasonable jury could find that he attempted to touch her several other times, but she thwarted his attempts. In addition, the evidence supports a finding that Ang engaged in at least two physically intimidating acts by pinning Matheny into her chair with his body.

Reid argues that for much of the time period, Ang did nothing more than stare at Matheny. But one district court has said of alleged staring or leering by a coworker that "if the alleged staring or leering is frequent, intense, and severe enough, it alone could

reasonably be found to rise to the level of creating a hostile environment." *Beattie v. Farnsworth Middle Sch.*, 143 F. Supp. 2d 220, 229 (N.D.N.Y. 1998). Matheny's description of the staring suggests that it was not as mild as Reid would lead one to believe: he leered at her, looked her "up and down" and "at every inch of her body" and this continued for several minutes, stopping only when Matheny abandoned her work area or someone else entered the Department.

The record before the court supports a reasonable inference that Ang's conduct toward Matheny was sufficiently severe or pervasive such that a reasonable person would find it hostile or abusive. Thus, the court must consider whether Reid may be held liable under Title VII.

2. Whether Reid May Be Held Liable Under Title VII

If a plaintiff can prove actionable harassment, she must also prove that the employer can be held liable. *See Haugerud v. Amery Sch. Dist.*, 259 F.3d 678, 696 (7th Cir. 2001). "In hostile work environment cases, the employer can avoid liability for its employees' harassment if it takes prompt and appropriate corrective action reasonably likely to prevent the harassment from recurring." *Id.* (quotation omitted); *see Hostetler*, 218 F.3d at 809. Matheny has presented sufficient evidence to raise a genuine issue of material fact as to whether Reid took prompt and appropriate corrective action.

In November 1998, when Matheny complained to Ehlers about Ang's inappropriate and unwelcome touching, Ehlers did nothing. While it is true that Matheny told Ehlers that she had taken care of it and did not want Ehlers to pursue the matter, at least one circuit court of appeals has concluded that "an employer's duty to investigate [a sexual harassment complaint] is not subordinated to the victim's desire to let the matter drop." *Malik v. Carrier Corp.*, 202 F.3d 97, 105 (2nd Cir. 2000). Ang continued to harass Matheny and, in January 1999 when Matheny complained about Ang's unlocking the doors to the Department, Ehlers instructed Ang to stop, but did not treat the matter as a harassment issue. A reasonable trier of fact could find that Reid's response was inappropriate given Ang's history and Reid's knowledge that he had made inappropriate comments to other women as well as his recent unwelcome and inappropriate touching of Matheny. Further, Matheny complained to Ehlers about Ang's conduct in March 1999 of looking her up and down and at every inch of her body and making comments like he "just wanted to look at [her]." And in July, Matheny reported to Hogg that Ang on two occasions had approached her from behind, leaned his body over hers and pinned her into the chair by placing his arms around her and his hands on her desk. Yet, Reid took no action until August 1999. Moreover, though Matheny requested in mid-August to be transferred from the Department, Reid decided not to transfer her. Reid explains that the decision was based, in part, on that fact that it could address her concerns about Ang more effectively in the Department than any other location. But it had not been effective in addressing her concerns up to that time, and the record suggests that Matheny often, if not almost always, worked alone in the Department, thus making her more susceptible to Ang's advances and

attentions. On the basis of all this evidence, a reasonable trier of fact could find that Reid failed to take prompt and appropriate corrective action reasonably likely to prevent the harassment from recurring.

Because Matheny has raised a genuine issue as to whether Ang's conduct rises to the level of actionable sexual harassment and whether Reid may be held liable, the court denies the summary judgment motion as to the hostile work environment claim.

B. Retaliatory Discharge

The Seventh Circuit issued its decision in *Stone v. City of Indianapolis Pub. Util. Div.*, No. 01-3210, 2002 WL 234239 (7th Cir. Feb. 19, 2002), to clarify the proper standard for summary judgment when a plaintiff claims retaliation. *Stone* indicates that Matheny can take two routes to prevent summary judgment on her retaliation claim. The first route, "the more straightforward" of the two, is unrelated to *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). *Id.* at *2. If Matheny takes this route, then she must "present direct evidence (evidence that establishes without resort to inferences from circumstantial evidence) that [s]he engaged in protected activity . . . and as a result suffered the adverse employment action of which [s]he complains." *Id.* If she presents such evidence and her evidence is uncontradicted, then she is entitled to summary judgment. *Id.* If, however, her evidence is contradicted, then the case goes to trial, unless Reid produces unrebutted evidence that it "would have taken the adverse employment action against [her] even if [it] had had no retaliatory motive[.]" *Id.* If Reid offers such evidence, then it is entitled to summary judgment. *Id.* This is because it will have demonstrated that Matheny was not harmed by retaliation. *Id.*

If Matheny takes the second route, the adaptation of the *McDonnell Douglas* framework, then she must "show that after [engaging in protected activity] only [s]he, and not any similarly situated employee who did not [engage in protected activity], was subjected to an adverse employment action even though [s]he was performing [her] job in a

satisfactory manner." *Stone*, 2002 WL 234239, at *3. If Reid produces no evidence in response, then Matheny is entitled to summary judgment. *Id.* If Reid "presents unrebutted evidence of a noninvidious reason for the adverse action, [it] is entitled to summary judgment." *Id.* But if Reid's evidence of its reason for discharging Matheny is rebutted, then the case must be tried. *Id.*

Matheny attempts to take the first route by offering direct evidence that she engaged in protected activity and as a result was discharged. Her direct evidence is limited to the proximity in timing between these events. As the Seventh Circuit reiterated in *Stone*, "mere temporal proximity between the [protected activity] and the action alleged to have been taken in retaliation for that [activity] will rarely be sufficient in and of itself to create a triable issue." *Stone*, 2002 WL 234239, at *3; *see also Bilow v. Much Shelist Freed Denenberg Ament & Rubenstein, P.C.*, 277 F.3d 882, 895 (7th Cir. 2001) ("[plaintiff] needs more than a coincidence of timing to create a reasonable inference of retaliation"). Further, "[t]he 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." *Bilow*, 277 F.3d at 895 (quoting *Sauzek v. Exxon Coal USA, Inc.*, 202 F.3d 913, 918 (7th Cir. 2000)). Matheny offers no evidence of other circumstances which reasonably suggest that her complaints were related to her discharge. Thus, Matheny cannot prevent summary judgment in favor of Reid by way of the first route identified in *Stone*.

Matheny also takes the second route in an effort to prevent summary judgment. This path leads her along the way to trial. The court assumes that Matheny can show that after complaining about discrimination and harassment, only she, and no similarly situated employee who did not complain, was subjected to an adverse employment action even though she was performing her job satisfactorily. The court must assume this at this stage because the Seventh Circuit decided *Stone* in which it clarified the proper standard for summary judgment on a retaliation claim after the parties had fully briefed Reid's summary judgment motion. As a result, the parties did not have the benefit of *Stone* and have not addressed whether Matheny can make this showing. The parties, however, have addressed Reid's reason for discharging Matheny and whether she has rebutted that reason, so the court proceeds to that matter.

Reid has presented evidence of a noninvidious reason for terminating her employment: her failure to take a UDP. Matheny claims that Ehlers orchestrated the UDP to occur when she knew Matheny would refuse and therefore be discharged. The evidence does not support a finding that Ehlers had any authority to request Matheny to take a UDP, only Rauch had such authority, but it does support a finding that Ehlers had a motive to retaliate against Murphy for complaining about the harassment and Ehlers' alleged non-responsiveness to her complaints. Though there is no evidence that Ehlers knew ahead of time that Matheny would have an anxiety attack on August 24 or actually recognized Matheny's anxiety attack for what Matheny claims it to have been, the evidence does establish that when Ehlers came upon Matheny to escort her to the meeting, Matheny was

on the floor of Hogg's office, crying, shaking and, as Ehlers described, "very upset." Matheny told Ehlers she wanted to go home and could not have a meeting, but Ehlers insisted that they have the meeting at that time, even though there was no urgency about it. Hogg's statement to Matheny supports a reasonable inference that Matheny could not go home (and take the UDP the next day) because "Jennifer [Ehlers] want[ed her] to stay." (Matheny Dep. at 204.)

It is undisputed that Ehlers knew the purpose of the meeting was to request Matheny to take a UDP and a reasonable trier of fact could infer from the evidence that, by insisting that they proceed, Ehlers arguably was counting on the fact Matheny was in such an emotional state that she would refuse to take the UDP, thus giving Reid grounds to fire her. At the least, a reasonable trier of fact could find that, Ehlers, who had a motive to retaliate against Matheny, made no effort to either herself postpone the meeting or recommend to Rauch that he postpone the meeting, and in this way impacted the termination decision. One reasonable inference a jury could draw from the evidence is if Ehlers had requested Rauch to postpone the meeting, he would have agreed. She chose not to, for some reason, and a reasonable jury could infer the reason was retaliatory. Summary judgment is inappropriate under such circumstances. *See Dey v. Colt Constr. & Dev. Co.*, 28 F.3d 1446, 1459 (7th Cir. 1994) ("Summary judgment generally is improper where the plaintiff can show that an employee with discriminatory animus provided factual information or other input that may have affected the adverse employment action.").

The court concludes that Matheny has rebutted the evidence that Reid offers for terminating her employment. A reasonable trier of fact could infer from the record presently before the court that Reid decided it was much easier to get rid of the young file clerk who complained about sexual harassment in the workplace rather than to replace the older, medical doctor who was accused of harassing her. Therefore, Reid should be granted summary judgment on the retaliation claim.

C. Negligent Retention

Reid argues that it is entitled to summary judgment on Matheny's negligent retention claim because it took prompt and appropriate action in response to Matheny's complaints about Ang as well as the complaints against him made by other women. In making this argument Reid relies on case law concerning the negligent retention of an employee, see, *e.g.*, *Grzan v. Charter Hosp.*, 702 N.E.2d 786 (Ind. Ct. App. 1998). This is somewhat puzzling: the parties agree that Ang was not a Reid employee, but rather an independent contractor, and Reid seems to have taken on a more onerous burden in defending against the negligent retention claim than maybe it should.[13] That said, the court finds that Reid's

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[13] In *Bagley v. Insight Communications Co., L.P.*, 658 N.E.2d 584 (Ind. 1995), the Indiana Supreme Court said that "an employer of an independent contractor may be subject to liability for personal injuries caused by the employer's failure to exercise reasonable care to employ a competent and careful contractor when one of the five exceptions to the rule on non-liability for the torts of independent contractors is applicable." *Id.* at 587. Matheny argues that Reid is liable only under one exception–where the act to be performed will probably cause injury to others unless due precaution is taken. *Kahrs v. Conley*, 729 N.E.2d 191, 195 (Ind. Ct. App. 2000) (quoting *Carie v. PSI Energy, Inc.*, 715 N.E.2d 853, 855 (Ind. 1999). The court has its doubts about whether this exception

(continued...)

motion for summary judgment should be denied with respect to the negligent retention claim. As discussed in relation to the Title VII claim, Matheny raises a genuine issues with respect to the appropriateness of Reid's response to her complaints about Ang's conduct. This is especially true in light of the multiple, prior complaints regarding Ang's similar conduct.

IV. Conclusion

For the foregoing reasons, Reid's motion for summary judgment will be GRANTED on the FMLA and ADA claims but DENIED on the Title VII and state law claims. This is a close case. Reid's response to Matheny's complaints may have been reasonable under the circumstances. It's concern about Matheny not submitting to the UDP at the moment it was requested may have been the true reason for her termination. Nonetheless, Matheny has presented enough evidence to put these matters to a jury. As claims remain for disposition at trial, judgment will not be entered at this time. A separate order will set this case for a telephonic conference for purposes of selecting a trial date.

ALL OF WHICH IS ORDERED this 12th day of March 2002.

[13](...continued)
applies. See *McDaniel v. Bus. Inv. Group, Ltd.*, 709 N.E.2d 17, 22 (Ind. Ct. App. 1999) (holding that "peculiar risk" "refers to the risk of a particularized harm specific to the work being performed or the conditions under which it is performed."). Though Matheny relied on *Bagley* in her response brief, Reid does not mention it in its reply, instead choosing to rely on case law pertaining to employer liability for negligent retention of an employee.

John Daniel Tinder, Judge
United States District Court

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