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Hennepin County, MN

STATE OF MINNESOTA **DISTRICT COURT**

COUNTY OF HENNEPIN **FOURTH JUDICIAL DISTRICT**

Judge Mel I. Dickstein

Assata Kenneh,

Plaintiff,

vs.

Homeward Bound, Inc.,

Defendant.

ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Court File No. 27-CV-17-391

The above-entitled matter came on for hearing before the Honorable Mel I. Dickstein, Judge of District Court, on September 14, 2017 pursuant to Defendant Homeward Bound, Inc.'s ("Defendant") Motion for Summary Judgment. Marko Mrkonich, Esq., and Emily McNee, Esq., appeared on behalf of Defendant. Ian Laurie, Esq., appeared on behalf of Plaintiff Assata Kenneh ("Plaintiff"), who was also present.

Now, therefore, based upon all the files, records, and proceedings herein, including the arguments of counsel, the Court makes the following:

ORDER

1. Defendant Homeward Bound, Inc.'s Motion for Summary Judgment is **GRANTED** and Plaintiff Assata Kenneh's Complaint is hereby **DISMISSED**.

2. The following memorandum is incorporated herein by this reference.

LET JUDGMENT BE ENTERED ACCORDINGLY.

Dated: December 5, 2017

BY THE COURT:

Dickstein, Mel (Judge) 2017.12.05 15:52:34 -06'00'

Mel I. Dickstein
Judge of District Court

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MEMORANDUM

I. Factual Background

Defendant Homeward Bound, Inc. ("Defendant") is a nonprofit organization that operates homes for the disabled. Plaintiff Assata Kenneh ("Plaintiff") began working for Defendant in October of 2014 as an Assistant Program Supervisor. Compl. ¶ 4. In February of 2016 Defendant promoted Plaintiff to the role of Program Resource Coordinator at Defendant's Fernbrook House. Id, Def.'s Mem. p. 6.

Beginning in March of 2016, Plaintiff suffered a series of unpleasant interactions with Anthony Johnson, a maintenance worker employed by Defendant. Plaintiff alleges Mr. Johnson committed the following acts which created a hostile work environment: 1) Mr. Johnson offered to cut Plaintiff's hair at his or her apartment; 2) while fixing a stuck drawer in Plaintiff's desk, Mr. Johnson told her to remain seated because he likes "beautiful women and beautiful legs;" 3) Mr. Johnson accompanied Plaintiff to a vending machine where he told her that he would "eat her" because he likes to "eat women," implicitly proposing oral sex; 4) Mr. Johnson pulled up next to Plaintiff at a gas station and asked what she did in her spare time and where she was headed; 5) Mr. Johnson repeatedly referred to Plaintiff as "beautiful" or "sexy." Id. ¶¶ 5(a) – (f).

On April 1, 2016 Plaintiff complained to her supervisor, Cheryl Foley, about Mr. Johnson's behavior. On April 5, 2016 Plaintiff submitted a formal complaint about Mr. Johnson to human resources. Defendant suspended Mr. Johnson with pay during the pendency of an internal investigation. On April 11, 2016 human resources determined their investigation was inconclusive. Defendant returned Mr. Johnson from paid suspension, and retrained him on Defendant's sexual harassment policies. Aff. of Emily McNee, Ex. 20.

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Plaintiff maintains that on June 29, 2016 she again complained to her supervisor about Mr. Johnson and requested a transfer to a flex position which would allow her to continue working for Defendant while avoiding further interactions with Mr. Johnson. Compl. ¶¶ 11-12. Plaintiff alleges Defendant then terminated her in reprisal for her complaints against Mr. Johnson. Id. ¶ 13.

Defendant maintains it did not terminate Plaintiff. Defendant asserts that on June 29, 2016 Plaintiff threatened to resign if not granted a transfer to a flex position because of a disagreement she had with a female coworker, Kasi LaHaye. Defendant maintains it accepted Plaintiff's resignation rather than grant the transfer. Def.'s Mem. p. 15-16.

Defendant now moves the Court for Summary Judgment, asserting that Plaintiff's allegations, even if true, do not meet the legal standards for sexual harassment and reprisal under the Minnesota Human Rights Act ("MHRA").

II. Legal Analysis

a. Summary Judgment Standard

Summary judgment is appropriate when the moving party demonstrates there is no genuine issue of material fact and is therefore entitled to judgment as a matter of law. Minn. R. Civ. P. 56.03; *Fabio v. Bellomo*, 504 N.W.2d 758, 761 (Minn. 1993). A genuine issue of material fact exists when reasonable minds can reach different conclusions from the evidence presented. *DLH, Inc. v. Russ*, 566 N.W.2d 60, 69 (Minn. 1997). Any issue of fact should be viewed in the light most favorable to the non-moving party. *Fabio*, 504 N.W.2d at 761.

When a motion for summary judgment is made and properly supported, the non-moving party may not rely upon unsupported allegations or mere averments or denials in the pleadings, but must come forward with specific, admissible facts to satisfy the burden of production. Minn.

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R. Civ. P. 56; *see also Bebo v. Delander*, 632 N.W.2d 732, 737 (Minn. Ct. App. 2001). Summary Judgment is a "blunt instrument" that "should be employed only where it is perfectly clear that no issue of fact is involved, and that it is not desirable nor necessary to inquire into facts which might clarify the application of the law. *Donnay v. Boulware,* 144 N.W.2d 711, 716 (Minn. 1966). All reasonable doubts and inferences should be resolved against the moving party, *328 Barry Ave., LLC v. Nolan Properties Grp., LLC,* 871 N.W.2d 745, 751 (Minn. 2015).

b. Analysis

i. Plaintiff's Allegations Do Not Constitute an Objectively Hostile Work Environment

Plaintiff asserts that Mr. Johnson's actions created a hostile work environment in violation of the Minnesota Human Rights Act ("MHRA") Minn. Stat. §363A.03, subds. 13,43. In *Gagliardi v. Ortho-Midewest, Inc.*, 733 N.W.2d 171, 176 (Minn. Ct. App. 2007) (internal citations omitted) the Minnesota Court of Appeals set forth the standard under which a claim for sexual harassment must be evaluated:

> To be actionable, the sexual harassment must have been so severe or pervasive that it altered the conditions of employment and created an abusive work environment. We determine whether an environment is sufficiently hostile or abusive to support a claim by viewing '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.' Although isolated instances of harassment may seem inconsequential, taken together they may demonstrate a course of conduct that creates a hostile environment.

For a claim of hostile work environment under the MHRA, the Court analyzes the severity of the alleged conduct both objectively and subjectively. "In determining whether the conduct … created an intimidating, hostile, or offensive employment environment under the MHRA, we consider whether the conduct was sufficiently severe or pervasive to objectively do so and

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whether the plaintiff subjectively perceived her employment environment to be so altered or affected." *Rasmussen v. Two Harbors Fish Co.*, 832 N.W.2d 790, 796-797 (Minn. 2013).

Defendant maintains that Mr. Johnson's conduct did not create an objectively hostile work environment as a matter of law, which Defendant asserts sets a high bar before a company is exposed to liability. In *Duncan v. General Motors Corp.*, 300 F.3d 928, 935 (8th Cir. 2002), for example, a divided panel of the Eighth Circuit in 2002 held that General Motors Corporation was entitled to judgment as a matter of law in a case involving a long series of serious sexual harassment in the workplace.[1] Within days of beginning her job, plaintiff's supervisor propositioned her during work hours for a sexual relationship. When she rebuffed him, the supervisor increased the criticism of her work, and degraded her professional conduct in front of co-workers. In addition, her supervisor touched her inappropriately, singled her out as a "man-hater" who must always be in control of sex, and required her to draw a vulgar planter (instead of an automobile part) as a precondition to be considered for promotion. Her supervisor also required she type up the minutes of the "He-Man Women Hater's Club" as a required duty of her job. The plaintiff complained about her supervisor's conduct to anyone who would listen, including other management personnel. Any change in her supervisor's hostility, however, was temporary, at best. It was in this context that the Eighth Circuit said the supervisor's conduct was "boorish, chauvinistic, and decidedly immature, [but did not create] an objectively hostile work environment permeated with sexual harassment." *Duncan*, 300 F.3d 928, 935.

[1] "As the result of the substantial similarities existing between Title VII and Minnesota's Human Rights Act, [Minnesota courts] have frequently applied principles which have evolved in the adjudication of claims under the federal act" in resolving claims under the MHRA. *Anderson v. Hunter, Keith, Marshall, and Co., Inc.*, 417 N.W.2d 619, 623 (Minn. 1988).

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Eight years later in *Geist-Miller v. Mitchell*, 783 N.W.2d 197 (Minn. Ct. App. 2010), the Minnesota Court of Appeals declined to find the conduct at issue actionable, notwithstanding an extraordinary level of conduct alleged. The allegations in that case involved the following:

1. In February 2003, Ronald Mitchell, concerned his wife was running around on him, asked plaintiff if she would protect him.
2. In August 2003, Ronald Mitchell told plaintiff she was denying him by not running away with him.
3. In October 2003, during a drive home, Ronald Mitchell put his arm around plaintiff and told her, “My one true love, will you run away with me?”
4. In October 2003, after a business associate asked plaintiff and Mitchell if they’d slept together, and plaintiff said, “God no,” Mitchell put his arm around her and said, “seeing that we had sex, maybe we should run away and continue having sex.” Plaintiff replied they had not and would not engage in sex.
5. In October 2003, Mitchell walked behind plaintiff and brushed up against her buttocks.
6. In a meeting with outside business associates Ronald Mitchell began comparing women’s breasts, and told plaintiff hers were “so-so.”
7. Ronald Mitchell told plaintiff he didn’t care if she was in the back pleasuring herself as long as she was getting her work done.
8. Ronald Mitchell told an employee she shouldn’t wear a certain shirt because it made her nipples show.
9. Mitchell said he could be out to lunch with two hairdressers one minute and the next minute be in bed with one of them.

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10. In 1996 or 1997 Mitchell grabbed and kissed plaintiff.

11. Mitchell attempted to touch his lips to plaintiff's after asking for lip balm.

12. Mitchell would often rest his hand on plaintiff's leg when they drove places together. *Id.* at 199-200. The court declined to find the alleged conduct actionable, calling it "boorish, chauvinistic and immature," but finding it "was not physically threatening or intimidating; nor is there other evidence that it interfered with appellant's ability to perform her job." *Id.* at 204 (internal citations omitted).The court found that despite plaintiff's testimony that Mitchell's conduct made her "uncomfortable," "embarrassed," and "upset," the allegations were insufficiently pervasive to be actionable. *Id.* at 200.

In upholding summary judgment in favor of defendant in *Geist-Miller*, the Court of Appeals distinguished *Gagliardi v. Ortho-Midwest*, in which the court reversed a grant of summary judgment initially entered in favor of the defendant. In *Gagliardi* plaintiff alleged that the principal of Ortho-Midwest, Craig Carlander, began harassing her on multiple business trips after she began her employment with Ortho-Midwest. Plaintiff alleged:

1. Carlander asked plaintiff to check out of her hotel room and wait in his room.
2. When she declined, he checked out of his room and came to hers.
3. Later that evening Carlander directed their limo driver to take them around Seattle while he sat very close to her and laid his head on her lap.
4. After returning home Carlander showed plaintiff a year old calendar with sexually suggestive photos of his wife.
5. During another business trip Carlander directed the limo driver to take both his and plaintiff's luggage to Carlander's room – even though they were staying at different hotels.

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6. Later, while working together on a computer in Carlander's room, he suggested they both get into bath robes and order room service.

Gagliardi 733 N.W.2d at 179 - 180. The court concluded that these facts tend to support the conclusion that Carlander had interacted with her unprofessionally and sexually in the workplace, and in the aggregate support the contention of a hostile work environment. *Id.* at 181.

Taken together, these cases suggest our courts have yet to lower the high bar set for a plaintiff seeking to pursue an action for damages as the result of sexual conduct creating a hostile work environment. Even when Ronald Mitchell allegedly suggested that Plaintiff run away with him and sleep with him, even after Mitchell was alleged to have commented on plaintiff's breasts, and on his ability to bed his employees, and even after Mitchell was alleged in the past to have touched plaintiff on the buttocks, lips, and leg, the Court declined to find that plaintiff had established a prima facie case for a hostile work environment.

It was only when the court could identify a specific campaign by a company principal to bed a plaintiff that the court found a hostile work environment sufficient to permit plaintiff's claim to proceed, as it did in *Gagliardi*. The facts in *Geist-Miller* and *Gagliardi*, both, are more egregious than those alleged in the present case. So, too, are the facts more severe in *Duncan v. General Motors*. Consequently, whether taken individually or together, Plaintiff's allegations do not allege an objectively hostile work environment.

Our courts need to revisit the issue of what facts constitute those "sufficiently severe or pervasive [acts] to alter the conditions of the victim's employment and create an abusive working environment." *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993). Cases which emanate from the 1980's, 1990's, or even the first decade of the present millennium no longer accurately

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reflect conduct that alters the conditions of a victim's employment and creates an abusive working environment. Times change, and with them so too do the standards of conduct. This Court doubts that anyone would reasonably find some conduct, once found unactionable, is still unactionable today.

This Court doubts that the Minnesota Supreme Court, if faced with the facts in *Geist-Miller* today, would find those facts are not so severe or pervasive as to create a hostile work environment or alter the conditions of Plaintiff's employment. There has been a sea-change in cultural attitudes toward sexual harassment. Conduct like that described in *Geist-Miller* and *Duncan* is not considered merely "boorish" or "obnoxious;" it is unacceptable. The conduct creates an atmosphere that is objectively hostile—it permeates the work environment with sexual innuendo and harassment. It is not a leap to say that gone are the days when men can use the workplace to further their prurient interests. Unwanted sexual advances, belittling sexual banter, touching, and mocking sexual language are no longer viewed as merely boorish, obnoxious, chauvinistic, or immature—they should be actionable.

The Minnesota Supreme Court today is more likely to take a different approach. It is more likely to find actionable conduct once accepted as merely disagreeable. The Court is more likely to use cases such as *Carrero v. New York City Housing Authority*, 890 F. 2d 569 (2nd Cir. 1989) as a springboard to articulate a more reasonable standard of conduct. In *Carrero*, the Second Circuit held that a female employee need not subject herself to an extended period of demeaning and degrading provocation before being entitled to seek the remedies provided by law. The Second Circuit held in *Carrero* that, "it is not how long the sexual innuendoes, slurs, verbal assaults, or obnoxious course of conduct lasts. The offensiveness of the individual actions

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complained of is also a factor to be considered in determining whether such actions are pervasive." *Id.* at 578.

But today it remains true that to alter the terms and conditions of employment, conduct must be severe and pervasive, both objectively and subjectively. And even under the more respectful articulation of the standard embraced in *Carrero*, the present claim does not satisfy the legal requisite to an action for a violation of the Minnesota Human Rights Act (MHRA) based on sexual harassment.

The facts taken in the light most favorable to Plaintiff, as is required on Defendant's motion for summary judgment, *see Fabio*, 504 N.W.2d at 761, are neither so pervasive nor so egregious as to alter the terms of Plaintiff's employment. On their first encounter, Mr. Johnson complimented Ms. Kenneh on her hair and said he cuts hair for five dollars. He offered to cut Ms. Kenneh's hair at either her residence or his, ostensibly because he does not work out of a shop.

On another occasion, Mr. Johnson offered to help Ms. Kenneh open her desk. When Ms. Kenneh began to get out of her chair to give Mr. Johnson enough room to work, he urged her to remain seated because, "I like beautiful women."

Another incident objectionable to Ms. Kenneh was her interaction with Mr. Johnson at a gas station when he pulled up a car behind hers. Mr. Johnson is alleged to have asked Ms. Kenneh where she was going and what she does after work.

None of the these three incidents are sufficient individually, or together, to establish facts that are so pervasive, or demeaning and degrading, that they alter the terms of Ms. Kenneh's employment. Some of the conduct was boorish and obnoxious, but one would be hard pressed to say more.

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Ms. Kenneh also testified, however, that Mr. Johnson would say "you look pretty" whenever he saw her, even after she told him to stop. In fact, even after Mr. Johnson was admonished by management not to be around Ms. Kenneh without someone else being present, he still greeted her with "hi, sexy," a greeting he repeated in a variety of ways, referring to Ms. Kenneh as "sexy," "beautiful," and "pretty."

While Johnson never touched her sexually, Ms. Kenneh said he nevertheless made her uncomfortable because he stopped by to see her regularly, and he greeted her in ways she deemed inappropriate.

It is more difficult to overlook Mr. Johnson's alleged statement to Ms. Kenneh, in a seductive tone, that "I will eat you. I eat women." This comment crosses a line – it is both objectively and subjectively unacceptable. It is particularly concerning in the context of Mr. Johnson's other conduct which, by itself, is not actionable.

But the facts in the present case, however obnoxious and unacceptable, do not expose the employer to liability under the high bar set by current caselaw. *See Cummings v. Koehnen*, 568 N.W.2d 418, 424 (Minn. 1997) ("This is a high threshold.") Until our courts articulate a different standard under which workplace conduct may be evaluated, the conduct alleged in the present case, however objectionable, does not constitute pervasive, hostile conduct that changes the terms of employment and exposes an employer to liability under the Minnesota Human Rights Act.

ii. Plaintiff's Claim for Reprisal Fails to Establish Causation.

Plaintiff maintains she was fired on June 29, 2016 in reprisal for her allegation of sexual harassment against Mr. Johnson. Under Minn. Stat. §363A.15, "it is an unfair discriminatory practice for any individual who participated in the alleged discrimination as a[n] … employer …

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to intentionally engage in any reprisal against any person because that person (1) opposed a practice forbidden under this chapter." The statute defines reprisal as "includ[ing], but … not limited to, any form of intimidation, retaliation, or harassment." Id. Plaintiff opposed Mr. Johnson's sexual harassment, and asserts her termination was an act of reprisal for her complaints against Mr. Johnson.

In order to establish a prima facie case of retaliation a plaintiff must show "that the complainant engaged in statutorily protected conduct, the employer took adverse action against the complainant, and a causal connection exists between the two." *Gagliardi v. Ortho-Midwest*, Inc., 733 N.W.2d 171, 182 (Minn. Ct. App. 2007). Defendant maintains it is entitled to summary judgment because Plaintiff cannot establish a causal connection between her complaints against Mr. Johnson and the end of her employment with Defendant.

Plaintiff's evidence of causation relies solely[2] on the nearly three month time period between Plaintiff's April 5, 2016 formal complaint against Mr. Johnson and her June 29, 2016 termination / resignation. While causation is normally a question of fact, *see Id.*, "generally, more than a temporal connection between the protected conduct and the adverse employment action is required to present a genuine factual issue on retaliation." *Smith v. Allen Health Systems, Inc.*, 302 F.3d 827, 832 (8th Cir. 2002) (quoting *Kiel v. Select Artificials, Inc.*, 169 F.3d 1131, 1136 (8th Cir. 1999)).

The 8th Circuit in *Allen Health Systems* conducted a review of the relevant precedent and determined that no bright-line exists for when a temporal interval is sufficient to establish causation. However, the Circuit Court did provide a specific analysis of the time-period at issue.

[2] Plaintiff does make passing reference in her brief to a potential illicit affair between Mr. Johnson and an unidentified director of Defendant. However, Plaintiff has not introduced any admissible evidence to substantiate this assertion as a causal connection for the end of her employment.

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In *Allen* the court held "Smith's family leave began on January 1 and Allen discharged her on January 14. These two events are extremely close in time and we conclude that under our precedent this is sufficient, *but barely so*, to establish causation." *Id.* at 833 (emphasis added). This finding of temporal causality was distinguished from *Kipp v. Missouri Highway and Transp. Com'n*, 280 F.3d 893 (8th Cir. 2002), where "we said that 'the interval of two months between the complaint and Ms. Kipp's termination so dilutes any inference of causation that we are constrained to hold as a matter of law that the temporal connection could not justify a finding in Ms. Kipp's favor on the matter of causal link.'" *Smith v. Allen Health Systems*, 302 F.3d 827, 833.

In the present matter, where nearly 3 months elapsed between Plaintiff's formal complaint and the adverse employment action, the temporal connection alone is insufficient to establish the causal element of a prima facie case of reprisal. Defendant is therefore entitled to summary judgment on this claim.

III. Conclusion

For all the reasons set forth above, Defendant Homeward Bound Inc.'s Motion for Summary is granted. Plaintiff Assata Kenneh's claims for hostile work environment based on sexual harassment and reprisal are therefore dismissed.

M I D