



# I

Bishop was hired by the defendant Electrolux LLC (“Electrolux”)<sup>2</sup> on February 10, 1999, for a new position as advertising services buyer at its Bristol, Virginia facility. During her period of employment several openings became available with Electrolux for the position of commodity buyer. Bishop wanted that position, but never received it. As of December 31, 2001, Bishop was terminated from employment with Electrolux. According to Electrolux, her position was eliminated in a restructuring.

The present action was filed June 19, 2001, while Bishop was still employed by Electrolux. On December 10, 2001, she became aware of her impending termination and on December 28, 2001, she filed an amended and supplemental complaint. In this amended and supplemental complaint, she claims that she was denied the commodity buyer position because she is a woman, even though she had been promised the position; that she was denied the position because she had resisted the romantic advances of male employees and because of her complaints to management about sexual harassment; that she was subjected to a hostile work environment; and that she was finally fired because she had filed a charge with the Equal Employment Opportunity Commission and had brought this lawsuit.

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<sup>2</sup> Electrolux LLC is now named Aerus LLC, but for convenience it will be referred to by its prior name in this opinion.

Following discovery, Electrolux filed a motion for summary judgment supported by the affidavit of Teresa Carter, the director of human resources for Electrolux, and Sharon Buck, the Electrolux manager in charge of hiring for the position of commodity buyer in 2001.<sup>3</sup> The plaintiff has responded to the motion with her own affidavit. The plaintiff has also requested that the discovery deadline established in the scheduling order be lifted and the trial date postponed. The issues have been briefed and the motion for summary judgment, as well as the plaintiff's requests, are ripe for decision.<sup>4</sup>

## II

Summary judgment is appropriate when there is “no genuine issue of material fact,” given the parties’ burdens of proof at trial. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); *see* Fed. R. Civ. P. 56(c). In determining whether the moving

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<sup>3</sup> In its initial brief, the defendant refers to and quotes from deposition testimony of the plaintiff and others. However, the only deposition “on file” as required by Federal Rule of Civil Procedure 56(c) is a small portion of the plaintiff’s deposition submitted with the defendant’s reply memorandum. I have not considered any deposition testimony not supported by a filed transcript. *See Whitlock v. Duke Univ.*, 829 F.2d 1340, 1343 (4th Cir. 1987) (holding that district court was not required to consider deposition testimony where depositions themselves had not been filed with reference to summary judgment motion). While depositions, along with other discovery, are not routinely filed, they must be filed when used in the proceeding. *See* Fed. R. Civ. P. 5(d).

<sup>4</sup> I will dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

party has shown that there is no genuine issue of material fact, a court must assess the factual evidence and all inferences to be drawn therefrom in the light most favorable to the nonmoving party. *See Ross v. Communications Satellite Corp.*, 759 F.2d 355, 364 (4th Cir. 1985).

A

Bishop asserts several different types of claims under Title VII, each of which requires a different analysis. One claim is that she did not receive a promotion on account of her sex. To establish such a claim of employment discrimination, the plaintiff must show that: (1) she is a member of a protected class; (2) she was qualified for the job; (3) in spite of her qualifications, she was not promoted; and (4) she was replaced by someone outside the protected class. *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973). Once a prima facie case is established, the burden shifts to the defendant to produce evidence that shows a legitimate, nondiscriminatory reason for its actions. *See Tex. Dep't of Comty. Affairs v. Burdine*, 450 U.S. 248, 254 (1981). If the defendant meets this burden, the burden then shifts back to the plaintiff to show that the reason proffered by the defendant was false and that sex was the real reason for the employment decision. *See St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 514-16 (1993).

Through its affidavits, Electrolux contends that on three separate occasions the position of commodity buyer became available and that Bishop timely applied only on the last occasion, in July of 2001. According to the affidavit of Sharon Buck, four persons were interviewed, including Bishop, but she was not selected because “she had little or no experience” with the computer system used in the position and “little or no knowledge of the parts and products.” (Buck Aff. ¶ 8.) Instead of Bishop, a male employee, Billy Whited, received the promotion. Buck attached to her affidavit a form which she says she used in ranking the applicants for the position, showing that Bishop had a lower score than Whited.

In her counter affidavit, Bishop denies that she failed to timely apply for the commodity buyer position open in the fall of 1999. In addition, she refutes the criteria supposedly used by Buck in making the selection in 2001. As to her knowledge of the computer system, she contends that she did have training on it and offered to complete her training after work hours. She asserts that there was no requirement that she have knowledge of current parts and products because they changed frequently and she points out that she was the only candidate with a college degree and purchasing experience.

As a prerequisite to a lawsuit, Title VII requires the filing of a timely administrative charge with the EEOC. *See* 42 U.S.C.A. § 2000e-5. In Virginia, the

time limit for such a charge is 300 days. *See Tinsley v. First Union Nat'l Bank*, 155 F.3d 435, 440 (4th Cir. 1998). Bishop's charge was filed with the EEOC on August 16, 2000. Central to her charge were the allegations that she had complained about sexually-oriented remarks between a female secretary named Sandy Sproles and a male buyer; that she had been promised a promotion to commodity buyer and a pay raise; that a director of marketing, Bob Burkhardt, had made a pass at her in the fall of 1999, but she had rebuffed him and the company had then given the position of commodity buyer to a new-hired employee, Richard Kiser,<sup>5</sup> and she had received a pretextual reason why she had not been given the job; that a new promise that she would be promoted to commodity buyer had been made by Jim Rye, the director of materials, but she had discouraged romantic advances by Rye and as a result had not gotten the promotion and had been moved to a "dead-end" job in a different department; and that her complaints to the company about her treatment had been ignored.

The EEOC closed its file on the charge on March 30, 2001, and Bishop thereafter filed the present action. In her initial complaint, filed June 19, 2001, she made the same allegations set forth in her charge to the EEOC, with some elaboration. She also contended that unlawful discrimination had continued against her, in particular by giving her a lower performance evaluation and by placing a newly-hired and

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<sup>5</sup> Bishop spelled the name "Kyser," but it is apparently correctly spelled "Kiser."

unqualified female employee in a position which “approximates” the position of commodity buyer. She contended that all of these actions had been as a result of sex discrimination and in retaliation against her for filing the EEOC charge.

In her amended and supplemental complaint, Bishop included the allegations of her initial complaint, and also added the company’s promotion of Billy Whited to commodity buyer instead of her in September of 2001 and her termination at the end of 2001 as further claims of unlawful discrimination and retaliation.

Electrolux argues that any claim for failure to promote prior to 300 days before Bishop’s charge was filed with the EEOC—that is, before October 21, 1999—must be rejected as untimely and that the claim of failure to promote in 2001 must be dismissed since it has not been the subject of an EEOC charge.

I agree with the defendant that conduct to prior to October 21, 1999, may not serve as the basis for a present sexual discrimination claim.<sup>6</sup> As to any events following March 30, 2001 (when the EEOC closed its file), I find that the court cannot consider such claims, since they occurred after the EEOC concluded its consideration of Bishop’s charge and they have not been the subject of a later administrative charge.

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<sup>6</sup> Indeed, Bishop now concedes that she is not making any claim for the Burkhardt harassment and failure to promote or the Sandy Sproles controversy, although she contends that those incidents are relevant evidence supporting her remaining claims. (Pl.’s Resp. at 2, 9 at n.3, 14.)

*See Daso v. Grafton Sch., Inc.*, 181 F. Supp. 2d 485, 489 (D. Md. 2002); *Miller v. Runyon*, 88 F. Supp. 2d 461, 472 (M.D.N.C. 2000).

Bishop also claims that she was fired effective December 31, 2001, because of her sex. As explained above, this claim has not been the subject of an EEOC charge and is thus premature.

As to the only remaining claim, that she was not promoted as promised by Jim Rye in 2000, she does not contend that a male was promoted in her place, and thus she cannot meet the *McDonnell Douglas* test for a prima facie case.

In summary, I find that Bishop has no valid claim for disparate treatment on account of her sex, either on the merits or for procedural reasons.

## B

Bishop next contends that the failure to promote her and her termination were in retaliation for her complaints about sexual harassment and discrimination and because she filed an EEOC charge and this lawsuit. Title VII makes it illegal for “an employer to discriminate against any of his employees . . . because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.” 42 U.S.C.A. § 2000e-3(a). In order to make a prima facie showing of retaliation under Title VII, the plaintiff must show that

“1) the employee engaged in protected activity; 2) the employer took adverse action against the employee; and 3) a causal connection existed between the protected activity and the adverse action.” *Ross*, 759 F.2d at 365.

Electrolux asserts the same procedural defenses to the retaliation claims as to the sex discrimination claims: that conduct before October 26, 1999, is barred as beyond the period of limitations and that conduct after March 30, 2001, is premature because it was not included in the EEOC charge.

In regard to the necessity of filing an EEOC charge, retaliation has been treated somewhat differently than other Title VII claims. As noted by the Fourth Circuit, retaliation is generally always related to the allegations contained in an EEOC charge and thus a second EEOC charge based on retaliation for filing the first charge is unnecessary. *See Nealon v. Stone*, 958 F.2d 584, 590 (4th Cir. 1992). However, the defendant argues that this exception is inapplicable here, where the retaliation allegedly occurred after the EEOC investigation had been concluded, and not while the initial EEOC charge was still pending. Some courts have accepted this argument, while others have rejected it. *Compare Daso*, 181 F. Supp. 2d at 489 (“[I]n order to be considered part of the same EEOC administrative procedure . . . [the claim] must occur while the EEOC complaint is still pending.”), *and Miller*, 88 F. Supp. 2d at 472 (“Because [plaintiff] had no pending complaint before the EEOC when the alleged

retaliation took place . . . he should have brought his retaliation charges in a separate claim.”), with *Malarkey v. Texaco, Inc.*, 983 F.2d 1204, 1209 (2d Cir. 1993) (“We see no reason why a retaliation claim must arise before administrative proceedings terminate in order to be reasonably related.”). The Fourth Circuit has not expressly ruled on the question, although dicta in *Nealon* appears to limit the exception to claims arising “‘during the pendency of the case before the Commission.’” 958 F.2d at 590 (quoting *Hill v. W. Elec. Co.*, 672 F.2d 381, 390 n.6 (4th Cir. 1982)).

I hold that the exception should be limited to those cases where the retaliation occurs while a previous charge is pending before the EEOC. An important rationale for allowing the litigation of factual claims not contained in an EEOC charge is that the EEOC undertakes to investigate all matters reasonably related to the EEOC charge, even though not expressly alleged in the charge itself. Accordingly, it is the scope of a reasonable investigation, and not the scope of a charge, that limits the later litigation. *See Sanchez v. Standard Brands, Inc.*, 431 F.2d 455, 466 (5th Cir. 1970). Where the conduct arises after the EEOC’s investigatory duties are ended, however, no presumption of a reasonable investigation can be made. Moreover, to excuse the administrative process under these circumstances would frustrate the emphasis in Title VII that the EEOC should be allowed to resolve employment disputes without lawsuits whenever possible. *See id.* at 467.

Accordingly, Bishop's retaliation claims based on the failure to promote her in 2001 and her subsequent termination will be dismissed without prejudice.

Bishop asserts a remaining claim that she was not promoted as promised by Jim Rye in 2000 in retaliation for her complaints about his romantic advances toward her. This allegation was contained in her EEOC charge and is not procedurally barred. However, the record shows that Rye had no power to promote her. Indeed Bishop agrees in her deposition that "he thought that he had more authority than he had." (Bishop Dep. at 192.) Bishop thus cannot prove a necessary element of a retaliation claim—a causal connection between the protected activity and the adverse employment action.

### C

Finally, Bishop claims sexual harassment. Sexual harassment claims fall into two general types: hostile work environment or quid pro quo discrimination. *See Spencer v. Gen. Elec. Co.*, 894 F.2d 651, 658 (4th Cir. 1990). Bishop asserts both types in this case.

Quid pro quo discrimination requires proof that she was subjected to unwelcome sexual harassment and that her reaction to the harassment affected tangible aspects of her job. *See id.* Bishop contends that her rejection of Jim Rye's sexual overtures cost her a promotion. In her affidavit in opposition to summary judgment, she alleges that

Rye visited her in her office on many occasions, talked about “non-business [sic] subjects,” and requested that she accompany him to the local Holiday Inn to work out at the motel’s gym, in order to relieve the upper back pain that she had been experiencing. (Bishop Aff. ¶ 16.) She claims that she declined each time on the ground that she did not have the time and eventually he became “agitated” with her and stopped asking her. (*Id.*) She contends that thereafter she did not receive the promotion that she had been promised by Rye.

Even assuming, as Bishop does, that Rye’s invitations to her had a sexual connotation,<sup>7</sup> the uncontradicted evidence shows that Rye had no power to grant her any promotion. Accordingly, Bishop cannot show that she suffered a tangible job detriment as a result of her reaction to the alleged harassment.

Bishop also contends that she was the victim of a hostile work environment. In order to prove this basis of discrimination, Bishop must prove that the work environment was “so polluted with sexual harassment that it altered the terms and conditions of her employment.” *Anderson v. G.D.C., Inc.*, 281 F.3d 452, 458-59 (4th

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<sup>7</sup> In her affidavit Bishop states, “Though Rye never mentioned the word ‘date’ or ‘sex’ I knew from prior experience at Electrolux what the male managers used the Holiday Inn for.” (Bishop Aff. ¶ 34.) She does not explain how she knew that, although in her amended and supplemental complaint she alleges that another manager “attempted to approach [her] as if to embrace or kiss her” while at a Holiday Inn. (Am. & Supplemental Compl. ¶ 6.)

Cir. 2002). “In assessing whether a work environment is objectively hostile, a court must consider ‘all 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.’” *Id.* at 459 (quoting *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 23 (1993)).

The record is clear that the incidents recited by Bishop, even if true, and even viewed in their totality, do not amount to a hostile environment. The conduct alleged simply was not sufficiently severe or pervasive to constitute a violation of Title VII.

### III

In summary, I rule that Bishop’s claims based on conduct occurring after March 30, 2001, including the failure to promote her to the position given to Billy Whited and her termination at the end of 2001, must be dismissed without prejudice for failure to exhaust administrative remedies under Title VII. As to her other claims, I will grant summary judgment in favor of the defendant.

Bishop has requested further discovery in the case, based on the fact that the exhibit to Sharon Buck’s affidavit supporting summary judgment that showed Buck’s criteria for judging the candidates for the job opening in 2001 had not been previously

disclosed to the plaintiff. Because of that exhibit, Bishop wishes to depose Buck. She also wants to depose the Electrolux manager who discharged her in 2001, although no reason is given why that deposition has not been taken earlier. In any event, since I will dismiss without prejudice the claims relating to the 2001 incidents, it is not necessary that the discovery deadline be reopened, even if good cause had been shown.

A separate judgment consistent with this opinion is being entered herewith.

DATED: April 19, 2002

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United States District Judge