UNPUBLISHED

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ABINGDON DIVISION

BETTY L. BLACKBURN,	)	
	)	
Plaintiff,	)	Case No. 1:01CV00039
	)	
v.	)	**OPINION AND ORDER**
	)	
COMMONWEALTH OF VIRGINIA DEPARTMENT OF CORRECTIONS, ET AL.,	)	By: James P. Jones United States District Judge
	)	
Defendants.	)	

E. Gay Leonard, Abingdon, Virginia, for Plaintiff; Guy W. Horsley, Jr., Senior Assistant Attorney General of Virginia, Richmond, Virginia, for Defendants.

In this case involving alleged retaliatory harassment of a state corrections officer, I find that the plaintiff has sufficient evidence to allow the case to go a jury at trial, although I will grant summary judgment in favor of the individuals sued and dismiss any claim for punitive damages.

I

Betty L. Blackburn, the plaintiff, asserts a claim for retaliation pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C.A. §§ 2000e to 20003-17 (West 1994

& Supp. 2001) ("Title VII"). She was employed as a state corrections officer and contends that after she accused a superior of an incident of sexual harassment, she was subjected to hostile treatment by her co-workers and superior officers. The defendants, who are the Commonwealth of Virginia Department of Corrections, the director of that department, and the warden of the state prison where she worked, have now jointly moved for summary judgment. The motion has been briefed and argued and is ripe for decision.

The essential facts of the case, either undisputed or, where disputed, recited in the light most favorable to the nonmovant on the summary judgment record, are as follows.

Blackburn was hired as a corrections officer at Keen Mountain Correctional Center, a Virginia state prison, on January 22, 1990. On February 2, 1991, she was promoted to the position of corrections officer senior and on July 16, 1994, was promoted to corrections sergeant. Her duties as corrections sergeant included supervision of rank and file correctional officers.

A pivotal event in the case occurred in December 1998 when another officer brought a birthday present to Blackburn's supervisor, a captain. On December 31, while Blackburn and the captain were in the watch office of the prison, the captain told Blackburn that he wanted to show her his present. He then removed from his desk a plastic wind-up toy shaped like a penis with attached legs and feet and allowed it to

"walk" across his desk. The next day, he showed the toy to male and female employees on two separate occasions when Blackburn was present.

On January 13, 1999, Blackburn made a written complaint concerning this conduct to the warden, Jack Lee. A subsequent investigation by the prison administration found that the captain and the other officer had committed violations of prison rules by bringing contraband into the prison and by sexual harassment. The captain was suspended without pay for four weeks and was removed from supervision of the plaintiff. The other officer was suspended without pay for two weeks.

Warden Lee wrote a letter to Blackburn on May 13, 1999, commending her report of the incident and urging her to contact the administration if she experienced any other incidents that she felt were discriminatory, harassing or retaliatory.

The plaintiff contends that thereafter her superiors, peers and subordinates began to treat her differently, with coldness and hostility. Although she had only received one written counseling in her first nine years, after the report she received three in one year and was threatened with the fourth. Blackburn's superiors questioned her decisions and changed her orders several times a day. As a result, Blackburn's subordinates "gloated" that they did not have to follow her orders.

This conduct continued until February 2, 2000, when, after one of her superiors threatened to file another complaint against her, she fainted and collapsed in the medical office of the prison. She was transported to a local hospital where she was

observed for three days before being released. Thereafter, she was placed on short-term disability, and did not return to work until April 13, but was again placed on short-term disability on September 10, 2000, due to a foot infection. On January 11, 2001, Blackburn was placed on permanent disability due to diabetic neuropathy and complications.

The plaintiff filed a complaint with the Equal Employment Opportunity Commission ("EEOC") on August 3, 2000, based on her perceived treatment. The EEOC did not find any violations of federal law and issued a right to sue letter on January 4, 2001. This suit followed.

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 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 non-moving party. *See Ross v. Communications Satellite Corp., 759* F.2d *355,* 364 (4th Cir. 1985).

At oral argument, the plaintiff agreed that her claim is based solely on retaliatory harassment. 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) (West 1994).

The Fourth Circuit has held that in order to make a prima facie showing of retaliation under this statute, 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.

A

The defendants argue that the plaintiff has failed to show that she engaged in a protected activity in order to meet the first prong of the *Ross* test. They contend that Blackburn's report about the captain's birthday present was not gender-based because the captain showed the item to both male and female employees. As a result, the defendants argue, Blackburn was not opposing an action that is protected by Title VII by making her complaint, so her retaliation claim must fail.

I find that the plaintiff has shown sufficient evidence to make a prima facie showing of protected activity. In *Ross,* the court noted that a retaliation claim may still lie even when an underlying discrimination claim had been dismissed. *See Ross*, 759 F.2d at 357 n. 1. Later Fourth Circuit cases, following the majority of other circuits,

have acknowledged the rule that in order to make a prima facie showing of protected activity, the employee need only show that she had a "good faith belief' that the activity she complained of was protected by Title VII. *See, e.g., Balazs v. Liebenthal*, 32 F.3d 151, 158-59 (4th Cir. 1994).

Blackburn has shown that she believed in good faith that the captain's actions constituted sexual harassment. In addition, the warden treated this activity as sexual harassment when he disciplined the captain and the other officer for the incident. It is not a bar to Blackburn's retaliation claim that this conduct might not be actual discriminatory conduct under Title VII. Therefore, the plaintiff has met the first prong of *Ross* for the purposes of this summary judgment motion.

B

The defendants also argue that the alleged conduct in this case does not rise to the level of an adverse employment action under Title VII. However, I find that the plaintiff has shown that a genuine issue of material fact exists over whether she suffered an adverse employment action.

In *Von Gunten v. Maryland*, 243 F.3d 858, 865 (4th Cir. 2001), the Fourth Circuit held that retaliatory harassment may constitute an adverse employment action. In order to meet the prima facie requirement, the plaintiff must provide evidence that the conduct complained of "adversely affected 'the terms, conditions, or benefits' of

the plaintiff's employment." *Id.* (quoting *Munday v. Waste Mgmt. of N. Am., Inc.*, 126 F.3d 239, 243 (4th Cir. 1997)).

Blackburn has presented evidence that her superiors curtailed and undermined her authority, discouraged her from making complaints and treated her abusively. If true, a jury could find that the conduct adversely affected the terms, conditions, or benefits of her employment.

C

Contrary to the defendants' argument that Blackburn has failed to make a prima facie showing of the third prong of the *Ross* test, I find that Blackburn has shown that a genuine issue of material fact exists as to causation.

In *Ross*, the court adopted a "but for" standard for causation. *See id.* at 365-366. Under this standard, a plaintiff must show that "but for" her protected activity, the adverse employment action would not have occurred. *See id.* In other words, the plaintiff must show that the adverse employment action was actually caused by the plaintiff's protected activity, such as filing a harassment complaint. It is not enough to show merely that retaliation was in part a reason for the action. *See id.* at 366.

A plaintiff is unable to make a prima facie showing of causation when a lengthy time lapse exists between the employer becoming aware of the protected activity and the adverse employment action, without additional evidence of causation. *See Causey v. Balog*, 162 F.3d 795, 803 (4th Cir. 1998) (citing *Dowe v. Total Action Against*

Poverty in Roanoke Valley, 145 F.3d 653, 657 (4th Cir. 1998)). However, the plaintiff need not show conclusive proof of causation. *See Williams v. Cerberonics, Inc.*, 871 F.2d 452, 457 (4th Cir. 1989).

In this case, the defendants argue that the plaintiff has not made a prima facie showing of causation because the period of time between the alleged protected activity—the filing of the complaint about the birthday present—is too remote in time from the alleged harassment, much of which occurred in January and February of 2000.

While Blackburn has not provided direct evidence that the offending conduct was causally related to the filing of her harassment complaint, she has provided evidence that her superiors treated her differently soon after the complaint was made and that the harassment against her accelerated over time, culminating in the events of January and February. Therefore, Blackburn has provided sufficient proof to survive a motion for summary judgment.

D

The plaintiff has named Ronald J. Angelone, the Director of the Virginia Department of Corrections and Jack Lee, the Warden of Keen Mountain Correctional Center as defendants. Supervisors are not individually liable under Title VII. *See Lissau v. S. Food Serv., Inc.*, 159 F.3d 177, 181(4th Cir. 1998). The only viable defendant in this case is the Commonwealth of Virginia Department of Corrections.

Because punitive damages are not available against a state agency, *see* 42 U.S.C.A. § 1982a(b)(1) (West 1994), the plaintiff's demand for such damages will be dismissed.

III

For the foregoing reasons, it is **ORDERED** that the defendants' motion for summary judgment [Doc. No. 4] is denied, except that the individual defendants Ronald J. Angelone, Director of the Department of Corrections, and Jack Lee, Warden, Keen Mountain Correctional Center, are dismissed as defendants, along with any claim for punitive damages.

ENTER: February 19, 2002

_____

United States District Judge