

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

VICKY L. HORNER,)
Plaintiff,) Civil Action No. 1:08cv00026
)
v.)
) <u>REPORT AND RECOMMENDATION</u>
SOUTHWEST VIRGINIA)
REGIONAL JAIL) BY: PAMELA MEADE SARGENT
AUTHORITY, et al.,) UNITED STATES MAGISTRATE JUDGE
Defendants.)

The plaintiff, Vicky L. Horner, brought this case against Southwest Virginia Regional Jail Authority, (“SWVRJA”), and numerous individual defendants individually and in their respective official capacities. Horner sought recovery under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et. seq.* for sex discrimination, the Fourteenth Amendment for a violation of procedural due process and wrongful discharge in violation of the Constitution of the Commonwealth of Virginia, Virginia state law and SWVRJA’s own regulations and policies. The claims stem from her employment as a detention officer at SWVRJA, effective October 6, 2005, and her termination¹ therefrom on May 17, 2007. By Order dated March 12, 2009, (Docket Item No. 25), the undersigned’s previous report and recommendation, (Docket Item No. 24), was adopted, thereby dismissing the case against the individual defendants and dismissing the claims for violation of procedural due process and wrongful discharge. Thus, the only

¹ The court notes that the defendant contends that Horner was not terminated and alleges that she resigned. On the other hand, Horner claims that after refusing to formally resign, she was terminated.

defendant remaining is SWVRJA, and the only claims remaining are those under Title VII.

This case is currently before the court on SWVRJA's Motion For Summary Judgment, ("Motion"), (Docket Item No. 37). The Motion is before the undersigned magistrate judge by referral pursuant to 28 U.S.C. § 636(b)(1)(B). As directed by the order of referral, the undersigned now submits the following report and recommended disposition.

I. Facts

Horner states in her declaration, (Declaration of Vicky L. Horner, ("Declaration"), (Docket Item No. 44)), that she was hired as a full-time detention officer for the Abingdon Facility of SWVRJA, effective October 6, 2005. She alleges that during the term of her employment with SWVRJA, she was subjected to intimidating and harassing conduct by supervisory personnel of SWVRJA on the basis of her gender. Horner alleges that, although she complained to superior officers regarding such conduct, no meaningful action was ever taken by SWVRJA or its employees to prevent the continuing harassment. Horner contends that SWVRJA has a pattern and practice of discriminating against females, in that female employees are singled out for intimidating and harassing conduct and are treated differently than male employees in disciplinary actions and termination.

Horner contends that the harassing behavior including numerous comments by Lieutenant Terry Powers, including statements that she was a distraction, she came in looking too "hot," her pants were too tight, she was "cheat on your wife

material” and her “boobs” were too small. According to Horner, Powers also referred to her and several other women as “HABS,” “Hot as Balls, my balls.” Powers also referred to having sex with ugly women and said that he would just lay them face down so that he did not have to look at them while “getting off.”

According to Horner, one of the officers on her shift, Officer Daven Eller, constantly made derogatory comments disrespectful toward women, including referring to women as “bitches.” Eller also made specific comments to Horner such as:

“Man they are giving me a hard time because we went to the club the other night and I had to f_ _ _ this ugly bitch because this hot bitch made my noodle hard and I didn’t want to go home and beat my meat;”

“Horner’s high maintenance;”

“Horner’s a bitch;”

“Horner, you don’t look like an officer, you should have been a nurse;” and

“Horner, your face looks like leather, can I have it when you die, it would make a good seat for my motorcycle.”

Horner claims Corporal Sergeant made derogatory comments toward women every time she saw him, including comments such as:

“There’s not enough bitches for the butches;”

“Those bitches back there are just hating on you, they’re jealous;”
“They’ll bend you over without lube around here;”
“You and Green are the only one on the shift worth f_ _ _ing;” and
“Women are like shoes, you keep the old shoes, you just replace the shoestrings from time to time.”

Horner claims that she complained of discrimination and harassing treatment to those above her in the chain of command, including Lieutenant William Couch, Corporal Christopher Snipes, Sergeant Jose Lopez, Lieutenant Nancy McCoy, Sergeant Melissa Mullins, Captain Vera Eaves, Captain Dwayne Lockhart and Major Matthew Pilkenton. Horner specifically alleges that defendant Major Matt Pilkenton, an employee of SWVRJA who held a position of authority and supervision over other SWVRJA employees, made statements prior to her termination that there were too many females within SWVRJA and that he intended to change that situation by getting rid of them and replacing them with males. Horner alleges that she had successfully completed all training and certification to hold her position and had never received an unsatisfactory employee performance review. Horner contends that there was disparate treatment of women in disciplinary matters at SWVRJA, in that males were more likely to be transferred or demoted for conduct for which a female employee would be more harshly disciplined or fired. Horner alleges that she was terminated without cause and was denied any meaningful process by which to contest her termination. She alleges that she was terminated in order to punish her and to retaliate against her due to her gender and for her complaints of discriminatory treatment.

In her Declaration, Horner alleges that the disparate treatment based on her gender included making her and other female officers work the female housing unit alone, not allowing female officers to take breaks, not allowing female officers to take meal breaks or forcing them to take late meal breaks, allowing male officers to eat all the food at meals leaving no food for female officers, refusing to allow female officers to respond to calls for assistance in male housing units but allowing male officers to respond to calls in female housing units, not allowing female officers to make rounds in male housing units but allowing male officers to make rounds in female housing units, not allowing Horner to take off for a relative's funeral while allowing male officers time off to go hunting and firing female officers while male officers involved in more serious incidents were allowed to retire, were promoted or were transferred.

II. Analysis

A. Motion for Summary Judgment

With regard to a motion for summary judgment, the standard for review is well-settled. The court should grant summary judgment only when the pleadings, responses to discovery and the record reveal that “there is no genuine issue as to any material fact and . . . the movant is entitled to a judgment as a matter of law.” FED. R. CIV. P. 56(c); *see, e.g., Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986); *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986). A genuine issue of fact exists “if the evidence is such that a reasonable jury could

return a verdict for the nonmoving party.” *Anderson*, 477 U.S. at 248.

In considering a motion for summary judgment, the court must view the facts and the reasonable inferences to be drawn from the facts in the light most favorable to the party opposing the motion. *See Anderson*, 477 U.S. at 255; *Matsushita*, 475 U.S. at 587. Thus, the court will view the facts and inferences in the light most favorable to the plaintiff on the defendant’s motion for summary judgment. In order to be successful on a motion for summary judgment, a moving party "must show that there is an absence of evidence to support the non-moving party's case" or that "the evidence is so one-sided that one party must prevail as a matter of law." *Lexington-South Elkhorn Water Dist. v. City of Wilmore, Ky.*, 93 F.3d 230, 233 (6th Cir. 1996).

B. Title VII Sexual Discrimination

There are two types of sexual discrimination claims under Title VII. These two types are hostile work environment and quid pro quo discrimination claims. *See Spencer v. Gen. Elec. Co.*, 894 F.2d 651, 658 (4th Cir. 1990). In this suit, Horner first claims that she was the victim of a hostile work environment as a result of the behavior of the defendant’s employees, who were her supervisors and colleagues.

1. *Hostile Work Environment*

In SWVRJA's Memorandum In Support Of Defendant's Second Motion For Summary Judgment, ("Defendant's Brief"), (Docket Item No. 38), SWVRJA argues that summary judgment should be granted because Horner cannot prove a Title VII violation, i.e., she cannot show a hostile work environment caused by sexual discrimination.

Title VII makes it "an unlawful employment practice for an employer ... to discriminate against any individual with respect to [her] compensation, terms, conditions, or privileges of employment, because of ... race, color, religion, sex, or national origin." 42 U.S.C.A. § 2000e-2(a)(1) (West 2003). The United States Supreme Court has said that Title VII is violated when an employee suffers sexual harassment that is "sufficiently severe or pervasive 'to alter the conditions of . . . employment and create an abusive working environment.'" *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 67 (1986) (quoting *Henson v. City of Dundee*, 682 F.2d 897, 904 (11th Cir. 1982)). In order to prevail on a claim for sexual harassment amounting to a hostile work environment, a plaintiff must prove: "(1) unwelcome conduct; (2) that is based on the plaintiff's sex; (3) which is sufficiently severe or pervasive to alter the plaintiff's conditions of employment and to create an abusive work environment; and (4) which is imputable to the employer." *Anderson v. G.D.C., Inc.*, 281 F.3d 452, 458 (4th Cir. 2002) (quoting *Conner v. Schrader-Bridgeport Int'l, Inc.*, 227 F.3d 179, 192 (4th Cir. 2000)).

Conduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment – an environment that a reasonable

person would find hostile or abusive – is beyond Title VII’s purview. Likewise, if the victim does not subjectively perceive the environment to be abusive, the conduct has not actually altered the conditions of the victim’s employment, and there is no Title VII violation.

Harris v. Forklift Sys., Inc., 510 U.S. 17, 21-22 (1993); *see also Lissau v. So. Food Serv., Inc.*, 159 F.3d 177, 183 (4th Cir. 1998).

Thus, there is both an objective, as well as a subjective, component to making a prima facie hostile work environment claim. The Supreme Court held in *Harris* that while “Title VII bars conduct that would seriously affect a reasonable person’s psychological well-being, . . . the statute is not limited to such conduct.” 510 U.S. at 22. Thus, in *Harris*, the Supreme Court held that a plaintiff need not show that the alleged conduct “seriously affect[ed] [her] psychological well-being” or led her to “suffe[r] injury,” noting that “[s]uch an inquiry may needlessly focus the factfinder’s attention on concrete psychological harm, an element Title VII does not require.” 510 U.S. at 22. The proper inquiry is as follows: “[s]o long as the environment would reasonably be perceived, and is perceived, as hostile or abusive . . . there is no need for it also to be psychologically injurious.” *Harris*, 510 U.S. at 22. In 2000, the Fourth Circuit, pursuant to *Harris*, included a fifth element to be considered in determining whether alleged conduct is subjectively perceived as severe and pervasive, whether psychological harm resulted therefrom. *See Conner*, 227 F.3d at 193, 199. Of course, the court must be mindful of the Supreme Court’s finding in *Harris* that the psychological impact need not be “serious.” *See* 510 U.S. at 22. Nonetheless, under the relevant case law, it appears that the plaintiff must make some showing of a psychological impact resulting from the offending conduct as evidence that he or she perceived the atmosphere as

hostile or abusive. However, I further note that “while psychological harm, like any other relevant factor, may be taken into account, no single factor is required.” *Harris*, 510 U.S. at 23.

SWVRJA maintains that Horner cannot set out a prima facie case on her hostile work environment claim, because she cannot demonstrate a sufficient amount of harassment, noting that episodic or isolated events are not sufficient. (Defendant’s Brief at 5-6.) Further, it is SWVRJA’s contention that the acts complained of by Horner are not pervasive enough to establish a hostile work environment. (Defendant’s Brief at 5-6.) SWVRJA does not contest the first, second or fourth elements of the above-mentioned test, i.e., that the conduct was unwelcomed, based on Horner’s sex and imputable to SWVRJA. (Defendant’s Brief at 4-6.) For the reasons discussed below, I find that Horner has presented facts sufficient for a reasonable jury to find that the harassment was severe or pervasive.

In order to determine whether a work environment is hostile or abusive, the court may look to the following factors: (1) the frequency of the discriminatory conduct; (2) its severity; (3) whether it is physically threatening or humiliating, or a mere offensive utterance; and (4) whether it unreasonably interferes with an employee’s work performance. *See Harris*, 510 U.S. at 23. Again, whether an environment is hostile or abusive requires a showing that a reasonable person would find it to be so – the objective component – and that the plaintiff found it to be so – the subjective component. Further, SWVRJA is correct in the assertion that “simple teasing, ... offhand comments, and isolated incidents (unless extremely

serious) will not amount to discriminatory changes in the terms and conditions of employment.” *Faragher v. City of Boca Raton*, 524 U.S. 775, 788 (1998) (internal citations omitted).

Horner set forth a litany of allegations in her Declaration, which, if true, are not only reprehensible, but could create a hostile work environment. As for the frequency of the inappropriate conduct and comments, Horner portrays the abuse as occurring on an almost daily basis. The wrongful conduct is alleged to have consistently occurred during the course of Horner’s employment with SWVRJA and, due to the volume of the alleged wrongful conduct, appears to have occurred frequently. Thus, when viewing the evidence most favorably to Horner, the indication is that the wrongful conduct occurred with some degree of frequency and is not an isolated event or a single indiscretion.

With respect to the severity of the discriminatory conduct, I find that the actions and comments alleged were sufficiently severe to remove them from the realm of simple teasing or off hand comments. The comments complained of by Horner are not limited to the single comment by Major Pilkenton, which is the focus of the Defendant’s Brief, namely that he was going to replace females with males because they were intellectually superior. Rather, there are numerous inappropriate comments, which arguably are much more egregious than the previously mentioned comment. Without providing a comprehensive list, some of the more heinous alleged conduct includes Horner’s allegations that Lieutenant Powers told her that her “boobs were too small,” she was “hot as balls, [his] balls,” he talked of having sex with ugly women and stated he would lay them face down

so he did not have to look at them while “getting off.” According to Horner, there were many other sexual comments. Also, Horner claims that Officer Daven Eller made many derogatory sexual comments, both directly and indirectly toward her, and referred to women as “bitches.” Also, Horner alleges Corporal Sergeant told her, “you and Green are the only one[s] on the shift worth f_ _ _ing.”

While Horner does not indicate that she was physically threatened or intimidated, throughout the Declaration she reiterated the fact that the conduct she complained of often occurred in front of co-workers or inmates and, as a result, caused her a great deal of humiliation. It is not clear what effect the alleged discriminatory conduct had on Horner’s work performance, other than her stating that the rumors and tumultuous relationship with her superiors caused a lack of respect from the inmates and caused her to be shifted to different posts more frequently than normal. Accordingly, I find that Horner has produced sufficient evidence to meet her burden on the objective component because a reasonable person could have found the work environment was hostile.

Furthermore, Horner also has produced sufficient evidence to establish the subjective component of the hostile work environment analysis. As discussed above, the plaintiff need not establish a “serious” psychological condition, but must assert some evidence showing that the discriminatory conduct was perceived as hostile or abusive. Horner often voiced her complaints of the discriminatory conduct to fellow SWVRJA employees, which provides an indication that she perceived the conduct as inappropriate. However, what particularly satisfies the subjective threshold is Horner’s statement in the Declaration that “I was so stressed

out and emotional. I was humiliated, I was embarrassed.... I was scared, I didn't trust any body, I tried to avoid everyone.... I dreaded going to work. I cried while I was getting ready, I cried going to work, I cried coming home. It was the worst situation I had ever been in." These factual allegations sufficiently show that Horner perceived the conduct as hostile and/or abusive, and demonstrate the psychological impact they had on her. Thus, I find that Horner has produced evidence sufficient to create a dispute in material fact as to whether she was subjected to a hostile work environment based on her gender. As such, I find that the Motion should be denied as to the hostile work environment claim.

2. *Disparate Treatment*

Horner also claims that she was a victim of disparate treatment by SWVRJA, in that, in disciplinary matters, male employees were not punished as harshly as female employees. Further, Horner alleges that she did not receive adequate breaks or support, and she states that she was prevented from performing certain duties because of her gender. Ultimately, Horner alleges that she was fired because of her gender.

When a plaintiff in a Title VII case has only indirect evidence of discrimination, then the burden shifting framework set forth by the Supreme Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973), applies. Under *McDonnell Douglas*, a plaintiff in a Title VII case relying on indirect evidence establishes a prima facie case of discrimination by showing the following: (1) she is a member of a protected class; (2) she suffered adverse employment action; (3)

she was performing her job duties at a level that met her employer's legitimate expectations at the time of the adverse employment action; and (4) the position remained open or was filled by similarly qualified applicants outside of the protected class. *See Hill v. Lockheed Martin Logistics Mgmt., Inc.*, 354 F.3d 277, 285 (4th Cir. 2004) (en banc). Under the *McDonnell Douglas* framework, if a plaintiff makes a prima facie case of discrimination, then the burden shifts to the defendant to articulate some legitimate, nondiscriminatory reason for the employer's action. *See Tex. Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 254 (1981). If a defendant does so, then the plaintiff must demonstrate that the proffered reason was not the true reason for the employment decision. *See Burdine*, 450 U.S. at 256.

In this case, however, Horner has presented direct evidence of discrimination. Thus, the *McDonnell Douglas* burden shifting scheme is inapplicable. *See Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 511-12 (2002) (citing *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 121 (1985)). “Direct evidence of discrimination is evidence which, if believed, would prove the existence of a fact ... without any inference or presumptions.” *O'Connor v. Consol. Coin Caterers Corp.*, 56 F.3d 542, 548 (4th Cir. 1995) (quoting *Bodenheimer v. PPG Indus., Inc.*, 5 F.3d 955, 958 (5th Cir. 1993)). I find that Horner has presented direct evidence of discrimination. In particular, Horner has offered evidence that Major Matthew Pilkenton made comments that there were too many females working at the jail and that he was going to weed them out. She further testified that Pilkenton was the individual who actually terminated her on May 17, 2007. I find that this evidence, if found to be credible by a jury, would be

sufficient to prove that the decision to fire Horner was based on a discriminatory reason. I further find that this evidence would be sufficient for a jury to find discriminatory intent. That being the case, I find that a reasonable jury could return a verdict for Horner on her disparate treatment claim, and I recommend that the Motion be denied as to Horner's disparate treatment claim.

It is important to note that the only argument SWVRJA makes regarding the disparate treatment claim is that a prima facie case cannot be established because Horner was not terminated, but rather she resigned. Further, SWVRJA argues that the statement of Pilkenton that he was going to replace females with males was too remote to the actual resignation to justify this claim. However, I find this argument unpersuasive. Despite SWVRJA's claim, it appears that Horner has presented evidence that she was, in fact, terminated. Horner's Declaration states that she told Pilkenton that she did not want to resign, at which point, he told her she was terminated. In fact, in a letter dated May 16, 2007, from Pilkenton to Horner, he wrote "[y]ou stated you didn't want to resign this making my decision to terminate your employment with the SWVRJA effective immediately." (Docket Item No. 44, Attachment 25.) Moreover, while it is true that the remoteness of a comment can diminish the effect it has in a discrimination claim, *see Birkbeck v. Marvel Lighting Corp.*, 30 F.3d 507, 511-12 (4th Cir. 1994), Horner has alleged a plethora of actions, which if proven, can establish a disparate treatment claim. Furthermore, there is a discrepancy regarding the timing of Pilkenton's comments. SWVRJA claims, and Pilkenton admits, that he made the comment once, shortly after he began working at the Abingdon, Virginia, SWVRJA facility. On the other hand, Horner claims that Pilkenton made the comment directly to her in December 2006.

Accordingly, I find that there are sufficient factual disputes so that the Motion should be denied.

PROPOSED FINDINGS OF FACTS AND CONCLUSIONS OF LAW

As supplemented by the above summary and analysis, the undersigned now submits the following formal findings, conclusions and recommendations:

1. Horner has produced evidence from which a reasonable person could find that the abuse by co-workers and superiors at SWVRJA based on gender in her work environment was severe and pervasive;
2. Further, Horner has produced evidence to establish that she found the conduct to be severe and pervasive;
3. Accordingly, a genuine issue of material fact exists, and the Motion should be denied as to Horner's hostile work environment claim;
4. Horner has produced direct evidence that her treatment by SWVRJA, including her termination, was based on her gender, in that she has proffered evidence that Major Pilkenton, the very individual who terminated her, made comments that there were too many females working at the jail and that he was going to weed them out; and
5. Therefore, a genuine issue of material fact exists, and the Motion should be denied as to Horner's disparate treatment claim.

RECOMMENDED DISPOSITION

Based on the above stated reasons, I recommend that the Motion be denied.

Notice to Parties

Notice is hereby given to the parties of the provisions of 28 U.S.C. § 636(b)(1)(c):

Within fourteen days after being served with a copy [of this Report and Recommendation], any party may serve and file written objections to such proposed findings and recommendations as provided by rules of court. A judge of the court shall make a de novo determination of those portions of the report or specified proposed finding or recommendation to which objection is made. A judge of the court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge. The judge may also receive further evidence to recommit the matter to the magistrate judge with instructions.

Failure to file written objection to these proposed findings and recommendations within 14 days could waive appellate review. At the conclusion of the 14-day period, the Clerk is directed to transmit the record in this matter to the Honorable James P. Jones, Chief United States District Judge.

The Clerk is directed to send copies of this Report and Recommendation to all counsel of record and all unrepresented parties.

DATED: This 18th day of February 2010.

/s/ *Pamela Meade Sargent*
UNITED STATES MAGISTRATE JUDGE