UNPUBLISHED

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

JENNIFER CLARKE,	)	
	)	
Plaintiff,	)	Case No. 1:01CV00012
	)	
v.	)	**OPINION**
	)	
PAUL O'NEILL, SECRETARY OF THE TREASURY OF THE UNITED STATES,	)	By: James P. Jones
	)	United States District Judge
	)	
	)	
Defendant.	)	

Susan D. Oglebay, Castlewood, Virginia, and Terry G. Kilgore, Wolfe, Williams & Rutherford, Gate City, Virginia, for Plaintiff; William W. Siler, Office of the United States Attorney, Memphis, Tennessee, for the Defendant.

In this government employment case involving alleged sexual discrimination, hostile work environment, and retaliation, I find that the plaintiff has failed to produce sufficient evidence to create a prima facie showing on her claims, and further failed to show discriminatory animus on behalf of the defendant. Because she cannot meet her burden of proof, I will grant summary judgment in favor of the defendant.

I

The plaintiff, Jennifer Clarke, is a special agent employed by the federal Bureau of Alcohol, Tobacco and Firearms ("BATF"). She has worked at the Bristol, Virginia field office since June 17, 1990. She alleges four incidents of disparate treatment, and claims that three of those events created a sexually hostile work environment. She also alleges retaliation based on a thirty-day suspension she received after filing her complaints with the equal employment opportunity ("EEO") office. She exhausted her claims administratively[1] and filed this action on February 5, 2001, under Title VII of the Civil Rights Act. *See* 42 U.S.C.A. §§ 2000e-2(a)(1), 2000e-3(a) (West 1994). The defendant moved for summary judgment. The motion has been briefed and is ripe for decision.[2]

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

[1] The disparate treatment and hostile work environment claims were denied by an administrative judge for the Equal Employment Opportunity Commission. *See Clarke v. Summers*, EEOC No. 100-99-8160X (Jan. 16, 2001). The retaliation claim was denied by an administrative judge for the Merit Systems Protection Board. *See Clarke v. Dep't of the Treasury*, No. DC-0752-00-0640-I-1 (Nov. 30, 2000).

[2] 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.

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).

"Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). Summary judgment is not "a disfavored procedural shortcut," but an important mechanism for weeding out "claims and defenses [that] have no factual basis." *Id.* at 327.

In opposing summary judgment, the nonmoving party must "set forth such facts as would be admissible in evidence." Fed. R. Civ. P. 56(e). Inadmissible hearsay cannot be used to oppose summary judgment. *See Greensboro Prof. Fire Fighters Ass'n v. City of Greensboro*, 64 F.3d 962, 967 (4th Cir. 1995).

II

The essential facts of the case, recited in the light most favorable to the plaintiff on the summary judgment record, are as follows.

The first alleged occurrence of disparate treatment happened in 1997, when the plaintiff was denied a promotion from the GS-12 grade of employment to a GS-13 grade. In her effort to be promoted to a GS-13, Clarke completed a promotional package in January 1997 and submitted it to a promotional panel for consideration. In her package, she described work she had performed in Atlanta, Georgia as part of the 1996 Olympic Games security detail. She explained that she had worked for seven weeks at the Bomb Management Center, helping to coordinate the diagnostic explosive teams. Her assignment included keeping track of bomb threats, suspicious packages, and explosive incidents. A panel of three members considered Clarke's promotion package. In order to grade a particular work assignment as GS-13, each member had to agree that at least four of six "Factor 1 elements" should be rated as GS-13, and that "Factor 2" warranted a rating of GS-13. The panel's summary sheet indicates that with respect to Clarke's Olympic Games detail work, only two of the panelists rated at least four of the "Factor 1 elements" at a GS-13 level, and none of the panelists rated "Factor 2" as GS-13.

The plaintiff contends that the Olympic Games detail work of two male agents, Stephen Zellers and Donald Rogers, was rated at the GS-13 level. Jeanarta C. Lee, Chief of the Pay and Position Branch of the BATF, reviewed the promotion packages of Agents Zellers and Rogers. She determined that Zellers' Olympic Games detail

work was not classified as GS-13, and his promotion to a GS-13 grade was not contingent on the Olympic Games work because he did not need it to meet his hours requirement. With respect to Agent Rogers, his Olympic Games detail work was rated as GS-13 because his duties included a supervisory role. In Rogers' promotion request, he stated that he had "organized, planned and directed the efforts of A.T.F. personnel as well as those of twenty-one additional agencies" and that he was Chairman of the Explosive Ordinance Disposal/Bomb Investigation Subcommittee. (Def's Mot. Ex. G at 1.) Furthermore, the decision to credit Rogers' Olympic Games detail work as GS-13 was not made by the panel members; rather, because a consensus could not be reached by the panelists, Rogers' promotion request was referred to the Division Chief for a decision.

On March 28, 1997, Clarke learned that her promotion had been denied. In July 1997, she was promoted to GS-13 through an alternative promotion process, but the promotion was not retroactive.

The second alleged incident of discrimination occurred on September 15, 1998, when the Resident Agent in Charge ("RAC") of the Bristol office, Kenneth Vicchio, met with other agents to plan the arrest of a suspect. The briefing happened on a Tuesday morning and Clarke arrived at the office after the meeting had already begun. Clarke had been away from the office for several weeks prior to that date, and

Vicchio decided that it would be preferable to allow Clarke to catch up on her accumulated paperwork instead of including her in the arrest. He believed that enough agents were already available for the arrest considering that the suspect was an older man who had cooperated with them in the past, and Clarke's help would not be necessary. He stated in his affidavit that, "[H]ad [Clarke] arrived to work on time and participated in the briefing, she would have been included. . . .[N]o one needed a special invitation to participate. Had she walked in the room she could have been easily added to the operation." (Def. Mem. Ex. I at 3-1.) Other agents in the office provided similar statements.

The third incident occurred on September 21, 1998, when Vicchio made critical remarks regarding a note that Clarke left on his desk. Clarke was concerned because she had been contacted by a collection agency about a work-related medical bill that she thought BATF had failed to pay. She attached the bill to a note in which she threatened to sue BATF. Upon receiving the note, and in Clarke's absence, Vicchio made comments to three other agents that he agreed with Clarke that BATF was responsible for payment of the bill, but expressed his frustration about the way Clarke had handled the situation, specifically, the negative and demanding tone she used in the letter.

On September 28, 1998, Vicchio made arrangements for an upcoming four-day absence from work. He assigned Agent Larry Hall to serve as acting RAC while Vicchio was out of the office. Clarke alleges that Vicchio's actions constituted sexual discrimination because he did not select her to be in charge. Vicchio's custom was to choose more senior agents to fulfill his duties in his absence. Agent Hall had fifteen years of service with BATF at that time, and Clarke was third in seniority with eight years of experience.

These three incidents of alleged discrimination by Vicchio were the only occurrences investigated by the administrative judge.

Clarke has submitted affidavits by two law enforcement officers who, in August 1994, overheard Vicchio comment that "women don't belong in law enforcement." (Pl.'s Mem. Ex. L.) Those and other sworn statements also chronicle some alleged untruthful statements that Vicchio made about the plaintiff's work performance as well as his alleged efforts to thwart her investigations by denying her use of certain investigative tools.

The plaintiff's retaliation claim is based on a thirty-day suspension she received for misuse of her government-owned vehicle ("GOV"). On July 2, 1999, Clarke was scheduled for vacation to visit her family, but her BATF duties interfered with those plans and she was required to work late that evening. When she left work,

she drove her GOV to the home of a friend, where she stayed overnight. On her drive home the next morning, she was rear-ended by another driver. Her friend, Trooper David Anderson, was an unauthorized passenger in the car. Trooper Anderson was with her to assist in unloading government equipment from the GOV, so that she could leave on the vacation that had already been delayed.

Clarke does not dispute that her actions violated BATF policy, but argues that the punishment was too severe. Her case was reviewed by a Professional Review Board ("PRB"), which must be composed of five members. One of those members was Wilfred Larry Ford, who at the time was one of Clarke's supervisors. He reviewed the documents connected with the case, but when the PRB convened, he recused himself due to his supervisory role. No replacement was assigned to the PRB, which now consisted of only four members, including Joseph Lynn Cheatwood, who was a named party in Clarke's discrimination complaint. Cheatwood did not recuse himself.

After the PRB made its recommendation to suspend Clarke for thirty days, the matter was referred to a deciding official, in this case, Wilfred Larry Ford. Ford upheld the recommendation of the PRB and issued the thirty-day suspension, effective June 13, 2000, based on misuse of an assigned GOV and transporting an unauthorized person in the GOV. He testified in an affidavit that he "based [his]

decision on the record before [him] and did not consider any other factor(s). . . . [W]hen [he] reviewed the suspension, [he] had no personal knowledge that SA Clarke had even filed an EEO claim or had any EEO issues concerning her employment with the Bureau." (Def.'s Mem. Ex. Q at 2.)

Clarke asserts that Ford was aware of her EEO complaints, despite his testimony to the contrary.[3] At his deposition, he was asked whether he had any knowledge that Clarke had raised an issue of discrimination. He responded, "I knew there was issues, I didn't know what the issues were. All I know they were issues . . . from, I guess, walking in on a conversation, a partial conversation." (Pl.'s Mem. Ex. G at 15.) Ford stated that he had walked in on the very end of the conversation, which was between two agents who were discussing Clarke.[4]

III

Under the proof scheme adopted by the Supreme Court for Title VII actions, the plaintiff has the initial burden of proving a prima facie case of discrimination. *See*

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[3] Many of the reasons asserted by Clarke as to why Ford allegedly had knowledge of her EEO complaints prior to the suspension decision are merely speculative or otherwise entirely unsupported by the summary judgment record, and thus will not be addressed here.

[4] The plaintiff contends that this conversation took place before March 22, 2000, approximately two months before Ford issued his decision against Clark. Ford testified at his deposition that the conversation took place sometime between July 1999 and August 2000.

McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973). The burden then shifts to the defendant to rebut the presumption of discrimination by producing evidence that shows a "legitimate, nondiscriminatory reason" for its actions. *Texas Dep't of Cmty. 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 gender discrimination was the real reason for the employment decision. *See St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 515 (1993).

Where the alleged discrimination is based upon a failure to promote, a prima facie case is established by proof that: (1) the plaintiff is a member of a protected group; (2) she applied for the position in question; (3) she was qualified for the position; and (4) she was rejected for the position under circumstances giving rise to an inference of unlawful discrimination. *See McNairn v. Sullivan*, 929 F.2d 974, 977 (4th Cir. 1991). Clark cannot establish the third element of a prima facie case—that she was qualified for the position. *See Taylor v. Va. Union Univ.*, 193 F.3d 219, 231 (4th Cir. 1999) (finding that plaintiff did not establish prima face case because she did not meet the requirements for a promotion to the rank of corporal). While Title VII prohibits the denial of a promotion on the basis of gender, nothing in the Civil Rights Acts requires that the plaintiff be promoted to a position for which she is not

qualified. *See Young v. Edgcomb Steel Co.*, 499 F.2d 97, 98 (4th Cir. 1974) (racial discrimination case). The summary sheet showing how the promotion panel assessed her Olympic Games detail work demonstrates that, in the opinion of its members, Clarke's duties did not meet the established requirements for a GS-13 rating. The process by which a promotion package is reviewed and the qualifications for a GS-13 grade are clearly established and have not changed since implementation of the promotion panel. Clarke's Olympic Games security detail did not measure up to the standards, thus preventing her from being promoted. Because she had not performed the requisite level of work, she was not qualified for a job at the GS-13 level.

Even if Clarke could establish a prima facie case, she has not produced any evidence of pretext to counter the defendant's legitimate nondiscriminatory reason for the panel's decision to deny the promotion. "The plaintiff may show pretext for discrimination with evidence that similarly situated employees outside of the plaintiff's protected group received favored treatment or did not receive the same adverse treatment." 1 Barbara Lindemann & Paul Grossman, *Employment Discrimination Law* 30-31 (3d ed. 1976). Clark identified two male BATF agents that she believed received preferential treatment, but she supplies no evidence to support this speculative belief and therefore does not create a triable issue of fact.

The defendant, however, has submitted the affidavit of Jeanarta Lee, which establishes that the Olympic work of Agent Zellers was not graded at GS-13. It also explains that Agent Rogers was granted a promotion to GS-13 based on his supervisory role and heightened responsibilities at the Olympics. Comparing the duties of Clarke and Rogers, as described in their promotion applications, it is clear that Rogers' work was significantly different from that of Clark, and therefore the promotion panel was justified in ranking his work at a higher level. *See Page v. Bolger*, 645 F.2d 227, 230 (4th Cir. 1981) ("[T]he mere fact that subjective criteria are involved in the reason articulated by an employer does not prevent according it sufficient rebuttal weight to dispel the inference of discrimination . . . ."). The defendant has adequately demonstrated that Rogers cannot be considered as a similarly situated employee for purposes of comparison.

There is nothing in the record from which a jury could infer discriminatory intent on the part of the promotion panel in making this decision. In fact, Clarke even denied that the individuals on the panel intended to discriminate, and instead stated that there was a flaw in "the way the panel was designed." (Def.'s Mem. Ex. F at 37.) Therefore, I find that even if Clarke could establish a prima facie case, which is doubtful, there is no evidence of pretext to satisfy the plaintiff's ultimate burden at trial on the issue of nonpromotion.

With respect to the three incidents of alleged discrimination by Vicchio in September 1998, the plaintiff again fails to meet her initial burden of proof. To establish a claim of employment discrimination, the plaintiff must show that: (1) she is a member of a protected class; (2) she was subject to an adverse employment action; and (3) that similarly situated male agents were treated more favorably. *See Brinkley v. Harbour Recreation Club*, 180 F.3d 598, 607 (4th Cir. 1999). An adverse employment action has been described as an "ultimate employment decision[] such as hiring, granting leave, discharging, promoting, and compensating." *Page*, 645 F.2d at 233. By contrast, "there are many interlocutory or mediate decisions having no immediate effect upon employment conditions which were not intended to fall within the direct proscriptions of . . . Title VII." *Id.* None of the events described by Clarke constitute an adverse employment action. Her absence from one meeting had no effect upon her employment condition. Likewise, Vicchio's negative reaction to Clarke's note is an insignificant action that should not be considered adverse to Clarke's employment status. Finally, the missed opportunity to serve as Acting RAC in Vicchio's absence did not affect the terms, conditions or benefits of her job. For these reasons, I find that Clarke cannot establish a prima facie case of discrimination based on these three trivial incidents.

In addition, Clarke has not presented any evidence of pretext to refute the legitimate nondiscriminatory reasons proffered by the defendant for certain of Vicchio's actions. Vicchio avers that he decided not to include Clarke in the operational briefing on September 15 because she had arrived late to work and had paperwork to complete due to her two-week absence from the office. Had Clarke arrived to the office on time that morning, Vicchio states that she would have been included in the meeting. With respect to the plaintiff's note, Vicchio openly admitted that Clarke was justified in her concern regarding the payment. He also testified that he chose an agent with more experience to perform the duties of Acting RAC while he was away from the office.

Clarke's assertion that Vicchio discriminated against her because of her gender is not supported by any evidence. Her allegations that Vicchio made dishonest statements about her work and commented to others that "women do not belong in law enforcement" are not sufficient to present a material issue of fact. "Derogatory remarks may in some instances constitute direct evidence of discrimination . . ., but 'Title VII was not designed to create a federal remedy for all offensive language . . . in the workplace.'" *Brinkley*, 180 F.3d at 608 (quoting *Hopkins v. Baltimore Gas & Elec.*, 77 F.3d 745, 754 (4th Cir. 1996)). Isolated or stray demeaning comments are not enough to demonstrate discriminatory animus. *See id.*

Moreover, to constitute evidence of pretext, such comments must be related to the employment decision at issue. *See id.* In this case, Vicchio's single negative comment about female officers and the few alleged instances of untruthfulness are insufficient to create an issue for the jury. The comment was made four years before the incidents in question and there is no reason to believe a nexus exists between his utterance or his dishonesty and the events in September 1998. Therefore, Clarke cannot prevail on this claim.

For her claim of hostile work environment, Clarke must prove that: (1) the harassment was because of sex; (2) the harassment was unwelcome; (3) the harassment was sufficiently severe or pervasive to create an abusive environment; and (4) there is a basis for imputing liability to the employer. *See EEOC v. R&R Ventures*, 244 F.3d 334, 338 (4th Cir. 2001). Evidence that the plaintiff was subject to callous words or treatment is insufficient to support a Title VII claim. *See Brinkley*, 180 F.3d at 611.

> "Title VII does not prohibit all verbal or physical harassment in the workplace . . . . The Supreme Court has cautioned that careful attention must be given by a court to the requirements of Title VII in order to avoid the risk of transforming the statute into "a general civility code for the American workplace."

Nichols v. Caroline County Bd. of Educ., 123 F. Supp. 2d 320, 326 (D. Md. 2000) (quoting *Oncale v. Sundowner Offshore Servs. Inc.*, 523 U.S. 75, 75 (1998)). To

determine whether a working environment is hostile or abusive, as required by the third element, the court must look to all circumstances, including the frequency and severity of the conduct, whether it is physically threatening or humiliating, and whether it unreasonably interferes with the plaintiff's work performance. *See Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 23 (1993).

Considering all of the circumstances, I find as a matter of law that the three incidents complained of were not pervasive or severe enough to create an abusive environment. Although all of the events took place in one month, that circumstance must be considered against the fact that Clarke and Vicchio had worked together for more than four years before the filing of her EEO complaints. Three relatively insignificant and isolated acts over the course of four years is insufficient to create a hostile environment. *See Patterson v. County of Fairfax*, No. 99-1738, 2000 WL 655984, at *4 (4th Cir. May 18, 2000) (unpublished) (holding that seven incidents spanning seven-year period not so pervasive as to create a hostile work environment). None of Vicchio's actions or comments were blatantly disparaging or offensive, or sexually directed. Clarke was never physically threatened. Furthermore, the events took place outside of her presence. Although Clarke alleges that she was unable to perform her job to her utmost capacity due to Vicchio's inconsiderate actions, there is no objective evidence that her work was significantly hindered by these incidents.

Clarke's retaliation claim also fails. A prima facie case of retaliation requires evidence that Clarke engaged in a protected activity, that her employer took an adverse employment action against her, and that there is a causal connection between the two events. *See Tinsley v. First Union Nat'l Bank*, 155 F.3d 435, 443 (4th Cir. 1998). Clarke's case fails because there is no evidence creating a link between her punishment for misuse of her GOV and the protected activity, in this case, her filing of discrimination claims. Clarke first officially complained about the alleged discrimination in September 1998 when she spoke to an EEO Regional Counselor regarding the incidents of disparate treatment that she had observed. She filed her complaint on October 29, 1998. The decision by Wilfred Ford to suspend Clarke for thirty days was made on May 25, 2000, more than a year and a half later. When such a significant amount of time exists between the protected activity and the adverse action, there can be no causal connection between the two. *See Dowe v. Total Action Against Poverty in Roanoke Valley*, 145 F.3d 653, 657 (4th Cir. 1998). Plus, the deciding official, Ford, swore in his affidavit that he was unaware that Clarke had filed an EEO complaint; therefore, retaliation for her discrimination claims could not have been his motivation for suspending her. *See Dowe*, 145 F.3d at 657 ("[T]he employer's knowledge that the plaintiff engaged in a protected activity is absolutely necessary to establish the third element of the prima facie case.").

Clark alleges that Ford did know about the EEO complaint. However, even if Ford had been aware of her discrimination claims, that fact alone is insufficient to withstand summary judgment considering that there were legitimate reasons for the suspension.[5] *See Peralta v. Levindale Hebrew Geriatric Ctr. & Hosp.*, No. HAR 94-3298, 1995 WL 604705, at *4 (D. Md. Aug. 1, 1995). Clarke's allegations that Ford did in fact know that she had raised discrimination issues in the Bristol office are speculative at best and do not create a genuine issue of fact. *See Beale v. Hardy*, 769 F.2d 213, 214 (4th Cir. 1985) ("The nonmoving party . . . cannot create a genuine issue of material fact through mere speculation or the building of one inference upon another."). The conversation that Ford overheard merely demonstrates that he may have been aware that there were some "issues" with Clarke, but as he testified in his deposition, he had no knowledge of what exactly those issues were. (Pl.'s Mem. Ex. G at 15.) Clarke has not produced any evidence to support the other reasons she proffers as to why Ford may have had knowledge of her protected activity; therefore, her allegations cannot be considered in deciding the defendant's motion. I find that she cannot establish a causal link between her protected activity and the suspension and thus cannot establish a prima facie case of retaliation.

[5] Clarke does not dispute that she violated BATF policy. There is a mandatory one-month suspension for willful unauthorized use of a GOV. *See* 31 U.S.C.A. § 1349(b) (West 1983).

IV

I find that this is an appropriate case for summary judgment because there is no genuine issue of material fact. The plaintiff has failed to produce evidence to support certain of the required elements of her claims, and thus cannot establish a prima facie case on the discrimination claims, the hostile work environment claim, or the retaliation claim. Nor can she show that the defendant's legitimate nondiscriminatory reasons are pretextual. Therefore, for the reasons stated above, I will grant summary judgment in favor of the defendant.

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

DATED: December 18, 2002

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United States District Judge