IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

LAURA McBURNEY,	)	
	)	
Plaintiff,	)	Civil No. 4-00-cv-10386
	)	
vs.	)	
	)	
ARCHITECTURAL WALL SYSTEMS, INC.,	)	ORDER
	)	
	)	
Defendant.	)	

Before the Court is defendant's motion for summary judgment filed September 20, 2001. Plaintiff resisted the motion on October 24, 2001, and defendant filed a reply on November 9, 2001. Oral argument has been requested but is unnecessary. The matter is fully submitted.

I. BACKGROUND

The following facts are either undisputed or viewed in a light most favorable to plaintiff. Defendant Architectural Wall Systems Co. ("AWS") is a commercial construction subcontractor. The president of AWS is Mike Cunnigham. Plaintiff Laura McBurney was hired by AWS to work as a project coordinator, and began working on February 1, 1999. McBurney's only other experience in the construction industry prior to her employment at AWS was as an administrative assistant for a glass installation company for approximately a year and a half. Many of her duties as project coordinator for AWS were similar to the duties she performed in her prior position as an administrative assistant.

McBurney was interviewed and hired by Tim Woolworth, operations manager for AWS. Woolworth was a senior company executive who was considered the second person in charge of the company's daily operations, behind Cunningham, the company's president. Woolworth had extensive experience in the construction industry. Prior to interviewing with Woolworth and working at AWS, McBurney had become engaged in a romantic relationship with him. Woolworth was married when he first became involved with McBurney, and throughout McBurney's employment with AWS. Accordingly, Woolworth's and McBurney's relationship was not publicly known. There is nothing in the AWS Employee Policy Manual that addresses whether a supervisor may hire someone with whom he is romantically involved, nor does it address whether employees may date. *See* Pltf's Exhibits at 000106-000159.

Prior to the time that McBurney was hired to be a project coordinator for AWS, the company was bidding on a contract for the construction of a forty-two story building in Omaha, Nebraska. The company spent substantial time and effort attempting to get this contract. This would have been an extraordinarily large project for AWS, that by all accounts would have taken AWS to the "next level" as a company and required AWS to hire more employees. *See* Pltf's Exhibits at 000069, 000078 (Woolworth's deposition). McBurney was informed by Cunningham during her employment with AWS that if the company got the Omaha contract, she would be a project coordinator on that job. *See* Pltf's Exhibits at 000027 (McBurney's deposition). However, on February 19, 1999, AWS learned that it did not get the Omaha contract.

On February 23, 1999, Woolworth had a meeting with Cunningham and Rob Ferin, business manager for AWS. At the meeting, Cunningham and Ferin stated that some AWS

employees suspected Woolworth was in a relationship with McBurney. *See* Deft's Exhibit A (Cunningham's deposition) at 37-38. During the meeting, Ferin and Cunningham both asked Woolworth whether he was having an extramarital affair with McBurney. *Id.* at 39-40. Woolworth lied and denied he was having an affair with her. *Id.* at 40; Pltf's Exhibits at 000065. Cunningham told Woolworth at the meeting that he believed that he was not having the affair. *Id.* Cunningham never asked McBurney if she was in a romantic relationship with Woolworth.

During this same meeting, after the initial discussion about the existence of an affair, Cunningham told Woolworth the perception of an affair still existed, and that he wanted Woolworth to fire McBurney. *See* Pltf's Exhibits at 000065. Woolworth asked Cunningham what reason he was to give McBurney for her termination, and Cunningham told him to tell her "it's because we lost the Omaha job." *See* Pltf's Exhibits at 000065. Later that afternoon, Woolworth informed McBurney that she was fired. He explained to her that he was supposed to tell her it was because AWS had lost the Omaha job, but the real reason was because of the perception of an affair. *See* Pltf's Exhibits at 000070. Despite his perceived involvement in an affair, Woolworth maintained his employment with AWS.

The day after McBurney was fired, Cunningham told Woolworth to fire another employee, John Fontani. Woolworth states that Cunningham wanted Fontani terminated for performance reasons, and that he informed Fontani of this decision. *Id.* at 000070 - 71. Cunningham denies Fontani was terminated for performance reasons, but rather asserts both Fonatani and McBurney were fired because of the loss of the Omaha job. *See* Deft's Exhibit A at 42. Woolworth did not document the reasons for either employee's termination. *See* Pltf's Exhibits at 000071.

The project coordinator position McBurney held was not immediately filled by AWS. In the spring of 1999, there was discussion between Cunningham and Woolworth that another project coordinator may be needed. *See* Pltf's Exhibits at 000086. In June 1999, Woolworth and Cunningham interviewed a candidate for the project coordinator position named Janet Juhl, who had drafting experience and training. Woolworth informed Cunningham that rather than just interview Juhl, he felt they should "see who else is out there." *Id.* at 000087. Thereafter, AWS advertised an opening for a project coordinator position in the newspaper and with the Iowa Workforce Development Center. Woolworth drafted the newspaper job listing, and did not show it to Cunningham before it ran in the newspaper. The listing did not state what type of work AWS did, nor did it list what qualifications or training or experience an applicant was to have. *Id.* at 000088. In response to this advertisement, AWS received a broad based response from approximately thirty people with all kinds of backgrounds. Woolworth informed McBurney, whom he was still romantically involved with, of the job listing and McBurney applied for the position. AWS did not interview McBurney or any of the other candidates who responded to the newspaper listing for a project coordinator opening.[1] McBurney contacted Cunningham directly, and he explained to her over the telephone that the company was looking for someone with more experience. *See* Pltf's Exhibit A at 4 (McBurney's affidavit). No one was ever hired in 1999 to replace the project coordinator position that McBurney held in February 1999.

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[1] One applicant for the project coordinator position was an individual named Dennis Rosendahl, who had approximately ten years experience as a project manager for a construction company. A project manager is a higher level position than a project coordinator, and Woolworth stated he did not interview Rosendahl because he felt Rosendahl would be overqualified. *See* Plaintiff's Exhibits at 000093.

McBurney filed her petition in state court on July 7, 2000. AWS removed the action to this Court on July 25, 2000. Plaintiff alleges sex discrimination in violation of Iowa and federal law. *See* IOWA CODE § 216.6 and 42 U.S.C. § 2000e. Prior to filing her action, McBurney had received an administrative release from the state of Iowa on April 11, 2000 and a notice of right to sue from the Equal Employment Opportunity Commission ("EEOC") on April 25, 2000.

II. APPLICABLE LAW & DISCUSSION

Summary judgment is properly granted when the record, viewed in the light most favorable to the nonmoving party, shows that there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *Walsh v. United States*, 31 F.3d 696, 698 (8th Cir. 1994). The moving party must establish its right to judgment with such clarity that there is no room for controversy. *Jewson v. Mayo Clinic*, 691 F.2d 405, 408 (8th Cir. 1982). "[T]he mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986) (emphasis added). An issue is "genuine," if the evidence is sufficient to persuade a reasonable jury to return a verdict for the nonmoving party. *Id.* at 248. "As to materiality, the substantive law will identify which facts are material.... Factual disputes that are irrelevant or unnecessary will not be counted." *Id.*

"Summary judgment should seldom be used in employment discrimination cases." *Crawford v. Runyon*, 37 F.3d 1338, 1341 (8th Cir. 1994). The Court should not grant defendant's summary judgment motion "unless the evidence could not support any reasonable

inference for the nonmovant." *Id.* (citations omitted); *see also Benson v. Northwest Airlines, Inc.*, 62 F.3d 1108, 1111 (8th Cir. 1995) (citation omitted).

In support of her gender discrimination claims,[2] McBurney has not argued that she has presented the Court with direct evidence of discrimination justifying the *Price-Waterhouse* analysis. *See Price Waterhouse v.* Hopkins, 490 U.S. 228 (1999) and *Kerns v. Capital Graphics, Inc.*, 178 F.3d 1011, 1017 (8th Cir. 1999) ("Direct evidence is evidence of conduct or statements by persons involved in the decisionmaking process that is sufficient for a factfinder to find that a discriminatory attitude was more likely than not a motivating factor in the employer's decision.") (citing *Browning v. President Riverboat Casino-Missouri, Inc.*, 139 F.3d 631, 641 (8th Cir. 1998)). Rather, both parties in their briefs address plaintiff's claims under the familiar *McDonnell Douglas* burden-shifting framework. *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 801-04 (1973).

Under *McDonnell-Douglas*, first, plaintiff must establish a prima facie case of discrimination. *See Reeves v. Sanderson Plumbing Prods., Inc.*, 120 S.Ct. 2097, 2106 (2000). If a prima facie case is established, then the burden shifts to defendant to produce evidence of a legitimate, nondiscriminatory reason for the termination. *Id.* This burden is one of production, and not persuasion, as "it 'can involve no credibility assessment.'" *Id.* After the employer produces this reason, the burden then shifts back to the employee to show that this reason is a pretext for discrimination. *Id.* at 2111 (stating the ultimate question at this stage of the analysis

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[2] Iowa has adopted the federal framework for evaluating discrimination claims, and Iowa courts have stated that Title VII law is instructive in the analysis of such claims under Iowa law. *See Kerns v. Capital Graphics, Inc.*, 178 F.3d 1011, 1016 n.3 (8th Cir. 1999) (citations omitted); *see also Vivian v. Madison*, 601 N.W.2d 872, 873 (Iowa 1999) ("Iowa courts traditionally turn to federal law for guidance in evaluating the ICRA."). Therefore, this Court will address plaintiff's claims under the federal analysis.

is "whether the plaintiff was the victim of intentional discrimination").

A prima facie case of sex discrimination is established if McBurney can show : (1) she was a member of a protected class; (2) she was qualified to perform her job; (3) she was subject to an adverse employment action; and (4) that nonmembers of her class, who were similarly situated, were not treated the same. *See Breeding v. Arthur J. Gallagher & Co.*, 164 F.3d 1151, 156 (8th Cir. 1999). AWS concedes that McBurney satisfies the first and third elements of the prima facie case, as she was a member of a protected class and she was terminated. AWS argues the second and fourth elements cannot be met by McBurney.

With regard to the second element of the prima facie case, AWS argues McBurney was not qualified to remain employed by the company. She was hired by Woolworth, with whom she was having an affair, and did not have significant experience in the construction industry or as a project coordinator. Further, Cunningham neither interviewed her nor did he approve of her hiring. While she had limited experience and was hired under dubious conditions by Woolworth, there is nothing in the record to indicate a problem with her performance of her job for AWS in the short time she was employed there. Furthermore, AWS has not asserted as its reason for termination that she was not qualified or that there were performance problems. The Court finds this element of the prima facie case met for purposes of this motion.

AWS also argues the fourth element of the prima facie case is not met as McBurney was not similarly situated to Woolworth. Viewing the facts most favorably to McBurney, she was terminated for the existence of a perceived extra-marital affair with Woolworth by other AWS employees, while Woolworth was not terminated. McBurney was employed in an administrative capacity subordinate to Woolworth, while he was a senior company executive who was

considered the second person in charge of the company's daily operations. "To show that employees are similarly situated, a plaintiff need only establish that he or she was treated differently than other employees whose violations were of 'comparable seriousness.'" *Lynn v. Deaconess Med. Ctr.-West Campus*, 160 F.3d 484, 487 (8th Cir. 1998) (finding male nurse was similarly situated to female nurses for purposes of fourth element of prima facie case of sex discrimination as conduct at issue was similar). Employees can be shown to be similarly situated in fact, or in contemplation of law. *See Post v. W.R. Harper*, 980 F.2d 491, 495 (8th Cir. 1993) (involving claim of due process) (cited in *Mercer v. City of Cedar Rapids*, 104 F.Supp. 2d 1130, 1159 (N.D. Iowa 2000)) .

In *Mercer*, 104 F.Supp. 2d at 1159-60, the district court found two employees at issue were not similarly situated as a matter of law. In that case, a female probationary police officer had a romantic affair with a male captain on the city's police force. The probationary officer was terminated before her probationary period came to an end, while the male police captain was not terminated. The Court stated the two police officers were not similarly situated in law because the police captain was a permanent employee with civil service rank and protections under Iowa law, while the probationary officer had no such status or protections. *Id.*

The district court in *Mercer,* however, went on in its analysis of the fourth prong of plaintiff's prima facie case and the "similarly situated" requirement, to discuss how the Eighth Circuit Court of Appeals in *Williams v. Ford Motor Co.*, 14 F.3d 1305, 1308 (8th Cir. 1994), had stated that "'the burden of establishing a prima facie case is not onerous'" and that it should not be conflated with the ultimate issue of discrimination. *See Mercer*, 104 F.Supp. 2d at 1160 (citing *Williams*, 14 F.3d 1305, 1308 (8th Cir. 1994) (quotation and citation omitted)). For these

reasons, it stated that it did not want to "impermissibly 'hopscotch' over the second and third prongs in the *McDonnell Douglas* analysis" and merely grant summary judgment to defendant based on a finding that the captain and plaintiff were not similarly situated. *See Mercer*, 104 F.Supp. 2d at 1160. Therefore, the district court was willing to

> assume [for purposes of analyzing the fourth element] that Mercer has satisfied the requirements of her *prima facie* case. She has done so on *factual* grounds, as the necessary factual *prima facie* showing of "similarly situated" employees is (or may be) limited by *Williams*, by pointing to evidence that she was treated differently than Captain Peters, a male person accused of the same conduct, an off-duty extra-marital relationship.

Id. at 1160. The district court was very clear in stating that the plaintiff's showing of the prima facie case was "thin." *Id.*

This Court finds this case is analogous to *Mercer*, and is persuaded by its reasoning. While neither of the comparable employees at issue in this case had statutory protection as one of those at issue in *Mercer* did, and thus it cannot be found that the employees in this case were not similarly situated as a matter of law,[3] Woolworth was clearly in a factually different capacity from McBurney. Woolworth hired McBurney, supervised her, and fired her. He was much more than just a co-worker. Woolworth's duties were very different from McBurney's. However, it was feared by Cunningham that AWS employees perceived that Woolworth and McBurney were in an extra-marital relationship, and only McBurney was terminated. The

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[3] AWS has argued that Woolworth and McBurney were not similarly situated as a matter of law, as McBurney was a probationary employee while Woolworth was not. The Court does not find this situation comparable to that in *Mercer*. The Court has not been made aware of anything in the record establishing what McBurney's probationary period was, nor that Woolworth ever had a probationary period. Regardless of that issue, nothing under the Iowa Code would establish the probationary period at issue like it did with the police officers in *Mercer*, and hence, it could not as a matter of law be enough of a distinction to make Woolworth and McBurney not similarly situated.

record before this Court shows that McBurney's termination followed the only conversation in which the subject of a potential extramarital affair was raised with Woolworth prior to McBurney's termination. This Court, therefore, like the district court in *Mercer*, finds that plaintiff has made a *thin* prima facie case of sex discrimination for purposes of this ruling on AWS's motion for summary judgment because both she and Woolworth were accused of a violation of "comparable seriousness." *See Lynn*, 160 F.3d at 487.[4]

As its only legitimate, non-discriminatory reason for McBurney's termination, AWS has asserted that she was hired to work on the contract AWS was hoping to get on the forty-two story building in Omaha, and terminated after AWS did not get that contract. AWS has asserted she was hired based on a predicted need that did not come to fruition. AWS has met its burden of establishing a legitimate, non-discriminatory reason for McBurney's termination under the second prong of the *McDonnell-Douglas* analysis. McBurney argues that this reason is pretext for Cunnigham's decision to terminate her, as she was really terminated because of the perception of an extramarital affair with Woolworth. McBurney's assertion that the real reason she was terminated was because of the perceived affair is supported by Woolworth. McBurney asserts a material issue of fact remains regarding whether AWS's given reason for her termination was pretextual.

This Court again looks to *Mercer* for guidance at this stage of the analysis. The district court in *Mercer* did a thorough examination of the third prong of the *McDonnell-Douglas*

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[4] The conduct of the employees, and not other comparable employment status measures, appears to be the real issue the Court is supposed to address when determining whether the employees are similarly situated at the prima facie stage of the case. *See Williams*, 14 F.3d at 1309 (cited in *Mercer*, 104 F.Supp. 2d at 1164). It is not until the third prong of the *McDonnell-Douglas* analysis that the Court determines whether the employees are similarly situated in all relevant respects. *Id.*

analysis as it was described by the Supreme Court in *Reeves*, 120 S.Ct. at 2106. *See Mercer*, 104 F.Supp. 2d at 1162-66. Upon reaching the pretext stage of the analysis, it is no longer required that the plaintiff show more than the falsity of the employer's explanation.[5] However, "*if the plaintiff created only a weak issue of fact as to whether the employer's reason was untrue and there was abundant and uncontroverted independent evidence that no discrimination had occurred*," then summary judgment[6] would still be appropriate. *See Mercer*, 104 F.Supp. at 1162 (quoting *Reeves*, 120 S.Ct. at 2109) (emphasis in original). Several factors need to be weighed in determining whether a material issue of fact remains regarding whether plaintiff has met her burden at the third stage of the analysis, including "*the strength of the plaintiff's prima facie case, the probative value of the proof that the employer's explanation is false, and any other evidence that supports the employer's case and that properly may be considered.*" *Mercer*, 104 F.Supp. at 1162 (quoting *Reeves*, 120 S.Ct. at 2109) (emphasis in original).

In this case, as previously stated, plaintiff's prima facie case is tenuous. The Supreme Court in *Reeves* and the district court in *Mercer* make clear this is a factor in determining whether plaintiff has shown a material issue of fact remains regarding pretext. The Court also finds weak the probative value of the proof submitted by McBurney that AWS's reason for her termination was not the loss of the Omaha contract. By all accounts, the Omaha contract was an extraordinarily large contract that would have taken AWS to the "next level" as a company and required AWS to hire more employees. *See* Pltf's Exhibits at 000069, 000078 (Woolworth's

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[5] In other words, "pretext-plus" is no longer required. *See Reeves*, 120 S.Ct. at 2109.

[6] The *Reeves* court was analyzing lower court opinions that were addressing motions for judgment as a matter of law, but it was made clear by the Supreme Court that their analysis was equally applicable to rulings on motions for summary judgment.

deposition). McBurney was informed by Cunningham that if the company got the Omaha contract, she would be a project coordinator on that job. *See* Pltf's Exhibits at 000027 (McBurney's deposition). The loss of the contract to work on the construction a forty-two story building appears to the Court to be a very strong reason for terminating an employee, especially a recently hired employee who was a *project coordinator* told by the president of the company that she was going to directly work on that *project*. The timing of McBurney's termination, four days after AWS found out they did not get the contract on the Omaha job, is consistent with AWS's purported reason for her dismissal.[7] Additionally, the Court notes that not only is McBurney's evidence of pretext extremely weak, but it is centered on the word of the man who hired her while he was having an affair with her and with whom she continued that affair long thereafter.

Additionally, while this Court, like the district court in *Mercer*, found plaintiff similarly situated for purposes of the prima facie case, the analysis of the similarly situated requirement is different at this stage of the analysis. At the third stage of the burden-shifting analysis, the Court is required to consider whether the employees were "'similarly situated in all relevant respects.'" *Mercer*, 104 F.Supp. 2d at 1164 (quoting *Williams*, 14 F.3d at 1309) (other citation omitted). The Court concludes they were not so similarly situated. Woolworth had a supervisory position,

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[7] The Court finds that a factual dispute is not created regarding whether AWS's reason for McBurney's termination was pretextual as a result of the advertisement for a project coordinator opening in June 1999. Upon initial inspection, the Court was troubled by the fact that AWS advertised to find a person to replace the position McBurney held, as she was terminated after because there was not enough work for her to do. However, no one was ever hired to fill the position McBurney held, despite the fact that AWS received numerous applications. The mere advertisement of a job opening four months after her termination does not raise significant doubt regarding the veracity of the stated reason for her termination – the company's failure to get the Omaha job.

and he personally hired McBurney, and delivered to her the news of her termination. Woolworth was given a great deal of responsibility and trust by AWS in his position as a senior executive. Woolworth had extensive experience in the construction industry, while McBurney had minimal experience. While there was disparate treatment of the two, as McBurney was terminated – and Woolworth was not – based on the existence of a perceived extramarital relationship between the two of them, this disparate treatment is not enough by itself to demonstrate pretext or intentional discrimination as McBurney and Woolworth were not similarly situated in all relevant respects. *See Mercer*, 104 F.Supp. 2d at 1165 (finding female probationary police officer could not demonstrate pretext or intentional discrimination because she was not similarly situated in all relevant respects to the male police captain with whom she had an affair) (citing *Scott v. County of Ramsey*, 180 F.3d 913, 917 (8th Cir. 1999)).

Additionally, in *Mercer*, the district court found it important that the female probationary police officer did not point to anything in the record to show "she was referred to in sex-associated, derogatory terms, but her male partner in the affair was not, or any evidence that her male partner in the affair was congratulated and admired for the affair while she was denigrated." *Mercer*, 104 F.Supp. 2d at 1165. These types of things are noticeably absent from the record now before this Court as well.

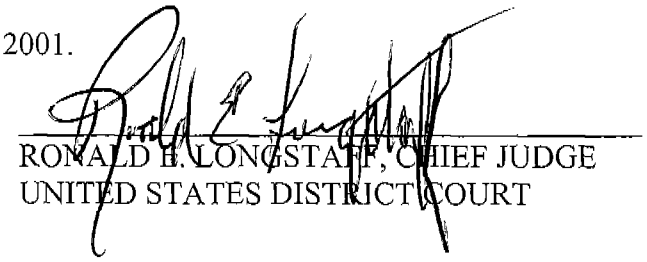
Thus, the Court finds there is not a material issue of fact for trial regarding whether McBurney can demonstrate AWS's reasons for her dismissal were pretextual or that AWS intentionally discriminated against her based on her sex. Plaintiff's state and federal claims fail at the third stage of the *McDonnell-Douglas* analysis.

III. CONCLUSION

For the above stated reasons, defendant's motion for summary judgment is granted. The Clerk of Court shall enter judgment for defendant and against plaintiff.

IT IS SO ORDERED.

Dated this 18th day of December, 2001.



RONALD H. LONGSTAFF, CHIEF JUDGE
UNITED STATES DISTRICT COURT