

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

CHARLES L. COX,

Plaintiff,

vs.

GMAC HOME SERVICES, INC., and
SCOTT L. HALE, individually,

Defendants.

No. 4:02-cv-40468

**ORDER ON DEFENDANTS'
MOTION FOR
SUMMARY JUDGMENT**

This matter comes before the Court on Defendants' Motion for Summary Judgment (Clerk's No. 17). This motion seeks dismissal of all counts alleged in Plaintiff's Complaint. Oral argument on the motion was heard Thursday, March 4, 2004. Attorneys for the Plaintiff are Brent R. Appel and Mollie Pawlowsky; attorney for the Defendants is Gene. R. La Suer.¹ The motion is now fully submitted, and for the reasons discussed below, the Court grants the motion in part and denies the motion in part.

PROCEDURAL HISTORY

Plaintiff, Charles L. Cox ("Cox"), commenced this action against Defendants, GMAC Home Services, Inc. ("GHS"), and Scott L. Hale ("Hale"), in this Court on September 13, 2002. Cox's Complaint asserts ten claims against Defendants.

¹ Both GMAC Home Services, Inc., and Scott Hale, individually, are represented by the counsel indicated.

Jurisdiction is proper pursuant to 28 U.S.C. § 1331, as this case arises in part under Title VII of the Civil Rights Act of 1964 (“Title VII”), 42 U.S.C. §§ 2000e et seq, and the Age Discrimination in Employment Act (“ADEA”), 29 U.S.C. §§ 621 et seq. The Court also has jurisdiction over Plaintiff’s claims brought pursuant to the Iowa Civil Rights Act (“ICRA”) and common law pursuant to the Court’s pendant claim jurisdiction under 28 U.S.C. § 1367(a).

The lawsuit arises out of alleged ongoing sexual harassment and the subsequent actions of Defendants, including the eventual termination of Plaintiff’s employment. On December 12, 2003, Defendants filed a Motion for Summary Judgment pursuant to Federal Rule of Civil Procedure 56. Defendants seek summary judgment on all of the counts asserted by Cox in his Complaint.

BACKGROUND FACTS

The Meredith Corporation formed a real estate business known as “Better Homes and Gardens” Real Estate (“BH&G Real Estate”). The company was headquartered in Des Moines, Iowa, with offices throughout the United States. The principal business of BH&G Real Estate was to establish and maintain a network of real estate brokers throughout the United States.

In July of 1998, GMAC Home Services, Inc., acquired substantially all of the assets of Meredith’s BH&G Real Estate Division. The home office of GHS was located in Liberty Corner, New Jersey. The operation initially remained in Des Moines under the

direction of Allan Sabbag.² The operations remained essentially unchanged for approximately two years following the acquisition.

Plaintiff Charles (Chuck) Cox was employed by Meredith in its BH&G Real Estate Division beginning in 1978. He worked as a regional manager in the mortgage and relocation area and, beginning in the mid-1980s, as contract renewal manager. As contract renewal manager, Cox was responsible for the renewal of franchise agreements with existing brokers.

Beginning in 1995, Cox's supervisor was Scott Hale. After GHS purchased BH&G Real Estate, both Cox and Hale continued in their same positions as GHS employees. Hale was the only manager that Cox had while he worked for GHS from the 1998 buyout until Cox was terminated in 2000. Cox had a good working relationship with Hale until 1995, but the relationship soured shortly after Hale became Cox's supervisor.

Cox alleges that on several occasions during 1995, Hale walked into Cox's office, unzipped his pants, and displayed his penis.³ During one of these incidents, Hale shook

² Sabbag left the company in the late spring of 2000.

³ Hale adamantly denies participating in the indecent exposure acts Cox alleges he was subjected to by Hale, reserving the right to fight these allegations later. In other words, Defendants do not concede the veracity of Cox's allegations regarding the incidents of exposure, but rather they accept that the Court infers the incidents did occur solely for the purposes of its determination of the merits of Defendants' Motion for Summary Judgment.

his penis, asked Cox, “What do you think of this?”, and walked up to Cox’s desk to provide a closer view. Cox estimates that there were between three and seven instances of exposure. Cox told Hale to stop this behavior, and he did so. All of these incidents occurred in Cox’s office over a period of approximately one and a half months, all during the year 1995. Cox took Hale’s exposure as an overture to engage in sex.⁴

The only other unwelcome *sexual* overtures consisted of Hale coming into Cox’s office, grabbing his crotch, and adjusting himself. This was done approximately half a dozen times.⁵ In addition, Cox also claims he repeatedly heard Hale use vulgar and sexual language, which sometimes consisted of a sexual remark or sexual joke.

Cox did not report the fact that Hale had allegedly exposed himself to anyone at Meredith until July 1998, more than two and a half years after the alleged exposure occurred. On July 24, 1998, Cox sent an e-mail to Ken Mishoe, an employee in human resources at Meredith, which outlined several concerns Cox had about his work environment. This e-mail specifically mentioned that Hale had “pulled his penis out of his trousers on several occasions.” This e-mail was sent shortly after it had been announced that GHS would be purchasing BH&G Real Estate, but prior to the closing of that transaction. Cox specifically instructed Mr. Mishoe that he did not want the

⁴ Cox admits, however, that Hale never requested that he engage in any sexual relations with Hale and that he was not otherwise aware of any homosexual interest on the part of Hale.

⁵ The record does not limit this conduct, i.e., the “crotch grabbing”, to 1995.

information forwarded to GHS by stating in the e-mail, “Ken, I need to put a formal statement into my ‘Meredith’ file – this is for Meredith only, not to be transferred to GMAC.”

Prior to the time that GHS purchased BH&G Real Estate in July of 1998, GHS performed a due diligence review. GHS was not informed of any employment related problems concerning either Cox or Hale. The first time Cox raised the issue of a hostile work environment with GHS was in late 1999 when he complained to Vera Lichtenberger, the Vice President of Marketing Services. Cox asked Lichtenberger if he could report to her instead of Hale. She told him that was not possible and suggested Cox go to Allen Sabbag, President of the Des Moines office.

On February 4, 2000, Cox directed a written memo to Sabbag that outlined all of Cox’s complaints surrounding his working relationship with Hale. When Cox met with Sabbag to discuss the memo, he told Sabbag of the indecent exposure incidents. Sabbag then met with Hale individually and later with both Cox and Hale to discuss the poor working relationship. Cox followed this meeting with another memo to Allan Sabbag dated March 2, 2000. This memo was entitled “Ongoing Harassment by Scott Hale.”

An anonymous letter dated September 21, 2000, was received by Judy O’Brien, GHS Vice-President of Business Development. The letter complained about Scott Hale. Suzi Schmalbach, Human Resources Manager at GHS, was assigned to investigate the complaint. On September 26, 2000, Schmalbach interviewed Scott Hale, Charles Cox,

Dara Miller, and Cindy Jones. During his interview, Cox told Schmalbach that he had a difficult time working for Hale. Cox also reported the exposure incidents to Schmalbach during this interview. According to Schmalbach, based on her investigation she was unable to find any evidence of harassment or discrimination to substantiate Cox's allegations.

Cox alleges that following the incidents of exposure and his rebuffing Hale's overtures, Hale's attitude toward him changed drastically and immediately. Cox alleges the following harassment occurred and was virtually constant: Hale's attitude toward Cox was hostile; Hale would not communicate with Cox, even leaving Cox out of meetings he should have been involved in; Hale gave Cox inaccurate and unfair reviews resulting in a lack of merit raises;⁶ Hale used vulgar language when Cox was in the vicinity;⁷ Hale focused on trying to catch Cox doing something wrong;⁸ Hale reduced Cox's vacation

⁶ Cox alleges Hale refused to give him a job description, leaving him with a lack of clarification as to the nature of his job responsibilities. Cox further claims Hale failed to follow GHS policy by not giving Cox notice of his review and Hale not going over his written evaluation with Cox.

⁷ The example repeatedly given of this by Cox consisted of one time when Cox heard Hale refer to a female regional manager as a "fucking cunt" and a "dumb bitch" after Hale got off the phone with her. In addition, Cox officed next to Hale with only a thin wall separating the two. As a result, Cox alleges he overheard Hale mutter extremely vulgar and sexual language on a frequent basis.

⁸ Cox claims Hale would give him a hard time about what time he arrived and how long his restroom breaks were, even going so far as asking a receptionist to keep track. Other employees noticed and remarked that Hale was out to get Cox.

time; and Hale threatened his job.⁹ Cox argues that Hale's varied actions were of a sexual nature because they were a result of the earlier exposures. Cox filed a complaint with the Iowa Civil Rights Commission ("ICRC") on February 15, 2001.

After GHS purchased BH&G Real Estate in July of 1998, the business continued to operate out of Des Moines. However, the Des Moines office did not do well financially and lost a substantial amount of money. In the summer of 2000, Judy O'Brien visited the Des Moines office with instructions to assess how costs could be immediately reduced in the office, and to create a plan to ultimately transition the entire Des Moines operation to New Jersey. The ultimate goal of GHS was to close the Des Moines office and have personnel in New Jersey assume the Des Moines area job functions being terminated.

At this time, there were three employees in the contract administration division, namely, Scott Hale, Charles Cox, and Cindy Jones. Hale managed the division, Cox was primarily in charge of renewal of existing contracts, and Jones took care of new contracts in addition to performing other administrative functions. GHS eliminated Cox's position,

⁹ Cox alleges that Hale threatened his job on three different occasions. One of the threats came after Cox participated in the civil rights investigation. During this confrontation, Hale allegedly threw an inch thick stack of papers at Cox, which slid across the desk and hit Cox in the chest. Hale then came at Cox and said, "If you continue this investigation, I'll have you out the door. You won't be here any longer." This threat was made in 2000. The other job threats were made earlier in 2000, and in mid-1999.

and his employment was terminated on October 19, 2000. For a time, Cox's job responsibilities were primarily performed by the remaining employees, Hale and Jones. The decision to terminate Cox was made by O'Brien, although Cox does assert that Hale played a role in his termination as he was the only source O'Brien consulted from the contract administration area and that this amounts to participation by providing information. In making the decision to eliminate Cox's position, GHS did not review Cox's personnel file or quality of work in any respect.

A short time later, all of the work being done in the contract administration area in Des Moines was transitioned in full to the GHS New Jersey office. The job function formerly performed by Cox is now being performed in Illinois.¹⁰ Ultimately, the other two positions in the contract administration area were also eliminated, and, like Cox, both Scott Hale and Cindy Jones were eventually laid off.

ANALYSIS

Defendants have moved for summary judgment on all of the counts asserted by Plaintiff in his Complaint. Cox filed a ten count Amended Complaint alleging various theories of employment discrimination. He sued both his former employer, GMAC Home Services, Inc., and his former supervisor, Scott Hale. The causes of action asserted by Cox are as follows: Count I – Title VII hostile environment sexual harassment

¹⁰ Due to subsequent changes, some of the functions are now being performed in Illinois rather than New Jersey as planned.

(against GHS); Count II – ICRA hostile environment sexual harassment (against GHS and Hale); Count III – Title VII retaliation (against GHS); Count IV – ICRA retaliation (against GHS and Hale); Count V – Title VII sex discrimination (against GHS); Count VI – sex discrimination (against GHS and Hale); Count VII – ADEA age discrimination (against GHS); Count VIII – ICRA age discrimination (against GHS and Hale); Count IX – promissory estoppel (against GHS); and Count X – intentional interference with employment relationship (against Hale).

Discovery has been conducted and a trial date set. Based upon the undisputed facts, Defendants urge they are entitled to summary judgment on all of the claims asserted by Cox. Defendants seek to have this Court dismiss the claims as a matter of law. Cox resists Defendants’ motion on seven of the ten counts but does not resist the remaining three counts in any of its written filings. These claims are dismissed by stipulation. The Court now discusses the parties’ contentions as to each of the remaining claims.

A. Standard for Summary Judgment

“[C]laims lacking merit may be dealt with through summary judgment under Rule 56.” Swierkiewicz v. Sorema N.A., 534 U.S. 506, 514 (2002). Rule 56 of the Federal Rules of Civil Procedure provides that summary judgment should be rendered

if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue

as to any material fact and that the moving party is entitled to a judgment as a matter of law.

Fed. R. Civ. P. 56(c). To avoid summary judgment, the nonmoving party must make a sufficient showing on every essential element of its case for which it has the burden of proof at trial. See Celotex v. Catrett, 477 U.S. 317, 322-23 (1986); Wilson v. Southwestern Bell Tel. Co., 55 F.3d 399, 405 (8th Cir. 1995); see also Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 142 (2000) (“The ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff.”) (quoting Texas Dep’t of Cmty. Affairs v. Burdine, 450 U.S. 248, 253 (1981)).

The nonmoving party must go beyond the pleadings, and by affidavits, depositions, answers to interrogatories, and admissions on file, designate “specific facts showing that there is a genuine issue for trial.” Fed. R. Civ. P. 56(e); Celotex, 477 U.S. at 324; see also Landon v. Northwest Airlines, Inc., 72 F.3d 620, 624 (8th Cir. 1995) (finding that in employment discrimination cases, “the plaintiff’s evidence must go beyond the establishment of a prima facie case to support a reasonable inference regarding the alleged illicit reason for the defendant’s action.”). While the quantum of proof that must be produced to avoid summary judgment is not precisely measurable, it must be enough evidence for a reasonable jury to return a verdict in favor of the nonmovant. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 257 (1986).

In considering a motion for summary judgment, the Court must view all of the facts in the light most favorable to the nonmoving party and give that party the benefit of all reasonable inferences that can be drawn from the facts. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587-88 (1986) (citations omitted); Rifkin v. McDonnell Douglas Corp., 78 F.3d 1277, 1280 (8th Cir. 1996); Marts v. Xerox, Inc., 77 F.3d 1109, 1112 (8th Cir. 1996). The question before this Court is whether the record, when viewed in the light most favorable to the nonmoving party, shows there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law. See Mansker v. TMG Life Ins. Co., 54 F.3d 1322, 1326 (8th Cir. 1995) (citing Celotex, 477 U.S. at 322-23, and Anderson, 477 U.S. at 249-50).

The Eighth Circuit has repeatedly cautioned that summary judgment should rarely be granted in employment discrimination cases. See Keathley v. Ameritech Corp., 187 F.3d 915, 919 (8th Cir. 1999); Lynn v. Deaconess Med. Ctr.-West Campus, 160 F.3d 484, 486 (8th Cir. 1998); Hindman v. Transkrit Corp., 145 F.3d 986, 990 (8th Cir. 1998); Crawford v. Runyon, 37 F.3d 1338, 1341 (8th Cir. 1994). “Because employment discrimination cases frequently turn on inferences rather than direct evidence, the court must be particularly deferential to the party opposing summary judgment.” Bell v. Conopco, Inc., 186 F.3d 1099, 1101 (8th Cir. 1999); see also Weiland v. El Kram, Inc., 233 F. Supp. 2d 1142, 1149 (N.D. Iowa 2002) (citing Crawford, 37 F.3d at 1341).

The Eighth Circuit has qualified this principle by explaining that notwithstanding this consideration, summary judgment “is appropriate where one party has failed to present evidence sufficient to create a jury question as to an essential element of its claim.” Whitley v. Peer Review Sys., Inc., 221 F.3d 1053, 1055 (8th Cir. 2000); see also Duffy v. Wolle, 123 F.3d 1026, 1033 (8th Cir. 1997) (“While ‘summary judgment should seldom be granted in employment discrimination cases, summary judgment is proper when a plaintiff fails to establish a factual dispute on an essential element of her case.’”) (quoting Helfter v. United Parcel Serv., Inc., 115 F.3d 613, 615-16 (8th Cir. 1997)). In short, “[s]ummary judgment is appropriate in employment discrimination cases only in ‘those rare instances where there is no dispute of fact and where there exists only one conclusion.’” Weiland, 233 F. Supp. 2d at 1149 (quoting Johnson v. Minn. Historical Soc’y, 931 F.2d 1239, 1244 (8th Cir. 1991)).

B. Hostile Environment Sexual Harassment (Counts I and II)

Cox has alleged a claim against GHS for hostile work environment sexual harassment under Title VII (Count I), and against both GHS and Hale under the ICRA (Count II). Claims under Title VII and under the ICRA are evaluated using the same legal principles. Beard v. Flying J, Inc., 266 F.3d 792, 798 (8th Cir. 2001); Pecenka v. Fareway Stores, Inc., 672 N.W.2d 800, 803 (Iowa 2003). Thus, a claim that is insufficient under Title VII is also insufficient under the ICRA. Hulme v. Barrett, 449 N.W.2d 629, 631 (Iowa 1989).

Cox alleges that his supervisor, Hale, made sexual overtures toward him and that GHS failed to take any action to halt the behavior after Cox complained. Cox further alleges that a hostile environment was created by virtue of the “continued sexual overtures, combined with Hale’s retaliatory actions.”

Defendants assert summary judgment is appropriate on both of the hostile environment claims. Defendants assert both claims are legally insufficient for the following reasons: (1) GHS cannot be held liable for events it was unaware of and that happened at a previous place of employment; (2) the claims are untimely and do not meet the burden of severity required; and (3) Cox cannot show that GHS exhibited hostility based on sex.

Title VII provides “[i]t shall be an unlawful employment practice for an employer . . . to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin.” 42 U.S.C. § 2000e-2(a)(1). The Supreme Court has held that sexual harassment that is so severe and pervasive as to alter the conditions of employment creates a hostile or abusive work environment and violates Title VII. Faragher v. Boca Raton, 524 U.S. 775, 786 (1998); Meritor Savings Bank, FSB v. Vinson, 477 U.S. 57, 66-67 (1986).

To establish an actionable hostile environment sexual harassment claim involving a supervisor, Cox must satisfy the following elements: (1) he belongs to a protected

group; (2) he was subjected to unwelcome sexual harassment; (3) the harassment was based on sex; and (4) the harassment was sufficiently severe or pervasive as to affect a term, condition, or privilege of employment. Henthorn v. Capitol Communications, Inc., — F.3d —, 2004 WL 405730, *2 (8th Cir. March 5, 2004) (citations omitted); Schoffstall v. Henderson, 223 F.3d 818, 826 (8th Cir. 2000) (citations omitted). In order to be actionable under Title VII as a hostile work environment, the Plaintiff must establish the workplace was “permeated with ‘discriminatory intimidation, ridicule, and insult’ . . . that is ‘sufficiently severe or pervasive to alter the conditions of the victim’s employment and create an abusive working environment.’” Harris v. Forklift Sys., Inc., 510 U.S. 17, 21 (1993) (quoting Meritor, 477 U.S. at 65, 67); see also Bowen v. Mo. Dep’t of Soc. Servs., 311 F.3d 878, 883 (8th Cir. 2002) (finding plaintiff must demonstrate unwelcome harassment was sufficiently severe or pervasive so as to affect a term, condition, or privilege of employment, thereby creating an objectively hostile or abusive work environment); Bradley v. Widnall, 232 F.3d 626, 631 (8th Cir. 2000) (finding hostile environment sexual harassment occurs when “the workplace is permeated with ‘discriminatory intimidation, ridicule, and insult’ that is ‘sufficiently severe or pervasive to alter the conditions of the victim’s employment and create an abusive working environment.’”) (quoting Harris, 510 U.S. at 21). In other words, a plaintiff must present evidence from which a reasonable jury could find the alleged conduct “was more than merely offensive, immature or unprofessional, for conduct that does not

exceed that threshold of severity is insufficient to constitute a prima facie case of sexual harassment.” Henthorn, — F.3d at —, 2004 WL 405730, at *3 (citing Duncan v. GMC, 300 F.3d 928 (8th Cir. 2002), and Alagna v. Smithville R-II Sch. Dist., 324 F.3d 975, 980 (8th Cir. 2003)).

This standard requires that the environment must be both objectively and subjectively offensive. Faragher, 524 U.S. at 787; Harris, 510 U.S. at 21-22. In other words, a reasonable person would find the work environment hostile or abusive and the victim in fact actually perceived it as such. Faragher, 524 U.S. at 787; Harris, 510 U.S. at 21-22 (1993).

An offensive workplace atmosphere does not amount to unlawful discrimination unless one gender is treated differently than the other. See Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 80 (1998). The fundamental issue is whether members of one sex are subjected to unfavorable conditions of employment that the members of the opposite sex are not. Id.

It is uncontroverted that a male may assert a claim of sexual harassment against another male. Id. at 79-81; Quick v. Donaldson Co., 90 F.3d 1372, 1377 (8th Cir. 1996). The harassment must, however, be based on the sex of the complainant. Oncale, 523 U.S. at 80-81; Quick, 90 F.3d at 1378. “Whatever evidentiary route the plaintiff chooses to follow, he or she must always prove that the conduct at issue was not merely tinged with offensive sexual connotations, but actually constituted ‘*discrimina[tion]* . . .

because of . . . sex.” Oncale, 523 U.S. at 80-81 (citations omitted). The appropriate inquiry “is whether ‘members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed.’” Quick, 90 F.3d at 1379 (quoting Harris, 510 U.S. at 25 (Ginsburg, J., concurring); see also Montandon v. Farmland Indus., Inc., 116 F.3d 355, 358 (8th Cir. 1997). In other words, there must be evidence that the offending action was motivated by a hostility toward the gender affected. Linville v. Sears, Roebuck & Co., 335 F.3d 822, 824 (8th Cir. 2003); see also Quick, 90 F.3d at 1378 (“Evidence that members of one sex were the primary targets of the harassment is sufficient to show that the conduct was gender based for purposes of summary judgment.”).

While there is no bright-line test to determine whether an environment is sufficiently hostile or abusive, Hathaway v. Runyon, 132 F.3d 1214, 1221 (8th Cir. 1997), courts are to look at the totality of the circumstances in making that determination. Duncan, 300 F.3d at 934. Some of the factors the court should look at include the “frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating; and whether it unreasonably interferes with an employee’s work performance.”¹¹ Harris, 510 U.S. at 23; see also Faragher, 524 U.S. at 787-88; Quick, 90 F.3d at 1378 (“A

¹¹ This is a nonexhaustive list. See Harris, 510 U.S. at 24-25 (Scalia, J. concurring). In fact, Harris also discusses the plaintiff’s psychological injury, if any, as a factor, but found that a court is not required to find conduct is psychologically injurious for a hostile environment sexual harassment claim to be actionable under Title VII. Id. at 22, 23.

discriminatorily abusive work environment may exist where the harassment caused economic injury, affected the employee's psychological well-being, detracted from job performance, discouraged an employee from remaining on the job, or kept the employee from advancing in his or her career.”). None of these factors is in itself dispositive, and there is no mathematically precise formula to use when considering these factors. See Harris, 510 U.S. at 22-23; Quick, 90 F.3d at 1378.

The standards for judging hostility of the work environment are demanding. Faragher, 524 U.S. at 788. This is to ensure that Title VII does not become a “general civility code,” Oncale, 523 U.S. at 80; Faragher, 524 U.S. at 788, as “[n]ot all unpleasant conduct creates a hostile work environment.” Williams v. Kansas City, 223 F.3d 749, 753 (8th Cir. 2000) (citing Hathaway, 132 F.3d at 1221). As the courts have explained, Title VII does not prohibit “genuine but innocuous differences in the ways men and women routinely interact with members of the same sex and of the opposite sex,” Oncale, 523 U.S. at 81, nor is it designed “to purge the workplace of vulgarity.” Duncan, 300 F.3d at 934 (quoting Baskerville v. Culligan Int’l Co., 50 F.3d 428, 430 (7th Cir. 1995)). Under this standard, “simple teasing, offhand comments, and isolated incidents (unless extremely serious) will not amount to discriminatory changes in the ‘terms and conditions of employment.’” Faragher, 524 U.S. at 788 (internal citations omitted).

Thus, the Supreme Court has “made it clear that conduct must be extreme to amount to a change in the terms and conditions of employment.” Id. “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.” Harris, 510 U.S. at 21. In other words, “[t]he harassment must have also affected a term, condition, or privilege of employment in order to be actionable.” Quick, 90 F.3d at 1378.

The Eighth Circuit has also recently made it clear that this element is not easily satisfied. See, e.g., Henthorn, — F.3d at —, 2004 WL 405730, at *3 (finding that although actions were “inappropriate, immature, and unprofessional, they did not cross the high threshold required to support a claim of sexual harassment.”); Tuggle v. Mangan, 348 F.3d 714, 722 (8th Cir. 2003) (finding hostile work environment claims must “satisfy the demanding standards . . . to clear the high threshold for actionable harm”); Alagna, 324 F.3d at 980 (“These standards are demanding”); Duncan, 300 F.3d at 934 (stating it is a “high threshold” that plaintiff must meet).

Cox contends the record contains sufficient evidence to create a genuine issue as to whether the hostile environment he was subjected to by Hale was because of sex. Cox argues the sexual overtures continued in and beyond 1995 by contending that although Hale only exposed himself in 1995, the later abuses of Cox were tied to these earlier exposures. In addition, Cox asserts that viewing all of the actions complained of

cumulatively, the severity or pervasiveness is obvious, and he timely filed his complaint with the ICRC.

1. Successor Employer Liability

Defendants first contend Cox's hostile environment claims fail because they cannot be held liable under the theory of successor liability. The Sixth Circuit identified nine factors that it determined are relevant in determining whether a successor employer can be liable for Title VII violations. See EEOC v. MacMillan Bloedel Containers, Inc., 503 F.2d 1086, 1094 (6th Cir. 1974) (citing Howard Johnson Co. v. Detroit Local Joint Executive Bd., Hotel & Rest. Employees & Bartenders Int'l Union, AFL-CIO, 417 U.S. 249, 256-58 (1974)). The Eighth Circuit recognized these same factors in the context of an action under the Vietnam Era Veterans' Readjustment Assistance Act of 1974, 38 U.S.C. §§ 2021 et seq. See Leib v. Georgia-Pacific Corp., 925 F.2d 240, 247 (8th Cir. 1991) (noting in addition that "[t]hese same factors, with the addition of whether the successor had notice of the employee's claim and the ability of the predecessor to provide relief, have been applied in Title VII cases brought by employees to remedy charges of discrimination.").

Of the nine factors identified in determining successor employer liability, the two most critical factors are whether the successor had notice of the claim prior to purchasing the assets and whether the predecessor can provide the relief requested. See Jackson v. Lockie Corp., 108 F. Supp. 2d 1164, 1167 (D. Col. 2000). This is "because it would be

‘grossly unfair, except in the most exceptional circumstances, to impose successor liability on an innocent purchaser when the predecessor is fully capable of providing relief.’” Coleman v. Keebler Co., 997 F. Supp. 1094, 1099 (N.D. Ind. 1998) (quoting Musikiwamba v. ESSI Inc., 760 F.2d 740, 752 (7th Cir. 1985)).

In fact, the nine factors identified in MacMillan have been subsequently refined by courts into a three criteria test. This test consists of the following:

(1) whether the successor employer had prior notice of the claim against the predecessor; (2) whether the predecessor is able, or was able prior to the purchase, to provide the relief requested; and (3) whether there has been a sufficient continuity in the business operations of the predecessor and successor.

Wheeler v. Snyder Buick, Inc., 794 F.2d 1228, 1236 (7th Cir.1986). In some cases, the court has found the lack of notice to the plaintiff’s claim dispositive. See, e.g., Coleman, 997 F. Supp. at 1099 (finding “a successor who exercises due diligence in its purchase and yet fails upon inquiry to uncover evidence of the plaintiff’s lawsuit prior to the purchase will not be found to have notice”); Scott v. Sopris Imports Ltd., 962 F. Supp. 1356, 1360 (D. Colo. 1997) (“I conclude that the lack of notice to Canyon [the successor owner] of plaintiff’s claim of discrimination and harassment is dispositive.”).¹²

¹² However, these cases can be distinguished from the present case in that none of the complaining employees or the alleged harassers worked for the successor corporation.

Cox claims that in 1995, when he was employed by Meredith Corporation, Hale came into his office on several occasions and exposed his penis to Cox. Cox told Hale to stop this, and Hale stopped. This exact behavior was not repeated anytime after 1995, and it never happened while Cox and Hale were employed by GHS.

Cox did not report this to anyone at Meredith until July of 1998, when Cox sent an e-mail to Ken Mishoe which outlined several concerns Cox had about his work environment and specifically mentioned the alleged incidents of indecent exposure. This e-mail was sent after it was announced that GHS was purchasing BH&G Real Estate, yet Cox specifically instructed Mishoe that he did not want the information forwarded to GHS and that it was for his “Meredith file only.”

Prior to acquiring BH&G Real Estate, GHS performed a due diligence review. Eileen Fogarty participated in the due diligence from a human resources perspective. Part of her responsibility was to determine whether there were any outstanding liabilities that GHS would be assuming, including litigation related to employment matters. Fogarty met with personnel from Meredith and also reviewed documents. She concluded there was nothing from a human resources perspective that would prevent the purchase. GHS was unaware of any issue with respect to Cox and Hale at the time it consummated the acquisition of BH&G Real Estate.

The first time Cox raised the issue of a hostile work environment with GHS was in late 1999. At this time, Cox complained to Vera Lichtenberger. She referred Cox to

the President of the Des Moines office, Allan Sabbag. Sabbag was apparently unsuccessful in resolving the issues.

The only incidents of harassment alleged by Cox that are based on sex occurred in 1995. GHS was not aware of those incident until late 1999. GHS performed a due diligence review and was not told that Cox had asserted any complaints of sexual harassment or hostile environment. In fact, it seems Cox did not want GHS to find out about his complaints. In most cases, “a successor who exercises due diligence in its purchase and yet fails upon inquiry to uncover evidence of the plaintiff’s lawsuit prior to the purchase will not be found to have notice.” Coleman, 997 F. Supp. at 1099.

However, the Court must grant all reasonable inferences to the nonmoving party, in this case Cox, and in so doing accepts that the events in 1995 led to Hale continuing to harass Cox, thereby constituting a continuous violation. Thus, the hostile environment claim would include conduct during the time period Cox and Hale were employed by GHS. There is evidence in the record that Cox did complain to GHS about the hostile treatment he allegedly was exposed to by Hale and made the company aware of his belief that such conduct stemmed from his response to the 1995 exposure incidents. Moreover, it is the conduct of GHS that Cox complains of as fostering the existing hostile environment by not properly responding to his complaints. Furthermore, the only qualifying adverse employment action takes place under the new company. The 1995 conduct is essentially offered as evidence that the later conduct was based on sex. As

a result, the successor company defense is unavailing for GHS as GHS is the company with the alleged hostile environment at issue.

2. Continuing Violation, Timeliness, and Severity

The Supreme Court recently clarified the continuing violation theory with respect to claims of sexual harassment. See Nat'l R.R. Passenger Corp. v. Morgan, 536 U.S. 101 (2002). The Supreme Court held that “[a] charge alleging a hostile environment claim . . . will not be time barred so long as all acts which constitute the claim are part of the same unlawful employment practice and at least one act falls within the time period.” Id. at 122. Thus, under Morgan, only a single act of discrimination or harassment need be shown to have occurred within the charge filing period. Madison v. IBP, Inc., 330 F.3d 1051, 1056-57 (8th Cir. 2003); Mems v. St. Paul, Dept’ of Fire & Safety Servs., 327 F.3d 771, 785 (8th Cir. 2003). Similarly, under Iowa law, a continuing violation may be established by “a series of acts with one independent discriminatory act occurring within the charge-filing period.” Madison, 330 F.3d at 1058 (quoting Hy-Vee Food Stores, Inc. v. Iowa Civil Rights Comm’n, 453 N.W.2d 512, 528 (Iowa 1990) (internal citations omitted)).

“[T]he consideration of the entire scope of a hostile work environment claim, including behavior alleged outside the statutory time period, is permissible for the purposes of assessing liability, so long as an act contributing to that hostile environment takes place within the statutory time period.” Morgan, 536 U.S. at 105. This is because

the very nature of a hostile environment claim involves repeated conduct. Id. at 115. The hostile environment claim is comprised of a series of acts together constituting a single unlawful employment practice. Id. at 117; see also Jensen v. Henderson, 315 F.3d 854, 859 (8th Cir. 2002) (citing Morgan and explaining “the Court has simplified the law by allowing courts to view allegations of a hostile work environment as ‘a single unlawful employment practice.’”).

Only the smallest portion of “a single unlawful employment practice” needs to occur within the limitations period for the claim to be timely. Jensen, 315 F.3d at 859. This is because “[a] work environment is shaped by the accumulation of abusive conduct, and the resulting harm cannot be measured by carving it “into a series of discrete incidents.” Hathaway, 132 F.3d at 1222 (quoting Burns v. McGregor Elec. Indus., Inc., 955 F.2d 559, 564 (8th Cir. 1992)).

Furthermore, “an incident within the limitations period need not satisfy the definition of sexual harassment under Title VII when viewed in isolation.” Jensen, 315 F.3d at 859. Indeed, all instances of harassment need not be overtly discriminatory to be relevant under Title VII as long as they are part of a course of conduct which is tied to evidence of discriminatory animus. Carter v. Chrysler Corp., 173 F.3d 693, 701 (8th Cir. 1999).

Thus, in order for Cox’s hostile environment sexual harassment claims to survive, it is necessary that he offer proof of at least one act of actionable harassment within the

charge filing period. In order for alleged harassment to be actionable, the threshold of proof is high. See Tuggle, 348 F.3d at 722; Alagna, 324 F.3d at 980; Duncan, 300 F.3d at 934. The harassment must be so severe or pervasive as to alter a term, condition, or privilege of employment. Duncan, 300 F.3d at 934. It is well settled that ostracism and rudeness by supervisors and co-workers does not rise to the level of an adverse employment action. Scusa v. Nestlé U.S.A. Co., 181 F.3d 958, 969 (8th Cir. 1999); Manning v. Metropolitan Life Ins., Co., 127 F.3d 686, 693 (8th Cir. 1997). In other words, not everything that displeases an employee is an actionable adverse employment action. Montandon, 116 F.3d at 359.

Cox alleges that the initial act of sexual harassment occurred in 1995. There were no further unwelcome sexual overtures after 1995 with the possible exception of the crotch grabbing and crotch adjustment.¹³ Cox further avers there were no inappropriate sexual comments or overtures directed at him during the time he worked for GHS. Cox does allege, however, that the sexual harassment continued because he was treated differently after the initial acts in 1995.

¹³ The Court fails to see how crotch grabbing and crotch adjustment could be construed by a reasonable person as unwelcome sexual overtures in the circumstances of this case. Cox himself described the “crotch grabbing” as akin to that done by a baseball player. Indeed, this conduct, while crass and unprofessional, is not uncommon in male-dominated environments.

The treatment Cox claims violates Title VII and the ICRA consists primarily of the following: a poor supervisor/employee relationship in which Hale tried to find things Cox was not doing correctly; that Cox overheard Hale using inappropriate language, consisting of cuss words and on one occasion referring to a female regional manager with whom he (Hale) had just gotten off the phone as “a fucking cunt and a dumb bitch”; that Hale gave Cox inaccurate job evaluations; that Hale did not inform Cox of meetings regarding contract administration that Cox felt he should have been included in; and that Hale threatened his job on several occasions.

According to Cox, “[t]he obviously sex-related conduct that was engaged in by Hale in 1995 created or contributed to a work environment that was charged with a sexual animus which continued up until the time that Cox was terminated.” Cox cites to a Tenth Circuit case to show that “the non-sexually explicit or non-gender motivated conduct which occurred . . . is relevant to the evaluation of Plaintiff’s hostile work environment claim.” O’Shea v. Yellow Technology Servs., Inc., 185 F.3d 1093, 1102 (10th Cir. 1999) (finding fact issues existed as to whether gender-motivated harassment of employee resulted in all subsequent harassing conduct being a product of gender hostility); see also McFarland v. Henderson, 307 F.3d 402, 408 (6th Cir. 2002) (applying Morgan and finding a hostile environment claim was timely when an overtly sexual act constituting a sexual advance was followed by several months of rudeness and rumor

spreading where at least some of the acts constituting the hostile environment fell within the statutory period).

In O'Shea v. Yellow Technology Services, Inc., the court found the plaintiff established a genuine issue of material fact as to whether the conduct was based on gender or sexual animus even though some of the conduct was not overtly sexual. O'Shea, 185 F.3d at 1099-1100. The conduct complained of included the following: plaintiff was not invited to lunch; plaintiff's coworkers would switch topics to sports when she joined conversations; coworkers became less communicative with her, and then totally ignored her; and a coworker shouted at the plaintiff, accusing her of doing things incorrectly. Id.

According to Cox, like in O'Shea, the 1995 incidents of harassment precipitated the hostile environment he was forced to endure while working under Hale. It was only after he rebuffed Hale's sexual overtures that his job was threatened by Hale, that he was left out of the loop of communication and meetings, that he received inaccurate evaluations, and that he was subjected to Hale's use of vulgar and sexual language. In other words, Cox bases his claim on the treatment he was allegedly subjected to from 1995 through at least October 2000. Cox urges the Court to consider this conduct cumulatively as a continuing violation contributing to the hostile work environment, and that as such, at least some of the conduct complained of occurred during the statutory period.

Defendants contend that Cox has merely alleged a series of unrelated events subsequent to 1995. They contend these events do not establish an ongoing violation as recent cases support the conclusion that the conduct Cox complains of does not meet the high threshold necessary to prove actionable harm. See, e.g., Tuggle, 348 F.3d 714 (stressing the high threshold for actionable harm to prevail on a hostile work environment claim and finding plaintiff failed to overcome that threshold where the conduct complained of consisted of harassing comments and photographs, undesirable work assignments, lack of training, and retaliatory acts, such that plaintiff was subjected to harassing conduct over a two-year period, but such conduct was “not so severe or pervasive as to poison her work environment”); Farmland Foods, Inc. v. Dubuque Human Rights Comm’n, 672 N.W.2d 733 (Iowa 2003) (reversing commission’s finding of hostile environment because conduct at issue was not severe or pervasive and did not permeate the work environment with discriminatory intimidation, derision, and abuse, but rather was sporadic in nature and related to work performance where the conduct complained of consisted primarily of criticism and close supervision of plaintiff’s activities); see also Pirie v. Conley Group, Inc., 2004 WL 180259 (S.D. Iowa Jan. 7, 2004) (discussing the threshold for hostile environment sexual harassment claims in the Eighth Circuit and finding isolated incident of exposure was not severe or pervasive enough to alter a term or condition of employment).

It is undisputed that the initial acts of sexual harassment occurred in 1995 and that Cox did not file his civil rights complaint until February 15, 2001. This is well beyond the statute of limitations established by Title VII. See 42 U.S.C. § 2000e-5(e)(1) (requiring that an aggrieved party file a claim with the EEOC within 180 days after the “alleged unlawful employment practice occurred”). The Court must determine whether the incidents complained of by Cox constitute actionable harassment such that Cox filed his complaint within the applicable time period.

While the incidents of exposure Cox alleges occurred in 1995 could arguably be considered sexual harassment, none of the other events he alleges rise to the level of actionable discriminatory conduct when viewed in isolation. None of the harassment he alleges within the statutory time frame is based on sex. Cox readily admits that there was no conduct of a sexually hostile nature during any of the time he worked for GHS. Furthermore, the conduct complained of is not so severe or pervasive as to be actionable. At best, Cox has alleged an inability to get along with his supervisor and that he was treated unfairly.

Cox urges the Court to avoid artificially parsing the actions which he deems constitutes the hostile environment. Rather, he urges the Court to recognize the pattern of discriminatory conduct lasting from 1995 until at least October 2000, which would make his February 15, 2001, filing with the ICRC timely. See, e.g., Hathaway, 132 F.3d at 1222 (finding there was conflicting evidence creating a jury question as to whether the

subsequent behavior of the alleged harassers grew out of the plaintiff's rebuff to the sexual advances of one of the harassers). This argument, however, is premised on the Court finding the course of conduct was sufficiently severe or pervasive as to constitute actionable conduct.

A hostile environment claim usually consists of a series of events and incidents that together constitute a single unlawful employment practice. Cox maintains that the harassing conduct he allegedly endured came about as a result of his rebuffing Hale's earlier sexual advances. Granting all inferences in favor of Cox, the Court accepts for purposes of this motion that Hale's behavior from 1995 to 2000 is tied to the multiple indecent exposure incidents of 1995. As a result, the subsequent conduct is part of a single unlawful employment practice.

The Court further finds, however, that the conduct alleged was not sufficiently severe or pervasive as to alter a term or condition of employment. As the Eighth Circuit has made clear, the threshold is high in determining whether *actionable* harassment has occurred. The conduct complained of simply does not rise to that level. While the 1995 incidents were boorish and offensive, the Court cannot find a basis to interpret them as sexual overtures. Moreover, none of the other conduct complained of could be considered severe or pervasive. The Court does not condone such actions, but the Court is not in the business of policing employers for all unprofessional conduct. The Court finds the conduct does not constitute actionable harassment sufficient to bring a hostile environment claim.

3. Motivation of Hostility – “Because of Sex”

In addition, for Cox to prevail on his claim of same sex harassment, he must necessarily show that the harassing conduct was directed at men and that women were treated differently. Quick, 90 F.3d at 1377. In other words, there must be evidence that the treatment was motivated or occurred “because of sex”, see Linville, 335 F.3d at 824 (concluding evidence did not support a claim of gender discrimination based on hostile work environment because plaintiff failed to provide evidence that harassment was “based on sex” when he offered no evidence that harasser was motivated by a hostility toward men), and that the conduct was not the work of someone who exhibits bad behavior to both sexes. Quick, 90 F.3d at 1379.

The proper inquiry for determining whether discrimination was based on sex “is whether ‘members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed.’” Id. (quoting Harris, 510 U.S. at 25 (Ginsburg, J., concurring)). This burden may be met if a plaintiff shows the conduct was motivated by sexual desire. Oncale, 523 U.S. at 80-81. Moreover, a court can find actions are “because of sex” if they amount to reprisals for rebuffing sexual advances. Hathaway, 132 F.3d at 1222.

The Court recognizes, however, that “[w]hereas conduct involving explicit or implicit proposals of sexual activity directed at a person of a different sex creates an inference that the proposals would not have been made to a person of the same sex, the same is not true in same-sex harassment cases.” Pedroza v. Cintas Corp., 2003 WL

828237, *6 (W.D. Mo. Jan. 9, 2003) (citing Oncale, 523 U.S. at 81). In other words, “in the case of same-sex workplace sexual harassment, no presumption exists that the harassment was because of sex.” Id. The plaintiff in these cases must show that the alleged harassing conduct was not merely “tinged with offensive sexual connotations,” but actually constitutes discrimination based on sex. See Oncale, 523 U.S. at 81.

Much of the offensive behavior of which Cox complains was directed at both men and women. Hale used vulgar language with respect to both men and women, directed at both sexes and in the company of both sexes. It is also alleged that Hale demeaned those around him irrespective of their gender. In addition, according to the record, both men and women had problems dealing with Hale.

However, Cox argues the treatment he was subjected to by Hale is distinguishable from the other offensive behavior in which Hale is alleged to have engaged. Cox and Hale were friends for some period before Cox rebuffed what he regards as Hale’s advances. According to Cox, during this period of friendship, Cox was frequently around Hale and was not subjected to the demeaning and derogatory treatment of which he was later a target. As a result, Cox urges the Court to find there is a genuine issue as to whether the hostile and discriminatory conduct Cox endured at the hands of Hale was motivated “because of sex”, i.e., because Cox had rebuffed Hale’s earlier puerile sexual overtures.

Again, granting all inferences in favor of Cox, the Court finds that he fails to generate an issue of material fact that the harassment was because of sex. The only

conduct in the record that could be interpreted as sexual is the 1995 conduct. Without more to explain that conduct, which was remote to the remainder of the specified allegations, the Court cannot find a reasonable jury would conclude the later treatment of Cox by Hale was based on sex. The record is devoid of any general evidence that men were treated differently than women in his work area. The vulgar and sexual language complained of was *overheard* by Cox, not directed at him. The other conduct complained of, i.e., the inaccurate reports, lack of communication, and the incessant checking up on him, is consistent with interpersonal conflict between Cox and Hale, not because of sex.

In sum, the Court finds as a matter of law the alleged harassing conduct was not so severe or pervasive as to alter a term or condition of employment, nor was the conduct based on sex. Cox has failed to generate a genuine issue of material fact on either of these two elements.

C. Retaliation (Counts III and IV)

Cox alleges a claim against GHS for retaliation under Title VII (Count III) and against both GHS and Hale for retaliation under the ICRA (Count IV). The basis of Cox's allegations is that adverse action was taken against him as a result of his participation in an internal investigation of a civil rights complaint. Cox claims that the adverse action consisted of termination, refusing to transfer him to another supervisor, and refusal to consider him for other positions for which he was qualified both before and

after termination. Defendants argue the retaliation claims are insufficient as a matter of law because Cox's position was eliminated pursuant to a legitimate business decision.

Title VII prohibits an employer from discriminating or retaliating against an employee for engaging in "protected activity", which is either opposing an act of discrimination prohibited by Title VII or participating in an investigation under Title VII. 42 U.S.C. § 2000e-3(a); see also Hunt v. Nebraska Pub. Power Dist., 282 F.3d 1021, 1028 (8th Cir. 2002). The ICRA contains similar protections. See Iowa Code § 216.11(2) (2003).

To establish a prima facie case of retaliation, Cox must prove the following elements: (1) he engaged in a protected activity; (2) his employer subsequently took some sort of adverse employment action against him; and (3) the adverse action is causally linked to the protected activity. Scusa, 181 F.3d at 968; see also EEOC v. Kohler Co., 335 F.3d 766, 772-73 (8th Cir. 2003); Hunt, 282 F.3d at 1028; Cross v. Cleaver, 142 F.3d 1059, 1071 (8th Cir. 1998); Hulme, 449 N.W.2d at 633. To be actionable, an "action claimed to be retaliatory must be sufficiently adverse to have created a material change in the employment, 'such as a change in salary, benefits, or responsibilities.'" Henthorn, — F.3d at —, 2004 WL 405730, at *4 (quoting LaCroix v. Sears, Roebuck, & Co., 240 F.3d 688, 691 (8th Cir. 2001)). In other words, "[n]ot everything that makes an employee unhappy constitutes an actionable adverse employment action." Id. For example, a negative employment review is only actionable if used to detrimentally alter the terms or conditions of employment, id. (citing Spears v. Mo. Dep't of Corr. &

Human Res., 210 F.3d 850, 854 (8th Cir. 2000)), and minor changes in responsibility or working conditions are not adverse employment actions if they do not result in a materially significant disadvantage to the employee. Id. (citing Kerns v. Capital Graphics, Inc., 178 F.3d 1011, 1016-17 (8th Cir. 1999)).

In the absence of direct evidence of retaliation,¹⁴ courts apply the McDonnell Douglas burden-shifting analysis. See Womack v. Munson, 619 F.2d 1292, 1296 (8th Cir. 1980) (applying the burden-shifting analysis of McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), to Title VII retaliation claims). Under this analysis, if the plaintiff establishes a prima facie case of retaliation, a presumption of unlawful discrimination exists. Hunt, 282 F.3d at 1028; Stuart v. GMC, 217 F.3d 621, 634 (8th Cir. 2000). The employer must then offer a legitimate and nondiscriminatory reason for the adverse

¹⁴ The record does contain what might be characterized as direct evidence of retaliation. One of the threats attributed to Hale came after Cox participated in the civil rights investigation. During this confrontation, Hale allegedly threw an inch thick stack of papers at Cox, which slid across the desk and hit Cox in the chest. Hale then came at Cox and said, “If you continue this investigation, I’ll have you out the door. You won’t be here any longer.” However, the Court has concluded this does not amount to direct evidence of retaliation that would make the burden-shifting analysis inapplicable. The Plaintiff does not really address the issue in this fashion. While Hale had management responsibilities for the handling of work in the small department, the record does not support a determination that he had supervisory power over Cox’s employment relationship. Weyers v. Lear Operations Corp., — F.3d —, 2004 WL 330092, *6 (8th Cir. Feb. 24, 2004) (adopting the view that “to be considered a supervisor, ‘the alleged harasser must have had the power (not necessarily exercised) to take tangible employment action against the victim, such as the authority to hire, fire, promote, or reassign to significantly different duties.’”) (quoting Joens v. John Morrell & Co., 354 F.3d 938, 940 (8th Cir. 2004)).

employment action to overcome this legal presumption. Hunt, 282 F.3d at 1028; Stuart, 217 F.3d at 634. If the employer meets its burden, the presumption of retaliation disappears. Cross, 142 F.3d at 1071-72. The burden then shifts back to the employee to offer evidence that the proffered reason is pretextual, Hunt, 282 F.3d at 1028; Stuart, 217 F.3d at 634, or that the proffered explanation is “unworthy of credence.” Weiland, 233 F. Supp. 2d at 1151-52. This test applies to both the Title VII and ICRA retaliation claims. Vivian v. Madison, 301 N.W.2d 872, 873 (Iowa 1999).

At the outset, the Court finds that only the termination potentially constitutes an actionable retaliatory action. The other actions Cox complains of do not qualify as retaliatory conduct because they did not produce a material change in employment. See Henthorn, — F.3d at —, 2004 WL 405730, at *4.¹⁵ Assuming, *arguendo*, that Cox has alleged a prima facie case as to the termination, Defendants assert that his retaliation claims must still fail because all employment actions taken with respect to Cox were done pursuant to a legitimate business reason and were lacking in any discriminatory motive.

GHS purchased BH&G Real Estate from Meredith Corporation in July of 1998. The operation and staff initially remained in Des Moines; however, the Des Moines operation did not do well financially and was losing a substantial amount of money. As

¹⁵ Specifically with regard to the argument of failure to transfer, there is nothing on the record indicating Cox ever actually sought a transfer. The only request of this nature made by Cox was his request of Vera Lichtenberger that he report to her instead of to Hale. This request was merely a request for a supervisor change, *not* for a transfer, and would not have altered his employment in a material way.

a result, GHS sent Judy O'Brien to the Des Moines office during the summer of 2000 with the stated objective of assessing how costs could be immediately reduced and to create a plan to move the entire Des Moines operation to New Jersey. The ultimate goal was to close the Des Moines office.

O'Brien visited the Des Moines office over the next several months. During her visits, she spoke with management in an effort to understand how their departments functioned, what activities they undertook, the process involved, and the cost structures. According to Defendants, the decision on which jobs to eliminate as a part of the immediate cost reduction was based upon the function being performed, the volume of work generated, and whether someone else in either Des Moines or New Jersey could assume the job functions. The issue of performance or work quality was not discussed or considered in any respect because the purpose was to eliminate jobs and thereby reduce costs.

With respect to the contract administration department, O'Brien determined that two, rather than three, people could handle the job responsibilities of the department. The three people in the department at the time were Cox, manager Hale, and administrative assistant Cindy Jones. GHS argues that it made the most sense from a business standpoint to eliminate Cox's position. The manager position had more critical functions and was aware of all of the functions performed in the department, while the administrative position also had critical functions and was simply more useful. In

addition, the elimination of Cox's position would result in a bigger cost savings and the required work could still be accomplished.

Merely disputing the reason proffered by the employer is not enough to show that reason is a pretext for discrimination. Stuart, 217 F.3d at 634. Rather, the employee must show that the reason given was false *and* that discrimination is the real reason behind the adverse employment action. Id.; see also St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 515 (1993). However, the plaintiff "need not disprove all possible reasons for his discharge. He need only offer sufficient evidence to support a reasonable inference that he was terminated [for an illegal reason]." EEOC v. HBE Corp., 135 F.3d 543, 555 (8th Cir. 1998).

A plaintiff with a retaliation claim has the opportunity to critically examine the proffered business reasons to determine whether the employer is telling the truth. Estes v. Dick Smith Ford, Inc., 856 F.2d 1097, 1101 n.1 (8th Cir. 1998), abrogated on other grounds, Price Waterhouse v. Hopkins, 490 U.S. 228 (1989). Plaintiffs may in part meet their ultimate burden of proof in an employment discrimination case by proving the defendant's proffered reason is unworthy of belief. Reeves, 530 U.S. at 146-47. In addition, the plaintiff's testimony alone is enough under some circumstances to create a genuine issue of material fact to preclude summary judgment. See Kenney v. Swift Transp., Inc., 347 F.3d 1041, 1045-46 (8th Cir. 2003).

A plaintiff may also establish pretext by showing it was not the employer's policy or practice to respond to such problems in the manner it responded in plaintiff's case.

Erickson v. Farmland Indus., Inc., 271 F.3d 718, 727 (8th Cir. 2001). In addition, instances of disparate treatment can support a claim of pretext. Weiland, 233 F. Supp. 2d at 1156. Keeping in mind that “[c]ourts do not sit as super-personnel departments to second-guess the business decisions of employers,” Dorsey v. Pinnacle Automation Co., 278 F.3d 830, 837 (8th Cir. 2002) (citing Wilking v. County of Ramsey, 153 F.3d 869, 873 (8th Cir. 1998)), the Court must determine whether Cox has established the Defendants’ proffered reason was pretext or otherwise unworthy of belief. See Reeves, 530 U.S. at 146-47; Stuart, 217 F.3d at 634.

According to GHS, the decision to eliminate Cox’s position was made at the senior level of GHS. Hale was not involved in the discussion or decision as to whose position was to be eliminated, and more specifically, had no involvement with the decision regarding Cox. Hale was not even informed that Cox’s position was being eliminated until that decision had already been made.

Cox was laid off due to the elimination of his position on October 19, 2001. In addition to Cox, there were several other employees whose positions were eliminated at this same time. Initially, Cox’s work was completed by the remaining positions in the Des Moines contract administration department. Eventually, all of the work being done in the contract administration area was transitioned to New Jersey. Scott Hale’s position was eliminated in December of 2001, and Cindy Jones’ position was eliminated in February of 2002.

Cox contends that GHS, and O'Brien in particular, did not follow the practice normally employed by GHS in making the decision to terminate Cox. Cox alleges that O'Brien failed to familiarize herself with the contract administration area or Cox's position. She did not prepare any documents relating to the cost reducing measures or the consolidation of the Des Moines office until November 27, 2000, well after Cox was terminated. Also, according to Cox, because O'Brien did not understand how the work was distributed between the three employees in the contract administration area she could not know whether they substantively performed the same job, and therefore whether O'Brien should take into consideration the fact of the recent investigation of Cox's employment complaints.¹⁶

Given the unique circumstances of the business issues being addressed, the record indicates that O'Brien undertook a thorough investigation of the entire Des Moines office, including the three-member contract administration department. She made her decision only after gathering facts and understanding the nature of the work done by the department. Contrary to Cox's assertions, O'Brien spoke to individuals, including Lichtenberger, in addition to Hale in order to understand the department. Moreover, O'Brien reviewed documentation as to the number of member agreements the department processed prior to concluding that the workload of the department could be

¹⁶ Schmalbach, the HR manager, admits that if there had been multiple people doing Cox's job GHS would have taken into consideration that the company had just concluded an investigation pertaining to one of the employees.

done by two persons rather than three. According to the Defendants, the elimination of Cox's position was the most logical and would result in the most cost savings. In addition, no written document was prepared until November because O'Brien was still in the initial stages of her assignment. A review of the record fails to generate a material fact question on this issue.

Defendants also contend that Cox has no evidence to support his claim that his participation in the civil rights investigation in any way impacted the decision to eliminate his job. With this argument, Defendants intimate that Cox cannot even meet the requirements of a prima facie case of retaliation. Temporal proximity alone is usually insufficient to create an issue of fact. See Smith v. Allen Health Sys., Inc., 302 F.3d 827, 832 (8th Cir. 2002); Buettner v. Arch Coal Sales Co., 216 F.3d 707, 716 (8th Cir. 2000); Kiel v. Select Artificials, Inc., 169 F.3d 1131, 1136 (8th Cir. 1999). A mere "coincidence of timing" does not raise an inference of causation. Kipp v. Mo. Highway & Transp. Comm'n, 280 F.3d 893, 897 (8th Cir. 2002); Scroggins v. Univ. of Minn., 221 F.3d 1042, 1045 (8th Cir. 2000). However, "temporal proximity rises in significance the closer the adverse activity occurs to the protected activity." Kohler, 335 F.3d at 774.

Cox claims there are facts in the record that call into question the issue of motivation. O'Brien spoke solely with Hale and based her understanding of the contract administration area on these discussions. O'Brien was aware of Cox's allegations regarding Hale, as well as the additional allegations from the anonymous letter regarding Hale. She was further aware that Suzi Schmalbach was conducting an investigation into

these allegations concurrently with O'Brien's own assessment of how to cut costs in preparation to move the Des Moines office to New Jersey. Cox points out that the decision to eliminate his position was made the *same day* that Schmalbach concluded the civil rights investigation in which Cox had participated.

As detailed above, however, the decision to eliminate Cox's position was part of a broad range business plan that would culminate with the closure of the entire Des Moines operation, with the work being performed in Des Moines transitioned to New Jersey. Cox was not the only employee impacted by this decision; rather, every Des Moines employee was impacted. Based on the foregoing, even accepting *arguendo* that Cox has made out a prima facie case, the Court finds that Cox has failed to rebut the reason proffered by GHS by showing it was pretext or unworthy of belief.

D. Sex Discrimination (Counts V and VI)

Cox alleges a claim against GHS for sex discrimination under Title VII (Count V) and against both GHS and Cox for sex discrimination under the ICRA (Count VI). Cox alleges that he was discriminated against on the basis of sex because GHS terminated him rather than attempting to stop the harassment he had alleged or offering him a transfer. Seemingly, the sole basis of Cox's claim of sex discrimination is based on his recollection that three female employees were transferred to different positions when they reported incompatibility with their supervisors, an opportunity Cox was not given. Defendants contend this bare allegation is insufficient as a matter of law, and therefore both sex

discrimination claims are legally insufficient as the decision to eliminate Cox's position had nothing to do with sex.

To establish a prima facie case of gender based employment discrimination, a plaintiff must prove (1) that he is a member of a protected class, (2) that he was qualified to do the job, (3) that he suffered an adverse employment action, and (4) that persons of the opposite sex were not treated the same. See Breeding v. Arthur J. Gallagher & Co., 164 F.3d 1151, 1156 (8th Cir. 1999). In addition, when the plaintiff is male, the prima facie case involves the additional step of showing "background circumstances." Duffy, 123 F.3d at 1028.¹⁷ This means that in reverse discrimination cases, the plaintiff must show "that background circumstances support the suspicion that the defendant is

¹⁷ Cox claims that he does not have to show "background circumstances," but rather only needs to make out a prima facie case to avoid summary judgment. Cox cites to Duffy v. Wolle, 123 F.3d 1026, 1036 (8th Cir. 1997), for this proposition. The quote Cox attributes to Duffy in fact comes from a Tenth Circuit case, Notari v. Denver Water Dep't, 971 F.2d 585 (10th Cir. 1992), which Duffy cites without further explanation.

The Notari case does not stand for the proposition for which it is cited. The case holds that where the plaintiff offers *direct* evidence of intentional discrimination and the McDonnell Douglas presumption is not relied upon, then "background circumstances" need not be shown. Notari, 971 F.2d at 590 (finding background circumstances need not be shown if there are specific facts supporting a reasonable inference that "but for plaintiff's status, the challenged decision would not have occurred."). However, if the plaintiff only has *indirect* evidence of discrimination and relied upon the McDonnell Douglas prima facie case analysis, a showing of "background circumstances" is indeed necessary. See Duffy, 123 F.3d at 1036.

In this case, there is no evidence on the record of specific facts that support a reasonable inference that the elimination of Cox's position would not have occurred but for Cox's status. Thus, Cox must rely on the McDonnell Douglas prima facie case analysis, and therefore it is still necessary that Cox make a showing of "background circumstances."

that unusual employer who discriminates against the majority.” Id. at 1036 (quoting Murray v. Thistledown Racing Club, Inc., 770 F.2d 63, 67 (6th Cir. 1985)).

Finally, in the event that the plaintiff established a prima facie case of sex discrimination, the burden-shifting analysis comes into play and the defendant must articulate a legitimate, nondiscriminatory reason for its actions. McDonnell Douglas, 411 U.S. at 802. The plaintiff must then rebut the proffered reason with evidence of pretext or discriminatory animus. Id. at 804-05.

In this case, the adverse employment action that Cox alleges is the termination of his employment and the failure to transfer. The inquiry for the Court is whether the fact that Cox was male impacted this decision. There is no evidence to support the conclusion that GHS was the “unusual employer who discriminates against the majority.” Duffy, 123 F.3d at 1036 (internal citations omitted). Indeed, the elimination of Cox’s position came about as a result of cost reducing measures and an ultimate plan to move all Des Moines job responsibilities to New Jersey. There is no evidence that females were allowed to keep their jobs to the exclusion of males.¹⁸ Thus, both males and females were treated the same.

¹⁸ Cox does state that “[n]one of these things happened to Cindy Jones, a similarly situated female in the contract administration area.” He claims Jones received better evaluations, was promoted and given a substantial raise, and kept her job when Cox was terminated even though O’Brien was unclear as to the respective difference between her job function and that performed by Cox. However, at the time Cox’s position was eliminated, several other positions were eliminated irrespective of the employee’s gender. Moreover, Jones’ position included administrative responsibilities different than Cox’s position.

Cox does allege that three women were allowed to transfer to other positions after complaining about their relationship with their superior.¹⁹ Cox contends he was not given this same opportunity. However, Cox fails to offer any evidence that this actually happened, or even the time frame involved. Allegations based on mere speculation are insufficient. See Rose-Matson v. NME Hosps., Inc., 133 F.3d 1104, 1109 (8th Cir. 1998) (finding bald assertions and conclusory affidavits insufficient to support an inference of pretext); Nitschke v. McDonnell Douglas Corp., 68 F.3d 249, 252 (8th Cir. 1995) (finding comparison to other employees is only valid if the other employees are similarly situated or otherwise “comparable” to the plaintiff); Harvey v. Anheuser-Busch, Inc., 38 F.3d 968, 972 (8th Cir. 1994) (finding that plaintiff’s mere recitation of incidents in which white employees were allegedly less severely disciplined was insufficient).

Furthermore, even if Cox is able to make out a prima facie case of sex discrimination, his sex discrimination claims fail. GHS has articulated a legitimate, nondiscriminatory reason for the elimination of Cox’s position that Cox has not shown is pretext.²⁰ Accordingly, the Court finds that Cox’s sex discrimination claims fail as a matter of law.

¹⁹ Cox names these individuals but does nothing more than perfunctorily state that they were moved when they had problems with their male bosses. The problem, however, is that Cox has no personal knowledge of the allegations regarding these individuals and has offered no proof they were similarly situated in all relevant aspects and has offered no details as to time, place, or circumstances.

²⁰ See discussion supra section C.

E. Age Discrimination (Counts VII and VIII)

Cox alleges a claim against GHS for age discrimination under the ADEA (Count VII) and against both GHS and Hale for age discrimination under the ICRA (Count VIII). Defendants argue both claims are insufficient as a matter of law because there is no evidence to support even a prima facie case of age discrimination.

Under the ADEA, it is “unlawful for an employer . . . to discharge . . . or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s age.” 29 U.S.C. § 623(a)(1). Liability depends on whether age “actually motivated the employer’s decision.” Hazen Paper Co. v. Biggins, 507 U.S. 604, 610 (1993). “That is, the plaintiff’s age must have actually played a role in [the employer’s decisionmaking] process and had a determinative influence on the outcome.” Reeves, 530 U.S. at 141 (quoting Hazen Paper Co., 507 U.S. at 610).

Cox did not dispute Defendants’ contentions relating to legal insufficiency of his age discrimination claims. Accordingly, the age discrimination claims will be dismissed by stipulation.

F. Promissory Estoppel (Count IX)

Cox alleges a claims against GHS for promissory estoppel under Iowa common law (Count IX). GHS asserts this claim is legally insufficient because Iowa Code Chapter 216 provides the exclusive remedy for such claims.

The Iowa Supreme Court has held “the ICRA, Iowa Code chapter 216 . . . , provides the exclusive remedy for particular conduct prohibited under that statute.” Channon v. United Parcel Serv., Inc., 629 N.W.2d 835, 857 (Iowa 2001) (citing Greenland v. Fairtron Corp., 500 N.W.2d 36, 38 (1993)). In other words, if the common law action requires proof of discrimination, it is not separate and independent and should be dismissed. Id.

Cox did not dispute Defendants’ contentions relating to legal insufficiency of his promissory estoppel claim. Accordingly, the promissory estoppel claim will be dismissed by stipulation.

G. Intentional Interference with Employment Relationship (Count X)

Cox alleges a claim against Hale for intentional interference with employment relationship under Iowa common law (Count X). In this claim, Cox alleges that Hale intentionally interfered with Cox’s employment relationship with GHS and that Hale’s interference caused GHS to terminate Cox. Hale argues the claim is legally insufficient for the following reasons: (1) Iowa Code Chapter 216 provides the exclusive remedy; (2) there is no evidence that any action of Hale had anything to do with the decision to eliminate Cox’s position; and (3) GHS did not have an employment contract with Cox.

The elements of tortious interference are as follows: (1) Cox had a contract with GHS; (2) Hale knew of that contract; (3) Hale intentionally and improperly interfered with the contract; (4) the interference caused GHS not to perform; and (5) Cox was damaged. Gibson v. ITT Hartford Ins. Co., 621 N.W.2d 388, 399 (Iowa 2001); Moore

v. Sutherland Printing Co., 662 N.W.2d 370, 2003 WL 182950, *3 (Iowa App. Jan. 29, 2003) (table).

In addition, in Iowa “the tort of malicious interference with a contract can only be committed by a third party, not a party to that contract.” Harbit v. Voss Petroleum, Inc., 553 N.W.2d 329, 331 (Iowa 1996) (citing Grahek v. Voluntary Hosp. Coop. Ass’n of Iowa, 473 N.W.2d 31, 35 (Iowa 1991), and Nesler v. Fisher & Co., 452 N.W.2d 191, 194 (Iowa 1990)). When the plaintiff in such a claim is a supervisory employee of one of the parties to the employment contract, that employee is an agent of the employer and “cannot be held liable for tortious interference with the employment contract.” Grimm v. U.S. West Communications, Inc., 644 N.W.2d 8, 12 (Iowa 2002). A supervisory employee may, however, still be liable for tortious interference with an employment contract if the supervisor violates the employment contract and otherwise exceeds the qualified privilege the supervisor is entitled to. Id.; see e.g., Hunter v. Bd. of Trs. of Broadlawns Med. Ctr., 481 N.W.2d 510, 518 (Iowa 1992).

1. Exclusive Remedy

The Iowa Supreme Court has held “the ICRA, Iowa Code chapter 216 . . . , provides the exclusive remedy for particular conduct prohibited under that statute.” Channon, 629 N.W.2d at 857 (citing Greenland, 500 N.W.2d at 38); Northrup v. Farmland Indus., Inc., 372 N.W.2d 193, 197 (Iowa 1985); see also Richards v. Farner-Bocken Co., 145 F. Supp. 2d 978, 990-91 (N.D. Iowa 2001) (recognizing that the Iowa Supreme Court has held that Section 216.16(1) renders the chapter’s remedies exclusive

and preemptive). “Preemption occurs unless the claims are separate and independent, and therefore incidental, causes of action.” Greenland, 500 N.W.2d at 38. “If, under the facts of the case, success on the non-ICRA claims requires proof of discrimination, such claims are not separate and independent.” Channon, 629 N.W.2d at 857.

If the common law action requires proof of discrimination, they are not separate and independent and should be dismissed. Id.; see, e.g., Westin v. Mercy Med. Servs., Inc., 994 F. Supp. 1050, 1057-58 (Iowa 1998) (finding claim of tortious discharge in violation of public policy for discrimination based on age and disability was preempted because ICRA provided exclusive remedy for these claims); Grahek, 473 N.W.2d at 34-35 (upholding summary judgment on count that asserts plaintiff was discharged because of age because this claim is indistinguishable from the civil rights claim filed with the commission); Vaughn v. Ag Processing, Inc. 459 N.W.2d 627, 639 (Iowa 1990) (finding civil rights statute preempted claims of wrongful discharge, unfair employment practices, and termination in bad faith because all were actually based on religious discrimination); Hamilton v. First Baptist Elderly Hous. Found., 436 N.W.2d 336, 341-42 (Iowa 1989) (concluding plaintiff’s claim of wrongful discharge was premised on sex discrimination and was therefore preempted by the civil rights statute); Northrup, 372 N.W.2d at 196-97 (finding sole remedies for discharge from employment based on disabilities was under the ICRA and any common law action for wrongful discharge could not be recognized). Thus, “[t]he test is whether, in light of the pleadings, discrimination is made an element of the non-ICRA claims.” Channon, 629 N.W.2d at 857 (internal citations omitted); see

also Borschel v. Perry, 512 N.W.2d 565, 567-68 (Iowa 1994) (“Our civil rights statute . . . preempts an employee’s claim that the discharge was in violation of public policy when the claim is premised on discriminatory acts.”).

Hale contends that the only allegations of wrongdoing made by Cox against Hale concern the incidents that give rise to Cox’s civil rights complaints. As such, there are no separate and independent acts alleged that are unrelated to the allegations of discrimination. Accordingly, Hale argues that Iowa Code chapter 216 provides Cox his exclusive remedy.

Cox, however, argues that he could succeed on his claim against Hale without proving that Hale acted in a discriminatory fashion. Therefore, Cox argues, the claim is not preempted. Indeed, Cox can succeed on a claim of tortious interference without relying on proof of discrimination. For example, in Moore v. Sutherland Printing Co. the court found a genuine issue of material fact existed where plaintiff claimed defendants intentionally interfered with his employment contract by keeping information from him. Moore, 662 N.W.2d 370, 2003 WL 182950, at *3.

Similarly, in this case, Cox alleges Hale gave him inaccurate reviews which ultimately prevented Cox from receiving raises or promotions. Cox can potentially make such a showing without resorting to showing Hale acted in a discriminatory fashion. In addition, Cox has also alleged that Hale interfered with his employment relationship by giving information to O’Brien upon which she relied in making the determination to eliminate Cox’s position.

Without passing judgment on the sufficiency of the Plaintiff's evidence on these allegations, the Court finds sufficient evidence on the record that Cox can make a showing of intentional interference with his employment relationship without needing to show discrimination on the part of Hale. Indeed, discrimination is not an element of the tortious interference claim, and the claim is not preempted.

2. Hale's Involvement with the Decision to Eliminate Cox's Position

Hale also contends there is no evidence to support Cox's claim that Hale's interference with Cox's employment relationship with GHS caused GHS to terminate Cox's position. Meanwhile, Cox contends that the sole source for O'Brien's decision to terminate Cox was Hale. This assertion is based on the fact that O'Brien spoke to no one and reviewed no documentation to assist her in making her decision other than having several discussions with Hale, the department manager. Cox argues that a fact finder could find that Hale intentionally interfered with Cox's employment relationship by providing the information to O'Brien that led to Cox's termination.

The evidence indicates that Cox's position was eliminated and that the decision to eliminate the position was based upon business considerations.²¹ The decisionmaking process employed by GHS in determining which jobs to eliminate involved neither job performance nor quality of work in any respect. GHS did not review performance evaluations prior to deciding that Cox's position should be eliminated. Thus, to the extent

²¹ See discussion regarding Defendants' proffered legitimate, nondiscriminatory reason for its actions, supra, Sections C and D.

Hale gave Cox unfair performance evaluations, these did not enter into the decision to eliminate Cox's position and thus are not evidence in support of Cox's claim.

According to Defendants, it is also undisputed that Hale was not involved in the decision to eliminate Cox's position. This decision was made by senior level GHS employees. Hale was informed only after the decision had been made, and such was communicated to him simply because he was Cox's manager and the decision would affect his department.

Furthermore, O'Brien has testified that in making this decision she would have spoken with other management personnel, that she would have reviewed documentation regarding the type and amount of work done by the department, and that she would have familiarized herself with the responsibilities of the department as a whole. Job performance or quality of work was never discussed because the terminations that were taking place arose because of the need to cut costs, not individual performance. Defendants contend this testimony indicates O'Brien did not rely solely upon the information she received from Hale in determining whose position to eliminate.

However, O'Brien's testimony as to what she would have done is not necessarily the same as what was actually done in this case. The Court finds there does exist a jury question on this issue as to the exact role played by Hale. Hale was the sole employee from the contract administration area consulted by O'Brien, and his discussion may have unduly influenced her decision.

Hale had shown by his past conduct that he had a conflict with and harbored animus towards Hale that affected their employment relationship. This conduct was egregious enough to be noticed and commented on by other employees.²² Indeed, Hale himself stated in threats against Cox that “I’ll have you out the door.” Resolution of this issue seems to rest on the credibility determination of Hale, O’Brien, and Cox. As a result, the Court cannot find as a matter of law that Hale did not intentionally interfere with Cox’s employment relationship with GHS.

3. Existence of Contractual Relationship

Defendants contend further that Cox’s claim for intentional interference with employment relationship should fail because Cox did not have an employment contract with GHS. Indeed, existence of an employment contract is the first element Cox cites in his recitation of the elements he needs to prove to succeed on his claim. According to Defendants, there was no employment contract.

This was the extent of the discussion by the parties on this issue. If indeed there was no employment contract, Cox would fail to meet the elements of this claim. Beyond GHS’s perfunctory statement that there was no employment contract, neither party has articulated the meaning of “employment contract” and whether Cox’s relationship with GHS would qualify. While still unclear, the Iowa cases reviewed by the Court do not resolve the issue of whether there exists a contractual relationship for the purposes of an

²² For example, Cox was told by a receptionist that Hale’s “trying to get you in trouble,” and by another employee that Hale was “doing a job” on Cox.

intentional interference claim for employees who are at-will employees. See, e.g., Grimm, 644 N.W.2d at 12 (discussing intentional interference claim without commenting on contractual status, instead finding claim was improper as it was brought against a supervisor); Gibson, 621 N.W.2d at 399-400 (noting parties do not dispute that *implied* contract existed and court would assume as much without needing to decide that such a contract did exist); Harbit, 553 N.W.2d at 331 (finding no employment relationship existed though summary judgment proper on tortious interference claim because all defendants were plaintiff's employers or their agents and thus were not third parties to the contract); Hunter, 481 N.W.2d at 513 (finding two exceptions to at-will employment relationship give rise to contractual claims, including the public policy exception to discharge and contract-forming language in a policy manual) (citing Fogel v. Trs. of Iowa College, 446 N.W.2d 451, 455 (Iowa 1989)). While Cox could have been fired at any time if he was an at-will employee, see Huegerich v. IBP, Inc., 547 N.W.2d 216, 219-20 (Iowa 1996), and Borschel, 512 N.W.2d at 566, Hale could have interfered with Cox's employment relationship by causing Cox to be fired at an earlier point. However, the parties have not provided the Court with sufficient information to determine Cox's contractual status as a matter of law.

Based on the foregoing discussion, the Court finds there exist genuine issues of material fact on the intentional interference with employment relationship claim. The Court has determined the claim is not preempted by Iowa's civil rights statute. The Court has further determined that jury questions still exist on the issue of Hale's

participation in the adverse employment action and whether it was enough to constitute intentional interference. In addition, the Court is unable to determine whether Cox's contractual status with GHS affects this claim because the parties have not provided the Court with an adequate basis to decide this issue. In short, summary judgment on the intentional interference claim is not warranted.

CONCLUSION

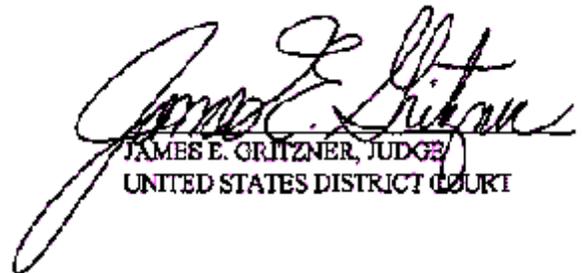
Cox did not resist summary judgment on three claims. Thus, the age discrimination claims and promissory estoppel claim are dismissed by stipulation. In addition, the hostile environment, retaliation, and sex discrimination claims fail as a matter of law. The hostile environment claim fails as the alleged conduct does not reach the threshold of sufficient severity or pervasiveness to alter a term or condition of Cox's employment. Moreover, Cox is unable to provide evidence upon which a reasonable jury could find the conduct complained of was based on sex. The retaliation and sex discrimination claims fail as Cox is unable to show Defendants' proffered reason is pretextual. The sex discrimination claims further suffer from the defect that Cox has not produced evidence that he was treated differently based on sex. On the other hand, genuine issues of material fact still remain on the intentional interference claim.

For the foregoing reasons, the Court hereby **grants** Defendants' Motion for Summary Judgment (Clerk's No. 17) as to Counts I and II (Hostile Environment Sexual Harassment), Counts III and IV (Retaliation), and Counts V and VI (Sex Discrimination). Furthermore, summary judgment is **granted** as to Counts VII and VIII (Age

Discrimination) and Claim IX (Promissory Estoppel) as the motion is not resisted on those bases. The Court **denies** Defendants' Motion for Summary Judgment (Clerk's No. 17) as to Count X (Intentional Interference with Employment Relationship).²³

IT IS SO ORDERED.

Dated this 12th day of March, 2004.



JAMES E. GRITZNER, JUDGE
UNITED STATES DISTRICT COURT

²³ The Court may decline to exercise supplemental jurisdiction over Plaintiff's state law claims if the Court has dismissed all claims over which it has original jurisdiction. 28 U.S.C. §1367(c)(3). Given the age of the litigation, the trial date and the degree to which this Court has already dealt with the details of this case, the Court has concluded it will retain supplemental jurisdiction over the interference claim.