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

TAMERA J. EDWARDS,

Plaintiff,

No. 4:04-cv-40193

VS.

MIDWEST CLOTHIERS, L.L.C.,

Defendant.

ORDER ON
DEFENDANT'S MOTION
FOR SUMMARY JUDGMENT

This matter comes before the Court on Defendant's Motion for Summary Judgment. Plaintiff Tamera Edwards ("Edwards") is represented by Michael Carroll.

Defendant Midwest Clothiers, L.L.C., is represented by Mark Thomas. The matter came on for hearing on October 28, 2005, and is fully submitted for ruling.

SUMMARY OF MATERIAL FACTS¹

The Defendant, Midwest Clothiers, owns and operates several retail clothing stores in the Des Moines area, including Badowers, Reichardt's, and Mr. B's. The

¹ The Court views all the facts in the light most favorable to the nonmoving party and gives 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 (1986); Lee-Thomas, Inc. v. Hallmark Cards, Inc., 275 F.3d 702, 705 (8th Cir. 2002); de Llano v. Berglund, 282 F.3d 1031, 1034 (8th Cir. 2002); Pace v. City of Des Moines, 201 F.3d 1050, 1052 (8th Cir. 2000); Prudential Ins. Co. v. Hinkel, 121 F.3d 364, 366 (8th Cir. 1997).

Plaintiff, Edwards, was employed at-will as a retail salesperson at Midwest Clothiers from September 22, 2002, until September 12, 2003.

Edwards initially worked at the Badowers location but later worked at Mr. B's and Reichardt's when two employees were on maternity leave. Midwest Clothiers characterizes this as a voluntary transfer made at Edwards' request, while Edwards claims she merely acquiesced in her employer's request.

Approximately one month into her tenure at Midwest Clothiers, Edwards began a consensual romantic relationship with Mark Pred ("Pred"), a co-worker. Edwards and Pred saw each other socially outside of the work environment on several occasions, and their relationship advanced to the point of consensual intimacy before Edwards decided she no longer wanted to pursue a relationship. Edwards attributed her decision to end the personal relationship to a series of comments in the workplace that she found disrespectful and inappropriate.

Following the termination of this relationship, Pred engaged in further conduct offensive to Edwards, and on November 20, 2002, Edwards complained to Midwest Clothiers' management. The complained-of conduct included an incident in the fall of 2002 when Pred instructed Edwards to "back her ass up" to a ruler and stated her sales would suffer if the width of her backside exceeded that of the ruler, and she would not make holiday sales if she was too chubby. Edwards claims she told Pred this was

offensive but that he just laughed it off as a joke. Edwards also claims Pred told her he wanted "to bend me over and fuck me over the pool table," told her other employees were taking bets on whether her bra and panties matched or if she wore underwear at all, and asked if she and a male friend "played hide the weenie" after celebrating her birthday. She asserts that Pred made discriminatory comments toward several homosexual customers and that he mocked a customer in a dressing room by some sort of gesture involving tongue movement and stroking a ruler. Edwards also asserts that minor groping or touching occurred at this point, but she did not report this in her initial complaint.

Edwards' initial complaint was investigated by Midwest Clothiers' management: Renee Gibson ("Gibson"), Human Resources Director, and Dave Lemons ("Lemons"), President. They spoke with Edwards and Pred, and Pred denied any wrongdoing. Pred was refreshed on the company harassment policies and received a letter from Lemons stating, "[a]lthough your actions were consensual most of the time . . . they are no longer welcome." The letter further instructed Pred to cease all harassing comments and not to punish Edwards in any way for making the complaint.

Pred returned to work with Edwards the following day. According to Edwards, he apologized, and his behavior improved temporarily. On December 2, 2002, Edwards complained to Lemons and Gibson a second time regarding Pred's behavior. Edwards

sent a letter detailing Pred's actions since her first complaint. She alleges that while Pred was assisting a customer who was a twin, he informed her that twins were "on his list of things to do" along with a mother/daughter combination. She further alleges that on a specific occasion when she walked up the stairs, Pred ran his hand up her inner thigh and grabbed her in an offensive fashion (in her letter of complaint, Edwards alleges he grabbed her backside, but in her deposition testimony she claims he grabbed her crotch). Pred received a second letter of reprimand and was transferred from Badowers to Mr. B's and instructed to have no further contact with Edwards, although Edwards claims Pred later called Badowers and made pig snorting noises into the phone when she answered. Edwards also claims Pred came into Reichardt's during her shift and made derogatory comments about a homosexual customer and breast implants.²

While Edwards was working at Mr. B's covering for an employee on maternity leave, she met a tailor named Balkaran Khodai ("Khodai"), also referred to as Sonny. The two became friends, and in April or May of 2003, Khodai began asking Edwards out on dates, which she declined. Edwards claims Khodai became increasingly persistent, and by June 2003 her co-workers became concerned and began checking on her.

² It is not clear from the record what the substance of these comments were or whether these comments were made to Edwards or about her.

³ Pred was temporarily moved back to Badowers to avoid interacting with Edwards while she worked at Mr. B's.

Edwards claims the escalating behavior included telling her she was "sexy," asking her to uncross her legs so he could see up her skirt, asking her if she was "wet," asking her if she would like to "taste chocolate" because he "liked vanilla," and trying to pull Edwards' hand to his crotch so she could "feel how hard I am for you." She also claims Khodai once sat across from her and began stroking his penis through his clothing. Midwest Clothiers claims its management staff was not aware of the situation with Khodai, though Edwards says that is impossible since her co-workers were aware of it. The record does not provide more than Edwards' allegation of general knowledge to support the conclusion management should have been aware of this activity.

On June 13, 2003, Khodai gave Edwards photographs of himself, nude and explicit. Edwards claims these photographs were unsolicited, and the only time Edwards shared any pictures of herself with Khodai was when she shared pictures of her vacation to Cancun generally with her co-workers. The defense notes that Edwards is wearing a bikini in these pictures. Edwards wrote Khodai a note explaining that it was inappropriate to give her these photos. Khodai repeatedly asked Edwards to return the pictures during the day, but Edwards refused. She says she did not return the photos because she wanted proof of her harassment. She also claims Khodai came running out of the store after her in pursuit of the pictures, and after several employees helped her get away, he chased her car.

Edwards reported her receipt of the photographs to her supervisor, Tim Stitzman ("Stitzman"), who was the manager of Mr. B's. Edwards claims at first Stitzman said Khodai "didn't know any better" because he was from a different country and "didn't understand how things are done here," and asked her if they could just forget about it. When Edwards told him she would not forget about it, Stitzman asked her to return to the store the next morning for a meeting.

A meeting was held with Lemons and Stitzman the following day, June 14, during which Edwards reported the series of personal advances by Khodai. When asked why she did not report it sooner, Edwards said she wanted to wait until she had proof. Midwest Clothiers interviewed Khodai, who provided documents, including a note written by Edwards providing Khodai with her home and cell phone numbers. Midwest Clothiers characterizes this as but one of a series of notes exchanged during a mutual flirtation between Edwards and Khodai, citing the fact that the note is signed with lipstick prints and uses the name "Jane Doe", which Khodai claims was part of an agreement between the two of them to use code names when communicating at work.⁴

⁴ The Defendant's filings also include a picture signed by Edwards that appears to be addressed to Khodai; however, due to poor image quality, it is not clear what is depicted in the picture or what is written upon it. Neither party's briefings address what the picture is, but some of Midwest's notes indicated that it might be a copy of Edwards' album cover, as her deposition reveals she sometimes works as a music teacher and singer.

Edwards denies the existence of a mutually flirtatious relationship. In her complaint, she claims this note asked for a "rain check" from one of Khodai's repeated requests, and that this was her way of gently refusing his advances. In her deposition, she claims she gave Khodai her phone numbers in an attempt to confront him away from the business; although she did not answer his call, stating that she changed her mind about confronting him.

Edwards claims that at the close of her meeting with Lemons and Stitzman, they sent her home for the rest of the day "to think about what [she] had done" and also told her they were sending Khodai home so they could finish collecting evidence, saying they believed both of them had evidence. Because Edwards was already scheduled to work, she was paid for the remainder of the day.

Khodai claimed Edwards requested the pictures and that she had once exposed her underwear to him by lifting her skirt. However, Khodai agreed to accept responsibility for the inappropriate action of showing the pictures during work hours.

Edwards and Khodai received letters following Midwest Clothiers' investigation.

Midwest Clothiers decided to reprimand Khodai, changed his hours so he was not working with Edwards, and ordered him to have no further contact with her.

After the meeting at which she reported receiving pictures of Khodai, Edwards alleges Midwest Clothiers began retaliating against her. Through June and July 2003,

Edwards repeatedly requested to return to Badowers but was told that her position was no longer available and that they did not want to upset the situation since Pred worked in that location. Edwards claims this interfered with her ability to earn a living because she was shuffled back and forth between stores to avoid working with Khodai, which impeded her ability to establish a client base and reduced her potential for commissions.

She further claims her co-workers started whispering abut her and taking her sales, thereby reducing her commission. Edwards specifically cites one incident where she was asked to iron downstairs for several hours while a co-worker took all the sales. Midwest Clothiers asserts that Edwards only reported one incident of alleged "commission-stealing", and further investigation showed that the sale was of a type upon which no commission was paid. Edwards' schedule was posted at the different store locations, and she claims no one else's schedule was posted, though Midwest Clothiers denies that. She also claims her hours were cut in half, while others' were not. Midwest Clothiers says all employee hours were reduced, and counsel for Edwards conceded at oral argument an inability to demonstrate the contrary.

Edwards also says an incident with Dan Higdon ("Higdon"), another Midwest Clothiers supervisor, was designed to get her to resign: He told her she was stupid, she would not learn anything in life until she was dead, and that he was sorry he ever hired her. Edwards also claims that while she was out of town sometime in July/August of

2003, Midwest Clothiers held a meeting and informed the staff that she was suing the company, though Gibson denies any knowledge of such a meeting. Edwards claims one co-worker told her, "we know what you're trying to do and what you're going to do to us as a company." Edwards also claims she saw a file indicating that her whereabouts and activity at work were being monitored by Midwest Clothiers. Stitzman, on the other hand, claimed it was Edwards who was keeping detailed notes on the store, which he interpreted as "setting up" the company for a lawsuit.

Edwards also alleges several complaints of a generally sexist attitude in the workplace. In October 2002, Edwards claims two men, who appeared intoxicated, came into Badowers shopping for blazers. One man told the other, "my dick is bigger than yours." When Edwards complained to Lemons, he told her she was in a man's world and should "toughen up" and deal with such behavior. Another time Edwards alleges Pred went on a date during work hours; when he was late for work, Edwards asked Lemons about Pred's whereabouts, and according to Edwards, Lemons claimed not to know. When Pred returned to work, Lemons asked about his date, and Pred responded that "she was a dog."

Edwards' employment with Midwest Clothiers ended September 12, 2003.

Midwest Clothiers claims she left voluntarily, but Edwards claims she was constructively discharged. She also claims the events leading up to her resignation/termination

caused her to have depression, anxiety, and upset stomach. She sought medical treatment and was prescribed Celexa, an anti-depressant.

On April 5, 2004, Edwards filed her Complaint, alleging sex discrimination and sexual harassment in contravention of Title VII, 42 U.S.C. § 2000e-2, and the Iowa Civil Rights Act, Iowa Code chapter 216. She also alleges Midwest Clothiers retaliated against her after she filed a complaint with the Iowa Civil Rights Commission and the EEOC. Jurisdiction for the Title VII claim arises under 28 U.S.C. § 1331, and supplemental jurisdiction for the ICRA claim arises under 28 U.S.C. § 1367.

Midwest Clothiers filed an answer on April 20, 2004, wherein it denied all substantive allegations of wrongdoing and asserted the affirmative defenses of equitable estoppel, failure to state a claim, and prompt and reasonable response to Edwards' allegations.

Midwest Clothiers filed a motion for summary judgment on July 6, 2005, and Edwards filed a resistance thereto on August 15, 2005, requesting oral argument. Finally, Midwest Clothiers filed a reply brief on August 22, 2005.

APPLICABLE LAW AND DISCUSSION

I. Standard for Summary Judgment

Rule 56 of the Federal Rules of Civil Procedure provides that summary judgment is proper "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 judgement as a matter of law." Fed. R. Civ. P. 56(c). A summary judgement motion should be utilized by the trial court to dispose of factually unsupported claims and defenses. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986); Celotex Corp. v. Catrett, 477 U.S. 317, 323-24 (1986); Matsushita Elec. Indus. v. Zenith Radio Corp., 475 U.S. 574, 586-87 (1986). Therefore, the trial judge is not to weigh the evidence and determine the truth of the matter but rather to determine whether there is a genuine issue for trial. Id. However, the Court is bound to view the facts in the light most favorable to the nonmoving party and to give that party the benefit of any reasonable factual inferences. E.g., Girten v. McRentals, Inc., 337 F.3d 979, 983 (8th Cir. 2003).

While the moving party must initially make a showing of the basis for its motion and the portions of the record that support the party's assertion that there is no issue of material fact, the moving party is not required by Rule 56 to support its motion with affidavits or other similar materials negating the opponent's claim. <u>Hartnagel v. Norman</u>, 953 F.2d 394, 395 (8th Cir. 1992) (citing <u>Celotex</u>, 477 U.S. at 323).

When the moving party has carried its initial burden, the nonmoving party must proffer specific facts demonstrating the existence of a genuine issue for trial and may not rely on mere allegations. <u>Vaughn v. Roadway Express, Inc.</u>, 164 F.3d 1087, 1089 (8th Cir. 1998) (citing <u>Celotex</u>, 477 U.S. at 324). The nonmoving party must make a satisfactory showing on every element of its case for which it has the burden of proof at

trial. Wilson v. Sw. Bell Tel. Co., 55 F.3d 399, 405 (8th Cir. 1995); see also Celotex, 477 U.S. at 322. "[T]o survive the defendant's motion, [the plaintiff] need only present evidence from which a jury might return a verdict in his favor. If he does so, there is a genuine issue of fact that requires a trial." Anderson, 477 U.S. at 257.

"Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." <u>Id.</u> at 248. It is thus the task of the trial court to "assess the adequacy of the nonmovants' response and whether that showing, on admissible evidence, would be sufficient to carry the burden of proof at trial." <u>Hartnagel</u>, 953 F.2d at 396 (citing <u>Celotex</u>, 477 U.S. at 322).

II. Sexual Harassment Claim

The Iowa Supreme Court analyzes Iowa Civil Rights Act claims under the same standard as the federal Title VII sexual harassment claim; therefore, the following analysis is equally applicable to both claims. See Henthorn v. Capitol Commc'n, Inc., 359 F.3d 1021, 1021 n.2 (8th Cir. 2004) (citing Pecenka v. Fareway Stores, Inc., 672 N.W.2d 800, 803 (Iowa 2003); Hulme v. Barrett, 449 N.W.2d 629, 631 (Iowa 1989)).

A. Hostile Work Environment

Title VII of the Civil Rights Act of 1964 prohibits employers from "discriminat[ing] 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) (2000). "Without question, when a supervisor sexually harasses a subordinate because of the subordinate's sex, that supervisor

'discriminate[s]' on the basis of sex." Meritor Sav. Bank v. Vinson, 477 U.S. 57, 64 (1986).

Sexual harassment claims are generally one of two types: quid pro quo or hostile work environment. <u>Burlington Indust.</u>, <u>Inc. v. Ellerth</u>, 524 U.S. 742, 751 (1998). Quid pro quo sexual harassment occurs when threats are carried out in retaliation against the harassment victim. <u>Id.</u> The second type occurs when the work environment is so permeated with "sufficiently severe or pervasive" harassment that it becomes a hostile work environment. <u>Id.</u>

Edwards postures her claim as hostile work environment sexual harassment. "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,' Title VII is violated." Harris v. Forklift Sys., Inc., 510 U.S. 17, 21 (1993) (internal citations omitted); accord Meritor Sav. Bank, 477 U.S. at 66 (recognizing hostile work environment sexual harassment cause of action).

To establish a prima facie case of hostile work environment harassment under Title VII, a plaintiff must show (1) that she belonged to a protected group, (2) that she was subjected to unwelcome sexual harassment, (3) that the harassment was based on sex, and (4) that the harassment affected a term, condition, or privilege of employment. Duncan v. Gen. Motors Corp., 300 F.3d 928, 933 (8th Cir. 2002). In addition, because Edwards is only asserting harassment by co-workers, not her supervisors, she must

prove the additional element that her employer knew or should have known of the harassment and did not take proper remedial action.⁵ Bowen v. Mo. Dep't of Soc. Servs., 311 F.3d 878, 883 (8th Cir. 2002); see also Meriwether v. Caraustar Pkg. Co., 326 F.3d 990, 994 (8th Cir. 2003) ("Prompt remedial action shields an employer from liability when the harassing conduct is committed by a co-worker rather than by a supervisor"). The parties dispute only the fourth and fifth elements of the case.

In order for the harassment to affect a term, condition, or privilege of employment under the fourth element, the work environment must be objectively and subjectively hostile; that is, a reasonable person would find the conduct hostile or abusive, and the plaintiff actually perceives it as such. Harris, 510 U.S. at 21-22. The determination of whether conduct creates an environment that is hostile or abusive is made by looking at all the circumstances, including the frequency and severity of the discriminatory conduct; "whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." Id. at 22-23.

⁵ The Defendant's brief cites the familiar <u>Faragher/Ellerth</u> defense that allows an employer to escape liability by showing that it exercised reasonable care to prevent and correct harassing behavior and that the employee failed to avail herself of any complaint or redress procedures provided by the employer. <u>See Burlington Indus., Inc.</u>, 524 U.S. at 765. However, that defense applies in cases of supervisor harassment. In cases of co-worker harassment, like this one, the employer's response and actions are considered in an additional fifth element of the prima facie case as addressed above.

To overcome summary judgement, Edwards "must present evidence from which a reasonable jury could find that [the] conduct towards her was more than merely offensive, immature or unprofessional." Henthorn, 359 F.3d at 1027. The Eighth Circuit has considered whether many different types of conduct constitute a hostile work environment. See, e.g., Henthorn, 359 F.3d at 1027-28 (repeated requests for dates, phone calls to home did not constitute hostile work environment in absence of lewd or threatening comments, inappropriate touching, or sexual propositions); Duncan, 300 F.3d at 933-34 (proposing relationship, hand touching, request to sketch phallic-themed planter, and chauvinistic posters did not constitute hostile work environment); Bowen, 311 F.3d at 885 (racial epithets, menacing remarks, threats of physical harm sufficiently evince hostile work environment to avoid summary judgment).

The Defendant suggests Edwards' receipt of nude photos from Khodai was simply one isolated incident that does not give rise to a hostile work environment claim. While Midwest Clothiers correctly notes that an isolated incident must be extremely serious to alter the terms and conditions of employment, see Faragher v. City of Boca Raton, 524 U.S. 775, 788 (1998), and that Title VII is not to be used as a "general civility code," id., the record contains numerous other allegations and evidence from which a jury could find that Edwards was subject to far more harassment than just receiving nude photos.

The fact that Edwards and Pred dated briefly does not mean that Pred cannot sexually harass her. "The gravamen of any sexual harassment claim is that the alleged

sexual advances were 'unwelcome." Meritor, 477 U.S. at 68 (holding that when the plaintiff and alleged harasser engaged in sexual intercourse, "[t]he correct inquiry is whether [the victim] by her conduct indicated that the alleged sexual advances were unwelcome, not whether her actual participation . . . was voluntary").

A reasonable person could find the conduct Edwards endured offensive, and Edwards actually did find it offensive as evidenced by her complaint to Midwest Clothiers. While some of the comments show mere immaturity and lack of professionalism (such as Pred's comments about homosexual customers, his snorting noises on the phone, or Khodai's "sexy" comment), many of the comments were explicit sexual propositions and references to Edwards made in her presence. See Henthorn, 359 F.3d at 1027-28. Edwards' allegations that Pred told her he wanted to "fuck her over the pool table," asked if she played "hide the weenie," and suggested that co-workers were placing bets on the status of her undergarments, if believed by a jury, are not "mere offensive utterance[s]," Harris, 510 U.S. at 23, especially when considered in combination with Khodai's chocolate/vanilla comments and the rest of the alleged harassing behavior, which includes allegations of unwanted physical contact. See Farmland Foods, Inc. v. Dubuque Human Rights Comm'n, 672 N.W.2d 733, 741 (Iowa 2003) (stating in discussion of statute of limitations issue that hostile work environment claims "involve repeated conduct and are based on the cumulative impact of separate acts"). The evidence of touching in this case goes beyond the mere suggestive hand touching of Duncan, 300 F.3d at 933-34. Edwards claims she was grabbed in the thigh and

backside or crotch by Pred, and that Khodai touched himself sexually in front of her and tried to force her to touch him in an intimate manner.

A reasonable jury, presented with the current evidentiary record, could find Edwards was subjected to numerous offensive sexual comments, propositioned, and touched inappropriately. (The fact that Khodai presented Edwards with nude photos of himself is undisputed.) This conduct spanned at least six months and was not infrequent. Therefore, the Court finds Edwards has created a question of material fact on the fourth element of her prima facie case.

The fifth element, that Midwest Clothiers knew or should have known of the harassment and did not take proper remedial action, creates the more substantial legal hurdle for the Plaintiff. This analysis involves consideration of several factors, including "the temporal proximity between the notice and remedial action, the disciplinary or preventive measures taken, and whether the measures ended the harassment." Meriwether, 326 F.3d at 994 (where prompt investigation, suspension, training, and warning resulted in no further harassment, employer's actions were prompt and effective).

"Title VII 'does not require an employer to fire a harasser," but the employer must take prompt remedial action calculated to end the harassment. <u>Bailey v. Runyon</u>, 167 F.3d 466, 468-69 (8th Cir. 1999); see also Robinson v. Valmont Indust., 238 F.3d 1045, 1047-48 (8th Cir. 2001) (an initial three-day suspension followed by diversity training, investigation, surveillance, and written warnings sufficient to constitute prompt, remedial action by employer). Prompt remedial action involves both "short-term,

temporary steps taken to deal with the situation while the employer takes steps to determine whether the complaint is valid, and second, the permanent remedial steps taken following the completion of the investigation into the complaint." Wilson v. City of Des Moines, 338 F. Supp. 2d 1008, 1035 (S.D. Iowa 2004).

Edwards lists several criticisms of Midwest Clothiers' handling of her harassment complaints. First, she asserts the meeting with Pred the day after her first complaint was not a proper remedy because Pred resumed harassing her about two weeks later. She also claims that even after Pred was moved to a different store, he was able to harass her on two occasions, once by snorting at her over the phone and once by entering the store during her work hours and making discriminatory comments about homosexuals and breast implants. She further asserts that Midwest Clothiers was not willing to take action designed to remedy the sexual harassment, as evidenced by Lemons' comment that Edwards should "toughen up" because she was in a "man's world" in response to a crass comment by a customer and her claim that Stitzman's initial reaction to the Khodai photos was asking her to "forget it" because Khodai is from a different country and "probably just misunderstood things."

The record evidence shows Midwest Clothiers' management first became aware of the situation with Pred upon Edwards' initial complaint. Edwards similarly provided notice of the Khodai situation, though she claims management should already have known about that in light of previous conversations about her harassment and because her

co-workers had knowledge of Khodai's behavior.⁶ In any event, Midwest Clothiers promptly responded each time Edwards reported harassment. In less than two days from each reported complaint, Midwest Clothiers had either started an investigation, called a meeting, or provided a written response to the parties.

The short-term disciplinary measures taken with Pred after the first complaint were a review of company policy and a written reprimand. Edwards admits this resolved the situation temporarily. When she complained a second time, Pred received another written reprimand and was moved to a different store as a long-term solution.

⁶ The record does not provide the Court with evidence from co-workers to support the allegation that this conduct was a matter of general knowledge in the workplace. Nor does the record provide a basis upon which to conclude that the structure and operation of the Defendant company was such that a matter of general knowledge among employees would necessarily be also known by management. Thus, the Court is provided only with Plaintiff's conclusions that (a) co-workers were generally aware of the basis for her current claims, and that (b) general awareness by co-workers raises a fact question regarding what managers should have known. While Plaintiff's impressions may be genuinely held, the Court is bound to follow the principle that conclusory allegations by the nonmovant will not be adequate to defeat a motion for summary judgment. See, e.g., Hedberg v. Indiana Bell Tele. Co., Inc., 47 F.3d 928, 931 (7th Cir. 1995).

The nonmoving party must go beyond the pleadings and by affidavits, or by the 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; Beyerbach v. Sears, 49 F.3d 1324, 1325 (8th Cir. 1995). See also Krein v. DBA Corp., 327 F.3d 723, 726 (8th Cir. 2003). "An issue of material fact is genuine if it has a real basis in the record." Hartnagel, 953 F.2d at 394 (8th Cir. 1992) (citing Matsushita, 475 U.S. at 586-87). "Summary judgment is appropriate where there is no independent evidence, other that [the nonmoving party's] unsubstantiated allegations." Pony Computer, Inc. v. Equus Computer Sys. Of Missouri, Inc., 162 F.3d 991, 997 (8th Cir. 1998).

Other than the two incidents listed above, Edwards had no further problems. While the snorting and rude comments were likely annoying, they are not severe, and Edwards was encouraged to report future harassment. Midwest Clothiers' response was therefore successful – Pred's harassment and contact with Edwards during work hours were essentially eliminated.

Although Stitzman's initial reaction to the Khodai situation might be subject to reasonable criticism, his immediately subsequent actions are of greater legal significance. He arranged a meeting the next morning to deal with the issue. The short-term solution was to meet with Edwards and Khodai, then release them on paid leave for the remainder of the day so management could conduct an investigation. Edwards denies the notes she wrote Khodai (including code names and lipstick marks) evince a mutual flirtation, but even if her explanation is true, it was reasonable for Midwest Clothiers to investigate the situation after being provided with these documents. The long-term solution was to issue Khodai a written reprimand and change his hours so they no longer worked together. After each long-term solution was in place, Edwards made no further complaints to Midwest Clothiers' management.

Edwards has failed to show that Midwest Clothiers did not take prompt and proper remedial action in response to her complaints of sexual harassment. Midwest was under no obligation to terminate Pred or Khodai. Even if Edwards or this Court would prefer a different course of action, the Court will not second-guess the human resources judgments of Midwest Clothiers, so long as their actions comport with the

law, as they did here. See Kiel v. Select Artificials, Inc., 169 F.3d 1131, 1136 (8th Cir. 1999) (district court will not "sit as super-personnel departments reviewing the wisdom or fairness of the business judgments made by employers, except to the extent that those judgments involve intentional discrimination."). Accordingly, Edwards has failed to make out a prima facie case, and Midwest Clothiers' motion for summary judgment must be granted as to the hostile work environment claim.

B. Retaliation

A prima facie case of retaliation requires the plaintiff "to show that she engaged in protected activity, that [her employer] took adverse action against her, and that there was a causal connection between those two actions." Henthorn, 359 F.3d at 1028. The parties do not dispute that filing a sexual harassment complaint is a protected activity.

The alleged retaliatory conduct must create a material change in the circumstances of employment to be an "adverse action." <u>Id.</u> (material changes include those affecting salary, benefits, or responsibilities). "Minor changes in duties or working conditions that do not result in materially significant disadvantage 'do not meet the standard of an adverse employment action." <u>Id.</u> (citing <u>Kerns v. Capital Graphics, Inc.</u>, 178 F.3d 1011, 1016-17 (8th Cir. 1999)). "[W]ork assignment claims that do not affect an employee's permanent job title or classification will not normally be actionable as adverse." <u>Farmland Foods, Inc.</u>, 672 N.W.2d at 743 (discussing adverse employment actions in the context of a racial discrimination claim).

Edwards contends she suffered an adverse employment action after reporting the nude photos of Khodai because her hours were cut in half. While such a dramatic reduction in hours may well be an adverse employment action, Gibson testified in her deposition that Midwest Clothiers reduced all employees' hours equally as a consequence of a decrease in business. Edwards has presented no evidence refuting Gibson's testimony and concedes no such evidence is available. While the Court is bound to view the facts in the light most favorable to Edwards, she is required to present evidence beyond mere speculation to sustain her claims. Edwards has failed to demonstrate the third element of her retaliation claim, because she has not shown a causal connection between her decreased hours and her sexual harassment claim.

Edwards also contends she was subject to an adverse employment action because her work schedule was posted when other employees' schedules were not. This may be an unfortunate and upsetting event for Edwards, but she has not produced any evidence indicating that the posting of her schedule created a material change or disadvantage in the terms and conditions of her employment.

Edwards further claims she suffered adverse employment action when Midwest Clothiers repeatedly refused her requests to transfer to another store. Edwards wanted to return to Badowers when her two co-workers returned from maternity leave but was told

⁷ Even if the record supported a finding that Edward's hours were reduced by a somewhat greater amount than other similarly situated employees, a smaller such deviation would not support an adverse employment action. <u>See Baucom v. Holiday Cos.</u>, ____ F.3d ____ (8th Cir. 2005), 2005 WL 3005490 (8th Cir. Nov. 10, 2005).

first that Midwest Clothiers did not want to upset the situation with Pred since he worked at Badowers and later that no position was available. In the latter instance, Stitzman promised Edwards a position would be created for her at Mr. B's or Reichardt's.

The fact that an employee finds a work assignment undesirable, standing alone, will not transform that assignment into an adverse employment action. <u>Tuggle v.</u> Mangan, 348 F.3d 714, 721-22 (8th Cir. 2003). However, Edwards asserts this denial of transfer caused her to lose money because moving back and forth between stores to avoid Kohdai and Pred deprived her of her ability to build a client base and thus earn greater commissions. Midwest Clothiers claims Edwards was protected against monetary loss because they maintained Edwards' base plus commission pay rather than compensating her based entirely or primarily on commissions. Edwards has not presented any evidence outside her own speculation that she would have made more money at Badowers. In fact, Stitzman testified in his deposition that Mr. B's is the company's highest volume store. Even giving Edwards the benefit of the doubt in that regard, she has not shown that the failure to transfer worked a materially significant disadvantage. Although Edwards disputes that she volunteered to fill in for her co-workers, she admits that she agreed to the arrangement. Her co-workers had returned from maternity leave when she requested the transfer, but this alone does not transform the rotating position into an adverse employment action.

The Court is required to view the facts in the light most favorable to Edwards, but the Court is not required to engage in mere speculation or conjecture. Edwards has

not shown beyond unsupported claims and argument that remaining in the rotating position affected her benefits, responsibilities, job title, or classification in a materially adverse way.

Edwards claims ostracization by her co-workers constituted an adverse employment action, in that she was whispered about, given the cold shoulder, and her sales were stolen. Midwest Clothiers admits it did investigate one instance of sale-stealing but determined a co-worker had rung up an employee-discount type transaction upon which commission was not available.

Co-worker ostracism or shunning alone is insufficient to create an adverse employment action, because adverse action generally involves the retaliator using the employer's authority to effect his retaliation. Scusa v. Nestle U.S.A. Co., 181 F.3d 958, 969 (8th Cir. 1999). This authority is generally not brought to bear when co-workers shun the plaintiff. Cf. EEOC v. Wyeth, 302 F. Supp. 2d 1041, 1070 (N.D. Iowa 2004) (finding co-worker ostracism constitutes adverse employment action when employer participates and acquiesces in the conduct). Edwards has not shown that Midwest Clothiers participated, encouraged, or in any way placed the weight of its authority behind any of the other employees' conduct. Indeed, she has failed to substantiate most of her alleged ostracism beyond mere allegations. Accordingly, she has not demonstrated an adverse employment action in this regard.

Edwards claims a tailor from one of Midwest Clothiers' stores told her the company held a meeting in August 2003, while she was out of town, in which the

employees were informed that Edwards was going to sue the company. She asserts this constitutes an adverse employment action. Midwest Clothiers denies that such a meeting ever took place, and the Court has no evidence from the tailor to corroborate this claim. However, even assuming a meeting did occur, it is not enough standing alone to constitute an adverse employment action. Edwards has not connected this meeting to any material change in her working conditions beyond hinting that the meeting prompted some of the ostracism; however, she has not shown or even alleged Midwest Clothiers instructed or encouraged its employees to ostracize Edwards or that management knew about most of the alleged ostracizing conduct. Without more, she has not met her burden of proof in this regard.

It is troubling that it appears Edwards, the victim, was the employee shuttled from store to store while Pred and Kohdai had more locational stability. Further, it is suspicious that only Edwards' schedule was posted and that a meeting may have been called to inform the employees that Edwards planned to sue the company. However, it does not appear that any of these events, even when viewed in the light most favorable to Edwards, constitute a material change in the terms and conditions of her employment, and thereby an adverse employment action.

The Court recognizes the possibility that these events, while insufficient individually, may in totality permit a jury to infer an adverse employment action. <u>See</u>

<u>Wilson</u>, 338 F. Supp. 2d at 1032. Even assuming such a possibility, however, Edwards' claim for retaliation must fail on the third element of her prima facie case, a causal

connection between the protected activity and the adverse employment action. Midwest Clothiers stated all employees had an equal reduction in hours, that posting the schedule was designed to facilitate the policy of keeping Edwards and Khodai separated, and that there was not a position available when Edwards requested to transfer stores. Midwest Clothiers denies a meeting about Edwards' lawsuit ever occurred. Edwards has presented no evidence beyond her assumptions that any of these explanations are untrue, nor has she presented additional evidence indicating that her harassment claims prompted retaliatory action against her on the part of the company. The Court therefore grants Midwest Clothiers' motion for summary judgment on the retaliation claim.

C. Constructive Discharge

Edwards did not brief the constructive discharge claim, and counsel stated at oral argument that this claim is tied to, or included within, the hostile work environment and retaliation claims. These are three separate causes of action, however, with different means to demonstrate a prima facie case.⁸

⁸ A prima facie case of constructive discharge includes a showing that the employer "deliberately created intolerable working conditions with the intention of forcing the plaintiff to quit." <u>See Coffman v. Tracker Marine</u>, 141 F.3d 1241, 1247 (8th Cir. 1998).

A prima facie case of retaliation requires the plaintiff "to show that she engaged in protected activity, that [her employer] took adverse action against her, and that there was a causal connection between those two actions." Henthorn, 359 F.3d at 1028.

A prima facie case of hostile work environment harassment requires a showing (1) that she belonged to a protected group, (2) that she was subjected to unwelcome sexual harassment, (3) that the harassment was based on sex, and (4) that the harassment affected a term, condition, or privilege of employment, <u>Duncan</u>, 300 F.3d at 933,

A plaintiff must show more than just a Title VII violation by her employer in order to prove that she has been constructively discharged. <u>Coffman v. Tracker Marine</u>, 141 F.3d 1241, 1247 (8th Cir. 1998). As discussed above, Edwards has not presented a prima facie case of Title VII sexual harassment, let alone made a showing beyond that.

Since Edwards failed to address constructive discharge in her brief, the Court is unsure whether she claims the harassing behavior constituted intolerable working conditions or the incidents claimed in her retaliation claim constitute the intolerable working conditions. However, Edwards has not shown a prima facie case under Title VII or a retaliation cause of action. Although Edwards was subjected to offensive sexual harassment, Midwest Clothiers' prompt responses undercut the notion that it "deliberately created intolerable working conditions with the intention of forcing the plaintiff to quit." Coffman, 141 F.3d at 1247.

Edwards has failed to even brief the issue of constructive discharge. For that and the above reasons, Midwest Clothiers' motion for summary judgment must be granted on the constructive discharge claim.

CONCLUSION

Edwards has provided a factual basis upon which a jury could conclude she was subjected to offensive sexual harassment, some of it severe. However, Midwest Clothiers made prompt and essentially effective responses. While these incidents are

and (5) that the employer knew or should have known of the harassment and did not take proper remedial action. <u>Bowen</u>, 311 F.3d at 883.

unfortunate and represent wrongful conduct on the part of the co-employee actors, they do not rise to the level of conduct legally actionable against the employer. Accordingly, Midwest Clothiers' Motion for Summary Judgment (Clerk's No. 7) must be **granted**. The above-entitled action is **dismissed**. The Clerk of Court is directed to enter judgment for the Defendant and against the Plaintiff.

UNITED STATES DISTRICT COURT

IT IS SO ORDERED.

Dated this 28th day of November, 2005.