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

LINDA MURPHY, Plaintiff, vs. THE McGRAW-HILL COMPANIES, INC., Defendant.	**No. 4:02-cv-40136** **ORDER ON SUMMARY JUDGMENT**

This matter is before the Court on Defendant's Motion for Summary Judgment. Defendant moved for summary judgment on Plaintiff's claims on April 1, 2003. The parties have not requested a hearing. The matter is now fully submitted for review. For the reasons discussed below, Defendant's Motion for Summary Judgment (Clerk's No. 15) is **granted**.

I. SUMMARY OF MATERIAL FACTS

In approximately July of 1994, Plaintiff Linda Murphy was hired as a consultant by McGraw-Hill in the School Division. In May of 1995, Murphy became a sales representative, covering the state of Iowa. Murphy sold all of McGraw-Hill's kindergarten through eighth grade educational products, such as reading, math, social studies, health, and music products, in addition to some smaller resources such as guided reading and assessment products. Both parties agree that Murphy's duties as a sales representative

were to work with districts, superintendents, and teachers, and present them with McGraw-Hill products and programs.

As indicated in the McGraw-Hill Human Resources Guide and the local regional handbook, employees are required to obtain advance approval from their manager in order to take vacation. In 1998, Murphy submitted a vacation request for five work days before and after the Thanksgiving holiday in order to take a vacation to Hawaii. Doug Beck, the district manager and Murphy's immediate supervisor, approved Murphy's 1998 five-day vacation request. Approximately one year later, on May 12, 1999, Murphy submitted a two-week vacation request with the vacation to take place from the last week of October through the first week in November. Beck received Murphy's request and wrote her back stating, "This is a long time to be out of your territory, especially during the busy season. Can we discuss some alternatives?" Beck was hesitant to grant the request because the vacation was for two weeks as opposed to one, and it was considered a long period of time for Murphy to be out of her territory during what McGraw-Hill deems its peak selling season. Murphy admits that despite Beck's reluctance, he approved the two-week vacation she had requested.

In June of 2000, Murphy submitted the vacation request that is at issue in the present complaint. Murphy again submitted a two-week vacation request, with the vacation to take place the last week in October through the first week in November. Due to the length and timing of Murphy's requested vacation, Beck asked her to look at other

alternatives, such as taking only one week of vacation during this time period or taking the two-week vacation during the summer months. Murphy informed Beck that she was going to take the two-week vacation whether or not her request was approved. Murphy's request was orally denied by Beck at the end of June.

In a letter dated August 4, 2000, McGraw-Hill denied Murphy's vacation request in writing, stating that McGraw-Hill had a policy that vacations could not be taken during October or November, that it was a "crucial time of year", and there was a symposium in Kansas City the sales representatives were required to attend. Murphy asserts she had routinely taken vacations during October and November in the past with McGraw-Hill's approval. Murphy claims that prior to August of 2000, she was unaware of any corporate policy that purported to prohibit such vacations. Murphy states that, in fact, in 2000, McGraw-Hill approved the vacation requests of male sales representatives for time periods in October and November; however, Murphy can only point to one male sales representative who was granted a vacation during this time period, and his request was for only five days.

Upon learning that Murphy intended to take the requested vacation despite the lack of corporate approval, McGraw-Hill notified Murphy she would be fired for insubordination if she took that action. In a letter dated September 29, 2000, Murphy resigned her position, to be effective October 16, 2000, and took her two-week vacation

to Hawaii. Murphy claims that she was constructively discharged from her employment and that her 2000 vacation request was denied on the basis of her gender.

In April of 2001, Murphy applied for a sales representative job with McGraw-Hill SRA. McGraw-Hill SRA is a division of McGraw-Hill that produces predominately reading programs. McGraw-Hill SRA focuses on specific needs, a niche market within the educational market that McGraw-Hill pursues (the School Division, in contrast, sells basal product, core-educational programs aimed at a larger and more general market). In an e-mail dated April 9, 2001, Murphy sent her resume to Joe Welty, Vice-President of Sales for the Midwestern Region. Murphy stated in the e-mail that "after eight years with McGraw-Hill's school division working K through 8, I decided to take a break from the work last October (2000) to spend some quality time with family and travel with my husband." Murphy subsequently had a preliminary telephone interview with Welty. During her phone interview, Murphy indicated to Welty that the reason she left McGraw-Hill in the fall of 2000 was to take time to travel and be with her husband.

On April 20, 2001, Murphy was personally interviewed in Kansas City for the sales representative position by Welty and Michael Walker, National Sales Manager for Open Territory. Murphy asserts that during her face-to-face interview with Welty and Walker, she told them that for the past three years she had taken a vacation to Hawaii. She further asserts that she explained during her interview that when she had put in her request for vacation the past year, the request was denied. She indicated that since the

company was not willing to give her the vacation time, she could no longer work with Doug Beck and she had resigned in order to take her vacation. Murphy stated in her deposition that she told Welty and Walker her "family is very important, and unfortunately they made me make a choice." Murphy claims Welty and Walker were appalled at the circumstances surrounding her resignation and the way she had been treated by McGraw-Hill. Murphy states she told them she had filed a charge of discrimination with the EEOC but that she had no intentions at that time of pursuing it.

Murphy claims that Walker verbally offered her the sales representative position with McGraw-Hill SRA during the Kansas City interview. She testified that either Welty or Walker said, "We want to get you on board immediately," which she interpreted as a job offer. Murphy claims that she was told she would earn at least what she was making in her prior position with McGraw-Hill but with an effort to get her more. She recalls she was told the job was hers and that McGraw-Hill SRA expected to be able to regain for her the seniority she had earned at her previous position. She claims Welty and Walker asked her to mark her calendar for McGraw-Hill's National Sales Meeting for July of 2001, that they provided her with their voice mail, pager, and cellular phone numbers, and that they instructed her to begin calling the sales representatives whose territory she was taking over in order to touch base with them. She further alleges that Welty instructed Walker to get her a company vehicle right away. Murphy claims that after she left the interview, she had no doubt in her mind that the job was hers. Murphy

asserts that Welty and Walker told her they would contact her again in a few days to discuss her starting compensation, but she never heard back from Welty or Walker, despite leaving several e-mails and voice mails for them.

Walker denies that Murphy was ever offered the sales position during the Kansas City interview, or at any other time. On May 3, 2001, in response to an e-mail he received from Murphy, Welty sent Murphy an e-mail which indicated they would be interviewing their final candidates the next week.

Welty and Walker suspected there may have been more to the vacation dispute than what Murphy had told them during the interview in Kansas City. Upon contacting Kathy Nauman, the Regional Manager/Regional Vice-President of McGraw-Hill for the territory in which Murphy had worked, Walker learned more about the circumstances surrounding Murphy's resignation. Walker asked Nauman if she had worked with Murphy. Nauman indicated she had. Walker asked her about the vacation scenario, and Nauman indicated it was true. Walker stated to Nauman that he was uncomfortable with someone leaving during that particular time of year, and Nauman indicated she understood and that it had been an issue for the School Division as well. Walker stated that Nauman did not indicate to him that Murphy had filed a civil rights complaint.

On May 18, 2001, Murphy received a letter from McGraw-Hill SRA's human resources department rejecting her application for the sales representative position. Murphy has asserted that she was not offered the position because she was not given a

positive reference from her previous employer, indicating she thinks they did not give her a positive reference because they were irritated with the way she resigned. Murphy claims Welty eventually told her that they chose not to hire her for the sales representative position because they found someone better qualified.

Murphy argues that McGraw-Hill SRA refused to rehire her for the sales representative position because she had previously filed complaints regarding McGraw-Hill with the ICRC and EEOC. On March 13, 2002, Murphy filed an action under Title VII of the Civil Rights Act and the Iowa Civil Rights Act, charging McGraw-Hill with sex discrimination and retaliation.

II. APPLICABLE LAW AND DISCUSSION

A. Title VII Sex Discrimination.

McGraw-Hill asserts that Murphy's sex discrimination claim is time-barred under Title VII. Murphy filed her charge with the ICRC for sex discrimination on February 13, 2001. This charge was cross-filed with the EEOC. On November 1, 2001, the EEOC issued a Right to Sue Letter with respect to Murphy's sex discrimination claim. Murphy filed her claim in this court on March 13, 2002, 132 days after receiving her Right to Sue Letter. Where the Commission determines it will not take any further action with respect to a complaint, it "shall so notify the person aggrieved and **within ninety days after the giving of such notice** a civil action may be brought against the respondent named in the charge." 42 U.S.C. § 2000e-5(f)(1) (emphasis added). As Murphy's sex discrimination

claim was not filed within the ninety-day time frame, under Title VII, it is untimely and must be dismissed. See 42 U.S.C. § 2000e-5(f)(1).

B. ICRA Sex Discrimination.[1]

Where a plaintiff does not offer any direct evidence of discriminatory intent to support their claim, ICRA claims are analyzed under the McDonnell-Douglas burden-shifting framework. Lang v. Star Herald, 107 F.3d 1308, 1311 (8th Cir. 1997); Reiss v. ICI Seeds, Inc., 548 N.W.2d 170, 174 (Iowa App. 1996); see also McDonnell-Douglas v. Green, 411 U.S. 792, 802 (1973). The initial burden is on the plaintiff to establish a *prima facie* case of discrimination. Texas Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 252-53 (1981). Once the plaintiff has satisfied this burden, a presumption of discrimination has been raised, and the burden shifts to the defendant to provide a legitimate, non-discriminatory reason for the action. Id. If the defendant provides a legitimate, non-discriminatory reason for the action, the burden shifts back to the plaintiff to show that the defendant's stated reason is in fact a pretext. Id.

To make a prima facie case of discrimination under Title VII, Murphy must show that she (1) is a member of a protected class; (2) was qualified to perform her job; (3) suffered an adverse employment action; and (4) was treated differently than similarly situated persons of the opposite sex. Schoffstall v. Henderson, 223 F.3d 818, 825 (8th

[1] Murphy's ICRA sex discrimination claim was timely filed within 90 days of receiving her ICRC right to sue letter.

Cir. 2000). The parties do not dispute that Murphy is a member of a protected class and that she was qualified to perform her job.

"[N]ot everything that makes an employee unhappy is an actionable adverse employment action." Coffman v. Tracker Marine, L.P., 141 F.3d 1241, 1245 (8th Cir. 1998). "Instead, the action must have had some materially adverse impact on [plaintiff's] employment terms or conditions to constitute an adverse employment action." Id. In Coffman, the court found the denial of paid vacation days was an adverse employment action. Id. The employee in that case had been completely denied her paid vacation days. Id. at 1244. Although Murphy argues that the effect of Beck's denial of her vacation time would have been the same had she not terminated her employment, this assertion is incorrect. Not only was Murphy informed by Beck in 1999 that she would need to make alternate arrangements in the future regarding her vacation time, she was also told by Beck in August of 2000 that he would allow her to carry over into 2001 any unused vacation time she had accrued. Murphy was also aware that her vacation would be approved if she limited it to one week or, alternatively, if she took the two-week vacation during the summer months instead of in the fall. "[T]he denial of vacation leave on the specific dates that Plaintiff requested it, pursuant to Defendant's leave policy, is not a significant change in employee status and benefits, and does not represent an adverse employment action." Cabral v. Philadelphia Coca Cola Bottling Co., 2003 WL 1421297 *7 (E.D. Pa. 2003); see also Boyd v. Presbyterian Hosp. in City of New York, 160 F.

Supp. 2d 522, 537 (S.D.N.Y. 2001) ("The particular timing of a vacation is not so disruptive that it crosses the line from "mere inconvenience" to "materially adverse" employment action."); Paniagua v. Texas Dept. of Criminal Justice, 2001 WL 540908 *6 (N.D. Tex. 2001) (denial of employee's request to take her vacation during December does not constitute an adverse employment action). Murphy was never subject to a complete bar on taking her vacation time; she was merely denied the ability to take her vacation during a specific time frame which she had previously been notified would create a problem for the company due to the length of her absence from her territory during what the company considered its peak selling season. This Court need not determine whether October and November were in fact the company's peak selling season; it is material that management regarded this as its peak selling season and as a poor time for Murphy to be absent from her territory.

Where a non-discriminatory reason has been offered for the decision to deny the vacation request, the Court will not second guess McGraw-Hill's business decision. "Courts 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)). Murphy was not completely barred from using her vacation time; therefore, under the circumstances of this case, the denial of Murphy's vacation request did not constitute an adverse employment action.

Murphy also argues that she suffered the adverse employment action of being constructively discharged from McGraw-Hill's employment. "A plaintiff claiming constructive discharge must show that a reasonable person would have found the conditions of employment intolerable and that the employer either intended to force the employee to resign or could have reasonably foreseen that the employee would do so as a result of its actions." Kerns v. Capital Graphics, Inc., 178 F.3d 1011, 1017 (8th Cir. 1999). A reasonable person would not deem the denial of a vacation request intolerable, especially where the employee was on notice that extended vacations during a specific time frame were not preferred and where the employee was not being completely barred from receiving her vacation time.

When Doug Beck denied Murphy's vacation request at the end of June, it was not reasonably foreseeable that Murphy would resign over the denial. Murphy was on notice as early as late May of 1999 that Beck was concerned with both the length and timing of a two-week October/November vacation during what the company considered its peak selling season. Murphy was also on notice as of 1999 that in the future she would need to explore alternatives to taking a two-week October/November vacation. As Murphy had been put on notice in 1999 that such a vacation request was considered problematic by McGraw-Hill, it is not reasonable that she would then resign when she again requested such a vacation in 2000 and her request was denied.

Further, there is no evidence in the record that the decision to deny Murphy's vacation request was intended to force her to resign, especially where Beck suggested shortening her vacation to only one week during the October/November time period and was willing to approve the carryover into 2001 of any unused vacation time Murphy had accrued, should she be unable to find an acceptable alternate arrangement. Such actions on behalf of Beck do not suggest that the denial of Murphy's vacation request was intended to force her to resign; rather, it evidences a willingness to compromise in order to resolve the issue to everyone's satisfaction. The record does not establish that Murphy was constructively discharged from her employment.

In support of her claim that she suffered an adverse employment action, Murphy argues that the Court should examine other alleged instances of Doug Beck's treatment of her in analyzing whether she suffered an adverse employment action. "Before the federal courts may hear a discrimination claim, an employee must fully exhaust her administrative remedies." Burkett v. Glickman, 327 F.3d 658, 660 (8th Cir. 2003). "Administrative remedies are exhausted by the timely filing of a charge and the receipt of a right-to-sue letter." Faibisch v. Univ. of Minnesota, 304 F.3d 797, 803 (8th Cir. 2002). "[T]he completion of that two-step process constitutes exhaustion only as to those allegations set forth in the EEOC charge and those claims that are reasonably related to such allegations." Id.

In her ICRC complaint, Murphy alleged simply that she was denied her vacation request based upon her sex. Murphy included no other basis for her claim for sex discrimination and provided the ICRC with no other set of facts on which to base her discrimination claim. Murphy now attempts to rely on allegations that Beck refused to meet with her and her customers, failed to assist her as he did his male subordinates, and blamed her and other females for his own mistakes. The other instances of discriminatory conduct Murphy alleges are not reasonably related to her allegation that she was denied her vacation based on her gender. Murphy cannot rely on any alleged instances of discriminatory conduct by Doug Beck other than the denial of her vacation request, because she has failed to exhaust her administrative remedies as to those alleged instances.

Even assuming Murphy could establish she suffered an adverse employment action, the record does not demonstrate that she was treated differently than similarly situated employees. Murphy "bears the burden to demonstrate by a preponderance of the evidence that there were individuals similarly situated in all respects to her who were treated differently." Gilmore v. AT&T, 319 F.3d 1042, 1046 (8th Cir. 2003).

Murphy cites to employee Ron Reetz as a similarly situated male employee. Reetz requested a one-week vacation to take place during the third week of November, and Reetz' request was quickly approved by Beck. "The individuals used as comparators must have dealt with the same supervisor, have been subject to the same standards, and engaged in the same conduct without any mitigating or distinguishing circumstances." Id.

(quoting Clark v. Runyon, 218 F.3d 915, 918 (8th Cir. 2000)) (internal quotation marks omitted). Reetz was not similarly situated to Murphy, as a distinguishing circumstance exists in the present case, i.e., the length of each of the relative vacation requests. Reetz' request was for only one week, whereas Murphy's request was for two. Further, Murphy admits that Beck said he would be more inclined to approve her vacation if it were just for one week, and that another request she made for a one-week vacation, submitted August 1, 2000, was granted on August 2, 2000. The record fails to establish a prima facie case for discrimination.

Assuming that Murphy could establish her prima facie case, which the Court finds she cannot, McGraw-Hill would then need to come forward with a legitimate, non-discriminatory reason for its decision to deny her vacation request. Beck and Nauman both felt that Murphy's absence in 1999 during the same time period may have had a negative impact on McGraw-Hill's business. McGraw-Hill asserts that Beck denied the vacation request because a two-week vacation, during what management considered a critical sales period, was too long a period for Murphy to be out of her territory, and there was a symposium in Kansas City during that time period that the sales representatives were required to attend. McGraw-Hill has stated a legitimate, non-discriminatory reason for its decision to deny Murphy's vacation request.

As McGraw-Hill is able to state a non-discriminatory reason for its vacation denial, Murphy would then be need to demonstrate the proffered reasons were a pretext for unlawful gender discrimination. Texas Dep't of Cmty. Affairs, 450 U.S. at 252-53.

Murphy argues that Beck's decision to grant Reetz' one-week vacation demonstrates pretext. This argument must fail. Not only did Beck approve Murphy's request for a one-week vacation to take place in August of 2000, Murphy was also aware that had she been willing to shorten her two-week vacation during October/November to only one week, her request would have been approved. Murphy's own assertion that Beck had approved her similar vacation requests for 1998 and 1999 is inconsistent with the claim that gender played a role in the decision to deny her 2000 vacation request.

Finally, Murphy argues that McGraw-Hill gave the ICRC a different story regarding why the 2000 vacation request was not granted. McGraw-Hill at that time stated (in relevant part), "The School Division discourages vacation days during the school year because that is the selling season, during which School Officials and teachers are in Schools and during which decisions to buy textbooks and other school materials are made." This is not, as Murphy attempts to argue, inconsistent with McGraw-Hill's stated reason that the request was denied in part because a two-week vacation during a critical sales period was too long a period for Murphy to be out of her territory. There is no evidence in the record which supports the conclusion that McGraw-Hill's stated reasons are a pretext.

"Mere arguments or allegations are insufficient to defeat a properly supported motion for summary judgment; a non-movant must present more than a scintilla of evidence and must advance specific facts to create a genuine issue of material fact for trial." F.D.I.C. v. Bell, 106 F.3d 258, 263 (8th Cir. 1997) (internal quotation marks omitted)

(citing Rolscreen Co. v. Pella Prods. of St. Louis, Inc., 64 F.3d 1202, 1211 (8th Cir. 1995)). Not only does the record fail to demonstrate that Murphy suffered an adverse employment action or that she was treated differently than similarly situated employees, no specific facts have been produced in the record which indicate that the decision to deny Murphy's 2000 vacation request was due to her gender. Mere speculation on behalf of the non-movant is not enough to defeat a summary judgment motion. "[A] non-movant cannot simply rely on assertions in the pleadings to survive a motion for summary judgment." Krein v. DBA Corp., 327 F.3d 723, 726 (8th Cir. 2003).

The Court finds that Murphy is unable to make her prima facie case of sex discrimination. Even if Murphy was able to establish her prima facie case, McGraw-Hill has provided legitimate, non-discriminatory reasons for its decision, and the record fails to support the conclusion that the proffered reasons were pretextual. McGraw-Hill's motion for summary judgment on Murphy's sex discrimination claim under the Iowa Civil Rights Act must, therefore, be granted.

C. Title VII Retaliation.

Murphy argues that McGraw-Hill SRA refused to rehire her for the sales representative position because she had previously filed complaints regarding McGraw-Hill with the ICRC and the EEOC. "To establish a prima facie case of retaliation under Title VII, a plaintiff must show that (1) she was engaged in a protected activity (opposition or participation); (2) she suffered an adverse employment action; and (3) the adverse action occurred because she was engaged in the protected activity." Hunt v. Nebraska Pub.

Power Dist., 282 F.3d 1021, 1028 (8th Cir. 2002). For purposes of this motion only, McGraw-Hill does not dispute that Murphy has established a prima facie case of retaliation.

"Once the plaintiff establishes a prima facie case of retaliation, the burden shifts to the defense to produce a non-discriminatory reason for the adverse employment action." Hunt, 282 F.3d at 1028; see also Luciano v. Monfort, Inc., 259 F.3d 906, 909 (8th Cir. 2001). McGraw-Hill asserts that Walker decided Murphy was not a good fit for the position because he felt she had not been completely truthful regarding the circumstances surrounding her resignation from McGraw-Hill in 2000. Walker perceived Murphy's resignation in favor of her vacation as a lack of commitment to her job and expressed doubt that Murphy would be able to make the transition from being a basal sales representative into the niche supplemental market. The reasons proffered by McGraw-Hill are valid reasons for deciding not to hire a prospective employee. As McGraw-Hill has set forth a legitimate, non-discriminatory reason for deciding not to offer Murphy the sales position with McGraw-Hill SRA, the burden shifts back to Murphy to show that McGraw-Hill's proffered reason is pretextual. Hunt, 282 F.3d at 1028.

Murphy claims that during her interview, she discussed with Walker and Welty the vacation dispute that led to her filing of a civil rights complaint, as well as her evidence of sex discrimination. Murphy claims that both Welty and Walker expressed that they

were "appalled" at Beck's actions and stated they did not blame Murphy for filing a civil rights complaint under those circumstances.

Neither Welty nor Walker recall being informed by Murphy that the "papers filed" were in fact a civil rights complaint, nor do they recall being informed that her complaint included allegations of sex discrimination. Welty does recall Murphy stating that she had filed some paperwork with the state department. Even assuming, in the light most favorable to Murphy, that she had informed Welty and Walker that the papers she filed were in fact a civil rights complaint, knowledge of a complaint alone is insufficient to demonstrate retaliation. See Woodson v. Scott Paper Co., 109 F.3d 913, 923 n.6 (3rd Cir. 1997) (knowledge of the complaints by the decision makers cannot in and of itself support an inference of retaliation).

Murphy asserts that Walker's expressed suspicion over the truthfulness of her explanation of her civil rights complaint can itself be interpreted by the jury as retaliation. Walker has asserted he did not think Murphy was being truthful in her interview regarding her explanation of why she left McGraw-Hill in 2000. His conversation with Nauman only reinforced his impression that Murphy had been less than forthcoming regarding the circumstances leading up to her resignation. Both Murphy's April 9, 2001, e-mail and her subsequent telephone interview with Welty, in which she indicated she left McGraw-Hill in 2000 in order to travel and spend time with her family, evidence that Murphy was not being completely candid regarding the circumstances that led up to her

resignation from McGraw-Hill in 2000. Walker's expressed suspicion over Murphy's explanation does not infer retaliation. Walker stated he was concerned because he thought Murphy was not being completely truthful, *not* because she had filed a complaint.

Murphy also points to Walker's statement during his deposition that when Murphy told them she had filed some papers, that "threw up a red flag" for him.[2] It is not clear from the record what Walker meant by his "red flag" remark. Even viewing that comment in the light most favorable to Murphy, it does not show that McGraw-Hill's

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[2] Q: What else do you remember discussing with respect to why Ms. Murphy left McGraw-Hill or this vacation?

A: She had said she had filed some papers, but that we should not be concerned, it was just that she had filed some papers.

Q: Did she tell you with whom she had filed papers?

A: No, she did not.

Q: What was your understanding you were left with about who she filed these papers with.

A: I wasn't clear at all.

Q: Did you ask her follow-up questions about that?

A: I asked her was there anything that we hadn't discussed that I should know about this filing of papers, and she said no.

Q: Ms. Murphy remembers you asking a question similar to that and something about is there anything in your personnel file that we should be aware of, and she remembers telling you at that point that she had filed papers with the Iowa Civil Rights Commission. Is that different than your recollection?

A: Yes, it is.

Q: Okay.

A: The fact that she had filed papers threw up a red flag. If she would have said the Civil Rights Commission, I would have had a whole different reaction.

Q: Explain that to me.

A: I just would have - - I would have noted - - I mean, that wouldn't have been something I would have forgotten.

proffered reasons for not hiring Murphy were pretextual. At most, it establishes that Walker took note of the fact that Murphy had filed papers with an unknown agency.

Murphy asserts that the reason McGraw-Hill initially gave for failing to hire her was that Kristy Stratman, another applicant, was better qualified.[3] Murphy argues that this demonstrates McGraw-Hill's proffered reasons are false and that the real reason she was not offered the position was illegal retaliation. Murphy states that no reasonable jury could believe that she would have been unable to make the transition from selling basal educational materials to niche market educational materials to the very same schools to whom she had successfully sold for eight years.[4]

In arguing that McGraw-Hill initially told her another applicant was better qualified, Murphy relies on a statement she alleges Welty made to her regarding the person they ultimately hired to fill the sales position. Murphy claims that Welty stated, "We found someone in the Kansas City area, and she was better qualified." Murphy claims that Stratman did not meet even the minimum requirements of the job, much less come close to the background and experience offered by Murphy. Walker testified at his deposition

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[3] McGraw-Hill states that it has never asserted that Murphy was not selected because Stratman was more qualified.

[4] Murphy fails to acknowledge that, in addition to that concern, McGraw-Hill SRA was also concerned Murphy would leave her territory during what the company considered an important selling period in order to take an extended vacation, as she had clearly done in the past.

that they had not yet seen Stratman's resume when they made the decision not to extend an employment offer to Murphy.

"The threshold question when considering pretext is whether [the employer's] reasons for its employment actions are true, not if they are wise, fair or correct." Dorsey, 278 F.3d at 837. Examining McGraw-Hill's ultimate hiring decision for the sales representative position, based on the relative qualifications of the applicants, would require the Court to evaluate the business decisions of McGraw-Hill. The Court declines to do so in the present case. Where McGraw-Hill's business decision concerning hiring for the sales position was not motivated by Murphy's civil rights complaint, and there is no evidence in the present case that it was, the Court will not second guess the employer's business judgment.

Murphy herself indicated she thought she was not offered the position because she did not get a good reference from McGraw-Hill *due to the circumstances surrounding her resignation*.[5] The record demonstrates that Murphy's decision to take her vacation without the requisite corporate approval during what management considered an important selling season, not her decision to file a civil rights complaint, played a role in McGraw-Hill SRA's decision not to offer her the sales representative position.

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[5] Murphy has not alleged that she did not receive a good reference based on her civil rights complaint.

Finally, Murphy argues that McGraw-Hill has failed to preserve and produce any of the documents related to Murphy's applications and interviews for the sales representative position at McGraw-Hill SRA, in violation of 29 C.F.R. § 1602.14, which requires that employers preserve all personnel records for at least one year. The regulation requires

> Any personnel or employment record made or kept by an employer . . . shall be preserved by the employer for a period of one year from the date of the making of the record or the personnel action involved, whichever occurs later. . . . Where a charge of discrimination has been filed, or an action brought by the Commission or the Attorney General, against an employer under title VII or the ADA, the respondent employer shall preserve all personnel records relevant to the charge or action until final disposition of the charge or the action.

29 C.F.R. § 1602.14. Murphy also relies on Iowa Admin. Code § 161-3.7(216) (2002), which states, "When a complaint or notice of investigation has been served on an employer, labor organization or employment agency under the Act, the respondent shall preserve all records relevant to the investigation until the complaint or investigation is finally adjudicated."

Murphy contends that as a direct result of McGraw-Hill's illegal destruction of documents, she had been denied access to documents related to her retaliation claims. McGraw-Hill argues that Murphy's complaint was not received by the ICRC until July 12, 2001, and that the documents were misplaced before Welty learned a complaint had been filed in relation to the McGraw-Hill SRA sales position. McGraw-Hill asserts that

the fact that some documents were misplaced before they learned that Murphy had filed a charge cannot be used to support an adverse inference. In his deposition testimony, Welty stated that when he received a call that there was an inquiry into this situation, he began looking for the files and discovered that he must have either misplaced or discarded some interview notes when he moved from Kentucky to Chicago on July 13, 2001. In fact, Welty states he has lost the files on all of the applicants that were considered during that round of interviewing.

Welty's deposition testimony creates an inference that he did not destroy or misplace the documents in anticipation of litigation, and, therefore, the Court should not give Murphy the benefit of a presumption that the destroyed documents would have bolstered her case. See Favors v. Fisher, 13 F.3d 1235, 1239 (8th Cir. 1994) (district court was not clearly erroneous in finding supervisor's testimony created an inference that he did not destroy the documents in anticipation of litigation, thereby rebutting the presumption that the destroyed records would have bolstered plaintiff's case).

"Once the moving party has met its burden, the non-moving party may not rest on the allegations of his pleadings, but must set forth specific facts, by affidavit or other evidence, showing that a genuine issue of material fact exists." Stone Motor Co. v. General Motors Corp., 293 F.3d 456, 465 (8th Cir. 2002). Other than Murphy's mere speculation that she was not offered the McGraw-Hill SRA sales representative position

due to her civil rights complaint, no evidence has been produced in the record which would support an inference that McGraw-Hill's proffered reason for its decision not to extend an employment offer to Murphy was a pretext for retaliation. "A case founded on speculation or suspicion is insufficient to survive a motion for summary judgment." Nat'l Bank of Commerce v. Dow Chem. Co., 165 F.3d 602, 610 (8th Cir. 1999). McGraw-Hill has shown that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law on Murphy's Title VII retaliation claim.

D. ICRA Retaliation Claim.

Where a plaintiff does not present separate arguments under the ICRA, state civil rights claims are addressed together with Title VII claims. Hannoon v. Fawn Eng'g Corp., 324 F.3d 1041, 1046 (8th Cir. 2003) (citing Iowa State Fairgrounds Sec. v. Iowa Civil Rights Comm'n, 322 N.W.2d 293, 296 (Iowa 1982)) (federal cases persuasive in selecting the analytical framework for deciding discrimination cases under the ICRA); see also Mercer v. City of Cedar Rapids, 308 F.3d 840, 846 n.2 (8th Cir. 2002). Because Murphy's retaliation claim under Iowa Code § 216 is premised on the same factual bases as her Title VII claim, it must also fail.

III. CONCLUSION

Murphy's sex discrimination claim under Title VII is time barred and, therefore, must be dismissed. McGraw-Hill has shown that there is no genuine issue of material

fact and that it is entitled to judgment as a matter of law on Murphy's remaining claims. Accordingly, the Defendant's Motion for Summary Judgment is **granted**.

IT IS SO ORDERED.

Dated this 30th day of July, 2003.

JAMES E. GRITZNER, JUDGE
UNITED STATES DISTRICT COURT