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

JAQUELINE J. BEGLEY,	)	
	)	
Plaintiff,	)	Civil No. 4-00-CV-10702
	)	
vs.	)	
	)	
DAVIS COUNTY HOSPITAL, RODNEY DAY, and DEBRA F. SCOTT,	)	ORDER
	)	
Defendants.	)	

Before the Court are cross-motions for summary judgment. Defendants filed their motion for summary judgment on August 28, 2001. Plaintiff resisted this motion on September 26, 2001 and defendants filed a reply to plaintiff's statement of facts on October 12, 2001. Then, plaintiff filed a motion for summary judgment on March 1, 2002. This motion does not request that plaintiff be granted summary judgment on the case as a whole, but rather that the Court find in favor of plaintiff with regard to a specific affirmative defense raised by defendants. This was resisted by defendants on March 13, 2002 and plaintiff filed a reply on March 19, 2002. Oral argument has been requested but found unnecessary. The matters are considered fully submitted.[1]

[1] The Court directs plaintiff's counsel to Local Rule 56.1(e), as appendix materials submitted did not conform to this rule. The record submitted by plaintiff's counsel was very difficult for the Court to traverse.

I. BACKGROUND

The following facts are viewed in a light favorable to plaintiff.[2] Jacqueline Begley, plaintiff, began working as an ultrasound technologist for Davis County Hospital, defendant (hereinafter "the Hospital"), in September 1993. She was hired by defendants Debra Scott and Rodney Day, who recruited Begley to move to Iowa and accept the position with the Hospital. Scott is the director of ancillary services at the Hospital and was Day's immediate supervisor. Day is radiology manager at the Hospital and was Begley's immediate supervisor.

Begley's job duties at the beginning of her employment were labeled as general ultrasound, including the performance of abdominal, obstetrical, and vascular ultrasound exams. However, it was expected from the beginning of her employment that she would learn and eventually perform echocardiograph and stress echocardiograph exams for the Hospital.

Begley's employment at the Davis County Hospital began well. She received a performance review on August 2, 1994 from her supervisor, Day, that indicated she was exceeding expectations. *See* Plaintiff's Exhibit M.[3] However, a problem surfaced that same year when she was informed that she would no longer receive pay for being "on call." Begley did not lodge a complaint with Day, but rather reported her complaint regarding this change in

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[2] The Court will view the facts in a light most favorable to plaintiff, as the non-moving party, for the majority of this Order. The Court will consider plaintiff's partial motion for summary judgment which addresses the *Ellerth / Faragher* defense at the end of this Order. *See Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 765 (1998) and *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998). For purposes of its ruling on plaintiff's limited motion for summary judgment, the Court will view matters in a light most favorable to defendant as the non-moving party.

[3] This performance review gave Begley an overall rating of 4.15 on a scale of 1 through 5. The rating scale indicates that a score of 4 means the employee is doing a very good job and exceeding expectations, and a score of 5 means the employee's performance is excellent or outstanding. *See* Plaintiff's Exhibit M.

pay structure directly to Day's boss, Scott. Begley reports that Day did not like the fact that she had gone to his supervisor with the complaint rather than to him, and that this was the beginning point of her difficulties with Day. *See* Begley Deposition at 46-49.

Beginning in 1994 and continuing throughout the time of Begley's employment with the Hospital, Day made derogatory comments at work directed at women in general. He often said things like "women belong in the home" and "women are stupid." *See* Begley Deposition at 67. Kathy Denato, radiology technologist for the Hospital, was also supervised by Day during the relevant time frame. Denato heard Day make inappropriate remarks about women being fat and about women's personal hygiene. *See* Denato Deposition at 9. Linda Smith, operating room supervisor for the Hospital, stated that she once heard Day say that "women should stay at home and raise the kids or something to that effect." *See* Smith Deposition at 7.

The environment that existed in Day's department was described as "tense" and "chauvinistic." *See* Smith Deposition at 17, and Begley Deposition at 163. Begley states that Day "talked down to us [female employees], like we were too stupid to figure out what he was saying." *See* Begley Deposition at 100. Sylvia Schlarbaum was a radiology technologist at the Hospital during the relevant time and Day was her supervisor. Schlarbaum observed that Day treated women as if they were stupid, and that the male employee of the department, Russel Bridgeman, was treated better than the female employees. *See* Schlarbaum Deposition at 15-16. Schlarbaum was unable to give specific examples of Bridgeman's preferential treatment, other than to indicate he was privy to information female employees were not.

Day made specific comments to Begley that addressed, and degraded, her gender. In March 1995, Begley was going to see her doctor. Day asked her, "What are you going for, a pap

smear?" *See* Begley Deposition at 81. In June 1995, Day informed Begley "[w]hat's wrong with you is you're female, fat, 40, and you smoke." *See* Begley Deposition at 79.

In July or August 1995, Begley issued a complaint to Scott about Day.[4] The breadth of conduct by Day that was addressed in this complaint is unclear. After she had received the complaint, Scott spoke to Begley about it. Then, in August 1995, a meeting was held with Begley by Scott and the Human Resource Manager for the Hospital, Lois Westercamp. The meeting primarily addressed issues related to echocardiograph exam classes Begley was going to attend. However, Westercamp's memo regarding that meeting indicates the topic of Day's alleged harassment was addressed. *See* Westercamp's Deposition, Exhibit 1 (attached). The memo also indicates that Westercamp warned Begley about spreading "hospital gossip" about Day, and that Scott, Day and Begley would meet about the issue "very soon." *Id.*

Scott called Day and informed him of the complaint against him. *See* Scott Deposition, at 16. A meeting was then held with Day, and he apologized to Begley. Another employee of the Hospital, Willa Matthews, out-patient coordinator for the Hospital, indicated that after this complaint by Begley and the meeting, Day "told everyone in the depart[ment] not to talk to her or help her." *See* Plaintiff's Exhibit T (notarized letter from Willa Matthews).

Begley received a performance review from Day dated August 20, 1995. *See* Plaintiff's Exhibit M. The review rated Begley as good or meeting expectations. *Id.*[5] Begley received a

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[4] The Hospital had a harassment policy which appeared in its employee handbook. The policy stated that "[i]f an employee believes that harassment has taken place, he/she should immediately report such incidents to the appropriate manager or personnel department." *See* Defendant's Statement of Undisputed Facts in Resistance to Plaintiff's Motion for Summary Judgment, Exhibit E (attached). It also stated that upon such complaint, a prompt investigation would take place. *Id.*

[5] Begley's overall rating was 3.1625, a decrease of nearly a full point from the previous year's assessment. A 3 on the ratings scale indicates the employee's performance is good and

three percent raise at that time. During this same time, Begley was discouraged with her employment experience at the Hospital and pursued other employment opportunities. Day and Scott both encouraged her to stay, and ultimately she decided to continue at the Hospital.

In September 1995, Begley began traveling to Des Moines to attend classes to enable her to perform echocardiograph and stress echocardiograph exams. The Hospital paid for this schooling. Begley completed the classes in the spring of 1996, and continued training to perform echocardiograms at the Hospital. Begley, however, did not take and pass the appropriate exams to gain her certification from the American College of Cardiography. *See* Begley Deposition, at 108.

In 1996 and 1997, Begley began performing echocardiograph and stress echocardiograph exams. A mobile services unit had been, and continued to be, the primary provider of these services for the Hospital, and Begley was given a chance to observe their work. Begley also received special training from an individual named Kevin Bradley. The goal was that Begley would eventually perform all of the echocardiograph and stress echocardiograph exam services for the Hosptial, and that the mobile services unit would no longer be required.

Begley received a performance review from Day dated December 29, 1996. It indicated her overall rating was between meeting expectations and exceeding expectations. *See* Plaintiff's Exhibit M.[6] This review also indicated that Begley needed to receive her vascular certification, and that the goal for receiving this certification was September 1997.

Begley continued training to perform echocardiograph and stress echocardiograph exams

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meeting expectations.

[6] Begley's overall rating was 3.775.

on patients for the Hospital. She observed and got some additional training regarding the performance of these procedures at hospitals in Des Moines, and she attended a training session in Dallas, Texas. By August 1997, she was beginning to exclusively perform these exams for the Hospital.

After she began performing echocardiograph and stress echocardiograph exams, she received some poor evaluations from cardiologists who were relying on her work. In particular, Begley received poor reports in September 1997 indicating that the exams she had performed were not capable of being interpreted. *See* Plaintiff's Exhibit P (Day's handwritten notes discussing Begley's history with training for and performing echocardiograms). At least three patients upon whom she had performed exams had to be called in to have the exams run again. *Id.* The Hospital then began receiving other indications that Begley was not ready to handle performing all echocardiograph and stress echocardiograph exams. Doctors also threatened to refrain from sending their patients to the Hospital if Begley was performing these measures. *Id.* At that time, in late September 1997, the Hospital decided to stop providing the echocardiograph and stress echocardiograph exam services. The stated reasons for stopping the services were the quality of exams performed by Begley as interpreted by cardiologists, patient care issues, and financial implications. *See* Plaintiff's Exhibit E.

In October, Begley was notified that she was going to be placed on part-time status by the end of the month, and that her employment would be reviewed in thirty days. Begley was only going to be allowed to perform abdomen, obstetrical, and small parts exams. She was also told she could continue to perform vascular studies until December 31, 1997, at which time she would have to be certified in that area. *Id.* In November, Begley took the vascular ultrasound

registry exam in order to receive her vascular certification, and failed half of it. This exam was going to be required by law, as of January 1, 1998, to perform vascular ultrasound.

In the fall of 1997, a performance review was executed by Day that indicated Begley was performing at a level between meeting expectations and below expectations.[7] At a November 25, 1997 meeting with Day and Scott, Begley informed both of them that she had contacted individuals with a civil rights commission regarding Day and his treatment of women in the Hospital.

On December 4, 1997, Begley was terminated following a meeting with both Scott and Day. The stated reason for her termination was that she was not able to adequately perform the full range of exams required of her position.

The individual who filled the ultrasound technologist position vacated by Begley was Patricia Van Dorin.[8] Van Dorin began working at the Hospital in 1998. She has indicated that Day would call her a "whiney bitch" and said she was so bitchy because she was "going through menopause." *See* Plaintiff's Exhibit S (affidavit of Patricia Van Dorin, formerly known as Patricia Gustafson). Van Dorin indicated that Scott was aware of the inappropriate comments made by Day, but that Scott did not do anything to address the situation.

Begley filed her official complaint with the Equal Employment Opportunity Commission "EEOC" and the Iowa Civil Rights Commission ("ICRC") on December 12, 1997. Begley

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[7] Begley received a grade of 2.525. On the ratings scale, a 2 indicates that the employee was performing below expectations and needed improvement. This performance review was dated December 28, 1997 – after Begley's termination. The record indicates, however, that it was completed prior to her termination.

[8] Van Dorin was hired as a full time employee to replace Begley, and did not enter into the part-time position which Begley vacated.

received a letter from the ICRC dated April 19, 2000 indicating a probable cause finding and a no probable cause finding. It was determined there was probable cause "to support the allegations of discrimination based on sex and retaliation for the incidents of harassing conduct," but that there was not probable cause "to support the allegations of the reduction in hours and termination." *See* Plaintiff's Exhibit A. Plaintiff requested a reopening of the no probable cause finding, but that request was denied on August 7, 2000. *See* Amended Complaint at ¶ 10. Plaintiff received a right-to-sue letter from the ICRC on October 13, 2000 and a notice of right to sue from the EEOC on November 27, 2000. *Id.* at ¶¶ 11-12.

Plaintiff filed her complaint in this Court on December 22, 2000. She then submitted an amended complaint on April 6, 2001, which was allowed by Order of April 9, 2001. She alleges therein that defendants committed sexual harassment[9] by creating a hostile working environment in violation of 42 U.S.C. section 2000e *et seq.* (Count I) and Iowa Code Chapter 216 (Count II). Plaintiff also alleges retaliation in violation of 42 U.S.C. section 2000e *et seq.* (Count III) and Iowa Code Chapter 216 (Count IV).

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[9] This case does not involve allegations of sexually suggestive comments or sexual advances against plaintiff, as have become common in cases of sexual harassment. However, it is a case involving a claim that may be labeled sexual harassment. "Title VII prohibits sexual harassment 'only because it is a form of gender discrimination . . . . [A]bsent a base in gender discrimination, there can be no actionable sexual harassment.'" *Rodkey v. Trans World Airlines, Inc.*, 1997 WL 823568 (W.D. Mo. 1997) (quoting *Vandeventer v. Wabash Nat'l Corp.*, 887 F.Supp. 1178, 1180 (N.D. Ind. 1995)). Plaintiff claims a hostile working environment was created because of Day's treatment of her, based on her gender. While the parties have consistently used the term sexual harassment to describe the charges in this case, "gender-based" harassment could be substituted for the term "sexual" harassment in this case.

II. APPLICABLE LAW & DISCUSSION

A. Summary Judgment

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

"Summary judgment should seldom be used in employment discrimination cases." *Crawford v. Runyon*, 37 F.3d 1338, 1341 (8th Cir. 1994). Summary judgment should be granted only on the rare occasion where no dispute of fact exists and there is only one conclusion. *Id.* (citations omitted) (quotations omitted). The Court should not grant defendants' summary judgment motion "unless the evidence could not support any reasonable inference for the nonmovant." *Id.* (citations omitted).

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

Federal cases under Title VII provide the basic framework for deciding discrimination cases under Iowa law. *See Quick v. Donaldson Co.*, 90 F.3d 1372, 1379 (8th Cir. 1996). However, "the Iowa and federal laws prohibiting sexual harassment are not identical." *See Stricker v. Cessford Constr. Co.*, 179 F.2d 987, 1013 (N.D. Iowa 2001). Beyond some of the obvious nuances that resulted because both sets of laws were drafted by different legislative bodies, there are a few key differences between Title VII and Iowa law in this area that will be noted in the discussion below. However, because these differences are not determinative of defendants' motion for summary judgment and Iowa law looks to federal cases for its basic framework, the Court will address plaintiff's state and federal claims simultaneously below.

"Harassment of an employee based on a prohibited factor (e.g., gender, race, religion) is prohibited conduct under Title VII." *Palesch v. Missouri Comm'n on Human Rights*, 233 F.3d 560, 566 (8th Cir. 2000). Harassment based on a person's gender which is so severe or pervasive as to alter the conditions of the victim's employment and create an abusive, hostile working environment is actionable under Title VII. *See Faragher v. City of Boca Raton*, 118 S. Ct. 2275, 2283 (1998) (citations omitted).[10] To state a claim for hostile work environment sexual harassment, a plaintiff must show:

> (1) she belongs to a protected group; (2) she was subject to unwelcome sexual harassment; (3) the harassment was based on sex; (4) the harassment affected a term, condition, or privilege of employment; and (5) [the employer] knew or should have known of the harassment and failed to take proper remedial action.

Quick v. Donaldson Co., Inc., 90 F.3d 1372, 1377 (8th Cir. 1996).

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[10] This is not a case involving the other kind of harassment under Title VII, quid pro quo. *See Jones v. Wesco Invs.*, 846 F.2d 1154, 1155 (8th Cir. 1988).

In determining whether such harassment is sufficiently severe and pervasive to qualify as a Title VII violation, a court must consider whether the environment is both subjectively and objectively offensive. *Id.*; *see also Quick v. Donaldson Co., Inc.*, 90 F.3d 1372, 1378 (8th Cir. 1996) ("So long as the environment would reasonably be perceived, and is perceived, as hostile and abusive, Title VII is violated.") (citation and internal quotations omitted). To be subjectively abusive and hostile, the alleged harassment must actually offend the plaintiff. *See Hathaway v. Runyon*, 132 F.3d 1214, 1221 (8th Cir. 1997). The environment must also be offensive to a reasonable person in the plaintiff's position. *Faragher*, 118 S. Ct. at 2283. In determining whether an environment is objectively hostile or abusive, a court should consider the totality of the circumstances, including factors such as:

> the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance.

Id. (citation and internal quotation marks omitted). The conduct at issue "must be extreme to amount to a change in the terms and conditions of employment," *id.* at 2284, and "simple teasing, offhand comments, and isolated incidents" do not constitute discriminatory conduct, unless such conduct is extreme. *Faragher*, 118 S. Ct. at 2283 (citations and internal quotation marks omitted). "The standards for judging hostility must be 'sufficiently demanding to ensure that Title VII does not become a 'general civility code.'" *Stuart v. General Motors Corp.*, 217 F.3d 621, 632 (8th Cir. 2000) (citing *Faragher*, 118 S.Ct. at 2275). The alleged harassment must be sustained and non-trivial. *See Parton v. GTE North, Inc.*, 802 F.Supp. 241, 253 (W.D. Mo. 1991) (citation omitted).

There is no dispute as to the first element of plaintiff's prima facie case, that as a woman Begley is a member of a protected class. Defendants contend, however, that Begley was not subjected to unwelcome sexual harassment; even assuming such harassment existed, it was not based on her sex nor did it affect a term, condition or privilege of employment; and, the Hospital's response to Begley's complaints were appropriate.

Begley asserts she was harassed by Day because of her gender. Begley alleges Day regularly made comments about women being stupid and that women belong in the home. She asserts he was chauvinistic in his attitude as her supervisor, and treated the male employee of the department better. She asserts Day made two specific harassing comments to her in 1995 – first questioning whether she was going to see the doctor to get a pap smear, and second informing her that her "problem" was that she was female, fat, forty and she smoked. The Court finds that while there is not an overabundance of evidence to support her claim, there is just enough evidence to definitively take her allegations outside of the realm of the trivial or offhanded comments, and to raise the issue whether Day's treatment of Begley was extreme enough to change the terms and conditions of her employment at the Hospital.[11] The Court also finds Scott and the Hospital knew of at least part of the alleged harassment, and the response to Begley's 1995 complaint of harassment by Day was quite minimal. There is material issue of fact

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[11] There is a material issue of fact whether Begley's terms and conditions of employment were altered because of Day's alleged harassment. Day was the central person involved in determining whether the echocardiograph and stress echocardiograph exams she performed were sufficient to allow the Hospital to continue to provide the service. This aspect of Begley's employment was something she trained for two years, and there is some evidence in the record indicating Day's version of how she was performing may have been biased. *See* Begley's Deposition and Van Dorin's Deposition. The Hospital's decision to no longer allow Begley to perform this service was the primary reason why Begley's employment was cut to part-time in October 1997, and was a factor in her December 1997 termination.

regarding whether that response qualifies as a prompt remedial action, adequate to avoid responsibility for a hostile working environment claim.

The close question, for purposes of defendant's motion for summary judgment, is whether Day's comments were truly based on Begley's gender. It appears Day's treatment of Begley *may* have stemmed from the 1994 incident where she went 'above his head' to Scott to complain of the loss of her on-call pay. Begley indicated that Day's harsh treatment of her appeared to begin at that time, and that he held some animosity against her because of that incident. However, the Court finds there is a material issue of fact regarding this question for a jury to decide. This is not a clear case where the supervisor treated employees differently based on his personal opinion of them. *See Montadon* v. *Farmland Inds., Inc.*, 116 F.3d 355, 358 (8th Cir. 1997) (holding that alleged harassment was not based on gender of plaintiff, as she admitted in her deposition that supervisor treated people differently based on whether he liked the person or not). The alleged comments made by Day clearly indicate that his opinion of Begley was based in large part based on the fact that she was a woman. Additionally, Begley's claim is partially supported by the other women who worked in her department and the woman who replaced her, Van Dorin. *See Stricker v. Cessford Constr. Co.*, 179 F.Supp. 2d 987, 1001 (N.D. Iowa 2001) (indicating that harassment directed at others of which plaintiff is aware can constitute evidence of a hostile working environment) (citing *Madion v. IBP*, 257 F.3d 780, 793 (8th Cir. 2001)).

Therefore, genuine issues of material fact remain and defendants will not be entitled to

summary judgment on plaintiffs claims of hostile work environment.[12]

C. Begley's Motion for Partial Summary Judgment

Begley alleges that defendants cannot raise the defense stated by the Supreme Court in *Faragher*, 524 U.S. at 807, and *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 765 (1998). Those cases held that "an employer has an affirmative defense to liability or damages caused by the harassment of an employee *when there is no 'tangible employment action,'* if (1) the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior and (2) plaintiff unreasonably failed to take advantage of preventive or corrective opportunities provided by the employer or to avoid harm otherwise." *See Stricker*, 179 F.Supp. 2d at 1001 (citing *Faragher*, 524 U.S. at 807 and *Ellerth*, 524 U.S. at 765) (emphasis added). Begley asserts that she was terminated in 1997, and that she was cut to part-time status that same year, and hence she did suffer a tangible employment action and this defense should not be available to defendants. "[N]o affirmative defense is available to an employer when a supervisor's harassment culminates in a tangible employment action such as discharge, demotion, or undesirable reassignment." *Phillips v. Taco Bell Corp.*, 156 F.3d 884, 889 n.6 (8th Cir. 1998) (citing *Faragher*, 118 S.Ct. at 2293 and *Ellerth*, 118 S.Ct. at 2270).[13] The Court finds

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[12] Under Iowa law, an individual supervisor can be held liable for harassment while that is not the case under Title VII. *See Stricker*, 179 F.Supp. 2d at 1013-14 (citing *Vivian v. Madison*, 601 N.W.2d 872 (Iowa 1999)). Neither party addressed this issue in their motion papers, and the Court will not do so on its own at this time.

[13] Defendants argue that this case is like *Phillips*, and that the Court should find a material issue of fact exists with regard to this defense. The Court disagrees. *Phillips* involved a case in which the trial was held before the Supreme Court issued its opinions in *Faragher* and *Ellerth*, and the Eighth Circuit panel determined that the case needed to be remanded to the district court for further proceedings to address the new defense. *Phillips*, 156 F.3d at 889. Additionally, there was not a tangible employment action at issue in the case as plaintiff had resigned. *Id.* at 887.

because tangible employment actions are at issue in this case, this defense is not available at trial.[14] If at trial Begley is able to maintain her claim of sexual harassment by Day, then the Hospital will be vicariously liable. *See Newton v. Cadwell Laboratories*, 156 F.3d 880, 883 (8th Cir. 1998) (citing *Ellerth* and *Faragher*).

D. Retaliation (Counts III and IV)

Iowa law follows Title VII in its review of retaliation claims. *See Stricker*, 179 F.Supp. 2d at 1017. Thus, the Court will address both the federal and state claims jointly below.

In order to state a prima facie case of retaliation, Begley has to show, "(1) she filed a charge of harassment or engaged in other protected activity; (2) her employer subsequently took an adverse employment action against her; and (3) the adverse action was causally linked to her protected activity." *See Scusa v. Nestle U.S.A. Co., Inc.*, 181 F.3d 958, 968 (8th Cir. 1999) (citations omitted) (involving claim that co-employees retaliated against the plaintiff which the supervisors ignored). Once this prima facie showing is made by the plaintiff, the burden shifts to the employer to articulate a legitimate, non-discriminatory reason for its actions; if it can do so, the burden shifts back to the plaintiff to show the reasons for termination were a pretext for illegal retaliation. *See Green v. The Servicemaster Co.*, 66 F.Supp. 2d 1003, 1014 (N.D. Iowa 1999) (citations omitted).

Begley alleges she engaged in protected activity by complaining to Scott in 1995, and by contacting the state and federal civil rights commissions in November 1997. She also asserts the

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[14] It is questionable whether the Iowa Supreme Court will adopt the *Ellerth / Fagagher* defense to claims under Iowa law. *See Stricker*, 179 F.Supp. 2d at 1014-1015; *see also McElroy v. Iowa*, 637 N.W.2d 488, 497 (Iowa 2001) (recognizing the *Ellerth / Fagagher* defense could have been asserted as an affirmative defense, but merely noting that defendant did not even raise the defense in the answer). However, the Court need not address this issue as it finds the defense is inapplicable to the case now before it.

adverse employment actions were the October 1997 change in her status to part-time, and her termination in December 1997. The first two elements of her retaliation claims are therefore met, insofar as plaintiff asserts the October 1997 change in her employment status was due to her 1995 complaint and her December 1997 termination was due to her contacting the civil rights commissions in November 1997 and alerting Day and Scott to that fact.[15] However, as explained below, the Court finds the third element of the prima facie case, the causal connection between the protected activities and the adverse actions, cannot be met with respect to the October 1997 adverse action. Further, while the Court finds the prima facie case is met with respect to the December 1997 adverse action, Begley cannot show the reason given for her termination were pretextual.

While proximity in time between a protected activity and an adverse action is not necessarily determinative of whether there is a causal connection, it is an important factor to consider. There was more than two years separating the 1995 complaint regarding Day and the October 1997 decision regarding part-time status. Following her 1995 complaint, Day and Scott actually encouraged Begley to stay. The record clearly indicates that the October 1997 decision to cut Begley to part-time status was based on her inability to adequately perform echocardiograph and stress echocardiograph exams. The Hospital stopped its efforts to perform 'in-house' echocardiograph and stress echocardiograph exams in September 1997. When Begley was hired in 1993, a key expectation of her job was that she would learn to perform these exams and do so for the Hospital. She began taking classes in 1995, and in 1996 completed those

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[15] Plaintiff cannot assert the October 1997 change in her status was due to her activity in November 1997, but she can assert that it was because of her 1995 complaint. Plaintiff can assert that her 1997 termination was due to her activity in 1995, but this Court will only address this adverse employment action as it relates to the protected activity in which she engaged in November 1997.

classes. She did not seek or receive certification from the American College of Cardiography. She continued to train to be able to perform these services for the Hospital for more than a year. Finally, when she began to perform these services in August 1997, the reports from doctors indicated there were problems with the exams she performed, and the Hospital then made its decision to halt the service and return to paying a mobile services unit to come to the Hospital on a weekly basis. Clearly, the record does not support a causal connection between the 1995 complaint regarding Day and the October 1997 part-time status decision.

Moreover, even though the close proximity between the time that Begley alerted Day and Scott to her protected activity in November 1997 and the decision to terminate her in December 1997 appears to satisfy the causation element of the prima facie showing with regard to this allegation, defendant has articulated two separate legitimate reasons supporting the Hospital's decision to terminate. First was Begley's inability to adequately perform echocardiograph and stress echocardiograph exams, as detailed above. Second, Begley failed her vascular ultrasound certification exam, further limiting the types and number of ultrasound exams she would be able to perform for the Hospital. These legitimate and non-discriminatory reasons for Begley's termination are particularly strong, as they go to her inability to perform key elements of her job. After carefully reviewing the summary judgment record, the Court finds the only reason Begley can legitimately assert to show these reasons are pretextual is the proximity in time between her protected activity and the adverse action. "[P]roximity in time – standing alone – is ordinarily insufficient to generate a fact question as to pretext." *See Green*, 66 F.Supp. 2d at 1016 (citation omitted). Therefore, Begley may not maintain her claim of retaliation based upon the December 1997 termination as she cannot show the Hospital's reasons were pretextual.

Defendant's motion for summary judgment with respect to plaintiff's retaliation claims will be granted.

III. CONCLUSION

For the above stated reasons, defendants' motion for summary judgment is granted in part and denied in part. It is denied with respect to Counts I and II, but granted with respect to Counts III and IV. Furthermore, plaintiff's motion for partial summary judgment is granted, as defendants will not be allowed to present the *Ellerth / Faragher* defense at trial.

IT IS SO ORDERED.

Dated this 4th day of April, 2002.

RONALD E. LONGSTAFF, CHIEF JUDGE
UNITED STATES DISTRICT COURT