SIXTH DIVISION
November 20, 2015

No. 1-15-1177

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

GEORGIA POLYCHRONIOU,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellant,	)	Cook County
	)	
v.	)	No. 2010 L 011083
	)	
NEWMARK KNIGHT FRANK,	)	Honorable
	)	James O'Hara,
Defendant-Appellee.	)	Judge Presiding

PRESIDING JUSTICE ROCHFORD delivered the judgment of the court.
Justices Hoffman and Delort concurred in the judgment.

ORDER

¶ 1 *Held*: We affirmed the grant of summary judgment in favor of defendant on plaintiff's sexual harassment counts, where plaintiff waived review of her theory of recovery on appeal by failing to plead it in her second amended complaint; we reversed the grant of summary judgment in favor of defendant on plaintiff's retaliation counts, finding the existence of genuine issues of material fact; and we remanded for further proceedings.

¶ 2 Plaintiff, Georgia Polychroniou, filed a second amended complaint alleging two counts of sexual harassment and two counts of retaliation against defendant, Newmark Knight Frank. The circuit court granted summary judgment in favor of defendant on all four counts of plaintiff's second amended complaint. On appeal, plaintiff contends questions of material fact preclude the grant of summary judgment. We affirm the grant of summary judgment in favor of defendant on

the sexual harassment counts, and reverse the grant of summary judgment in favor of defendant on the retaliation counts and remand for further proceedings thereon.

¶ 3 On September 29, 2010, plaintiff filed her original one-count complaint against defendant and Matthew Whipple, alleging battery. Plaintiff alleged: she began working as a broker for defendant, a commercial real estate company, on or about September 15, 2008; while at work on November 7, 2008, one of defendant's senior brokers, Mr. Whipple, suggested meeting after work to discuss current deals; later that evening, Mr. Whipple cornered plaintiff in a room and asked her several times to have sex with him; plaintiff repeatedly said no, after which Mr. Whipple took off all his clothes, took his penis in his hands and asked her to have sex with him; plaintiff turned to leave, and then Mr. Whipple pulled plaintiff by the front of her pants, ripping the button and zipper; Mr. Whipple pushed plaintiff onto a couch and she struggled to push him off her for about 20 minutes.

¶ 4 Plaintiff further alleged she reported Mr. Whipple's conduct to her supervisor, Mitchell Loveman, but that Mr. Whipple was not disciplined in any way. Plaintiff believed she was subsequently ostracized by defendant's employees, not given opportunities to earn money, and was "constructively discharged" on September 30, 2009. Plaintiff alleged that Mr. Whipple's conduct on November 7, 2008, constituted a battery and that defendant was liable for Mr. Whipple's battery against her based on *respondeat superior*.

¶ 5 While plaintiff's complaint was pending, she filed for bankruptcy protection in Ohio, but failed to list this Illinois lawsuit as an estate asset. The bankruptcy trustee subsequently discharged the bankruptcy without requiring plaintiff to satisfy any portion of her outstanding debts. After her bankruptcy was discharged in Ohio, defendant and Mr. Whipple filed a joint motion in the circuit court here to dismiss her battery action, based on the doctrine of judicial

estoppel. In their joint motion defendant and Mr. Whipple cited *Moy v. Ng*, 371 Ill. App. 3d 957 (2007), which held that the following five elements generally are required for the doctrine of judicial estoppel to apply: "the party to be estopped must have (1) taken two positions, (2) that are factually inconsistent, (3) in separate judicial or quasi-judicial administrative proceedings, (4) intending for the trier of fact to accept the truth of the facts alleged, and (5) have succeeded in the first proceeding and received some benefit from it." *Id*. at 962. Defendant and Mr. Whipple argued that plaintiff took the position in the Ohio bankruptcy court that her Illinois battery action had no value, and that she benefited from taking that position because the bankruptcy trustee ultimately discharged her bankruptcy without requiring her to pay any of her creditors in whole or in part. Defendant and Mr. Whipple contended that plaintiff's position in the bankruptcy court that the Illinois battery action had no value was factually inconsistent with her position in the Illinois circuit court that her battery action was worth more than $50,000 and, therefore, that the doctrine of judicial estoppel applied to bar plaintiff's complaint.

¶ 6 While the circuit court was considering the joint motion to dismiss, plaintiff amended her original action against defendant and Mr. Whipple. In her five-count first amended complaint filed on August 22, 2011, plaintiff realleged her battery cause of action in count I. In count II, plaintiff alleged sexual harassment under the Illinois Human Rights Act (775 ILCS 5/1-101 *et seq*. (West 2010)). Plaintiff alleged that, approximately once a week during the period she worked for defendant, from September 2008 to September 2009, Mr. Whipple talked to male co-workers in the presence of plaintiff about his sexual activities, making specific references to sexual intercourse and commenting on female body parts. During these conversations, Mr. Whipple usually gyrated his hips to "dramatize a sexual act." Plaintiff informed her supervisor, Mr. Loveman, that this conduct by Mr. Whipple made her uncomfortable, but Mr. Loveman

responded by stating he did not want to know about Mr. Whipple's conduct. Plaintiff contended that the aforementioned conduct of Mr. Whipple, and the failure of Mr. Loveman to address this conduct after she reported it, constituted sexual harassment.

¶ 7 Count III, also labeled sexual harassment, realleged the allegations of count II and added that on or about September 30, 2009, plaintiff decided to resign from defendant after it failed to address her complaints regarding Mr. Whipple's conduct.

¶ 8 In count IV, plaintiff alleged retaliation under section 6-101(A) of the Illinois Human Rights Act (775 ILCS 5/6-101(a) (West 2010)). Plaintiff alleged that after Mr. Whipple tried and failed to have sex with her against her will on November 7, 2008, he told others that they had engaged in sexual intercourse. Plaintiff told her supervisor, Mr. Loveman, on November 20, 2008, that she never had sex with Mr. Whipple, and that he had tried to force himself on her, ripping her pants in the process. Mr. Loveman responded by asking why Mr. Whipple would lie about having slept with plaintiff and that she must have "put [herself] into that position and [she] can't do that as a woman." Mr. Loveman also told her to "put [her] head down and work hard." Immediately after this conversation, Mr. Loveman retaliated against her by failing to work with her on real estate transactions and failing to pay her for work she had already done.

¶ 9 Count V, also labeled retaliation, repeated the allegations of count IV, and added that because Mr. Loveman refused to compensate plaintiff consistently, she felt she had to resign in September 2009.

¶ 10 On December 6, 2011, the circuit court granted the joint motion to dismiss plaintiff's original one-count complaint for battery with prejudice based on judicial estoppel and also dismissed Mr. Whipple from the case with prejudice.

¶ 11 On February 15, 2012, plaintiff filed her four-count, second amended complaint. Plaintiff's second amended complaint consisted of two sexual harassment counts and two retaliation counts, all of which were substantively identical to those same counts in the first amended complaint. The difference between the second amended complaint and the first amended complaint is that: (1) the first amended complaint included Mr. Whipple and Newmark Knight Frank as defendants, whereas the second amended complaint only named Newmark Knight Frank as defendant; and (2) the second amended complaint did not contain a count alleging battery based on Mr. Whipple's conduct in trying to forcefully engage in sexual intercourse with her on November 7, 2008.

¶ 12 Discovery depositions of plaintiff and Mr. Loveman were taken. In her deposition, plaintiff stated she worked for defendant for one year, from September 2008 to September 2009 as a real estate broker. Defendant advanced plaintiff a monthly "draw" of $3,000 ($36,000 for the year) to be applied against her earned commissions. The draw balance would result in either additional money being owed to plaintiff if her earned commissions were higher than her draw or would result in a debt owed to defendant if her commissions were less than her draw. In the event that plaintiff was financially unable to repay her draw balance when her commissions were less than her draw, Mr. Loveman, a shareholder and Principal of defendant, agreed to be personally responsible for the amount plaintiff owed defendant.

¶ 13 Plaintiff stated that on her first or second day of work, a co-worker, Mr. Whipple, asked her if she had ever dated a broker. Plaintiff said no, and Mr. Whipple said: "You will." Plaintiff told Mr. Whipple that his comment was inappropriate. Mr. Whipple also had a tendency to talk about his "sexual escapades" with people in the back of the office, made "inappropriate gestures

and gyrations" when talking with a male co-worker, and used binoculars to look at women in other offices. Plaintiff considered all of this behavior to be inappropriate for the office.

¶ 14 Plaintiff stated that in early November 2008, she went out with some of her coworkers to a bar, where she made some type of comment about "gang-banging a prostitute." Mr. Loveman was subsequently informed of plaintiff's comment, and he spoke about it with her. Plaintiff told Mr. Loveman she had merely repeated what someone else had said about "gang-banging a prostitute," and Mr. Loveman told her not to use that type of language when speaking with her coworkers.

¶ 15 Plaintiff stated that later in November 2008, she, Mr. Whipple, and some other people went to a bar where she had one drink. Mr. Whipple drank "a lot." Mr. Whipple asked her to go with him to a friend's house to continue to discuss business. They went to the friend's house, where Mr. Whipple cornered her in a room and asked her to have sex with him. When plaintiff said no, Mr. Whipple took off all his clothes and asked her for sex again. Plaintiff again said no, after which Mr. Whipple pulled at her pants, ruining the zipper, and pushed her onto a couch and got on top of her. Plaintiff pushed him off and immediately left the house. Plaintiff did not call the police because she was traumatized and because she knew she had to continue to work with Mr. Whipple. Plaintiff was concerned about the consequences to her career if she reported Mr. Whipple to the police.

¶ 16 Plaintiff stated that, 10 to 15 days later, on November 20, 2008, she learned from a co-worker, Ashley Devick, that Mr. Whipple was telling people at the office that he and plaintiff had engaged in sex. Concerned that Mr. Whipple was ruining her good name, plaintiff confronted him in front of about five to eight coworkers and stated: "Don't tell people that we

had sex when it did not happen." Mr. Whipple responded that she was an idiot, and that he had never told anyone that they had engaged in sex.

¶ 17 Plaintiff stated that later that day, she met with Renee Pegues, the regional operations manager, and told her about how she had confronted Mr. Whipple regarding his lying about their having had sex. Ms. Pegues asked plaintiff if she was okay, and she said yes. Plaintiff did not tell Ms. Pegues about how Mr. Whipple had tried to forcefully have sex with her in early November (hereinafter referred to, for purposes of this order only, as the attempted sexual assault).

¶ 18 After meeting with Ms. Pegues, plaintiff met with Mr. Loveman and told him about how Mr. Whipple had falsely told her coworkers that they had engaged in sex, and Mr. Loveman responded that he did not "want to know about it." Plaintiff did not tell Mr. Loveman of Mr. Whipple's attempted sexual assault of her. Mr. Loveman asked plaintiff if she would like to move her desk away from Mr. Whipple. Plaintiff said yes, so her desk was moved near Ms. Pegues' office away from Mr. Whipple's "immediate environment."

¶ 19 Plaintiff stated that at the end of November 2008, she again told Mr. Loveman about how Mr. Whipple had falsely told her co-workers that they had engaged in sex. Mr. Loveman responded that it was "not his business." In late November or early December 2008, plaintiff and Mr. Loveman were walking to a client's office and she told him of Mr. Whipple's attempted sexual assault of her. Mr. Loveman told her not to put herself "in that position as a woman." Plaintiff subsequently brought the matter up again with Mr. Loveman in late November or early December 2008 while walking to a client's office, telling him Mr. Whipple had lied when he told the co-workers that they had engaged in sex, and that Mr. Whipple had attempted to sexually

assault her. Mr. Loveman responded by telling plaintiff to put her head down and work harder than the men. Plaintiff never raised the matter again with Mr. Loveman.

¶ 20 Plaintiff stated that she continued to work for defendant for another 10 months, until September 2009. At some point, she spoke with Kevin Duckler, defendant's managing principle, about the "incident" with Mr. Whipple (it is unclear which incident plaintiff was referring to, the attempted sexual assault and/or the false statement about having had sex with her), and Mr. Duckler responded that Mr. Whipple's age and lack of experience were the reasons for his behavior.

¶ 21 Plaintiff stated that from December 2008 until her departure 10 months later, the "entire work environment was inappropriate towards women." She twice saw an image of a "scantily clad" woman on a co-worker's computer, which she labeled as pornography, and she heard the men in the back of the office talk about their "sexual escapades." However, plaintiff subsequently stated that after she moved her desk in November 2008, she did not "personally" hear the sexually explicit comments.

¶ 22 Plaintiff stated that, after informing Mr. Loveman, who she described as her "partner and mentor and superior," about Mr. Whipple's attempted sexual assault of her, Mr. Loveman stopped bringing her in on commissionable transactions. Her good name had been "trashed" by Mr. Whipple, she felt ostracized and uncomfortable by the "day-to-day behavior of the men in the office," and she resigned in September 2009. Just prior to resigning, plaintiff had a conversation with Mr. Duckler in which he asked her whether she was leaving because of Mr. Whipple, and she said yes. Mr. Duckler asked her not to leave, but plaintiff responded that she did not feel comfortable staying there any longer. Mr. Duckler then told her that defendant "will

destroy you." Following her resignation from defendant, plaintiff was unemployed for 13 months.

¶ 23 Mr. Loveman stated in his deposition that, after plaintiff first told him of Mr. Whipple's alleged sexual assault against her, he had some follow-up conversations with her, but plaintiff never asked him "to do something about it." Nonetheless, Mr. Loveman made sure that the human resources professional, Ms. Pegues, and the managing principle, Mr. Duckler, were aware of the allegation, and he also spoke with Mr. Whipple, who denied that he had tried to sexually assault plaintiff. Plaintiff never told Mr. Loveman she was being harassed at the office after the alleged assault had occurred.

¶ 24 Mr. Loveman stated that he could not recall inviting plaintiff in on any deals where she would share in the commission prior to November 20, 2008, but that after that date, he did invite her to participate with him in commissionable deals involving clients at 770 North Halsted Street in Chicago and 75 North Fairway Drive in Vernon Hills.

¶ 25 Mr. Loveman stated that he was the guarantor of plaintiff's monthly $3,000 draw and, thus, had the incentive for her to make money (otherwise, he would have to pay back the draw from his own monies). In the year plaintiff worked for defendant, she earned only $3,500 in total commissions and, so, Mr. Loveman had to pay the balance of her draw; over $30,000.

¶ 26 In addition to the deposition testimony, plaintiff submitted three affidavits in support of her complaint. In the first affidavit, sworn to on June 19, 2014, plaintiff stated that in September or October 2009, she spoke with Ashley Devick regarding how Mr. Duckler was threatening Ms. Devick so as to stop her from helping plaintiff with her sexual harassment case. The remainder of the affidavit contains what plaintiff said to Ms. Devick in this conversation, but does not include any direct quotes from Ms. Devick. In pertinent part, the affidavit states:

> "The following is what I said to Ms. Devick in this conversation. *** I know Newmark is a yucky yucky company. What happened? Kevin Duckler threatened you? How did he threaten you? He thinks you are a mole? He lowered your split on a commission from 30% to 25% because you are a mole? So he punished you for talking to me by lowering your commission? If he can't have a mole working for him that is an additional threat. Well, he knows that we talk and have during the entire time that I worked for Newmark. You don't have to beg me. I understand. Yes, you have my confidence on this conversation until your commission money is deposited into your account. You're welcome."

¶ 27 The trial court ultimately struck plaintiff's June 19 affidavit for failing to comply with Illinois Supreme Court Rule 191 (Ill. S. Ct. R. 191 (eff. Jan. 4, 2013)), finding that it does not set forth with particularity the facts upon which the claim is based, and does not consist of facts admissible in evidence.

¶ 28 In an affidavit sworn to on August 18, 2014, plaintiff attached two photographs which, she claimed, showed how Mr. Whipple's attempted sexual assault of her resulted in the "teeth on each side [of her pant's] zipper [becoming] deformed from the force of his pull of my pants, such that the zipper would no longer catch, in order to zip." Two very blurry, black and white copies of the photographs of the deformed zipper are contained in the record on appeal.

¶ 29 In a second affidavit sworn to on August 18, 2014, plaintiff stated that, after she moved her desk away from Mr. Whipple on November 20, 2008, she "often walked to the back area to speak with Ashley Devick. When [she] walked toward the area where Mr. Whipple had a desk, a hush would come over the employees near Mr. Whipple's office area, as they saw [her] approaching. As [she] walked toward the back, [she] often saw Mr. Whipple making

inappropriate sexually explicit hand and arm gestures toward his pelvic area, while making pelvic gyrations of a sexual nature." Plaintiff further stated she was subjected to this "inappropriate" behavior on a weekly basis until she left defendant's employ.

¶ 30 Mr. Duckler gave a deposition where he denied cutting or reducing Ms. Devick's commissions in retaliation for helping with plaintiff's sexual harassment lawsuit.

¶ 31 On March 26, 2015, the circuit court granted summary judgment in favor of defendant on plaintiff's second amended complaint. Plaintiff appeals.

¶ 32 Summary judgment is appropriate "if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." 735 ILCS 5/2-1005(c) (West 2010). Review is *de novo*. *American Zurich Insurance Co. v. Wilcox and Christopoulos, L.L.C.*, 2013 IL App (1st) 120402, ¶ 27.

¶ 33 Initially, defendant points out that plaintiff failed to include in the record on appeal the circuit court's March 26, 2015, order setting forth its reasoning for granting defendant's summary judgment motion, but included the order as an attachment to her appellant's brief. Defendant argues that we may not consider an attachment to a brief that is not a part of the appellate record. See *Jones v. Police Board of the City of Chicago*, 297 Ill. App. 3d 922, 930 (1998) (holding that attachments to briefs not otherwise of record are not properly before the reviewing court and cannot be used to supplement the record).

¶ 34 Defendant argues we should affirm the circuit court's grant of summary judgment on the basis that the March 26, 2015, order was not included in the appellate record. Defendant cites *Webster v. Hartman*, 195 Ill. 2d 426 (2001), which held that when the appellant fails to meet his burden of providing a sufficiently complete record, the reviewing court presumes the order

entered by the circuit court was in conformity with the law and had a sufficient factual basis. *Id.* at 432.

¶ 35 In the present case, defendant does not dispute the authenticity of the copy of the order contained in the appendix to the appellant's brief. We may take judicial notice of orders entered by the circuit court. *Walsh v. Union Oil Co. of California*, 53 Ill. 2d 295, 300 (1972). That being the case, the record on appeal is sufficient for us to determine, on *de novo* review, whether there are any genuine issues of material fact and whether defendant is entitled to judgment as a matter of law. Accordingly, we decline to dismiss the case on this technical ground and will proceed to consider plaintiff's appeal on the merits.

¶ 36 First, we address the circuit court's grant of summary judgment in favor of defendant on plaintiff's sexual harassment counts. The Illinois Human Rights Act, in pertinent part, defines sexual harassment as "any unwelcome sexual advances or requests for sexual favors or any conduct of a sexual nature when *** such conduct has the purpose or effect of substantially interfering with an individual's work performance or creating an intimidating, hostile or offensive working environment." 775 ILCS 5/2-101(E) (West 2010).

¶ 37 The Illinois Human Rights Act also provides:

> "It is a civil rights violation: *** For any employer, employee, agent of any employer, employment agency or labor organization to engage in sexual harassment; provided, that an employer shall be responsible for sexual harassment of the employer's employees by nonemployees or nonmanagerial and nonsupervisory employees only if the employer becomes aware of the conduct and fails to take reasonable corrective measures." 775 ILCS 5/2-102 (D) (West 2010).

¶ 38 The prohibition of sexual harassment found in the Illinois Human Rights Act "closely parallels" Title VII of the Civil Rights Act (42 U.S.C. §2000e *et seq*. (1982)), and, therefore, examination of federal Title VII law is appropriate. *Trayling v. Board of Fire and Police Commissioners of the Village of Bensenville*, 273 Ill. App. 3d 1, 11 (1995). The United States Supreme Court has held that sexual harassment is actionable under Title VII if it is "sufficiently severe or pervasive 'to alter the conditions of [the victim's] employment and create an abusive working environment.' " *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 67 (1986) (quoting *Henson v. Dundee*, 682 F. 2d 897, 904 (11th cir. 1982)). In *Harris v. Forklift Systems, Inc*., 510 U.S. 17 (1993), the United States Supreme Court held that whether an environment is hostile or abusive "can be determined only by looking at all the circumstances. These may include 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." *Harris*, 510 U.S. at 23.

¶ 39 In the present case, plaintiff argues on appeal that there is a question of material fact as to whether Mr. Whipple's attempted sexual assault of her at his friend's home after work, in conjunction with his "pelvic gyrations" at the office, were severe and pervasive enough to constitute a hostile and abusive working environment and, thus, actionable sexual harassment. Plaintiff also argues that a question of material fact exists as to whether defendant's action in moving her desk away from Mr. Whipple's desk was a reasonable corrective measure sufficient to defeat her claim of sexual harassment. Given these questions of material fact, plaintiff argues that the circuit court erred in granting defendant's motion for summary judgment.

¶ 40 Defendant responds that Mr. Whipple's attempted sexual assault of plaintiff was "off-duty, non-workplace conduct" and it cannot be held liable under the Illinois Human Rights Act

and that it took prompt remedial action to prevent her from being subject to any further objectionable conduct at the office and, therefore, we should affirm the circuit court's grant of summary judgment in defendant's favor.

¶ 41 Review of the record indicates that, in her original complaint, plaintiff alleged that Mr. Whipple's attempted sexual assault of her at his friend's house after work constituted a battery for which defendant was responsible under the principle of *respondeat superior*. After the trial court dismissed plaintiff's original battery complaint based on judicial estoppel, plaintiff ultimately filed the second amended complaint at issue here, which alleged two counts of sexual harassment based only on Mr. Whipple's inappropriate sexual comments and gyration of his hips. Plaintiff did not plead in either of her sexual harassment counts that Mr. Whipple had attempted to sexually assault her at his friend's house after work, and that such an attempted sexual assault should be considered sexual harassment for which defendant is responsible. Accordingly, plaintiff waived review of her theory on appeal that Mr. Whipple's attempted sexual assault of her at a friend's house after work constituted sexual harassment for which defendant is legally responsible. See *Keefe-Shea Joint Venture v. City of Evanston*, 332 Ill. App. 3d 163, 170 (2002) (a party waives review of a theory that is not contained in the complaint). Plaintiff makes no argument on appeal that Mr. Whipple's other conduct at the office (*i.e.*, his alleged sexual comments and gyrations), were enough, in and of themselves, to raise a question of material fact regarding whether they constituted actionable sexual harassment for which defendant is legally responsible. Therefore, we affirm the circuit court's grant of summary judgment in favor of defendant on plaintiff's sexual harassment counts.

¶ 42 Next, we address the circuit court's grant of summary judgment in favor of defendant on plaintiff's retaliation counts. The Illinois Human Rights Act states in pertinent part that it is a

civil rights violation for a person, or for two or more persons to conspire, to "[r]etaliate against a person because he or she has opposed that which he or she reasonably and in good faith believes to be *** sexual harassment in employment." 775 ILCS 5/6-101(A) (West 2010). As discussed, sexual harassment is defined as "any unwelcome sexual advances or requests for sexual favors or any conduct of a sexual nature when *** such conduct has the purpose or effect of substantially interfering with an individual's work performance or creating an intimidating, hostile or offensive working environment." 775 ILCS 5/2-101(E) (West 2010).

¶ 43 To establish a *prima facie* case of retaliation under the Illinois Human Rights Act, plaintiff must show: (1) she was engaged in a protected activity; (2) defendant committed a material adverse act against her; and (3) a causal nexis exists between the protected activity and the adverse act. *Hoffelt v. Illinois Department of Human Rights*, 367 Ill. App. 3d 638, 634 (2006); *Stone v. Department of Human Rights*, 299 Ill. App. 3d 306, 316 (1998).

¶ 44 Plaintiff pleaded that defendant unlawfully retaliated against her under section 6-101(A) of the Illinois Human Rights Act for reporting to her supervisor, Mr. Loveman, that Mr. Whipple: (1) attempted to sexually assault her; and (2) was falsely telling their co-workers that they had engaged in sexual intercourse. Plaintiff alleged, in pertinent part, that defendant's retaliation took the form of Mr. Loveman failing to include her on commissionable real estate transactions.

¶ 45 Neither party argues that, by reporting Mr. Whipple's conduct, plaintiff was doing anything other than opposing that which she reasonably and in good faith believed to be sexual harassment in employment, *i.e.*, that she was engaging in a protected activity. See *Hoffelt*, 367 Ill. App. 3d at 638 (reporting sexual harassment is a protected activity). The parties' argument centers on whether defendant engaged in retaliation against plaintiff by committing a material

adverse act against her that was causally connected to her reporting of Mr. Whipple's alleged sexual harassment.

¶ 46 Defendant contends that Mr. Loveman's deposition testimony, coupled with an email sent by Mr. Loveman to plaintiff, establish that there was no retaliation because defendant committed no material adverse act against plaintiff causally connected to her reporting of Mr. Whipple's alleged sexual harassment. Plaintiff counters that her deposition testimony raises a question of material fact regarding whether defendant retaliated against her by committing the materially adverse act of depriving her of working on commissionable real estate transactions.

¶ 47 We proceed to examine the relevant evidence. In support of its argument that defendant did not deprive plaintiff of working on commissionable real estate transactions in retaliation for reporting Mr. Whipple's alleged sexual harassment of her, defendant points to Mr. Loveman's deposition testimony stating that: (1) prior to plaintiff's first report of the alleged sexual harassment on November 20, 2008, he mentored and trained plaintiff by involving her in conference calls with clients and taking her to client meetings, but he did not recall inviting her to participate in commissionable real estate transactions during this training period; (2) however, *after* November 20, 2008, when plaintiff first reported to him about Mr. Whipple's alleged sexual harassment, Mr. Loveman included plaintiff on multiple commissionable real estate transactions. Defendant contends Mr. Loveman's testimony shows that, far from retaliating against plaintiff for reporting Mr. Whipple's alleged sexual harassment by preventing her from participating in commissionable real estate transactions that she previously had been given access to, defendant actually *increased* plaintiff's access to such money-making real estate transactions after she made her sexual harassment report.

¶ 48 Defendant further points to Mr. Loveman's testimony that he had an incentive to help plaintiff work on commissionable real estate transactions because he was responsible to pay back plaintiff's $36,000 draw from defendant in the event she did not earn enough monies to pay it back herself; elsewhere in his testimony, though, Mr. Loveman admitted that, by including plaintiff on his commissionable deals, he earned less commissions for himself and, thus, "there [was] a balance there." Defendant also points to a September 4, 2009, email from Mr. Loveman to plaintiff (written *after* plaintiff reported on Mr. Whipple's alleged sexual harassment), in which Mr. Loveman references a "commissionable deal" plaintiff was then working on.

¶ 49 However, in her deposition testimony, plaintiff testified in pertinent part:

"Q. From your observations, was there any difference between your relationship with Mr. Mr. Loveman relating to deals he was involved in before and after you first discussed what had happened with you and Mr. Whipple, Mr. Whipple?

A. Before we had discussed what had happened, he voluntarily brought me transactions that were solid, commissionable, potential deals in the city, and he voluntarily brought those to me. After I brought the incident to his attention, he not only said that he did not want me to work on his transactions, but he didn't bring me in on any more of those deals.

Q. Do you remember anything specific about a deal involving Clearwire and Goldman Sachs?

A. I know that those were two of the transactions that he was involved with that he-that I asked him if I could work on with him, and he said no.

Q. What was the timing of those transactions as far as before or after you first discussed what had happened between you and Mr. Whipple?

A. Both of those transactions were after that discussion about Mr. Whipple."

¶ 50 Plaintiff was asked about the September 4 email, and she testified:

"Q. Is there anything inaccurate in [Mr. Loveman's] email to you? For example, that what he's representing is a commissionable deal.

A. It was not a commissionable deal as far as I could tell. It was work that he didn't want to do that was busywork and required a lot of time spent traveling and time spent doing things that would have ended up taking all of my time and all of my energy until I could no longer stay at the firm any more, which was very different than his previous work."

¶ 51 Thus, plaintiff's deposition testimony conflicted with the testimony of Mr. Loveman regarding whether she was given commissionable work before making her first report of Mr. Whipple's alleged sexual harassment on November 20, 2008; plaintiff testified she was given such commissionable work prior to making her report, whereas Mr. Loveman testified to the contrary. Plaintiff's deposition testimony also conflicted with the testimony of Mr. Loveman regarding whether defendant retaliated against her reporting of the alleged sexual harassment on November 20, 2008, by depriving her of further commissionable work; plaintiff testified defendant stopped providing her with commissionable real estate transactions after her report, whereas Mr. Loveman testified to the contrary that he included her on multiple such commissionable real estate transactions subsequent to her report. This conflicting testimony raised genuine issues of material fact regarding: (1) whether defendant committed a materially adverse act by depriving plaintiff from working on commissionable real estate transactions that she had previously been allowed to work on prior to her reporting of Mr. Whipple's alleged sexual harassment of her; and (2) whether a causal nexus existed between such a materially

adverse act and plaintiff's reporting of the alleged sexual harassment. Given these genuine issues of material fact with regard to the elements of plaintiff's retaliation action, we reverse the circuit court's grant of summary judgment in favor of defendant on plaintiff's retaliation counts, and remand for further proceedings thereon. As we are reversing the grant of summary judgment on plaintiff's retaliation counts and remanding based on the genuine issues of material fact surrounding whether defendant deprived plaintiff of commissionable real estate transactions in retaliation for reporting Mr. Whipple's alleged sexual harassment, we need not address plaintiff's other arguments for reversal based on other allegedly retaliatory acts committed by defendant.

¶ 52 For all the foregoing reasons, we affirm the grant of summary judgment in favor of defendant on plaintiff's sexual harassment counts, reverse the grant of summary judgment in favor of defendant on plaintiff's retaliation counts, and remand for further proceedings. As a result of our disposition of this case, we need not address the other arguments on appeal.

¶ 53 Affirmed in part; reversed in part; remanded.