2015 IL App (2d) 140770-U
No. 2-14-0770
Order filed April 27, 2015

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

WENDY J. MOYLAN,	)	Appeal from the Circuit Court
	)	of McHenry County.
Plaintiff-Appellant,	)	
	)	
v.	)	No. 11-LA-208
	)	
McHENRY COUNTY COLLEGE,	)	Honorable
	)	Thomas A. Meyer,
Defendant-Appellee.	)	Judge, Presiding.

JUSTICE BIRKETT delivered the judgment of the court.
Presiding Justice Schostok and Justice McLaren concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court properly granted defendant summary judgment on plaintiff's complaint for retaliatory discharge: under the "direct method," plaintiff could not establish a causal link between her sexual-harassment complaint and her termination; under the "indirect method," she could not point to a similarly situated employee who was treated more favorably.

¶ 2 Plaintiff, Wendy J. Moylan, appeals the trial court's grant of summary judgment for defendant, McHenry County College, on her complaint alleging retaliatory discharge and breach of contract. She contends that she presented sufficient evidence to survive summary judgment on her claim that defendant fired her in retaliation for pursuing a sexual-harassment complaint against a coworker. We affirm.

¶ 3 Plaintiff was defendant's Director of Resource Development, working under a series of one-year contracts beginning in 2002. Each contract incorporated defendant's policies and regulations, which provided that defendant's technology resources were to be used only for college-related purposes and that their inappropriate use could lead to termination.

¶ 4 In September 2009, plaintiff lodged a sexual-harassment complaint against a coworker, Joe Baumann. Plaintiff initially discussed her concerns about Baumann with interim college president Kathleen Plinske. Her complaint was formally registered with Assistant Vice-President of Human Resources Angelina Castillo. Specifically, plaintiff complained that, while they were working on a grant proposal together, Baumann had advised her to " 'sex it up.' " On another occasion, Baumann told her a joke of a sexual nature. On a third occasion, Baumann pulled plaintiff into a subordinate's office to watch a video of a sexual nature in front of two other employees. On November 4, 2009, plaintiff was formally notified by Castillo and Tony Miksa, Vice-President of Academic and Student Affairs, that her complaint was unfounded.

¶ 5 In an affidavit filed with defendant's summary-judgment motion, Castillo noted that plaintiff complained of sexual harassment only after learning that Baumann was in line for a promotion. Castillo concluded that, although Baumann did not violate defendant's sexual-harassment policy, his conduct was unprofessional. Thus, she recommended that he attend sexual-harassment avoidance training and that he receive a written reprimand.

¶ 6 In February 2010, defendant launched an investigation into the use of its e-mail system. The investigation began after administrators discovered that former employees were still communicating by e-mail with current employees about "internal College operations." The investigation uncovered large volumes of e-mails sent between five employees, including plaintiff. Plaintiff's "sent mail" file contained 26,000 e-mails, including many that were sexual

and violent, and some of which were sent to subordinates. Plaintiff's deleted-mail file contained another 20,000 e-mails.

¶ 7 On March 5, 2010, plaintiff was summoned to a meeting with Castillo, Miksa, Interim Executive Director of Institutional Effectiveness Pat Stejskal, and two of defendant's attorneys. There she was informed that she was being placed on administrative leave pending an investigation into her e-mails for potential violations of defendant's sexual-harassment and anti-violence policies.

¶ 8 According to Castillo, plaintiff was shown a copy of an e-mail she sent repeating Baumann's joke. She also relayed Baumann's "sex it up" comment with a link to a music video. Plaintiff admitted that Baumann's jokes and comments were no worse than some that she had shared with friends via e-mail. She reported Baumann not because she was offended by his comments, but because she knew that he was being considered for promotion and she did not believe that his behavior was appropriate for a supervisor. Castillo concluded that these e-mails showed that plaintiff's sexual-harassment complaint was false.

¶ 9 During the March 5 meeting, Miksa stated, " 'I cannot wrap my head around the fact that you would make a sexual harassment complaint while it seems you were doing the same thing.' " Others at the meeting also commented on plaintiff's perceived hypocrisy.

¶ 10 As a result of the e-mail investigation, Castillo and Miksa concluded that plaintiff violated defendant's e-mail and sexual-harassment policies. On March 10, 2010, Miksa recommended to defendant's Board of Trustees that it terminate plaintiff's employment.

¶ 11 On March 12, 2010, plaintiff received a letter from Miksa stating that he was recommending that plaintiff be fired. The letter states that it was unprofessional for plaintiff to complain about a fellow administrator while engaged in similar conduct herself.

¶ 12 The Board acted on Miksa's recommendation at its March 16, 2010, meeting. Plaintiff attended the meeting and responded to the allegations, but the Board nevertheless voted to terminate plaintiff's employment contract. Prior to plaintiff's termination, she had received no complaints, poor reviews, or formal discipline.

¶ 13 Plaintiff later learned that Tim Soutar, another college employee who was a subject of the e-mail investigation, was also being terminated. Soutar had recently filed a worker's compensation claim against the college. Another employee, Geary Smith, was involved in the same investigation but was not terminated.

¶ 14 In her deposition, plaintiff acknowledged that she knew that her contract was subject to defendant's policies and that a violation of those policies could lead to termination. She also acknowledged that her use of the e-mail system was inappropriate.

¶ 15 Defendant moved for summary judgment. It argued that, based on the uncontradicted evidence, there was no question that plaintiff was fired for violating defendant's e-mail and sexual-harassment policies and not in retaliation for filing the sexual-harassment complaint. The trial court granted the motion and plaintiff timely appeals.

¶ 16 Plaintiff contends that she presented sufficient evidence to avoid summary judgment on the question whether she was fired in retaliation for pursuing a sexual-harassment charge against a coworker. According to plaintiff, the evidence adduced in connection with the summary-judgment motion shows that her violation of the college's e-mail policy was merely a pretext to punish her for having filed the sexual-harassment complaint.

¶ 17 The trial court granted defendant summary judgment. In reviewing such a ruling, we consider the pleadings, depositions, admissions, and affidavits in the light most favorable to the nonmoving party, here plaintiff. *Bohner v. Ace American Insurance Co.*, 359 Ill. App. 3d 621,

622 (2005). Summary judgment is proper when the pleadings, depositions, and affidavits demonstrate that no genuine issue of material fact exists and that the moving party is entitled to judgment as a matter of law. 735 ILCS 5/2-1005(c) (West 2012). Our review is *de novo*. *Espinoza v. Elgin, Joliet & Eastern Railway Co.*, 165 Ill. 2d 107, 113 (1995).

¶ 18 Plaintiff first contends that she established a *prima facie* case of retaliation under the "direct method." To establish retaliation this way, a plaintiff must show that (1) she engaged in a protected activity, (2) she suffered an adverse employment action, and (3) there was a causal link between the protected activity and the adverse employment action. *Brown v. Advocate Suburban Hospital*, 700 F.3d 1101, 1106 (7th Cir. 2012).

¶ 19 The parties do not dispute that plaintiff established the first two elements. Her sexual-harassment claim was a protected activity under Title VII of the Civil Rights Act (42 U.S.C. §2000(e) *et seq.* (2006)). *Williams v. Silver Spring Volunteer Fire Dept.*, 2015 WL 237146, at 14* (D. Md. Jan. 16, 2015) (citing *Laughlin v. Metropolitan Washington Airports Authority*, 149 F.3d 253, 259 (4th Cir. 1998)); see also *Hoffelt v. Illinois Department of Human Rights*, 367 Ill. App. 3d 628, 637-38 (2006) (sexual-harassment complaint was protected activity under Illinois Human Rights Act (775 ILCS 5/1-101 *et seq.* (West 2004))). Moreover, plaintiff's termination was clearly an adverse employment action. Thus, the only issue here is whether the two were causally related.

¶ 20 Causation in this context means the traditional standard of "but for" causation: but for plaintiff's protected activity, defendant would not have fired her. *University of Texas Southwestern Medical Center v. Nassar*, 570 U.S. ___, ___, 133 S. Ct. 2517, 2533 (2013). Under the direct method, a plaintiff must provide either direct or circumstantial evidence that the adverse employment action was taken in retaliation for her protected activity. See *Hobgood v.*

Illinois Gaming Board, 731 F.3d 635, 643 (7th Cir. 2013). Direct evidence would require evidence akin to an admission from the employer. *Id.*

¶ 21 Circumstantial evidence in this context is evidence that would allow a jury to infer retaliation and includes (1) suspicious timing or ambiguous statements or behaviors; (2) evidence that similarly situated employees were treated differently; and (3) a pretextual reason for the adverse employment action. *Kasten v. Saint-Gobain Performance Plastics Corp.*, 703 F.3d 966, 972-73 (7th Cir. 2012). A plaintiff may combine these various types of circumstantial evidence to create a "convincing mosaic" from which a factfinder could make a reasonable inference of retaliatory intent. *Hobgood*, 731 F.3d at 643.

¶ 22 Plaintiff claims that she has created such a mosaic based on the following evidence. Plaintiff had worked for defendant for several years with no prior discipline. The only other employee fired as a result of the e-mail investigation had previously filed a worker's compensation claim against defendant; none of the other three employees involved was fired. Miksa and several others involved in the investigation commented on plaintiff's perceived hypocrisy in filing a sexual-harassment complaint when she was guilty of nearly identical conduct herself.

¶ 23 Defendant, for its part, notes that the e-mail investigation began six months after plaintiff first filed the sexual-harassment claim and four months after that investigation concluded. Plaintiff was not the initial focus of the investigation, and plaintiff was terminated because of the relatively egregious nature of her conduct. Defendant points to the sheer volume of e-mails involved, that many of the e-mails contained threats of violence, and that some emails were directed at subordinates.

¶ 24 We agree with defendant that plaintiff's evidence is simply too tenuous to support a causal link between her sexual-harassment complaint and her termination. As defendant notes, the e-mail investigation began six months after her complaint was registered and four months after the investigation was completed. Such a time frame has been found to be too long to support a causal link. *Leonard v. Eastern Illinois University*, 606 F.3d 428, 432 (7th Cir. 2010) (six months). Moreover, the e-mail investigation was originally focused not on plaintiff, but on a former employee. There is simply no evidence from which a factfinder could infer that defendant began investigating employees' e-mail accounts as a way to surreptitiously find a reason to fire plaintiff.

¶ 25 Plaintiff makes much of Miksa's comment about plaintiff having made a sexual-harassment complaint when she was guilty of much the same thing. This appears to have been simply an offhand remark. Merely referring to the sexual-harassment complaint in some manner does not mean that the sexual-harassment complaint was the reason for plaintiff's termination. Moreover, Miksa was not the ultimate decision maker. Both Castillo and Miksa averred, without contradiction, that Miksa recommended to the Board of Trustees that plaintiff be terminated based on her violation of defendant's e-mail and sexual-harassment policies and, to the best of their knowledge, the Board acted on this recommendation. Plaintiff points to no evidence that the Board considered the sexual-harassment complaint in its decision or, for that matter, that the Board was even aware of it.

¶ 26 In the cases plaintiff cites, the plaintiffs presented much stronger evidence of a causal link between their protected activities and the subsequent unfavorable employment actions. In *Hobgood*, the plaintiff alleged that he was fired in retaliation for having helped a fellow employee in a lawsuit against the agency. When they discovered this, the defendant's

administrators decided to investigate the plaintiff. After the state police and the State's Attorney's office decided that the plaintiff had done nothing illegal, the Board began its own investigation. At the outset, the Board's general counsel told its investigator that the Board wanted " 'discharge to be considered as the first option.' " *Hobgood*, 731 F.3d at 638-39.

¶ 27 The Seventh Circuit's opinion catalogued numerous deviations from policy in the course of the investigation. At the end of the investigation, the Board charged the plaintiff with misconduct. The Board's administrator personally drafted the charges, which included a charge of illegal conduct that the state police had found no evidence to support and that focused on the plaintiff's role in the other employee's lawsuit. In reversing summary judgment for the defendant, the Seventh Circuit stated, " 'Significant, unexplained or systematic deviations from established policies or practices can no doubt be relative and probative circumstantial evidence of [unlawful] intent.' " *Id.* at 645 (quoting *Hanners v. Trent*, 674 F.3d 683, 694 (7th Cir. 2012)).

¶ 28 Here, there was no evidence of the type of "witch hunt" described by the Seventh Circuit in *Hobgood*. Nothing in the record suggests that the e-mail investigation was in any way irregular, and plaintiff was not even the initial target.

¶ 29 Plaintiff's reliance on *Henson v. Canon Business Solutions, Inc.*, 2014 WL 4783031 (N.D. Ill. Sept, 23, 2014), does not help her, either. There, the plaintiff alleged retaliation following her complaint to the Equal Employment Opportunity Commission (EEOC). One of the plaintiff's supervisors told her during a meeting that " 'no one asked you to go to the EEOC.' " *Id.* at 6*. When the plaintiff wondered aloud why she did not receive a severance package when other former employees had, a human-resources employee told her that the other employees " 'didn't file a complaint with the EEOC.' " *Id.* The court held that neither statement standing alone was sufficient to establish the causal nexus, but, together, they formed a

sufficiently convincing mosaic to allow the case to go to the jury. Here, Miksa's understandable comment about plaintiff's apparent hypocrisy did not somehow convert the investigation into something more sinister.

¶ 30 Plaintiff alternatively claims that she presented evidence sufficient to survive summary judgment under the indirect approach. The indirect method, or the *McDonnell Douglas* test, has three steps. The first step is that the plaintiff must come forward with evidence of a *prima facie* case, which has four elements as adapted for this case: (1) the plaintiff engaged in activity protected by law; (2) she met her employer's legitimate expectations, *i.e.*, she was performing her job satisfactorily; (3) she suffered a materially adverse action; and (4) she was treated less favorably than a similarly situated employee who did not engage in the activity protected by law. *Hobgood*, 731 F.3d at 641 (citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973)). If the employee has evidence on each of these four elements, the burden shifts to the employer to articulate a legally permissible reason for the adverse action. If the employer does so, the analysis moves to the third step, in which the employee tries to show that the employer's stated reason is false, which permits a reasonable inference that the real reason was unlawful. *Id.* at 641-42. If any one of the elements of a *prima facie* case is lacking, the plaintiff loses. *Id.* at 642.

¶ 31 Plaintiff's *prima facie* case falls on the fourth element: she failed to present sufficient evidence that a similarly situated employee was treated more favorably. To be sure, she presented evidence that another employee was treated the same, *i.e.*, was terminated, after he had filed a complaint, while three other employees whose e-mails were investigated were not fired. However, the record contains virtually no information about the other employees that would permit a meaningful comparison. We do not know whether any of the retained employees had

also pursued grievances at some point. We do not know the nature and extent of the other employees' misuse of the e-mail system. Defendant presented uncontradicted evidence that plaintiff's misuse of the system was particularly egregious. Absent some comparison evidence regarding the other employees, we cannot say that they were similarly situated.

¶ 32 Even if we assume that plaintiff presented a *prima facie* case, we would find that defendant presented a legitimate basis for its decision to terminate plaintiff. Moreover, the discussion above under the direct method shows that plaintiff could not prove that the proffered reason was pretextual. Therefore, the trial court did not err in granting defendant summary judgment.

¶ 33 Finally, plaintiff has forfeited her claim regarding a breach of contract because she makes no argument about count II of her complaint. We thus affirm summary judgment as to that count as well.

¶ 34 The judgment of the circuit court of McHenry County is affirmed.

¶ 35 Affirmed.