

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OATESVILLE**

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| Derek Whoolander, Plaintiff, | : | |
| | : | CIVIL ACTION |
| v. | : | |
| | : | No. 09-1017 |
| Blue Steel Corp., Defendant. | : | |
| | : | |

Opinion of the Court

Plerhoples, Senior District Judge.

On January 9, 2009, Derek Whoolander (“Whoolander”), instituted this action against his employer, Blue Steel Corp. (“Blue Steel”), alleging that Blue Steel subjected Whoolander to both a hostile work environment and a retaliatory action, in violation of Title VII of the Civil Rights Act of 1964. The case is now before this court on a motion for summary judgment brought by Blue Steel.

Summary judgment “should be rendered if the pleadings, the discovery and disclosure materials on file, and any affidavits show...that the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(c). As the Supreme Court stated in *Anderson v. Liberty Lobby*, “[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.” 477 U.S. 242, 247-248 (1986) (emphasis added). The moving party, however, is not required to “negat[e] the opponent’s claim.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). For the following reasons, Blue Steel’s motion for summary judgment is granted on both the hostile work environment and retaliation claims.

Facts

The facts of this case, as stipulated by the parties, are as follows: Plaintiff Derek Whoolander is a former full-time, professional male model. With his career in decline at the ripe age of 27, Whoolander moved back to his hometown of Playmont, Oatesville. Looking for work, he applied to the town's largest employer, Blue Steel, for the position of day-shift pig machine operator. Whoolander's father was a stove tender for Blue Steel for over 20 years before he died, so Whoolander believed he had a natural aptitude for the work.

Blue Steel is the third-largest steel mill in Oatesville. It employs approximately 11,000 workers and has been in business since 1952. Its motto is, "We work hard; we play hard."

After he applied, Whoolander was interviewed by Samuel "Sparky" Donaldson ("Donaldson"), the mill's Human Resources Manager. During the interview, Whoolander told Donaldson, "I'm really interested in this daytime shift because I work weekends at a second job." Whoolander did not tell Donaldson that his second job entailed freelance male modeling. Donaldson informed Whoolander that no employee is guaranteed a particular shift at Blue Steel, but the company does take personal circumstances into consideration when scheduling workers.¹ Thereafter, Whoolander was hired onto the day shift – Monday to Friday from 8am - 5pm.

Whoolander was assigned to an all-male crew of long-time steelworkers. On his first day of work, May 9, 2008, Whoolander immediately stood out from his coworkers due to the regular facials, manicures, and hair treatment he received for his male modeling job. Whoolander's constant grooming did not go unnoticed by his more rugged co-workers, who immediately began calling him "Fabio" and "Pretty Boy."

¹ However, due to inevitable competition for more desirable shifts, Blue Steel initiated a policy over ten years ago by which seniority is used as a "tiebreaker" in the event that two workers requested a particular shift.

The workers at Blue Steel socialized together on a regular basis, often enjoying each other's company over beers after work at nearby Corgan's Bar & Grill, as well as during semi-competitive basketball games for an unofficial company team. Whoolander, however, was never invited to join these events. On one occasion, he coincidentally stopped by Corgan's, and was promptly mocked by his co-workers from across the bar for ordering a glass of Pinot Grigio. When Whoolander asked a co-worker, Chad Strausbaugh ("Strausbaugh"), why he was never invited to join the others, Strausbaugh replied, "We didn't think a guy like you would be interested." Similarly, when Whoolander inquired about the basketball games, another co-worker, Daniel Jouenne ("Jouenne"), stated "We didn't want you to get carried away with butt-grabbing during the games," adding, "[y]ou'd probably like that kind of thing, but it's a flagrant foul."

On Friday, August 15, 2008, during an otherwise uneventful lunch hour, a co-worker was casually flipping through a copy of Wrigley Department Store's mail-order catalogue when he spotted an advertisement with Whoolander modeling a designer Speedo. After the photograph was passed throughout the break room, a large group of co-workers teased Whoolander incessantly, calling him "Queer," "Fairy Boy," and "Heidi Klum." The following Monday, this same group of employees surrounded Whoolander, and began to chant "Catwalk, Catwalk," goading him into displaying his modeling walk while a manager silently observed the occurrences. Whoolander initially ignored their shouts and started to walk away, but was pushed back into the circle. Whoolander responded by giving his hips a little shake as he walked to his machine. For the next few weeks his coworkers laughed, pointed, and shook their hips when he passed by.

Shortly thereafter, Whoolander filed an official complaint with Donaldson about the catwalk incident and the incessant teasing. Donaldson told Whoolander he was just being “ribbed” because he was “the new guy” and assured Whoolander that his coworker’s conduct would soon end.

However, the teasing did not stop, nor subside, in the months following that meeting. Whoolander alleged in his complaint that the name-calling and mimicry continued into the fall. Finally, on November 9, 2008, an incident occurred in which Whoolander was “embarrassed” by an orchestrated joke at his expense. It is a Blue Steel tradition to play a locker-room practical joke on new employees when they hit their sixth-month anniversary at the mill. The practical joke usually involves stealing the new worker’s clothes while he showers after his shift, and leaving him with only a gorilla suit to wear home. On Whoolander’s six-month anniversary, November 9, 2008, Whoolander’s clothes were replaced with a pink skirt, instead of the gorilla suit. Whoolander was forced to drive home in the pink skirt that day.

The following workday, Whoolander demanded that Donaldson either fire or severely admonish the coworkers who had stolen his clothes. Donaldson told Whoolander that practical jokes happen to all new employees and that hot peppers had been placed in his sandwiches shortly after he joined Blue Steel. Nevertheless, Whoolander insisted on an investigation and threatened to “go up the ladder on this one.” Donaldson then assured Whoolander that there would be an investigation.

The next week, Whoolander’s day shift was changed to the graveyard shift: Monday to Friday from 9pm – 5am. Whoolander was told that a pig-machine operator had been let go from that shift and Whoolander was needed to replace him.

Whoolander's new schedule ultimately led to sleeping problems that negatively impacted his appearance and hindered his weekend modeling. Not only did the quality of Whoolander's photos significantly decline, but also his agent faced increasing difficulty in finding work for a "drained-looking" Whoolander. On December 10, 2008, Whoolander again met with Donaldson, this time to demand he be reinstated to the day shift because the graveyard shift was interfering with his weekend job. Donaldson explained Blue Steel's policy on shift requests and told Whoolander that he could not guarantee when another shift change might become available. When Whoolander asked about the status of the investigation into the "skirt incident," Donaldson stated that it was ongoing.

Whoolander contemplated resigning, but decided to remain with Blue Steel due to the economic recession. On January 9, 2009, after exhausting all available administrative remedies, he brought this action against Blue Steel alleging both a hostile work environment claim and a retaliation claim under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e et seq.

I. Hostile Work Environment Claim Under Title VII

Although every Blue Steel worker is male, Whoolander asserts that sex discrimination fostered a hostile work environment in violation of Title VII. Under Title VII of the Civil Rights Act of 1964: "[i]t shall be an unlawful employment practice for an employer ... to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(1). The Supreme Court has held that, "[Title VII] not only covers 'terms' and 'conditions' in the narrow contractual sense, but 'evinces a congressional intent to strike at the entire spectrum of disparate treatment of men and women in employment.'" *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75, 78 (1998). "When the workplace is permeated with

discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment, Title VII is violated.” *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 21 (1993) (citations and internal quotation marks omitted).

In *Oncale*, the Supreme Court determined that there is no justification for a categorical rule excluding same-sex harassment claims from the coverage of Title VII. *Oncale*, supra at 79. The appropriate inquiry is whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed. *Id.* at 80 (internal citations omitted). Moreover, in a same-sex harassment case, the plaintiff must show that the “conduct at issue was not merely tinged with offensive sexual connotations but actually constituted discrimination...because of...sex.” *Id.* at 81.

There are several situations in which same-sex harassment can be seen as discrimination because of sex. First, same-sex harassment may be found where there is evidence that the harasser sexually desires the victim. *Id.* at 80. Second, same-sex harassment may be found where there is no sexual attraction but where the harasser displays hostility to the presence of a particular sex in the workplace. *Id.* Third, a plaintiff may be able to prove that same-sex harassment was discrimination because of sex by presenting evidence that the harasser's conduct was motivated by a belief that the victim did not conform to the stereotypes of his or her gender. *See Nichols v. Azteca Restaurant Enterprises, Inc.*, 256 F.3d 864, 875 (9th Cir. 2001).²

² This last theory is based on the *Price Waterhouse* theory of gender stereotyping. In *Price Waterhouse v. Hopkins*, the Supreme Court noted, “As for the legal relevance of sex stereotyping, we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group, for [i]n forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes.” *Price Waterhouse v. Hopkins*, 490 U.S. 228, 251 (1989) (internal citations omitted).

As Whoolander has failed to present admissible evidence in opposition to this motion to raise a triable issue of material fact that the harassment he endured at Blue Steel was “because of sex,” Blue Steel’s motion for summary judgment is granted as to Whoolander’s hostile work environment claim.³ Whoolander argues that his well-kept appearance, his designer dress, and his modeling career led the workers at Blue Steel to believe he was effeminate, thereby bringing his claim within the *Price Waterhouse* gender non-conformity framework. *See Price Waterhouse* at 251. However, even when viewing the facts in the light most favorable to Whoolander, it is clear that the conduct of the workers at Blue Steel was motivated by their belief that Whoolander was homosexual. The Court finds the following facts determinative: (1) the use of epithets such as “Heidi Klum,” “Fairy Boy,” and “Queer” in referring to Whoolander; (2) Jouenne’s remark that he “didn’t want [Whoolander] to get carried away with butt-grabbing during [basketball] games” and that Whoolander would “probably like that”; (3) the use of a pink skirt in place of a gorilla suit as part of the semi-annual practical joke; and (4) the mimicking of Whoolander’s hip-shaking gait during his performance on the impromptu catwalk during work hours. These facts, taken together, indicate that the workers were motivated by their belief that Whoolander was a homosexual, not an effeminate man.⁴

Although “harassment on the basis of sexual orientation has no place in our society...Congress has not yet seen fit...to provide protection against such harassment. *Bibby v. Philadelphia Coca Cola Bottling Co.*, 260 F.3d 257, 265 (3d Cir. 2001) (internal citations omitted). In fact, multiple attempts to amend Title VII to include sexual orientation have failed.

³ Therefore, we need not analyze whether the work environment at Blue Steel was sufficiently “severe or pervasive to alter the conditions of [Whoolander’s] employment.” *Harris*, supra at 21. In any event, the fact that practical jokes and horseplay were commonplace at Blue Steel is demonstrative of a culture in which Whoolander was treated much like everyone else. After all, Blue Steel’s motto is “We work hard; we play hard.”

⁴ The absence of any teasing regarding Whoolander’s job performance, which includes arduous and toilsome labor, is compelling. If Whoolander was indeed believed to be effeminate, his coworkers surely would have questioned his employment within a position requiring great strength, skilled machine operation, and, stereotypically, a “real man.”

See Employment Nondiscrimination Act of 1996, S.2056, 104th Cong. (1996); Employment Non Discrimination Act of 1995, H.R. 1863, 104th Cong. (1995); Employment Non-Discrimination Act of 1994, H.R. 4636, 103d Cong. (1994). Thus, Whoolander's claim must fail as a matter of law and Blue Steel's motion for summary judgment is granted on this issue.

II. Retaliation Claim Under Title VII

Whoolander further claims that his reassignment to the graveyard shift constituted employer retaliation for his complaint to Donaldson regarding coworker misconduct. Again, the Court finds that Whoolander's claim fails as a matter of law and grants summary judgment to Blue Steel.

DISTINCTION IN TITLE VII CLAIMS

At the outset, it should be noted that under Title VII of the Civil Rights Act of 1964, the claims of retaliation and hostile work environment are two distinct claims. Whoolander can succeed on a retaliation claim even if his hostile work environment claim proves groundless; the standard is not whether the acts complained about were prohibited, but whether the employee reasonably believed the acts were prohibited. See *Clark County v. Breeden*, 532 U.S. 268, 271, (2001); *Trent v. Valley Elec. Ass'n, Inc.*, 41 F.3d 524, 526 (9th Cir. 1994); *McClair v. Northwest Community Center*, 440 F.3d 320, 335 (6th Cir. 2006); *Payne v. McLemore's Wholesale & Retail Stores*, 654 F.2d 1130 1137-38 (5th Cir. 1981); *Sisco v. J.S. Alberici Construction Co.*, 655 F.2d 146, 150 (8th Cir. 1981); *Berge v. LaCrosse Cooler Co.*, 612 F.2d 1041, 1045-46 (7th Cir. 1980). The only requirement, then, is that Whoolander must hold an "objectively reasonable belief, in good faith, that the activity [he] oppose[s] is unlawful under Title VII." *Moore v. City of Philadelphia*, 461 F.3d 331, 341 (3d Cir. 2006) citing *Clark County v. Breeden*, supra.

Accordingly, although Whoolander's hostile work environment claim is legally insufficient, his claim for unlawful retaliation must be addressed independently.

TITLE VII PROTECTED ACTIVITY

Under Title VII, it is unlawful for an employer to retaliate against an employee who engages in the protected activity of reporting "workplace race or gender discrimination." *Crawford v. Metropolitan Government of Nashville and Davidson County, Tenn.*, __ U.S. __, 129 S.Ct. 846, 849 (2009). Title VII's anti-retaliation provision, found in section 704(a), lists two types of protected activity, (1) opposition to unlawful activity and (2) participation in an investigation of unlawful activity. Section 704(a) states in pertinent part:

It shall be an unlawful employment practice for an employer to discriminate against any of his employees.... Because *he has opposed any practice* made an unlawful employment practice by this subchapter, or because *he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing* under this title.

42 U.S.C. § 2000e-3(a) (2009) (emphasis added). These two clauses of 704(a) are known as the "opposition" clause and "participation" clause.

The opposition and participation clauses have been interpreted as being inclusive rather than exclusive and, as a result, "protected activity" has been broadly construed to include informal complaints or reports or confrontations with management. *See generally, Crawford v. Metropolitan*, *supra*. The parties have stipulated that Whoolander did make a complaint to his supervisor about two occasions of perceived sexual harassment, and asked for disciplinary proceedings to be instituted against the employees in question. The fact that Whoolander did not pursue a formal charge through a regulatory agency has no bearing on this analysis.

THE BURDEN-SHIFTING ANALYSIS OF A RETALIATION CLAIM

To prove a prima facie retaliation claim under Title VII, a plaintiff must prove that: (1) he engaged in a protected activity; (2) he was subject to an adverse employment decision; and (3) there is a causal connection between his protected conduct and an adverse employment action. *Farrell v. Planters Lifesavers Co.*, 206 F.3d 271, 279 (3d Cir. 2000).⁵ As retaliation claims are evaluated under the burden-shifting rules in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), once an employee meets his burden of establishing a prima facie case, the burden shifts to the employer “to articulate some legitimate, nondiscriminatory reason for the employee’s [treatment].”) *Id.* at 802. “The employer satisfies its burden of production by introducing evidence which, taken as true, would permit the conclusion that there was a nondiscriminatory reason for the unfavorable employment decision.” *Fuentes v. Perskie*, 32 F.3d 759, 763 (3d Cir. 1994). Once the employer satisfies its burden, the burden of proof then shifts back to the employee to prove that the articulated reason is pretext for discrimination. *Id.* This pretext claim must be proven by a preponderance of the evidence. *Id.*

As stated above, this Court finds Whoolander’s complaints to his supervisor, Donaldson, to be “protected activity” under Title VII. However, Whoolander has failed to establish a prima facie case because no adverse employment decision resulted from those complaints.

THE ADVERSE EMPLOYMENT PRONG OF A PRIMA FACIE RETALIATION CLAIM

Until the recent Supreme Court decision in *Burlington Northern & Santa Fe Railway v. White*, the United States Circuit Courts of Appeal had not resolved the issue of whether an “adverse employment action” meant a “tangible employment decision,” an “alteration of the

⁵ Other Circuit Courts of Appeal analyze claims of retaliation under either an indirect method or direct method rubric, (See e.g., *Tomanovich v. City of Indianapolis*, 457 F.3d 656, 662-63 (7th Cir. 2006)) or under a four-factor test, (see e.g., *Abbott v. Crown Motor Co.*, 348 F.3d 537, 542 (6th Cir. 2003). Although bound by none of these decisions, this Court prefers the test articulated by the Third Circuit.

terms and conditions of employment,” or simply anything that could be considered materially adverse to a reasonable employee. 548 U.S. 53, 59-61 (2006) (citations omitted). In order to define an “adverse employment action,” *Burlington* created a test with an objective employee requirement and a materially adverse requirement. *Id.* at 57. The Court held that the retaliation provision covers “those (and only those) employer actions that would have been materially adverse to a reasonable employee or job applicant,” and the “employer’s actions must be harmful to the point that they could well dissuade a reasonable worker from making or supporting a charge of discrimination.” *Id.*

Though *Burlington* might seem to broaden the anti-retaliation provision, the materiality requirement still acts to bar claims arising from trivial or *de minimis* harms inflicted in the workplace. “An employee’s decision to report discriminatory behavior cannot immunize that employee from those petty slights or minor annoyances that often take place at work and that all employees experience.” *Id.* at 68. Indeed, not everything that makes an employee unhappy is an actionable “adverse employment decision,” under Title VII’s anti-retaliation provision. *Smart v. Ball State University*, 89 F.3d 437 (7th Cir. 1996). *Burlington* held that the court should apply an objective standard when determining if the employee has been materially adversely affected. The Court reasoned that this approach avoids the “uncertainties and unfair discrepancies that can plague a judicial effort to determine a plaintiff’s unusual subjective feelings.” *Burlington*, *supra* at 68-9. Therefore, this Court’s analysis is based on the premise that Whoolander must show that the change in his shift at Blue Steel constituted a materially adverse employment decision such that it would deter a reasonable employee from engaging in activity protected under Title VII.

The *Burlington* standard is stated in general terms because what a reasonable employee might find materially adverse will change depending on the employment context. The Court did

not hold that a lateral transfer or shift change could never constitute an adverse employment action, and this Court refuses to state the same as a bright-line rule. As Whoolander's shift change, however, did not implicate any demotion or other harassment, and in light of Blue Steel's policy of changing worker shifts at will, this Court finds that Whoolander's shift change was not a materially adverse decision that would dissuade the reasonable employee from engaging in conduct protected by Title VII.

Finding no adverse employment decision, this Court holds that Whoolander has not met his prima facie burden under Title VII's anti-retaliation provision. Accordingly, the causal connection prong need not be addressed. For the aforementioned reasons, this Court grants the Defendant, Blue Steel Corp., summary judgment on the Title VII retaliation claim.

It is so ordered.

Authorities:

Summary Judgment Standard

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Hostile Work Environment

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