Pagination
* BL

Majority Opinion >

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

Kelly Hogan, Plaintiff, v. CoreCivic of Tennessee LLC, Defendant.

No. CV-17-03752-PHX-DLR

May 8, 2019, Filed May 8, 2019, Decided

For Kelly Hogan, an individual, Plaintiff: Nathan Michael Smith, LEAD ATTORNEY, Ariano & Associates, Phoenix, AZ.

For CoreCivic of Tennessee LLC, Defendant: Christopher Miller Suffecool, LEAD ATTORNEY, Kristy Leah Peters, Littler Mendelson PC - Phoenix, AZ, Phoenix, AZ; Robert Shawn Oller, LEAD ATTORNEY, Littler Mendelson, Phoenix, AZ.

Douglas L. Rayes, United States District Judge.

Douglas L. Rayes

WO

ORDER

Plaintiff Kelly Hogan alleges that her former employer, Defendant CoreCivic of Tennessee, LLC, violated Title VII of the Civil Rights Act of 1964 by creating a hostile work environment and retaliating against her for engaging in protected activity. Defendant moves for summary judgment on both claims. (Doc. 58.) The motion is fully briefed.1 (Docs. 61, 64.) For the following reasons, Defendant's motion is granted in part and denied in part.

BACKGROUND

Plaintiff, who worked as a correctional officer for Defendant throughout February 2017, alleges that she endured a hostile work environment permeated with sexual harassment. Plaintiff's complaint alleges a number of specific instances of sexual harassment:

- On her first shift, the shift supervisor commented on her appearance, while another supervisor accused her of coloring her hair to attract inmates.

- Captain Cartwright and correctional officer Harris told graphic sex stories to each other in front of Plaintiff when the three were assigned to the guard shack.

- Staff members accused Plaintiff of painting her nails to attract inmates.

- Sergeant Newton commented that a stain on Plaintiff's uniform looked like semen.

- An inmate informed Plaintiff that other correctional officers were making sexually explicit jokes about her. When Plaintiff confronted the correctional officers identified by the inmate, they did not deny the allegations. Instead, the correctional officers accused Plaintiff of being too close with the inmates.

- Staff members threatened to punish inmates that spoke with Plaintiff.

- Sergeant Henry texted Plaintiff requesting she send him a "sexy pic."

- Correctional officer Harris sexually assaulted Plaintiff in her car, which was parked in the staff lot prior to her shift beginning.

(Doc. 21 ¶¶ 11, 12, 16.)

The evidence supporting these allegations primarily consists of Plaintiff's own testimony from her July 18, 2018 deposition and a post-discovery declaration submitted with her response in opposition to Defendant's motion for summary judgment. Plaintiff's testimony more fully fleshes out some of the allegations included in her complaint. For example, with respect to the incident in the guard shack, Plaintiff explained in her declaration that her supervisor and the

other correctional officer boasted about fellatio, penis size, ejaculation, and having multiple sexual partners. (Doc. 61-2 ¶ 15.) With respect to the alleged sexual assault, Plaintiff stated that she met with Harris in her truck before **[*2]** their 1:00 A.M. shift to discuss how to handle the harassment she was experiencing at work. Soon after getting in her truck, however, Harris grabbed Plaintiff's hand and put it onto his erect penis. Plaintiff states that she pulled her hand away and yelled "no," but Harris pulled her hand back onto his penis, at which point he ejaculated on her hand. Plaintiff told Harris that she was not interested in a sexual liaison. Nevertheless, Harris attempted to kiss Plaintiff. Plaintiff rebuffed his advances and instructed him to leave. (¶¶ 27-28.)

Plaintiff's testimony also supplements the allegations made in her complaint, adding the following episodes of harassment:

- During training, instructors and other correctional officers flirted with Plaintiff and asked her out.

- Sergeant Freeman accused Plaintiff of being too friendly with inmates.

- Officer Luke told other staff that Plaintiff was having inappropriate interactions with inmates.

- Sergeant Frazier told Plaintiff that it looked bad to talk to inmates because she was a woman.

- Officer Valenzuela criticized Plaintiff for being too friendly with inmates.

- Officer Duvall criticized Plaintiff for escorting an inmate to the chaplain. Officer Duval also told Plaintiff she was "dirty staff" and instructed her to stop talking with inmates because she was a woman.

- Plaintiff was told by staff members not to discuss chaplain services with inmates because, as a woman, it made her appear too close to the inmates.

- Sergeant Newton asked Plaintiff if she was dating. After answering Newton's question in the affirmative, Newton began asking about Plaintiff's boyfriend's penis, drawing pictures of penises, and asking which drawing best reflected the size of Plaintiff's boyfriend's penis.

(¶¶ 10-25.)

Plaintiff also explained that she tried to report the sexual harassment on several occasions. Specifically, Plaintiff attempted to report the above incidents to Captain Reyes, a supervisor. Before Plaintiff could finish recounting her concerns, however, Captain Reyes interrupted her, putting his hand up to signal for her to stop talking. Reyes then told Plaintiff that she was doing a great job and not to worry. Plaintiff recalls the interaction lasting no more than 30 seconds. Likewise, Plaintiff tried to tell Sergeants Acuff and Henry. Acuff refused to listen to Plaintiff's allegations, telling her that what she was reporting was how prison worked.

Moreover, Plaintiff stated that Captain Ropelt observed Sergeant Newton's comment that Plaintiff had "cum dripping down [her] shirt." Plaintiff complained about the remark, but Ropelt laughed and stated "Jesus, a sexual harassment case." When Sergeant Newton left the room, Plaintiff renewed her complaint to Captain Ropelt, but he ignored her complaints, telling her to keep up the good work. Plaintiff did not complain to the Human Resources Department or to the Warden while she was employed with Defendant, nor did Plaintiff use the employee grievance procedure.

The sexual harassment, sexual assault, and reporting attempts all occurred before **[*3]** March 1, 2017. Upon arriving at work on March 2, 2017, internal investigator Ian Denham and Officer Renee Spezowka approached Plaintiff, informing her that they needed to search her vehicle because Plaintiff had reportedly been compromised.2 The parties disagree on what prompted the search. Plaintiff contends that the search was done in retaliation for her rebuffing Harris' sexual advances. In support of her position, Plaintiff contends that Denham told her Harris had reported that she was compromised. Defendant, on the other hand, contends that Denham received two reports on March 1, 2017, citing concerns that Plaintiff had been compromised. First, Master Scheduler Patricia Escudero reported observing Plaintiff smoking with a bunch of inmates near the central control building. Next, Sergeant Meyer reported to Denham that Plaintiff was observed passing an unidentifiable object to an inmate. Plaintiff

contends that she passed the inmate a bubble sheet, which was part of her duties that shift.3 After confirming Sergeant Meyer's report via facility security tape, Denham determined further investigation was necessary, including searching Plaintiff's truck for contraband.

During the search, Denham found three sheets of an inmate photo roster. On the reverse side of the inmate roster were Plaintiff's handwritten notes of alleged episodes of harassment. Immediately following the search, Denham interviewed Plaintiff. Although Denham's investigation initially focused on whether Plaintiff had been compromised, many of his questions were about Plaintiff's notes. According to Plaintiff, during this interview she minimized the instances of sexual harassment memorialized in her notes because the stated focus of the investigation was her workplace conduct. Plaintiff did not inform Denham that she had been sexually assaulted by Harris. Nor did Plaintiff inform Denham about any other incidents of harassment not included in her notes.

After the interview, Plaintiff drafted a resignation letter that stated she wanted to resign immediately. Plaintiff testified that she penned the resignation letter in response to threats from Denham. According to Plaintiff, towards the end of the interview Denham turned the tape recorder off and told her that she was not suited to be a correctional officer, had no future working for Defendant, and would be reassigned to perimeter duty. Denham disputes that he told Plaintiff she would be reassigned to perimeter duty and contends he did not have the authority to make such a reassignment.

LEGAL STANDARD

Summary judgment is appropriate when there is no genuine dispute as to any material fact and, viewing those facts in a light most favorable to the nonmoving party, the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a) . Summary judgment may also be entered "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett* ***[*4]*** , 477 U.S. 317 , 322 , 106 S. Ct. 2548 , 91 L. Ed. 2d 265 (1986). A fact is material if it might affect the outcome of the case, and a dispute is genuine if a reasonable jury could find for the nonmoving party based on the competing evidence. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 , 248 , 106 S. Ct. 2505 , 91 L. Ed. 2d 202 (1986).

The party seeking summary judgment "bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of [the record] which it believes demonstrate the absence of a genuine issue of material fact." *Celotex*, 477 U.S. at 323 . The burden then shifts to the non-movant to establish the existence of a genuine and material factual dispute. Id. at 324 . The non-movant "must do more than simply show that there is some metaphysical doubt as to the material facts," and instead "come forward with specific facts showing that there is a genuine issue for trial." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 , 586-87 , 106 S. Ct. 1348 , 89 L. Ed. 2d 538 (1986) (internal quotation and citation omitted). Conclusory allegations, unsupported by factual material, are insufficient to defeat summary judgment. *Taylor v. List*, 880 F.2d 1040 , 1045 (9th Cir. 1989). If the non-movant's opposition fails to cite specifically to evidentiary materials, the court is not required to either search the entire record for evidence establishing a genuine issue of material fact or obtain the missing materials. *See Carmen v. S.F. Unified Sch. Dist.*, 237 F.3d 1026 , 1028-29 (9th Cir. 2001); *Forsberg v. Pac. N.W. Bell Tel. Co.*, 840 F.2d 1409 , 1417-18 (9th Cir. 1988).

DISCUSSION

I. Preliminary Matter

At the outset, the Court addresses Defendant's argument that certain paragraphs of Plaintiff's declaration should be disregarded. (Doc. 64 at 5-7, 11.) "The general rule in the Ninth Circuit is that a party cannot create an issue of fact by an affidavit contradicting his prior deposition testimony." *Van Asdale v. Int'l Game Tech.*, 577 F.3d 989 , 998 (9th Cir. 2009). The sham affidavit rule is necessary because "if a party who has been examined at length on deposition could raise an issue of fact simply by submitting an affidavit contradicting his own prior testimony, this would greatly diminish the utility of summary judgment as a procedure for screening out sham issues of fact." *Kennedy v. Allied Mut. Ins. Co.*, 952 F.2d 262 , 266 (9th Cir. 1991). However, "the sham affidavit rule should be applied with caution because it is in tension with the principle that the court is not to make credibility

determinations when granting or denying summary judgment." *Yeager v. Bowlin*, 693 F.3d 1076 , 1080 (9th Cir. 2012).

To trigger the sham affidavit rule, the Court "must make a factual determination that the contradiction is a sham, and the inconsistency between a party's deposition testimony and subsequent affidavit must be clear and unambiguous to justify striking the affidavit." *Id .* "The non-moving party is not precluded from elaborating upon, explaining or clarifying prior testimony elicited by opposing counsel on deposition and minor inconsistencies that result from an honest discrepancy, a mistake, or newly discovered evidence afford no basis for excluding an opposition affidavit." *Id .*

Defendant's reply memorandum includes a table setting out perceived inconsistencies it believes demonstrate that Plaintiff's declaration is **[*5]** a sham. (Doc. 64 at 6-7.) Defendant contends that Plaintiff's deposition testimony contradicts her declaration as to select instances of harassment, arguing "Plaintiff did not identify this supposed harassment when asked whether there were any other incidents of harassment." (*Id.*) The deposition testimony Defendant cites in support, however, is not so clear cut:

> Q: . . . I want to know if there's any other incidents that we haven't talked about, any other incidents of sexual harassment?
>
> A: Yes. A lot of them, yes.
>
> Q: What are they?
>
> A: Harris pulling out his penis in my vehicle and trying to make me touch it.
>
> Q: We'll talk about that in a second. Any other incidents?
>
> A: Henry asking me to - - let's see. Yeah, basically, Henry trying to ask me to go out with him and he wanted an opportunity to be with me. And he sent me a message over Facebook saying, "I still wish we would have hooked up."
>
> Q: And those incidents, the one from Dante Henry you talked about where he asked you out and the one from Mr. Doty, those occurred after your employment ended; right?
>
> A: I'm not sure of the dates.
>
> Q: Right. I'm asking you about incidents during your employment with [Defendant].
>
> A: Okay.
>
> Q: We've talked - - we're going to talk about Sergeant Harris. Any other incidents during your employment with [Defendant] that we haven't talked about besides Sergeant Harris' conduct?
>
> A: Can you go back to that question, so I can think about it?
>
> Q: Yeah, if you think of anything else, let me know.
>
> A: Yeah. Okay.

(Doc. 58-2 at 118:6-119:19.)

The sham affidavit rule seeks to strike declarations where the inconsistencies are "so extreme" as to constitute contradiction. This is not the case here. Although Plaintiff's failure to supplement her deposition testimony with these new allegations may be fertile ground for cross examination, Defendant cites no portion of the deposition testimony where defense counsel returned to the question and clarified that Plaintiff could remember no other instances of harassment.4 The Court therefore cannot say that Plaintiff's declaration contradicts or is inconsistent with her deposition testimony, wherein Plaintiff more or less stated that she experienced other forms of harassment, but that she could not immediately recall the details.

Defendant also contends that Plaintiff contradicted her deposition testimony that she was personally unaware of who reported to Denham that she was compromised when, in her declaration, she states that Denham told her Harris was the source of the report. (Doc. 64 at 7.) Defendant conflates what Plaintiff personally knew with what she was told by Denham.

> Q: You say that "Someone reported that [Plaintiff] was suspected of passing contraband to prisoners." At the time you were being investigated, do you know who that was?

A: I was - - at the time of investigation?

Q: Yes.

A: The investigator said that he had spoke [sic] to Harris. Harris was the only person that was brought up in the conversation, really, I mean, for the most part, so . . .

Q: Well, I guess my question is a little bit different.

A: Okay.

Q: You say someone reported you of passing contraband to the prisoners. Do you know who reported you of **[*6]** passing something to the prisoner?

A: No.

Q: You don't know. Did Mr. Denham say it was Mr. Harris that reported you?

A: Right before he started talking to me, he told me that he had spoke [sic] to Harris. And I don't remember exactly what he had said, but it was the gist that Harris had said it.

Q: Do you know now who reported that you were suspected of passing contraband to prisoners as you sit here today?

A: Not entirely sure, no.

(Doc. 61-3 at 173:14-174:19.) Plaintiff's testimony is consistent with her declaration that Denham told her Harris made the report, but that she did not have independent, personal knowledge of such.

For these reasons, the Court will not strike the portions of Plaintiff's declaration that Defendants have singled out in their reply.

II. Hostile Work Environment

"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 Sys., Inc.*, 510 U.S. 17 , 21 , 114 S. Ct. 367 , 126 L. Ed. 2d 295 (1993) (internal quotations and citations omitted). To establish a prima facie hostile work environment claim, a plaintiff must demonstrate: "(1) that [s]he was subjected to verbal or physical conduct of a . . . sexual nature; (2) that the conduct was unwelcome; and (3) that the conduct was sufficiently severe or pervasive to alter the conditions of [her] employment and create an abusive work environment." *Vasquez v. Cty. of L.A.*, 349 F.3d 634 , 642 (9th Cir. 2003). The working environment must be "both objectively and subjectively offensive, one that a reasonable person would find hostile and one that the victim in fact did perceive to be so." *EEOC v. Prospect Airport Servs., Inc.*, 621 F.3d 991 , 997 (9th Cir. 2010). In determining whether a work environment is sufficiently hostile, the Court must look "at all the circumstances," including "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 . "It is enough if such hostile conduct pollutes the victim's workplace, making it more difficult for her to do her job, to take pride in her work, and to desire to stay in her position." *Fuller v. Idaho Dep't of Corr.*, 865 F.3d 1154 , 1162 (9th Cir. 2017).

Defendant does not argue that Plaintiff lacks evidence that she was subjected to verbal or physical sexual conduct. Instead, Defendant argues that Plaintiff cannot show that she found the conduct offensive5 or that it was sufficiently severe or pervasive. Alternatively, Defendant contends that, even if Plaintiff can make a prima facie case of a hostile work environment, it is entitled to summary judgment on its "reasonable care" affirmative defense.

A. Prima Facie Case

Defendant argues that Plaintiff did not consider the alleged harassment to be offensive, nor was the conduct so severe and pervasive that it created an abusive work environment. For support, Defendant highlights that Plaintiff's contemporaneous notes include only a single instance of harassment now included in the **[*7]** lawsuit—Newton's comment about Plaintiff having semen on her shirt. (Doc. 58 at 14.) Defendant also points to Plaintiff's email to the Equal Employment Opportunities Commission ("EEOC"), in which Plaintiff stated that her notes evidence "every

time" she was harassed. (*Id.*) Further, Plaintiff stated in her interview with Denham that Newton's comment "did not even matter." (*Id.*) Defendant also contends that Plaintiff's allegations "are a prime example of a patchwork of unconnected, isolated comments by a mixture of co-workers and alleged supervisors that does not meet the high standard of 'extreme conduct' sufficient to alter the terms and conditions of employment." (Doc. 58 at 17.)

Defendant paints one version of events that a jury reasonably could adopt. For the Court to adopt this version of events, however, it would need to draw inferences from the evidence in Defendant's favor. The Court cannot do this when ruling on a motion for summary judgment.

Drawing all reasonable inferences in Plaintiff's favor, as the Court must at this stage, the Court concludes that a jury reasonably could find that the alleged instances of sexual harassment were both offensive to Plaintiff and sufficiently severe and pervasive. For instance, a reasonable jury could give little weight to Plaintiff's stray comment to Denham given that it was made during an interview with the stated purpose of investigating if Plaintiff was compromised, not whether she had been sexual harassed. Moreover, there is other evidence from which a jury could reasonably find that Plaintiff found the conduct subjectively hostile. For example, Plaintiff found the conduct disturbing enough to keep contemporaneous notes of at least some episodes of harassment and to attempt to report allegations of harassment on several occasions. (Doc. 61-2 ¶¶ 30-36.) A jury also could reasonably find that, cumulatively, the verbal and physical sexual conduct to which Plaintiff alleges she was subjected was severe and pervasive enough to alter the conditions of the workplace. *See, e.g., Burrell v. Star Nursery, Inc.*, 170 F.3d 951 , 953-55 (9th Cir. 1999).

B. Reasonable Care Defense

Under the reasonable care defense, an employer is not liable on a hostile work environment claim if it can show that (1) it exercised reasonable care to prevent and correct harassment, and (2) the plaintiff unreasonably failed to take advantage of preventive or corrective opportunities. *See Hardage v. CBS Broad., Inc.*, 427 F.3d 1177 , 1184 (9th Cir. 2005). An employer cannot assert a reasonable care defense, however, if the employee has been subjected to unlawful "tangible employment action." *Holly D. v. Cal. Inst. of Tech.*, 339 F.3d 1158 , 1167 (9th Cir. 2003).

With respect to the first element, "an employer's adoption of an anti-harassment policy and its efforts to disseminate the policy to its employees establish that [the employer] exercised reasonable care to prevent sexual harassment in the workplace." *Hardage*, 427 F.3d at 1185 (internal quotation and citation omitted). Here, Defendant promulgated a sexual harassment policy. (Doc. 58-2 at 113-16.) The policy describes prohibited conduct, enforcement of the policy, and the **[*8]** company's internal complaint procedure, among other things. (*Id.*) According to the policy, "[s]exual harassment includes repeated offensive sexual flirtations; repeated verbal abuse of a sexual nature; sexually degrading words used to describe an individual; the display in the workplace of sexually suggestive objects or pictures; [and] sexual contact or activity in the workplace . . . ." (Id. at 113.) The policy also "encourages and expects any employee who believes he or she is or has been a victim of harassment, sexual harassment, or retaliation, or who becomes aware that another employee has been a victim . . . , to report the circumstances . . . ." (Id. at 114.) Pursuant to the policy, an employee may report to: the employee's supervisor or any other supervisor with whom the employee feels comfortable; the Warden; the Human Resources ("HR") Representative; Defendant's Ethics and Compliance Helpline; or through the Employee Grievance Procedures. (*Id.*) Moreover, any supervisor "who becomes aware of conduct that may constitute harassment, sexual harassment, or retaliation must immediately report such conduct to the Warden . . . or to the HR Representative." (Id. at 115.) Finally, the policy requires reports of violations to be "escalated" to the legal department and "promptly and thoroughly investigated." (*Id.*) Plaintiff does not dispute that she received a copy of the policy during training. (Doc. 61-2 ¶ 6.)

As part of the first prong, however, Defendant must demonstrate that it took reasonable steps to promptly correct Plaintiff's complaint of sexual harassment. *Hardage*, 427 F.3d at 1185-86 . Although an "investigation is a key step," courts must "consider the overall picture to determine whether the employer's response was appropriate." Id. at 1186 (internal quotation and citation omitted). "Notice of the sexually harassing conduct triggers an employer's duty to take

prompt corrective action that is reasonably calculated to the end the harassment." *Swenson v. Potter*, 271 F.3d 1184 , 1192 (9th Cir. 2001) (internal quotation and citation omitted).

Here, there is evidence that Defendant did not take reasonable and prompt steps to correct Plaintiff's complaints of sexual harassment. For example, there is evidence that Captain Ropelt heard Sergeant Newton's comment to Plaintiff that a stain on her shirt looked like semen. Plaintiff complained about these comments twice. Yet there is no evidence that Captain Ropelt complied with the sexual harassment policy by immediately reporting the conduct to the Warden or HR representative. Nor is there evidence that Captain Ropelt escalated the reported violation to the legal department for a prompt and thorough investigation as required by the policy. Likewise, there is evidence that Acuff, Reyes, and Henry acted unreasonably by cutting Plaintiff off, preventing her from giving more detailed complaints.6 The responses from these supervisors to Plaintiff's reports suggest that they generally understood Plaintiff to be raising allegations harassment, yet there is no evidence that they relayed these concerns to the Warden, HR representative, or legal department **[*9]** as required by the policy. A jury hearing this evidence reasonably could find that the Defendant's failure to respond was unreasonable. Defendant therefore is not entitled to summary judgment on its reasonable care defense.

III. Retaliation

Plaintiff alleges that Defendant investigated and constructively discharged her in retaliation for complaining of sexual harassment. Title VII "prohibits retaliation against an employee 'because [she] has opposed any practice made an unlawful employment practice'" by Title VII. *Nelson v. Pima Cmty. College*, 83 F.3d 1075 , 1082 (9th Cir. 1996) (quoting 42 U.S.C. § 2000e-3(a)). Plaintiff can make a prima facie case of unlawful retaliation by producing evidence that (1) she engaged in protected activity, (2) she suffered an adverse employment action, and (3) there was a causal connection between the two. *See Vasquez*, 349 F.3d at 642 . If Plaintiff makes a prima facie case, the burden of production shifts to Defendant to present a legitimate, non-retaliatory reason for the adverse employment action. *See Brooks v. City of San Mateo*, 229 F.3d 917 , 928 (9th Cir. 2000). If Defendant carries this burden, Plaintiff "must demonstrate a genuine issue of material fact as to whether the reason advanced by [Defendant] was a pretext." *Id .*

Defendant does not argue that Plaintiff did not engage in protected activity.7 Instead, Defendant challenges Plaintiff's ability to show that she suffered an adverse employment action, or that any adverse action was causally connected to her protected activity. (Doc. 64 at 10.) Alternatively, Defendant contends that Plaintiff cannot show that its reasons for investigating her were pretextual.

A. Adverse Action

Plaintiff contends, among other things, that she suffered an adverse action when Denham initiated a frivolous investigation into her conduct in retaliation for resisting Harris' attempted sexual assault. (Doc. 21 ¶¶ 43-45.) In response, Defendant argues that "an investigation is not an adverse employment action under the law," citing as support *Campbell v. Hawaii Department of Education*, 892 F.3d 1005 (9th Cir. 2018). (Doc. 64 at 10.) *Campbell* does not stand for such a proposition. Quite the opposite—in *Campbell*, the Court opined that "merely investigating an employee—regardless of the outcome of that investigation—likely can support a claim for Title VII retaliation." 892 F.3d at 1022 (citing *Lakeside-Scott v. Multnomah Cty.*, 556 F.3d 797 , 803 n.7 (9th Cir. 2009); *Poland*, 494 F.3d at 1180). A jury could reasonably find that the investigation into Plaintiff constitutes an adverse action.

B. Causal Connection

Next, Defendant argues that "even if Plaintiff could show an adverse employment action, she cannot demonstrate a causal connection between any protected activity and that employment action." (Doc. 64 at 10.) Specifically, Defendant contends that Denham's investigation cannot be retaliatory because he had no knowledge of the alleged sexual assault by Harris, or any other protected behavior undertaken by Plaintiff. (Doc. 64 at 10.) The Court agrees. Plaintiff's only evidence of causation is the temporal proximity between the protected activity and the adverse employment action. Under the factual circumstances **[*10]** in this case mere temporal proximity is insufficient for Plaintiff to demonstrate the causal connection. *See, e.g., Fazeli v. Bank of Am., NA*, 525 Fed. App'x 570 , 571 (9th Cir. 2013).

Even assuming that Plaintiff could establish a prima facie case of retaliation, Defendant is entitled to summary judgment because it has proffered a legitimate non-retaliatory reason for investigating Plaintiff, and Plaintiff has not offered specific evidence undermining the reason.

C. Pretext

To meet its burden, "the employer need only produce admissible evidence which would allow the trier of fact rationally to conclude that the employment decision had not been motivated by [retaliatory] animus." *See Texas Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248 , 257 , 101 S. Ct. 1089 , 67 L. Ed. 2d 207 (1981). In this case, Defendant has produced evidence that Denham initiated the investigation after receiving a report that Plaintiff passed an unidentified object to an inmate who was not supposed to be in her building. (Doc. 58 at 5.) After surveillance video confirmed this report, Denham determined that further investigation was necessary. (*Id.*) Denham elected to search Plaintiff's vehicle for contraband because he was concerned Plaintiff could have been passing the inmate drugs, cell phones, love letters, or some other contraband. (*Id.*) After concluding the search, Denham interviewed Plaintiff about her interactions with the inmate on video. (Id. at 7.) This evidence sufficiently establishes a non-retaliatory motive for the investigation. *See Burdine*, 450 U.S. at 257 .

Plaintiff fails to carry her burden of showing that Defendant's explanation for investigating her interaction with the inmate was pretext for retaliation. To demonstrate that the employer's reason is pretextual, a plaintiff may either show that the employer's proffered explanation is "unworthy of credence" or that a retaliatory reason "more likely motived the employer." *Chuang v. Univ. of Cal. Davis*, 225 F.3d 1115 , 1123-24 (9th Cir. 2000); *see also Gray v. Masterfoods USA*, 304 Fed. App'x. 611 , 612 (9th Cir. 2008) (applying the same test for pretext in a retaliation claim as that applied in discrimination claims). In this Circuit, pretext can be proven with either direct or circumstantial evidence, but where the plaintiff relies on circumstantial evidence to prove pretext, that evidence must be "specific" and "substantial" to survive summary judgment. *Stegall v. Citadel Broad. Co.*, 350 F.3d 1061 , 1066 (9th Cir. 2003). Evidence of pretext is both specific and substantial when it is "sufficient to raise a genuine issue of material fact under Rule 56 []." *Cornwell v. Electra Cent. Credit Union*, 439 F.3d 1018 , 1029 (9th Cir. 2006).

Plaintiff contends that Defendant's reason for the search must be pretext because passing out a bubble sheet is not prohibited or cause for an investigation. (Doc. 61 at 10.) Plaintiff's argument presupposes that Denham knew it was a bubble sheet when he started the investigation. There is no evidence of as much. Instead, the only evidence is that Denham was alerted to the fact that Plaintiff passed an unknown object to an inmate who was not in the proper location. (Doc. 58-4 at 16:10-18:23.) That the investigation later showed Plaintiff had passed out a permissible item does **[*11]** not undermine the purpose of the investigation.

Next, Plaintiff contends that it was unreasonable for Denham to investigate her and not the inmate. (Doc. 61 at 10.) As a factual matter, however, Denham investigated both the inmate and Plaintiff. (Doc. 61:5 at 68:18-20; Doc. 61-8 at 45:2-13.) Moreover, whether Denham went about his investigation in a prudent manner does not undermine the legitimacy of his reason for investigating. Finally, Plaintiff contends that Harris, her alleged assailant, was present during the interview of the inmate. (Doc. 61 at 11.) Plaintiff fails to explain, however, how Harris' presence at the inmate's interview shows that Defendant's proffered reason for initiating the investigation is pretextual, especially given that Plaintiff did not inform Denham that Harris had sexual assaulted her.

For these reasons, Defendant is entitled to summary judgment on Plaintiff's retaliation claim.

IT IS ORDERED that Defendant's motion for summary judgment (Doc. 58) is **GRANTED** as to Plaintiff's retaliation claim and **DENIED** as to Plaintiff's hostile work environment claim.

IT IS FURTHER ORDERED that the parties shall appear telephonically on ***May 16, 2019 at 10:00 a.m.*** in Courtroom 606, 401 West Washington Street, Phoenix, AZ 85003 before Judge Douglas L. Rayes to discuss setting a trial date and other pre-trial deadlines.

Dated this 8th day of May, 2019.

/s/ Douglas L. Rayes

Douglas L. Rayes

United States District Judge

---

fn 1

Plaintiff requested oral argument, but after reviewing the parties' briefing and the record, the Court finds oral argument unnecessary. *See* Fed. R. Civ. P. 78(b) ; LRCiv. 7.2(f) .

fn 2

Although the parties do not define compromised, it appears that a correctional officer is deemed to be compromised when engaging in prohibited behavior on behalf of, or with, an inmate.

fn 3

Bubble sheet is not defined in the parties' briefs.

fn 4

Moreover, disregarding these new allegations would not affect the Court's ruling because, even without these additional allegations, there is sufficient evidence from which a jury reasonably could find that Plaintiff experienced subjectively objectionable harassment that was severe and pervasive.

fn 5

The Court finds it more suitable to discuss the second element of a hostile work environment claim in terms of whether the plaintiff considered the conduct at issue to be offensive or hostile, rather than whether the conduct was "unwelcome" or "unwanted." By referring to the second element as such, the Court does not modify the substance of the second element or Plaintiff's burden.

fn 6

Defendant contends that Plaintiff's alleged reports to Acuff, Reyes and Henry were undetailed and thus insufficient to create a genuine factual dispute as to whether Defendant was on notice and failed to respond reasonably. Defendant relies on *Hardage* as support for this proposition. (Doc. 58 at 12.) The facts in *Hardage* , however, are distinguishable from the facts in this case. In *Hardage*, the court determined that it was reasonable for the employer to not investigate harassment allegations where the employee was vague about the extent and nature of the harassment and the employee specifically asked the supervisor to not investigate the matter because he wanted to handle the situation himself. 427 F.3d at 1188 . Here, Defendant does not contend that Plaintiff requested her supervisors not to investigate or intervene. Moreover, Plaintiff contends that the lack of detail in her complaints was due to her supervisors cutting her off, which, if credited by a jury, could indicate a lack of responsiveness or an unwillingness to listen to complaints.

fn 7

Plaintiff argues that by resisting sexual harassment, including Harris' sexual assault, she was engaging in a protected activity. *See* https://www.eeoc.gov/laws/types/facts-retal.cfm (listing "resisting sexual advances" as protected activity); *see also Black v. City & Cty. of Honolulu*, 112 F. Supp. 2d 1041 , 1049 (D. Haw. 2000) ("courts have held that refusal of sexual advances is sufficient to constitute protected activity") (collecting cases). Defendant does not challenge this assertion.

General Information

Judge(s)	Douglas L. Rayes
Related Docket(s)	2:17-cv-03752 (D. Ariz.);
Topic(s)	Employment Law; Civil Procedure
Parties	Kelly Hogan, Plaintiff, v. CoreCivic of Tennessee LLC, Defendant.
Court	United States District Court for the District of Arizona