Team Number 1729

CASE NO.: 15:17-cv-00068-CHR-ESM

IN THE UNITED STATES DISTRICT COURT

FOR THE FOURTEENTH CIRCUIT

LINDSAY BOOTH,

Plaintiff,

v.

SUDDEN VALLEY CONSTRUCTION COMPANY

Defendant.

SUPPLEMENTAL BRIEFING IN SUPPORT OF DEFENDANT'S

MOTION TO DISMISS

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Supreme Court Opinions

Second Circuit Opinions

Seventh Circuit Opinions

Eleventh Circuit Opinions

Federal District Court Opinions

United States Code

Rules

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF STETSON
METTS CITY DIVISION

LINDSAY BOOTH,

CASE NO.: 15:17-cv-00068-CHR-ESM

Plaintiff

v.

SUDDEN VALLEY CONSTRUCTION COMPANY,

Defendant.

_____/

DEFENDANT'S SUPPLEMENTAL BRIEFING IN SUPPORT OF MOTION TO DISMISS

QUESTION PRESENTED

The Court requested the parties to submit a supplemental briefing on the following two issues: (1) whether 42 U.S.C. § 2000e-2(a)(1) protects discrimination based on an employee's sexual orientation; and (2) whether the plaintiff has properly pleaded a claim for retaliation under 42 U.S.C. § 2000e-3(a), including but not limited to the issue of whether a person who rejects a supervisor's sexual advance has engaged in a protected activity to sufficiently state a retaliation claim.

STATEMENT OF JURISDICTION

This Court has federal question jurisdiction over this action which is based on Title VII of the Civil Rights Act of 1964. Jurisdiction over this case pursuant to 28 U.S.C. §§ 1331, 1343 (2012), and venue is proper under 28 U.S.C. § 1391. Plaintiff and Defendant reside in the City of Metts, in the State of Stetson and are subject to this Court's authority.

STANDARD OF REVIEW

To survive a motion to dismiss under Fed. R. Civ. P. 12(b)(6), "a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). A claim is facially plausible when the plaintiff's pleaded facts allow "the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.*

STATEMENT OF FACTS

Sudden Valley Construction Company ("SVCC") is developing a commercial and residential site in Balboa Island, Stetson, known as the Milford Manor (the "Project"). Plaintiff's Complaint ("Compl.) ¶ 2. The project broke ground on February 29, 2016, and was scheduled to open by Fall 2019. *Id.* It is divided into four quadrants, with a construction project engineer assigned to each quadrant; the project engineers report to the construction superintendent, Jesse Bowers ("Ms. Bowers"). *Id.* ¶¶ 6, 10.

Ms. Bowers, an SVCC employee since 2008, was promoted to construction superintendent for the Milford Manor project in the Fall of 2015. Compl. ¶ 9. As the construction superintendent Ms. Bowers handles the day-to-day operations, controls the short and long-term schedules, and supervises the performance of the four project engineers. *Id.* ¶ 10.

Lindsay Booth ("Ms. Booth")—who is openly homosexual—was hired by Tobias Funk ("Mr. Funk"), SVCC's Vice President, as one of the four construction project engineers on February 1, 2016. Compl. ¶¶ 5-8. As a project engineer, Ms. Booth was responsible of supervising and assisting a team of twenty-eight construction workers in the project's Northeast quadrant. *Id.* ¶¶ 7, 14. This quadrant, was an anticipated location for several stores, including a Jaguar Land Rover dealership ("Jaguar"). *Id.* ¶ 15. Jaguar's lease required SVCC to report its progress quarterly, and it allowed Jaguar to terminate the lease if there was "any substantial delay in the development of its dealership." *Id.*

Despite an accident that injured three construction workers which occurred under Ms. Booth's supervision, she received a positive review. Compl. ¶¶ 16, 17. Ms. Booth was described as "an efficient and effective project engineer" who "handled the stresses and problems of the first quarter of development with ease." *Id.* ¶ 17. Ms. Bowers, to whom Ms. Booth reported weekly, signed the review and delivered it along with Mr. Funk on June 28, 2016. *Id.* ¶¶ 14, 17. Following the

review, Ms. Booth received a $4,500.00 bonus despite the construction in her quadrant being four days behind schedule. *Id.* ¶¶ 17, 18.

After six months of construction, on September 12, 2016, Ms. Booth and Ms. Bowers became aware of a defect in the foundation for the Jaguar dealership. Compl. ¶ 19. The defect required the foundation to be demolished and rebuilt. *Id.* Ms. Booth, the quadrants team supervisor, fired the four construction workers responsible for the defect. *Id.* ¶¶ 7, 20. About a month later, on October 8, 2016, when Ms. Booth performed an internal review, she realized that the Northeast quadrant was three weeks behind schedule. *Id.* ¶ 21. When Ms. Booth informed Ms. Bowers about the delays—three days later— she also indicated that the Northeast quadrant was unlikely to open before February 2020; they were to work overtime to remedy the delays. *Id.* ¶¶ 21, 22.

According to Ms. Booth, she and Ms. Bowers were working alone the night of October 19, 2016. Compl. ¶ 23. Ms. Booth, who was concerned about her upcoming review, alleges that Ms. Bowers praised her work, made a sexual advance to her, and offered to "take care of the review," which she "unequivocally" rejected. *Id.* ¶¶ 23, 24. According to Ms. Booth, some days later she overheard one of her construction members, Marta Estrella ("Ms. Estrella"), use a derogatory term about homosexuals in reference to her. *Id.* ¶ 26. While Ms.

Booth reprimanded the employee, she says she learned that Ms. Estrella heard it from Ms. Bowers. *Id.*

Twenty days after determining that the project would not open on time, Ms. Booth received her quarterly performance review. Compl. ¶¶ 21, 27. Like before, the review was signed by Ms. Bowers, and delivered by her and Mr. Funk. *Id.* ¶ 27. The review indicated that the project required its engineers to have "strong moral values that Ms. Booth lacks," and that "Ms. Booth's *performance* between June and October had *declined significantly*, to the point that the Milford Manor team may need to be *restructured to* acc*ommodate for delays attributed to Ms. Booth's dreary leadership*." *Id.* (emphasis added).

Due to the "substantial delay" in the development of the Northeast quadrant and the unrest in the United Kingdom from the Brexit referendum, on November 2, 2016, Jaguar terminated its lease with SVCC. Compl. ¶ 29. The delay pushed the opening date from the Fall 2019, to mid-January 2020. *Id.* ¶¶ 6, 28. Days later, during a meeting between Ms. Bowers and Mr. Funk allegedly, Ms. Bowers went on a "profanity-ridden tirade against Ms. Booth" which included personal and professional attacks. *Id.* ¶ 30.

On November 8, 2016, Ms. Bowers met with Ms. Booth to inform her that she was being demoted and would not receive a quarterly bonus. Compl. ¶¶ 32, 33. Ms. Booth alleges that Ms. Bowers told her that she would have more time for her

spouse. *Id.* ¶ 32. Yet when Ms. Booth asked Mr. Funk about the demotion, he said that the "change in position" was permanent while "the British continue[d] to be up in arms." *Id.* ⁋ 34.

About a week later, on November 14, 2016, Ms. Booth delivered her resignation letter to Mr. Funk, alleging that SVCC's actions amounted to constructive discharge. Compl. ¶ 35. On November 29, 2016, Ms. Booth filed a charge of discrimination with the Equal Opportunity Commission (EEOC). *Id.* ¶ 36. There, she alleged she was discriminated and retaliated against by SVCC because she refused Bowers' sexual advance on October 19, 2016. *Id.* Ms. Booth received a right-to-sue letter from the EEOC on June 6, 2017 and this suit followed. *Id.* ¶ 37.

SUMMARY OF ARGUMENT

This Court should grant SVCC's motion to dismiss because the Plaintiff has failed to show she has a cause of action upon which relief can be granted. First, sexual orientation is not an enumerated classe under Title VII, and giving the legislative history and purpose of the statute, it does not follow that the word "sex" encompasses "sexual orientation."

Second, the Plaintiff has not shown she engaged in a protected activity for purposes of Title VII, nor that there is a causal connection between her rejection of

the alleged sexual advance and her demotion. For these reasons, the Court should grant the motion to dismiss.

ARGUMENT

I. THIS COURT SHOULD GRANT SVCC'S MOTION TO DISMISS BECAUSE SEXUAL ORIENTATION IS NOT A PROTECTED CLASS UNDER TITLE VII.

Title VII of the Civil Rights Acts of 1964 makes it unlawful for an employer "to discriminate against any individual . . . because of such individual's . . . sex." 42 U.S.C. § 2000e-2(a)(1). The inclusion of "sex" as a protected category was a last-minute decision by Congress, not leaving much legislative history to guide the interpretation of what Congress meant by "sex." *See Meritor Sav. Bank, F.S.B. v. Vinson*, 477 U.S. 57, 63-64 (1986). However, "it is certain that the word 'sex' in Title VII had no immediate reference to homosexuality." *Hively v. Ivy Tech Cmty. Coll. of Ind.*, 853 F.3d 339, 353 (7th Cir. 2017) (Posner, J., concurring) (emphasis omitted).

"In passing Title VII, Congress made the simple but momentous announcement that sex, . . . [is] not relevant to the selection, evaluation, or compensation of employees. Yet the statute *does not purport to limit other qualities and characteristics* that employers *may* take into account in making employment decisions." *Price Waterhouse v. Hopkins*, 490 U.S. 228, 239 (1989) (emphasis added). Title VII "evinces a congressional intent to strike at the entire spectrum of disparate treatment of men and women." *Meritor,* 477 U.S. at 64

(internal citation and quotation omitted). As the Supreme Court noted, the critical issue under Title VII "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." *Oncale v. Sundowner Offshore Servs.*, 523 U.S. 75, 80 (1998) (internal citation omitted).

Until recently, all circuits agreed that discrimination based on sexual orientation was not a form of sex discrimination, and these are rather different forms of discrimination. *See Hively*, 853 F.3d at 361 (Sykes, J., dissenting). Due to the lack of debate—outside the social and political sphere—and agreement among the lower courts, the Supreme Court has never addressed the question whether sex discrimination encompasses sexual orientation. *See id.* at 340, 361. Despite existing precedent, the *Hively* court felt compelled to revisit this question, and it erroneously concluded that discrimination due to sexual orientation constitutes sex discrimination under Title VII. *See id.* at 341.

A. Traditional Notions of Statutory Interpretation Do Not Allow the Conclusion That Sexual Orientation Is a Protected Category Under Title VII.

The determination of what it means to discriminate because of someone else's sex, "is a pure question of statutory interpretation." *Hively*, 853 F.3d at 343. In interpreting the statute, there are three different approaches available to the courts. *Id.* at 352 (Posner, J. concurring).

The most conventional and least controversial form of statutory interpretation is to extract the *original intent* of the statute, namely, what the legislators understood to be conveyed by the words contained in the statute. *Id.* "It is a fundamental cannon of statutory construction that . . . words will be interpreted as taking their ordinary, contemporary, common meaning;" where "contemporary" means contemporaneous to the enactment of the statute, and not "contemporary" as in "now." *Id.* at 362 (Sykes, J., dissenting) (internal citations omitted). As the majority in *Hively* states, "the analysis must begin with the statutory text," *id.* at 343, yet sometimes "the best source for disambiguation is the broader context of the statute that the legislature . . . passed;" which leads to the second form of interpretation, *id.* at 362 (Posner, J., concurring).

The second form of interpretation is one which considers the limitations on language and how sometimes a law, if taken literally, would "bear either none, or a very absurd" meaning thus, requiring an interpretation which reflects the *unexpressed intent* of the law. *Id.* at 352 (Posner, J. concurring). Finally, the third and *most controversial* form of interpretation is that which requires the courts to give a statement a—*fresh new meaning*—to the words and the connotation given to the word contained within a statute. *Id.*

In *Hively,* the majority and the concurrence, took the most controversial approach to statutory interpretation, giving a whole new meaning to the term

"sex," resulting in "a statutory amendment courtesy of unelected judges." *Id.* at 360 (Sykes, J., dissenting). When Title VII was enacted—*no one* would have thought that the term "sex" would encompass sexual orientation—for this reason, "an explanation is needed for how 53 years later the *meaning* of the *statute has changed* and the word 'sex' in it *now connotes both gender and sexual orientation*." *Id.* at 353 (Posner, J., concurrence) (emphasis added).

While the *Hively* majority sustains its interpretative task was guided by the Supreme Court's decision in *Oncale*, the *Hively* majority adopted an activist position, by giving the term "sex" a new meaning, and thus expanding the scope of what Congress intended when it enacted Title VII. *See id.* at 344. In *Oncale*, the Court adopted an originalist interpretation of the statute's language when it decided the statute's language did not prevent an individual from bringing a sex discrimination claim against another of the same sex. 523 U.S. at 79. In doing so, the Court reasoned that "statutory prohibitions often go beyond the principal evil *to cover reasonably comparable evils*, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed." *Id.*

As the Court reasoned, with "the many facets of human motivation, it would be unwise to presume as a matter of law that human beings of one definable group will not discriminate against other members of that group." *Id.* at 78. However, in reaching its decision, the Court limited its interpretative task to answering the

question of *who* can infringe Title VII. On the other hand, the *Hively* court expanded the enumerated classes under Title VII effectively *creating a new cause of action*; task constitutionally vested in Congress and beyond the role entrusted to the courts. *See Simonton v. Runyon,* 232 F.3d 33, 36 (2d Cir. 2000) (discussing how the *Oncale* decision did not allow revisiting the issue of whether Title VII proscribes discrimination due to sexual orientation, which is considered settled law); *see also Anonymous v. Omnicom Grp., Inc.,* 852 F.3d 195, 199 (2d Cir. 2017).

B. Congressional Action and Inaction Only Allows the Conclusion That Congress Has Been Unable to Amend Title VII as Prescribed by the Constitution.

When a statute's language is clear, it is improper for the courts to conclude "that what Congress omitted from [a] statute is [] within its scope." *Univ. of Tex. Sw. Med. Ctr. v. Nassar,* 133 S. Ct. 2517, 2528 (2013). Admittedly, "the fact the enacting Congress may not have anticipated a particular application of the law cannot stand in the way of the provisions of the law that are on the books." *Hively,* 853 F.3d at 345. Nevertheless, "Title VII is a detailed statutory scheme," *Nassar,* 133 S. Ct. at 2530, and Congress' intent can only be derived from the words that were used, and the courts "*cannot speculate* beyond the reasonable import of these words." *Id.* at 2528-29 (internal citation and quotation omitted) (emphasis added).

Despite the Court's guidance as to statutory interpretation, *Hively's* majority speculates as to Congress' intent and fails to recognize all of the unsuccessful attempts made by Congress "to add the words 'sexual orientation' to the list of prohibited characteristics." *Hively*, 853 F.3d at 344. Indeed, the majority in *Hively*, guesses as to Congress' consideration to "carve sexual orientation *out* of the statute," as viewed by the EEOC; drawing an inappropriate inference as to Congress' intent. *Id*.

Although they had the opportunity, Congress has never amended the statute and it has rejected efforts to include sexual orientation as a protected class under Title VII. *Simonton,* 232 F.3d at 35. Judging by the numerous instance in which Congress acted to amend other statutes to include sexual orientation as a protected category, it would be inappropriate to conclude that Congress may be considering to amend Title VII. *See generally Hively*, 853 F.3d at 363-64 (Sykes, J., dissenting.) Thus, the—*only one reliable inference*—that can be drawn is that the legislature has been unable to follow the established constitutional procedure to amend Title VII. *See id.* at 360 (Sykes, J., dissenting).

"Congress' refusal to expand the reach of Title VII is strong evidence of congressional intent." *Simonton*, 232 F.3d at 35. Considering Congress' actions, inactions, and inability to pass an amendment, following the established

constitutional and political process, this Court should not indulge in enacting laws from the bench by creating a new cause of action under Title VII.

II. EVEN IF THIS COURT DETERMINES THAT SEXUAL ORIENTATION IS A PROTECTED CATEGORY, THE PLAINTIFF HAS FAILED TO PROPERLY PLEAD A CLAIM FOR RETALIATION UNDER TITLE VII.

The opposition clause under 42 U.S.C. § 2000e-3(a), makes it unlawful for an employer to retaliate against an employee for opposing an employment practice made unlawful by Title VII. *Crawford v. Metro. Gov't of Nashville & Davidson Cty.*, 555 U.S. 271, 274 (2009).

To support a prima facie claim of retaliation, an employee must show: (1) that the employee engaged in an activity protected by Title VII; (2) that the employer was aware of the protected activity; (3) that the employee was subject to an adverse employment action; and (4) that there is a causal link between the protected activity and the adverse action taken by the employer. *E.g.*, *Reid v. Ingerman Smith L.L.P.*, 876 F. Supp. 2d 176, 187 (E.D.N.Y. 2012).

While a plaintiff under Title VII does not need to plead every element of a prima facie case, the court must dismiss a complaint when it is clear that no relief can be granted. *See Williams v. N.Y. City Hous. Auth.*, 458 F.3d 67, 71-72 (2d Cir. 2006) (applying the Supreme Court's decision in *Swierkiewicz*, and holding that retaliation claims under Title VII do not have a heightened pleading standard). In the present case, it is undisputed that Ms. Booth was demoted however, the

Plaintiff has failed to show sufficient evidence to raise an inference (1) that she engaged in a protected activity; and (2) that said protected activity was the motive for the adverse employment action.

A. The Plaintiff Has Not Engaged in a Protected Activity Under Title VII Because Even If Ms. Booth Rejected a Sexual Advance, SVCC Had No Knowledge of the Alleged Protected Activity.

The primary objective of the antiretaliation provision under Title VII is to prevent "an employer from interfering (through retaliation) with an employee's efforts to secure or advance enforcement of the Act's basic guarantees." *Burlington N. & Santa Fe Ry. v. White*, 548 U.S. 53, 63 (2006). Whether the rejection of a sexual advance in itself constitutes retaliation is a question that has split courts, and remains open in certain circuits. *See Fitzgerald v. Henderson*, 251 F.3d 345, 366 (2d Cir. 2001). However, this provision "seeks to prevent harm to individuals based on what they do," and is not meant to be "general civility code for the American workplace." *Id.* at 63, 68 (internal citation and quotation omitted).

A protected activity is a formal or informal "*action taken to protest or oppose* statutorily prohibited discrimination." *Dillon v. Ned Mgmt.*, 85 F. Supp. 3d 639, 659 (E.D.N.Y. 2015) (internal citation and quotation omitted) (emphasis added). While Title VII does not define the term opposition, it is understood that an employee opposes to an unlawful employment practice whenever the employee

communicates to the employer "a belief that the employer has engaged in a form of [retaliation]." *Crawford,* 555 U.S. at 276 (internal citation and quotation omitted).

An employee may also oppose an employer's unlawful practices by taking a stand and "refusing to follow a supervisor's order[s]." *Id.* at 277. However, "it is questionable whether silent opposition is covered by the opposition clause." *Id.* at 282 (Alito, J., concurrence) (discussing the problems for an employer to find out about an employee's "expression of disapproval" to an unlawful practice that took place in a private conversation). There is an implicit requirement that the employer knew of the protected activity, and "that the plaintiff's opposition was directed at the prohibited conduct." *Galdieri-Ambrosini v. Nat'l Realty & Dev. Corp.,* 136 F.3d 276, 292 (2d Cir. 1998) (internal citation omitted).

If an employee does not communicate the opposition to the employer, and since it is unrealistic to think that the harasser will communicate the act to the employer, it cannot be concluded that the employer was aware of the alleged opposition to support a retaliation claim. *See Del Castillo v. Pathmark Stores,* 941 F. Supp. 437, 439 (S.D.N.Y. 1996) ("the broadest interpretation of a retaliation claim cannot encompass instances where the alleged 'protected activity' consists simply of declining a harasser's sexual advances"); *see also Reid,* 876 F. Supp. 2d 176, 189 (adopting "the view that the rejection of sexual advances does not constitute a protected activity" where the employee did not inform the employer

about the incident); *but see Farrell v. Planters Lifesavers Co.*, 22 F. Supp. 2d 372, 392 (D.N.J. 1998) (holding that the rejection of a sexual advance in itself is a protected activity).

Here, the Plaintiff has failed to show that she was retaliated against by SVCC because her rejection to the alleged sexual advance by Ms. Bowers is not a "protected activity" under Title VII. Absent an attempt to exercise her right to oppose the alleged misconduct, it cannot be inferred that SVCC interfered with Ms. Booth's right to oppose to an unlawful employment practice by retaliating against her. While incidents of sexual misconduct are not tolerable in the workplace, Ms. Booth's retaliatory claim rests solely on the rejection itself and not on an action taken by Ms. Booth. By simply rejecting a sexual advance, the Plaintiff has not tried to enforce her rights under the statute and therefore has not engaged in a protected activity contemplated by Title VII.

A protected activity would have required Ms. Booth to express her opposition to the unlawful employment practice to her employer, SVCC. However, Ms. Booth fails to show that she made any attempt to report the alleged sexual advance to anyone in SVCC. Ms. Booth did not discuss it with any employees or supervisors prior to her filing a complaint with the EEOC—one week after Ms. Booth quit her job, and almost a month after the alleged sexual advance.

As a policy matter, to consider the rejection of a sexual advance as sufficient to satisfy the opposition clause, would lead to unthinkable situations. An employee who rejects another employee's misconduct, and whose employment terms are incidentally altered, would have an automatic retaliation claim against the employer. Exposing employers to claims without notice or an opportunity to provide a remedy. Given that the employer had no knowledge of the unlawful practice, and no way of finding out about an employee's opposition to another employee's (in private) misconduct; knowledge would have to be imputed to the employer. Ultimately, holding the employer vicarious and strictly liable for a tort-like claim and a fortuitous business decision. Such a result is an unthinkable and impermissible deprivation of due process for an employer.

B. The Plaintiff Has Failed to Show a Causal Connection Between her Rejection to the Alleged Sexual Advance and Her Demotion.

Causation can be shown either (1) directly, with evidence of the defendant's "retaliatory animus directed against the plaintiff;" or (2) indirectly, "by showing that the protected activity was followed closely by [a] discriminatory treatment." *Hicks v. Baines*, 593 F.3d 159, 170 (2d Cir. 2010). But at a minimum, a plaintiff must establish

> [T]hat the defendant was actually aware of the protected expression at the time the defendant took the adverse employment action. Since corporate defendants act only through authorized agents, in a case involving a corporate defendant the plaintiff must show that the

> corporate agent who took the adverse action was aware of the plaintiff's protected expression.

Raney v. Vinson Guard Serv., 120 F.3d 1192, 1197 (11th Cir. 1997) (citing *Goldsmith v. City of Atmore*, 996 F.2d 1155, 1162-63 (11th Cir. 1993)).

1. The Plaintiff has failed to show that SVCC was aware of her alleged opposition for which it is impossible to conclude that SVCC retaliated against her.

For a retaliation claim, "awareness with more evidence than mere curious timing coupled with speculative theories" is required. *Raney*, 120 F.3d at 1192. Especially in the context of a private conversation, where timing alone would prove problematic due to the uncertainty as to when did an "employer become aware of the employee's private expression of disapproval." *Crawford*, 555 U.S. at 283 (Alito J., concurrence).

For example, in *Raney*, the plaintiff did not satisfy the causal link because aside from the closeness in time, there was no indication that the decision-making corporate agent was aware of the employee's protected expression, and the employee only had a "hunch" that her employer knew of her intentions to file a complaint. *Id. See also Coe v. N. Pipe Prods., Inc.*, 589 F. Supp. 2d at 1055 (N.D. Iowa 2008) (finding that retaliation was not shown because the employer was unaware of an employee's opposition to a manager's alleged sexual advance even where it could be inferred that manager influenced the decision to terminate the employee).

In *Dillon*, on the other hand, the court found a causal temporal connection and it determined that the employee had established a prima facia case of retaliation. In this case, the plaintiff had engaged in a protected activity when she manifested her opposition to sexual harassment by verbally complaining to the company owner, and following the opposition, she was fired without warning or explanation. 85 F. Supp. 3d at 664. *But see Gregory v. Daly*, 243 F.3d 687, 701 (2d. Cir 2001) (refusing to consider episodes of harassment prior to the employee's complaints to her employer).

It is fundamental for Ms. Booth to show that SVCC was aware of the alleged sexual advance. However, the Plaintiff has failed to establish a causal connection between the alleged protected activity and her demotion because SVCC was unaware of her opposition thus, it is not possible to conclude that SVCC retaliated against her.

According to the complaint, the alleged advance occurred at a time when only Ms. Bowers and Ms. Booth were present. However, the Plaintiff pleaded no facts suggesting that Mr. Funk knew about her private expression in opposition, nor that she communicated the incident to anyone. Thus, making it impossible to infer that Mr. Funk, who discussed with Ms. Booth the reason for her demotion, had a way of finding out about the alleged misconduct for him to retaliate against Ms. Booth.

Additionally, even if Ms. Bowers assisted Mr. Funk in making the decision as to Ms. Booth's demotion, the Plaintiff must show that SVCC was aware of her opposition. If SVCC was unaware of the alleged rejection, SVCC could not have retaliated against her, and SVCC's decision to demote Ms. Booth cannot be seeing as anything more than just a business decision.

The Plaintiff also fails at establishing a temporal relationship between her demotion and the protected activity. Ms. Booth did not file a complaint with the EEOC until after she resigned, and she has plead no facts indicating that she communicated her intentions of filing a complaint to suggest that SVCC was aware of her intentions of exercising her rights under Title VII. For which it is not possible to conclude that there is temporal proximity between the alleged protected activity and her demotion.

2. The Plaintiff has failed to show that but-for her opposition she would not have been demoted.

A retaliation claim under Title VII "must be proved according to traditional principles of but-for causation," and proof "that the unlawful retaliation would not have occurred in the absence of the alleged wrongful action" is required. *Nassar,* 133 S. Ct. 2517, 2533. Although Congress intended to provide broad protection, "such protection is not without limits. A court must balance the Act's goal of encouraging reasonably expressed opposition to employer discrimination against management's recognized prerogative to maintain internal discipline and a stable

working environment." *Gonzalez v. Bolger*, 486 F. Supp. 595, 600-01 (D.D.C. 1980).

In *Goldsmith*, for example, the plaintiff was engaged in a protected activity, a fact that was known to her employer. However, the employer had concerns with the plaintiff's job performance before finding out about the protected activity. For this reason, the court concluded that a retaliation claim could not be inferred from the facts because the employer had a legitimate business reason for the adverse employment action. 996 F.2d at 1163. *See also Gemmell v. Meese*, 655 F. Supp. 577, 582 (E.D.Pa. 1986) (finding that a plaintiff must show that the person who took the adverse employment action against her knew of the protected activity and acted with a retaliatory motive).

Here, the Plaintiff has not shown that but-for her rejecting the alleged sexual advance she would not have been demoted. The Plaintiff has no evidence suggesting that the reason for her demotion was the refusal to Ms. Bowers' alleged sexual advancement. If anything, Ms. Booth has successfully shown that her poor performance led to her demotion, and that SVCC had legitimate business reasons for demoting Ms. Booth.

While under the Plaintiff's direct supervision, three construction workers were injured when a scaffolding collapsed. Furthermore, it was under her direction that the foundation of the project was built in a defective manner, requiring it to be

demolished and rebuilt. Ms. Booth's poor management skills lead to substantial and costly delays in the project's much-anticipated Northeast quadrant, resulting in Jaguar terminating its lease. As such, Ms. Booth is unable to show that the alleged sexual advancement was the reason for her demotion and not her poor job performance.

CONCLUSION

This Court should grant the motion to dismiss because the Plaintiff has failed to show that she belongs to a protected class under Title VII, she has not engaged in a protected activity, and she failed to establish the required causation to establish a prima facia case of retaliation.

Respectfully submitted,

_____

Team 1729
Attorney for Defendant
Dated: September 14, 2017