STATE OF VERMONT

SUPERIOR COURT **CIVIL DIVISION**
Rutland Unit **Docket No. 176-3-13 Rdcv**

SHARON CURRIE,
Plaintiff

v.

RUTLAND REGIONAL MEDICAL CENTER,
Defendant

DECISION
Defendant's Motion for Summary Judgment (MPR 6)
Defendant's Motions to Strike (MPR 7 & MPR 8)

In this wrongful termination from employment suit, the Defendant, Rutland Regional Medical Center (RRMC), has moved for summary judgment and has also moved to strike various filings made by the Plaintiff. The Defendant is represented by Attorneys Andrew H. Maass and John A. Serafino of Ryan Smith & Carbine, and the Plaintiff is represented by Attorneys John Paul Faignant and Marie Peck Fabian of Miller Faignant & Fabian. For the reasons set forth below, the Court denies the Defendant's motions to strike and grants in part and denies in part the Defendant's Motion for Summary Judgment.

Background

The Plaintiff was formerly employed by RRMC as a radiological technologist. She alleges in Count I of the Complaint that the Defendant violated the health care employee whistleblower protection law, 21 V.S.A. § 507, by firing her in retaliation for her challenge to a directive that she believed to be contrary to the standards and ethics of her profession. She claims that the Defendant required her to take portable chest x-ray images using the same technique[1] as was used for previous images of the same patient. She claims that she objected to this requirement because she believed it would result in overexposing some patients to radiation, which she believed would constitute improper quality of care.

She further alleges in Count II that, during the course of her employment, RRMC denied her requests to be moved to the day shift because of her older age. She alleges that the RRMC

[1] The term "technique" means the combination of the strength and duration of exposure of radiation used to produce a radiographic image of a patient.

did so because it believed that she would not be able to work effectively during the day shift due to her advanced age. She also claims that two of her colleagues were in romantic relationships with radiologists and received preferential treatment as a result. She claims that she was encouraged to go out drinking with her younger day shift colleagues to help her fit in better with them. She contends that these acts violated the Fair Employment Practices Act, 21 V.S.A. § 507 ("FEPA"), by discriminating against her based on both age and sex, and by creating a hostile work environment.

RRMC denies that the Plaintiff was fired for any activity protected by the whistleblower statute, and asserts that in fact she was fired for falsification of medical records. RRMC alleges that the Plaintiff inaccurately annotated at least one radiographic image with the technique that she believed should be used in the future for that patient, rather than the technique that was used to produce the image she was annotating. This, the RRMC claims, constituted falsification of medical records, and was the true reason the Plaintiff was discharged. RRMC also denies that it engaged in any discriminatory conduct.

Both parties have made voluminous submissions of materials in support of their positions on summary judgment. The Plaintiff submitted, alongside her Opposition to the Defendant's summary judgment motion, a filing captioned "Plaintiff's Statements [sic] of Undisputed Material Facts in Opposition to Defendant's Motion for Summary Judgment." The Defendant moved to strike this filing, arguing that it is improper under V.R.C.P. 56(b) for a party opposing a summary judgment motion to submit a statement of undisputed material facts, and that the opposing party is permitted only to submit a statement of disputed material facts. The Plaintiff opposes the motion, arguing that the filing was permissible under V.R.C.P. 56(c).

The Plaintiff also made a filing captioned "Plaintiff's Supplemental Response to Defendant's Statement of Undisputed Material Facts." The Defendant moved to strike this filing also, arguing that V.R.C.P. 56(b) does not permit the filing of multiple opposition memoranda. The Plaintiff argues that it is a permissible response to the Defendant's filings.

Motions to Strike

Regarding the Defendant's Motion to Strike the Plaintiff's Statements of Undisputed Material Facts, the Defendant correctly points out that V.R.C.P. 56(b) provides that a party opposing a motion for summary judgment "may file a memorandum in opposition, statement of disputed facts and affidavits[.]" Rule 56(b) does not explicitly permit a party opposing a motion for summary judgment to file a statement of undisputed material facts. However, nothing in Rule 56 forbids the nonmoving party from asserting undisputed facts in addition to those submitted by the moving party as long as they are pertinent to a ruling on the claim. The Defendant cites case law from the District of Vermont interpreting F.R.C.P. 56 to do so, but that case law is not binding authority upon this Court. The Plaintiff notes in opposition that the facts asserted in the challenged filing are offered to undermine the motion for summary judgment.

It would not serve the interests of justice and judicial efficiency for the Court to strike the Plaintiff's factual assertions in opposition to summary judgment simply because they are captioned as undisputed rather than disputed facts. At times, additional facts, not included by a moving party, are material to a judicial ruling. The Court therefore denies the Defendant's Motion to Strike.

Regarding the Defendant's Motion to Strike the Plaintiff's Supplemental Response to Defendant's Statement of Undisputed Material Facts, the Plaintiff argues that this filing was necessary to address matters raised in the Defendant's Reply Memorandum. In general, Rule 56 and Rule 78 do not contemplate surreplies. However, it does not appear that the challenged filing would prejudice the Defendant's rights. The filing does not appear to have been made with intent to delay or unnecessarily complicate the proceedings. The Defendant's Motion to Strike is denied.

Summary Judgment

Summary judgment is appropriate when the movant shows that there is no genuine dispute as to any material fact and that the movant is entitled to judgment as a matter of law. V.R.C.P. 56; *Gauthier v. Keurig Green Mountain, Inc.*, 2015 VT 108, ¶ 14. In determining whether there is a genuine issue as to any material fact for purposes of summary judgment, the Court must accept as true the allegations made in opposition to the motion for summary judgment, so long as they are supported by affidavits or other evidentiary material. *Gauthier*, 2015 VT 108 at ¶ 14 (quoting *Robertson v. Mylan Labs, Inc.*, 2004 VT 15, ¶ 15). The nonmoving party receives the benefit of all reasonable doubts and inferences. *Robertson*, 2004 VT 15 at ¶ 15.

Count I – Whistleblower Claim

Health care whistleblower actions are governed by the three-part burden shifting framework first articulated by the Supreme Court of the United States in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-04 (1973). *See Griffis v. Cedar Hill Health Care Corp.*, 2008 VT 125, ¶ 12. Within this framework, the Plaintiff bears the initial burden of establishing, by a preponderance of the evidence, a prima facie case of retaliation. *Id.* If she succeeds, the burden of production shifts to the Defendant, who must state a legitimate, non-retaliatory reason for the discharge. *Id.* If the Defendant does so, the burden shifts back to the Plaintiff, who, in order to prevail, must then prove by a preponderance of the evidence that the reasons stated by the Defendant are pretextual. *Id.*

If there appears to be any genuine dispute as to any fact material to any question that might affect the outcome of the litigation within this framework, the Court cannot grant summary judgment and the case must be tried.

The Defendant asserts that, based on the undisputed material facts, the Plaintiff cannot make out a prima facie case of retaliation, and that even if she could, it had a legitimate non-retaliatory reason for discharging her, and that reason was not merely pretextual.

I. Plaintiff's Prima Facie Case

The elements of a prima facie case of retaliation are: (1) the plaintiff engaged in a protected activity; (2) the employer was aware of the activity; (3) the plaintiff suffered an adverse employment decision; and (4) there was a causal connection between the protected activity and the adverse employment decision. *Gauthier*, 2015 VT 108 at ¶ 16.

a. Protected Activity

The Defendant argues that the Plaintiff cannot establish that she engaged in a protected activity, the first element of a prima facie case of retaliation.

Under 21 V.S.A. § 507(b)(3), the Plaintiff was protected from retaliation for objecting to or refusing to participate in any activity, policy or practice of the Defendant that she reasonably believed was in violation of a law or constituted improper quality of patient care. The Plaintiff argues that her objection to the hospital's directive to take portable chest x-ray images using the same technique as was used for previous images of the patient was protected under this section of the statute as an objection to an activity, policy, or practice that she reasonably believed constituted improper quality of patient care.

The essence of the Plaintiff's objection was that, in certain cases, a different technique using less radiation could produce a film of equal or even better quality while also reducing the risk of overexposure to dangerous radiation. Her position was that adherence to the directive would, in those cases, result in unnecessary irradiation of patients. She argues that this would constitute improper quality of patient care.

The Defendant asserts that the directive did not infringe upon the technologists' discretion to deviate from the previously used technique when circumstances justified deviation. The Defendant urges the Court toward the conclusion that, because the Plaintiff retained the ability to administer whatever technique she believed in her professional judgment to be proper, she cannot have reasonably believed the directive to have constituted improper quality of patient care. The Defendant's position is that the Plaintiff's objections to the directive are therefore hollow and illusory, and cannot constitute a protected activity.

There is conflicting evidence in the record as to whether the directive was an absolute mandate or whether it preserved the technologists' discretion. The deposition testimony of the Plaintiff's supervisors and the emails sent to the Plaintiff and her colleagues suggest that technologists retained discretion to deviate from the previous technique so long as they noted the

deviation and justification. However, the Plaintiff's own affidavit indicates that the directive was indeed an absolute mandate.

While the Plaintiff's affidavit is uncorroborated by the documentary evidence and is contradicted by the testimony of the other witnesses, the Court is not empowered on summary judgment to disregard it. To do so would be "falling for the trap of weighing conflicting evidence during a summary judgment proceeding." *Payne v. Pauley*, 337 F.3d 767, 771 (7th Cir. 2003). Even uncorroborated self-serving testimony from the non-movant is sufficient to prevent summary judgment. *See Berry v. Chicago Transit Authority*, 618 F.3d 688, 691 (7th Cir. 2010). "If based on personal knowledge or firsthand experience, such testimony can be evidence of disputed material facts. It is not for courts at summary judgment to weigh evidence or determine the credibility of such testimony; we leave those tasks to factfinders." *Id.*

Granting the Plaintiff the benefit of all favorable inferences, the conflicting evidence demonstrates the existence of a genuine dispute as to a material fact regarding the first element of the Plaintiff's prima facie case.

b. Causation

The Defendant also argues that the Plaintiff cannot establish the required casual connection between the alleged protected activity and her termination, and thus cannot establish the fourth element of her prima facie case. The Defendant points out that the policy was implemented in 2009, and that the Plaintiff's previous objections did not result in any adverse employment consequences. The Plaintiff alleges in her affidavit that she reiterated her objection to the directive during a conversation with a colleague that resulted in her suspension and subsequent termination.

Prima facie causation can be established by mere proximity in time. *Gauthier*, 2015 VT 108 at ¶ 19. In *Gauthier*, *id.*, the Supreme Court of Vermont characterized the plaintiff's initial burden of establishing prima facie causation as "relatively light," and approvingly quoted an excerpt from *Seeger v. Cincinnati Bell Tel. Co.*, 681 F.3d 274, 284 (6th Cir. 2012), in which it is described as a "low threshold of proof."

Applying the highly permissive standard for prima facie causation and granting the Plaintiff the benefit of all favorable inferences, the Court finds that that the Plaintiff's evidence is sufficient to establish a genuine dispute as to a material fact on the issue of causation.

II. Legitimate Non-Retaliatory Reason

The Defendant's consistent position throughout this litigation has been that the Plaintiff was discharged for falsification of medical records and not for any protected activity. The Defendant claims – and the Plaintiff does not dispute – that she annotated at least one radiographic image with the technique that she believed would be appropriate for future use,

rather than the technique that she actually used to produce the image. The Plaintiff argues that, although she did this, it did not constitute falsification of medical records, because she made supplemental comments clarifying her actions in the electronic record of the image, and because the actual technique used to produce the image is indelibly recorded in the electronic record of the image and can be accessed for reference.

Though the Plaintiff disputes the validity of the proffered reason, the burden on the Defendant at this stage of the analysis is "only a burden of production, rather than one of persuasion." *Gauthier*, 2015 VT 108 at ¶ 20 (quoting *Robertson*, 2004 VT 15 at ¶ 31). It is sufficient for the Defendant to articulate an explanation that would, "*if taken as true*, permit the conclusion that there was a nondiscriminatory reason for the adverse action." *Gauthier*, 2015 VT 108 at ¶ 20 (emphasis added) (internal quotations and citation omitted). If taken as true, the Defendant's explanation would permit the conclusion that the Plaintiff was discharged for a nondiscriminatory reason.

The Defendant's assertion of a nondiscriminatory reason at this stage of the three-step burden shifting framework, alone, does not support a grant of summary judgment. Rather, the burden shifts back to the Plaintiff to demonstrate with evidence that the Defendant's proffered reason was pretextual. *Id.* at ¶ 22.

III. Pretext

The Plaintiff can carry her burden of persuasion on the question of pretext and survive the Defendant's motion for summary judgment "by demonstrating weaknesses, implausibilities, inconsistencies, or contradictions in the employer's proffered legitimate, nonretaliatory reasons for its action. From such discrepancies, a reasonable juror could conclude that the explanations were a pretext for a prohibited reason." *Id.* at ¶ 22 (quoting *Kwan v. Andalex Grp. LLC*, 737 F.3d 834, 846 (2d Cir. 2013)).

The Plaintiff must show that the Defendant did not honestly believe its proffered reason for discharging her. For the Defendant to prevail at this stage, the Defendant's belief in its proffered reason need not be premised on reasonable reliance on particularized facts, and can even be foolish, but must be honest. *Id.* at ¶¶ 26-33 (rejecting the reasonable reliance standard developed in the Sixth Circuit and adopting the Seventh Circuit's bare honesty standard). Thus, the question at this stage is whether the Defendant honestly believed that the Plaintiff falsified a medical record and discharged her on that basis.

"Falsification of a medical record" is not a term with a precise legal definition.[2] The question of whether the Plaintiff's conduct constituted falsification of medical records is a

[2] The Plaintiff points to *In re Chase*, 2009 VT 94, ¶¶ 25-26, and argues for a definition of falsification that includes an element of willfulness. However, *Chase* dealt with a statutory provision defining

question of fact. To answer that question, the practical consequences of the Plaintiff's actions must be evaluated within the context of the customary practice in her workplace. The parties present conflicting evidence as to both the practical consequences of the Plaintiff's actions and the customary practice in her workplace. In particular, the parties dispute the extent to which the function of the technologist's annotation on an image was to record the technique actually used, as opposed to merely providing guidance for future images. The parties also seem to dispute the extent to which the Plaintiff's annotation would have been relied upon for its precise accuracy by other technologists or radiologists examining the image.

These disputes are genuine disputes of facts that are highly material to the question of whether the Defendant honestly believed that the Plaintiff falsified medical records. In the face of these genuine disputes of material facts, the Court cannot find conclusively that the Defendant honestly believed that the Plaintiff's actions constituted falsification of a medical record, and therefore cannot grant summary judgment.

The Plaintiff further alleges that she consulted with her direct superior, Mr. Peter Abatiell, concerning her annotation of the image immediately after making the annotation, and was explicitly advised three days later by Mr. Abatiell not to correct the annotation. She also alleges that irregularities and inaccuracies in the annotations of radiographic images were commonplace, and that none of her colleagues were disciplined for them. These allegations, if true, could be viewed by a factfinder as "weaknesses, implausibilities, inconsistencies, or contradictions" that might cause "a reasonable juror to conclude that the explanations were a pretext for a prohibited reason." *See id.* at ¶ 22.

In summary, because of the disputes of material fact at all three stages of the framework needed to establish liability on a whistleblower claim, summary judgment for the Defendant is denied on the whistleblower claim in Count I.

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unprofessional conduct by a physician, and that statutory definition included "willfully making and filing false reports or records in his or her practice as a physician." The question before the Court in *Chase* was whether the word "willfully" in that context meant that a finding of unprofessional conduct required a finding that the physician intentionally filed false information or whether it was enough for the physician to have "engaged in the voluntary act of making a report that turned out to be inaccurate, even if the professional did not intend to file false information." *Chase*, *id.*, at ¶ 25. *Chase* is about the definition of "willfully," not the definition of falsification. Furthermore, the word "willfully" appears in the statute modifying the subsequent clause "making and filing false reports or records," so if anything, the natural conclusion from the *Chase* analysis is that falsification, in itself, *does not* include an element of willfulness.

Count II – Discrimination

The Plaintiff alleges in Count II of her Complaint that she was subjected to discrimination based on her sex and her age. In particular, she states five ways in which she claims to have been subjected to illegal discrimination during the course of her employment:

(1) She was subjected to radiologists openly having extramarital affairs with technicians;
(2) Those technicians were favored over her in terms of shift schedules and vacation scheduling;
(3) She was told that "at her age" supervisors did not think she would be able to keep up with the busier pace on days, despite her night shift performance exceeding that of those on the day shift;
(4) She was told that she would fit in better with the younger technicians if she would go out and have drinks with them on Friday nights; and
(5) Her employment was terminated in retaliation for her reporting unethical conduct of the radiologists and technicians with regard to administering portable X-ray examinations of patients.

She also alleges that this discriminatory conduct created a hostile work environment and resulted in her termination.

I. Sex Discrimination

The Plaintiff submitted no briefing relating to her putative sex discrimination claims (see parts (1) and (2) above), in her opposition materials. The Defendant urges the Court to treat these claims as abandoned and to grant summary judgment on them. These claims would not survive summary judgment on the merits anyway. The paramour preference theory of employment sex discrimination liability on which they rest has been rejected by the overwhelming majority of jurisdictions that have considered it. *See, e.g., DeCintio v. Westchester County Medical Center*, 807 F.2d 304, 308 (2d Cir. 1986); *Tenge v. Phillips Modern Ag Co.*, 446 F.3d 903, 908 (8th Cir. 2006); *Preston v. Wisconsin Health Fund*, 397 F.3d 539, 541 (7th Cir. 2005); *Womack v. Runyon*, 147 F.3d 1298, 1300 (11th Cir. 1998); *Becerra v. Dalton*, 94 F.3d 145, 149-50 (4th Cir. 1996). The majority view is that paramour favoritism, however unseemly or imprudent it might be in any particular circumstance, is not cognizable as sex discrimination under FEPA, and the Court adopts this view. The Court can see no other theory, and the Plaintiff has provided none, on which a FEPA sex discrimination claim could conceivably rest in this case, so summary judgment for the Defendant is appropriate and is granted on the sex discrimination claim.

This leaves the Plaintiff's claims of age discrimination and her hostile work environment claim.

II. Age Discrimination

Analysis of the Plaintiff's age discrimination claim under FEPA is also governed by the three-step burden shifting framework. *See Robertson*, 2004 VT 15 at ¶ 16. The Plaintiff must establish a prima facie case of age discrimination, the Defendant must articulate a non-discriminatory justification for the adverse employment action, and the Plaintiff must demonstrate that the Defendant's justification was pretextual.

The Defendant's proffered justification for discharging the Plaintiff and the Plaintiff's response to it are the same for the age discrimination claim as they are for the whistleblower claim, discussed above. As concluded above, there are genuine disputes of material fact as to whether the Defendant's proffered justification of falsification of a medical record is pretextual. Therefore, summary judgment cannot be granted. However, the Court was able to reach that step of the analysis only because it found that the Plaintiff had established a prima facie case of whistleblower retaliation. Now, the Plaintiff must establish a prima facie case of age discrimination.

To establish a prima facie case of age discrimination under FEPA, the Plaintiff must show that: "(1) she was a member of a protected group; (2) she was qualified for the position; (3) she suffered an adverse employment action; and (4) the circumstances surrounding this adverse employment action permit an inference of discrimination." *Id.* at ¶ 25.

The first three of these four elements are essentially undisputed by the parties – the Plaintiff's age places her in protected group, the Plaintiff was qualified for the position, and the Plaintiff's discharge was an adverse employment action. The parties diverge on the fourth element, the question of whether the circumstances surrounding the Plaintiff's discharge permit an inference of age discrimination.

The Plaintiff makes the following relevant allegations in her affidavit in opposition to summary judgment:

- On multiple occasions between 2008 and 2010, the Plaintiff was denied desirable transfer opportunities because of her age.
- During a performance evaluation in the Fall of 2009, in response to a transfer request, the Plaintiff was told by a supervisor, Leah Denton, that she did not think that the Plaintiff, at her age, would be able to keep up with the pace of the day shift or fit in with the younger people on the day shift.
- In April 2010, the hospital abandoned its longstanding policy of granting transfer requests based on seniority and adopted a policy emphasizing "good fit teams."
- In June 2010, the Plaintiff applied for a shift transfer and was rejected in favor of a less senior colleague.

- In July 2010, the Plaintiff again applied for a shift transfer, and while that application was pending in August 2010, she complained to a human resources manager, Mr. David Twitchell, that she felt she was not being considered fairly because of her age. In October 2010, Ms. Denton advised the Plaintiff that she had to give her the job because no one else applied, and reiterated that she did not think the Plaintiff would be able to meet the demands of the day shift or fit in with her younger colleagues.
- In July 2011, the Plaintiff was told by Ms. Denton that she would be a better fit with her younger colleagues if she went out drinking with them after work on Friday nights.

Again, the Court's job is not to weigh the evidence, but rather to evaluate its sufficiency. *See Payne*, 227 F.3d at 771. For the purposes of summary judgment, the Court assumes the truth of all of these allegations and considers the question of whether they raise any genuine dispute of material fact.

The Court concludes that they do not. The adverse employment action that is the subject of this litigation is the Plaintiff's termination in September 2011. The Court cannot find that this testimony constitutes sufficient prima facie evidence that "the circumstances surrounding this adverse employment action" – that is, the Plaintiff's discharge – "permit an inference of discrimination." *See Robertson*, 2004 VT 15 at ¶ 25.

The Plaintiff's relevant evidence consists of testimony regarding her efforts to secure a day shift transfer during the period leading up to October 2010, when it appears she succeeded and the Defendant granted her the transfer she requested, in addition to a single instance in July 2011 of a supervisor suggesting that she participate in social gatherings with her younger colleagues. A factfinder could not reasonably infer from this evidence that the Plaintiff's termination in September 2011 was motivated by discriminatory animus based on age.

Because the Plaintiff's evidence cannot support an inference of age discrimination, she has failed to make out a prima facie case of age discrimination. Accordingly, summary judgment is granted in favor of the Defendant with respect to the age discrimination claim.

IV. Hostile Work Environment

Finally, the Plaintiff alleges that she was subjected to a hostile work environment. An employee is subjected to a hostile work environment when there exists "a pattern of discrimination or a series of acts sufficiently severe or pervasive to alter the conditions of [the victim's] employment and create an abusive working environment." *In re Boyde*, 165 Vt. 624, 626 (1996) (internal quotations and citations omitted). Frequency and pervasiveness are requisite features of this type of discrimination. *Id.* Findings of hostile work environments have been upheld in cases where the employee was constantly subjected to offensive and demeaning harassment in the workplace. *See In re Butler*, 166 Vt. 423, 426 (1997) (upholding a finding of a hostile work environment where the female employee's male colleagues subjected her to constant sex-based hostility, including constant open display of images of semi-nude women in

the workplace, a male colleague telling her to "suck on this" while grabbing his crotch, and a male colleague referring to her as his "sex slave").

The Court concludes that the Plaintiff's evidence, even when accepted as true, falls short of being able to support a hostile environment finding. The Plaintiff's evidence describes a superior, Ms. Denton, who, on two occasions over two years, expressed concern about the Plaintiff's ability to transition from a slower-paced night shift to a faster-paced day shift. Ms. Denton's infrequent and non-pervasive remarks amount to far less than the type of inescapable perpetual hostility that is the hallmark of a hostile work environment.

Summary judgment is therefore granted on the hostile work environment claim.

Having concluded that summary judgment in favor of the Defendant is appropriate for each claim contained within Count II of the Complaint, the Court grants summary judgment for the Defendant on the whole of Count II.

ORDER

For the reasons set forth above:

1. The Defendant's Motion to Strike (MPR 7) is *denied*,
2. The Defendant's Motion to Strike (MPR 8) is *denied*,
3. The Defendant's Motion for Summary Judgment (MPR 6) is *denied* with respect to Count I of the Complaint and is *granted* with respect to Count II of the Complaint.

Dated at Rutland this 30th day of March, 2016.

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Mary Miles Teachout
Superior Court Judge