

STATE OF MINNESOTA

DISTRICT COURT

COUNTY OF HENNEPIN

FOURTH JUDICIAL DISTRICT

Lorie Smith,

File No. 27-CV-06-19663

Plaintiff,

**ORDER GRANTING SUMMARY
JUDGMENT IN PART AND
DENYING IT IN PART
AND MEMORANDUM OF LAW**

vs.

C.H. Robinson Worldwide, Inc.

Defendant.

Defendant, C.H. Robinson Worldwide, Inc. ("C.H. Robinson"), brought a Motion for Summary Judgment in the above-entitled matter before the undersigned Judge of District Court on July 14, 2007, at The Hennepin County Government Center in Courtroom 1655, Hennepin County, State of Minnesota.

Kara L Thompson, Esq., 2100 Bank of America Plaza, 600 Peachtree St., N.W., Atlanta, GA appeared *pro hac vice* on behalf of Defendant, C.H. Robinson.

Joseph W. Hammell, Esq., 50 South Sixth St., Suite 1500, Minneapolis, MN 55402 also appeared on behalf of Defendant, C.H. Robinson.

Mara R. Thompson, Esq., 310 Fourth Ave. S., Suite 600, Minneapolis, MN 55415 appeared on behalf of Plaintiff, Lorie Smith.

Daniel C. Bryden, Esq., 310 Fourth Ave. S., Suite 600, Minneapolis, MN 55415 also appeared on behalf of Plaintiff, Lorie Smith.

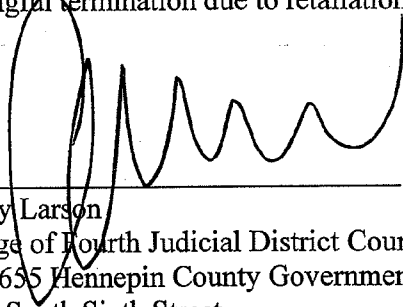
Based upon the files, records, and proceedings herein, and being fully informed in the premises, the Court makes the following:

ORDER

1. Defendant's Motion for Summary Judgment is **DENIED IN PART** as to Plaintiff's claim for relief for damages from sexual harassment.
2. Defendant's Motion for Summary Judgment is **DENIED IN PART** as to Plaintiff's claim for relief for damages from gender discrimination.
3. Defendant's Motion for Summary Judgment is **GRANTED IN PART** as to Plaintiff's claim for relief because of wrongful termination due to retaliation.

BY THE COURT:

Dated: ~~August~~ ^{9/14}, 2007



Gary Larson
Judge of Fourth Judicial District Court
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I. INTRODUCTION

This matter involves a claim by Lori Smith (“Smith”) against her employer, C.H. Robinson Worldwide, Inc. (“C.H. Robinson”). This claim was originally part of a class action lawsuit which alleged widespread gender-based discrimination by C.H. Robinson against its female employees. The class action was filed in United States District Court for the District of Minnesota on October 2, 2003, styled *Carlson, et al v. C.H. Robinson World Wide, Inc.*, Civil No. CV-02-3780 (D. Minn.). The Court in *Carlson* denied certification of a class action with respect to the Plaintiffs’ hostile work environment claims. *Carlson* also resulted in a partial summary judgment against a number of the plaintiffs for failure to advance a prima facie claim of a hostile work environment. As result of the non-certification in *Carlson*, Smith filed a claim in this Court as an individual Plaintiff against C.H. Robinson. This claim alleges C.H. Robinson violated the Minnesota Human Rights Act, Minn. Stat. §§ 363A.01, 363A.15, *et seq.* (“MHRA”) in three respects. Smith alleges that during her tenure at C.H. Robinson, she was subjected to (1) sexual harassment resulting from a hostile work environment, (2) gender-based discrimination in being denied access to promotions, and (3) retaliation for being a member of the *Carlson* class action. C.H. Robinson challenges the validity of all three counts as a matter of law in the summary judgment motion currently before the court.

II. FACTS

C.H. Robinson is a transportation logistics company with branch offices located throughout the United States. Smith worked at C.H. Robinson’s Brooklyn Park, Minnesota branch office from April 2001 to April 2004. Smith’s employment position at C.H. Robinson was as a traffic coordinator.

A. Facts Relating to Smith’s Sexual Harassment Claim.

Smith bases her sexual harassment claim on her exposure to the antics of her co-workers Steve Knapper ("Knapper") and Richard Welle ("Welle"). Smith claims that Knapper and Welle sexually harassed her. Smith asserts that this harassment, combined with the C.H. Robinson's inability to act upon Smith's complaints, created a hostile working environment sufficient to establish a prima facie harassment claim under the MHRA.

Smith testified that Knapper repeatedly called her a "fucking bitch" and a "fucking pussy" in the workplace. According to Smith, this occurred about a hundred times. Smith asserts that Knapper told her "we're in the trucking business. Buck up. Truckers don't use nice language."

Smith claims that Knapper once made a simulated motion of grabbing her breasts. Smith alleges that Knapper did not make physical contact with her body, but that Knapper's hands came within inches of her breasts.

Smith claims that Welle and Knapper exposed her to lewd internet images. One of these images, a picture of a whale's penis, was directed specifically at Smith. However, most of the internet images seen by Smith were not specifically brought to her attention by either Knapper or Welle. Smith claims that due to the close proximity of cubicles in the office, it was impossible to avoid seeing the internet images that she thought inappropriate. Smith was reprimanded twice by C.H. Robinson management for disseminating inappropriate internet images. After the second reprimand, Smith was suspended from work for a week. Smith claims that these images were in no way inappropriate, but rather non-sexual or otherwise offensive.

Smith also claims that conversations between Welle and Knapper about their sexual exploits contributed to creating a hostile work environment. These conversations included stories of seducing women and going to strip clubs.

Smith complained to Shelly Decker ("Decker"), her immediate supervisor, about the whale penis picture, Knapper's use of profanity, and Knapper's sex stories. Smith did not tell anyone at C.H. Robinson about the Knapper's simulated breast touching. Nor did Smith make any complaints of a hostile work environment to the office branch manager, Jim Wilharm ("Wilharm").

Upon commencing her employment at C.H. Robinson, Smith signed the company's sexual harassment policy. This policy statement directed employees to make complaints of sexual harassment to the legal department, human resources department, or the branch manager. Smith testified that after signing this document, she was never provided with a copy that would allow her to remember who to contact in case of sexual harassment. Smith also alleges that because of Wilharm's "out on the floor" management style, it would be impossible for him to be unaware of the nature of Knapper's inappropriate conduct.

B. Facts Relating to Smith's Gender-Based Disparate Treatment Claim.

Smith claims she experienced several instances of gender discrimination during her time at C.H. Robinson. Smith claims that she was denied access to promotional opportunities because such opportunities were not posted by Wilharm. Smith claims that instead of giving all employees equal notice of promotional opportunities, Wilharm would selectively target less qualified men for promotions in favor of women who were more qualified. Smith feels that she was discriminated against by being denied the opportunity to become a consolidator. Smith considered the consolidator position to be an upgrade from her position as traffic coordinator. C.H. Robinson instead gave the consolidator position to Knapper. Smith argues that her experience as a truck driver and safety manager prior to joining C.H. Robinson made her significantly more qualified for the consolidator position than Knapper. Wilharm did offer Smith

training in carrier services. However, Smith considered working in carrier services to be less prestigious than working in consolidation. Working in carrier services would have also placed Smith in a position of having to report to Knapper and Welle, something Smith was not comfortable with.

Smith also claims that C.H. Robinson management was discriminatory in selectively punishing her for inappropriate internet use. Two out of the three people reprimanded for improper internet use were women. Smith claims this is sufficient evidence of discrimination considering the more egregious examples of inappropriate internet use by her male coworkers that went unpunished.

C. Facts Regarding Smith's Retaliation Claim

Smith alleges C.H. Robinson terminated her employment in retaliation for joining the *Carlson* class action suit. C.H. Robinson asserts that Smith was fired for repeated tardiness and absenteeism, as well as for failure to complete assigned training. Both sides agree that in 2003, C.H. Robinson began to monitor Smith's time more closely.

The Plaintiff's and Defendant's briefs present a dispute of fact on two points. First, Smith claims that she joined the *Carlson* action in August, 2003, while C.H. Robinson claims Smith joined *Carlson* in August, 2002. Second, the parties dispute whether Wilharm knew about Smith's membership in *Carlson* at the time he authored Smith's 2002 progress report.

Smith's 2002 employment performance review ranged from "fair" to "good" in its evaluations. Smith's 2003 performance review was more negative than in 2002. The 2003 review was most critical of Smith on two issues. The 2003 review gave Smith a low marks for failing to adequately complete her training for the carrier resources position. This report was also critical of Smith for taking unpaid sick leave. Smith argues that because she had to cover

for another a coworker's maternity leave, she was unable to complete her training. Smith also asserts that her taking of unpaid sick days after all paid sick leave had been used up was a common practice for C.H. Robinson employees. Smith has admitted on the record that towards the end of her employment with C.H. Robinson that she was having problems with attendance.

III. STANDARD OF LAW.

A. SUMMARY JUDGMENT STANDARD

Rule 56 of the Minnesota Rules of Civil Procedure provides in relevant part that:

“Judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that either party is entitled to summary judgment as a matter of law.”

Minn. R. Civ. P. 56.03.

In order to oppose a motion for summary judgment, the non-moving party must demonstrate at the time of the motion that specific material facts are disputed and create a genuine issue for the finder of fact to resolve at trial. *Hunt v. IBM Mid America Emp. Fed. Cr. Union*, 384 N.W.2d 853, 855 (Minn. 1986). Summary judgment is appropriate when there is exclusively a question of law involved. *French v. State Farm Mut. Auto Ins. Co.*, 372 N.W.2d 839, 841 (Minn. Ct. App. 1985). Evidence presented with respect to a summary judgment motion must be viewed in the light most favorable to the non-moving party. *Concord Co-Op v. Security State Bank of Claremont*, 432 N.W.2d 195, 197 (Minn. Ct. App. 1988). Whether a genuine issue of material fact is presented is determined by asking if “a reasonable jury could return a verdict for the non-moving party.” *Anderson v. Liberty Lobby, Inc.* 477 U.S. 242, 248 (1986). As to which facts are material, “the substantive law will identify which facts are material. Only disputes over facts that might affect the outcome of the suit under the governing

law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted.” *Anderson*, 477 U.S. at 248. However, the mere existence of a scintilla of evidence in support of the non-moving party’s position will be insufficient; there must be evidence on which the jury could reasonably find for the non-moving party. *DLH, Inc. v. Russ*, 566 N.W.2d 60, 71 (Minn. 1997).

“While summary judgment is intended to secure a just, speedy, and inexpensive disposition, it is not designed as a substitute for a trial where there are issues to be determined.” *Vieths v. Thorp Fin. Co.*, 305 Minn. 522, 525, 232 N.W.2d 776, 778 (Minn. 1975). A material fact is one that will affect the result or outcome of the case, depending upon its resolution. *Zappa v. Fahey*, 310 Minn. 555, 556, 245 N.W.2d 258, 259-60 (Minn. 1976). Thus, “summary judgment is proper when the non-moving party fails to provide the court with specific facts indicating that there is a genuine issue of material fact.” *Hunt*, 384 N.W.2d at 855, *citing* *Erickson v. General United Life Ins. Co.*, 256 N.W.2d 255, 258-59 (Minn. 1977). The United States Supreme Court has stated:

“In our view, the plain language of Rule 56c mandates the entry of summary judgment, after adequate time for discovery and upon motion, against the party who fails to make a showing sufficient to establish the existence of an element essential to the party’s case, and on which the party will bear the burden of proof at trial.”

Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986).

B. Standard Applied

In the case presently before the Court, Smith’s first and second claims have material facts in dispute and therefore can not be resolved through summary judgment. Smith’s claim of sexual harassment and her claim of gender discrimination both have material fact questions which need to be resolved before the case can be ruled on as a matter of law. The appropriate

place for resolution of these facts is by the finder of fact at trial. Admittedly the parties have different recollections as to why Smith was not promoted. Without knowing the true motive behind Smith's lack of promotion, Smith's claims can not be ruled on. Likewise, whether Smith was subjected to a hostile work environment is a question of fact inappropriate for summary judgment.

IV. ANALYSIS

A. Because a reasonable trier of fact could find a material fact in favor of Smith, her claim under the MHRA for relief due to sexual harassment survives summary judgment.

The MHRA prohibits sexual harassment in the workplace. Minn. Stat. §§ 363A.03, subd. 13, .08 subd. 2(3) (2006). Under the MHRA, sexual harassment includes "unwelcome sexual advances, requests for sexual favors, sexually motivated contact or other verbal or physical conduct or communication of a sexual nature." *Id.* § 363A.03, subd. 43. Smith is not alleging *quid pro quo* harassment on the part of C.H. Robinson. Therefore, in order to survive summary judgment, Smith must produce a prima facie case establishing the existence of a hostile work environment at C.H. Robinson. Smith must show that: (1) She is a member of a protected group; (2) her co-workers subjected her to unwelcome harassment; (3) the harassment was based on Smith's membership in a protected group; (4) the harassment affected a term, condition, or privilege of her employment; and (5) C.H. Robinson knew of, or should have known of the harassment and failed to take appropriate disciplinary action. *Goins v. West Group*, 635 N.W.2d 717, 725 (Minn. 2001); *Gagliardi v. Ortho-Midwest, Inc.*, 733 N.W.2d 171 (Minn Ct. App. 2007). For her claim to be actionable, Smith must have been subjected to sexual harassment that was severe or pervasive to the point of creating a hostile or abusive work environment. *Gagliardi*, 733 N.W.2d at 171. A court determines whether a work environment is sufficiently

hostile or abusive to support a sexual harassment claim by analyzing “the totality of 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.” *Wenigar v. Johnson*, 712 N.W.2d 190, 207 (Minn. Ct. App. 2006); *see also Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 23 (1993).

Because Smith is a woman, she is a member of a protected group under the MHRA. Smith claims her co-workers subjected her to unwelcome harassment. Since the parties do not dispute Knapper repeatedly called Smith a “fucking pussy” and “fucking bitch”, there is little dispute that such comments were unwelcome. Defendant cites cases that declare using words like “bitch” and “slut” do not always convey a misogynistic message. *See Kriss v. Sprint Communications Co.*, 58 F.3d 1276 (8th Cir. 1995); *Martinez v. Mary’s Woods at Marylhurts, Inc.*, 2006 WL 1360846 (D. Or. 2006); *U.S.E.E.O.C. v. Continental Airlines, Inc.*, 2006 WL 14510 (N.D. Ill. 2006). This Court agrees “bitch” and “pussy” can be used outside of the context of misogyny. For example, two boys might call each other “pussies”, when questioning each other’s toughness. However, this does not mean a jury is restricted from ever inferring “bitch” or “pussy” ever have a gender-specific connotation. A man referring to a woman by a derogatory term for “vagina” can obviously be construed to have a sexual or misogynistic meaning.

A more difficult issue before the Court is whether Knapper and Welle created a hostile work environment that rises to the level of an actionable claim. Hostile work environment claims require a high evidentiary showing that the plaintiff’s 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.” *Harris*,

510 U.S. at 21; *see also Vajdl v. Mesabi Acad. Of Kidspace, Inc.*, 484 F.3d 546, 550 (8th Cir. 2007). *Harris* also states that a plaintiff does not have to establish physical harm or a psychotic breakdown to proceed with a hostile work environment claim. 510 U.S. at 21. Smith must pass both a subjective and objective requirement to proceed with her claim. *Id.* She must show that she subjectively believed her work environment is hostile. *Id.* She must also produce enough evidence such that a reasonable person would determine the existence of a hostile work environment. *Id.*

The Supreme Court's standard forces this Court to weigh the facts in a summary judgment motion. The line between hostile or deeply repugnant behavior and merely chauvinistic and boorish behavior can be difficult to discern. *Baskerville v. Culligan Int'l Co.*, 50 F.3d 428, 431 (7th Cir. 1995). C.H. Robinson does not refute that Smith found Knapper's behavior to be subjectively abusive, and this Court sees no need to question Smith's subjective opinions of her workplace. The objective reasonability of Smith's claim essentially boils down to this question: Would a reasonable woman perceive her work environment to be hostile after a male coworker had called her a "bitch" or "pussy" about a hundred times, made a grabbing motion at her breasts, and frequently viewed inappropriate internet sites in her presence? This Court holds that a reasonable woman could indeed come to that conclusion. Knapper's activity was frequent, often targeted toward her, and in the case of his language, abusive. While the incidents of pornography viewing may seem inconsequential, and individual instances of Knapper's use of profanity may seem like "mere offensive utterances", such conduct should not be considered individually, but in the aggregate. *See Giuliani v. Stuart Corp.*, 512 N.W.2d 589, 594 (Minn. Ct. App. 1994). In the aggregate, the facts of this case would allow a finder-of-fact to find a hostile work environment. C.H. Robinson sites the fact that Smith was reprimanded to

