Sex, Race, and Sour Grapes: A Look at the Sixth Circuit's Summary Judgment Jurisprudence in Title VII Hostile Work Environment Claims

I. INTRODUCTION

There is a fine line between intensively fact-specific and simply arbitrary application of a rule of law. The infinite combinations and permutations in which events can take place creates a tension in the law to implement rules that can be equitably applied to diverse factual scenarios, yet may still be applied uniformly enough for predictability. In *Winters v. J.M. Smucker Company*,[1] Judge Dowd of the Northern District of Ohio declared that the Sixth Circuit's jurisprudence in the area of summary judgment for Title VII hostile work environment claims has crossed this line and is simply arbitrary.[2] An in-depth examination of this accusation shows that while the legal standard in this area of law is workable, the application as undertaken by the Sixth Circuit is arbitrary and in need of modification.

In Part II, this comment will set forth the factual and legal framework of the *Winters* case which led to Judge Dowd's conclusion. Part III will explore the underlying motivations of Judge Dowd's critique and the propriety of using the *Winters* case as the vehicle to express his discontent with the Sixth Circuit's jurisprudence. A substantive examination of Judge Dowd's allegations is undertaken in Part IV by examining the Sixth Circuit's legal standard regarding summary judgment in Title VII hostile work environment claims and its application. Part V proposes a modified application of the existing legal standard, and Part VI is an overview of the practical implications the existing state of the law has for judges, as well as practitioners and litigants.

II. *WINTERS V. J.M. SMUCKER COMPANY*

The plaintiff in this case was Rhonda Gail Winters, an African-American female.[3] She sued her employer, J.M. Smucker Company, asserting, *inter alia*, claims of a racially hostile work environment which violated Title VII.[4] The defendant moved for summary judgment on some, but not all, of these claims, including the hostile work environment claim.[5]

Ms. Winters set forth a variety of behaviors which she alleged she was subjected to in her workplace which created a racially hostile work environ-

1. No. 5:00 CV 3172, slip op. (N.D. Ohio June 18, 2002).
2. *See id* at 14.
3. *Id.* at 1.
4. *Id.*
5. *Id.* at 2.

ment.[6] These reported incidents included co-workers tampering with machinery to pose risk of injury to her,[7] vandalizing her car,[8] pushing and fighting with her,[9] posting an "ugly picture" of her,[10] stealing her time card,[11] calling her names,[12] placing weight-loss advertisements in her locker,[13] spraying her with pressurized water,[14] and falsely accusing her of participating in many of these same types of behaviors.[15] All of these incidents were allegedly perpetrated by Caucasian co-workers or by unknown co-workers.[16] The plaintiff also complained that "racially charged pictures" were posted throughout the workplace with her name on them,[17] that she was verbally threatened by an African-American co-worker,[18] and that a cartoon caricature marked in blackface and labeled with her name was posted.[19] Two of the three co-workers Ms. Winters identified as being responsible for the latter posting are African-American.[20]

The evidence also included many incidents of misbehavior on the plaintiff's part, including two undisputed cases of fighting with co-workers.[21] Many other similar types of incidents occurred where there was more evidence that Ms. Winters was engaging in inappropriate behavior than those she was accusing.[22] However, for purposes of deciding the defendant's motion for summary judgment on the hostile work environment claim, the district court was required to (and did)[23] make all inferences from the facts in favor of the plaintiff.[24]

In applying the law to the facts at hand, Judge Dowd expressed his opinion that he was constrained by the Sixth Circuit's opinion in *Williams v. General Motors Corporation*[25] and, therefore, unable to grant summary judg-

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6. *Winters*, No. 5:00 CV 3172 at 4-11.
7. *Id.* at 4.
8. *Id.* at 5.
9. *See id.* at 5-6.
10. *Id.* at 6.
11. *Winters*, No. 5:00 CV 3172 at 8.
12. *Id.* at 9.
13. *Id.* at 9.
14. *Id.* at 10.
15. *See id.* at 5-9.
16. *See Winters*, No. 5:00 CV 3172 at 5-10.
17. *Id.* at 11.
18. *Id.* at 9.
19. *Id.* at 6.
20. *Id.* at 7.
21. *Winters*, 5:00 CV 3172 at 5, 8-9.
22. *See id.* at 4-10.
23. *See id.* at 12.
24. *See id.* at 2 (citing United States v. Diebold, Inc., 369 U.S. 654, 655 (1962)).
25. 187 F.3d 553 (6th Cir. 1999).

ment on the hostile work environment claim.[26] He recast the language of the *Williams* court (which had dealt with a sexually hostile work environment case) in terms of race stating that "[p]resumably, this court must read *Williams* as teaching that harassing behavior that is not racially explicit but is directed at blacks and motivated by discriminatory animus against blacks satisfies the 'based on race' requirement."[27] Judge Dowd found that "virtually *none* of the incidents alleged by the Plaintiff (even if believed exactly as she allege[d] them) ha[d] *any* racial overtones," yet still was unwilling to determine that a racially hostile work environment had not been established.[28]

Judge Dowd based his refusal to grant summary judgment not only on the expanded rule of law set forth in *Williams*, but also on what he perceived as an extremely fickle application of that law by the Sixth Circuit.[29] He stated that "the outcome of any kind of Title VII claim of harassment in *this* circuit is entirely fact-specific and panel-dependent,[30] leaving district courts with no clear guidance when resolving summary judgment motions."[31] In the face of this uncertainty, Judge Dowd was unwilling to grant partial summary judgment, which might later be overturned, because this might result in the trial of different claims arising from the same facts at two different times.[32] Instead, he refused to grant summary judgment so all the claims would be heard at once in the same trial.[33]

III. THE METHOD OF JUDGE DOWD'S CRITICISM

Before examining the substance of Judge Dowd's critique of the Sixth Circuit, it is interesting to briefly note both his reasons for doing so and the method he used. Even a cursory perusal of the section of Judge Dowd's *Winters* opinion discussing the hostile work environment claim gives the reader a strong impression of sour grapes.[34] Not surprisingly, a look at the *Williams* case so cruelly castigated by Judge Dowd shows that in that case the Sixth Circuit overturned a grant of summary judgment by none other than

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26. *See Winters*, No. 5:00 CV 3172 at 12-13.
27. *Id.* at 13 (internal quotation omitted).
28. *Id.* at 12-13.
29. *See id.* at 12-15.
30. Though characterizing the Sixth Circuit's jurisprudence as panel-dependent, Judge Dowd pointed out in a footnote that Judge Daughtrey has ruled the opposite way in two cases which were factually indistinguishable. *Id.* at 14 n.5. This observation points to an inconsistency in application even deeper than the characterization as panel-dependent.
31. *Winters*, No. 5:00 CV 3172 at 14.
32. *See id.* at 14-15.
33. *Id.* at 15.
34. *See id.* at 12-15.

Judge Dowd himself.[35] Moreover, the *Williams* case has a quantity of language that is none too complimentary of the opinion written by the district judge it is overturning.[36] Seen in this context, it is clear that Judge Dowd's latest salvo in this ongoing battle contains at least some measure of personal involvement which should be taken into account when evaluating his legal analysis.

More troubling than Judge Dowd's motivation for critiquing the Sixth Circuit is his method in undertaking that critique. If faced with a case which truly dictated that *Williams* be applied to reject summary judgment, an analysis and criticism of that case would be fully appropriate. However, it is questionable whether *Winters* was that kind of case.

The first reason it is questionable whether Judge Dowd should have relied so heavily on the *Williams* case is that a key issue in *Williams* was determining what behaviors were "based on sex."[37] This determination is inherently ambiguous in a way that the requirement that behavior be "based on race" is not. The ambiguity in the former stems from the dual definitions of the word "sex."[38] In the *Williams* case, the court was addressing this ambiguity and clarifying that both sexually explicit behavior and behavior directed against someone specifically because of their gender are "based on sex."[39] Since no such ambiguity is present in racially hostile work environment claims, Judge Dowd's use of the language from the *Williams* court, which was intended to clarify an ambiguity, is questionable.

A second reason that Judge Dowd perhaps should not have used the *Winters* case as his platform for expressing his discontent with the Sixth Circuit is that even under *Williams*, the facts of the case were probably still not sufficient to establish a claim for a hostile work environment. None of the actions alleged by the plaintiff to have been perpetrated by her Caucasian co-workers had any racial overtones.[40] The one cartoon posted, which might be construed to have racial implications because it was marked in blackface, was allegedly posted by the plaintiff's African-American co-workers.[41] Though Ms. Winters' conflicts with her co-workers are obvious, there is nothing to indicate that these conflicts were based on her race.[42] These facts indicate that Judge Dowd stretched the law set forth by the Sixth Circuit beyond its intended point in order to show the absurdity of the rule. Though this is not

35. *Williams*, 187 F.3d at 553.

36. *See id.* at 561-66.

37. *See id.* at 565-66.

38. *See, e.g.*, David S. Schwartz, *When is Sex Because of Sex? The Causation Problem in Sexual Harassment Law*, 150 U. PA. L. REV. 1697, 1708 (2002).

39. *See Williams*, 187 F.3d at 565-66.

40. *See Winters*, No. 5:00 CV 3172 at 5-10.

41. *See id.* at 6-7.

42. *Id.* at 12.

a novel technique,[43] the implications for the defendant's right to summary judgment are troubling.

In spite of Judge Dowd's motivations and choice of case to voice his concerns, his critique of the Sixth Circuit's summary judgment standard in Title VII hostile work environment claims merits a close examination.

IV. THE SUBSTANCE OF JUDGE DOWD'S CRITICISM

In order to properly evaluate Judge Dowd's criticisms of the Sixth Circuit, the legal framework which the circuit applies to summary judgment motions in Title VII hostile work environment claims must first be examined. After this, the application of that standard must be evaluated in the context of specific factual scenarios which have been presented to the Sixth Circuit. This section will undertake both of these tasks and then conclude with an evaluation of the merits of Judge Dowd's critique.

A. Current Legal Standard on Summary Judgment in Title VII Hostile Work Environment Cases in the Sixth Circuit

For purposes of this comment the legal standard applied to summary judgment motions in hostile work environment claims in the Sixth Circuit can be separated into two parts. The first part is the general standard set forth by the United States Supreme Court. However, though this general standard is useful for background, it is not the subject of Judge Dowd's critique. That critique is focused on the way the Sixth Circuit has applied the general standard set forth by the Supreme Court and formed rules to fill in the gaps not addressed by the Court.

According to the Supreme Court, an actionable hostile work environment exists "[w]hen 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."[44] The underlying discrimination must be that targeted by Title VII, that is, discrimination "because of [an] individual's race, color, religion, sex, or national origin."[45] Determining whether conduct is "sufficiently severe or pervasive" to constitute a hostile or abusive work environment requires examining all the circumstances including the frequency and severity of the conduct, its nature as physically threatening as opposed to simply an offensive comment,

43. *See, e.g.*, Trident Ctr. v. Conn. Gen. Life Ins. Co., 847 F.2d 564, 568-69 (9th Cir. 1988).
44. Harris v. Forklift Sys., Inc., 510 U.S. 17, 21 (1993) (internal citations and quotations omitted).
45. The Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)(1).

and the level of interference with the victim's ability to conduct his or her work.[46]

Judge Dowd's critique in *Winters* falls upon the pronouncement and application of two particular rules of law set forth by the Sixth Circuit. The first is that the Supreme Court's directive that all the circumstances be examined to determine whether there is a hostile work environment "mandates that district courts consider harassment by all perpetrators combined"[47] and "must be construed to mean that even where individual instances of sexual harassment do not on their own create a hostile environment, the accumulated effect of such incidents may result in a Title VII violation."[48] The second rule is that an action need not be sexually explicit in order to meet the "based on sex" requirement of Title VII.[49] The Sixth Circuit concluded that "harassing behavior that is not sexually explicit but is directed at women and motivated by discriminatory animus against women satisfies the 'based on sex' requirement."[50]

B. Current Application of the Legal Standard in the Sixth Circuit

Since the aspects of the Sixth Circuit's rules of law which Judge Dowd criticizes were first expounded in *Williams v. General Motors*, an examination of the application of those rules to different factual cases must include that case and subsequent relevant cases. Though there have been a handful of cases heard in the Sixth Circuit since *Williams* addressing summary judgment for hostile work environment claims,[51] the two cases in which the application of the law will be closely examined are *Williams* and *Bowman v. Shawnee State University*. These are the two cases specifically addressed by Judge Dowd,[52] and they exemplify the troubling theme which runs through all the similar cases.

1. *Williams v. General Motors*[53]

In *Williams v. General Motors*, the plaintiff alleged a sexually hostile work environment based on actions and comments by her supervisor, two

46. *Harris*, 510 U.S. at 23.

47. *Williams*, 187 F.3d at 562-63.

48. *Id.* at 563.

49. *Id.* at 565.

50. *Id.*

51. *See* Smith v. Leggett Wire Co., 220 F.3d 752 (6th Cir. 2000); Burnett v. Tyco Corp., 203 F.3d 980 (6th Cir. 2000); Mast v. IMCO Recycling of Ohio, Inc., No. 01-3657, 2003 WL 247109 (6th Cir. Feb. 3, 2003); Curry v. Nestle USA, Inc., No. 99-3877, 2000 WL 1091490 (6th Cir. July 27, 2000).

52. *See Winters*, No. 5:00 CV 3172 at 12-14.

53. 187 F.3d 553 (6th Cir. 1999).

specific co-workers, and certain actions perpetrated by unidentified individuals in her workplace.[54] On three occasions the plaintiff's supervisor made clearly sexual comments to her.[55] Don Giovannoe, a co-worker, frequently used profanity, called the plaintiff a slut, stated "I'm sick and tired of these fucking women," and threw a couple of boxes at the plaintiff during a verbal altercation (but did not hurt her).[56] The plaintiff further reported that on one occasion a female co-worker locked her in the tool crib where she worked.[57] Finally, the plaintiff listed other factors which contributed to a hostile work environment including that she was forced to take the midnight shift, one time a box of forms was glued to her desk, she was denied overtime, she was the only person without a key to the office, she was the only person denied a break, and that on a couple of occasions, materials were placed in the alternate exit of the tool crib where she worked.[58]

The Sixth Circuit overturned the district court's grant of summary judgment to the defendant on the hostile work environment claim.[59] In doing so, it stated that the Supreme Court's totality of the circumstances test dictated that all of the factors listed by the plaintiff had to be considered together in order to determine if they were severe and pervasive enough to state a claim for a hostile work environment.[60] The Sixth Circuit was willing to consider all the incidents, though they were not all explicitly based on the plaintiff's sex, because it found that "[t]he myriad instances in which Williams was ostracized, when others were not, combined with the gender-specific epithets used, such as 'slut' and 'fucking women,' create an inference, sufficient to survive summary judgment, that her gender was the motivating impulse for her co-workers' behavior."[61]

2. *Bowman v. Shawnee State University*[62]

Only a year after *Williams*, the Sixth Circuit heard a reverse discrimination claim in which it came to the opposite conclusion.[63] In *Bowman*, the plaintiff was a male physical education instructor at a state university who complained of various actions of his female supervisor.[64] On different

54. *Id.* at 559.
55. *See id.*
56. *Id.*
57. *Id.*
58. *Id.*
59. *Williams*, 187 F.3d at 558.
60. *Id.* at 562.
61. *Id.* at 565-66.
62. 220 F.3d 456 (6th Cir. 2000).
63. *See id.* at 458.
64. *See id.* at 458-59.

occasions his supervisor rubbed his shoulders, grabbed his butt, and put her hand on his chest (each time the plaintiff clearly objected to the conduct).[65] Other complaints regarded the supervisor making suggestive remarks to him on two occasions, calling him at home on several occasions, requiring him to take additional athletic training in order to keep his position, allowing female employees to work outside the university but prohibiting him from doing so, demanding him to come to her home and perform duties during working hours, chastising him without reason for missing classes or meetings, forcing him to apologize for not attending her friend's party, and threatening to "pull the plug" on him if he didn't do what she wanted.[66]

On these facts the district court granted the defendant summary judgment on the hostile work environment claim.[67] The Sixth Circuit upheld this determination by concluding that the only circumstances alleged by the plaintiff that met the requirement of being based on sex were the three incidents where his supervisor touched him and the two suggestive remarks.[68] Since the court reached the conclusion that many of the allegations were not sexual in nature or based on Bowman's gender, they characterized them as simply harassment, and not discriminatory harassment, so they were not taken into account.[69] Title VII only prevents the latter, not the former.[70] In examining the totality of circumstances of only some of the conduct, and not considering the rest of the allegations, the court concluded that the conduct was not pervasive or severe enough to create a hostile working environment.[71]

3. The Bottom Line: A Workable Legal Rule Desperately in Need of Appropriate Application

The disparity of the results in *Williams* and *Bowman* certainly gives one pause. A worrisome theme is seen in these two cases and other similar cases the Sixth Circuit has heard: the legal rules enunciated remain constant, but the results vary widely. The underlying legal rules are sound, but the application leaves much to be desired.

The two legal rules espoused by the Sixth Circuit, which Judge Dowd targets in his critique, are the way the "totality of the circumstances" test is applied and the rules regarding classifying behavior as based on sex.[72] Yet

65. *Id.*
66. *Id.* at 459.
67. *Bowman*, 220 F.3d at 460.
68. *Id.* at 464.
69. *See id.*
70. *See id.*
71. *Id.*
72. *See Winters*, No. 5:00 CV 3172 at 12-14.

these rules, as stated in the abstract, are logical explications of the basic rules governing Title VII cases. The totality of the circumstances test set forth by the Supreme Court mandates that courts look at factors such as the frequency, severity, and nature of conduct to determine whether it was severe and pervasive enough to constitute a hostile work environment.[73] The Sixth Circuit's application of this rule to mean that all the discrete acts complained of must be considered together (even if perpetrated by different individuals) is a logical extension of this, especially in light of the fact that frequency is a specific factor. The purpose of the law is to determine whether the work environment as a whole is hostile, so it makes sense to consider all the discriminatory acts which have occurred in that work environment.

The Sixth Circuit's interpretation of Title VII's "based on sex" requirement is also sound. In *Williams*, the Sixth Circuit made clear that actions do not have to be sexual or sexually explicit in order to meet this requirement.[74] Actions, which are taken against a person simply because of his or her gender, are also "based on sex."[75] Several other circuits have also interpreted the statutory language in Title VII precisely this way.[76] This position is further supported by the clear analogy between the actions of a person who directs specific acts towards persons of a particular gender and such acts directed against persons of a particular race. People may have strong feelings about another group (either in general or in the context of a particular work setting) which lead to discrimination of that group whether the group is defined by race or gender. Since Title VII prohibits discrimination against a person based on either race or sex (read gender),[77] the Sixth Circuit's analysis is valid.

Though the Sixth Circuit has formulated logical and well-supported rules of law to apply to summary judgment issues in hostile work environment claims, its application of those rules has left much to be desired. Perhaps it would be more accurate to speak of the *various* methods of application of those rules. Just choosing one method of applying these rules, even if it was a bad application, would at least give the jurisprudence in this area some predictability. Instead, the Sixth Circuit has alternately conflated and parsed the relevant rules of law.

The *Williams* case is the clearest example of the Sixth Circuit conflating its totality of the circumstances test and its rule that conduct "based on sex"

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73. *See Harris*, 510 U.S. at 23.

74. *See Williams*, 187 F.3d at 565-66.

75. *Id.* at 565-66.

76. *See, e.g.*, Andrews v. City of Philadelphia, 895 F.2d 1469, 1485 (3d Cir. 1990); Lipsett v. Univ. of Puerto Rico, 864 F.2d 881, 905 (1st Cir. 1988); Hall v. Gus Contr. Co., 842 F.2d 1010, 1014 (8th Cir. 1988); Hicks v. Gates Rubber Co., 833 F.2d 1406, 1415 (10th Cir. 1987); McKinney v. Dole, 765 F.2d 1129, 1138 (D.C. Cir. 1985).

77. Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)(1).

does not have to be sexual in nature. In *Williams*, the court concluded that since the epithets "slut" and "fucking women" were oriented towards the plaintiff's gender, these acts were "based on sex" within the meaning of Title VII.[78] Moreover, because the other harassing acts occurred in the context of this behavior and sexual advances from the plaintiff's boss, they were to be considered as based on the plaintiff's sex as well.[79] The court seemed to acknowledge that only acts that are discriminatory as defined by Title VII (i.e., "based on sex") could be considered in the totality of the circumstances test.[80] However, they bootstrapped the majority of the actions alleged by the plaintiff into the totality of the circumstances test by characterizing them as based on sex for no reason except that the totality of the circumstances included other acts that were, in fact, based on sex.[81] This application of the law allows plaintiffs to get past summary judgment with only a few acts even arguably based on sex as long as they can point to other harassing behavior in their workplace. This is contrary to the intent of Title VII, which is aimed to protect people from discriminatory harassment, not all harassment.[82]

A similarly inadequate application of law is found in *Bowman*. Here the Sixth Circuit applied its law on summary judgment in an overly formalistic manner. Directly contrary to *Williams*, the court concluded that the only actions which could be considered in looking at the totality of the circumstances were those that were specifically sexual in nature.[83] The court found that the other incidents alleged by the plaintiff were not "based on sex" because he did not show that they "had an anti-male bias."[84] Apparently, the court determined that the plaintiff's supervisor would have had to make anti-male comments in order for her conduct towards Bowman to be considered based on his sex.[85] It stated that,

> [u]nlike the plaintiff in *Williams*, Bowman has not alleged that Jahnke [, his supervisor,] made a single comment evincing an anti-male bias. Besides a bare and unsupported assertion that some women employees were allowed to engage in work outside the University while he was

78. *See Williams*, 187 F.3d at 565-66.

79. *See id.*

80. *See id.* at 563-64.

81. *See id.* ("Rather than constituting merely oafish behavior, the pranks, seen as part of the 'constellation of surrounding circumstances' including the threatening language and sexually aggressive innuendo from a supervisor, could well be viewed as work-sabotaging behavior that creates a hostile work environment.")

82. *See, e.g.*, Faragher v. City of Boca Raton, 524 U.S. 775, 788 (1998).

83. *See Bowman*, 220 F.3d at 463-64.

84. *Id.* at 464.

85. *See id.*

not, Bowman has not shown that the non-sexual conduct he complains of had anything to do with his gender.[86]

This application of the Sixth Circuit's own rule laid out in *Williams* is inappropriate for two reasons. First, it requires the plaintiff to show the harassment at issue is anti-male instead of applying the broader formulation that the actions were directed against him because of his gender. For example, while Jahnke probably did not require Bowman to step up his athletic training because she hates men, it would be entirely reasonable for a jury to conclude that Jahnke took this step because Bowman is male (especially in light of the evidence of Jahnke's amorous ambitions with regard to Bowman). The standard of whether behavior is "based on sex" includes anti-male or anti-female sentiment, but it extends beyond that as well.[87]

The second error in application was that the Sixth Circuit applied its incorrectly narrow formulation of the "based on sex" requirement in an overly formalistic manner. The court did not look at the circumstances to see whether there was evidence that Jahnke evinced an anti-male bias, it looked only at what she said.[88] The lack of any verbal statement showing such bias was found to be determinative.[89] The court was not willing to look at whether Jahnke treated her male subordinates differently that her female subordinates and even dismissed the evidence Bowman submitted on this point.[90] A plaintiff should be able to demonstrate bias by pointing to differential treatment of different groups as well as by reporting specifically discriminatory comments. Arguably a person's actions are even better evidence than a person's words, and in these circumstances, both are probative evidence which should be considered.

Whatever Judge Dowd's motive and methods, his critique of the Sixth Circuit's summary judgment jurisprudence in Title VII hostile work environment claims is certainly justified. Though the rules of law in this area are logical and workable, the application of those rules has been contrary to both the idealistic and practical aspirations of the law. As a result, we have neither justice nor predictability.

V. BEYOND THE *WINTERS* CRITICISM: FIXING THE PROBLEM

A proper application of the totality of the circumstances test depends on recognizing that non-sex based conduct cannot be considered. When a plain-

86. *Id.*
87. *See Williams*, 187 F.3d at 565.
88. *See Bowman*, 220 F.3d at 464.
89. *See id.*
90. *See id.*

tiff alleges a list of actions which he or she avers constitute a hostile work environment, the court must first determine whether each of those actions is based on sex.[91] The Sixth Circuit itself has recognized that Title VII only protects against *discriminatory* harassment, not any harassment.[92] This recognition must be put into practice by closely examining each incident separately to determine if it is discriminatory in nature. Once the nature of each incident is determined, the effects of those which are discriminatory must be examined together in order to determine if, as a whole, they are pervasive and severe enough to constitute a hostile working environment.

Properly applying the totality of the circumstances test is predicated on a proper application of the "based on sex" requirement.[93] In order to remedy its notorious fickleness in determining what actions are discriminatory (that is, based on sex), the Sixth Circuit needs to strike a balance between the approaches taken in *Williams* and *Bowman*. In *Williams*, the court found non-sexual conduct perpetrated by some individuals to be discriminatory because different individuals had made anti-female statements.[94] Under a legitimate application of the law, those statements would be some evidence that facially gender-neutral actions of *the person who made the anti-female statements* were motivated by anti-female animus. However, such a statement or action would not generally have any relevance to whether facially gender-neutral conduct undertaken by a different person was motivated by the same anti-female animus. On the other hand, if a person is treating males and females markedly differently for no legitimate reason, that conduct is evidence of a discriminatory motivation for facially gender-neutral (when examined in isolation) incidents. In short, both the comments and actions of the person accused of engaging in discriminatory conduct must be examined to determine if the conduct is truly discriminatory.

VI. PRACTICAL IMPLICATIONS OF THE CURRENT STATE OF THE LAW

Though a consistent application of the law of summary judgment in the Sixth Circuit along the lines described in the previous section would be desirable, it is not a reality today. Between now and any point when the Sixth Circuit (or the Supreme Court) fixes these problems, judges, practitioners, and

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91. The discussion of the totality of the circumstances test in this paragraph can also be directly applied to claims of a hostile work environment based on race, color, religion or national origin. Sex is simply used as the example in this section for the sake of continuity and convenience.

92. *Bowman*, 220 F.3d at 464.

93. Contrary to the previous paragraph, the problems discussed here are unique to claims of actions "based on sex" because of the ambiguity of the term noted above. *See supra* text accompanying note 37.

94. *See Williams*, 220 F.3d at 563-64.

litigants will have to cope with the grim realities of the current state of the jurisprudence.

A. *Implications for Judges*

The struggle Judge Dowd faced in deciding the motion for summary judgment in the *Winters* case is indicative of the predicament judges across the Sixth Circuit will find themselves in with cases, including claims based on a sexually hostile work environment.[95] None of the options are pleasant. A judge may choose one version of the application of the law used by the Sixth Circuit and hope on appeal that they do not choose a different one. Another option would be applying the law, as set forth in the previous section of this comment, in hopes of bringing the Sixth Circuit to its senses and risking getting overturned. Since the current rule of law would still be used and only the application would be refined, this would arguably be a legitimate course of conduct for a district judge to take. A final option would be to take the course set by Judge Dowd and simply refuse to grant defendants' motions for summary judgment on these claims, at least where there are other claims based on the same facts that will be going to trial anyway.[96] The choices are not very palatable: an unpredictable risk of getting overturned versus a patently unjust universal refusal of summary judgment motions.

B. *Implications for Practitioners and Litigants*

The uncertainty facing judges in deciding these summary judgment motions clearly creates a very high level of unpredictability both for those suing and being sued. Any of the options creates problems for plaintiffs and defendants alike. If district court judges grant defendants' summary judgment motions, this is clearly bad for plaintiffs. However, the very realistic risk of reversal on appeal creates a potential problem for defendants because by the time the Sixth Circuit reverses the summary judgment on a hostile work environment claim, the parties would probably have already tried the other claims in the case.[97] So defendants would have to go to trial twice to try different claims based on the same facts. This would cost them more than if the summary judgment motion had been initially refused and all the claims were tried together. On the other hand, if such summary judgment motions are routinely denied as Judge Dowd has expressed an intention of doing, defendants are forced to pay the costs of trying all claims, at least some of

95. Realistically, these problems do not extend into the realm of racially hostile work environment claims, Judge Dowd's application of the law notwithstanding. *See supra* text accompanying notes 37-39.

96. *See Winters*, No. 5:00 CV 3172 at 14-15.

97. *See, e.g., id.* at 14-15 n.6.

which will be illegitimate. This option also ultimately costs plaintiffs more because they will spend money trying claims that should have been dismissed. Though most cases will settle anyway, the costs of trial and summary judgment under the current jurisprudence are still important because the parties' estimated costs of going to trial and the likely result at trial will drive the ultimate settlement dollar figure. Such a high level of uncertainty of the costs of summary judgment, reversal, and trial will create substantial difficulties in arriving at an appropriate settlement figure.

VII. CONCLUSION

Under an appropriate application of the law, J.M. Smucker Company's motion for summary judgment on the hostile work environment claims in *Winters* clearly should have been granted. Yet it was not. This is precisely the sort of injustice that is doomed to occur due to the Sixth Circuit's diverse repertoire of methods for applying the law on summary judgment to these kinds of claims. Under the current state of affairs, judges do not know which way to turn and litigants are faced with monumental uncertainty. Hopefully Judge Dowd's critique will be an impetus for change and not a harbinger of worse things to come.

RACHAEL HINKLE

002-071-02

DOWD, J.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Rhonda Gail Winters,	)	
	)	CASE NO. 5:00 CV 3172
Plaintiff(s),	)	
	)	
v.	)	MEMORANDUM OPINION
	)	AND ORDER
J.M. Smucker Co.,	)	
	)	(Resolving Doc. No. 88)
Defendant(s).	)	
	)	

Before the Court are the Defendant's motion for partial summary judgment (Doc. No. 88), Plaintiff's response (Doc. No. 96), and Defendant's reply (Doc. No. 101). For the reasons set forth below, the motion is granted in part and denied in part.

I. THE COMPLAINT

On December 21, 2000, plaintiff Rhonda Gail Winters, an African-American female, filed a complaint against her employer, defendant J.M. Smucker Company. The first amended complaint (Doc. No. 20) was filed on April 16, 2001. Plaintiff sets forth eight causes of action, consisting of four federal claims and four counterpart state law claims.

The first and second causes of action assert claims of a racially hostile work environment in violation of Title VII and O.R.C. Chapter 4112. The fifth and sixth causes of action assert claims of retaliation for plaintiff's having filed charges of discrimination with the Ohio Civil Rights Commission

(OCRC), also in violation of Title VII and O.R.C. Chapter 4112. Defendant's motion for summary judgment addresses only these four claims, as well as plaintiff's prayer for punitive damages.

Defendant has not moved for summary judgment with respect to the remaining claims. The third, fourth, seventh and eighth causes of action all assert claims of discrimination in employment based on plaintiff's race. In the third and fourth claims, plaintiff asserts that she was suspended because of her race in violation of Title VII and O.R.C. Chapter 4112. In the seventh and eighth claims, plaintiff asserts generally that the terms and conditions of her employment are different from those of her white counterparts, in violation of Title VII and O.R.C. Chapter.

II. DISCUSSION

A. Summary Judgment Standard

Summary judgment is appropriate where there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56. When considering a motion for summary judgment, "the inferences to be drawn from the underlying facts contained in [affidavits, pleadings, depositions, answers to interrogatories, and admissions] must be viewed in the light most favorable to the party opposing the motion." U.S. v. Diebold, Inc., 369 U.S. 654, 655 (1962). However, the adverse party "may not rest upon mere allegation or denials of his pleading, but must set forth specific facts showing that there is a genuine issue for trial." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 256 (1986).

(5:00 CV 3172)

The Rule requires the nonmoving party who has the burden of proof at trial to oppose a proper summary judgment motion "by any of the kinds of evidentiary material listed in Rule 56(c), except the mere pleadings themselves[.]" Celotex Corp. v. Catrett, 477 U.S. 317, 324 (1986). General averments or conclusory allegations of an affidavit do not create specific fact disputes for summary judgment purposes. See Lujan v. National Wildlife Federation, 497 U.S. 871, 888-89 (1990). Nor may a party "create a factual issue by filing an affidavit, after a motion for summary judgment has been made, which contradicts . . . earlier deposition testimony." Reid v. Sears Roebuck & Co., 790 F.2d 453, 460 (6th Cir. 1986) (citing Biechell v. Cedar Point, Inc., 747 F.2d 209, 215 (6th Cir. 1984)). Further, "'[t]he mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff.'" Street v. J.C. Bradford & Co., 886 F.2d 1472, 1477 (6th Cir. 1989) (quoting Anderson v. Liberty Lobby, 477 U.S. at 252).

In sum, "[t]he inquiry performed is the threshold inquiry of determining whether there is the need for a trial -- whether, in other words, there are any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party." Anderson v. Liberty Lobby, 477 U.S. at 250.

(5:00 CV 3172)

B. Factual Background

Materials submitted in support of and in opposition to the motion for partial summary judgment reveal the parties' positions with respect to the facts underlying these claims.[1] A few, but not all, of the facts are undisputed.

Defendant is engaged in the manufacture of jams and jellies at twelve locations in the United States, including a facility in Orrville, Ohio, where it employs approximately 450 hourly workers represented for purposes of collective bargaining by the International Brotherhood of Teamsters, Local Union 510 (Union). Plaintiff, a member of the Union, has been employed by Defendant at the Orrville facility since October 1989, primarily as a Cook's Helper. She asserts that, almost from the very beginning of her employment, she has been subjected to a hostile working environment and that, despite her complaints, the defendant has failed or refused to do anything about that environment and has allowed the harassment to escalate. Defendant sees it differently, arguing that it is Plaintiff who is constantly causing conflicts with her co-workers.

Plaintiff claims that, in the mid-1990s, she reported several incidents to Defendant. First, she reported "to management" that a Caucasian co-worker, Scott Smith, who worked as a sugar weigher, was tampering with her machinery causing it to slam into her and subjecting her to potential injury. She

[1] These materials include excerpts from the depositions of the Plaintiff, John Messina (Defendant's human resources manager), Albert Yeagley (a plant manager), Elizabeth Valentine (a co-worker of the Plaintiff), and Mark Wake (a supervisor), as well as excerpts from an arbitration hearing that took place in February 2000 when Plaintiff challenged a three-day suspension which she received. The materials also include an affidavit of the Plaintiff and of John Messina, which is accompanied by various written reports of his investigations into Plaintiff's complaints over the years.

(5:00 CV 3172)

also reported to her supervisor, Tony Hartman, two occasions when she discovered vandalism to her vehicle parked in the Defendant's lot. The vehicle was "keyed," nails were placed in the tires, water was poured in her window during the winter causing her door to freeze, and the windshield wiper was bent. Plaintiff claims that Defendant did nothing in response to her complaints. Defendant denies this, and further argues that there is nothing to suggest that any of these incidents had any nexus to Plaintiff's race.

Plaintiff also claims that in the early 1990s, when she was working as a glass hauler, she and a Caucasian co-worker, Marilyn Brubaker, who was a jar weigher, had an verbal exchange which ended in some pushing. Apparently Brubaker reported the incident and accused Plaintiff of calling her "a wrinkled-up old bitch." Plaintiff claimed she was innocent and that Brubaker was completely responsible for the altercation. Despite the fact that both women were suspended for one day for violating the company policy regarding fighting, Plaintiff asserts that Defendant "accepted the words of Brubaker, a caucasian, and refused to believe the words of Ms. Winters, a woman of color."

Plaintiff complains of an incident in 1995 when she had an altercation with another Caucasian co-worker, Billie Anderson. After a verbal dispute, Anderson shoved the Plaintiff and told her to get out of her way. Plaintiff admits that she "momentarily grabbed Ms. Anderson's neck." When the incident was reported, apparently by Anderson, a supervisor, Keith Gustely, purportedly told Plaintiff that he did not believe her story because "she had it easy all of her life." Plaintiff asserts that Gustely "clearly felt this way because Ms. Winters was an African-American." Defendant tells a different story, stating that Plaintiff struck Anderson "with a hard uppercut elbow and forearm into [her] chest, neck

and face because Ms. Anderson had complained about the Plaintiff not doing work which had been assigned her [Plaintiff]." As with the earlier incident, both employees were suspended for one day. Anderson filed a grievance and the suspension was removed from her file. Defendant states that, "[i]n an extraordinary display of patience," Plaintiff's suspension was also removed. However, in Plaintiff's view, Defendant acted as it did only because it "did not want to get Ms. Anderson into trouble."

Plaintiff claims that in 1997 she was falsely accused of calling a Caucasian co-worker, Scott Smith, "white trailer trash." She claims that he was harassing her by "rearrang[ing] the manner in which she set her hopper on the track." She became "disgusted with [his] childish behavior" and called him, not "white trailer trash," but rather "ass." A full investigation was conducted by the former human resources manager, Mr. Hartman. After two days, Plaintiff was called into the office of her supervisor, Keith Gustely, who chastised her and allegedly refused to believe her side of the story.

Plaintiff next asserts that, in March 1999, she reported to then human resources manager, John Messina, that someone had posted in the plant a cartoon caricature marked in black face and labeled with Plaintiff's name, as well as an "ugly picture" of her from her high school days. She told Messina the names of co-workers whom she believed were responsible. According to Plaintiff, Messina did nothing, although he promised he would investigate and get back to her. Plaintiff admits that plant manager Albert Yeagley instructed that a notice be posted stating that unauthorized postings violated company policy and would not be tolerated; however, she argues that this was ineffective. Defendant argues that Messina did investigate and that he spoke to the plant manager, supervisors and the three people whom Plaintiff named, all of whom denied any knowledge of who was responsible for the

(5:00 CV 3172)

postings. Defendant also asserts that the postings cannot constitute racial harassment because two of the three people identified by the Plaintiff as having posted these pictures are themselves African-American. Defendant also notes that, although Plaintiff has complained that co-workers harassed her by calling her names, such as "Predator," she herself admitted during testimony at an arbitration hearing that, on one occasion, she took down one of the "ugly pictures" from her yearbook, wrote something on it, signed it "Predator" and re-posted it.

In May 1999, Plaintiff was accused of elbowing a Caucasian co-worker, Missy Sears. Plaintiff asserts that, in fact, Sears brushed up against her as she passed the Plaintiff and another worker who were walking down a stairway. Even so, Plaintiff alleges that management refused to question the co-worker who witnessed the incident and, instead, "placed a copy of the harassment policy in both Ms. Winters and Sears file."

In August 1999, Plaintiff was accused of twice calling another Caucasian co-worker, Liz Valentine, "white trailer trash." Plaintiff claims that Valentine simply overheard a conversation between Plaintiff and another co-worker, John Neiman, and that Valentine misconstrued what she heard. When Valentine, who does live in a trailer park, reported the incidents to management, an investigation was undertaken, including interviewing and taking statements from workers who had witnessed the incident. As a result, on September 2, 1999, Plaintiff was suspended for three days and placed on one year's probation, with a warning that further violations would result in discharge.[2] The disciplinary action was

[2] The very next day, Plaintiff filed a charge of discrimination with the OCRC, alleging that the Defendant suspended her because of her race. This incident is apparently what forms the basis of (continued...)

later vacated following a grievance proceeding in which the arbitrator ruled that the Defendant had not sustained its burden of proof at the hearing. The discipline was removed from the Plaintiff's file and Plaintiff was reimbursed her lost pay for the three days.

In October 1999, Plaintiff reported to supervisors Keith Toomey and Mark Wake that her time card was being repeatedly stolen, but that she had no idea who was doing it. Again, she claims nothing was done. Defendant says that, since it had no idea who to blame, it simply re-posted near the time-clock its written policy that tampering with time cards was a serious violation of company policy. After that, there were apparently no further incidents with Plaintiff's time card.

In November 1999, the Defendant re-imposed on the Plaintiff the suspension and probation that had earlier been removed when it learned of the following additional incidents of misconduct by the Plaintiff: (1) on September 23, 1999, she abruptly and purposely pulled her car in front of a co-worker's car, almost causing an accident; (2) later that day, she purposely drove a forklift so close to a co-worker that he had to jump out of the way; (3) on September 27, 1999, Plaintiff "slung" a large food hopper on a rail at Traci Butler, a close friend of the woman Plaintiff had been accused of calling "white trailer trash;" (4) on September 28, 1999, she did the same to another worker; (5) on October 5, 1999, Plaintiff went out of her way to bump into a co-worker in a warehouse aisle; (6) on October 11, 1999, Plaintiff used a forklift to pin co-worker Valentine against equipment in the cookroom; and

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[2](...continued)
Plaintiff's third and fourth causes of action, which are not at issue in this motion. On May 11, 2000, the OCRC issued a finding of probable cause and on November 16, 2000, it issued a right to sue letter, copies of which are attached to the complaint.

(5:00 CV 3172)

(7) on October 13, 1999, Plaintiff followed Valentine part of the way home late at night after the two left work. Defendant asserts that Plaintiff's conduct generally improved after the suspension and probation, but that since then she has also increased her unsubstantiated reports of harassments by both black and white co-workers.

Plaintiff asserts that on several occasions she reported "to management" that her name was being scratched out on the posted scheduling sheets and was being replaced with derogatory names like "Bitch," "Predator," "Stuck Up" and "Good Riddens." She also reported that co-workers were calling her these names to her face. Again, she claims nothing was done. Defendant argues that it disciplined one co-worker for calling Plaintiff "Bitch" and that it was unable, despite investigation, to determine who else was responsible for the name-calling. It further asserts that Plaintiff refused to cooperate with the investigation and told the investigators to "deal with her lawyer."

Plaintiff asserts that, on or about May 15, 2000, she reported to Messina that Chuck Blackwell, an African-American co-worker, had verbally threatened her. Apparently, as Plaintiff walked past Blackwell upon her arrival at work in the morning, Blackwell said to other co-workers something to the effect of: "She's smiling now; wait until we get her." Defendant states that it promptly interviewed Blackwell and other co-workers supposedly involved in the incident (Pugnea, Freeman and Humphries), all of whom denied any such activity or remarks, rendering the Defendant unable to discipline anyone.

Plaintiff also reported in May 2000 that, on three separate occasions, someone had placed an advertisement regarding weight loss in her locker. The Defendant investigated but could not find the

culprit. All it could do was post an interoffice memorandum warning employees of the consequences of such activity. It also had all department managers review this topic with their supervisors.

On October 31, 2000, Plaintiff filed a second charge with the OCRC alleging that she had been retaliated against for having previously filed her charge of discrimination.[3] Defendant claims that the incidents alleged in that charge (except for a couple), had never been reported by the Plaintiff to the Defendant. Upon receipt of the charge, the Defendant immediately undertook an investigation and was unable to conclude that any of the incidents alleged in the charge had ever occurred.[4]

Plaintiff asserts that in April 2001, she reported to Messina that on two occasions, she was sprayed on or about the face with a pressurized water sprayer used to clean product cooking vessels. She claimed that the incidents involved Jimmy Rowe, Gary Nalbach, Liz Valentine and Craig Peters, all Caucasians. She states that Messina did nothing. Messina attests that he interviewed all of these employees and they all vehemently denied participation in any such incident. He also interviewed all of the other employees who had been in the vicinity and they all denied having witnessed any such occurrence. Even though everybody denied the incident, Messina nonetheless took time to review with each of them the company's policy with respect to "horseplay" and emphasized the importance of following the policy.

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[3] Copies of the charge and the right to sue letter issued on January 17, 2001 are attached to the complaint.

[4] Defendant states that Plaintiff never reported the incidents, considerable time had passed since the alleged incidents had occurred, Plaintiff was unable to identify any perpetrator by name, and all co-workers who might reasonably have had knowledge of the occurrences denied that they happened.

(5:00 CV 3172)

Plaintiff asserts that in early 2002, she reported to a manager, Dave Thomas, that co-worker John Pugnea was harassing her by throwing things in her path while she was attempting to move a fruit hopper. During a meeting with Thomas, Pugnea and Plaintiff regarding this incident, Pugnea called Plaintiff a "Bitch." As already noted, Pugnea was disciplined for this, even though Plaintiff insists that nothing was done.

Finally, Plaintiff states that recently she reported that "racially charged pictures" were posted "with references labeled with her name." For instance, a picture of Osama bin Laden was posted throughout the plant. It had Plaintiff's name on it as well as the term "Drama Queen."

In addition to all of the problems with her co-workers, Plaintiff also alleges racial discrimination by management and supervisors. She asserts that they never take her complaints seriously and always disbelieve her version of events while believing her Caucasian co-workers' versions. She claims that they have engaged in "witch hunts" disguised as investigations, during which they took statements from her co-workers "to validate these fictitious complaints." She claims that the supervisor in the cookroom calls her "Predator." She claims that she was denied a job as a homogenizer operator that she had been awarded through the bidding process. She claims that management keeps a "secret file" on her which they refuse to share with her. She claims that the re-affirmation of her suspension in November 1999 resulted from management's belief of the various false accusations made by her co-workers.

(5:00 CV 3172)

C. Racially Hostile Work Environment (First Cause of Action)

In ruling on this portion of defendants' motion for summary judgment, the Court takes its direction from Williams v. General Motors Corp., 187 F.3d 553 (6th Cir. 1999), where the Sixth Circuit overturned this Court's grant of summary judgment in favor of an employer on a Title VII claim of a sexually hostile work environment. Relying on Harris v. Forklift Systems, Inc., 510 U.S. 17 (1993), Faragher v. City of Boca Raton, 524 U.S. 775 (1998), and Burlington Industries, Inc. v. Ellerth, 524 U.S. 742 (1998), the Sixth Circuit overruled this Court's conclusion "that the incidents of alleged sexual harassment, while offensive, were not so severe or pervasive as to constitute a hostile work environment[.]" 187 F.3d at 560. The Court stated:

> . . . the district court committed several errors in its analysis, en route to dismissing the incidents as "infrequent, not severe, not threatening or humiliating, but merely offensive."
>
> First, the district court disaggregated the plaintiff's claims, contrary to the Supreme Court's "totality of circumstances" directives, which robbed the incidents of their cumulative effect. Second, the district court improperly concluded that the conduct alleged to have created a hostile work environment must be explicitly sexual. Finally, the court misconstrued the requirements of the subjective test.

Williams, 187 F.3d at 561-62 (footnote omitted).

Here, the Court is faced with a similar situation, but in the context of racial rather than sexual harassment. Clearly, there are rather significant problems in the Defendant's workplace between Plaintiff and many (if not all) of her co-workers. However, notwithstanding the fact that virtually none of the incidents alleged by the Plaintiff (even if believed exactly as she alleges them) have any racial overtones, this Court is reluctant to conclude that Plaintiff has failed to establish a racially hostile work

environment, in view of the Williams majority opinion which "has so dramatically and radically changed the law in this circuit for actionable . . . harassment under Title VII[.]" 187 F.3d at 569 (Ryan, J., dissenting).

In Williams, the Sixth Circuit said that there can be sexual harassment even where the majority of incidents that make up the "totality of the circumstances" have no sexual overtones. Citing a First Circuit case, the Williams majority declared that "the law recognizes that non-sexual conduct may be illegally sex-based where it evinces 'anti-female animus[.]'" 187 F.3d at 565 (citing Lipsett v. University of Puerto Rico, 864 F.2d 881, 905 (1st Cir. 1988)). The majority went on to conclude: "Thus, harassing behavior that is not sexually explicit but is directed at women and motivated by discriminatory animus against women satisfies the 'based on sex' requirement." Id. (citations omitted). The court then cited a Seventh Circuit case for the same conclusion with respect to allegations of racial harassment, namely, that even non-racial incidents "may be considered as a predicate act in establishing racial harassment in a hostile work environment, because it would not have occurred but for the fact that [the plaintiff] was black." 187 F.3d at 565 (quoting Daniels v. Essex Group, Inc., 937 F.2d 1264, 1273 (7th Cir. 1991)).

Presumably, this Court must read Williams as teaching that "harassing behavior that is not [racially] explicit but is directed at [blacks] and motivated by discriminatory animus against [blacks] satisfies the 'based on [race]' requirement." Admittedly, in Williams, the acts complained of were committed by men against a woman and included at least a few sexually explicit incidents, in addition to several gender- and sex-neutral incidents. Arguably, this Court could find a distinction between

(5:00 CV 3172)

Williams and the instant case since here there are instances of both whites and blacks allegedly racially harassing the Plaintiff and there are no racially explicit incidents. Even so, the Court is of the view that the outcome of any kind of Title VII claim of harassment in this circuit is entirely fact-specific and panel-dependent, leaving district courts with no clear guidance when resolving summary judgment motions. Compare, e.g., Williams, supra (overruling a grant of summary judgment in favor of an employer, concluding that non-sexual conduct evincing anti-female animus can be found to contribute to a sexually hostile work environment) with Bowman v. Shawnee State University, 220 F.3d 456 (6th Cir. 2000) (affirming a grant of summary judgment in favor of employer, finding no anti-male bias, notwithstanding overt sexual actions, to support a claim of sexually hostile work environment allegedly created by a female supervisor).[5] As a result, when coupled with the often inordinate amount of time that it takes for the circuit to resolve any appeal of a summary judgment ruling, this Court is faced with the prospect of resolving a case, only to have it returned to its docket 18-24 months later with directives that require a trial.[6]

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[5] Interestingly, the very same judge who authored Williams sat on the Bowman panel, but did not find sexual harassment when a male was the complainant. In Bowman, the panel concluded that the female supervisor's behavior was not severe or pervasive, even though there were at least three incidents of touching, one clearly sexual, and two incidents of sexually-suggestive invitations and remarks made by the supervisor, along with numerous other incidents where Bowman alleged he had been treated differently than female counterparts. *This* court sees *no* distinction between the "totality of the circumstances" in Williams and Bowman, except that the former involved harassment of a female by a male and the latter involved the less "traditional" complaint of harassment of a male by a female.

[6] In Williams, this Court issued its ruling on March 10, 1997 and the appeal was filed on April 7, 1997; the circuit ruled on August 5, 1999, with the mandate issuing on October 8, 1999, 31 months after this Court's ruling. A trial was promptly conducted beginning on December 8, 1999; it ended on (continued...)

(5:00 CV 3172)

This Court is not inclined, in light of the "moving target" nature of Title VII case law in this circuit, to grant partial summary judgment. The Court is of the view that a jury should be given the entire case sooner rather than later. Therefore, the Court denies the motion for partial summary judgment with respect to Plaintiff's first cause of action under Title VII.

D. Retaliation (Fifth Cause of Action)

In her fifth cause of action, Plaintiff alleges that she was retaliated against, in violation of Title VII, because she filed charges of discrimination with the OCRC. The complaint is not specific regarding how, precisely, the Defendant is alleged to have retaliated against the Plaintiff. However, in her response to the instant motion, Plaintiff asserts that the retaliation has taken several forms: (1) the November 2, 1999 reaffirmation of her probation period, coupled with a final warning; (2) a "witch hunt" masquerading as an investigation of her own complaints; (3) refusal to take effective action to stop the harassment in the workplace; and (4) refusal to investigate her continuing complaints of harassment.

In order to establish a claim of retaliation, the Plaintiff must show: (1) that she engaged in an activity protected by Title VII; (2) that the exercise of her civil rights was known to the Defendant; (3)

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[6](...continued)
December 10, 1999 with a verdict completely in defendant's favor. Thus, the result after all of this delay was the same as this Court had originally ruled. The plaintiff's motion for a new trial was denied and that ruling was upheld on appeal. See also, Carten v. Kent State University, Case No. 4:97 CV 2757 (Appeal No. 98-3150), where this Court's ruling of January 30, 1998 was not reversed and remanded until February 25, 2002.

that, thereafter, the Defendant took an employment action adverse to the Plaintiff; and (4) that there was a causal relationship between the protected activity and the adverse employment action. Williams, 187 F.3d at 568 (quoting Wrenn v. Gould, 808 F.2d 493, 500 (6th Cir. 1987)).

Here there is nothing to suggest that the Plaintiff has suffered any adverse employment action at the Defendant's hands. Even the reaffirmation of her probation and the final warning that she was given on November 2, 1999 did not constitute an adverse employment action since she has not suffered any change in status with respect to wages, benefits or duties. Hollands v. Atlantic Company, Inc., 188 F.3d 652 (6th Cir. 1999) (a threat of discharge is too ambiguous to satisfy the adverse employment action requirement for a retaliation claim); see also, Krause v. City of LaCrosse, 246 F.3d 995, 1000 (7th Cir. 2001) (a letter of reprimand alone is not an adverse employment action).

As for her assertions that the Defendant has, as a form of retaliation, either refused to investigate her complaints or has utilized its investigation to conduct a "witch hunt" against her, Plaintiff can point to no first-hand evidence to support this. In fact, the Defendant has submitted a significant amount of material to support its assertion that it has investigated each of Plaintiff's complaints to the best of its ability, especially given Plaintiff's own occasional lack of cooperation, and has done whatever it could (in the face of very little information gleaned from the investigations) to stop the behaviors which the Plaintiff finds offensive. Even if the Court were to believe that everything happened just as the Plaintiff claims, there is nothing here to suggest that any of these incidents have a causal link to Plaintiff's OCRC charge of discrimination. If anything, they are no more than an extension of the

(5:00 CV 3172)

claims set forth in the first and seventh causes of action which allege Title VII violations in the form of a racially hostile working environment and disparate treatment based on race.

The Court finds merit in Defendant's motion with respect to the retaliation claim stated in the fifth cause of action. Accordingly, Defendant is entitled to summary judgment on this claim and the same shall be granted.[7]

E. Prayer for Punitive Damages and State Law Claims (Second, Fourth, Eighth Causes of Action)

Under 28 U.S.C. § 1367(c)(2), this Court may decline to exercise supplemental jurisdiction over state law claims which "substantially predominate over the claim or claims over which the district court has original jurisdiction[.]"

Since November of 1991, plaintiffs prevailing under Title VII are permitted to recover compensatory damages as well as attorney's fees and costs. The compensatory damages are limited by statutory caps. Under Ohio civil rights law, prevailing plaintiffs cannot recover attorney's fees; however, there are no statutory caps on compensatory damages. In addition, the federal law limits punitive damages whereas state law does not.

Over time, it has become apparent to the Court that plaintiffs typically assert both federal and state claims in an obvious attempt to enjoy the benefits of both laws. Because the question of damages

[7] The Defendant is, therefore, also entitled to judgment on the sixth cause of action which is no more than the state law counterpart of the Title VII claim in the fifth cause of action. These claims are judged by the same standards. See Mitchell v. Toledo Hosp., 964 F.2d 577, 582 (6th Cir. 1992); Plumbers & Steamfitters Comm. v. Ohio Civil Rights Comm., 66 Ohio St.2d 192, 196 (Ohio 1981).

becomes a major issue in these very fact-driven cases, it is possible for a state law discrimination claim (with the possibility of unlimited compensatory and punitive damages) to overtake the federal claim during the adjudication of the case. As a result, it has become this Court's practice, notwithstanding the relatedness of the two claims, to decline to exercise its supplemental jurisdiction over discrimination claims brought under state law, including claims for punitive damages. The Court shall adhere to that practice in this case.

Therefore, the Court will exercise its discretion to decline jurisdiction over the state law claims which add nothing to the case but the potential for collecting additional damages not permitted under federal law.

Accordingly, the Court denies the Defendant's motion for summary judgment with respect to the Plaintiff's second cause of action; however, the Court will dismiss that claim without prejudice. Further, the Court sua sponte dismisses the state law claims in the fourth and eighth causes of action. The sixth cause of action has already been disposed of above.

III. CONCLUSION

For the reasons set forth above, summary judgment is granted in favor of the Defendant on the Plaintiff's fifth and sixth causes of action. Summary judgment is denied on the first cause of action. The Court sua sponte dismisses the second, fourth and eighth causes of action brought under state law, as well as any claim for punitive damages.

(5:00 CV 3172)

The case will proceed to trial on the first, third and seventh causes of action in the first amended complaint.

IT IS SO ORDERED.

June 18, 2002
Date

/s/ David D. Dowd, Jr.
David D. Dowd, Jr.
U.S. District Judge