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6 IN THE UNITED STATES DISTRICT COURT
7 FOR THE DISTRICT OF ARIZONA

8
9 Melissa Ganucheau,

10 Plaintiff,

11 vs.

12 E-Systems Management, LLC, an Arizona
13 limited liability company; Brad Hamilton, a
14 married individual,

15 Defendants.

No. CV 11-01470-PHX-NVW

ORDER

16 Before the Court is Defendants' Motion to Dismiss First Amended Complaint
17 (Doc. 22). The motion will be granted for the reasons stated below.

18 **I. BACKGROUND FACTS**

19 Plaintiff was an employee of Defendant E-Systems Management until her
20 termination on April 4, 2011. Defendant Hamilton was her supervisor, and non-party
21 Jessica Birney was her subordinate employee. In August 2010, Hamilton and Birney
22 began a sexual relationship which was offensive to Plaintiff. Birney described her sexual
23 relationship with Hamilton to Plaintiff while at work in August 2010. Plaintiff reported
24 the offensive remarks to Hamilton's supervisor, but no action was taken. Plaintiff also
25 observed Hamilton and Birney making "inappropriate and sexually-charged comments
26 and advances toward one another" during a company sponsored event in December 2010.
27 This conduct similarly offended Plaintiff, who reported the incident to E-Systems
28 Management. The day after that event, Birney described another sexual encounter to
 Plaintiff. Plaintiff reported this comment to E-Systems Management as well.

1 Plaintiff alleges that Birney received preferential treatment from Hamilton because
2 of their sexual relationship. She also claims that Birney's work performance was poor,
3 but that Plaintiff was unable to take action against her because of her relationship to
4 Hamilton. The failure to address Birney's poor work performance caused Plaintiff's
5 subordinate employees to lose respect for her. Additionally, Hamilton reprimanded
6 Plaintiff for attendance and time-management issues after she took a one-week approved
7 medical leave in February 2011 in retaliation for making complaints. Plaintiff alleges she
8 was terminated for complaining about Hamilton and Birney's relationship and Birney's
9 comments about their relationship.

10 **II. LEGAL STANDARD**

11 On a motion to dismiss under Fed. R. Civ. P. 12(b)(6), all allegations of material
12 fact are assumed to be true and construed in the light most favorable to the non-moving
13 party. *Cousins*, 568 F.3d at 1067. Dismissal under Rule 12(b)(6) can be based on "the
14 lack of a cognizable legal theory" or "the absence of sufficient facts alleged under a
15 cognizable legal theory." *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir.
16 1990). To avoid dismissal, a complaint must contain "only enough facts to state a claim
17 for relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570
18 (2007). The principle that allegations in a complaint are accepted as true does not apply
19 to legal conclusions or conclusory factual allegations. *Ashcroft v. Iqbal*, 556 U.S. 662,
20 129 S. Ct. 1937, 1949 (2009). "Threadbare recitals of the elements of a cause of action,
21 supported by mere conclusory statements, do not suffice." *Id.* (citing *Twombly*, 550 U.S.
22 at 555).

23 To show that the plaintiff is entitled to relief, the complaint must permit the court
24 to infer more than the mere possibility of misconduct. *Id.* ("The plausibility standard is
25 not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a
26 defendant has acted unlawfully."). "A claim has facial plausibility when the plaintiff
27 pleads factual content that allows the court to draw the reasonable inference that the
28 defendant is liable for the misconduct alleged." *Id.* (citing *Twombly*, 550 U.S. at 556).

1 **III. ANALYSIS**

2 Plaintiff's amended complaint contains two counts for relief: (1) Sexual
3 Harassment and Discrimination; and (2) Retaliation (Doc. 21). Defendants have moved
4 to dismiss Plaintiff's complaint for failure to state a claim for relief under Fed. R. Civ. P.
5 12(b)(6).

6 **A. Sexual Harassment and Discrimination**

7 To state a claim for hostile work environment sexual harassment, Plaintiff must
8 show "1) she was subjected to verbal or physical conduct of a sexual nature, 2) this
9 conduct was unwelcome, and 3) this conduct was sufficiently severe or pervasive to alter
10 the conditions of ... employment and create an abusive working environment." *Little v.*
11 *Windermere Relocation, Inc.*, 301 F.3d 958 (quoting *Fuller v. City of Oakland*, 47 F.3d
12 1522, 1527 (9th Cir.1995) (internal quotations and citation omitted). In determining
13 whether a work environment is "sufficiently hostile or abusive to violate Title VII," the
14 Court considers "the frequency of the discriminatory conduct; its severity; whether it is
15 physically threatening or humiliating, or a mere offensive utterance; and whether it
16 unreasonably interferes with an employee's work performance." *Id.* (quoting *Clark Cnty.*
17 *Sch. Dist. v. Breeden*, 532 U.S. 268, 270-71 (2001)). "[T]he work environment must both
18 subjectively and objectively be perceived as abusive . . . and the objective portion of the
19 claim is evaluated from the reasonable woman's perspective." *Id.* (citing *Ellison v.*
20 *Brady*, 924 F.2d 872, 879-80 (9th Cir. 1991)).

21 Plaintiff has failed to state a plausible claim for relief for sexual harassment.¹
22 Plaintiff has only alleged that Birney spoke graphically about her sexual relationship with
23 Hamilton on two occasions: once in August 2010 and once in December 2010. Her only
24 other allegation is that on one occasion, also in December 2010, Plaintiff observed Birney

25 ¹ Because Plaintiff has failed to allege sufficient facts to support her claim for sexual
26 harassment, the Court need not address the issue of the sufficiency of her filing before the
27 Equal Employment Opportunity Commission which was raised in the pleadings (*see* Doc.
28 22 at 5-6; Doc. 23 at 3-5).

1 and Hamilton behaving inappropriately at a work sponsored event. These allegations are
2 insufficient to establish that Plaintiff's work environment was sufficiently hostile so as to
3 be violative of Title VII. While Plaintiff may have been subjectively offended by
4 Birney's isolated remarks about the relationship, these offensive comments are neither
5 severe or frequent enough to support a claim that a reasonable woman would objectively
6 perceive Plaintiff's work environment to be abusive. *See, e.g., Candelore v. Clark Cnty.*
7 *Sanitation Dist.*, 975 F.2d 588, 590 (9th Cir. 1992) (holding "isolated incidents of sexual
8 horseplay" and allegations that a co-worker received preferential treatment as a result of
9 an affair with a supervisor insufficient to state a claim for discrimination under Title VII);
10 *Davis v. Team Elec. Co.*, 520 F.3d 1080, 1095 (9th Cir. 2008) ("[S]imple teasing, offhand
11 comments, and isolated incidents (unless extremely serious) do not constitute a hostile or
12 abusive work environment." (internal citations and marks omitted)). Because Plaintiff
13 has not alleged facts to establish a prima facie case of hostile work environment sexual
14 harassment, this claim will be dismissed.

15 **B. Retaliation**

16 Title VII "prohibits retaliation against an employee 'because [she] has opposed
17 any practice made an unlawful employment practice'" under Title VII. *Nelson v. Pima*
18 *Cnty. College*, 83 F.3d 1075, 1082 (9th Cir. 1996) (quoting 42 U.S.C. § 2000e-3(a)). To
19 state a claim for retaliation, a plaintiff must allege "(1) a protected activity; (2) an adverse
20 employment action; and (3) a causal link between the protected activity and the adverse
21 employment action." *Cornwell v. Electra Cent. Credit Union*, 439 F.3d 1018, 1034-35
22 (9th Cir. 2006). The failure of any one of these elements defeats a retaliation claim. *See*
23 *Villiarimo v. Aloha Island Air, Inc.*, 281 F.3d 1054, 1065 (9th Cir. 2002) (finding first
24 two elements met but affirming grant of summary judgment because no evidence of
25 causal link). Plaintiff alleges she engaged in protected activity by complaining about
26 Birney and Hamilton's relationship and Birney's comments about their relationship and
27 that she was terminated for making these complaints. Defendant argues that Plaintiff did
28 not engage in any protected activity by complaining to her supervisors about the

1 relationship between Birney and Hamilton, and that there is no causal link between any
2 alleged

3 An employee engages in a “protected activity” when the employee complains
4 about or protests conduct that the employee reasonably believes constitutes an unlawful
5 employment practice. *Trent v. Valley Elec. Ass’n Inc.*, 41 F.3d 524, 526 (9th Cir. 1994)
6 (citing *E.E.O.C. v. Crown Zellerbach Corp.*, 720 F.2d 1008, 1013 (9th Cir. 1983)).
7 Plaintiff has not sufficiently alleged that she reasonably believed that Birney and
8 Hamilton’s relationship constituted an unlawful employment practice. Indeed, as
9 discussed above, Plaintiff’s subjective offense at Birney and Hamilton’s relationship does
10 not establish that it was objectively reasonable to believe the existence of the relationship
11 itself and E-Systems Management’s failure to take action to stop it was in any way
12 unlawful.

13 Further, Plaintiff has not alleged sufficient facts demonstrating a causal link
14 between her allegedly protected activity of complaining to her supervisors about Birney’s
15 comments regarding their relationship and her ultimate termination. Birney’s two
16 comments were made in August 2010 and December 2010, and Plaintiff was not
17 terminated until April 2011. Plaintiff’s complaint alleges that she met with E-Systems
18 Management’s senior vice president in March 2011, but that her complaints then were
19 limited to “low employee morale, Ms. Birney’s poor performance, the effect that it had
20 on the entire Carefree store, and how Mr. Hamilton’s and Ms. Birney’s relationship was
21 the cause of these problems.” (Doc. 21 at 5.) These complaints do not constitute
22 protected activity, so no termination resulting therefrom can appropriately be labeled
23 retaliation. Plaintiff’s retaliation claim will therefore be dismissed.

24 **C. Defendant Hamilton**

25 Plaintiff named Hamilton as a defendant in her First Amended Complaint (Doc.
26 21). However, it is well-established that “Title VII does not provide a separate cause of
27 action against supervisors or co-workers.” *Craig v. M&O Agencies, Inc.*, 496 F.3d 1047,
28 1058 (9th Cir. 2007). In her response, Plaintiff acknowledges that Hamilton “is no longer

1 a party to this lawsuit.” (Doc. 23 at 1, n.1.) Accordingly, any claims against Hamilton
2 will also be dismissed.

3 **IV. LEAVE TO AMEND**

4 Although leave to amend should be freely given “when justice so requires,” Fed.
5 R. Civ. P. 15(a)(2), the Court has “especially broad” discretion to deny leave to amend
6 where the plaintiff already has had one or more opportunities to amend a complaint.
7 *Ascon Props., Inc. v. Mobil Oil Co.*, 866 F.2d 1149, 1161 (9th Cir. 1989). “Leave to
8 amend need not be given if a complaint, as amended, is subject to dismissal.” *Moore v.*
9 *Kayport Package Exp., Inc.*, 885 F.2d 531, 538 (9th Cir. 1989). “Futility of amendment
10 can, by itself, justify the denial of a motion for leave to amend.” *Bonin v. Calderon*, 59
11 F.3d 815, 845 (9th Cir. 1995).

12 Plaintiff has already been given the opportunity to file an amended complaint and
13 has failed to state any plausible claim for relief against Defendants, nor is there any
14 reason to think Plaintiff could state a sufficient claim in any amended complaint.

15 IT IS THEREFORE ORDERED that Defendants’ Motion to Dismiss First
16 Amended Complaint (Doc. 22) is granted.

17 IT IS FURTHER ORDERED that the Clerk enter judgment dismissing this action.
18 The Clerk shall terminate this case.

19 Dated this 17th day of April, 2012.

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23 Neil V. Wake
24 United States District Judge
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