IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
ST. JOSEPH DIVISION

ARON GEORGE-SEXTON,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case No. 06-6120-CV-W-HFS
	)	
GARRY L. LEWIS d/b/a GARRY LEWIS PROPERTIES,	)	
	)	
Defendant.	)	

MEMORANDUM AND ORDER

Defendant, Garry L. Lewis d/b/a Garry Lewis Properties, has filed a motion for summary judgment (doc. 45), and a motion for mental exam (doc. 72). Plaintiff, Aron George-Sexton,[1] has filed a motion to enforce discovery orders (doc. 78). Finally, defendant has filed a motion seeking leave to file a sur-reply to plaintiff's motion to enforce discovery orders (doc. 86).[2]

In her complaint, plaintiff has alleged various violations of Title VII, and certain state law claims. Specifically, plaintiff alleges sexual harassment in Count I; battery in Count II; outrageous conduct in Count III; intentional or negligent infliction of emotional distress in Count IV; and false imprisonment in Count V.

[1]At the time of the incidents complained of, plaintiff's last name was George; she has married Joe Sexton since that time.

[2]The unopposed motion included defendant's sur-reply as an attachment, and will be deemed filed.

Factual Background

Defendant owns and manages residential property consisting of several adjacent complexes and some small adjacent retail space in Missouri, as well as properties in Louisiana. In July of 2004, plaintiff began working for defendant in the rental office at one of his properties located in Columbia, Missouri. Plaintiff states she was hired as a property manager; defendant claims she was hired as a receptionist. Jennifer Welsh was the property manager and plaintiff's direct supervisor. Plaintiff and Ms. Welsh occupied the same office, which was shared with defendant when he was in town approximately three times a month. Plaintiff was hired by defendant at an annual rate of pay of $25,000. In August of 2004, plaintiff sought a raise based on her qualifications and the need to offset the absence of medical benefits; defendant raised her annual salary to $31,000. Shortly thereafter plaintiff requested from defendant, and received the use of a vehicle as an additional fringe benefit. In addition, for the period of July through October of 2004, plaintiff and other employees received cash bonuses of $100.

Prior to working for defendant, plaintiff worked at Columbia Housing Authority at an annual rate of pay of $27,000; she then quit and started her own cleaning business called "George Renovations." (Defendant's Exh. A: George Depo., pg. 264 -65). Defendant states, and plaintiff did not dispute, that she did not report her self-employment earnings for certain years to any tax agency. (Id: pg. 267). Plaintiff claims that on approximately October 22, 2004, defendant placed a $100 bill on the inside of her thigh and insisted on receiving a hug from her; plaintiff claims that she reported this incident to her supervisor, Ms. Welsh, who advised her that defendant also attempted to touch

her and advised plaintiff to "fight him (defendant) off."[3] Defendant points out that in prior pleadings, plaintiff stated that defendant merely placed the money on her desk and then tried to hug her. (Complaint: ¶ 14; Defendant's Exh. D: Answer to Interrogatory No. 9).[4] Defendant also disputes any claim of sexual encounters with plaintiff, but in the event plaintiff's allegations are taken as true for summary judgment purposes, defendant states that any sexual relationship with plaintiff was consensual. (Supporting Suggestions: ¶ 7, n. 16).

Plaintiff claims that on approximately October 23, 2004, defendant requested that she sit next to him on a couch to review some numbers, he then grabbed plaintiff's hand, placed it on his penis, and told her that once she squeezed it, he would let her up. Defendant does not deny that the event occurred, but argues that plaintiff did not reject the request and did not get off the couch. Plaintiff states that defendant released her hand only upon the arrival of potential customers into the office.

According to plaintiff, on Friday, November 12, 2004, after having lunch with defendant, she agreed to defendant's request that she accompany him to his on-site residence out of fear of losing her job. Once there, and despite plaintiff's protestations, defendant forced plaintiff to have oral sex and sexual intercourse with him. Plaintiff then returned to work that afternoon. Plaintiff

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[3]The deposition excerpts provided by plaintiff do not support plaintiff's claim that Ms. Welsh was also harassed by defendant. In fact, Ms. Welsh actually testified that she expressly denied the existence of a relationship between herself and defendant. (Defendant's Exh. B: Welsh Depo., pg. 21).

[4]Defendant argues that the evidence presented by plaintiff is significantly contradictory in various pleadings, and should therefore be stricken. Specifically, defendant complains that the content of plaintiff's affidavit are new assertions inherently inconsistent with prior sworn statements made in her interrogatory responses, sworn statements to the MCHR, and her deposition testimony.

A review of the pleadings does in fact reveal inconsistencies, and will be duly noted. Although the affidavit will not be stricken at this juncture, should this case proceed to trial, these inconsistencies may be used to impeach plaintiff. Keppler v. Hinsdale Township High School District 86, 715 F.Supp. 862, 864 n.1 (N.D.Ill. 1989).

states that over the weekend, she recounted the story to her boyfriend who became very upset.[5] Upon reporting to work on Monday November 15, 2004, plaintiff reported the incident to Ms. Welsh. Plaintiff did not return to work until Friday, November 19, 2004, when she called defendant and told him she could not continue to work for him. Defendant apologized, assured plaintiff it would not happen again, and advised her that if she would continue to work for him he would take care of her. Shortly thereafter, plaintiff went to work for Raul Walters with an annual rate of pay of $27,000.

Plaintiff filed a complaint with the Missouri Commission on Human Rights "MCHR" and alleged sexual harassment and constructive discharge. After concluding an investigation of plaintiff's claims, the MCHR returned a finding of no probable cause. (Defendant's Supporting Suggestions: Ex. F). The investigator noted that while plaintiff complained that defendant repeatedly groped her and made verbal sexual advances, plaintiff failed to provide any witnesses to the conduct, and those witnesses that plaintiff said were aware of the alleged misconduct, denied any knowledge of it. (Id: Ex. F, pg. 2). The investigator also found that a number of plaintiff's statements were not credible. (Id). Because the investigator determined that the alleged sexual harassment did not occur, there was no causal connection between the alleged misbehavior and plaintiff's decision to quit. (Id). Thus, there was no constructive discharge. (Id).

Analysis

A. Summary Judgment

Summary judgment is appropriate if the record shows that "there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Reed v. Cedar County, 474 F.Supp.2d 1045, 1059 (N.D.Iowa 2007); quoting, Fed.R.Civ.P. 56(c). "An issue of fact

[5]Plaintiff's boyfriend, Joe Sexton, testified that plaintiff told him she had been raped by defendant, but he did not see a need to report the incident to the police. (Opposing Suggestions: Sexton Depo., pg. 77).

is genuine when 'a reasonable jury could return a verdict for the nonmoving party' on the question." Id; quoting, Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). A fact is material when it is a fact that "might affect the outcome of the suit under the governing law." Reed, at 1060. The court must view the record in the light most favorable to the nonmoving party and afford it all reasonable inferences. Id.

Procedurally, the moving party bears "the initial responsibility of informing the district court of the basis for its motion and identifying those portions of the record which show lack of a genuine issue." Reed, at 1060; quoting, Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). Once the moving party has successfully carried its burden under Rule 56(c), the nonmoving party has an affirmative burden to go beyond the pleadings and by depositions, affidavits, or otherwise, designate "specific facts showing that there is a genuine issue for trial." Reed, at 1060. Summary judgment should seldom be used in employment-discrimination cases, and is appropriate only in "those rare instances where there is no dispute of fact and where there exists only one conclusion." Reed, at 1060; quoting, Johnson v. Minn. Historical Soc'y, 931 F.2d 1239, 1244 (8th Cir. 1991). Notwithstanding, this caveat the plaintiff's evidence must go beyond the establishment of a prima facie case to support a reasonable inference regarding the alleged illicit reason for the defendant's action. Reed, at 1060.

B. Sexual and Quid Pro Quo Harassment

Plaintiff has alleged sexual harassment in violation of Title VII of the Civil Rights Act, and asserts that the harassment took the form of a hostile work environment claim, and a quid pro quo claim. Title VII prohibits employment discrimination based on sex and covers a broad spectrum of disparate treatment. Henthorn v. Capitol Communications, Inc., 359 F.3d 1021, 1026 (8th Cir. 2004); citing, 42 U.S.C. § 2000e-2. When the discrimination is not patent, a plaintiff may still prevail by showing that the inappropriate conduct creates a "hostile work environment." Henthorn, at 1026;

citing, 29 C.F.R. §1604.11(a)(3) (2004). To make a prima facie claim of hostile work environment and sexual harassment, plaintiff needs to prove: (1) she belonged to a protected group; (2) she was subjected to unwelcome harassment; (3) the harassment was based on sex; (4) the harassment affected a term, condition, or privilege of her employment. Id; see also, Morgan v. CRST Van Expedited, Inc., 2007 WL 402407 * 7 (N.D.Iowa Feb. 1, 2007).

To determine whether the complained of conduct altered a term, condition, or privilege of employment a two-fold inquiry is used: (1) the harassment must be sufficiently severe or pervasive to create an "objectively hostile" work environment; (2) the victim must "subjectively perceive the environment as abusive." Henthorn, at 1026. In order for conduct to be "objectively hostile," "[i]t must be more than merely offensive, immature, or unprofessional; it must be extreme." Id. In determining whether a hostile work environment exists, the court must view the totality of the circumstances, including the frequency of the offending conduct, its severity, whether it was physically threatening or humiliating, and whether it unreasonably interfered with work performance. Hesse v. Avis Rent a Car Sys., Inc., 394 F.3d 624, 630 (8th Cir. 2005). As to the subjective inquiry, the employee must actually have felt harassed. Kratzer v. Rockwell Collins, Inc., 398 F.3d 1040, 1047 (8th Cir. 2005).

There is no dispute that plaintiff belongs to a protected group, and defendant has not disputed that any alleged harassment was based on sex. However, the parties disagree as to whether plaintiff was subjected to unwelcome harassment. The "gravamen of any sexual harassment claim is that the alleged sexual advances were 'unwelcome.' " Quick v. Donaldson Co., Inc., 90 F.3d 1372, 1377-78 (8th Cir. 1996); quoting, Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 68 (1986); see also, Burns v. McGregor Electronic Industries, Inc., 989 F.2d 959, 964-65 (8th Cir. 1993). Harassing conduct is considered unwelcome if it was "uninvited and offensive." Quick, at 1378; quoting, Burns, at 962.

The question of whether particular conduct was unwelcome will turn largely on credibility determinations by the trier of fact. Quick, at 1378; citing, Meritor, at 68. The proper inquiry is whether the plaintiff indicated by her conduct that the alleged harassment was unwelcome. Id.

Here, the allegations of sexual harassment essentially comprise three incidents, the couch incident, the bonus incident, and the alleged rape.[6] In her complaint, plaintiff alleged that while at work during the afternoon of Friday, October 22, 2004, defendant asked her to sit near him on a couch to review some numbers, and then grabbed her hand and put it on his penis. (Complaint: ¶¶ 11-13). Plaintiff states that she tried to pull back and defendant asked her to "just give it one squeeze." (Id: ¶ 13). Plaintiff states that defendant then groped her, touching her through her clothing, and stopped only when potential customers walked into the office. (Id). According to plaintiff, defendant then gave her a cash bonus which she said was related to the sexual advance. (Id). Plaintiff states that she reported the incident to her supervisor, Jennifer Welsh, who advised her

[6]As to the couch incident, plaintiff is pretty consistent with her recital of the circumstances surrounding that allegation. However, in her complaint, plaintiff states that defendant gave her the $100 bonus on October 22, 2004, which was the same day he allegedly forced her to touch his penis. (Complaint: ¶¶ 11-14). Plaintiff later repeats the circumstances of the couch incident, with the exception that it occurred on October 23, 2004. (Supporting Suggestions: 1st Interrogatories; Answer to Interrogatory 8). She then states that defendant gave her the bonus on October 22, 2004, after hugging her inappropriately; however, rather than on her thigh, plaintiff stated that defendant placed the money on her desk. (Id; Answer to Interrogatory 9).

Finally, it is noted that plaintiff initially stated that while in defendant's residence on November 12, 2004, defendant grabbed her and used force (Complaint: ¶¶ 19-20, 22), and that he acted "very aggressive and in a violent manner," and coerced her to have oral sex with him. (Answer to Interrogatory 11). Yet, she later stated that defendant did not put his hands on her, but rather hovered over her forcing her to back up into the bedroom. (Opposing Suggestions: George Depo. pg. 215). Plaintiff also later testified that once in the bedroom defendant did not force her to lay on the bed, but that she did so voluntarily, and agreed that he "gently" removed her pants and underwear. (Id: pg. 224). Plaintiff also agreed that she "willingly" performed oral sex on defendant. (Id: pg. 227).

to just fight him (defendant) off. (Id: ¶ 15).[7] Plaintiff states that the next incident of unwelcome sexual harassment occurred on November 12, 2004, when after taking plaintiff to lunch, defendant pulled her to him; plaintiff states that she refused his advances. (Id: ¶ 16). Defendant then requested that plaintiff accompany him home to view holiday decorations; plaintiff states that she complied out of fear of losing her job. (Id: ¶ 17). Upon arriving at the apartment, defendant locked the doors, turned on the fireplace, and began kissing and groping plaintiff. (Id: ¶¶ 17-19). Plaintiff states that defendant took her into the bedroom and demanded that they have sexual intercourse, and that he coerced her to perform oral sex on him. (Id: ¶¶ 20, 24). Plaintiff states that she was falsely imprisoned because her car was locked in the garage, and the door to the residence was locked; therefore, she succumbed to defendant's demands. (Id: ¶ 22).

Defendant argues that similar to the plaintiff in Staton v. Maries County, 868 F.2d 996 (8th Cir. 1989) who claimed to have been raped by a supervisor, there is no showing that the alleged conduct was unwelcome.[8] Defendant's reliance on Staton is misplaced, however, because the issue of sexual harassment was not raised within the context of a summary judgment standard, rather, the

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[7]At her deposition, plaintiff stated that defendant placed the hundred dollar bill on the inside of her thigh. (Plaintiff's Opposing Suggestions: George Deposition, pg. 28). However, as to plaintiff's report of the incident to Ms. Welsh, plaintiff could no longer recall whether Ms. Welsh told her that she too had suffered inappropriate conduct by defendant. (Id: pg. 40-42, 48). Actually, Ms. Welsh testified that she explicitly told plaintiff that she never had a sexual relationship with defendant, and that it was her understanding that defendant did not tolerate such behavior between employees. (Defendant's Supporting Suggestions: Ex. B, Welsh Deposition, pg. 20-21).

[8]The district court resolved the issue of Staton's credibility against her after entering findings that a special prosecutor appointed to investigate the allegation of rape determined that no criminal action should be taken; the Missouri Commission on Human Rights made a finding of no probable cause on Staton's claim of sexual harassment; Staton pled guilty to a charge of making false statements to obtain benefits under employment security law; and various other findings that Staton and the defendant were close and confided in one another. Staton v. Maries County, 868 F.2d at 998.

determination was reached by a jury subsequent to trial. Equally unpersuasive is defendant's reliance on Scusa v. Nestle U.S.A. Co., Inc., 181 F.3d 958, 966 (8th Cir. 1999) (where the undisputed evidence showed that plaintiff engaged in behavior similar to that which she claimed was offensive, she failed to show the complained of conduct was unwelcome).

Here too, there has been testimony from co-workers, that plaintiff by her actions may have invited defendant's conduct, and there have been discrepancies noted in the complaint as compared with plaintiff's deposition testimony. For example, plaintiff testified that on the morning of November 12th she discussed her fear of being alone with defendant with co-worker, Scotty Akers. (Plaintiff's Opposing Suggestions: George Deposition, pg. 195). However, Mr. Akers testified that during a prior lunch event with co-workers, his wife observed that plaintiff was forward and flirtatious toward defendant. (Id: Akers Deposition, pg. 26). This testimony was corroborated by the testimony of co-worker, Wendy Cooley, who stated that she felt plaintiff's behavior toward defendant was "inappropriate" and "embarrassing;" said behavior included a lot of touching, and leaning in close to defendant. (Defendant's Supporting Suggestions: Ex. H, Cooley Depo. Pg. 6-9).

Nevertheless, throughout the pleadings plaintiff has consistently stated that she did not wish to engage in a sexual relationship with defendant, that she told defendant as much, and also complained to Ms. Welsh. A court's role is not to evaluate the weight of the evidence, to judge the credibility of witnesses, or to determine the truth of the matter, but instead to determine whether there is s genuine issue of triable fact. Anderson v. Liberty Lobby, Inc., 477 U.S., at 249-50. Thus, in taking plaintiff's evidence as true and drawing all reasonable inferences in her favor, there is a material question of fact as to plaintiff's claim that the sexual harassment was unwelcome.

Similarly, in viewing the totality of the circumstances, the complained of conduct was clearly sufficiently severe to create an objectively hostile work environment, and in viewing the facts in a

light favorable to plaintiff, a reasonable jury could find that she perceived the environment as abusive such that a condition of her employment was altered.

This may not end the inquiry, however, for when the alleged harasser is the plaintiff's supervisor, the plaintiff must also prove that the harassment resulted in a tangible employment action; then, the employer is vicariously liable for the supervisor's harassment. Parada v. Great Plains Intern. of Sioux City, Inc., 483 F.Supp.2d 777, 798 (N.D.Iowa 2007). If plaintiff is unable to prove that the harassment resulted in a tangible employment action, then the employer may escape vicarious liability by proving the following elements of an affirmative defense: (1) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior; and (2) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise. Parada, at 798; citing, Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 765 (1998); see also, Faragher v. Boca Raton, 524 U.S. 775, 807 (1998). The facts of the instant case make such an analysis tricky, for the alleged harasser here was both plaintiff's supervisor and at least a co-owner. There are no facts to avoid vicarious liability. Consequently, summary judgment will be denied as to plaintiff's claim of sexual harassment hostile work environment.

Plaintiff also claims to have been subjected to quid pro quo harassment, however such a claim often adds little to a straightforward Title VII analysis. Henthorn, at 1026. Both quid pro quo and hostile work environment sexual harassment claims are grounded in the same legal theory under Title VII, the former involving an explicit, and the latter a constructive change in conditions of employment. Id; citing, Burlington Industries v. Ellerth, 524 U.S. 742, 752 (1998). In addition to establishing the first three factors of a sexual harassment claim, in order to raise an inference of quid pro quo harassment a plaintiff must show that her submission to the unwelcome advances was an

express or implied condition for receiving job benefits or her refusal to submit resulted in a tangible job detriment. Ogden v. Wax Works, Inc., 214 F.3d 999, 1066 (8th Cir. 2000). Sexual harassment is quid pro quo if a tangible employment action follows the employee's refusals to submit to a supervisor's sexual demands. Henthorn, at 1026-27. A plaintiff in that situation need not prove that the offensive conduct is severe or pervasive because any carried-out threat is itself deemed an actionable change in the terms or conditions of employment. Id, at 1027; Ellerth, 524 U.S. at 753-54.

Plaintiff states that the bonus she received from defendant in October of 2004, and the conversation between the two on November 19, 2004, when she resigned constituted quid pro quo sexual harassment and discrimination. (Complaint: ¶ 37). The October incidents include plaintiff's testimony that defendant grabbed her hand, forcibly holding it on his penis while he requested that she "just give it one squeeze;" and he then gave her $100 . According to plaintiff, defendant placed the money on the inside of her thigh, and then insisted on a hug. (Opposing Suggestions: Plaintiff's Depo., pg. 28). Plaintiff also claims that her conversation with defendant on November 19, 2004, when he promised to take care of her if she would continue to work for him constituted quid pro quo sexual harassment.

Defendant argues that plaintiff's claim as it relates to the bonus payment is insufficient to support a quid pro quo claim because there was evidence that several employees also received bonuses at various times. (Supporting Suggestions: Plaintiff's Depo., pg. 46; Welsh Depo., pg. 15-16). I find that plaintiff's quid pro quo claim fails not so much because of defendant's stated argument, but, rather, because there is no evidence that plaintiff's submission to defendant's unwelcome advances was an express or implied condition for receiving the bonus. Grozdanich v.

Leisure Hills Health Center, Inc., 25 F.Supp.2d 953, 967 (D.Minn. 1998).[9] It is noted that there is no evidence that the salary increase or use of a vehicle was premised on plaintiff's submission to unwelcome sexual advances. Moreover, defendant did not condition plaintiff's submission to his advances in October of 2004, on the bonus; he simply gave it to her after the alleged transgression took place. Even if the bonus was given prior to seeking a hug from plaintiff, there was no threat either expressly or implicitly of retaliation in the event plaintiff rejected defendant. E.E.O.C. v. American Home Products Corp., 2001 WL 34008505 * 8 (N.D.Iowa Dec. 21, 2001) (even if the defendant expressly or implicitly conditioned job benefits on submission to sexual advances, if he never came through on a threat to retaliate for failure to submit to his advances, plaintiff cannot state a quid pro quo claim). Likewise, defendant's request on November 19, 2004, that plaintiff continue working for him was accompanied by his promise that nothing untoward would happen again and that he would take care of her. Such concessions do not constitute threats of a tangible job detriment. Furthermore, there is no evidence that plaintiff's refusal to submit to defendant's advances resulted in a tangible job detriment. Thus, plaintiff does not have a viable claim for quid pro quo sexual harassment, and summary judgment will be granted, Grozdanich, at 969, but denied as to the harassment claim itself.

C. Constructive Discharge

An employee cannot show constructive discharge merely by showing that the employer

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[9]Cf., Ogden v. Wax Works, Inc., 214 F.3d 999, 1003-04 (8th Cir. 2000), where the defendant told the plaintiff that he would perform her evaluation if she agreed to accompany him on a trip, and when she refused, the defendant responded by berating her over a personnel matter and refused her request for vacation time. Further, the defendant made no secret of his predilection for affairs with other employees, and boasted of the raises and promotions he procured for those with whom he was involved. Ogden, at 1004.

violated Title VII. Reed v. Cedar County, 474 F.Supp.2d, at 1065. A constructive discharge occurs when an employee resigns after an employer has created an intolerable working environment in a deliberate attempt to compel such resignation. Reed, at 1066. Thus to prove a case of constructive discharge, a plaintiff must show: (1) that a reasonable person in her situation would find the working conditions intolerable; and (2) that the employer intended to force the employee to quit. Wright v. Rolette County, 417 F.3d 879, 886 (8th Cir. 2005). If the plaintiff cannot show the employer consciously intended her to quit, she can still prevail on a constructive discharge claim if " ' the employer ... could have reasonably foreseen that the employee would [quit] as a result of its actions.' " Wright, at 886 (internal quotation and citation omitted).

Here, there is sufficient evidence that defendant's actions strongly demonstrated his desire that plaintiff continue working for him, as opposed to resigning. Notwithstanding material issues of fact as to whether defendant's conduct was unwelcome, the undisputed evidence shows that he repeatedly attempted to induce plaintiff's continued employment. For instance, pursuant to plaintiff's request, defendant gave her a raise of $5,000.00, and the use of a car; he also permitted her to select the job title she felt she deserved. (Supporting Suggestions: Welsh Depo., pg. 8-10, 16). There is no evidence that defendant either consciously or otherwise intended plaintiff to quit. In fact, upon hearing of her decision to quit, plaintiff testified that defendant assured her there would be no further sexual contact, and promised her he would take care of her if she remained employed with him. Nevertheless, there remains a genuine issue as to whether plaintiff's decision to quit was a reasonably foreseeable consequence of the defendant's alleged misbehavior. Consequently, summary judgment cannot be granted as to this claim.

D. State Law Claims

Further claims alleged by plaintiff arise under state law and include Battery, Outrageous Conduct, Intentional or Negligent Infliction of Emotional Distress, and False Imprisonment. Plaintiff claims that in forcing plaintiff to touch his penis, and by using his power as her employer over her to have sex, defendant's actions constituted battery and outrageous conduct. (Complaint: ¶¶ 42, 46). Plaintiff also claims that defendant's actions, "acting himself and through his agent, Jennifer Welsh," caused her severe emotional damage. (Id: ¶¶ 51, 54). Finally, plaintiff claims that her restraint by defendant on November 12, 2004, constituted false imprisonment. (Id: ¶ 56). Plaintiff concedes that to the extent her claim for negligent infliction of emotional distress is considered as a stand alone negligence claim it is barred by the Missouri Workers' Compensation Act.

Under Missouri law, worker compensation is the exclusive remedy for employees who are injured on the job, and Missouri courts apply the same rule to other tort claims as well. Wagner v. Cookbook Publishers, Inc., 2006 WL 1041681 (W.D.Mo. Apr. 13, 2006) (Mo.Rev.Stat. § 287.120,[10] establishes exclusivity of workers' compensation remedies and precludes plaintiff's claim for intentional infliction of emotional distress arising from sexual harassment in the workplace); see also, Thompson v. Western-Southern Life Assur., 82 S.W.3d 203, 209-10 (Mo.Ct.App. 2002) (pursuant to section 287.120, plaintiff's claim of assault by supervisor was properly dismissed and

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[10]Section 287.120 provides in pertinent part:

1. Every employer subject to the provisions of this chapter shall be liable, irrespective of negligence, to furnish compensation under the provisions of this chapter for personal injury or death of the employee by *accident* arising out of and in the course of his employment, and shall be released from all other liability therefor whatsoever, whether to the employee or any other person. The term "accident" shall include, but not be limited to, injury or death of the employee caused by the unprovoked violence or assault against the employee by any person.

2. The rights and remedies herein granted to an employee shall exclude all other rights and remedies of the employee ... at common law or otherwise, on account of such accidental injury or death, except such rights and remedies as are not provided for by this chapter.

summary judgment was appropriate). Similarly, in Yount v. Davis, 846 S.W.2d 780, 782-83 (Mo.Ct.App. 1993), where an employee filed a complaint against her employer for assault and battery based on her boss's repeated touching, grabbing, and fondling of her body, the court of appeals affirmed the circuit court's dismissal of the complaint for lack of subject matter jurisdiction. Thompson, at 209; citing Yount v. Davis, 846 S.W.2d at 782. Dismissal was held to be proper because a circuit court may not determine whether there was an accident arising out of and in the course of employment. Id. Although acknowledging that an argument might be made that sexual harassment might not be properly deemed to arise out of and in the course of employment, the Yount court, nevertheless, refused jurisdiction. Thompson, at 109-10; Yount, at 782.

Subsequent case law continues to follow this rationale. Harrison v. Reed Rubber Company, Inc., 603 F.Supp. 1456 (E.D.Mo. 1984) (plaintiff's claims of assault and battery, and negligent infliction of emotional distress arising under sexual harassment are bared under Missouri Compensation Law). Likewise, in Crittendon v. Columbia Orthopaedic Group, 799 F.Supp. 974 (W.D.Mo. 1992), the court held that plaintiff's claims of emotional distress and medical injury arising out of alleged harassment in the workplace appeared to be covered by the Missouri Workers Compensation Fund; thus, the court had no jurisdiction over those matters.

Because plaintiff alleges that defendant was acting within the scope of employment, exclusive jurisdiction for plaintiff's claims of battery, assault, outrageous conduct, intentional or negligent infliction of emotional distress, and false imprisonment, rests with the Missouri Workers' Compensation Board. Brown v. Southland Corp., 620 F.Supp. 1495, 1497-98 (D.C.Mo. 1985). Therefore, summary judgment will be granted as to these claims.

E. Damages

1. Punitive Damages

Plaintiff seeks punitive damages for her claims against defendant, and argues that his conduct was willful and malicious. According to plaintiff, defendant acted with malice and reckless indifference to her rights. Plaintiff states that this was illustrated when defendant placed money on her thigh, forcibly put her hand on his penis, and forced her to have sex with him. Defendant counters that based on her testimony, plaintiff did not resist or say "no," and willingly engaged in sex with him. Thus, he did not act with reckless indifference or malice.

Punitive damages may be awarded for an intentional Title VII violation if the employer acted "with malice or with reckless indifference to the federally protected rights of an aggrieved individual." Coe v. Northern Pipe Products, Inc., 589 F.Supp.2d 1055, 1107 (N.D.Iowa 2008). The requisite showing of malice or reckless indifference requires proof that the employer "at least discriminate[d] in the face of a perceived risk that its actions will violate federal law." Coe, at 1007 (citation omitted). Thus, punitive damages are inappropriate if the employer was unaware of the federal prohibition, or if the plaintiff's underlying theory of discrimination was novel or poorly recognized, or if the employer reasonably believed that its discrimination satisfied a bona fide occupational defense. Id. Moreover, even if particular agents exhibited malice or reckless indifference, the employer may avoid vicarious punitive damages liability by showing that it made good faith efforts to comply with Title VII. Id. Given these stringent standards, plaintiffs face a "formidable burden" when seeking punitive damages for employment discrimination. Id.

As noted at the outset, this case is somewhat novel in that the alleged harasser is not a co-worker, or supervisor per se, but, rather, the sole owner of a business entity that employed plaintiff. The record is silent as to whether there was a sexual harassment policy in place, and there is no evidence of prompt remedial action being undertaken. At most, there is only plaintiff's testimony that upon giving notice of her intention to resign, defendant apologized and assured her it would not

happen again if she remained an employee. However, because she did not continue in her employment with defendant, it is not possible to determine whether defendant's apology and assurances are sufficient.

There have been several cases where an apology by the offender as part of remedial action has been deemed insufficient. For example, in Davis v. Tri-State Mack Distributors, Inc., 981 F.2d 340, 343-44 (8th Cir. 1992), the court held that an apology, in and of itself, was insufficient for Title VII required more than a mere request to refrain from discriminatory conduct. Although the offender need not be fired, an employer must take prompt remedial action reasonably calculated to end the harassment. Id. Under the circumstances at bar, without more, it is difficult to discern if defendant's apology and assurances were adequate to alleviate any taint of discriminatory conduct because plaintiff resigned. Cf., Canady v. Wal-Mart Stores, Inc., 452 F.3d 1020, 1021 (8th Cir. 2006) (where a singular apology reduced what was otherwise severe and pervasive racial harassment to an unactionable level, the repeated use of humiliating racial epithets both before and after the apology rendered the apology, in effect, meaningless). Consequently, there is a question of fact as to the issue of punitive damages and it should, therefore, be evaluated at trial.

2. Wage Claims

Plaintiff states that due to defendant's conduct she suffered embarrassment, humiliation, fear, and emotional distress. (Complaint: ¶ 30). She seeks back pay and front pay as part of her claim for damages. Defendant argues that these claims are barred because plaintiff failed to report her cash income both prior and subsequent to her employment with defendant.

Under Title VII, an award of back pay is not automatic or mandatory, but rather lies within the sound discretion of the district court. Jaros v. Lodgenet Entertainment Corp., 171 F.Supp.2d 992,

1005 (D.S.D. 2001). To be eligible for back pay, a Title VII claimant must "use reasonable diligence in finding other suitable employment." Jaros, at 1005-06; quoting, Ford Motor Co. v. EEOC, 458 U.S. 219, 231 (1982). An award of back pay represents the difference between the earnings plaintiff lost as a result of the illegal conduct and what plaintiff earned in mitigation during the period of her unemployment. Jones v. Wesco Investments, Inc., 1987 WL 14927 *1 (W.D.Mo. 1987).

Plaintiff testified that in 2003, she was self-employed with a residential cleaning service named George Renovation, but she did not report the cash earnings. (Supporting Suggestions: George Depo., pg. 267-68). At some point thereafter plaintiff testified that she subsequently filed an amended return to reflect some of the income received in 2003. (Id: pg. 278). Plaintiff admitted that there were no documents or any evidence of her earnings in the year prior to working for defendant, and there was no way to verify her income during that time. (Id). According to records for tax year 2004, plaintiff received income of $10,564. (Id: pg. 288). After resigning from employment with defendant, plaintiff made $27,000 for tax year 2005 while working at Raul Walters, and $11,000 in 2006, while working for the State of Missouri. (Id: pg. 295-96).

There was also testimony that after resigning from defendant's employment, plaintiff almost immediately thereafter began to work for Raul Walters. (Opposing Suggestions: George Depo., pg. 10-11). However, because plaintiff's stated annual salary at defendant's business was $31,000, and $27,000 at Raul Walters, there appears to be only a limited amount due at best. The evidence showed that plaintiff's salary increased to $31,000 in lieu of medical insurance, and it is not clear whether the later employers paid for such insurance.

As to any claim for front pay, the district court is required to consider all aspects of the case and to "address equitable needs such as the ability to obtain employment with comparable compensation and responsibility." Partial summary judgment on the wage claim will be denied at

this time.

F. Other Pending Matters

1. RULE 35 Motion for Mental Examination

Defendant has filed a motion seeking to have plaintiff submit to a compulsory physical/mental examination (d0c. 72). Defendant argues that plaintiff has claimed injuries that consist of embarrassment, humiliation, fear, emotional stress, horror, shame, grief, marital discord, loss of reputation, and monetary loss. Plaintiff has been examined by social worker Kittie Rogers who has diagnosed plaintiff with Post Traumatic Stress Disorder, and pursuant to Fed.R.Civ.P. 35a, defendant claims entitlement to have plaintiff submit to an examination by examiner, Jeffrey Kline, Ph.D, a licensed psychologist.

Plaintiff does not oppose the request in its entirety, but states that any questions regarding plaintiff's mental status could have been submitted during plaintiff's deposition, and that Ms. Rogers could have been deposed as well. Plaintiff admits that the notice was specific enough in that it stated that the mental examination would include a medical/psychological history assessment and forensic, clinical and medical examination to include personality and/or multi axial inventory and/or SIRS/TSI tests, but fears the examination will lead into a fishing expedition. Plaintiff also notes that Jeffrey Kline is not a medical doctor and is not licensed pursuant to Rule 35. Although pending for some time, defendant has not filed a reply to plaintiff's opposition; however, the motion will be construed as fully briefed and presumed to remain a live controversy.

Rule 35(a) states in pertinent part that in an action where a party's mental condition is in controversy, the court may order said party to submit to a mental examination by a suitably licensed

or certified examiner. The Supreme Court held that "a plaintiff in a negligence action who asserts mental or physical injury places that mental or physical injury clearly in controversy and provides the defendant with good cause for an examination to determine the existence and extent of such asserted injury." Tomlin v. Holecek, 150 F.R.D. 628, 630 (D.Minn. 1993); quoting, Schlagenhauf v. Holder, 379 U.S. 104, 118-19 (1964). The Court also states that Rule 35(a), like other discovery rules, is to be liberally construed. Id. As an initial matter, a determination must be made whether the party requesting the medical examination has adequately demonstrated the existence of the Rule's requirement of "in controversy" and "good cause." Javeed v. Covenant Medical Center, Inc., 218 F.R.D. 178, 179 (N.D.Iowa 2001).

Here, plaintiff has asserted a specific cause of action for intentional or negligent infliction of emotional distress and has been examined by a social worker who has diagnosed plaintiff with a specific condition, i.e. Post Traumatic Stress Disorder. Javeed, at 179. And although plaintiff has expressed concern with the mode and method of the examination, she concedes that through her pleadings and allegations, she has placed her mental state into controversy.[11]

Contrary to plaintiff's contention, the examiner is not required to be a medical doctor. Defendant states that his examining expert is a licensed psychologist, and has shown good cause to allow him to examine plaintiff. Peters v. Nelson, 153 F.R.D. 635, 638 (N.D.Iowa 1994) (Rule 35 requires that the expert be either a physician or psychologist). Finally, plaintiff complains that the notice for examination was too broad and requests that the examiner be prohibited from inquiring into other areas. Specifically, plaintiff resists an examination that would include personality/multi

[11]A sexual harassment claimant does not, by virtue of the nature of the claim itself, put her emotional state in controversy, and because she alleges damages for emotional distress associated with working in a hostile environment does not of itself warrant a Rule 35(a) examination. Javeed, at 179. However, here, the circumstances demonstrate that plaintiff has placed her mental injury into controversy.

axial inventory SIRS/TSI tests and a medical examination. Rule 35 requires that the trial judge delineate the conditions, and scope of the examinations, however, the notice states that the scope of the examination will be a mental exam regarding injuries such as fear, humiliation, marital discord, etc., as expressed by plaintiff . It therefore appears, and I would strongly urge defendant to ensure that the examination is strictly limited to these areas. Thus, the motion will be granted consistent with this opinion.

2. Discovery - Privileged Matters

Plaintiff has filed a motion seeking to enforce discovery orders (doc. 78). Discovery issues have been a bone of contention between the parties through most of the pendency of this case. It appears, however, that the remaining dispute involves communications between defendant and Ms. Welsh regarding plaintiff, as well as communications between defendant and defense counsel's investigator. As such, plaintiff seeks the hard drives from the Welsh and Lewis (defendant) computers, or to have access to the computers to make copies of any communications that discuss or pertain to plaintiff.[12] Plaintiff also seeks the imposition of sanctions due to defendant's repeated failure to provide this information.

Defense counsel states that he has "repeatedly advised plaintiff of the categories of documents that are privileged." (Opposing Suggestions: pg. 2). For example, defense counsel resists providing communications pertaining to plaintiff by his investigator as work product, but states that there has been no communication outside of plaintiff's deposition. (Id: pg. 4). and states that

[12]These would include letters, facsimiles, emails, tape recordings or communications fixed in any other media, computer text messages, instant messaging, cell phone text messages, or other communications, including any hard drives, flash drives or portable memory devices used by any employee. (Supporting Suggestions: pg. 6).

defendant is an attorney, licensed in Missouri, and Ms. Welsh is his secretary; thus, any communications drafted or dictated by him to Ms. Welsh are privileged. Defendant also notes that it is common business practice for an attorney to dictate letters to his secretary, and it does not break the privilege. Defendant claims that the category of documents claimed to be withheld have been disclosed to plaintiff's counsel on numerous occasions. These documents include defendant's communications with his attorneys, and his attorney's own notes which constitute work product.

Defendant also points to his deposition in which he testified that he rarely uses e-mail, and was only cognizant of one email he received from employee LaShay Crowley regarding plaintiff, which was turned over to plaintiff's counsel. (Opposing Suggestions: pg. 7). Defendant testified that he received written communication with Ms. Welsh regarding plaintiff, but defense counsel states that copies of these communications have been sent to plaintiff's counsel.

Attorney-client privilege is not dependent on anticipation of litigation, but instead depends on the nature of the relationship involved; an attorney must be acting in the role of legal counsel with respect to the information in issue before privilege may attach, and if an attorney is acting in some other role, as ordinary businessman, for example, privilege may not properly be claimed. Mission Nat. Ins. Co. v. Lilly, 112 F.R.D. 160 (D.Minn. 1986). Notwithstanding defendant's license to practice law in Missouri, without further argument to the contrary, it would seem that communications between defendant and Ms. Welsh were in the context of defendant's role as a party to this action, not as an attorney. Moreover, there is no evidence that defendant was retained as counsel for Ms. Welsh which would serve as a basis to invoke the attorney-client privilege. Thus, the communications between defendant and Ms. Welsh are not protected under the attorney-client privilege and should be disclosed to plaintiff's counsel.

Pursuant to Fed.R.Civ.P. 26(b)(3), the work product doctrine provides that documents

prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative may be obtained in discovery only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means. St. Paul Reinsurance Company, Ltd. v. Commercial Financial Corp., 197 F.R.D. 620 (N.D.Iowa 2000). Work-product privilege is intended to protect from disclosure materials prepared in anticipation of litigation; inchoate possibility, or even likely chance of litigation, does not give rise to privilege. Id. Fed.R.Civ.P. 26(b)(3) provides special protection to the mental processes and opinions of counsel. Id. Insofar as defendant was acting in his capacity as Ms. Welsh's boss, and not as an attorney, any communications between them as it relates to plaintiff was not conducted in anticipation of litigation. Thus, such matter is not privileged under the work-product doctrine.

It is noted that most communications pertaining to plaintiff as they occurred between defense counsel and defendant may fall within the ambit of attorney-client privilege. Likewise, communications between defense counsel and his investigator as well as communications between defense counsel and Ms. Welsh, may very well fall under protection from disclosure pursuant to the work-product doctrine. However, it is difficult to discern without the aid of a privilege log which defense counsel was directed to do in a prior order. In the event counsel continues to insist that privilege has attached, a log addressing each document sought must be provided in a timely fashion; with the caveat that the failure to do so may result in the imposition of sanctions.

Accordingly, it is hereby

ORDERED that defendant's motion for summary judgment (ECF doc. 45) is GRANTED in part and DENIED in part, consistent with this opinion. It is further

ORDERED that defendant's motion for a separate mental examination (ECF doc. 72) is

GRANTED. Defendant is directed, within twenty days from the date of this order, to provide notice to plaintiff of the date, time, and place of the examination, consistent with the limitations expressed in this opinion. It is further

ORDERED that plaintiff's motion to enforce discovery orders (ECF doc. 78) is GRANTED in part, and DENIED in part, consistent with this opinion. It is further

ORDERED that defendant's motion to file a sur-reply to the discovery motion (ECF doc. 86) is GRANTED retroactively.

/s/ Howard F. Sachs
HOWARD F. SACHS
UNITED STATES DISTRICT JUDGE

March 25, 2009

Kansas City, Missouri