

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION**

**REGINA F. EDMONDS, JULIA
BARNER, and MINNETTA BAYRAQ,**

Plaintiffs,

v.

CASE NO. 06-cv-2295

**STATE OF TENNESSEE DEPARTMENT
OF PROBATION AND PAROLE,**

Defendant.

MEMORANDUM OPINION, ORDER, AND JUDGMENT

I. INTRODUCTION

Plaintiff Minnetta Bayraq brought a case alleging retaliation in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e et seq., against Defendant State of Tennessee Department of Probation and Parole (“Defendant” or “BOPP”). The Court conducted a non-jury trial on November 18-19 and December 8-10, 2008. After considering the testimony of the witnesses, the exhibits, and the arguments of the parties, the Court makes the following findings of fact and conclusions of law.

II. FINDINGS OF FACT

Bayraq has been an employee of the State of Tennessee for approximately twenty-five years. She spent the first fifteen of those twenty-five years with the Tennessee Department of Corrections (“TDOC”). Bayraq began her career as a Correctional Counselor 2 and was then promoted to the position of Probation and Parole Officer 3 (“PPO3”). In 1999, TDOC merged with the Board of Pardons and Parole to form the Board of Probation and Parole (“BOPP”).

After the merger, Bayraq became an employee of BOPP, with whom she is currently employed as a PPO3.

In 1999, at the time of the merger, Bayraq was supervised by B.J. Murray. In 2000, Clarence Williams took charge of supervising Bayraq. As part of this supervision, immediate supervisors conduct an evaluation process of each of their employees, which consists of an initial meeting called a Job Performance Planning Discussion, at least one Interim Review Discussion, and a final Annual Evaluation. The initial Job Performance Planning Discussion is an opportunity for the supervisor and the employee to discuss the employee's specific responsibilities, as well as the supervisor's expectations. Thereafter, at the Interim Review Discussion and at the Annual Evaluation, the supervisor reviews the employee's job performance based on the goals, objectives, and expectations explained at the Job Performance Planning Discussion. After each of these discussions, the employee and supervisor are asked to sign and date the evaluation so as to indicate only that the particular discussion occurred. Towards the end of the calendar year, at the Annual Evaluation Discussion, the supervisor rates the employee's overall performance on a scale of one (1) to five (5), one being "Not Acceptable" and five "Exceptional."

For each of the years that Clarence Williams ("Williams") supervised Bayraq—2000, 2001, and 2002—she received a score of five (5) on her overall evaluation and recommendation. (Trial Exs. 37, 38, and 39, respectively.) As a PPO3 under Williams, Bayraq testified that she supervised three to four PPO1 and PPO2 employees, but did not carry a caseload. In 2002, Bayraq had a number of problems with Williams. Bayraq claimed that Williams followed her around the office building and made sexually explicit gestures to her on at least one occasion.

In 2003, Williams was replaced as Bayraq's supervisor by Michelle Steward ("Steward"). As a result of this switch and realignment of staff, Bayraq did not receive an Annual Evaluation for 2003. Bayraq's responsibilities as a PPO3 continued unchanged, except that the responsibility of carrying absconder cases was added to her duties.

Bayraq testified that initially her relationship with Steward was acceptable but that it grew problematic. On April 1, 2004, Steward conducted an Interim Evaluation Discussion with Bayraq. In that discussion, Steward rated Bayraq with an overall score of four (4), meaning that her performance was "Superior." (Trial Ex. 67.) The following day, April 2, 2004, Bayraq called the governor's office to complain about the quality of the supervision and management in the Delta Region. Steward claims that after both of these events, the files of Cindy Harwell, Bayraq's subordinate, came to the attention of Steward. Harwell had recently left her position with BOPP, and before her files could be transferred to other officers, they had to be reviewed by Steward. Steward claimed that the files were in disarray—some files were not properly closed out, arrest checks were not been performed, and absconder files were located in other offices.

After reviewing Harwell's files, Steward gave Bayraq an oral warning. Steward held Bayraq accountable for the state of the files because Bayraq was Harwell's direct supervisor and thus ultimately responsible for them. Steward then issued a written follow-up to this oral warning in which she laid out specific examples of problem areas and ways to correct these issues.¹ (Trial Ex. 68.) In response to this warning, Bayraq filed a grievance against Steward and against Helen Ford, the District Director. (Trial Ex. 40.) In that grievance, Bayraq claimed that the oral warning she received from Steward was in retaliation for her contacting the governor's office. (Id.) She also stated that Ford and Charles Traughber, Chairman of BOPP,

¹ Steward also issued two other memoranda following up on the issues contained in her April 8, 2004 letter. (Exs. 69, 70.)

harassed and retaliated against her for “an [unspecified] incident that happened to me” in 1995. (Id.) In response to Bayraq’s April 8, 2004 grievance, she received a letter from Donna Blackburn, Executive Director, that stated there was sufficient documentary evidence to support the oral warning and that her grievance did not set forth a grievable matter as defined by department regulations. (Trial Ex. 42.)

After the First Interim Review Discussion on April 1, 2004 and the subsequent oral warning, Steward did not conduct a Second Interim Review of Bayraq. (Trial Ex. 43.) On November 30, 2004, Steward conducted the 2004 Annual Evaluation. In this evaluation, Steward gave Bayraq an overall score of three (3) or “Good.” (Id.) Bayraq refused to sign the evaluation but wrote in the section for employee’s comments that the evaluation was “unfair,” that her work was being sabotaged, and that she was being harassed, intimidated, subjected to “fear tactics,” and retaliated against because she had filed a grievance. (Id.) Within the evaluation, Steward made a number of recommendations on how Bayraq could improve her performance, which included conducting arrest checks, submitting compliance exception reports after reviewing them with her staff, and making notes on files, after reviewing them, within sixty days so that her staff would be aware of required actions. (Id.) Bayraq then filed a grievance in response to the Annual Evaluation alleging that Steward and Ford conspired to harass, intimidate, and retaliate against her. (Trial Ex. 44.) This grievance was found to be non-grievable. (Trial Ex. 45.)

On April 6, 2005, Bayraq filed a charge of discrimination with the EEOC alleging that she had suffered sexual harassment from Clarence Williams. (Trial Ex. 46.) The complaint also alleged that Ford and Traugher harassed and retaliated against her on the basis of her age. (Id.) In early August 2005, Steward brought eighty-six files to Bayraq’s attention. These eighty-six

files had not been closed properly and in accordance with the fee manual policy, which resulted in the files showing that fees continued to accrue when the fees should have been terminated and deemed uncollectible. Steward told Bayraq to review these files and properly terminate the fee screens. In response to this request, Bayraq filed a grievance on August 5, 2005 in which she complained that Steward was making unrealistic demands and that her actions were in retaliation for Bayraq's EEOC "suit." (Trial Ex. 47.) On August 9, 2005, Bayraq filed another grievance complaining that Steward had "demanded" the return of forty-one of the eighty-six cases with a form from the electronic management system, TOMIS, attached to the front. (Trial Ex. 48.) Bayraq claimed that Steward's request was not necessary according to BOPP policy and procedure and that this was harassment in retaliation for seeking redress through the EEOC. (Id.) Both of these grievances were determined to be non-grievable and Bayraq was informed of this through a letter from Chairman Traughber. (Trial Ex. 50, 52.)

On August 22, 2005, Steward issued a written warning because Bayraq had not performed the work instructed regarding the eighty-six files. (Trial Ex. 51.) In her warning, Steward put-forth a detailed schedule for Bayraq to follow in order to terminate the review of the eighty-six files by September 13, 2005. (Id.) After Bayraq received her written warning, she responded on September 20, 2005 with a letter rebutting and appealing the warning, which was sent to Chairman Traughber, State Director Gary Tullock, and Governor Phil Bredesen. (Trial Ex. 53.) This letter once again made reference to harassment and retaliation as a result of her EEOC suit. (Id.) Bayraq also complained that the files she was told to close were not hers and that she had never been asked in the past to do the things that Steward now requested. (Id.) Chairman Traughber subsequently responded to this letter on October 26, 2005 and upheld the written warning. (Trial Ex. 54.)

In late November 2005, Steward conducted the Annual Evaluation Discussion with Bayraq. In that evaluation, Steward rated Bayraq's performance a 2 or "Marginal" due mainly to her failure to submit requested case files and her inability to follow instructions related to the eighty-six case files. (Trial Ex. 55.) Steward noted that Bayraq's performance had not improved despite the fact that Ford and Steward had reduced the number of individuals that she supervised in order to improve her performance. (Id.) Steward recommended that Bayraq's supervisory responsibilities be removed. (Id.) Bayraq refused to sign the Annual Evaluation.

On December 13, 2005, Bayraq filed another grievance claiming that the 2005 Annual Evaluation was harassment in retaliation for her EEOC complaint. (Trial Ex. 56.) Two days later, Chairman Traughber wrote her a letter stating the evaluation was non-grievable. (Trial Ex. 57.)

Approximately ten months later, on October 10, 2006, Bayraq filed a grievance claiming that Steward and Ford were "deliberately delaying" her work and retaliating against her by making her submit typed copies of her annual reviews of the employees she supervised. (Trial Ex. 58.) On November 9, 2006, Chairman Traughber once again sent a letter stating that her grievance was non-grievable. (Trial Ex. 59.)

Also on November 9, 2006, Steward issued Bayraq's 2006 Annual Evaluation. (Trial Ex. 60.) Bayraq refused to attend the discussion. (Id.) Bayraq was once again rated a 2 or "Marginal" for her work performance. (Id.) Steward listed a number of areas in which Bayraq had made errors, including the supervision of her employees, and stated that Bayraq's performance had suffered as a result of her refusal to follow instructions. (Id.) On December 6, 2006, Helen Ford informed Bayraq that her supervisory duties were being removed. Ford told her that it was not a demotion, that her salary would not be affected, but that her duties would be

shifted so that she would work on cases and not have to supervise other employees. Ford stated that she made this change in an effort to give Bayraq an opportunity to improve her performance. On the same day that Ford told Bayraq that her supervisory duties would be removed, Bayraq filed a grievance alleging that Ford's decision was harassment and retaliation for Bayraq's EEOC complaint. (Trial Ex. 61.) Bayraq was informed a week later by letter that her grievance was non-grievable. (Trial Ex. 62.)

As part of the changes made by Ford, Bayraq was assigned to a new supervisor, Ms. Mary E. Williams. In 2007, as a PPO3 without supervisory responsibilities and working under Ms. Williams, Bayraq achieved a score of 4 or "Superior" on her Annual Evaluation. (Trial Ex. 64.) Although Williams became her new direct supervisor, Bayraq continues to work under Ford in the Delta District.

On May 17, 2006, after receiving her right to sue letter from the EEOC, Bayraq filed the instant law suit against Defendant State of Tennessee Department of Probation and Parole. (Trial Ex. 76.)

II. CONCLUSIONS OF LAW

A. Prima Facie Case

Title VII of the Civil Rights Act of 1964 provides that:

It shall be an unlawful employment practice for an employer to discriminate against any of his employees . . . because he has opposed any practice made an unlawful employment practice by [Title VII], or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under [Title VII].

42 U.S.C. § 2000e-3(a).

To state a prima facie case of retaliation, the plaintiff must demonstrate that: 1) she engaged in an activity protected by Title VII; 2) defendant knew plaintiff engaged in protected

activity; 3) defendant took an action adverse to plaintiff; and 4) there was a causal connection between the protected activity and the adverse employment action. Wrenn v. Gould, 808 F.2d 493, 500 (6th Cir. 1987).

In its order on summary judgment, this Court found that Bayraq's April 6, 2005 EEOC complaint constituted protected activity under Title VII, that Defendant knew of the EEOC complaint, and that the removal of Bayraq's supervisory responsibilities was an adverse action based on the standard prescribed in Burlington Northern & Santa Fe Ry. v. White, 548 U.S. 53 (2006). (D.E. #77: *Order Granting in Part and Denying in Part Def.'s Mot. for Summ. J.*) Thus, the only element in question from the prima facie case is whether a causal connection exists.

In order to establish a causal connection between her protected activity and the challenged action, a plaintiff must "proffer evidence sufficient to raise the inference that her protected activity was the likely reason for the adverse action." EEOC v. Avery Dennison Corp., 104 F.3d 858, 861 (6th Cir. 1997) (citation omitted). "Although temporal proximity itself is insufficient to find a causal connection, a temporal connection coupled with other indicia of retaliatory conduct may be sufficient to support a finding of a causal connection." Randolph v. Ohio Dept. of Youth Servs., 453 F.3d 724, 737 (6th Cir. 2006). A plaintiff can demonstrate other indicia of retaliatory conduct by presenting evidence that the he or she was treated differently than similarly situated employees who had not exercised their rights under Title VII. See, e.g., Moore v. KUKA Welding Systems & Robot Corp., 171 F.3d 1073, 1080 (6th Cir. 1999); Little v. BP Exploration & Oil Co., 265 F.3d 357, 364-65 (6th Cir. 2001).

In the present case, the Court finds that Bayraq has failed to carry her burden because she has not supplied sufficient evidence to support an inference of a causal connection. Bayraq filed her EEOC complaint on April 6, 2005, and the removal of her supervisory duties occurred on

December 6, 2006. A year and eight months separate her protected activity and the loss of her supervisory responsibilities. This lack of temporal proximity between the protected activity and the adverse action does not support a finding of a causal connection.

Bayraq claims, however, that the repeated denials of her grievances by Defendant as non-grievable closes the temporal window and presents “other indicia of retaliatory conduct” to establish the causal connection. Specifically, Bayraq points to her October 10, 2006 grievance and the subsequent removal of her supervisory duties as evidence of temporal proximity. While Bayraq’s grievance within two months of Defendant’s adverse action does provide a more workable argument for temporal proximity, temporal proximity without other indicia of retaliatory conduct is not sufficient to demonstrate a causal connection, Randolph, 453 F.3d at 737, and Defendant has failed to establish evidence of these other indicia.

In closing argument, Bayraq contended that the finding of her grievances to be non-grievable was evidence that she was treated differently than other employees. Bayraq, however, offered no testimony or documentary evidence to support this contention. In fact, the documentary evidences shows that Bayraq’s grievances, which uniformly complained of retaliation, harassment, and hostile work environment based on work assignments, corrective action taken by supervisors, and evaluations, were deemed non-grievable both before and after the filing of her EEOC complaint. For example, on April 8, 2004, Bayraq filed a grievance complaining of “harassment and intimidation tactics,” as well as “overt intimidation, harassment, and retaliation.” (Trial Ex. 40.) The underlying act that constituted the alleged “intimidation, harassment, and retaliation” was an oral warning given because Bayraq reportedly did not properly supervise a subordinate to ensure that her files were not in disarray. (Id.) Defendant in response wrote a letter stating Bayraq’s grievance was non-grievable because it fell within the

exception of “verbal and written reprimands.” (Trial Ex. 42.) Four months after filing her EEOC complaint, Bayraq filed a grievance alleging that she was assigned eighty-six cases on which to work and given unrealistic demands and expectations, which led her to believe she was being “harassed/retaliated against due to my suit (EEOC) against the agency.” (Trial Ex. 47.) This matter was found to be non-grievable based on the exceptions to grievances, which in the case consisted of “normal supervisory counseling” and “reasonable work assignments.” Thus, as the responses to these grievances indicate, not only did Bayraq not establish that she was treated differently from similarly situated employees, she failed to establish that she herself was treated any differently after engaging in protected activity.

Defendant, through the testimony of Charles Traugher, Helen Ford, and Gary Tullock, established that the determination of whether a grievance was grievable was not based on what the complained of actions were labeled. Instead, Defendant looked to whether the underlying actions were of a type that were ultimately grievable. In other words, labeling something retaliation or harassment did not mean it was grievable. The actual events or actions complained of had to reflect some inappropriate action or event that fell within the type of complaint that was actually grievable and not among the exceptions. (Trial Ex. 2 at 4-5.) Defendant thus found non-grievable complaints based on verbal warnings given by Bayraq’s supervisor or complaints expressing displeasure with her work assignments, even though they were labeled harassment and retaliation based on the filing of an EEOC complaint, because those specific actions were non-grievable under the Tennessee Department of Personnel Rules. (See Trial Ex. 2.)

Bayraq did establish at trial that the investigations of the grievances she filed were wholly insufficient. In his testimony, Charles Traugher repeatedly testified that upon receiving the grievances, no one contacted Bayraq, her supervisors, or anyone in the regional office to actually

ask questions regarding the complained of incidents. Nevertheless, Traugher claimed that the grievances were “thoroughly investigated,” apparently based on the review of files on the electronic system. Although there are cases in which such a review of files might be sufficient to make a determination on grievability, the Court finds that a proper investigation by any reasonable understanding did not occur. The problem for Bayraq, however, is that Defendant’s failure to investigate grievances, such as by talking to the complainant and her supervisors, occurred both before and after Bayraq filed her EEOC complaint. (See Trial Exs. 42, 45.) Thus, the Court finds that the lack of an investigation into the grievances does not establish an indication of retaliatory action. Therefore, Bayraq has failed to establish a causal connection between her protected activity and any adverse action.

B. Legitimate, Non-Retaliatory Reason and Pretext

Even assuming that Bayraq has established a prima facie case of retaliation by demonstrating the existence of a causal connection, the Court still finds that Bayraq failed to prove by a preponderance of the evidence that Defendant’s proffered reason for the removal of her supervisory duties was mere pretext. If a plaintiff establishes the elements of a prima facie case, the burden then shifts to the defendant to articulate a legitimate, non-retaliatory reason for the adverse employment action. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973); Wrenn, 808 F.2d at 501. If the defendant is successful in establishing this legitimate, non-retaliatory reason for its adverse action, the presumption of retaliation that flows from the prima facie case disappears. Wrenn, 808 F.2d at 501 (citing Weems v. Ball Metal & Chemical Division, Inc., 753 F.2d 527, 529 n.2 (6th Cir. 1985)). A plaintiff must then demonstrate by a preponderance of the evidence that the proffered reason is mere pretext for retaliation. Tex. Dep’t of Cmty. Affairs v. Burdine, 450 U.S. 248, 253 (1981). A plaintiff may demonstrate that a

defendant's reason is not credible by establishing that (1) the proffered reasons have no basis in fact, (2) the proffered reasons were not the defendant's actual motivation for the adverse action, or (3) the proffered reasons were insufficient to motivate the adverse action. Manzer v. Diamond Shamrock Chems. Co., 29 F.3d 1078, 1084 (6th Cir. 1994). Although this burden shifting analysis requires the defendant to articulate a non-retaliatory reason for an adverse action taken against plaintiff, "the ultimate burden of persuasion never shift[s] from the plaintiff." Wrenn, 808 F.2d 501 (citing Burdine, 450 U.S. at 253).

Defendant has stated through the testimony of Helen Ford, Gary Tullock, and Michelle Steward that Bayraq was having trouble managing her supervisory duties and that her performance was suffering. The testimony of these witnesses is supported by the detailed Annual Evaluations and memoranda presented at trial. Helen Ford testified that based on Bayraq's consistent performance problems from 2004 to 2006, she made the decision to remove Bayraq's supervisory responsibilities in the hopes that her performance would improve. The Court found Ford's testimony to be, for the most part, credible. Additionally, Mr. Tullock, whom the Court finds to have given thoughtful and honest testimony, corroborated Ford's explanation.

In contrast, Bayraq presented no convincing evidence to controvert Defendant's assertion that her performance was poor and that it began to deteriorate in April 2004, twenty months before she engaged in protected activity. While testifying, Bayraq, in response to the issues raised by Defendant concerning her performance and the warnings and evaluations offered as evidence at trial, stated that she was doing her job the same way she had been for the twenty-two previous years and that she could not understand why she would be asked to do assignments that she had never been asked to do before. The Court found Bayraq to be obstinate, contradictory,

and likely difficult to supervise, yet credible. Bayraq seemed incapable of providing a straightforward answer even to questions asked by her own attorney.

Further, Bayraq offered no documentary evidence or testimony from any of her subordinates that controverted the testimony of Michelle Steward and Helen Ford and the evaluations and warnings that evidenced her poor performance. Bayraq did offer the testimony of Sherrell Lott, whom Bayraq supervised from 2001-2003, in an attempt to demonstrate her competency. This testimony was largely irrelevant, however, as the documented evidence of Bayraq's poor performance did not begin until 2004. Bayraq also failed to explain to the Court's satisfaction how the 2004 Annual Evaluation, which evidenced a decline in performance, and the April 2004 problems with Bayraq's supervision of Ms. Harwell's files fit into the scheme of her theory of retaliation for activity protected under Title VII. Therefore, based on Plaintiff's failure to put forth testimony or evidence to demonstrate that Defendant's proffered reason had no basis in fact, was not the actual motivation for its decision, and/or was not sufficient to motivate the removal of her supervisory duties, the Court finds that Bayraq has not proved by a preponderance of the evidence that Defendant's actions and ultimate removal of Bayraq's supervisory duties were mere pretext for the adverse action.²

After hearing the testimony of all of the witnesses and thoroughly examining the documentary evidence offered by both sides, the Court concludes that although the relationship between Bayraq and Steward was thoroughly dysfunctional, its problems and the removal of Bayraq's duties were not based on retaliation for any protected activity engaged in by Bayraq. Bayraq's performance seemed to be deteriorating from 2004 to 2006. Ms. Ford's decision to

² The Court notes that the Sixth Circuit has held that evidence of a causal connection can also be used as sufficient evidence to find that an employer's proffered reason for taking adverse action is pretext. Cantrell v. Nissan N. Am., Inc., 145 F. App'x 99, 107-108 (6th Cir. 2005). The Sixth Circuit held that this was the case for evaluating a motion for summary judgment, thus this Court holds that, even if Bayraq had demonstrated a causal connection, the evidence of that connection does not demonstrate by a preponderance of the evidence that Defendant's reason for removing her supervisory duties was pretext.

remove Bayraq's supervisory duties in order to give her an opportunity to improve her performance appears to be justified because without those duties and under a new immediate supervisor Bayraq's 2007 performance improved to a score of 4 or "Superior" on her annual evaluation. Therefore, based on the testimony and evidence presented at trial, the Court finds that Bayraq has failed to establish by a preponderance of the evidence that Defendant's proffered reason for removing her supervisory responsibilities was mere pretext.

IV. CONCLUSION

For the foregoing reasons, the Court finds that Bayraq has failed to establish by a preponderance of the evidence that Defendant retaliated against her in violation of Title VII of the Civil Rights Act of 1964. Accordingly, judgment is entered in favor of Defendant, and Bayraq's case is dismissed with prejudice.

IT IS SO ORDERED this 23rd day of December, 2008.

s/Bernice B. Donald
BERNICE BOUIE DONALD
UNITED STATES DISTRICT COURT JUDGE