IN THE MISSOURI SUPREME COURT

Supreme Court No. SC 88981

CYNTHIA HILL,

Plaintiff/Appellant,

vs.

FORD MOTOR COMPANY,
KEN HUNE and PAUL EDDS,

Defendants/Respondents.

SUBSTITUTE BRIEF OF DEFENDANTS/RESPONDENTS FORD MOTOR COMPANY and PAUL EDDS

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JURISDICTIONAL STATEMENT

Respondents adopt Appellant's jurisdictional statement.

I. STATEMENT OF FACTS

Respondents are dissatisfied with the accuracy and completeness of Appellant's Statement of Facts. Therefore, in accordance with Rule 84.04(f), Respondents are providing their own Statement of Facts.

II. BACKGROUND

A. Appellant's Employment Background

Appellant began working for Ford in 1994 as an hourly production employee in the Trim Department ("Trim"). (L.F. 48:19-23.)[1] The 2,600 hourly production/labor pool employees, such as Appellant, are responsible for assembling Ford vehicles. (L.F. 220:21.) The hourly employees are members of the United Auto Workers, Local 325 (the "Union"). The Collective Bargaining Agreement ("Contract") between Ford and the Union governs the terms and conditions of their employment. (L.F. 221:6-8.) Although most hourly employees are assigned to one of several departments, it is common for hourly employees, such as Appellant, to work in other departments as needed. This practice is called "floating." (L.F. 50:12 – 51:1.) Appellant has floated at various times, consistent with the terms of the Contract. (L.F. 50:12 – 51:1; 224, ¶ 5.) Per the Contract,

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[1] All citations to the Legal File are abbreviated L.F. ____. Copies of new/unpublished decisions, statutes, rules, and regulations cited herein can be found in the Appendix, consecutively numbered A1 through A53.

management retains the right to assign labor pool employees, such as Appellant, to any job within the employee's classification. (*Id.*)

The Contract contains a grievance and arbitration provision whereby an employee can file a grievance regarding workplace disputes. (L.F. 233:16 – 234:11.) The Union assists employees in filing the grievance and represents their interests throughout the process. (L.F. 51:7-20; 224 ¶ 9; 234:1-6.) Pursuant to the Contract, Ford usually addresses workplace violations at disciplinary hearings. (L.F. 224, ¶ 9; 235:9-16.) At a hearing, management typically presents facts to a labor representative that support a workplace violation, and the employee and/or Union representative present facts they believe exonerate the employee. (L.F. 224, ¶ 9.) The labor representative has sole responsibility for determining whether discipline is appropriate. (L.F. 219:11-14; 224, ¶ 9; 253:7-12.)

Ford had disciplined Appellant for what it considers workplace violations and attendance issues on numerous occasions prior to the events at issue in this case. (L.F. 52:3-15; 151:19-21; 235:17 – 236:14; 236:20 – 238:1; 238:6 – 239:9; 239:15 – 240:1; 241:17-20; 242:19 – 243:14; 243:17 – 244:4; 244:17 – 245:13; 246:6-18; 246:21 – 247:6; 247:9-16; 248:11 – 249:1; 258-259; 261-266; 268-270.)

Appellant has a long history of disagreements/confrontations with various supervisors, both male and female, prior to the issues underlying this case, and she had been previously disciplined for failing to follow the orders of various supervisors. (L.F. 121:24 – 122:10; 152:9-24; 153:6-14; 153:25 – 154:18; 267; 271; 274.) The Union has represented Appellant in connection with those disciplinary actions and has filed

numerous grievances on her behalf. (*Id*.) On several occasions prior to the events underlying this case, Appellant filed grievances contending that various supervisors were "harassing" her. Often Appellant based her allegations of "harassment" upon her dissatisfaction with her supervisors' decisions to place her on various jobs. (L.F. 272-273.)

B. Ford's Anti-Harassment Policy

Ford has a well-publicized Zero-Tolerance Anti-Harassment Policy ("Policy"), which Appellant has reviewed. (L.F. 104:3-17; 285-290.) On July 25, 2000, Appellant signed an Acknowledgment of Receipt form, indicating that she had read and understood the Policy. (L.F. 104:14 – 105:15; 275.) As part of its Policy, Ford provides employees, including Appellant, with a document entitled "On the Road to Mutual Respect" ("Mutual Respect"). (L.F. 105:15 – 106:1; 276-290.) The Ford Policy requires employees who are harassed to report it to their supervisor, manager, Human Resources, or Ford's 24-hour hotline immediately. (L.F. 147:20 – 148:22; 283; 287-288.) Thus, Appellant had multiple avenues, both inside and outside the Plant, to report any alleged harassment. (*Id*.) Although the Policy advises employees, if they are comfortable doing so, to tell the offending employee that the conduct is unwelcome, the Policy also requires an employee to report it *immediately*. (L.F. 287-288.)

Ford shut down production in the Plant so that all employees could attend training on the Policy. (L.F. 106:22 – 107:9; 108:3-5; 109:7-17; 276-290.) The facilitators discussed what "exemplifies" conduct that violates the Policy and posed questions to the employees. (L.F. 143:25 – 144:6; 144:8-22.) Appellant remembers "covering this entire

road map, this entire pamphlet here, everything in [Mutual Respect] and its contents. This was the policy." (L.F. 141:7-12; 276-290.)

The anti-retaliation provision of Ford's policy strictly prohibits retaliation against any employee who has brought forth harassment claims or who otherwise assists or cooperates in an investigation. Ford's Policy states that no employee will be promoted for a period of 2-3 years if he or she is disciplined or suspended for engaging in conduct that violates the anti-discrimination policy. (L.F. 282.) Appellant reviewed the company's anti-retaliation provision. (L.F. 148:23 – 149:6; 284.)

In addition to the Policy, the Union Contract provides another means of redressing alleged harassment. Article X, Section IX provides for filing of a grievance if an employee believes he or she is subject to harassment or discrimination. (L.F. 292-293.) Appellant had filed this type of grievance prior to the alleged incidents underlying this case. (L.F. 292-293.)

C. Alleged Hostile Environment

Appellant contends Kenny Hune ("Hune"), a former supervisor at the Plant, sexually harassed her. (L.F. 61:19-25.) The alleged harassment is limited to a handful of comments allegedly made by Hune between April and September 2002. (L.F. 66:24 – 67:10; 84:2-14.) At no time did Hune ever touch Appellant, expose himself to her, or fondle himself in her presence. (L.F. 63:24 – 64:9.)

At the time of the alleged harassment, Appellant was floating to different areas/jobs with various supervisors on an as-needed basis. (L.F. 62:13 – 63:6.) Appellant contends that Hune approached Tracy Stevens, another hourly employee, and

her approximately ten times, asking about their undergarments. (L.F. 67:11-18; 68:8-13, 21-24; 69:6-19; 70:12 – 71:6; 300-301.) In response to Hune's comments, Appellant shrugged and gave him a "distasteful look." (L.F. 72:10-17; 300-301.) She further responded by, "not communicating with him in those lewd ways that he was trying to engage me in." (L.F. 88:20 – 89:6.) Appellant did not complain or report the conduct to anyone at the time.

In May 2002, Appellant contends Hune asked her, when she was in a group of employees, how much she weighed. (L.F. 78:1-22; 300-301.) Appellant asked him why he wanted to know, and Hune replied that he bet he could bench-press her. She responded, "No. I told him he could not." (*Id*.) Appellant was 5' 7" and 113 pounds at the time that she worked at the Plant. (L.F. 64:15-21.) Hune is six feet, two inches tall and looks "like he kept in shape, broad chest." (L.F. 63:17-24.) Other individuals have commented about her slight build. (L.F. 79:9-13.) Appellant did not complain or report the incident at the time.

According to Appellant, in June 2002 a co-worker, Phyllis Wright, told Appellant that Hune made a comment about having "one of them on top and one on the bottom." (L.F. 72:21 – 73:19.) This comment was not made by Hune to Appellant or in Appellant's presence. (*Id.*) Appellant did not complain or report the comment at the time.

In mid-August 2002 Hune asked Appellant why she did not like him and she told him that she did not dislike him and that she did not really know him. (L.F. 85:11-12.) In response, Hune placed his hand on his hip but did not make any comment, which

Appellant interpreted to mean "what about all of this." (L.F. 84:25 – 86:1; 86:6-11.) During this exchange, Hune did not fondle himself, try to move closer to her, or touch her. (L.F. 86:14-25.) Appellant did not complain or report the conduct at the time.

Appellant claims that Hune made one comment to fellow employee, Tracy Stevens, another employee, and her that Appellant interpreted as a reference to oral sex. (L.F. 87:15-16.) Ms. Stevens, however, denies that Hune ever made any sexual comments to Appellant in her presence. (L.F. 311-312.) Appellant did not complain or report the comment at the time. Appellant also offered the testimony of a co-worker who claims Hune stared at Appellant in the same way he looked at Appellant's co-worker Tracy Stevens. (L.F. 364, ¶ 8.)

Appellant claims Hune made only one sexual comment while he was her supervisor. (L.F. 173:20 – 174:1.) This incident allegedly occurred in late August 2002 when, according to Appellant, Hune told Tracy Stevens and her that he would like to have one of them on the top and one on the bottom. (L.F. 72:21 – 73:19; 173:4 – 174:1.) Appellant did not complain or report the conduct to anyone at the time. The other alleged comments to her were made when Appellant was not working for Hune and had no business reason to be near him; Appellant was voluntarily going into Hune's department on breaks to talk to her friends. (L.F. 171:25 – 172:9.)

Finally, on one occasion in September 2002, Hune allegedly told Appellant that she would have to "act like a lady" if she wanted to work in his area. (L.F. 79:14 – 81:2.) Appellant admits she used profanity in the workplace. (L.F. 81:5-10.)

D. Appellant's Belated Report of Harassment and Ford's Response

Appellant believed Hune was sexually harassing her from the time it allegedly began in April 2002 and felt that even one comment about her underwear was too many. (L.F. 64:10-14; 66:6-11; 70:24 – 71:1.) However, Appellant admits that she did not report any of these incidents until September 2002 despite her knowledge of, and previous use of, both the Zero-Tolerance Policy and the Article X, Section IX grievance procedure. (L.F. 82:18 – 83:2; 97:25 – 100:25; 250:14-25; 301; 315, ¶ 11.)

Appellant now claims she reported this alleged harassment to Ford during a disciplinary hearing on September 5, 2002. No one else in attendance at the hearing, including the two Union officials who were representing Appellant at the hearing, understood anything Appellant said at that meeting to be a complaint of harassment. (L.F. 214:11 – 215:7; 216:7-18; 226, ¶ 16; 314, ¶ 4; 315, ¶ 9; 322, ¶¶ 3-4.) It is undisputed that Appellant called Ford's 1-800 hotline on September 10, 2002, more than 5 months after the behavior allegedly commenced. (L.F. 83:9-13.)[2] Appellant described the harassment in her hotline call. (L.F. 87:8 – 88:6.)

Following the September 5, 2002 hearing, Appellant visited her personal physician and obtained a personal medical leave. (L.F. 162:9-163:2; 169:4-18). Appellant did not

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[2] Appellant also claims that she told Edgar "Pete" Wade about the alleged conduct of Hune. (L.F. 76:9-21.) She admits that Wade is not a supervisor, but another hourly employee, and that she knew he would not do anything about the behavior. (L.F. 77:1-12.)

return from her medical leave to work from the time of the September 5, 2002 hearing until December 1, 2002. (L.F. 168:15-21.)

The Ford employee who took Appellant's hotline call immediately notified Labor Supervisor Paul Edds of her complaint on September 10, 2002, and on that same day Edds began an investigation. (L.F. 226-227, ¶¶ 24-25.) Ford placed Hune on administrative leave during the investigation and Hune was ultimately terminated. Appellant never worked with Hune following her complaint of harassment. (L.F. 227, ¶¶ 27 and 32.)

Linda Hill, a member of the UAW who was then chairperson of the Plant's diversity/civil rights committee, assisted Edds in his investigation. (L.F. 226-227, ¶ 25.) This committee participates in and assists with investigations into allegations of harassment brought by Union members. (L.F. 227, ¶ 25.) Both Linda Hill and Edds were specifically trained to investigate harassment claims. (L.F. 226-227, ¶ 25.)

The investigation involved interviews with at least 16 different employees, including Hune. (L.F. 227, ¶ 26.) Appellant was not interviewed because she was on medical leave at the time. (L.F. 227, ¶ 27.) However, the investigation included interviews with Appellant's co-workers, including Tracy Stevens, whom Appellant identified in her hotline call as a witness to the alleged harassment. (L.F. 227, ¶¶ 26-27.) None of the individuals interviewed corroborated Appellant's allegation that she had been the subject of any unwelcome or inappropriate behavior by Hune. (L.F. 227, ¶ 28.) Rather, the investigation revealed Appellant was not even present at the time that Hune allegedly made a comment regarding oral sex to two other employees, which Appellant

had claimed in her hotline call to have been directed at her. (L.F. 227, ¶ 29.) The investigation did reveal that Hune had engaged in behavior directed toward others that was not in the best interest of the company and which could violate the company's Zero-Tolerance Policy, and he was terminated. (L.F. 227, ¶ 30.)

E. Retaliation

1. Alleged "Obstruction from Job"

The Ford Trim Department is made up of different "lines" (L.F. 381, p. 101:1-10), and Hune had supervisory responsibility for only two lines within the department. (*Id.*; L.F. 357, ¶ 3.) Appellant was floating at the time and had identified three jobs in Trim that she could do within her medical restrictions. (L.F. 92:10-13; 93:4-10.) Despite the fact that she now claims Hune had been harassing her for months, Appellant specifically requested the Cladding Job that was under Hune's direct supervision. (L.F. 94:4-17.) At the time, there were other jobs, not supervised by Hune, which Appellant could perform. (L.F. 90:16-18; 94:9-25.)

The Cladding Job does not pay more than any other labor pool job inside or outside of Hune's direct supervision; it does not provide any extra benefits or increase seniority. (L.F. 91:12; 92:3-9.) The Cladding Job is no different than other assembly jobs, in that they are all labor pool jobs that involve assembling motor vehicles. (L.F. 92:14-22.)

Plant Superintendent Maurice Woods told Hune to place Appellant in the Cladding Job on September 4, 2002. (L.F. 398, p. 11:7-10.) However, Woods did not know who was performing the Cladding Job at the time he gave the instruction. (L.F.

317, ¶ 4.) Prior to September 4, 2002, Ford had placed Cheryl Horton in the Cladding Job due to her medical restrictions. (L.F. 319, ¶ 5.) It was the Plant's practice at the time that employees who were medically placed on the job would not be displaced in favor of another employee with medical restrictions, regardless of seniority. (L.F. 317-318, ¶¶ 3-5; 319, ¶ 5.)

On September 5, 2002, Appellant reported to Hune's office to begin work on the Cladding Job. (L.F. 382, p. 108:14 – 109:4). After Hune arrived, he expressed his displeasure with Appellant's assignment to the Cladding Job. (L.F. 90:1-6.) Although Appellant now characterizes this event as an assault, in Appellant's sworn Interrogatory responses, she stated that Hune approached his office, walked inside, and slammed the door without speaking to her. (L.F. 299.) Appellant does not know if Hune even knew she was behind him when he went into the office and closed the door. (L.F. 464:25 – 466:17.) Indeed, Appellant admits that she has no basis for her belief that Hune was intending to strike her. (L.F. 469:15-22.) Appellant refused Hune's direct order to leave his area during the interaction. (L.F. 387, p. 158:16-22.)

Hune did not have the final authority to decide whether or not Appellant was placed on the Cladding Job. (L.F. 398, p. 11:8-10.) Appellant did not notify Woods, Hune's boss, that she had not been placed on the job she desired on that day. (L.F. 95:24 – 96:4; 394, p. 204:15-22.) Appellant never worked with Hune again following this incident. (L.F. 169:15-21.)

2. Appellant's Three-Day Suspension

On the morning of September 5, 2002, Union officials visited Edds and expressed concern regarding Appellant's mental condition, as she had recently exhibited several outbursts of anger and had many confrontations with her co-workers. (L.F. 225, ¶ 10.) The Union officials suggested that Ford send Appellant for a psychological examination and counseling. (L.F. 225, ¶ 10.) Later that same day, Ford held a disciplinary hearing regarding Appellant's failure to keep her safety glasses on and her disrespect of Hune during the incident regarding job placement. (L.F. 155:24 – 156:20.) Sheron Wright, a labor representative, began the hearing. (L.F. 212:4-6.) Wright stopped the hearing because she perceived Appellant's behavior to be disrespectful and outrageous, including Appellant's excessive use of profanity. (L.F. 215:1-14.) Wright had never witnessed such behavior in a disciplinary hearing before and concluded that she needed Paul Edds' assistance to finish the hearing. (L.F. 213: 17 - 214:7.)

Prior to the hearing, Appellant had reviewed the Plant's Rules and Regulations. (L.F. 151:9-18; 321.) Failure to wear safety glasses at all times is a violation of the Rules. (L.F. 96:10-13; 321.) Appellant stated during the hearing that she "pulled [her] glasses off [her] face." (L.F. 157:17-20; 225, ¶ 14; 315, ¶ 6.)

Based on what was presented at the disciplinary hearing, Edds gave Appellant a three-day suspension for Appellant's failure to keep her safety glasses on and her disrespect of Hune. (L.F. 225, ¶ 14). The Union has never filed a grievance on behalf of Appellant regarding her three-day suspension, as it does not grieve issues where an employee admits to violating safety rules. (L.F. 161:7-13; 315, ¶¶ 8 and 12.) The three-

day suspension that Edds meted out to Appellant for violation of Plant safety rules was consistent with the punishments he meted out to similarly situated individuals. (L.F. 225, ¶¶ 14-15.) Although Appellant now claims that she was not informed of her suspension during the disciplinary hearing, Appellant admitted in her deposition multiple times that she was suspended at the time of the hearing. (L.F. 382, p. 107:16-25; 155:15-23.)

3. Psychological Counseling

During the September 5, 2002 disciplinary hearing, Edds requested that Appellant seek counseling. (L.F. 158:19-23.) Although Appellant now calls this act retaliation, at the time she thanked Edds for his concern and indicated that she would take advantage of the offer. (L.F. 389, p. 166:11- 167:6.) Unbeknownst to Edds, at the time that Edds requested that she seek psychological counseling, Appellant was already undergoing treatment with a mental health professional. (L.F. 226:19.) Edds learned this only after speaking with the Plant doctor when the doctor returned to the Plant. (L.F. 226, ¶ 21.) Because Appellant was already seeing a mental health professional, there was no need for a further referral. The decision to rescind the request for a psychological exam was made on September 9th. (L.F. 226, ¶ 12.) Appellant did not suffer any diminution of benefits, salary, or seniority because Edds requested that Appellant seek psychological counseling. (L.F. 165:7 – 166:7; 167:1-18; 226, ¶ 20.)

On September 10th, Edds called Appellant and told her that she did not have to take a psychological exam, that her three-day suspension for the safety violation ended on Wednesday, September 11th, and that she should report to work at that time. (L.F. 163:18 – 164:19.) However, Appellant did not report to work as Edds requested. (L.F.

162:9-19.) Instead, Appellant visited her personal physician and obtained a personal medical leave. The medical leave had nothing to do with Edds' suggestion that Appellant seek psychological counseling. (L.F. 162:20 – 163:2.) Ford paid Appellant while she was on medical leave. (L.F. 168:3-6.) Appellant did not return from her medical leave until December 1, 2002. (L.F. 168:15-21.) By the time Appellant returned, Hune had already been terminated. (L.F. 169:19-21.)

The Union never filed a grievance on behalf of Appellant or complained regarding her three-day suspension, Edds' request that she seek psychological counseling, the allegations she has made against Hune in this lawsuit, or the company's actions during the September 5, 2002 hearing. (L.F. 161:7-21; 159:25 – 160:2; 315 ¶ 12.)

F. Paul Edds

Paul Edds was named personally as a defendant in this lawsuit. (L.F. 228, ¶ 41.) Edds was not aware that Appellant intended to name him in any charge of discrimination before the EEOC or Missouri Commission on Human Rights ("MCHR"). (L.F. 228, ¶ 34.) Edds' name does not appear as a "Respondent" in the Charge or in the body of the Charge. (L.F. 228, ¶ 35.) Edds did not provide a response to the EEOC or MCHR on his behalf, which he would have done had he believed he was a named party. (L.F. 228, ¶ 37.) Edds did not participate in any conciliation efforts in front of the EEOC and MCHR or have an opportunity to do so. (L.F. 228, ¶ 38.) Edds did not receive a copy of a Notice of Right to Sue indicating that Appellant intended to name him personally as a respondent or that she could bring a lawsuit against him. (L.F. 228, ¶ 40.)

III. RESPONSE TO POINT I

The trial court properly entered summary judgment in favor of Ford because there is no genuine issue of material fact as to whether Hune engaged in sexual harassment as it is defined by the Missouri Human Rights Act ("MHRA").

A. Standard of Review

The standard of review applied to the circuit court's grant of summary judgment is *de novo. Eisenberg v. Redd,* 38 S.W.3d 409, 410 (Mo. banc 2001). Appellate review of a decision to grant summary judgment is limited to the issues put forth before the trial court. *Barner v. The Missouri Gaming Co.*, 48 S.W.3d 46, 50 (Mo. App. 2001). "An issue not presented to the trial court is not preserved for appellate review." *Id*. Therefore, an appellant is bound by the position he or she took in the trial court, and the appellate court can review the case only upon those theories. *Sheedy v. Missouri Highway and Transp. Comm'n*, 180 S.W.3d 66, 70-71 (Mo. App. 2005). Unlike an appellant, however, a respondent is permitted to raise a new theory on appeal for the purpose of sustaining a favorable judgment. *Id*. at 71 (internal citation omitted); *American Standard Ins. Co. of Wisconsin v. May*, 972 S.W.2d 595, 601 (Mo. App. 1998) (holding that an appellate court is required to affirm the trial court's judgment if it is correct on any reasonable theory consistent with the pleadings and supported by the evidence regardless of the theory of recovery or defense relied on below).

When defending parties, such as Respondents, move for summary judgment, it is not necessary for the movants to controvert each element of the non-movant's claim. *Id*. at 381. In order to establish a right to summary judgment, a movant who is a defending

party must show: "(1) facts that negate any one of the claimant's elements, (2) that the non-movant, after an adequate period of discovery, has not been able to produce, and will not be able to produce, evidence sufficient to allow the trier of fact to find the existence of any one of the claimant's elements, or (3) that there is no genuine dispute as to the existence of each of the facts necessary to support the movant's properly-pleaded affirmative defense . . . ." *Id.* For purposes of Rule 74.04, a genuine issue of material fact is a dispute that is real and not merely "argumentative, imaginary, or frivolous." *Thompson v. Western-Southern Life Assurance Co.*, 82 S.W.3d 203, 205-206 (Mo. App. 2002).

Once the movant has demonstrated the right to summary judgment in its opening brief, "the non-movant's only recourse is to show – by affidavit, depositions, answers to interrogatories, or admissions on file – that one or more of the material facts shown by the movant to be above any genuine dispute is, in fact, genuinely disputed." *ITT v. Commercial Finance Corp v. Mid-America Marine Supply Corp.*, 854 S.W.2d 371, 381 (Mo. banc 1993) (citations omitted; emphasis in original). "[A]n adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this Rule 74.04, *shall set forth specific facts* showing that there is a genuine issue for trial." *Id.*

However, evidence – and specifically affidavits – must meet certain well-established evidentiary standards before the Court can consider them. Affidavits must be based on personal knowledge, must set forth such facts as would be admissible in evidence, and must show affirmatively that the affiant is competent to testify to the

matters therein, or they must be stricken. Mo. R. Civ. P. 74.04(e). *See Yow v. Village of Eolia*, 859 S.W.2d 920, 922 (Mo. App. 1993). Furthermore, hearsay statements are not admissible in evidence and may not be considered in adjudicating summary judgment. *Fitzpatrick v. Hoehn*, 746 S.W.2d 652, 654-55 (Mo. App. 1988.)

B. Appellant Failed to Establish a Sexually Hostile Work Environment as a Matter of Law.

To establish a *prima facie* claim of hostile work environment under the MHRA, Appellant must prove: (1) that she was a member of a protected group, (2) that she was subject to unwelcome harassment, (3) that the harassment was based on sex, and (4) that the harassment affected a term, condition, or privilege of her employment. *Cooper v. Albacore Holdings, Inc.*, 204 S.W.3d 238, 244 (Mo. App. 2006).

Contrary to Appellant's representations, mere evidence of some "improper conduct" and subjective offense does not preclude summary judgment. (Appellant's Substitute Brief, p. 18). Appellant must "clear a high threshold to demonstrate actionable harm, for 'complaints attacking the ordinary tribulations of the workplace, such as sporadic use of abusive language, gender related jokes, and occasional teasing' obtain no remedy." *Nitsche v. CEO of Osage Valley Elec. Coop.*, 446 F.3d 841, 845-46 (8th Cir.) (quoting *Faragher v. City of Boca Raton*, 524 U.S. 775, 788 (1998)). Laws like the MHRA and Title VII are not designed to "smooth the rough edges of our daily discourse" or to provide a cause of action for every slight. *Powell v. Yellow Book USA, Inc.* 445 F.3d 1074, 1077 (8th Cir. 2006) (citations omitted).

To be actionable, Appellant must demonstrate that "the unwelcome harassment was sufficiently severe or pervasive as to affect a term, condition or privilege of employment by creating an objectively hostile or abusive environment." *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 23 (1993); *Cooper*, 204 S.W.3d at 245 (citation omitted). *Faragher*, 524 U.S. at 787, n.1 (citation omitted) ("incidents of . . . harassment must be more than episodic; they must be sufficiently continuous and concerted to be deemed pervasive"). The environment must be objectively hostile to a reasonable person and subjectively hostile to the plaintiff. *Harris*, 510 U.S. at 21; *Cooper*, 204 S.W.3d at 244-45. "Allegations of a few isolated or sporadic incidents will not suffice; rather the plaintiff must demonstrate the alleged harassment was so intimidating, offensive, or hostile that it poisoned the work environment." *Nitsche*, 446 F.3d at 864 (internal quotations and citations omitted); *see also Scusa v. Nestle U.S.A. Co. Inc.*, 181 F.3d 958, 967 (8th Cir. 1999). Determining whether the environment is hostile or abusive depends on all of the circumstances, including "the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." *Harris*, 510 U.S. at 21-22. Furthermore, a plaintiff "may only rely on evidence relating to harassment of which she was aware during the time she was allegedly subject to a hostile work environment." *Cottrill v. MFA, Inc*., 443 F.3d 629, 636 (8th Cir. 2006).

1. Appellant Failed to Submit Evidence From Which a Reasonable Jury Could Conclude that the Harassment Was Sufficiently Severe or Pervasive to Affect her Employment

In the instant case, Appellant presents only a handful of incidents occurring over an almost six month period.[3] For example, Appellant, who is 5' 7" and weighs 113 pounds, contends that on one occasion, Hune asked her how much she weighed and told her he could probably "bench press" her. (L.F. 64:15-21; 78:1-22; 300-301.) Appellant also alleges Hune told her she could not work for him if she did not "act like a lady." (L.F. 79:14 – 81:2.) Neither of these innocuous comments is the type of behavior covered by the MHRA's prohibition against sexual harassment.

The conduct that can even be considered to be based on Appellant's sex is extremely limited. Appellant alleges that on various occasions over six months Hune (who was not her supervisor at the time) asked Tracy Stevens and her about the size, type, and style of undergarments they wore. (L.F. 67:11-18; 68:8-13, 21-24; 300-301.) Appellant claims that there were a total of ten comments over the six-month period.

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[3] Appellant's initial list of alleged acts of harassment provided in her interrogatory answers, was limited to four. At her subsequent deposition, Appellant added another alleged incident and then yet another in her response to Ford's motion for summary judgment. Even if all these acts are considered, no reasonable jury could conclude that the workplace was so permeated with improper behavior as to constitute sexual harassment.

Appellant also alleges that Hune made one comment to Tracy Stevens and her that she interpreted as concerning oral sex and that Hune made a comment to Tracy Stevens and her that he "wanted one on the top and one on the bottom." (L.F. 72:21 – 73:19; 173:4-23.) Only this last alleged incident occurred while Hune was supervising Appellant. (L.F. 173:4-23.)[4]

On appeal, Appellant added for the first time an argument that the incident involving Hune on September 5th, which led to Appellant being sent to labor relations, should also be considered an incident of harassment based on sex. Even if the Court were to consider this one additional incident as contributing to a hostile environment, there is no factual support for concluding that this incident was based on sex. *See, e.g.*, *Barekman v. City of Republic*, 232 S.W.3d 675, 680 (Mo. App. S.D. 2007) ("critical issue

[4] Appellant seeks to include two other alleged incidents, neither of which can be considered. Appellant contends that Hune said he would like to have Appellant and a co-worker (Phyllis Wright) one on bottom and one on top. (L.F. 300-301.) However, at her deposition, Appellant admitted that Wright told her that Hune had supposedly said this; it was not directed to her, and she did not hear it. (L.F. 72:21 – 73:19.) Appellant also contends that Hune stared at her and looked up and down at her body while she worked. (Appellant's Substitute Brief at p. 19.) This testimony is of a co-worker who claims she saw Hune stare at Appellant. (L.F. 364, ¶ 8.) There is no way this claimed conduct could have created a hostile environment for Appellant, as either she was personally unaware of it (as she never herself mentioned it as harassment) or she was not offended by it.

is whether members of one gender are exposed to disadvantageous terms or conditions of employment to which members of the other gender are not exposed.") Unlike *Carter v. Chrysler Corp.* 173 F.3d 693 (8th Cir. 1999), cited by Appellant, where the accused harasser constantly used sexual and racial epithets, no evidence exists that this confrontation, if it occurred, was because of Appellant's sex or any different than Hune might have treated a male hourly worker under the circumstances. Appellant can offer only her speculation that this encounter was because of her sex – something insufficient to create a genuine issue of material fact. *See Thompson*, 82 S.W.3d at 208.

Finally, there is no evidence that the environment was sufficiently severe or pervasive such that Appellant was unable to perform her job duties over the time she claims she was subjected to harassment. *See Scusa*, 181 F.3d at 967 (finding no hostile environment where the plaintiff was able to work full shifts and perform all of her job duties while allegedly being harassed). On the contrary, Appellant continued to visit Hune's area during and after the alleged harassment and, in fact, brought this lawsuit based, in part, on a claim that she was not allowed to work under his supervision. (L.F. 204:1-6.)

Numerous courts have affirmed summary judgment on far more egregious facts than Appellant presents here. *See Duncan v, General Motors Corp.*, 300 F.3d 928, 930-34 (8th Cir. 2002) (plaintiff failed to establish hostile work environment where the employee propositioned the plaintiff, touched plaintiff's hand, kept sexually explicit plants and toys in his office and asked the plaintiff to write an offensive memorandum); *Alagna v. Smithville R-II School Dist.*, 324 F.3d 975, 977-78, 980 (8th Cir. 2003)

(concluding that a co-worker's conduct was not actionable where it included calls to the plaintiff's home, frequent visits to her office, discussions about relationships with his wife and other women, touching the plaintiff's arm, saying he "loved" her and she was "very special," placing romance novels in her mailbox, and invading her personal space); *Ottman v. City of Independence, Mo.*, 341 F.3d 751, 760 (8th Cir. 2003) (concluding that the district court erred in finding a triable issue where the conduct consisted of belittling and sexist remarks on almost a daily basis); *Tuggle v. Mangan*, 348 F.3d 714, 717-18, 721 (8th Cir. 2003) (finding no hostile environment where a male co-worker not only made comments about plaintiff's appearance, possible pregnancy, and her secretarial and organizational skills, but also took a photo of her from behind and pasted it on a company bulletin board); *Meriwether v. Caraustar Packaging Co.*, 326 F.3d 990, 993 (8th Cir. 2003) (holding that a sexual harassment claim failed where a co-worker grabbed the plaintiff's buttocks and then confronted her about it the next day); *Caleshu v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 737 F. Supp. 1070 (E.D. Mo. 1990), *judgment aff'd*, 985 F.2d 564 (8th Cir. 1991) (dismissing a claim even though the plaintiff presented evidence that a sales manager kissed her, touched her, told off-color jokes, and invited her to dinner); *Shephard v. Comptroller of Pub. Accountants of State of Texas.*, 168 F.3d 871, 872, 874 (5th Cir. 1999) (holding that several incidents over a two-year period, including a comment that "your elbows are the same color as your nipples," another comment that plaintiff had big thighs, repeated touching, and attempts to look down her dress were insufficient). *See also Adusumilli v. City of Chicago*, 164 F.3d 353, 357, 361-62 (7th Cir. 1998) (evidence was insufficient to establish a hostile environment where the

employee made sexual jokes aimed at the plaintiff, told her people might think she was a prostitute, leered at her breasts, commented on her appearance, and touched her arms, fingers and buttocks); *Weiss v. Coca-Cola Bottling Co. of Chicago*, 990 F.2d 333, 337 (7th Cir. 1993) (holding there was no sexual harassment when the plaintiff's supervisor asked the plaintiff for dates, asked her about her personal life, called her a dumb blond, put his hand on her shoulder several times, placed "I love you" signs at her work station, and attempted to kiss her three times); *cf Cooper*, 204 S.W.3d at 241 (summary judgment not proper where the company CEO repeatedly touched the plaintiff's breasts, chest, thigh, torso and arm in front of a group of male managers). Accordingly, the conduct alleged by Appellant does not establish a hostile work environment as a matter of law.

2. Appellant Failed to Present Sufficient Evidence of Subjective Offense to the Alleged Conduct

Even if the alleged workplace was sufficiently objectively offensive, Appellant must also submit sufficient evidence from which a reasonable jury could conclude she was subjectively offended. As with every issue in this case, Appellant first insists that subjective offense is always a question of fact for the jury. This is not the case. Appellant must show that she "neither solicited it nor invited it and regarded the conduct as undesirable or offensive." *Scusa*, 181 F.3d at 966. The "proper inquiry is whether plaintiff indicated by her conduct that the alleged harassment was unwelcome." *Id*. (citing *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 63 (1986)). The undisputed facts here confirm that there was no subjective offense.

After supposedly suffering months of harassment, Appellant chose – out of all of the jobs in the Plant – to request a job directly under Hune's supervision. (L.F. 94:4-17.) This request was made despite her admission that there were other jobs available. (L.F. *Id.*; 94:9-25.) Appellant admits that she voluntarily returned to the area where the alleged harassment occurred "to visit her friends." Moreover, when asked specifically how she "rejected" Hune's advances, Appellant stated that she simply gave him a distasteful look. (L.F. 72:10-17; 300-301.) However, she also told him that "she did not dislike him," (L.F. 85:11-12.), and she does not claim that she ever told him to stop his behavior. (L.F. 171:25 – 172:9.) Appellant's actions are contrary to her testimony that she found his actions offensive, and she should not be able to create a genuine issue of material fact by ignoring her objective, contemporaneous conduct. *Cf.*, *Conolly v. Clark*, 457 F.3d 872 (8th Cir. 2006) (finding self-serving statements insufficient to create a genuine issue of material fact).

Appellant tries to bolster her claims of subjective offense by submitting testimony from Michael Gorski, a co-worker, who allegedly heard Appellant say on one occasion, "Don't call me baby." This statement is either inadmissible or wholly irrelevant. First, this is pure hearsay. Second, Appellant never contends that Hune called her "baby," much less that she found such a statement (if it did occur) offensive. In any event, Gorski does not claim that he heard the conversation leading up to this hearsay statement, and so the record is devoid of any evidence that Hune ever made a sex-based statement to Appellant using the term "baby." (L.F. 361-362 ¶ 4.)

Appellant makes reference to comments Hune allegedly made to other women in the workplace in support of her hostile environment claim. Again, the Court should not consider such evidence. There is nothing in the record to suggest that Appellant was even aware of, much less present for, these alleged incidents, and thus they cannot be a part of a hostile environment claim as to Appellant. *See Cottrill*, 443 F.3d at 636 (finding that a plaintiff may rely on a defendant's harassment of others only to the extent that she was aware of the harassment at the time the plaintiff was allegedly subjected to a hostile work environment); *Woodland v. Joseph T. Ryerson & Son, Inc.*, No. Civ. 00-1492DWFAJB, 2001 WL 848563, *5 (D. Minn. July 25, 2001), *judgment aff'd*, 302 F.3d 839 (8th Cir. 2002) (other incidents of harassment cannot be used to "boot-strap" the plaintiff's own claims; the plaintiff can "only bring an action for a hostile environment [s]he [herself] endured").[5]

Appellant also claims subjective offense is proven because she eventually reported the conduct. She conveniently ignores the fact that she failed to do so for five months and only did so after she was disciplined or called to a disciplinary hearing for violating Ford's workplace rules. *Williams v. Missouri Dept. of Mental Health*, 407 F.3d 972, 976 (8th Cir. 2005) (affirming summary judgment, in part, because employees failed to report

[5] In addition, the incidents related by Gorski, Stevenson and Wade are nothing more than rank hearsay on multiple levels and thus inadmissible under 74.04(e). *Cooper*, 204 S.W.3d at 246. *See Yow*, 859 S.W.2d at 922; *Fitzpatrick*, 746 S.W.2d at 654-55.

conduct for over four months). There is simply no evidence of subjective offense, and the circuit court properly granted summary judgment in favor of Ford.

3. No Actionable Employment Decision Was Made Because of Appellant's Alleged Rejection of Hune's Purported Advances

Appellant argues that summary judgment was inappropriate because Hune made submission to or rejection of his allegedly unwelcome sexual advances the basis for an "employment decision" affecting Appellant, citing 8 C.S.R. 60-3.040 (17)(A)(2). (Appellant's Substitute Brief at 17.) The employment "decision" is Hune's alleged one-day obstruction of Appellant from assuming the Cladding Job on September 5, 2002.

As an initial matter, Appellant failed to raise this theory to the trial court and, consequently, should not be allowed to rely on this alternative legal theory on appeal. *See Sheedy*, 180 S.W.3d at 70-71.[6] (L.F. 529-530.) Even if the Court determines Appellant can raise this argument for the first time on appeal, she still cannot avoid summary judgment. The language in the MHRA regulation relied on by Appellant is identical to that found in the regulations to Title VII. *Compare* 29 C.F.R. § 1604.11(a)(2). This language refers to what was known as a "*quid pro quo*" theory of sexual harassment.

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[6] To the trial court, Appellant argued that this purported obstruction was an act of retaliation. Appellant did give cursory mention to the "obstruction" issue in her discussion of an alleged hostile environment, but she did not discuss it in the context currently presented. (L.F. 529-531.)

Appellant's argument is based on the mistaken and unsupported impression that the term "employment decision" used in the regulation is somehow a lower standard than that applicable to the question of whether Appellant suffered a tangible job action, as discussed in response to Point II. However, as noted by the Supreme Court in *Ellerth v. Burlington Indus., Inc.*, 524 U.S. 742, 753-54 (1998), in the case of a *quid pro quo* claim, a plaintiff must prove that a "tangible employment action" resulted from a refusal to submit to a supervisor's sexual demands. 524 U.S. at 753-54. Moreover, regardless of whether labeled an "employment decision" or "tangible job action," there is no support in the record for the proposition that Hune took any adverse action against Appellant because she rejected alleged sexual advances.

IV. RESPONSE TO POINT II

The trial court properly granted summary judgment in Ford's favor because Ford was entitled to assert the MHRA affirmative defense to hostile work environment harassment and successfully established the two prongs of the defense by demonstrating both that it took reasonable steps to prevent and correct harassment and that Appellant failed to take advantage of its preventive or corrective measures for over five months.

A. Standard of Review.

The standard of review for Point II is the same as Point I and is incorporated by reference.

B. Ford was Entitled to Assert the MHRA Affirmative Defense to a Hostile Environment Claim Because Hune Never Subjected Appellant to an Adverse Tangible Employment Action.[7]

Under the MHRA and the instructive federal law, unless a plaintiff suffers a "tangible employment action" an employer is entitled to assert an affirmative defense and thereby avoid liability if it shows that: (1) it exercised reasonable care to prevent and promptly correct any harassing behavior, and (2) the employee unreasonably failed to take advantage of any preventive or corrective measures or to otherwise avoid harm.

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[7] Ford need rely on the affirmative defense only if this Court determines that Hune was, in fact, Appellant's supervisor. The MHRA limits "supervisors" to individuals with immediate or successively higher authority over the employee, or by one whom the employee reasonably believes can significantly influence employment decisions affecting her even if outside of the chain of command. 8 C.S.R. 60-3.040 (17)(D). There is no evidence in the record that Hune had the authority to make employment decisions such as hiring, firing, promoting, demoting, or disciplining Appellant. Indeed, the evidence reflects that Hune did not even have the authority to deny Appellant's assignment to the Cladding Job and that he had no power to discipline her. (L.F. 219:11-14; 224, ¶ 9; 253:7-12; 398, p. 11:1-10.) Accordingly, the Court may affirm the circuit court's decision on the ground that Hune was a co-worker and Appellant has not presented evidence that Ford knew or reasonably should have known about the harassment and failed to take reasonable steps to correct it.

Ellerth, 524 U.S. at 765, and *Faragher*, 524 U.S. at 775. *See* 8 C.S.R. 60-3.040 (17)(D)(1). "A tangible employment action is a significant change in employment status." 8 C.S.R. 60-3.040 (17)(D)(3) (emphasis added). "[I]t requires an official act of the enterprise; it usually is documented in the official company records; it may be subject to review by higher level supervisors; and it often requires formal approval of the enterprise and the use of its internal processes." *Id*. According to Missouri's regulations, a tangible employment action is an act that "inflicts direct economic harm" on the employee. 8 C.S.R. 60-3.040 (17)(D)(3) (emphasis added). Indeed, the Missouri regulations list as examples the following conduct: "hiring and firing, promotion and failure to promote; demotion; undesirable reassignment; a decision causing a significant change in benefits; compensation decisions and work assignments." 8 C.S.R. § 60-3.040(17)(D)(4).

Here, the action allegedly taken by Hune was his assertion that he did not want Appellant to assume the Cladding Job on a particular day. (Appellant's Substitute Brief, pgs. 23 – 24.) However, with respect to this job, it is uncontroverted that:

- The job did not pay more than any other job in the department. (L.F. 91:12; 92:3-9.)
- The job did not provide extra company benefits. (*Id*.)
- The job did not increase seniority. (*Id*.)
- The job was no different from any other assembly job in the department, in that they are all labor pool jobs involving the assembly of motor vehicles. (L.F. 92:14-22.)
- There were other jobs Appellant could perform. (L.F. 90:16-18.)

Thus, Appellant has unarguably admitted that she experienced no tangible employment action under the MHRA or the analogous federal authorities.[8] Moreover, there is nothing in the record to suggest that Hune's alleged conduct concerning the Cladding Job comprised an official act of Ford, was approved by higher management, or was documented in Ford's records. Because there is no adverse tangible employment action, Ford is entitled to the affirmative defense.

C. Ford Has Established Both Elements of the Affirmative Defense as a Matter of Law.

If this Court finds an issue of fact as to whether Appellant was subjected to an actionable hostile environment, summary judgment should still be affirmed as to Appellant's sexual harassment claims. Based on the record, Ford has established as a matter of law that it satisfied the two-prong affirmative defense set out in the Missouri regulations and in the Supreme Court decisions of *Ellerth*, 524 U.S. at 765, and *Faragher*, 524 U.S. at 775. *See* 8 C.S.R. 60-3.040 (17)(D)(1). To prevail on the affirmative defense, Ford is required to establish: (1) it exercised reasonable care to prevent and promptly correct any harassing behavior, and (2) Appellant unreasonably

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[8] Appellant also argues that her three-day suspension was a tangible job action. However, it is undisputed that it was Paul Edds, not Hune, who meted out the discipline (L.F. 225, ¶¶ 14-15). Appellants' argument – that being taken to Labor Relations by Hune was itself a tangible job action – is no more availing, as that act had no impact on her employment status.

failed to take advantage of any preventive or corrective measures or to otherwise avoid harm. *Id*.; *Cooper*, 204 S.W.3d at 242. Significantly, the legislative history for the Missouri regulation embodying the defense unequivocally states that it was meant to bring the statute in line with the United States Supreme Court decisions in *Faragher* and *Ellerth*. *Cf.* Orders of Rulemaking, Title 8, 8 C.S.R. 60-3.040 Employment Practices Related to Men and Women (May 15, 2001) (Appendix A18) and Proposed Amendment to 8 C.S.R. 60-3.040, Vol. 26, No. 3, *Missouri Register*, Feb. 1, 2001 (Appendix A19-20). Thus, federal cases interpreting and applying the *Faragher* defense are particularly relevant in assessing cases under the MHRA defense. *Cooper*, 204 S.W.3d at 242.

As Appellant does throughout her brief, she argues that the issue of whether a defendant satisfies the affirmative defense is automatically and always for the jury. (Appellant's Substitute Brief, p. 25.) However, the single case cited by Appellant, *Harris v. Neihaus*, 857 S.W.2d 222 (Mo. banc. 1993), is not a case brought under the MHRA, and in fact, *Neihaus* confirms that a court should not submit a case to the jury simply because reasonableness is an element of the claim. *Id*. at 227-28 (reversing the judgment of the trial court and remanding for entry of judgment in favor of the defendants). Moreover, this Court, in *Cooper*, and numerous other courts have concluded that the defense may be established as a matter of law despite the fact that it is couched in terms of reasonableness. *See, e.g.*, *Cooper*, 204 S.W.3d 238; *Williams*, 407 F.3d 972.

1. Ford Established as a Matter of Law That it Took Reasonable Steps to Prevent and Promptly Respond to the Complaint of Sexual Harassment.

a. Ford's Prevention of Sexual Harassment Was Reasonable as a Matter of Law.

Ford's efforts to prevent sexually harassing behavior far exceed that which this Court and numerous others have found sufficient as a matter of law. As the undisputed facts establish, Ford has a well-publicized Zero-Tolerance Anti-Harassment Policy. (L.F. 104:3-17; 105:15 – 106:1; 276-290.) Under the Policy, Plant employees have multiple reporting avenues, both inside and outside of the Plant. *Id*.; *Williams*, 407 F.3d at 977 (cited by this Court in *Cooper* and holding that where, as here, the employer's policy identified various employees to whom they could report harassment, the policy met the *Faragher* and *Ellerth* standards). In addition, as in *Williams*, Ford's Policy has "non-retaliation and zero tolerance provisions [that] also protect employees from adverse actions resulting from their complaint." *Id.* (L.F. 148:23 – 149:6; 284.) The Policy strictly prohibits retaliation against any employee who has brought forth harassment claims or otherwise assists or cooperates in an investigation. (L.F. 148:23 – 149:6; 284.) Moreover, Ford's anti-discrimination policy provides stiff penalties for those disciplined or suspended for engaging in conduct that violates the Policy. (L.F. 282.) Further, as in *Williams*, Ford's Policy assures employees that the investigation will be confidential, to the extent practical. (*Id*.; L.F. 108:7-12; 276-290.) Thus, Ford's Policy is even more

comprehensive than those found to be sufficient as a matter of law in *Cooper* and *Williams*.

To ensure employees were aware of and familiar with the Policy, Ford provided employees, including Appellant, with specific interactive training and explanatory materials, which not only identifies behavior that violates the Policy, but also outlines procedures regarding to whom sexual harassment should be reported, when the harassment must be reported, and the steps the employee should follow in reporting the harassment. (L.F. 105:15 – 106:1; 106:22 – 107:9; 108:3-5, 7-12; 109:7-17; 144:19-22; 147:20 – 148:22; 148:23 – 149:6; 276-290.)[9] Appellant not only signed an Acknowledgement of Receipt form, indicating that she had read and understood the Policy, but she also had used the Policy prior to the harassment alleged in this case. (L.F. 104:14 – 105:15; 250:14-25; 275.) Thus, like the plaintiffs in *Cooper* and *Williams*,

[9] In her Substitute Brief, Appellant argues for the first time that summary judgment was improper because there was "no evidence" that Ford employees, Hune, Woods, Edds or Wright knew of and/or received Ford's harassment policy and its obligations. (Appellant's Substitute Brief at 26). Even if Appellant could raise this argument for the first time on appeal it was uncontroverted before the circuit court that Ford shut down the plant so that "all employees could attend a seminar where male and female facilitators reviewed the contents of 'On the Road to Mutual Respect' with the employees." (L.F. 38 & 328.) (emphasis added.)

Appellant was inarguably aware of the Policy. *Cooper*, 204 S.W.3d at 242; *Williams*, 407 F.3d at 976-77.

Appellant argues that there is a dispute about the effectiveness of Ford's Policy because Pete Wade, another hourly employee, claims he made a comment to a Ford supervisor, Maurice Woods, about Hune's conduct at some unknown time. This argument fails for several reasons. First, Wade's affidavit on this point is either inadmissible, or if admissible, completely immaterial. Wade does not state that he conveyed to Woods a complaint of sexual harassment, much less a specific complaint by any female employee, or significantly, by Appellant. There is no evidence that Appellant was aware that Wade had had a conversation with Woods or that Wade had had this conversation on behalf of Appellant, much less that it influenced Appellant's behavior in any way.

A far more analogous case is *Williams* (relied on by the Appellate court in *Cooper*) in which the 8th Circuit rejected just such an argument. The *Williams* court found that an employer's policy was effective as a matter of law even though the Appellant claimed that another employee's complaint about the same supervisor had gone unheeded. *Williams*, 407 F.3d at 976 (granting summary judgment for the employer).

b. Ford's Response to the Complaint of Harassment Was Reasonable as a Matter of Law.

Under the second part of the first prong of the affirmative defense, Ford must show that it exercised reasonable care to respond to the sexual harassment, and it has

done so.[10] *Faragher*, 524 U.S. at 807. In determining whether an employer took prompt remedial action, the Court may look at the amount of time elapsed from notice to the remedial action, the options available to the employer to discipline or correct the behavior, and whether the employer's actions ended the harassment. *Carter* 173 F.3d at 702 (cited by Appellant). Here, it is undisputed that Ford satisfied the remedial action requirement.

Appellant admits she complained about the behavior for the first time in September 2002. Within, at most, three business days after Appellant finally complained to the Labor Relations Department, Hune was suspended and an extensive investigation, which led to Hune's termination, was undertaken. *Williams*, 407 F.3d at 977 (finding that the employer moved swiftly to investigate when an investigation was begun within three days of the employer hearing of the alleged harassment). It is undisputed that Appellant experienced no further harassment after her complaint.

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[10] Appellant also seeks to interject another argument never previously advanced when she suggests that the "pervasive nature of Hune's conduct is itself proof that Ford did not exercise reasonable care." (Appellant's Substitute Brief, p. 25.) In order to accept Appellant's proposition, the Court would have to accept that the alleged improper behavior of only one employee allegedly directed at up to three women in a plant with 2,600 hourly production workers constitutes pervasive conduct or evidence of the failure of Ford's policies. Not surprisingly, Appellant has provided no authority for such a proposition.

Ford's investigation and response were reasonable and effective as a matter of law. Ford's investigation exceeded the measures found to be reasonable in C*ooper* and *Williams*. Indeed, in *Cooper* there was no evidence that any action was taken against the alleged harasser, yet the *Cooper* court still affirmed summary judgment for the employer after noting that the defendant satisfied its obligation by "initiating an investigation" after receiving the report of harassment. 204 S.W.3d at 242. In *Williams*, the court affirmed the trial court's finding on summary judgment that the employer had satisfied the remedial measure requirement by initiating a prompt investigation and placing the offender on administrative leave pending the investigation. 407 F.3d at 975-76.

Specifically, Ford has presented uncontroverted evidence regarding the adequacy of the investigation. The chairwoman of the Plant's diversity/civil rights committee, a Union member, assisted Paul Edds in the investigation. (L.F. 226-227, ¶ 25.) Both investigators were specifically trained in investigating harassment claims. (*Id*.) The investigation into Hune's behavior involved interviews with at least 16 different employees, including Hune. (L.F. 227, ¶ 26.) Although Ford did not interview Appellant because she was on medical leave at the time of the investigation, the investigation included interviews with Appellant's co-workers whom Appellant identified as witnesses to the alleged harassment. (*Id.* at ¶¶ 26-27.) The investigation revealed that Appellant was not present at the time when Hune allegedly made a comment regarding oral sex, which Appellant claimed in her hotline call had been made to her and two other employees. (L.F. 227, ¶ 29.) None of the individuals interviewed corroborated the allegation made by Appellant that she had been the subject of unwelcome inappropriate

behavior by Hune. (L.F. 227, ¶ 28.) Notwithstanding the lack of corroborative evidence, Ford placed Hune on administrative leave during the investigation and ultimately terminated him. Appellant never worked with Hune again. (L.F. 227, ¶¶ 27 and 32.) Thus, Ford's Policy and actions produced a prompt, corrective response.

Despite Appellant's arguments to the contrary, an employer's response is not required to be tailored to Appellant's satisfaction or whims, just "reasonably likely to prevent the harassment from recurring." *Williams v. Waste Management of Illinois,* 361 F.3d 1021, 1030 (7th Cir. 2004). Nothing in *Faragher* and *Ellerth*, and consequently the defense adopted by Missouri, requires an employer to conduct an investigation that meets the personal expectations of the employee.

Appellant tries to claim that Ford did not investigate her complaint about Hune. On pages 27 & 28 of her Substitute Brief, Appellant avers that because Edds and Marteen did not understand her to have made a complaint of harassment on September 5th, Ford could not have investigated her claims or taken any action on that basis. This is a complete distortion of the record, in which it is undisputed that it was Appellant's hotline call that initiated the investigation. (L.F. 226-227, ¶¶ 24-25.)

Appellant also claims that because Lillian Stevenson, one of the 16 individuals who were interviewed, does not recall being asked specifically about Appellant when interviewed, the investigation must have been insufficient. Appellant cannot avoid the fact that the investigation was sufficient to lead to Hune's termination – the ultimate corrective action. Moreover, Stevenson admits she was asked to discuss Hune's

workplace conduct, which certainly would have included any conduct by Hune against Appellant.

Finally, Appellant cites three completely inapposite cases to support her argument that Ford's response was inadequate. In *Cadena v. Pacesetter Corp.*, 224 F.3d 1203 (10th Cir. 2000), the plaintiff complained of the alleged harasser's conduct to management months before an investigation was initiated. *Id*. at 1206-07. In response to her complaints, the managers told her that corporate officers were already aware of the alleged harasser's conduct but "would not address it because he made too much money for the company" and that "the business world was full of pricks like [harasser] and . . . to get used to it because that is the way the business world was." *Id*. at 1208-09. Finally, managers told the plaintiff that she should take the alleged harasser's conduct as a compliment and that if she dropped her complaints, she would get a raise, or she should just quit. *Id*. at 1203. When an investigation was eventually launched months after the plaintiff's repeated complaints, the person investigating admitted that she had not even been told who had complained or who the target of the complaint was and never spoke to the alleged harasser. *Id*.

Here, it is uncontroverted that Edds knew Appellant had complained, knew she had complained about Hune, interviewed Hune and 15 other people as part of the investigation, and specifically interviewed Tracy Stevens, whom Appellant indicated had witnessed Hune harassing her. (L.F. 227, ¶¶ 24-26.)

Appellant's citations of *Ogden v. Wax Works, Inc.*, 214 F.3d 999, 1007 (8th Cir. 2000), and *Smith v. First Union Nat'l Bank*, 202 F.3d 234 (4th Cir. 2000), are also

unavailing. Both cases are cited for the proposition that an investigation should not focus on issues other than the alleged harassment. There is no evidence in the record that the investigation here focused on anything other than the harassment. Moreover, in *Ogden*, the employee was forced to resign following her complaint, which certainly would have been a failure to correct the alleged harassment. *Ogden*, 214 F.3d at 1007. In *Smith*, the plaintiff put forth evidence that the investigation was conducted regarding the alleged harasser's management style, not on the alleged sexually harassing behavior. *Smith*, 202 F.3d at 245. Here, Edds testified that the investigation revealed that Appellant was not even present when the sexual comments she had reported were made. Moreover, in *Smith*, the plaintiff had been told that she should never complain to human resources if she ever wanted to go anywhere in the company. *Id*. There is no such evidence here.

Finally, even if the process by which the employer arrives at a remedy in the case of alleged harassment is flawed, the defense is still available where remedial results are adequate. *See Walton v. Johnson & Johnson Serv., Inc.*, 347 F.3d 1272, 1288 (11th Cir. 2003) ("where the substantive measures taken by the employer are sufficient to address the harassing behavior, complaints about the process under which those measures are adopted ring hollow"). Here, Ford suspended Hune following Appellant's complaint, and he was terminated before Appellant ever returned to work. Thus, Ford's conduct ended

the harassment, and any complaints about the process are irrelevant.[11] To conclude otherwise would require the Court to suspend both logic and reason.

2. The Circuit Court Correctly Concluded That Appellant Unreasonably Failed to Take Advantage of the Corrective Measures Available to Her.

Finally, in order to prevail on the affirmative defense, Ford must prove that Appellant unreasonably failed to use the preventative and corrective mechanisms it offered. Regarding this prong of the affirmative defense, the Supreme Court has opined:

> And while proof that an employee failed to fulfill the corresponding obligation of reasonable care to avoid harm is not limited to showing any unreasonable failure to use any complaint procedure provided by the employer, a demonstration of such failure will normally suffice

[11] Appellant claims that Ford should still be liable despite the fact that the harassment ceased after she complained, citing *Smith*. However, in *Smith*, the plaintiff had been criminally assaulted, and rather than being disciplined, the alleged harasser was promoted and continued to harass other females after the assault on the plaintiff – nothing even remotely approximating the facts here. *Id.* at 535. In *Williams* the remedial action was found appropriate where the alleged harasser resigned following the complaint, and thus the harassment there stopped "fortuitously," but the defense was still met. *Williams,* 407 F.3d at 975.

to satisfy the employer's burden under the second element of the defense.

Faragher, 524 U.S. at 807-08.

Here, Appellant admits she believes that Hune's alleged conduct was inappropriate at the first instance. (L.F. 64:10-14; 66:6-11.) *Williams*, 407 F.3d at 977. However, despite Ford's well-publicized Zero-Tolerance Policy and the training that Ford provided Appellant regarding the Policy, she did not report it to the proper authorities until nearly five months after the harassment began. Appellant's delay is particularly unreasonable given the multiple reporting avenues, the Policy's requirement of immediate reporting, and the fact that she had previously used the Policy.[12]

Not only did Appellant have an obligation to immediately report the offensive conduct under Ford's Policy, she also had a duty to promptly report under the preventive rules the Supreme Court built into *Faragher* and *Ellerth*, and consequently, the MHRA defense.[13] The purpose of the defense is to stop the harassment before it reaches the

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[12] Appellant claims that she was not required to report because Ford's Policy directs employees to stop the offending conduct. What the Policy actually tells employees is that, ***if they are comfortable in doing so***, they should tell the offending party to stop his or her conduct. But, in any event, the employee is also told to immediately report the conduct. (L.F. 286-287.)

[13] Appellant points to the inclusion of the phrase "course of conduct" in the Notes to MAI 31.24 to suggest a wholesale change in established law and the elimination of an

severe and pervasive stage that violates Title VII. *See Ellerth*, 524 U.S. at 764. In crafting the defense in *Ellerth*, the Supreme Court recognized that "to the extent limiting employer liability could encourage employees to report harassing conduct before it became severe and pervasive, it would serve Title VII's deterrent purpose." *Id*. Thus, Appellant's claims that she was not required to report when the conduct began because it was not yet severe and pervasive is wholly unpersuasive. *Id*.; *Williams*, 407 F.3d 972; *Walton*, 347 F.3d at 1290 (noting that if the employee had reported the conduct when it began, she could have avoided all other incidents). The defense gives employees a choice: assist in the prevention of harassment by promptly reporting it to the employer or lose the opportunity to successfully prosecute a discrimination claim based on harassment. *Id*. Here, Appellant chose the latter.

In *Cooper*, this Court held that even an eight-day delay in reporting the offensive conduct was too long. *Cooper*, 204 S.W.3d at 242. In *Williams*, upon which *Cooper* relied, a four-month delay was presumptively unreasonable. *Williams*, 407 F.3d at 976. Numerous other cases have found similar delays unreasonable as a matter of law. *See*, *e.g.*, *Walton*, 347 F.3d at 1289-91 (an employee's reporting delay of two-and-a-half

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employee's obligation to report harassment (Appellant's Substitute Brief at 30.) Nothing in the Note refers to the affirmative defense or in any way relieves an employee from the reporting requirement. Instead, the Note merely provides that the first paragraph of the MAI may be modified if the plaintiff alleges harassment rather than discrimination involving a discrete employment decision.

months after the first incidents of harassment was too long as a matter of law); *Baldwin v. Blue Cross/Blue Shield of Alabama*, 480 F.3d 1287, 1307 (11th Cir. 2007) (affirming summary judgment after finding that a three-month delay in reporting alleged harassment was neither "prompt, early or soon"). Thus, Appellant's failure to report the offensive conduct for five months is per se unreasonable, and summary judgment is appropriate.

An employee has a duty under *Ellerth* to alert the employer to any allegedly hostile environment, and an employee's subjective fears of humiliation, confrontation, unpleasantness, or retaliation do not alleviate the employee's duty. *Williams*, 407 F.3d at 977 (citations omitted). In light of the nature of the allegations against Hune and Ford's clear and unambiguous Policy, it was unreasonable for Appellant not to promptly report Hune's alleged conduct.

Appellant cites *Velazquez-Garcia v. Horizon*, 473 F.3d 11 (1st Cir. 2007) for the proposition that her conduct here was reasonable, because she attempted to "shun" Hune. Nothing in the *Horizon* case is applicable to this case and the court there specifically noted its holding was limited to the particular environment at issue in that case. *Id*. at 19. Moreover, this argument conveniently ignores the fact that Appellant was in proximity to Hune only because she placed herself there, that she sought a job under his supervision, and that she never once told him to stop his conduct. Although she claims in her brief that she told him "their relationship was professional only," what she previously testified saying was "I don't dislike you; I don't really know you." (L.F. 84:25 – 85:12.)

On appeal, Appellant argues for the first time that her conduct was reasonable because reporting the conduct would have been futile.[14] (Compare L.F. 536-537 with Appellant's Substitute Brief at 31-32.) This argument should not be considered by the Court for that reason. But even if this argument is considered, it is baseless.

After Appellant's complaint, an investigation was undertaken and Hune was fired. Appellant was never harassed again. One can hardly call this result "futile." In addition, Appellant argues that because another purported report of harassment (unrelated to her) allegedly went unheeded by Superintendent Maurice Woods, she was herself absolved from reporting Hune's behavior. However, Appellant does not contend that she knew about the Wade "complaint," and therefore cannot claim that it influenced her behavior. She also claims that complaining would have been futile because Edds and Wright asserted that she did not raise any issues of harassment during the September 5, 2002 hearing. Even assuming, *arguendo*, that she complained on September 5th, the claimed

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[14] As with every argument made by Ford, Appellant alleges that the issue of reasonableness is one for the jury. However, the case she cites in support, *Greene v. Dalton*, 164 F.3d 671 (D.C. Cir. 1999), could not be more inapposite. In *Greene*, the alleged harassing conduct occurred over only a period of ***ten days*** and culminated in the rape of the plaintiff. *Id.* at 673. In any event, even if the Court were to accept Appellant's tortured reading of *Greene*, this decision is wholly inconsistent with Missouri decisions and those of Missouri federal courts applying the MHRA. *Williams*, 407 F.3d at 977; *Cooper*, 204 S.W.3d at 245.

response of Edds and Wright at that time neither excuses nor explains her failure to report for the preceding five months. Appellant simply cannot point to anything in the record that would have led her to conclude that the complaint process was anything but effective. Thus, summary judgment on Appellant's harassment claims was proper, and the circuit court's opinion should be affirmed.

V. RESPONSE TO POINT III

Whether the proper analysis is under the *McDonnell Douglas* burden-shifting framework or under the standard for analyzing claims adopted in *Daugherty v. City of Maryland Heights*, 231 S.W.3d 814 (Mo. banc 2007), the circuit court properly entered summary judgment on Appellant's retaliation claims because she has failed to adduce evidence that she engaged in protective activity which was causally connected to any adverse action.

A. Standard of Review.

The standard of review for Point III is the same as Point I and is incorporated by reference.

B. Elements of Retaliation Claim under the MHRA

The required elements of a retaliation claim are well established. Under the MHRA, it is unlawful to retaliate against any other person because such person has opposed discrimination or because such person has filed a complaint or assisted in a complaint involving discrimination. Mo. Rev. Stat. § 231.070(2). To establish retaliation under the MHRA, a plaintiff must prove that: (1) she complained of discrimination; (2) the employer took adverse action against her; and (3) a causal relationship existed

between the complaint of discrimination and the adverse employment action. *Cooper v. Albacore Holdings, Inc.*, 204 S.W.3d 238, 245 (Mo. App. 2006).

Despite the established standard, Appellant states that the only "elements of a retaliation claim under the MHRA are that she engaged in protected activity and as a direct result she suffered damages due to an act of reprisal." (Appellant's Substitute Brief at 33). Citing *Keeney v. Hereford Concrete Products, Inc.*, 911 S.W.2d 622, 626 (Mo. banc 1995), Appellant mistakenly argues that a plaintiff need not show an adverse job action to establish retaliation and that "any" apparent wrong can suffice.[15]

In an effort to further dilute the requirements, Appellant also contends that simple claims of emotional distress are sufficient damages to state a retaliation claim. Appellant's position, however, is unsupported by any Missouri or federal law discussing retaliation. Instead, Appellant cites as support *State ex rel. Dean v. Cunningham*, 182 S.W.3d 561 (Mo. banc 2006), holding that defendant could not obtain medical records in discovery when the plaintiff limited her claim to "garden variety" emotional distress without medically documentable injury. If this Court took the unprecedented step of accepting Appellant's watered-down standard for retaliation, then virtually any work place slight or cross look would be actionable.

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[15] *Keeney* addressed whether a former employee was included within the definition of "employee" under the MHRA retaliation provisions, an issue not present in this case. Obviously, in the case of a former employee, it might not be possible to establish an adverse job action because the employee is no longer employed.

As with the federal courts, which are a recognized guide for the MHRA, discrimination and retaliation laws are not intended to operate as workplace civility codes. *Higgins v. Gonzales*, 481 F.3d 578, 589 (8th Cir. 2007) ("Title VII . . . does not set forth a general civility code for the American workplace." (citation and internal quotations omitted)). "As such, certain behavior continues to be non-actionable under the retaliation provision such as 'petty slights or minor annoyances that often take place at work and that all employees experience,' 'personality conflicts at work that generate antipathy,' and 'snubbing by supervisors and co-workers.'" *Id.* at 589-90 (quoting *Burlington Northern & Santa Fe Ry. v. White*, 126 S. Ct. 2405, 2415 (2006)). Unlike Appellant's proposed standards, the traditional elements of a retaliation claim recognize this important distinction between those things actionable under civil rights laws such as Title VII and the MHRA and simple boorish workplace behavior.

C. Summary Judgment Standard Applicable to Retaliation Claims

In Point Number 3, Appellant contends that application of *McDonnell Douglas* is no longer proper and asks the Court to apply the same analysis to retaliation claims as that recently applied to discrimination claims by this Court in *Daugherty*. Under either analysis, however, Appellant's retaliation claims fail.

Under the *McDonnell Douglas* framework, once a plaintiff establishes a *prima facie* case, the defendant may then rebut the plaintiff's *prima facie* case by advancing a legitimate, non-retaliatory reason for the adverse action. *See, e.g.*, *Medley v. Valentine Radford Communications, Inc.*, 173 S.W.3d 315, 320 (Mo. App. 2005). If the defendant

makes this showing, the plaintiff must demonstrate that defendant's proffered reason was a pretext for illegal retaliation. *Id*.

This Court explicitly adopted this framework for MHRA cases. In *Midstate Oil Co., Inc. v. Missouri Comm'n on Human Rights*, 679 S.W.2d 842, 846 (Mo. 1984), this Court *en banc* held that claims brought under Mo. Rev. Stat. § 296.020, the precursor to Mo. Rev. Stat. § 213.055, must be analyzed under the *McDonnell Douglas* framework. The court noted that a substantial number of states use the standard when evaluating cases brought under state anti-discrimination laws. The court called the *McDonnell Douglas* framework "a sensible, orderly way to evaluate the evidence in light of common experience as it bears on the critical question of discrimination." *Id*. (internal citation omitted).

Despite these statements in *Midstate*, this Court recently rejected use of the *McDonnell Douglas* analysis in the context of discrimination claims. Although Appellant urges this Court to apply *Daugherty* to her retaliation claim, *Daugherty* did not involve a retaliation claim under Mo. Rev. Stat. § 213.070, such as that asserted here.

Specifically, in *Daugherty* this Court concluded that the "contributing factor" standard set forth in MAI 31.24 for discrimination claims under the MHRA should be applied to summary judgment analysis. *Daugherty*, 231 S.W.3d at 820. In particular, *Daugherty* provided that "this Court's review of summary judgment in the context of MHRA employment discrimination claims must determine whether the record shows two plausible, but contradictory, accounts of essential facts and the 'genuine issue' in the case is real, not merely argumentative, imaginary, or frivolous." *Id.* at 820. Thus, *Daugherty*

specifically limits its holding to "MHRA employment discrimination claims" and makes no mention of retaliation claims in the opinion.

Furthermore, MAI 31.24, the instruction upon which *Daugherty* rested its analysis, does not cover retaliation cases. It is also limited to discrimination claims brought under § 213.055. *See* MAI 31.24. No similar jury instruction has been approved by this Court for retaliation claims brought under § 213.070. Thus, this Court's conclusion in *Daugherty* that the analysis at summary judgment should parallel MAI 31.24 has no application here, absent an extension of the law by this Court.

Finally, the *McDonnell Douglas* burden-shifting analysis should not be abandoned because, contrary to Appellant's arguments, it adds particular value in properly analyzing retaliation claims. Appellant intimates that an employee who complains about discrimination or harassment and is thereafter subject to any adverse action, regardless of the reason, is entitled to a trial. This is not and should not be the law. The *McDonnell-Douglas* burden-shifting analysis provides a means of fairly and adequately testing the claim of retaliation at the summary stage to avoid going to the expense of trial on meritless claims. Thus, the employer is entitled to summary judgment if the employer presents evidence that it would have taken the same action absent a retaliatory motive.

Here, however, which standard applies does not change the result. Even if this Court extends *Daugherty* to retaliation claims, Respondents were entitled to summary judgment on Appellant's retaliation claim. Even under *Daugherty*, a plaintiff must prove that a protected activity contributed to the act of reprisal. *Daugherty*, 231 S.W.3d at 819.

Both *Daugherty* and the MHRA require that the protected activity make a difference in the decision. First, the specific language of the MHRA provides for liability only when the person retaliates "because" such person has opposed discrimination or has filed a complaint of discrimination. *Id.* ("Missouri employment discrimination law . . . should more closely reflect the plain language of the MHRA . . . ."). "Because" means "for the reason that; since." The American Heritage Dictionary 166 (Houghton Mifflin Co. 2nd College ed. 1985). Second, "contribute" means "to act as a determining factor." *Id.* at 318. Similarly, Merriam-Webster defines "contribute" as "to play a significant part in bringing about an end or result." Merriam-Webster Online Dictionary <http:www.merriam-webster.com/dictionary/contribute> (accessed March 28, 2008). At bottom, these definitions support the conclusion that the "contributing factor" standard requires that the protected activity make a difference in the ultimate decision or act of reprisal.

This is particularly true in evaluating retaliation claims. The very meaning of "retaliate" is to "inflict in return." *Keeney*, 911 S.W.3d at 625. And as this Court stated, "[retaliation] merely requires the commission or omission of an act as a quid pro quo for the filing of a complaint before the Commission." *Id.* In short, one cannot retaliate by definition unless the act is done because of the prior act.

As discussed below, Appellant's retaliation claim must fail because she has not adduced evidence to create a genuine issue of material fact that she suffered any damages resulting from an act of reprisal because she undertook a protected activity.

D. Appellant Cannot Establish the Elements of Retaliation Required to Survive Summary Judgment.

Appellant cannot survive summary judgment on her retaliation claim because she has not established a genuine issue of material fact that the alleged "acts of reprisal" are causally linked to her alleged "protected activity." In her brief, Appellant essentially identifies three "acts of reprisal": (1) Hune's alleged obstruction of Appellant from the Cladding Job; (2) Edds' request that she undergo a psychological evaluation which was later withdrawn; and (3) her three-day suspension from her job for violating a work-place rule. Respondent addresses each of these job actions in turn below.

1. Obstruction from the Cladding Job

Appellant's allegation that Hune kept her from working at the Cladding Job because she "rebuffed" his advances cannot support her retaliation claim for three reasons. First, her claim that she "rebuffed" Hune's advances is contrary to the record. As previously stated, Appellant never told Hune to cease his conduct, and the MHRA requires the employee to "oppose" any alleged prohibited conduct. Mo. Rev. Stat. § 213.070. This alone is sufficient to distinguish the *Ogden* case cited by Appellant, where the employee explicitly and repeatedly told the alleged harasser to leave her alone and "not to touch her." *Ogden*, 214 F.3d at 1003. Appellant did nothing of the sort here. Thus, she has failed to present evidence that she engaged in protected activity.

Second, Hune's desire not to place Appellant on the Cladding Job does not amount to an adverse action, as required by the MHRA and analogous federal authorities. Appellant cites no Missouri case law to support her argument that Hune's conduct

amounts to an adverse action, other than *Keeney*, which as already noted, did not eliminate the requirement of an adverse action. The only other case Appellant cites is *Burlington Northern & Santa Fe Railway Co. v. White*, 126 S. Ct. 2405, 2409 (2006). However, there the Supreme Court explained that in establishing an adverse action, the complained-of conduct must still be materially adverse, noting, "We speak of material adversity because we believe it is important to separate significant from trivial harms." *Id*. at 2415. The challenged action must be one that "might well dissuade a reasonable worker from making or supporting a charge of discrimination." *Id*. at 2415 (internal citations omitted). Here, Ford routinely invoked its right under the Contract to assign employees to jobs, as it desires. (L.F. 50:12 – 51:1; 224, ¶ 5). For Appellant to argue that an employer, such as Ford, engages in actions that dissuade an employee from reporting discrimination because Ford did what it routinely can and does do under the Contract, is, at best, nonsensical.

In *Burlington Northern*, the court found the standard "adverse action" was met where the employee was transferred to another position that was "by all accounts more arduous and dirtier." *Id*. at 2417. Here, Appellant admits that her claimed job obstruction resulted in no difference in pay, benefits, or seniority. More importantly, there is no contention that the job Appellant received instead of the Cladding Job was different or more arduous than any other assembler job in the Plant that she could perform. (L.F. 90:16-18; 94:9-25.) Without such evidence, Appellant cannot prevail on summary judgment. *See Higgins v. Gonzales*, 481 F.3d 578 (8th Cir. 2007) (finding that a claimed transfer did not satisfy the *Burlington Northern* standard where the employee

failed to allege that the new position to which she was transferred was qualitatively more difficult).

Moreover, even if she had worked the Cladding Job on September 5, 2002, she could have been re-assigned at any time under the terms of the Contract, and as such, Ford's actions, consistent with the Contract, and as discussed above, would have had no "chilling effect." Further, the alleged actions of Hune did not, in fact, dissuade Appellant from reporting harassment. Indeed, according to her, it inspired her to report the alleged harassment and to file a charge of discrimination. *See, e.g., Sykes v. Pennsylvania State Police*, 2007 WL 141064 (W.D. Pa., Jan. 17, 2007) (finding no adverse action where the plaintiff continued to stridently complain about the alleged harassment following the claimed retaliatory act.) As such, there is no adverse action associated with Hune's decision.

Third and finally, Appellant failed to adduce evidence that Hune's refusal to allow Appellant to assume the Cladding Job was causally connected to her "rebuffing" Hune's advances. Respondent has provided a legitimate, non-discriminatory reason for not assigning Appellant to the Cladding Job. The uncontroverted evidence is that there was already someone medically assigned to that position, and as such, that individual would not have been bumped from that job just to accommodate Appellant's desire to work in that position. (L.F. 317-318, ¶¶ 3-5; 319, ¶ 5.) This is especially true where, as here, Appellant admits that there were other jobs she could perform at that time. There is no evidence, other than Appellant's speculation, that the confrontation was because of

Appellant's rejection of Hune's alleged advances. Therefore, Respondent is entitled to summary judgment.

2. Psychological Evaluation

Appellant's allegation that Edds' request that she undergo a psychological evaluation, which he later withdrew because Appellant was already undergoing psychological treatment, also fails to support her retaliation claim.

As to Edds, Appellant has identified three instances of protected activity. First, she now claims that she reported Hune's alleged harassment to Ford during the September 5, 2002, disciplinary hearing. No one else in attendance at the hearing understood anything Appellant said at the meeting to be a complaint of harassment. (L.F. 214:11 – 215:7; 216:7-18; 226, ¶ 16; 314, ¶ 4; 315, ¶ 9; 322, ¶¶ 3-4.) Second, it is undisputed that she called Ford's 1-800 hotline on September 10, 2002, more than five months after the behavior commenced. (L.F. 83:9-13.) Third, Appellant alleges that the issuance by the EEOC of a notice of right to sue on a prior unrelated charge of discrimination is protected activity.

Only the alleged complaint at the September 5 hearing can constitute protective activity as to the request for a psychological evaluation. First, the issuance of the right to sue letter – an action in which the employee takes no part – is not protected activity by the employee. *See, e.g., Clark County School District v. Breeden*, 532 U.S. 268, 273 (2001) (Supreme Court found the argument that the mere "issuance" of the right to sue letter as protected activity was "utterly implausible"). Furthermore, in *Breeden*, the Court found that plaintiff's claim that the earlier charge of discrimination, which

occurred years earlier, was protected activity was too remote in time to support a causal connection. *Id.* Here, Appellant's charge on the unrelated matter was filed a year and two months before the alleged retaliation. (L.F. 354). This time period is far too long to raise an inference of retaliation. *See Kiel v. Select Artificials, Inc.*, 169 F.3d 1131, 1136 (8th Cir. 1999). Second, the call to the hotline occurred *after* the request. Accordingly, at most, Appellant's only plausible protected activity is her alleged complaint in the September 5, 2002 hearing.

Appellant has not, however, adduced any evidence that these complaints were causally connected to the request for psychological counseling or that the request was sufficiently adverse. Instead, the uncontroverted evidence is that Union officials specifically suggested that Edds refer Appellant to counseling. (L.F. 225, ¶ 10.)

In addition, the request that Appellant seek psychological counseling was not sufficiently adverse to constitute an "act of reprisal." Although Appellant now casts Edds' request as an act of retaliation, her response at the time was quite different. In fact, Appellant testified that she thanked Mr. Edds for his concern and indicated that she would take advantage of the offer. (L.F. 389, p. 166:11- 167:6.)

Even if Appellant is now allowed to call what she previously welcomed as a "threat," her claim still fails. It is axiomatic that unfulfilled threats do not constitute adverse action, and there is nothing to suggest that the *Burlington Northern* opinion would lead to a different conclusion. *See Higgins*, 481 F.3d at 587 (concluding that a recommendation that an employee be terminated which was not followed was not an adverse action); *Hottenroth v. Village of Slinger*, 388 F.3d 1015, 1030 (7th Cir. 2004);

Ajayi v. Aramark Business Services, Inc., 336 F.3d 520, 531 (7th Cir. 2003) (an "unfulfilled threat, which results in no material harm, is not materially adverse"). Indeed, cases decided after *Burlington Northern* have continued to find adverse action lacking where there is no attendant change in pay and benefits. *Higgins*, 481 F.3d at 583-587. Thus, Edds' withdrawn request that she undergo treatment is insufficient to support a claim of retaliation.

Further, Appellant's testimony establishes that she did not consider Edds' request to be materially adverse. Under *Burlington* and the analogous requirements under the MHRA, the Court should consider whether a "reasonable employee would have found the challenged retaliatory action materially adverse." *Burlington*, 126 S.Ct. at 2415. Appellant admitted that her reaction to Edds' request was to thank him. (L.F. 389, p. 166:11-167:6.) Appellant does not provide sufficient evidence that she viewed it as a threat. It is only on appeal that Appellant seeks to re-write the request as a materially adverse action in order to survive summary judgment.

Even if Appellant could establish that the request was materially adverse, her claim that her complaints about Hune's conduct were cut off by Edds' suggestion that she obtain treatment is insufficient to show a causal connection. *Kiel v. Select Artificials, Inc*, 169 F.3d 1131, 1136 (8th Cir. 1999) (more than temporal connection between protected conduct and the adverse action is required to create genuine factual issue on retaliation); *Feltmann v. Sieben*, 108 F.3d 970, 975 (8th Cir. 1997) (mere temporal proximity of firing to complaint insufficient); *Caudill v. Farmland Indus., Inc.*, 919 F.2d 83, 86-87 (8th Cir. 1990) (close proximity between plaintiff's filing of charges and plaintiff's discharge was a

mere "slender reed of evidence"; any conclusion of temporal proximity would be "rank speculation"). Instead, the uncontroverted evidence establishes that Edds made the request that Appellant obtain the psychological evaluation as a result of the Union request and her behavior and that Appellant welcomed the suggestion. Thus, the withdrawn request for a psychological evaluation does not support a claim of retaliation.

3. Suspension

Appellant's final claimed act of reprisal consists of her three-day suspension for violating workplace rules. The suspension does not support her claim of retaliation because there is no evidence of a causal connection between protected activity and the suspension.

Appellant failed to establish that she engaged in protected activity that resulted in Edds' decision to suspend her. Again, as to this alleged instance of retaliation, Appellant alleges three instances of protected activity: (1) her alleged complaint at the September 5, 2002 disciplinary hearing; (2) her call to the Ford hotline on September 10, 2002; and (3) the issuance of a right to sue letter on an unrelated charge filed more than a year earlier. As discussed above, the issuance of the right-to-sue letter and earlier charge on an unrelated matter does not support her claim. *Breeden*, 532 U.S. at 273. Thus, her only plausible acts of protected activity include her alleged complaint at the September 5, 2002 hearing and her September 10, 2002 call to the Ford hotline. In any event, Appellant has failed to create a genuine issue that any of these alleged protected activities is causally connected to the suspension.

A genuine issue prevents summary judgment only where the record shows two plausible accounts of the essential facts, not when the "genuine issue" is merely argumentative, imaginary, or frivolous. Appellant's account is not plausible.

First, the law is clear that protected activity does not insulate an employee for violating the employer's rules. Appellant admitted that she removed her safety glasses.[16] (L.F. 157:17-20.) She further admitted that she knew the Plant Safety Regulations instructed her to wear them at all times. (L.F. 96:10-13; 151:9-18.) Both Edds' testimony and that of the Union representative who was in attendance at the disciplinary hearing confirm that it was Appellant's failure to wear safety glasses that led to her discipline. (L.F. 225, ¶ 14; 315, ¶¶ 5-8.) *Kiel*, 169 F.3d at 1136 (engaging in protected activity does not insulate an employee from discipline for violating an employer's rules); *Griffith v. City of Des Moines*, 387 F.3d 733, 738 (8th Cir. 2004), 387 F.3d at 738 ("complaining of discrimination in response to a charge of workplace misconduct is an abuse of the retaliation remedy").

Indeed, the Union, which represented Appellant's interests, "confirms" that the discipline here was appropriate. (L.F. 314-315.) Appellant presented no evidence that

[16] Appellant's attempts to cast her removal of her glasses as a defense to an assault are, as already stated, completely unsupported, and in any event, she admitted that she is required to wear her glasses at all times. It is also curious that one who claims she was in imminent danger of being struck would remove her protective eyewear.

the suspension for not wearing her safety glasses was more severe than that given to others for the same offense.

Second, it is also not plausible that Edds suspended Appellant as a result of her complaints about Hune because the uncontroverted evidence establishes that he promptly investigated her complaint and that Hune was ultimately fired. (L.F. 226-227, ¶¶ 24-25.) Appellant never worked with Hune again. (L.F. 227, ¶¶ 27 and 32.) It is simply implausible that Edds meted out a suspension to retaliate against Appellant, yet he credited her complaint and investigated the alleged harassment.

At the end of the day, Appellant has proffered no evidence of a causal connection other than her speculation. This is not enough to overcome summary judgment. *See Thompson*, 82 S.W.3d at 208 (plaintiff's speculation that the protected activity must have played a role is not enough); *Kiel*, 169 F.3d at 1136 (more than a coincidence of timing is needed to establish a causal connection).

"The core question in a [MHRA] retaliation case does not, ultimately, concern the veracity of the facts underlying an employer's legitimate non-discriminatory reason for [its actions], but rather concerns whether the employment decision was based upon intentional discrimination." *Stuart v. General Motors Corp.*, 217 F.3d 621, 637 (8th Cir. 2000); *Kincaid v. City of Omaha*, 378 F.3d 799 (8th Cir. 2004) (noting that courts do not sit as "super-personnel departments," reviewing the wisdom and fairness of business judgments). There is no evidence that Appellant was treated differently than any other employee would have been treated under the circumstances or that her protected activity in any way played a role in the actions taken with respect to her employment. Once

again, without such evidence of a causal connection, Appellant's claims fail. *See Stuart*, 217 F.3d at 636-37.

VI. RESPONSE TO POINT IV

The trial court correctly granted summary judgment in favor of individual defendant Paul Edds because Appellant failed to exhaust her administrative remedies with respect to Edds, among other things, by failing to name him in her Charge or to receive a right-to-sue letter naming him as a respondent.

A. Standard of Review.

The standard of review for Point IV is the same as Point I and is incorporated by reference.

B. Appellant Failed to Satisfy the Necessary Prerequisites Before Filing Suit Against Edds

Appellant argues that the circuit court was incorrect in dismissing the claims against Edds because he may be held individually liable for his alleged acts of retaliation. Assuming for purposes of this appeal that individuals are subject to individual liability under the MHRA, Appellant still cannot overcome the threshold issue that she failed to exhaust her administrative remedies as to Edds.

Edds filed a separate motion for summary judgment in the circuit court. (L.F. 17-19.) Appellant never responded to that motion or the uncontroverted facts presented therein. Because Appellant failed to respond to his motion and because she further failed to specifically raise the "identity of interest" argument in the circuit court despite the fact that Edds submitted facts to the court that showed such a theory inapplicable here, she

cannot now raise this argument on appeal. *Cf. Reese v. Ryan's Family Steakhouse, Inc.*, 19 S.W.3d 749 (Mo. App. 2000) (a party's failure to respond to allegations regarding failure of causation required judgment in favor of the moving defendant).

Even if the Court considers Appellant's arguments, she has failed to satisfy the necessary prerequisites before filing suit against Edds. Indeed, it is undisputed that Appellant never filed any administrative claim whatsoever naming Edds before commencing the present action, and she never received a right-to-sue notice naming Edds. (L.F. 228, ¶¶ 34-40; 295; 636.) Both are required before an employee can bring suit against a respondent. Mo. Rev. Stat. § 213.075(1) (requiring that a charge of discrimination "state the name and address of the person alleged to have committed the unlawful discriminatory practice"); Mo. Rev. Stat. § 213.111 (stating that a notice of right to sue can only be requested and issued for the party named as a respondent in the charge of discrimination). *See, e.g.*, *Whitmore v. O'Connor Management, Inc.*, 156 F.3d 796, 800 (8th Cir. 1998); *Igoe v. Dept. of Labor and Indus. Rel.*, 2004 WL 376872 (Mo. Ct. App. Mar. 2, 2004) *transf. to Mo. S. Ct. and rev'd on other grounds by* 152 S.W.3d 284 (2005); *Waldermeyer v. ITT Consumer Financial Corp.*, 782 F. Supp. 86, 88 (E.D. Mo. 1991).

Appellant's Charge names "Ford Motor Company" as the respondent. Neither party disputes the fact that nowhere in her Charge or the Notice of Right to Sue is Paul Edds referred to by name. This is fatal to Appellant's claims against Edds. *Waldermeyer*, 782 F. Supp. at 88 (granting summary judgment for an individual defendant who was not named as a respondent in the charge).

Appellant argues that the Court should allow her to proceed against Edds because she referred to her suspension and the psychological referral in the body of her Charge. She claims that this provides actual notice of her intent to name him personally in the Charge and pursue litigation against him. Factually and legally, this argument fails. First, assuming that Edds even saw the Charge, Appellant fails to explain how Edds was supposed to conclude that this vague reference expressed her intent to pursue claims against him individually. Edds could have just as easily assumed that she had consciously chosen not to name him in her Charge and did not intend to personally pursue him in this litigation. Indeed, *Waldermeyer* found that an individual should be dismissed even where, unlike here, he was named in the body of the charge. *Id*.

Appellant then urges the Court to adopt an "identity of interest" test. She admits that no Missouri court has applied this test in this context and cites only two wholly inapplicable cases to support her argument: *Sedlacek v. Hach*, 752 F.2d 333 (8th Cir. 1985), and *Knowlton v. Teltrust Phones, Inc.*, 189 F.3d 1177 (10th Cir. 1999). In *Sedlacek* and *Knowlton*, the issue was not whether a human resources professional or other corporate employee must be named in a charge, but whether a parent, subsidiary or related corporation must be named, or if naming one or the other is sufficient to confer jurisdiction over both. Importantly, the *Sedlacek* court correctly stated the purpose of such a test: i.e., that an aggrieved complainant "should not be charged with the knowledge of the oftttimes intricate legal corporate relationships between closely held operating units." *Sedlacek*, 752 F.2d at 336 (emphasis added). No such intricate corporate relationship exists here.

In contrast, in cases involving individual defendants, especially where, as here, the individual was known to Appellant at the time the Charge was filed, identity of interest does not exist. *Waldermeyer*, 782 F. Supp. at 88. *See also McClaskey v. La Plata R-II School Dist.*, 2006 WL 1994903 (E.D. Mo., July 14, 2006). *Cf. Hoover v. Stauffer Communications*, Inc., 1989 WL 84511 *7 (D. Kan., July 24, 1989) (applying the multi-factor test set out in *Knowlton* and finding no identity of interest existed between supervisor and employer; also concluding that dismissal was appropriate even where no conciliation was undertaken by the agency because the failure to name the individual still deprived him of the opportunity to resolve the claims at the agency level); *Garcia v. Gardner's Nurseries, Inc.*, 585 F. Supp. 369, 372 (D. Conn. 1984) (dismissing an individual supervisor where his identity was known at the time the charge was filed); *Ajaz v. Continental Airlines*, 156 F.R.D. 145, 147 (S.D. Texas 1994).

The *Sedlacek* court also found that it was the EEOC who was responsible for completing the charge and that the employee should not be penalized for the agency's failure to recognize that the omitted respondent should have been named. *Sedlacek*, 752 F.2d at 335. Here, there is nothing in the record that would suggest that the MHRA was responsible for filling out Appellant's Charge. Thus, *Sedlacek* is further inapposite.

Here, Edds testified that he had no awareness or understanding that Appellant intended to name him in her Charge, as she now apparently claims. (L.F. 228, ¶ 34.) He provided no response to the MCHR setting forth a defense to the allegations. (L.F. 228, ¶ 37.) Edds did not participate in, or have the opportunity to participate in, the MHRA

conciliation process and did not receive a notice of right to sue indicating that he was a proper party to an action by Appellant. (L.F. 228, ¶ 38.) *Hoover*, 1989 WL 84511 at *7.

What Appellant is really advocating is that an employee should be allowed to file a charge against a corporation and then, in litigation, name as many individuals who work for the corporation as he or she sees fit. This is contrary to the MHRA's requirements for notice and would deprive individuals of the opportunity to separately respond and conciliate with charging parties. To find Edds a proper defendant and to excuse Appellant's failure to comply with the statutory prerequisites to a lawsuit under these circumstances would utterly defeat the stated purpose of the exhaustion provisions, and the "exception" urged by Appellant would quickly and completely swallow the rule. *Waldermeyer*, 782 F. Supp. at 88.

Finally, even if the Court determines that Edds was properly before the district court, as set forth *infra* in Part V, the substantive retaliation claims against him fail as a matter of law, and the circuit court's determination should be affirmed.

VII. CONCLUSION

For the reasons set forth above, Ford and Edds respectfully request that this Court affirm the decision of the circuit court in its entirety and award Ford such further relief as it deems just and proper.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that two copies of the foregoing and a CD-ROM containing the same were served upon the following on April 7th, 2008, via U.S. mail, postage prepaid:

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies the following regarding the Respondent's Substitute Brief: (1) it includes the information required by Rule 55.03; (2) it complies with the limitations of Rule 84.06(b); (3) relying on the word count mechanism of Microsoft Word, the total number of words (exclusive of the sections designated in Rule 84.06(b) is 15,555; and (4) the electronic copy has been scanned for viruses and is virus free.

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