2001 WL 34008505
Only the Westlaw citation is currently available.
United States District Court, N.D. Iowa, Central Division.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION and Jean Black, Plaintiffs,
and
Carolyn Penny LEWIS and Joyce Gitch, Plaintiffs–Intervenors,
v.
AMERICAN HOME PRODUCTS CORPORATION d/b/a Fort Dodge Animal Health, Defendant.

No. C 00–3079–MWB. | Dec. 21, 2001.

Opinion

MEMORANDUM OPINION AND ORDER REGARDING CROSS–MOTIONS FOR PARTIAL SUMMARY JUDGMENT ON PLAINTIFF–INTERVENOR LEWIS'S *QUID PRO QUO* CLAIM

BENNETT, Chief J.

TABLE OF CONTENTS

I. INTRODUCTION 3

A. Procedural Background 3

B. Factual Background 4

II. LEGAL ANALYSIS 6

A. Standards For Summary Judgment 6

1. Requirements of Rule 56 7

2. The parties' burdens 7

3. Summary judgment in employment discrimination cases 8

B. Quid Pro Quo Sexual Harassment 10

1. Distinguishing quid pro quo and hostile environment harassment 10

2. Employer liability 12

3. Lewis's quid pro quo claim 14

a. Conditioning of job benefits 15

b. Tangible job detriment 18

III. CONCLUSION 21

***1** This matter comes before the court pursuant to plaintiff-intervenor Carolyn Penny Lewis's August 30, 2001, motion for partial summary judgment on her *quid pro quo* claim, and defendant AHP's October 3, 2001, cross-motion for partial summary judgment on the same claim. Lewis and AHP each resisted the other's motion for partial summary judgment, and the EEOC also resisted AHP's cross-motion on October 31, 2001. Plaintiff-intervenor Lewis is represented by Jeane W. Pearson of Price & Pearson in Fort Dodge, Iowa. Plaintiff EEOC is represented by Deborah J. Powers, Senior Trial Attorney, and Jean P. Kamp, Regional Attorney, of the EEOC's District Office in Milwaukee, Wisconsin. Defendant American Home Products is represented by Neven J. Mulholland of Johnson, Erb, Bice, Kramer, Good & Mulholland, P.C., in Fort Dodge, Iowa, and Mark S. Dichter of Morgan, Lewis & Bockius, L.L.P., in Philadelphia, Pennsylvania.

I. INTRODUCTION

A. Procedural Background

In this action, filed on September 29, 2000, pursuant to Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e, the EEOC seeks "to correct" unlawful sexual harassment and retaliation by defendant AHP and "to make whole" five individuals who have allegedly suffered from unlawful employment practices. On December 12, 2000, Carolyn Penny Lewis and Joyce Gitch were granted leave to intervene in this action to assert their own claims, pursuant to Title VII and Iowa common law, against AHP. The EEOC subsequently filed a First Amended Complaint on April 11, 2001, which adds a class action allegation on behalf of "a class of female employees who have been aggrieved by [unlawful employment practices on the basis of sexual harassment]." First Amended Complaint, "Nature Of The Action," unnumbered first paragraph. On April 12, 2001, a separate action initiated by plaintiff Jean Black was consolidated with the present action.

Only Lewis's Complaint in Intervention, and indeed, only one of her claims, is at issue in the motions before the court. In Count I of her Complaint in Intervention, Lewis alleges sexual discrimination in violation of Title VII, as follows:

> 18. Defendants have discriminated against ... Carolyn Penny Lewis ... in the terms and conditions of [her] employment, including pay, benefits, promotions and responsibilities, and have maintained a sexually hostile work environment, aided and abetted sexual harassment, engaged in retaliation against [Lewis] and other claimants to the point that [Lewis] [was] no longer able to work and [was] either placed on medical leave or sought medical attention.

Complaint in Intervention of Plaintiffs–Intervenors Lewis and Gitch, ¶ 18. Lewis now maintains that this claim alleges "three theories of civil rights violations on the basis of gender discrimination in employment: 1) quid pro quo sexual harassment; 2) sexually hostile environment; [and] 3) retaliation." Plaintiff–Intervenor Lewis's Motion for Partial Summary Judgment, 1. AHP does not dispute Lewis's characterization of her Title VII claim. In addition, Lewis alleged intentional infliction of severe emotional distress in Count II of her Complaint in Intervention. Lewis now seeks partial summary judgment on the first of her theories of sexual discrimination, *quid pro quo* harassment. In response, AHP also seeks partial summary judgment on this claim.

B. Factual Background

***2** The court will not attempt here a thorough disquisition of the undisputed and disputed facts pertaining to Lewis's *quid pro quo* claim. Rather, the court will present only sufficient statement of the nucleus of undisputed facts and sufficient of the parties' factual disputes to put in context the parties' cross-motions for partial summary judgment on Lewis's *quid pro quo* claim.

Lewis, who is an African–American woman, performed clerical functions for Mark Davis, the Director of Pharmaceutical Manufacturing at AHP's "Riverside Plant" in Fort Dodge, Iowa, from the fall of 1998 until June of 1999. In July of 1999, she was transferred to a secretarial position in the main plant, also in Fort Dodge, Iowa, in the Bio Regulatory Affairs department, where she remained until December of 1999, when she left on medical leave. Lewis did not return to work at AHP.

While she worked at the "Riverside Plant," Davis was Lewis's supervisor, and his performance reviews of her work were favorable. The next person in the company hierarchy above Davis was David Hanlon, Vice President of Fort Dodge Operations. Hanlon's office was at the main plant in Fort Dodge, Iowa. Lewis asserts that, after she was hired by AHP, Hanlon persistently showed her an unusual amount of attention of a sexual nature, including frequently staring at her breasts, genitals, and legs while praising her "performance" and offering her raises. She alleges that Hanlon also engaged in numerous unwelcome sexual advances, including, on one occasion, rubbing her neck and shoulders and resting the heel of his hands on her shoulders with his fingertips just above the tops of her breasts; asking her if she had watched a James Bond movie involving a secretary named Money Penny who had a sexual relationship with her boss; offering her raises and other benefits, including overtime pay, company day care, and travel, at the same time asking her to meet him privately and socially after regular working hours or in his office on the weekends for drinks; "stalking" or following her around Fort Dodge; and showing inappropriate attention to or asking inappropriate questions about her personal and social life, including whether she had a boyfriend who would be angry if she met Hanlon after work. She also contends that Hanlon caused Davis to place Lewis's name on a layoff list, although she was later removed from that list and transferred to the secretarial position in the Bio Regulatory Affairs department, which she alleges was closer to Hanlon's office.

Lewis alleges that Hanlon's conduct caused her to avoid or hide from Hanlon at work, quit working overtime on weekends, and ultimately caused her such emotional distress that she took medical leave in December of 1999 and never returned to her job at AHP. Lewis also asserts that her complaints about Hanlon's conduct toward her were ignored by other officials of the company. Lewis eventually filed a charge of sexual harassment and discrimination with the EEOC in November of 1999, shortly before leaving her job at AHP.

***3** AHP denies most of these allegations and denies that any of the incidents alleged, to the limited extent that they are actually supported by the record, establishes *quid pro quo* harassment. Moreover, AHP contends that the record is devoid of any incidents involving *quid pro quo* harassment, and almost devoid of any incidents involving contact of any kind between Lewis and Hanlon, after May 1999, several months before Lewis left her job on medical leave.

The parties agree that Hanlon was reprimanded for creation of an unprofessional environment in the late summer of 1998, but was later promoted on August 14, 1998, effective September 1, 1998. Hanlon again came under company scrutiny as the result of complaints of sexual harassment in 1999, and in August, signed an agreement concerning improving his conduct. Hanlon was terminated in November of 1999, just days after Lewis filed a charge of sexual harassment with the EEOC.

II. LEGAL ANALYSIS

A. Standards For Summary Judgment

This court has considered in some detail the standards applicable to motions for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure in a number of prior decisions. *See, e.g., Swanson v. Van Otterloo,* 993 F.Supp. 1224, 1230–31 (N.D.Iowa 1998); *Dirks v. J.C. Robinson Seed Co.,* 980 F.Supp. 1303, 1305–07 (N.D.Iowa 1997); *Laird v. Stilwill,* 969 F.Supp. 1167, 1172–74 (N.D.Iowa 1997); *Rural Water Sys. # 1 v. City of Sioux Ctr .,* 967 F.Supp. 1483, 1499–1501 (N.D.Iowa 1997), *aff'd in pertinent part,* 202 F.3d 1035 (8th Cir.), *cert. denied,* 531 U.S. 820 (2000); *Tralon Corp. v. Cedarapids, Inc.,* 966 F.Supp. 812, 817–18 (N.D.Iowa 1997), *aff'd,* 205 F.3d 1347 (8th Cir.2000) (Table op.); *Security State Bank v. Firstar Bank Milwaukee, N.A.,* 965 F.Supp. 1237, 1239–40 (N.D.Iowa 1997); *Lockhart v. Cedar Rapids Community Sch. Dist.,* 963 F.Supp. 805 (N.D.Iowa 1997). The essentials of these standards for present purposes are as follows.

1. Requirements of Rule 56

Rule 56 itself provides, in pertinent part, as follows:

> Rule 56. Summary Judgment
>
> (b) For Defending Party. A party against whom a claim ... is asserted ... may, at any time, move for summary judgment in the party's favor as to all or any part thereof.
>
> (c) Motions and Proceedings Thereon.... *The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.*

FED. R. CIV. P. 56(a)-(c) (emphasis added). Applying these standards, the trial judge's function at the summary judgment stage of the proceedings is not to weigh the evidence and determine the truth of the matter, but to determine whether there are genuine issues for trial. *Quick v. Donaldson Co.,* 90 F.3d 1372, 1376–77 (8th Cir.1996); *Johnson v. Enron Corp.,* 906 F.2d 1234, 1237 (8th Cir.1990). An issue of material fact is genuine if it has a real basis in the record. *Hartnagel v. Norman,* 953 F.2d 394 (8th Cir.1992) (citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574, 586–87 (1986)). As to whether a factual dispute is "material," the Supreme Court has explained, "Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248 (1986); *Rouse v. Benson,* 193 F.3d 936, 939 (8th Cir.1999); *Beyerbach v. Sears,* 49 F.3d 1324, 1326 (8th Cir.1995); *Hartnagel,* 953 F.2d at 394.

2. The parties' burdens

***4** Procedurally, the moving party bears "the initial responsibility of informing the district court of the basis for its motion and identifying those portions of the record which show lack of a genuine issue." *Hartnagel,* 953 F.2d at 395 (citing *Celotex Corp. v. Catrett,* 477 U.S. 317, 323 (1986)); *see also Rose–Maston,* 133 F.3d at 1107; *Reed v. Woodruff County, Ark.,* 7 F.3d 808, 810 (8th Cir.1993). "When a moving party has carried its burden under *Rule* 56(c), its opponent must do more than simply show there is some metaphysical doubt as to the material facts." *Matsushita,* 475 U.S. at 586. Rather, the party opposing summary judgment is required under Rule 56(e) to go beyond the pleadings, and by affidavits, or by the "depositions, answers to interrogatories, and admissions on file," designate "specific facts showing that there is a genuine issue for trial." FED. R. CIV. P. 56(e); *Celotex,* 477 U.S. at 324; *Rabushka ex. rel. United States v. Crane Co.,* 122 F.3d 559, 562 (8th Cir.1997), *cert. denied,* 523 U.S. 1040 (1998); *McLaughlin v. Esselte Pendaflex Corp.,* 50 F.3d 507, 511 (8th Cir.1995); *Beyerbach,* 49 F.3d at 1325. If a party fails to make a sufficient showing of an essential element of a claim with respect to which that party has the burden of proof, then the opposing party is "entitled to judgment as a matter of law." *Celotex Corp.,* 477 U.S. at 323; *In re Temporomandibular Joint (TMJ) Implants Prod. Liab. Litig.,* 113 F.3d 1484, 1492 (8th Cir.1997). In reviewing the record, the court must view all the facts in the light most favorable to the nonmoving party and give that party the benefit of all reasonable inferences that can be drawn from the facts. *See Matsushita Elec. Indus. Co.,* 475 U.S. at 587; *Quick,* 90 F.3d at 1377 (same).

3. Summary judgment in employment discrimination cases

Because this is an employment discrimination case, it is well to remember that the Eighth Circuit Court of Appeals has cautioned that "summary judgment should seldom be used in employment-discrimination cases." *Crawford v. Runyon,* 37

F.3d 1338, 1341 (8th Cir.1994) (citing *Johnson v. Minnesota Historical Soc'y,* 931 F.2d 1239, 1244 (8th Cir.1991); *Hillebrand v. M–Tron Indus., Inc.,* 827 F.2d 363, 364 (8th Cir.1987), *cert. denied,* 488 U.S. 1004 (1989)); *see also Snow v. Ridgeview Medical Ctr.,* 128 F.3d 1201, 1205 (8th Cir.1997) (citing *Crawford); Helfter v. United Parcel Serv., Inc.,* 115 F.3d 613, 615 (8th Cir.1997) (quoting *Crawford); Chock v. Northwest Airlines, Inc.,* 113 F.3d 861, 862 (8th Cir.1997) ("We must also keep in mind, as our court has previously cautioned, that summary judgment should be used sparingly in employment discrimination cases," citing *Crawford); Smith v. St. Louis Univ.,* 109 F.3d 1261, 1264 (8th Cir.1997) (quoting *Crawford); Hardin v. Hussmann Corp.,* 45 F.3d 262 (8th Cir.1995) ("summary judgments should only be used sparingly in employment discrimination cases," citing *Haglof v. Northwest Rehabilitation, Inc.,* 910 F.2d 492, 495 (8th Cir.1990); *Hillebrand,* 827 F.2d at 364). Summary judgment is appropriate in employment discrimination cases only in "those rare instances where there is no dispute of fact and where there exists only one conclusion." *Johnson,* 931 F.2d at 1244; *see also Webb v. St. Louis Post–Dispatch,* 51 F.3d 147, 148 (8th Cir.1995) (quoting *Johnson,* 931 F.2d at 1244); *Crawford,* 37 F.3d at 1341 (quoting *Johnson,* 931 F.2d at 1244). To put it another way, "[b]ecause discrimination cases often depend on inferences rather than on direct evidence, summary judgment should not be granted unless the evidence could not support any reasonable inference for the nonmovant." *Crawford,* 37 F.3d at 1341 (holding that there was a genuine issue of material fact precluding summary judgment); *accord Snow,* 128 F.3d at 1205 ("Because discrimination cases often turn on inferences rather than on direct evidence, we are particularly deferential to the nonmovant," citing *Crawford); Webb v. Garelick Mfg. Co.,* 94 F.3d 484, 486 (8th Cir.1996) (citing *Crawford,* 37 F.3d at 1341); *Wooten v. Farmland Foods,* 58 F.3d 382, 385 (8th Cir.1995) (quoting *Crawford,* 37 F.3d at 1341); *Johnson,* 931 F.2d at 1244.

***5** However, not long ago, the Eighth Circuit Court of Appeals also observed that, "[a]lthough summary judgment should be used sparingly in the context of employment discrimination cases, *Crawford v. Runyon,* 37 F.3d 1338, 1341 (8th Cir.1994), the plaintiff's evidence must go beyond the establishment of a prima facie case to support a reasonable inference regarding the alleged illicit reason for the defendant's action." *Landon v. Northwest Airlines, Inc.,* 72 F.3d 620, 624 (8th Cir.1995) (citing *Reich v.. Hoy Shoe Co.,* 32 F.3d 361, 365 (8th Cir.1994)); *accord Kiel v. Select Artificials, Inc.,* 169 F.3d 1131, 1134 (8th Cir.) (observing that the burden-shifting framework of *McDonnell Douglas* must be used to determine whether summary judgment is appropriate), *cert. denied,* 528 U.S. 818 (1999). In the case of a *quid pro quo* sexual harassment claim, summary judgment may properly be granted for lack of a genuine issue as to whether submission to the harasser's alleged advances was an express or implied condition for receiving job benefits, or whether the plaintiff's refusal to submit resulted in a tangible job detriment. *See Cram v. Lamson & Sessions Co.,* 49 F.3d 466, 473 (8th Cir.1995); *Kneibert v. Thomson Newspapers, Mich., Inc.,* 129 F.3d 444, 455 (8th Cir.1997) (requiring that party "must provide sufficient, probative evidence which would permit a fact finder to rule in his favor as opposed to engaging in 'mere speculation, conjecture, or fantasy" ' in order to survive summary judgment motion) (citation omitted).

The court will apply these standards to Lewis's and AHP's cross-motions for partial summary judgment on Lewis's *quid pro quo* sexual harassment claim.

B. Quid Pro Quo Sexual Harassment

1. Distinguishing quid pro quo and hostile environment harassment

In *Meritor Savings Bank, FSB v. Vinson,* 477 U.S. 57 (1986), the Supreme Court "distinguished between *quid pro quo* claims and hostile environment claims, and said both were cognizable under Title VII, though the latter requires harassment that is severe or pervasive." *Burlington Indus., Inc. v. Ellerth,* 524 U.S. 742, 752 (1998) (internal citations omitted) (citing *Meritor,* 477 U.S. at 65). A *quid pro quo* claim involves threats to retaliate against an employee if she "denies [the harasser] some sexual liberties," and the threats are carried out, "as distinct from bothersome attentions or sexual remarks that are sufficiently severe or pervasive to create a hostile work environment." *Id.* at 751. Thus, "[t]he terms *quid pro quo* and hostile work environment are helpful, perhaps, in making a rough demarcation between cases in which threats are carried out and those where they are not or are absent altogether." *Id.; Ogden v. Wax Works, Inc.,* 214 F.3d 999, 1006 (8th Cir.2000) ("[I]n 'supervisor harassment' cases such as this, the terms 'quid pro quo' and 'hostile environment' remain relevant only to the extent they illustrate the evidentiary distinction between cases involving threats which are carried out and those featuring offensive conduct in general.").

***6** As the Eighth Circuit Court of Appeals recently explained, to prevail on a *quid pro quo* claim, the plaintiff must prove the following: "(1) she was a member of a protected class; (2) she was subjected to unwelcome harassment in the form of sexual advances or requests for sexual favors; (3) the harassment was based on sex; and (4) her submission to the unwelcome

advances was an express or implied condition for receiving job benefits or her refusal to submit resulted in a tangible job detriment." *Ogden,* 214 F.3d at 1006 n. 8 (citing *Cram v. Lamson & Sessions Co.,* 49 F.3d 466, 473 (8th Cir.1995)). On the other hand, to prevail on a hostile environment claim, the plaintiff must prove the following: "(1) she belonged to a protected group; (2) she was subjected to unwelcome harassment; (3) the harassment was based on sex; and (4) the harassment affected a term, condition, or privilege of her employment." *Id.* at n. 9 (citing *Schmedding v. Tnemec Co., Inc .,* 187 F.3d 862, 864 (8th Cir.1999)).

2. Employer liability

In addition to providing a "rough demarcation between cases in which threats are carried out and those where they are not," *see Ellerth,* 524 U.S. at 751, the distinction between *quid pro quo* and hostile environment harassment formerly determined the standard for employer liability for harassment by a supervisor. *See id.* at 753.

> If the plaintiff established a *quid pro quo* claim, the Courts of Appeals held, the employer was subject to vicarious liability. *See Davis v. Sioux City,* 115 F.3d 1365, 1367 (C.A. 8 1997); *Nichols v. Frank,* 42 F.3d 503, 513–514 (C.A. 9 1994); *Bouton v. BMW of North America, Inc.,* 29 F.3d 103, 106–107 (C.A. 3 1994); *Sauers v. Salt Lake County,* 1 F.3d 1122, 1127 (C.A. 10 1993); *Kauffman v. Allied Signal, Inc.,* 970 F.2d 178, 185–186 (C .A. 6), *cert. denied,* 506 U.S. 1041, 113 S.Ct. 831, 121 L.Ed.2d 701 (1992); *Steele v. Offshore Shipbuilding, Inc.,* 867 F.2d 1311, 1316 (C.A. 11 1989). The rule encouraged Title VII plaintiffs to state their claims as *quid pro quo* claims, which in turn put expansive pressure on the definition. The equivalence of the *quid pro quo* label and vicarious liability is illustrated by this case. The question presented on certiorari is whether Ellerth can state a claim of *quid pro quo* harassment, but the issue of real concern to the parties is whether Burlington has vicarious liability for Slowik's alleged misconduct, rather than liability limited to its own negligence. The question presented for certiorari asks:
>
> > "Whether a claim of *quid pro quo* sexual harassment may be stated under Title VII ... where the plaintiff employee has neither submitted to the sexual advances of the alleged harasser nor suffered any tangible effects on the compensation, terms, conditions or privileges of employment as a consequence of a refusal to submit to those advances?" Pet. for Cert. i.

***7** *Ellerth,* 524 U.S. at 753. Lewis is apparently under the misconception that the distinction in employer liability based on the nature of the harassment claim asserted still applies, because she asserts that AHP is "vicariously liable" for Hanlon's *quid pro quo* harassment.

However, the Supreme Court established a different standard for employer liability for a supervisor's harassment in *Ellerth,* concluding that when harassment can be established under either theory, "the [following] factors [,] and not the categories *quid pro quo* and hostile work environment, will be controlling on the issue of vicarious liability." *Ellerth,* 524 U.S. at 753–54.

> An employer is subject to vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over the employee. When no tangible employment action is taken, a defending employer may raise an affirmative defense to liability or damages, subject to proof by a preponderance of the evidence, see Fed. Rule Civ. Proc. 8(c). The defense comprises two necessary elements: (a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise. While proof that an employer had promulgated an antiharassment policy with complaint procedure is not necessary in every instance as a matter of law, the need for a stated policy suitable to the employment circumstances may appropriately be addressed in any case when litigating the first element of the defense. 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 to satisfy the employer's burden under the second element of the defense. No affirmative defense is available, however, when the supervisor's harassment culminates in a tangible employment action, such as discharge, demotion, or undesirable reassignment.

Ellerth, 524 U.S. at 765;[1] *accord Faragher v. City of Boca Raton,* 524 U.S. 775 (1998) (adopting the same standard); *see also*

Newton v. Caldwell Labs., 156 F.3d 880, 883 (8th Cir.1998) (explaining the *Ellerth/Faragher* affirmative defense).

3. Lewis's quid pro quo claim

Unlike the situation in *Ellerth,* the parties here dispute whether or not *quid pro quo* harassment has been established as a matter of law, as Lewis contends, or cannot be established at all, as AHP contends. *Compare Ellerth,* 524 U.S. at 754 (assuming that discrimination under a *quid pro quo* or hostile environment theory could be proved). Thus, the court cannot conflate the question of whether or not Lewis can prove *quid pro quo* harassment by Hanlon, an employer with immediate or successively higher authority over her, into the question of whether or not AHP can be liable for that harassment. *Compare id.* at 753 (although the question on *certiorari* was whether or not the plaintiff could state a claim of *quid pro quo* harassment, "the issue of real concern to the parties [was] whether [the employer] ha[d] vicarious liability for [the supervisor's] alleged misconduct, rather than liability limited to its own negligence.").

***8** More specifically, the parties dispute whether or not Hanlon ever conditioned job benefits on Lewis's submission to unwelcome advances, and if he did, whether her refusal to submit resulted in any tangible job detriment. *See Ogden,* 214 F.3d at 1006 n. 8 (last element of a *quid pro quo* claim). Even if Hanlon expressly or implicitly conditioned job benefits on submission to sexual advances, if he never came through on a threat to retaliate for failure to submit to his advances, Lewis cannot state a *quid pro quo* claim, but only a "hostile environment" claim. *See Newton,* 156 F.3d at 883 ("Because Newton's claim does not involve either fulfilled threats or other detrimental employment action resulting from her refusal to submit to Love's sexual overtures, Newton's claim 'should be categorized as a hostile work environment claim which requires a showing of severe or pervasive conduct." ') (quoting *Ellerth,* 524 U.S. at 754).

a. Conditioning of job benefits

The parties apparently agree that Hanlon never *expressly* conditioned any benefits on Lewis's submission to his advances. However, "express" conditioning of benefits on submission to advances is not required. *See Ogden,* 214 F.3d at 1006 n. 8 (stating the element as whether "her submission to the unwelcome advances was *an express or implied condition* for receiving job benefits or her refusal to submit resulted in a tangible job detriment") (emphasis added). Here, the parties dispute whether there is sufficient evidence to establish, or generate a genuine issue of material fact as to whether, Hanlon *implicitly* conditioned job benefits upon Lewis's submission to his advances. AHP contends that there is no evidence beyond Lewis's speculation about the import of various comments Hanlon purportedly made, which is insufficient standing alone to generate the necessary genuine issue of material fact.

For example, AHP points out that Lewis testified that "when [Mr. Hanlon] was asking me about my boyfriends and where I hung out, that to me was the same as him saying he was interested in a sexual relationship and if I gave him what he wanted, he could advance me with the company." Defendant's Appendix, p. 37. AHP argues that this case, like *Mendoza v. Borden, Inc.,* 195 F.3d 1238 (11th Cir.1999), *cert. denied,* 529 U.S. 1068 (2000), bears the markings of "perception prevarication," in which a "plaintiff describing her subjective impressions can say that while her supervisor's conduct might have appeared neutral to some, she felt, believed–just knew–it was lecherous." *Mendoza,* 195 F.3d at 1256 (Carnes, J., concurring).

On the other hand, Lewis and the EEOC detail a number of situations in which they argue that the implication that Hanlon was conditioning suggested benefits on Lewis's submission to his advances was made clear: Hanlon would stare at Lewis's body while telling her that her "performance" was good and that she could get a raise and he could re-evaluate her salary, or he would note that he was aware that Lewis was a single mom and he could get her on-site daycare, or a raise, or overtime not available to other employees in the same conversation in which he would invite her for drinks in his office or to join him socially outside of the work place. Lewis and the EEOC argue that, in the context in which these job benefits were offered, the jury should determine whether or not Hanlon was conditioning benefits on submission to sexual advances, not least, because the issue is one of credibility of Lewis's testimony.

***9** The court agrees that, while the threads of inference may appear tenuous on a written record, this is precisely the sort of situation in which the court should be extremely cautious about granting summary judgment on an employment discrimination claim "[b]ecause [this case] depend[s] on inferences rather than on direct evidence," *Crawford,* 37 F.3d at 1341 (holding that there was a genuine issue of material fact precluding summary judgment); *accord Snow,* 128 F.3d at 1205 ("Because discrimination cases often turn on inferences rather than on direct evidence, we are particularly deferential to the nonmovant," citing *Crawford*), and the strength of the inferences in turn depends to a large degree on the credibility of Lewis's testimony, a matter on which the court should not pass at summary judgment. *See Yates v. Rexton, Inc.,* 267 F.3d

793, 800 (8th Cir.2001) ("In determining whether a plaintiff has met its burden with respect to pretext in a summary judgment motion, a district court is prohibited from making a credibility judgment or a factual finding from conflicting evidence. *See El Deeb v. Univ. of Minn.,* 60 F.3d 423, 430 (8th Cir.1995)."); *see also Reeves v. Sanderson Plumbing Prods., Inc.,* 530 U.S. 133, 150 (2000) ("Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge."). Plainly, if a jury were to believe Lewis's testimony, it could find that Hanlon repeatedly implied that job benefits were conditioned on Lewis's submission to his sexual advances. Just as plainly, however, neither party is entitled to summary judgment on Lewis's *quid pro quo* claim on the basis that this element can or cannot be proved as a matter of law. In short, in light of the evidence on this element, this employment discrimination claim does *not* present one of "those rare instances where there is no dispute of fact and where there exists only one conclusion." *Johnson,* 931 F.2d at 1244; *see also Webb,* 51 F.3d at 148 (quoting *Johnson); Crawford,* 37 F.3d at 1341 (also quoting *Johnson*).

b. Tangible job detriment

Perhaps an even closer question is presented on whether Lewis's undisputed refusal to submit to any of Hanlon's sexual advances resulted in a tangible job detriment. *See Ogden,* 214 F.3d at 1006 n. 8 (citing *Cram,* 49 F.3d at 473).[2] AHP apparently equates "tangible job detriment," as required for a *quid pro quo* claim, *see Ogden,* 214 F.3d at 1006 n. 8, with "tangible employment action," which forecloses availability of the *Ellerth/Faragher* defense and establishes vicarious liability of an employer for supervisory harassment. *See Ellerth,* 524 U.S. at 765. However, the Supreme Court clearly perceived the two things as different, because the Court held in *Ellerth* that, *once actionable harassment by a supervisor was established–i.e.,* under either a *quid pro quo* or "hostile environment" theory–the inquiry for employer liability turned on whether or not the supervisor's harassment caused a "tangible employment action." *Id.* If the two standards meant the same thing, it would seem to follow that *quid pro quo* harassment *necessarily* involved "tangible employment action," and then *quid pro quo* harassment would once again *necessarily* result in vicarious liability of an employer, the precise proposition the Court rejected in *Ellerth. See id.* at 753–54.

***10** Contrary to the contentions of either AHP or Lewis, there are genuine issues of material fact as to whether Lewis suffered a "tangible job detriment" as a result of her refusal to submit to Hanlon's alleged requests for sexual favors. *See Ogden,* 214 F.3d at 1006 n. 8 (citing *Cram,* 49 F.3d at 473). First, there are genuine issues of material fact as to whether or not Lewis was denied a promised promotion, notwithstanding AHP's contention that the position to which Lewis claims she was promised promotion, as Mr. Davis's administrative assistant, was not filled until August of 2000, long after Lewis had quit working for AHP. Such genuine issues of material fact arise primarily from Lewis's deposition testimony that Hanlon promised her such a promotion in June of 1999. *See* Plaintiff–Intervenor Lewis's Supplemental Statement of Material Facts with Appendix at 136. AHP contends that any loss of overtime pay as a result of Lewis's not working on Saturdays was "voluntary," and in any event *"de minimis,"* so that it could not constitute a "tangible employment detriment," but this is only one "spin" on the record evidence. Lewis has presented evidence that, while the dollar amount of lost overtime may appear small, it was of some significance when compared with her annual salary. The record evidence, particularly Lewis's deposition testimony, could also be taken, without a painful or unreasonable stretch, to suggest that she felt she could not work overtime without appearing to give in to Hanlon's requests for improper contacts when there were no other people at work or appearing to give in to his offers of additional overtime when he was supposedly limiting the overtime other people were allowed to work. Finally, there is a reasonable inference that Lewis was initially placed on the "layoff list," because she would not submit to Hanlon's requests, even though she was not in fact laid off and AHP has pointed to some evidence that all clerical positions at the "Riverside Plant" were eliminated in a reduction in force. Those genuine issues of material fact arise from Lewis's evidence that she was removed from the "layoff list" as a result of the intercession of Jean Black, not because of anything Hanlon did, and in light of her testimony that she had to train her replacement when she was transferred to the position at the main plant. By the same token, Lewis has not proved any "tangible job detriment" beyond dispute, so that partial summary judgment in her favor cannot be entered either. In light of these genuine issues of material fact concerning the "tangible job detriment" element of Lewis's *quid pro quo* claim, this employment discrimination claim does *not* present one of "those rare instances where there is no dispute of fact and where there exists only one conclusion." *Johnson,* 931 F.2d at 1244; *see also Webb,* 51 F.3d at 148 (quoting *Johnson); Crawford,* 37 F.3d at 1341 (also quoting *Johnson*).

***11** The court agrees with AHP that Lewis's contentions concerning constructive discharge, "stalking," and deterioration in her health may be relevant to her "hostile environment" and "retaliation" theories, but they are not relevant to her *quid pro quo* claim. The constructive discharge and decline in Lewis's health are too remote in time from any alleged incident in which Hanlon purportedly conditioned job benefits on submission to his sexual advances to bear a reasonable inference that Lewis was forced from her job because she would not submit to Hanlon's advances. Similarly, Lewis has not coherently

articulated, nor pointed to evidence demonstrating, any connection between “stalking” and a specific job benefit or detriment resulting from her refusal to submit to Hanlon’s advances. Thus, the court need not and does not pass on the question of whether there are genuine issues of material fact as to whether or not Lewis was constructively discharged, whether her health problems were “caused” by sexual harassment at AHP, or whether Hanlon “stalked” her at all or did so to the point that his conduct created or contributed to a hostile work environment.

III. CONCLUSION

Upon review of the arguments of the parties and the record evidence presented, the court concludes that neither Lewis nor AHP is entitled to partial summary judgment on Lewis’s *quid pro quo* claim. Rather, there are genuine issues of material fact on this claim that require that it be submitted to a jury.

Plaintiff-intervenor Carolyn Penny Lewis’s August 30, 2001, motion for partial summary judgment on her *quid pro quo* claim, and defendant AHP’s October 3, 2001, cross-motion for partial summary judgment on the same claim, are both denied.

IT IS SO ORDERED.

Footnotes

1 Notwithstanding that the category of supervisory harassment is no longer determinative of the standard for employer liability, the Supreme Court reiterated the continuing relevance of distinctions between *quid pro quo* and “hostile environment” harassment:

> To the extent they illustrate the distinction between cases involving a threat which is carried out and offensive conduct in general, the terms are relevant when there is a threshold question whether a plaintiff can prove discrimination in violation of Title VII. When a plaintiff proves that a tangible employment action resulted from a refusal to submit to a supervisor’s sexual demands, he or she establishes that the employment decision itself constitutes a change in the terms and conditions of employment that is actionable under Title VII. For any sexual harassment preceding the employment decision to be actionable, however, the conduct must be severe or pervasive. Because Ellerth’s claim involves only unfulfilled threats, it should be categorized as a hostile work environment claim which requires a showing of severe or pervasive conduct. *See Oncale v. Sundowner Offshore Services, Inc.,* 523 U.S. 75, 81, 118 S.Ct. 998, 1002–1003, 140 L.Ed.2d 201, (1998); *Harris v. Forklift Systems, Inc.,* 510 U.S. 17, 21, 114 S.Ct. 367, 370, 126 L.Ed.2d 295 (1993).

Ellerth, 524 U.S. at 753–54.

2 The EEOC argues that Lewis need not establish both that her submission to unwelcome advances was an implied condition for receiving job benefits *and* that her refusal caused a tangible job detriment, but only one or the other, citing *Newton,* 156 F.3d at 882. The court acknowledges that, in both the *Newton* and *Ogden* decisions, the Eighth Circuit Court of Appeals stated the last element of a *quid pro quo* claim in terms of whether the plaintiff established that her “submission to the unwelcome advances was an expressed or implied condition for receiving job benefits *or* her refusal to submit resulted in a tangible job detriment.” *Ogden,* 214 F.3d at 1006 n. 8 (emphasis added); *Newton,* 156 F.3d at 882. Both decisions, however, rely on the pre-*Ellerth* decision in *Cram v. Lamson & Sessions Co.,* 49 F.3d 466, 473 (8th Cir.1995), for the statement of this element. However, as the Supreme Court in *Ellerth* and the Eighth Circuit Court of Appeals in *Newton* made clear, where the plaintiff fails to show her refusal to submit resulted in a detrimental employment action, *where she did not in fact submit,* the plaintiff’s claim can only be considered under a “hostile environment” theory. *See Ellerth,* 524 U.S. at 753–54 (the plaintiff did not submit and the threats were never fulfilled); *Newton,* 156 F.3d at 883 (citing *Ellerth,* also in a situation involving unfulfilled threats). Moreover, the court reads the somewhat inartful statement of this element in *Cram* as an attempt to encompass both the situation in which the plaintiff received a job benefit *only after she submitted* to the harasser’s demands, and the situation in which the plaintiff *did not submit,* and was subjected to a job detriment. Both situations clearly would constitute unlawful *quid pro quo* harassment.