NA 04-0132-C B/H Kocher v Farm Bureau Ins
Judge Sarah Evans Barker Signed on 7/18/06

NOT INTENDED FOR PUBLICATION IN PRINT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
NEW ALBANY DIVISION

TAMMY KOCHER,	)	
	)	
Plaintiff,	)	
vs.	)	NO. 4:04-cv-00132-SEB-WGH
	)	
FARM BUREAU INSURANCE,	)	
	)	
Defendant.	)	

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TAMMY KOCHER,	)	
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vs.	)	4:04-cv-0132-SEB-WGH
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FARM BUREAU INSURANCE,	)	
Defendant.	)	

ENTRY GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

This matter comes before the Court on Defendant's, Farm Bureau Insurance ("Farm Bureau"), Motion for Summary Judgment seeking judgment as a matter of law on Plaintiff's, Tammy Kocher ("Kocher"), claims of sex discrimination and retaliation under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, et seq., as amended, and defamation under Indiana law. Kocher maintains that her female manager at Farm Bureau terminated Kocher and replaced her with another woman because Kocher is a woman and in retaliation for her previous complaints of sex discrimination by her boss. Kocher also asserts that Farm Bureau employees made defamatory statements about her after she had been terminated. Farm Bureau contends that Kocher was properly terminated because of long-standing issues with her conduct and professionalism and that no statements of a defamatory nature were made by its employees and, if any such statements were made, they are protected by qualified privilege.

As we explain below, we GRANT Defendant's Motion for Summary Judgment on all remaining counts.[1]

[1] Plaintiff voluntarily dismissed Counts III and IV of her Complaint alleging violations of Indiana public policy and breach of contract.

Factual Background[2]

A. *Kocher's hiring and promotion to independent agent.*

Terri Toops ("Toops"), a female agency manager for Farm Bureau, hired Kocher to work as an employee agent in Farm Bureau's Batesville, Indiana office on April 24, 2001. Kocher Dep. pp. 23, 28, 30-31, 37-38, 52; Toops Dep. pp. 6, 13. Toops' supervisor, a man, Doug Ferguson ("Ferguson"), the Director of Field Resources, approved the hiring of Kocher. Ferguson Dep. pp. 7-8, 47. In addition to Kocher, the Batesville office employed two male agents and two female customer service representatives ("CSR"). Kocher Dep. at 43. During Kocher's association with Farm Bureau, Toops supervised thirteen agents in five offices, including two other female agents besides Kocher. Toops Dep. at 8.

According to Farm Bureau, in order to become an independent agent, an employee agent must perform in a satisfactory manner and meet expectations regarding professionalism, production, and service. Poehler Dep. at 10-11. Kocher met these expectations and became an independent agent with Farm Bureau on August 27, 2002. Kocher Dep. at 35; Poehler Dep. at 30-31.

Farm Bureau expects all of its agents to achieve established goals in three separate areas—sales, client service, and professionalism. Poehler Dep. at 12; Kocher Dep. Ex. 25. Ferguson testified that agents within an office are expected to work as a team. Ferguson Dep. pp. 25-26. According to Ferguson, Kocher "got off to a good start in the life [insurance] area" as an independent agent. Ferguson Dep. at 39. Toops testified, however, that she perceived from

[2] The Court's task in sorting out the facts in this matter has been considerably complicated by the repeated liberties taken by both parties in the factual recitations in their respective briefs.

the outset of Kocher's employment at Farm Bureau that Kocher had difficulty meeting Farm Bureau's professionalism and teamwork expectations. Toops Aff. ¶ 3; Kocher Dep. Ex. 8; Ferguson Dep. Ex. 1.

B. *Kocher's Independent Agent Contract*.

Following a promotion, Kocher signed a contract, entitled "Agent's Agreement," paragraph 17 of which states: "This Agreement may be canceled by any party, at any time and for any reason, upon giving thirty (30) days' notice in writing to the other parties." Kocher Dep. at 35; Kocher Dep. Ex. 5, ¶ 17. At the time of signing, Kocher inquired of Toops about the meaning of the thirty-day cancellation provision and Toops allegedly responded that it was "something you will never have to worry about unless you comingle, steal or do the clients wrong." Kocher Dep. at 36.[3]

C. *Farm Bureau Discipline Policy*.

Farm Bureau has a practice of counseling employee agents and independent agents before termination of employment which process includes verbal discussions, written discussions and a "final warning." The "final warning" document provides specific expectations of "what [is] to happen and how it [is] to happen." Poehler Dep. at 32. This discipline policy has not been reduced to writing; it is merely company practice. Poehler Dep. at 33. Kocher contends that during her employment with Farm Bureau she did not receive any written warnings nor did she engage in the counseling process. Poehler Dep. at 34; Pl.'s Aff. at ¶ 2. However, she did receive numerous verbal warnings.

D. *August 2001 "Call-In Business" Incident.*

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[3] For the purpose of summary judgment only, Farm Bureau did not dispute that this conversation occurred.

While still an employee agent, Kocher complained that the CSRs (both of whom were female) were not giving her a fair share of the call-in business. Kocher Dep. at 77; Kocher Dep. Ex. 8. Rita Schutte ("Schutte"), one of the accused CSRs, admitted in an email to Toops that she did send more of the call-ins to agents other than Kocher, explaining:[4]

> I know Tammy [Kocher] is not happy the way things are going, and maybe I do give the guys the new call ins but if I never know whenshe [sic] will be here and I do not know if she will return calls or not. And I have told her I will help her if she needs help. But when she does talk to her clients she most of the time has to have the guys help her do the work. She made the coment [sic] that she wants to sell life and that the guys can work on P&C and she will do the life cause that is where the money is. Which is fine but the way I look at it this company is P&C and life and service not just life. I'm sorry if I sound upset but she was accusing me of give [sic] all new clients to Doug which is not true. Yes maybe I give the guys more but if Shes [sic] is not here someone needs to call them and not wait for days or we could loose [sic] the account. Am I wrong in this?

Pl.'s Ex. A.[5] In response to Kocher's complaint, Toops met with Kocher and the two other agents, Brian Voss ("Voss") and Doug Schwering ("Schwering"), on September 6, 2001, and changed the CSR assignments. Kocher Dep. at 80. Toops explained that she changed the assignments because the CSR who normally worked with Kocher felt she could no longer do so. Toops Dep. at 62-63. Toops' notes from the meeting reveal that she did not feel that either Voss or Schwering were "[encroaching] on any business that should have been [Kocher's]." Kocher Dep. Ex. 8. After the meeting, Toops spoke with Kocher privately. Although Kocher does not recall the exchange (Kocher Dep. pp. 78-79), Toops contemporaneously documented her conversation with Kocher as follows:

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[4] Schutte's email was written entirely in capital letters. For ease of reading, we have changed the email's capitalization style to ordinary style.

[5] Kocher's recollection was that the CSRs did not realize they were supposed to give Kocher one-third of the call-in business and they apologized for not doing so.

> I expressed to her that I did not believe that she was being taken advantage of. I also expressed to her that things had not went [sic] well since her first day of hire. I felt she did not want to be a part of our agency team and did not respect my wishes on many occasions. I asked that she make one of two choices. 1) start following procedures like everyone else 2) let me know #1 was not possible and we would get resignation forms started.

Kocher Dep. Ex. 8. Toops' notes included an addendum dated September 10, 2001, indicating that Kocher chose the first option and further: "she understands this agency's expectations and will adhere to those expectations. She will concentrate on being timely, responsible, sales focused in all areas." Kocher Dep. Ex. 8. Kocher maintains that until this meeting, Toops had never "formally" disciplined her for "not following procedures." Pl. Aff. at ¶ 2.

E. *March 2003 "Kinker" incident*

Farm Bureau contends that in March 2003 Kocher failed to process life insurance contracts in a timely fashion and consistent with what she had told Toops she would do. Toops Dep. at 72. In this instance, a client, John Kinker ("Mr. Kinker"), had decided to decline the life insurance that had been sold to him by Kocher and demanded his $10,000 premium back. In order for Mr. Kinker to get his premium refunded, the policy had to be filed and the money refunded from the corporate office. Kocher mailed the forms to the corporate office rather than sending them via the company's daily courier. Although Kocher testified that she had mailed the forms the same day they were requested, the forms did not arrive at the corporate office in a timely manner. Kocher maintained that she could not control what happened after they were mailed. Kocher Dep. pp. 85-88. Kocher also testified that Mr. Kinker's wife, Joann Kinker ("Mrs. Kinker"), was the legal owner of the policies, not Mr. Kinker, and that Mrs. Kinker wanted Kocher to hold off canceling the policy because she wanted the policy and thought she could convince Mr. Kinker to keep it. Kocher Dep. pp. 86, 89. Kocher also asserts that, in fact,

she had followed Toops's instructions for returning payment and that Toops had accompanied Kocher on the sales call to the Kinkers' residence. Kocher Dep. at 87. Farm Bureau managers, however, had the impression that Kocher intentionally delayed processing the forms so that the refund would not negatively affect her March bonus. Ferguson Dep. pp. 71, 80-81; Jongleux Dep. pp. 19-20; Kocher Dep. Ex. 15. Kocher contends in response that the delay would not have helped her bonus at all but would have helped a bonus received by Toops. Kocher Dep. at 88.

As a result of the delay, Mr. Kinker got upset and called Ferguson. Ferguson Dep. at 81. Lynn Jongleux ("Jongleux"), Senior Vice President, General Counsel and Corporate Secretary, became involved in the matter because of statutory compliance issues surrounding the return of money when a life insurance policy is declined and because of the concern about a possible lawsuit from the client. Jongleux Dep. pp. 6, 18. The senior vice president in charge of the life insurance company was also brought in to expedite the refund once the policies were finally returned by Kocher. Jongleux Dep. pp. 18-19.

Toops wanted to terminate Kocher's contract in March after the Kinker incident, but Jongleaux advised Toops that termination would not be justified at that point. Toops Aff., ¶ 4; Jongleux Dep. pp. 6-7. Although the decision was made not to terminate Kocher at that time, Patty Poehler, Senior Vice President of Marketing, instructed Ferguson to print out an email he had sent to her regarding the Kinker matter because they "may need it for evidence later." Poheler Dep. at 43; Pl.'s Ex. B. Toops remained critical of Kocher for her handling of the Kinker matter. Kocher Dep. at 89.

F. *Various Other Discipline Issues.*

At various times throughout Kocher's association with Farm Bureau, Toops criticized Kocher's late arrivals to agency meetings (Kocher Dep. at 58); her failure to timely

provide paperwork (Kocher Dep. pp. 62-63); her manner of dress (Kocher Dep. pp. 63-64); and her failure to attend a scheduled training session (Kocher Dep. pp. 74-76). Toops also had to prod Kocher to respond to information requests in a timely manner. Kocher Dep. pp. 55-56, 94-98.

Kocher testified that she believes that Toops was "easier" on the male agents than she was on her. Kocher Dep. at 67. As examples of unequal treatment, Kocher cited Toops's allowance of male agents' failure to complete applications, when she was always required to complete her applications; Toops permitted the men to wear golf shirts, but Kocher's attire was regularly criticized by Toops (i.e., failing to wear a jacket) and her shoes (i.e., wearing open-toed shoes and apparently some closed-toed shoes as well); Toops also allegedly criticized Kocher's "timeliness," but not the males agents';[6] Toops monitored the comings and goings and appointments of Kocher but not the male agents' activities; when one male agent in the Batesville office held checks and applications, Toops did criticize him; Toops responded to the male agents' e-mails and telephone calls more promptly than she did to Kocher's emails and calls; and Toops was late to Kocher's appointments with clients but not to the appointments with male agents' clients. Further, as previously described, Kocher believed that the female CSRs in the Batesville office gave the call-ins to the male agents, rather than to her. Kocher Dep. pp. 65-71, 73-74; 113-114.

G. *Kocher's Complaints to Farm Bureau Management about Toops.*

Kocher complained to Teresa Koopman, Director of Advertising and Promotions, about

[6] In her deposition, Kocher only mentioned two male agents who were late as frequently as she was: Owen (no last name given) and David Young. Kocher Dep. at 60. Neither of these agents worked in the Batesville office and it is unclear from the cited portions of the deposition testimony whether Toops supervised the offices where these agents worked.

Toops. Kocher Dep. at 111; Koopman Dep. pp. 6, 12.[7] Kocher does not recall the dates of these complaints. Kocher Dep. pp. 112, 114.[8] Kocher contends that she told Koopman that Toops was late to meetings for Kocher's clients and in picking her up for an awards ceremony and that "[Toops] treated [her] differently." Kocher Dep. pp. 113, 115. Koopman only recalls Kocher saying that she had a problem with her manager but does not recall Kocher detailing any specific concerns she had about Toops. Koopman Dep. at 13. Koopman responded by telling Kocher that she should take her concerns to Ferguson, Toops's supervisor. Kocher Dep. at 115; Koopman Dep. at 14. Kocher told Koopman that she did not want to talk to Ferguson because she knew Toops would be upset and she did not want to cause trouble for herself. Kocher Dep. at 115. Thereafter, Koopman contacted Ferguson on Kocher's behalf. Kocher Dep. at 115; Ferguson Dep. pp. 47-48; Koopman Dep. at 14.

According to Ferguson, Koopman told him that Kocher was not happy, that she had concerns about Toops, and that in reporting these problems Kocher had said she was "kind of" the agency spokesperson because she was not the only one in the agency who had trouble with Toops. Ferguson Dep. at 48; Kocher Dep. Ex. 16. Although Koopman does not specifically recall what she told Ferguson, she does remember Kocher telling her that she was the "agency spokesperson" and that she was having problems with Toops, as were others. Koopman Dep. at

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[7] Koopman testified that she believed Kocher spoke with her about her concerns with Toops because Koopman was a woman and Kocher was reluctant to speak with Ferguson, who was Toops's supervisor, because Ferguson is a man. Koopman Dep. at 13, 14, 17.

[8] It is undisputed that Kocher had been making such complaints for "several weeks." Kocher Dep. Ex. 16. However, it is not clear from the record to whom the complaints were addressed. Kocher testified that she had several conversations with Koopman regarding these issues, but there is no corroboration that these conversations actually occurred. See Kocher Dep. at 114; Kocher Dep. Ex. 16.

16. Ferguson contacted Kocher on April 2, 2005, and asked if he could meet with her the following day. Ferguson Dep. at 48; Kocher Dep. Ex. 16. Kocher agreed, and Ferguson met with Kocher in Batesville on April 3, 2003. Kocher Dep. at 117, Dep. Ex. 16; Ferguson Dep. at 52. Kocher does not have a specific recollection of what was said during the meeting, other than she was very upset about the way she was being treated, that Ferguson assured her that what she told him would stay with him, and that he told her she was not going to lose her job over this. Kocher Dep. pp. 119-20. Ferguson summarized everything he recalled from the meeting in an e-mail, which he sent two days thereafter to his boss, Patty Poehler ("Poehler"), Vice President of Marketing, and to Lynn Jongleux ("Jongleux"), Senior Vice President, General Counsel and Corporate Secretary. Ferguson Dep. pp. 7, 55; Poehler Dep. at 5; Kocher Dep. Ex. 16. His email reflects that Kocher phrased her concerns about Toops as if she were speaking on behalf of herself and other agents; for example, he wrote: Kocher "feels that [Toops] is negative in the way she handles situations;" Kocher "does not feel [Toops] respects the agents;" Kocher "was upset that [Toops] did not help her more to make top ten;" "[Toops] is slow in response time, takes 4-5 days to get something done through [Toops], and if the agents try to do it themselves, [Toops] gets mad'" and that Kocher "feels it is very important for [Toops] to let everyone know she is in charge." Kocher Dep. Ex. 16. Ferguson's e-mail also records that Kocher had stated that other male agents felt the same way she did about Toops, mentioning four agents by name and indicating that she believed her concerns were shared by seven or eight of the agents in the agency. Kocher Dep. Ex. 16. Ferguson testified that, as a result of this conversation, he did not believe Kocher thought she was being treated differently than male agents and that she never told him she was discriminated against because of her gender. Ferguson Dep. pp. 55, 74. Ferguson advised Kocher that she should examine her own behavior to see what she had been

doing that was wrong, and instructed her to confront Toops herself with her complaints, allowing her seven days in which to do so. Kocher Dep. Ex. 16.

Ferguson met with Toops for forty-five minutes to an hour on the same day as his meeting with Kocher, April 3, 2003, to relay Kocher's concerns. Toops Dep. at 84, 88; Ferguson Dep. at 56; Kocher Dep. Ex. 16. Based on her conversations with Ferguson, Toops never understood Kocher to be complaining that Toops gave her less favorable treatment than she gave the male agents. Toops Dep. pp. 44, 84-85.

Toops did not wait for Kocher to call her, confronting Kocher, on or about April 4, 2003, regarding her conversations with Ferguson and Koopman. Toops Dep. at 90; Kocher Dep. at 121; Kocher Dep. Ex. 17. Toops's notes from the conversation indicate she believed that Kocher had not been a "team player" and expressed dissatisfaction that Kocher had spoken with Ferguson and Koopman about the various issues she had with Toops. Kocher Dep. Ex. 17. When Kocher asked Toops what action, if any, Toops wanted Kocher to take, Toops stated that she did not know what she wanted Kocher to do because she "found it hard to trust her." (Kocher Dep. Ex. 17.)

H. *August 2003 Compliments*

In August 2003, Toops complimented Kocher on her job performance. According to Kocher, Toops told her that she was doing a wonderful job, that she was so glad she was arriving at meetings on time, that she had obviously turned over a new leaf, and that she was proud of her. Kocher Dep. pp. 58-59.

I. *October 2003 Discovery of Kocher's Improper Vehicle Ratings.*

According to Farm Bureau, the incident which precipitated Kocher's termination was the discovery by Farm Bureau's Personal Lines Underwriting Manager, Heather Willsey

("Willsey"), of problems with the insurance coverage ratings on Kocher's personal automobiles, insured through Farm Bureau, which were reported in an October 16, 2003 e-mail from Willsey to Toops. Kocher Dep. Ex. 20. Willsey had noted that, although a "business" code is required on the vehicle principally operated by a Farm Bureau agent, the automobile Kocher used for work was rated as a "short commuter" (short commuter typically receives a lower rate). Willsey noted that the code on Kocher's vehicle was changed by CSR Rita Schutte ("Schutte") to "short commuter" from "business" on April 9, 2003. Willsey also expressed concerns about whether one of Kocher's vehicles that was receiving a farm rate was actually used for farm purposes and also about Kocher's collision coverage on a motorcycle that was not entitled to receive collision coverage because it had previously been salvaged (and subsequently repaired). Kocher Dep. Ex. 20.[9] Wilsey concluded her email with these words: "I am discouraged with what I see. If [Kocher] does not handle her own account correctly, what do we have with all her clients?" Kocher Dep. Ex. 20. Kocher's car had been rated incorrectly in the past and had been changed by Renee Ihrke ("Ihrke"), an underwriter, to the correct code in January 2002. Kocher Dep. at 137, Kocher Dep. Exs. 19-20. At that time, Ihrke explained to Kocher that her personal vehicle needed to be coded as "business." Kocker Dep. Ex. 19. Kocher understood that, if she changed the code on her vehicle from the business rating, it would be improper. Kocher Dep. at 140, 144.

Toops approached Kocher about the problem with her vehicle ratings on October 17, 2003. Kocher Dep. at 146; Toops Aff., ¶ 6. Kocher told Toops that the motorcycle had not been salvaged and that her husband's truck was classified as farming because it was primarily used for farming. Kocher claims that Toops told her there was not a problem with these two vehicles.

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[9] Kocher testified that she told Toops the motorcycle had not been salvaged. Kocher Dep. at 153.

Kocher Dep. at 144-45, 153. Kocher also claimed that after her January 2002 conversation with Ihrke, she had never asked a CSR to change her vehicle code from "business." With respect to the April 9, 2003, change, Kocher stated that she did not always go through to check what the CSRs had entered with respect to vehicle codes, implying that Schutte "could have made a mistake" in miscoding her vehicle. Kocher Dep. at 138, 140-41;[10] Toops Aff. ¶ 8. When Toops asked Schutte why she changed the vehicle code and Schutte explained that Kocher had instructed her to do so. Toops Aff., ¶ 7. Ultimately, Toops came to believe Schutte's account over Kocher's. Toops Aff. ¶ 8.

After thse discussions between Toops and Kocher, Kocher understood that Toops was going to correct the rates for her vehicles because, Kocher maintains, she could not make the changes herself. Kocher Dep. at 147.[11] Toops, however, remembers, and her contemporaneous notes reflect, that she asked Kocher to take care of changing the code herself. Toops Aff. ¶¶ 6, 9. Toops testified that, after Kocher failed to correct her vehicle codes for several days, Toops met with her again on October 21, 2003, to remind her again to change the codes. Toops Aff. ¶ 6.

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[10] Although Kocher testified at one point in her deposition that she never instructed a CSR to change the code on her personal automobile to "short commuter" from "business" (Kocher Dep. at 138), her answers with respect to the April 9, 2003, change seem evasive to us . For example, in response to the question: "But is it your testimony that you didn't tell Rita to change your code from 133 to 131?", Kocher responded: "I would not jeopardize my job." Kocher Dep. at 140. Kocher gives similarly vague responses to a number of questions and never specifically indicates whether she knew her vehicle was improperly coded or whether she had talked to Schutte about the vehicle codes. Since the court does not weigh credibility on summary judgment, we simply note the inconclusive responses by Kocher.

[11] During her deposition, Kocher repeatedly refused to answer clear, direct questions about whether she could have asked a CSR to change the code on her personal vehicle for her. Kocher Dep. at 147-152.

Because of the problems with Kocher's vehicle codes, Toops reviewed all of the codes on personal vehicles of all the agents she supervised to make sure they were correct. Toops Aff. ¶ 10. Toops discovered one other agent, Schwering, a male, who had his car rated incorrectly. Toops Aff. ¶ 10. Kocher also independently investigated the codes on the other agents' vehicles and informed Toops that Schwering's account was not coded correctly. Kocher Dep. at 153. Toops agreed with Kocher that Schwering's vehicle was not coded properly and informed Kocher that she (Toops) would take care of the problem. Kocher Dep. pp. 153-54. Toops testified that she asked Schwering to change the codes, which he did without further reminder. Toops Aff. ¶ 11. Toops also expressed that, to her knowledge, this was the first time Schwering's vehicle been incorrectly coded, and that he had not been informed previously of the proper code to use, as Kocher had. Toops Aff. ¶ 11.

J. *Kocher's October 2003 Termination.*

Toops testified that Kocher's improperly coded vehicle precipitated a broader review of Kocher's job performance after which Toops decided to terminate her employment based, she claims, on Kocher's continued pattern of ethical and professionalism issues. Toops Aff. ¶ 12; Jongleux Dep. at 10. Prior to meeting with Kocher to deliver the termination message, Toops prepared an outline of Kocher's performance problems and presented it to Ferguson and Jongleux who, based on their review, concurred in Toops's decision to terminate Kocher. Toops Dep. pp. 95-96; Ferguson Dep. pp. 57-60, 76; Ferguson Dep. Ex. 1; Jongleux Dep. pp. 9-11. Toops maintains that all but one of the items listed on this document factored into the decision to terminate Kocher. Toops Dep. at 74-75. Among the items listed, Toops cited the August 2001 meeting, held in response to Kocher's complaints about the unfair directing of call-in business to male agents. Ferguson Dep. Ex. 1. Patty Poehler ("Poehler"), Senior Vice President of

Marketing, who had also been made aware of the decision to terminate Kocher, also supported the termination decision. Poehler Dep. pp. 38-39.

On October 24, 2003, Toops met with Kocher at the Batesville office to inform her that her contract with Farm Bureau was being terminated. Kocher Dep. 159; Kocher Dep. Ex. 23. The effective date of her termination, under the 30-day provision in the agent's agreement, was November 22, 2003. Kocher Dep. Exs. 23-24. According to Kocher, the reasons given by Toops for her termination were that her cars were not rated properly and "other things." Kocher Dep. pp. 160-61. When Kocher asked what "other things" were included as reasons for her termination, Toops allegedly responded, "If you think I forgot about the conversation with [Ferguson], I didn't." Kocher Dep. 160. Kocher believed Toops' statement referred to her April 2003 conversation with Ferguson in which she had criticized Toops's performance.

Kocher contends that, after informing her of her termination of employment from with Farm Bureau, instead of terminating the other agent(s) who also had improperly coded vehicles, Toops simply reminded them about the need to assign proper vehicles codes. Kocher Dep. Ex. 21.

Toops replaced Kocher with another female, Kathy Hertel. Kocher Dep. at 81; Toops Dep. pp. 8-9.

K. *Allegedly Defamatory Post-Termination Statements.*

In its EEOC position statement, Farm Bureau asserted that it had terminated Kocher for "longstanding issues with professionalism" for which Kocher had never been formally disciplined. Pl.'s Ex. D. Among the issues Farm Bureau listed as providing justification for Kocher's termination was her alleged "extremely unprofessional" behavior at a baseball game in Cincinnati, the details of which were recounted in a memo dated June 19, 2003, authored by

Toops. In that memo, Kocher contends Toops falsely asserts that Kocher was "drunk, making a spectacle of herself to surrounding fans," and that Kocher "commenced fighting with another [fan], almost to the point of a physical fight." Kocher Dep. at 129-131; Toops Dep. Ex. 2. Farm Bureau cited this "unprofessional behavior at company-sponsored events" in its answers to Plaintiff's Interrogatories as a basis for Plaintiff's termination. Pl. Ex. C. It is undisputed, however, that this incident could not have factored into Toops's decision to terminate Kocher because Toops did not learn of Kocher's alleged misbehavior until after she had already terminated Kocher. Toops Dep. at 36-37.

Toops testified that she has not discussed the reasons for Kocher's termination with clients or other agents. Toops Dep. pp. 42-43. Kocher admits that she has no proof that any manager, including Toops, said anything false or malicious about her regarding her termination or events leading up to it. Kocher Dep. at 225.

Kocher does note that Stephanie Schmitt ("Schmitt"), Executive Assistant, Marketing, in response to an incident after Kocher's termination, authored an email to several Farm Bureau managers stating, falsely according to Kocher, that she believed Kocher had convinced a former client to travel to Indianapolis and go on a "rampage" at Farm Bureau's offices on her behalf. Pl.'s Ex. E; Pl. Aff. ¶ 3.

Legal Analysis

I. *Summary Judgment Standard*

On a motion for summary judgment, the burden rests on the moving party, Farm Bureau in this case, to demonstrate "that there is an absence of evidence to support the nonmoving party's case." Celotex Corp. v. Catrett, 477 U.S. 317, 325 (1986). After the moving party demonstrates the absence of a genuine issue for trial, the responsibility shifts to the nonmovant

to "go beyond the pleadings" and point to evidence of a genuine factual dispute precluding summary judgment. Id. at 322-23. "If the non-movant does not come forward with evidence that would reasonably permit the finder of fact to find in her favor on a material question, then the court must enter summary judgment against her." Waldridge v. American Hoechst Corp., 24 F.3d 918, 920 (7th Cir. 1994), citing Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 585-87 (1986); Celotex, 477 U.S. at 322-24; Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249-52. (1986).

Summary judgment is not a substitute for a trial on the merits, nor is it a vehicle for resolving factual disputes. Waldridge, 24 F.3d at 290. Therefore, in considering a motion for summary judgment, we draw all reasonable inferences in favor of the nonmovant. Venters v. City of Delphi, 123 F.3d 956, 962 (7th Cir. 1997). If genuine doubts remain, and a reasonable fact-finder could find for the party opposing the motion, summary judgment is inappropriate. See Shields Enters., Inc. v. First Chicago Corp., 975 F.2d 1290, 1294 (7th Cir. 1992); Wolf v. City of Fitchburg, 870 F.2d 1327, 1330 (7th Cir. 1989). But if it is clear that a plaintiff will be unable to satisfy the legal requirements necessary to establish his case, summary judgment is not only appropriate, but mandated. See Celotex, 477 U.S. at 322; Waldridge, 24 F.3d at 920. A plaintiff's self-serving statements, unsupported by specific concrete facts reflected in the record, cannot preclude summary judgment. Albiero v. City of Kankakee, 246 F.3d 927, 933 (7th Cir. 2001); Slowiak v. Land O'Lakes, Inc., 987 F.2d 1293, 1295 (7th Cir. 1993).

We note that the Seventh Circuit has determined that the summary judgment standard is to be applied with special scrutiny to employment discrimination cases because intent and credibility are such critical issues. See Senner v. Northcentral Technical College, 113 F.3d 750, 757 (7th Cir. 1997); Michas v. Health Cost Controls of Ill., Inc., 209 F.3d 687, 692 (7th Cir.

2000). To that end, we have carefully reviewed affidavits and depositions for circumstantial proof which, if believed, would show discrimination. However, it is equally clear that employment discrimination cases are not governed by a separate set of rules and remain amenable to disposition by summary judgment so long as there is no *genuine* dispute as to the material facts. Giannopoulos v. Brach & Brock Confections, Inc., 109 F.3d 406, 410 (7th Cir. 1997).

II. *Kocher's Sex Discrimination Claim.*

Kocher alleges that Farm Bureau suspended, and subsequently terminated her employment because of her sex, which allegation Farm Bureau denies. A plaintiff may prove intentional employment discrimination under Title VII by using either the (A) "direct method" or (B) "indirect method." Rhodes v. Illinois Dept. of Transp., 359 F.3d 498, 504 (7th Cir. 2004) (citation omitted). We find that Kocher has failed to produce sufficient evidence to satisfy the direct method; thus, analysis of her claim must proceed under the indirect method.

Kocher's proof is adduced under the indirect method through the burden-shifting process outlined in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973); Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981); St. Mary's Honor Center v. Hicks, 509 U.S. 502 (1993); and Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133 (2000). There are three primary steps in the burden-shifting model: (1) Kocher must first establish a prima facie case of discrimination. (2) If she does, she raises a presumption of discrimination which Farm Bureau must rebut by producing evidence of a legitimate nondiscriminatory explanation for its adverse employment action. (3) If Farm Bureau meets that burden, Kocher must show, through admissible evidence, that Farm Bureau's explanation is pretextual. See Freeman v. Madison Metropolitan School Dist., 231 F.3d 374, (7th Cir.2000); Stewart v. Henderson, 207 F.3d 374,

376 (7th Cir. 2000).

To establish a prima facie case of sex discrimination, Kocher must present evidence showing that: (1) she is a member of a protected class; (2) she was performing her job satisfactorily; (3) she suffered an adverse employment action; and (4) at least one similarly-situated employee, not in her protected class, was treated more favorably. Gordon v. United Airlines, Inc., 246 F.3d 878, 885-886 (7th Cir. 2001); Wallace v. SMC Pneumatics, Inc., 103 F.3d 1394, 1398 (7th Cir. 1997).

Kocher's case founders at the second and fourth levels of the prima facie stage in that she has not provided proof of her own satisfactory job performance and the more favorable treatment of another similarly situated employee. It is undisputed that Kocher had a pattern of being late to meetings, failing to attend certain scheduled meetings, periodically violating the dress code, failing to follow certain office procedures, failing on occasion to timely respond to her manager's requests, twice having her personal vehicle miscoded, and repeatedly receiving verbal warnings about her failures to comply with Farm Bureau's professionalism standards for agents. Although there is no dispute that these incidents occurred and that Farm Bureau's managers believed Kocher had committed these derelictions, Kocher denies that she was personally responsible for many, if not all, of the incidents for which she was disciplined.[12] Given this

[12] For example, with respect to the miscoded vehicle in April 2003, Kocher contends that she never asked a CSR (presumably including Schutte) to change the codes but suspects that Schutte "could have made a mistake;" Schutte, however, reported to Toops that Kocher specifically told her to change the code. It is undisputed that Toops ultimately believed Schutte. There are similar she-said/she-said disputes regarding the "business call-in" incident and the "Kinker" incident and, in both of these cases, Farm Bureau managers did not believe Kocher's version of events. Regardless of which employees were ultimately telling the truth about these incidents, there is no evidence in the record to suggest that Kocher's managers' (almost all female) decisions to believe another female's account of the circumstances rather than Kocher's

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undisputed list of performance issues, Kocher cannot demonstrate that she was performing her job satisfactorily[13] nor has she identifed any similarly-situated male employee(s) who received more favorable treatment.[14]

Moreover, Kocher has not met the higher evidentiary burdens required for maintaining a reverse discrimination case. See Ineichen v. Ameritech, 410 F.3d 956, 959 n.1 (7th Cir. 2005) ("reverse discrimination claims arise where the decisionmakers are of the same sex or race as the alleged victim"). Because Kocher is a woman and was fired by a woman, and then replaced by a

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[12](...continued)
had anything at all to do with Kocher's sex.

[13] Kocher argues that despite the long list of performance issues for which Farm Bureau believed she was responsible, she was nonetheless performing her job satisfactorily because she "was never formally disciplined or written up during her entire time with Defendant." Pl.'s Resp. Brief at 14. However, Kocher was repeatedly *verbally* warned about her conduct, including an incident when Toops warned Kocher that she either had to start following office procedures like everyone else or she needed to resign. Thus, it is well-established in the record that Farm Bureau had not been satisfied with several aspects of Kocher's job performance.

[14] Kocher attempts to identify male agents who committed one of the same offenses as Kocher. However, the record discloses that none of the identified male agents had engaged in the same conduct as Kocher. For example, Kocher notes that in October 2003, Schwering was discovered to have had his personal vehicle miscoded. However, unlike Kocher, Schwering had no prior incident of vehicle miscoding nor had he been previously explicitly instructed on the proper coding for his vehicle nor did Schwering have the long list of additional performance issues that Kocher did. In addition, there was evidence suggesting that Kocher had intentionally instructed a CSR to miscode her vehicle on the second occasion. In light of these facts, Schwering cannot be considered a "similarly-situated" male agent. Kocher also argues that Toops treated her differently than the male agents in several ways that do not amount to an adverse employment action (e.g. being late for meetings and criticizing her dress, attendance, and punctuality). In any event, this discriminatory conduct is described by vague and conclusory allegations and Kocher never specifically identifies any male agents who were treated better than she. Moreover, none of this allegedly discriminatory conduct rises to the level of an adverse employment action.

woman,[15] her claim is one of reverse discrimination requiring Kocher to show "'background circumstances' sufficient to demonstrate that the particular employer has 'reason or inclination to discriminate invidiously against [women] or evidence that 'there is something 'fishy' about the facts at hand.'" Id. (quoting Phelan v. City of Chicago, 347 F.3d 679, 684 (7th Cir. 2003)). Kocher has not presented any such evidence. Assuming Kocher had presented a prima facie case of discrimination, Farm Bureau has provided legitimate nondiscriminatory explanations for its actions which Kocher has not refuted.[16]

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[15] It is telling the number of women Kocher blames for discriminating against her based on her sex. In fact, all the allegedly actionable conduct that Kocher has identified was committed against her by women. As best we can discern, Kocher implicates at least six other women for allegedly discriminating, retaliating, and/or defaming her. Kocher has blamed Schutte (and vice versa) for the "call in business" incident and the vehicle miscoding incident. Kocher has blamed Toops (and vice versa) for the "Kinker" incident and the vehicle miscoding incident. Following the "Kinker" incident, Poehler suggested that the managers' emails be saved for later as evidence (or, as Kocher describes it, to create a "paper trail" in order to terminate her). Wilsey discovered and reported the coding problems on Kocher's vehicles. Jongleaux consulted with Toops and agreed with the decision to terminate Kocher. Finally, Schmitt authored an allegedly defamatory email about Kocher after her termination. The only male involved in any of these activities is Ferguson, but Kocher includes no allegation that he discriminated against or defamed her in any way.

[16] Kocher argues that a jury could speculate about various aspects of this case and decide that Farm Bureau's stated reasons for the termination are merely pretextual. However, the opportunity to argue pretext does not allow the plaintiff simply to second-guess the employer's decision. As the Seventh Circuit recently explained: "A pretext, to repeat, is a deliberate falsehood. . . . The only concern in reviewing an employer's reasons for termination is the honesty of the employer's beliefs." Forrester v. Rauland-Borg Corp., 2006 WL 1767760, *3 (7th Cir. June 29, 2006) (internal quotation and citations omitted). Kocher has not presented any evidence that Farm Bureau's stated reasons for terminating her were not honestly held. Instead, in her brief, Kocher tries to create factual disputes about the identity of the decisionmaker who decided to fire her and the reasons for doing so. Highlighting minor factual disputes, however, does not impugn Farm Bureau's stated reasons. The undisputed testimony is that Toops made the decision to terminate Kocher and that her decision was finalized after consultation with Ferguson and Jongleux at a meeting they all three attended. Although there *may* be some disagreement in the record about what role each of these three individuals played in reaching the decision and whether anyone else was present at the meeting, such minor factual variations in

(continued...)

For these reasons, we conclude Kocher has failed to assert a valid claim for sex discrimination.

III. *Kocher's Retaliation Claim.*

Kocher's next claim is that Farm Bureau retaliated against her because she complained about sex discrimination by her manager, Toops, which is a protected activity under Title VII. Farm Bureau maintains that Kocher cannot establish that she engaged in a protected activity, let alone that she was retaliated against.

Again, a plaintiff may prove retaliation under Title VII by using either the (A) "direct method" or (B) "indirect method." Under the direct method, she must show that: (1) she engaged in a statutorily protected activity; (2) she suffered an adverse employment action; and (3) a causal connection exists between the two. Moser v. Indiana Department of Corrections, 406 F.3d 895, 903 (7th Cir. 2005). In the alternative, a plaintiff may indirectly establish a prima facie case of retaliation by showing that: (1) she engaged in a statutorily protected activity; (2) she met the employer's legitimate expectations; (3) she suffered an adverse employment action; and (4) she was treated less favorably than similarly situated employees who did not engage in statutorily protected activity. Id. Kocher has not demonstrated she was retaliated against under either method of proof.

A. *Direct Method*.

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[16](...continued)
otherwise consistent testimony do not preclude summary judgment. Similarly, Farm Bureau's explanation for the termination has always been its long-standing professional and ethical concerns about Kocher's job performance. Summary judgment is not precluded by the mere fact that some of Defendant's disclosures or official statements included, within a larger list of performance issues, a particular instance (i.e. unprofessional conduct at a Cincinnati Reds game) which was not actually a basis for the termination.

Kocher's retaliation claim cannot satisfy the first and third requirements of the direct method of proof. First, Kocher has not established that she engaged in a statutorily protected activity. The only person Kocher alleges she spoke to about her claims of sex discrimination was Koopman and, at her deposition, Kocher described her conversations with Koopman only in the vaguest terms, never explicitly stating that she complained of sex discrimination.[17] Koopman, on the other hand, testified that she understood Kocher to be making her complaint as an "agency spokesperson" about problems Kocher, along with the other agents, was having with Toops. Koopman's contemporaneous notes substantiate her recollection of the conversation. To the extent there is a factual dispute between the testimony of these two women, it is due solely to the failure of Kocher to explicitly state, instead of merely implying, that she complained of sex discrimination to Koopman. Accordingly, Kocher has not established that she ever engaged in the statutorily protected activity of complaining about sex discrimination.

Assuming Kocher engaged in such protected activity, there is no causal link between this activity and her termination. "The critical issue here . . . is whether the person who made the decision to terminate [her] employment was aware of the discrimination allegations at the time, because absent such knowledge [a plaintiff] lacks a causal link between the termination and the complaint of discrimination." Maarouf v. Walker Mfg. Co., Div. of Tenneco Automotive, Inc., 210 F.3d 750, 755 (7th Cir. 2000) (citing Dey v. Colt Construction & Development Co., 28 F.3d 1446, 1458 (7th Cir. 1994)). There is no evidence that the individuals responsible for

[17] For example, in response to the question: "Do you have any specific recollection of' things you told Teresa Koopman?", Kocher responded: "I told Teresa Koopman that [Toops] treated me differently." Kocher Dep. p. 115. However, it is not exactly clear from the deposition transcript which episodes of alleged mistreatment by Toops were discussed in these conversations, although it appears that Kocher told Koopman about Toops being late for meetings with Kocher. Kocker Dep. 113-14.

terminating Kocher (Toops and perhaps Ferguson and/or Jongleaux) were aware that she had complained of sex discrimination. Kocher did not testify that she told either Toops or Ferguson that she was concerned about sex discrimination and there is no suggestion in the notes of Toops or Ferguson that either manager understood Kocher to be complaining of sex discrimination. Nor is there any evidence that Koopman conveyed to Toops and/or Ferguson that Kocher had complained of sex discrimination; (indeed, as we noted above, Koopman testified she did not understand Kocher to have made such complaints). Accordingly, Kocher has failed to demonstrate that Farm Bureau managers who decided to terminate her employment were aware that she had made sex discrimination claims.

Kocher attempts, unpersuasively, to argue there is a temporal link between Toops's desire to terminate Kocher and Kocher's alleged complaints of sex discrimination which occurred six months prior. However, the Seventh Circuit has held that "six months is too long to establish a causal link without more." Franzoni v. Hartmarx Corp., 300 F.3d 767, 773 (7th Cir. 2002) (citing Horwitz v. Bd. of Ed. of Avoca Sch. Dist. No. 37, 260 F.3d 602, 612 (7th Cir. 2001)). Moreover, the record clearly indicates that Toops wanted to fire Kocher after the Kinker incident but was informed by Jongleaux that there was not at that point a basis for termination. At this same time, Poehler was trying to create a "paper trail" about the Kinker incident (allegedly for justification for terminating Kocher). These events all occurred shortly *before* Ferguson and Toops were informed about Kocher's conversations with Koopman. Thus, the record clearly reveals that Farm Bureau management had decided to fire Kocher prior to Kocher's engaging in any protected activity.

For these reasons, Kocher's retaliation claim fails under the direct method of proof.

B. *Indirect Method.*

Kocher's retaliation claim when analyzed under the indirect, burden-shifting model fails for the same reasons her indirect sex discrimination claim failed. Specifically, Kocher cannot demonstrate that she was performing her job satisfactorily nor can she identify any similarly-situated male employees who were treated more favorably. In addition, Farm Bureau has presented legitimate, non-retaliatory reasons for its decision to terminate Kocher. See Section II, supra.

IV. *Kocher's Defamation Claims.*

In the continuing evolution of her defamation claim, Kocher ultimately asserts she was defamed when: (1) in its EEOC position statement prepared by Jongleaux, Farm Bureau listed as a justification for Kocher's termination her alleged "extremely unprofessional" behavior at a baseball game in Cincinnati, and (2) when Stephanie Schmitt ("Schmitt") sent an intra-office email recounting an interaction with a former client of Kocher's whom Schmitt believed Kocher had convinced to travel to Indianapolis to stage a "rampage" at Farm Bureau's offices on her behalf. Accepting them as true, neither of these statements supports a defamation claim against Farm Bureau.

Under Indiana law, to establish a prima facie case of defamation, the following elements must be proved: (1) communication with defamatory imputation; (2) malice; (3) publication; and (4) damages. Lovings v. Thomas, 805 N.E.2d 442, 447 (Ind. Ct. App. 2004). Kocher maintains that the statements in question were defamatory *per se*. A communication is considered defamatory *per se* if it imputes: "(1) criminal conduct; (2) a loathsome disease; (3) misconduct in a person's trade, profession, office, or occupation; or (4) sexual misconduct," and damages are presumed if the communication is defamatory *per se*, even without proof of actual harm to the plaintiff's reputation. Id. Whether a communication is defamatory is generally a question of law

for the court to decide. Id.

Not all defamatory statements are actionable because of the qualified privilege which:

> applies to communications made in good faith on any subject matter in which the party making the communication has an interest or in reference to which he has a duty, either public or private, either legal, moral, or social, if made to a person having a corresponding interest or duty.

Schrader v. Eli Lilly and Co., 639 N.E.2d 258, 262 (Ind. 1994). Intra-company communications regarding the fitness of an employee (or more aptly an ex-employee) are protected by a qualified privilege to accommodate the important role of free and open intra-company communications and legitimate human resource management needs. Id. "Absent a factual dispute, whether a statement is protected by a qualified privilege is a question of law." Id.

Kocher has presented no evidence of malice on the part of either Jongleaux or Schmitt when the statements in question were made and, although the EEOC statement proved erroneous as a basis for the termination decision,[18] there is no evidence that Jongleaux knew it to be so when she prepared the EEOC statement. Assuming *arguendo* that Farm Bureau's agents' statements were defamatory, they are protected by a qualified privilege.

Conclusion

For the reasons set forth above, Plaintiff has failed to assert any actionable claim for sex discrimination, retaliation, or defamation. Accordingly, Defendant's Motion for Summary Judgment is GRANTED. IT IS SO ORDERED.

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[18] Toops testified that Kocher's conduct at the Cincinnati Reds game did not factor into her decision to terminate Kocher because Toops only learned about the incident after Kocher had already been terminated.

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