

NOT INTENDED FOR PUBLICATION IN PRINT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

MARLA A. KAYS,)	
)	
Plaintiff,)	
vs.)	NO. 1:03-cv-00735-SEB-VSS
)	
PENSKE LOGISTICS, INC.,)	
PENSKE LOGISTICS, LLC,)	
PENSKE TRUCK LEASING)	
CORPORATION,)	
PENSKE TRUCK LEASING, L.P.,)	
)	
Defendants.)	

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION**

MARLA A. KAYS,
Plaintiff,

vs.

**PENSKE LOGISTICS, INC., PENSKE
LOGISTICS, LLC, PENSKE TRUCK
LEASING CORPORATION, PENSKE
TRUCK LEASING, L.P.,**
Defendant.

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) **1:03-cv-735-SEB-VSS**
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ENTRY ON DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

This case comes before us on the Motion for Summary Judgment filed by the Defendants, Penske Logistics, Inc., Penske Logistics, LLC, Penske Truck Leasing Corporation and Penske Truck Leasing, L.P. (hereinafter referred to, collectively, as "Penske").¹ For the reasons expressed in this entry, we find the motion well taken and grant summary judgment in favor of the Defendants.

¹Defendants claim that Penske Logistics, LLC is the only appropriately named Defendant in this employment related lawsuit because it was Plaintiff's employer and the other three named Defendants are parent entities and a predecessor. Plaintiff argues that the Defendants refer to all of the various entities generically as "Penske" and "must be held liable for creating any confusion." We are aware of no liability that attaches to a sibling or parent corporation as a result of an employer referring to itself, by name, in a shorthand form. More importantly, the relationship between the Defendants has absolutely no bearing on the substantive issues in this case nor our decision with regard to whether or not Plaintiff's employer violated Title VII of the Civil Rights Act of 1964. Consequently, in this order we refer to Plaintiff's employer, and collectively all four Defendants, as Penske.

I. SUMMARY JUDGMENT STANDARD

Summary judgment is appropriate where the record shows that there is “no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” FED. R. CIV. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). Disputes concerning material facts are genuine where the evidence is such that a reasonable jury could return a verdict for the non-moving party. *Anderson v. Liberty Lobby*, 477 U.S. 242, 248 (1986). In deciding whether genuine issues of material fact exist, the court construes all facts in the light most favorable to the non-moving party and draws all reasonable inferences in favor of the non-moving party. *See id.* at 255. However, neither the “mere existence of *some* alleged factual dispute between the parties,” *Anderson*, 477 U.S. at 247, nor the existence of some “metaphysical doubt as to the material facts,” *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986), will defeat a motion for summary judgment. *Michas v. Health Cost Controls of Illinois, Inc.*, 209 F.3d 687, 692 (7th Cir. 2000).

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 it believes demonstrate the absence of a genuine issue of material fact.” *Celotex*, 477 U.S. at 323. The party seeking summary judgment on a claim on which the non-moving party bears the burden of proof at trial may discharge its burden by showing an absence of evidence to support the non-moving party’s case. *Id.* at 325.

Summary judgment is not a substitute for a trial on the merits, nor is it a vehicle for

resolving factual disputes. *Waldrige v. American Hoechst Corp.*, 24 F.3d 918, 920 (7th Cir.1994). Therefore, after drawing all reasonable inferences from the facts in favor of the non-movant, if genuine doubts remain and a reasonable fact-finder could find for the party opposing the motion, summary judgment is inappropriate. *See Shields Enterprises., 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 her case, summary judgment is not only appropriate, but mandated. *See Celotex*, 477 U.S. at 322; *Ziliak v. AstraZeneca LP*, 324 F.3d 518, 520 (7th Cir. 2003).

II. FACTUAL BACKGROUND

Consistent with the requirement that we view the facts in a light most favorable to the non-moving Plaintiff, we have drawn them primarily from Plaintiff's affidavits and depositions.² Defendants affidavits and depositions have been used only so far as necessary to fill any lacunae in Plaintiff's narrative. Finally, this Court has ignored those portions of affidavits that run contrary to the requirements that "[s]upporting and opposing affidavits shall be made on

²We defer to Plaintiff's rendition of the facts despite Plaintiff's failure to comply with our local rule requirement that it specifically include a section labeled "Statement of Material Facts in Dispute" which "responds to the movant's asserted material facts by identifying the potentially determinative facts and factual disputes which the nonmoving party contends demonstrate that there is a dispute of fact precluding summary judgment." S.D. Ind. Local Rule 56.1(b). Without that section in the brief or any real effort to point out the material conflicts in the evidence, it is difficult for us to sort through and determine the material facts. This is not the first time counsel has risked having us simply adopt the facts as asserted by the moving party, which is the prescribed outcome in subsection (e) of the local rule when a responding party fails to follow subpart (b). Counsel is forewarned that in the future we will not be as reticent to follow the rule in its most literal interpretation.

personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matter stated therein.” FED. R. CIV. P. 56(e).

In March, 1995, Marla Kays began work at ERX Logistics (“ERX”) as a transportation clerk at the Indianapolis Local Distribution Center (“LDC”) and was eventually promoted to the position of warehouse leader. In January 1999, Penske, a company providing transportation and logistics services to customers throughout the United States, purchased ERX and took over its accounts. Subsequently, Penske promoted Kays to manager of the Indianapolis LDC, making her responsible for the daily supervision of all employees and the daily operations of the LDC facility.

The Penske LDC in Indianapolis services Whirlpool appliance accounts. It receives home appliances from a regional center in Ohio and distributes these products to retailers and private homes. Penske employs two categories of drivers to transport appliances between these three points. First, line haul drivers are responsible for supplying the Indianapolis LDC with appliances from Penske’s regional distribution center in Columbus, Ohio. Two such drivers, who worked evenings, supplied the Indianapolis LDC during the period of Kays’s employment. Second, regular daytime drivers are primarily responsible for delivering and installing appliances. The Indianapolis LDC had four such drivers. Both categories of drivers are subject to the Federal Motor Carrier Safety Regulations issued by the U.S. Department of Transportation, which limits the number of hours per day and the number of days per week drivers may legally

operate their vehicles.³ 49 C.F.R. § 395.3. As warehouse leader, Kays gave load assignments to the regular daytime drivers and monitored their hours of service. The line haul drivers reported to Mike Varkonda, a Penske manager located at the regional distribution center in Ohio.

For the most part, in order to monitor drivers' hours of service, Penske uses the XATA system, which it inherited from ERX. XATA is a monitoring system that tracks and records shift activity by means of a computer key that the driver inserts into his or her truck at the beginning of each shift. The key records when the truck is in motion and when it is stopped. At the end of each shift, the driver transfers the XATA key to a central computer in the LDC office and downloads the shift data. These data include the driver's hours of service, on-duty time, driving time, and available hours of service remaining for the following day. The system also records any hours of service violations that may have occurred during the shift. On occasion driver's would forget to use the key properly or to manually enter certain information, requiring that Kays edit the computer records to correct driver error and add information which drivers had neglected to enter during their shifts. Kays received no formal XATA training, relying instead on the XATA user's manual and advice of other location managers using the system. Complicating matters, some drivers used paper time logs rather than the XATA computer. However, these drivers were still required to submit their logs at the end of each shift so that hours of service could be tabulated. Without these logs, Kays was unable to compute the remaining hours of service of drivers who, for whatever reason, did not use the XATA system.

³For example, during the relevant time period the regulation limited drivers to no more than 10 hours of driving following eight consecutive hours off duty. 49 C.F.R. 395.3(a)(1). Also, drivers could not drive after being on duty (driving or not driving) for 70 hours in any given 8 day period. 49 C.F.R. 395.3(b)(2).

In 2001, the Regional Distribution Center (RDC) in Ohio⁴ initiated a change in personnel management policy, whereby the evening line haul drivers who delivered appliances from RDC to the various LDC facilities would take direction and receive general supervision from the various LDC managers, including Kays in Indianapolis. The line haul drivers still reported to the RDC regarding their dispatch assignments.

In March 2001, driver Mark Duff complained to line haul driver James Terrell about the condition of the vehicle they shared. During the exchange, Duff referred to Terrell, who is African American, as “Buckwheat.” Terrell, in turn, threatened to “beat Duff’s ass.” On March 9, Kays met with both Duff and Terrell to review company policies and procedures in the wake of the incident. She admonished them to come to her in the future if issues arise between them and not attempt to settle them on their own. Later that month, Terrell complained to Kays that other drivers were drinking on the job. When Kays met with the drivers regarding this issue, she revealed to them that Terrell had complained. Subsequently, Terrell was rude and short-tempered in his interactions with Kays and the other drivers. At one point, Terrell accused Kays of being a racist who was singling him out for harassment.

On August 13, 2001, Terrell filed a charge of discrimination against Penske with the Equal Employment Opportunity Commission (EEOC), alleging that Kays had created a racially hostile work environment. During its internal investigation, Penske discovered that Kays had instructed the drivers under her supervision not to talk to Terrell unless it was “work related”. It also learned that she used unnecessary and vulgar language toward Terrell after he filed his

⁴The RDC in Ohio was actually a Whirlpool warehouse facility, but Penske line haul drivers and a manager worked out of that location.

charge with the EEOC, and, at a later point, became upset with Terrell and told him, “You’re next.” Kays admitted this behavior and signed the written mismanagement warning issued to her by Penske, which set forth her inappropriate conduct. Kays cooperated with Penske’s remedial plan, but her relationship with Terrell remained tense.

In September 2001, Kays complained to area manager Jim Christensen⁵ and Mike Varkonda that Terrell refused to take direction from her because of her sex. Varkonda told Terrell on several occasions that he still must report to Kays. Several Penske management officials began to work with Kays to resolve issues relating to Terrell. Several e-mail exchanges occurred among these officials and Kays in an attempt to manage Terrell’s conduct subsequent to his EEOC complaint. As a result of one of these exchanges, Varkonda agreed to attend a meeting via telephone during which Kays gave Terrell a verbal warning regarding his performance. After the meeting, Kays expressed her appreciation to Varkonda for his participation. Later, Terry Cooley, Penske’s Human Resources Manager, informed Kays that Terrell had contacted him to complain of renewed harassment by Kays. Kays thanked Cooley for alerting her, noting that she had “learned a lot from all of you on how to handle this situation.”

On March 5, 2002, Kays met with Terrell to give him a written warning regarding disciplinary problems. Louisville LDC manager Tony Mills was also present for the meeting. Terrell became angry during the meeting and announced he would not drive his route that evening. Stucky learned of Terrell’s actions through consultation with Kays, Mills, and

⁵ Kays reported to Jim Christensen until she began reporting to John Stucky after January 1, 2002.

Varkonda. He decided that Terrell's employment should be terminated due to job abandonment.

While the events surrounding Terrell's termination unfolded, two drivers and an assistant under Kays's supervision requested vacation time for the same week in March of 2002. The drivers, Robert Haynes and Allen Dryden, also wanted to take the preceding Friday (Good Friday) off as a vacation day as well. Kays wanted to grant the requests, but she was concerned that she would be unable to get drivers from other locations to cover her drivers' absence. She e-mailed Stucky for guidance, indicating that the requested time off was "March 29th thru April 5th - Sprink Break." Stuckey responded, indicating that the decision to grant or deny the request was ultimately hers. Kays decided to grant the three employees' request for a week's vacation, but there is a dispute as to whether she also granted the drivers request to be off on March 29, Good Friday.⁶

During a driver meeting on March 14, Kays announced that she had granted vacation time for three employees and that the LDC would be short-handed the week following Easter. On March 21, Kays e-mailed Stucky requesting an additional driver to help with the high volume at Indianapolis. He did not provide one. The day before Good Friday Kays called Haynes and Dryden to give them their route assignments for the next day, but neither driver returned her call. The two drivers did not show up to work on Good Friday.

Mills came to Indianapolis on April 5 (the Friday after Good Friday) to assist Kays in

⁶ For reasons explained below, this disagreement does not rise to the level of a dispute of material fact for the purposes of the instant motion for summary judgment.

interviewing applicants for a new driver's position. While he was there, Kays told Mills that Haynes and Dryden had not worked their scheduled shifts on the previous Friday. Mills consulted with Cooley and Stucky regarding the absences of Haynes and Dryden, and Stucky authorized Kays to terminate their employment upon their return. Also during this week, driver James Russo called the office to state that he was in danger of violating his hours of service limit. Kays did not know whether this was in fact the case because Russo was using paper logs rather than the XATA system, and he had not recorded his hours in the office. Responding to Russo's statement that he was running out of service hours, Kays told him to be a "team player." Russo interpreted this as pressure to violate the hours of service regulation, but in her affidavit Kays states she meant that Russo should turn in his paper logs so she could track his hours and plan accordingly. While these statements are not mutually exclusive, any inherent discrepancy in their interpretation does not rise to the level of a dispute of material fact, as explained below.

When Haynes and Dryden returned to work on April 8, Kays terminated their employment for their failure to work on March 29. When Kays presented Haynes with a box containing his personal belongings, he threw the box at her and made several disparaging and vulgar remarks, including calling her a "bitch." She then marked his termination form "not eligible for rehire."

Sometime over the next two days, Russo telephoned Stucky to inform him of the conversation during which Kays told Russo to be a "team player." Russo also complained about Kays's termination of Haynes and Dryden. Stucky requested Russo provide him with a written copy of his version of the conversation regarding his hours. Based on his examination of Russo's written statement, Stucky decided that further investigation was warranted. On April

22, Stucky told Kays that he and Dennis Hartweg, Penske's safety manager, would come to the Indianapolis LDC on April 24 to conduct an unscheduled audit of the XATA records. Kays objected to the audit, noting that it was a busy time and she was understaffed. However, Penske proceeded with the audit.

In the course of his investigation, Hartweg found numerous hours of service violations, a significant number of edits to the XATA system, a failure to perform monthly log audits, and the failure to follow up on deficiencies uncovered in an earlier safety audit. Hartweg recorded his findings and delivered them to Stucky along with copies of the XATA records he reviewed.

On the second day of the audit, Stucky interviewed the remaining regular daytime drivers regarding hours of service. Russo stated that he heard Kays discussing with her assistant a method by which hours of service violations could be edited out of the XATA system. He further stated that Kays instructed drivers to clock out and not clock back in until their trucks were fully loaded and ready for delivery. Moreover, Russo explained that while riding with Phil Garvin, a driver who had been reprimanded for hours of service violations, he heard Kays tell Garvin to finish his shift even though he was running out of legitimate hours and she would edit the XATA system. Duff stated that Kays set up driver schedules with more work than could be accomplished during the time limits prescribed by federal regulations and that Kays would get angry if the work was not completed. According to Duff, Kays instructed drivers to load their trucks fully before engaging the XATA key. He also stated that Kays told him to drive illegally and that she would correct the violations in XATA later. After the audit and interviews, Stucky and Hartweg telephoned Cooley to discuss their findings. The discussion concluded with all three managers agreeing that Kays had violated federal regulations and Penske policy and that

her employment should be terminated.

Finally, during Stucky's interviews, some of the drivers mentioned to him that Haynes had been unfairly discharged. The drivers did not contest Dryden's termination. The drivers who were present at the March 14 meeting said that Kays had approved Haynes's request for Good Friday as well. The drivers and office staff related the same information to Mills after he assumed Kays's responsibilities. Based on these circumstances, Stucky authorized Mills to rehire Haynes, subject to a probationary period, beginning May 2002, approximately one month after Kays's termination.

III. ANALYSIS

A. *Appropriate Defendant*

As we intimated in an earlier footnote, Penske Logistics, LLC, is the only proper defendant in this action. The other named companies, Penske Truck Leasing Corp. and Penske Truck Leasing Co. LP, are not proper defendants because they are not Kays's employers. There are three ways in which a company can be found to be a proper defendant in a Title VII action: (1) plaintiff can present evidence that the company maintained an employment relationship with plaintiff; (2) plaintiff can pierce the corporate veil and present evidence that the company is only an alter ego of plaintiff's employer; or (3) if plaintiff can present evidence that the company took actions to avoid liability under the discrimination laws or might have directed the discriminatory act, practice, or policy of which plaintiff complains. *Worth v. Tyler*, 276 F.3d 249, 259-60 (7th Cir. 2001).

In *Worth*, the Seventh Circuit balanced five factors of an “economic realities test” to determine whether the alleged victim of sexual harassment was an employee of the defendant company and therefore had a right to sue under Title VII: (1) the extent of employer’s control and supervision over the worker, including direction and scheduling; (2) the kind of job and skills required to carry out the work and whether those skills are learned at the workplace; (3) the responsibility for cost of the operation, *i.e.*, who pays for equipment, supplies, fees, licenses, and general maintenance; (4) the method and form of payments and benefits; and (5) the length of the job commitment or expectations. *Id.* at 263 (citing *Knight v. United Farm Bureau Mut. Ins. Co.*, 950 F.2d 377, 378-79 (7th Cir. 1991)). The most important factor is the company’s ability to control and direct the worker’s actions. *Id.*; accord, *Alexander v. Rush North Shore Medical Center*, 101 F.3d 487, 492-93 (7th Cir. 1996).

In the instant case, Penske’s payroll forms identify Kaysher as an employee of Penske Logistics, LLC. Penske Logistics, LLC maintains its own human resources department, which is “controlled by and devoted exclusively to Penske Logistics, LLC employees.” Furthermore, the drivers under Kays’s supervision are employees of Penske Logistics, LLC, and the supervisor to whom Kays reported is an employee of Penske Logistics, LLC. All three managers who participated in the decision to terminate Kays’s employment are employees of Penske Logistics, LLC. And, finally, Kays offers no evidence that the other named defendants (Penske Logistics, Inc., Penske Truck Leasing Co., L.P. or Penske Truck Leasing Corp.) had any involvement in the daily management of Kays’s employment or her discharge.

She does point to several facts that she asserts demonstrate that her pursuit of all four defendants is proper. Kays notes, for example, that: 1) all four defendant companies have the

same distinctive corporate address; 2) all four companies are represented by the same lawyers; and 4) that the defendants refer to themselves individually and collectively as “Penske.” In essence, she asserts that “[a]ny confusion in the identities of the entities has been caused by the defendants and they must be held liable for creating any confusion in plaintiff and the public.” However, Plaintiff’s or even the public’s confusion is an insufficient standard by which to establish employer-employee relationships in the Seventh Circuit. Therefore, Penske Logistics, LLC is the sole proper defendant, and the remaining defendants are entitled to summary judgment in their favor as a matter of law.

B. Discrimination

Kays has proceeded in this matter alleging that Penske terminated her employment as manager of the Indianapolis LDC on account of her sex in violation of Title VII of the Civil Rights Act of 1964. Penske argues that Kays was terminated because she compelled drivers under her supervision to drive in violation of hours of service limits mandated by the Department of Transportation, thereby placing Penske at risk of a shipping suspension.

Title VII of the Civil Rights Act of 1964 provides that it “shall be unlawful employment practice for an employer . . . to discharge any individual, or otherwise to discriminate against any individual with respect to [her] . . . sex[.]” 42 U.S.C. § 2000e-2(a)(1). A plaintiff in an action under Title VII may pursue her cause of action “under a direct or indirect method of proof.” *Butts v. Aurora Health Care*, 387 F.3d 921, 924 (7th Cir. 2004); *see also Stone v. City of Indianapolis Public Util. Div.*, 281 F.3d 640, 644 (7th Cir. 2002). Direct evidence is such that, if believed by the trier of fact, proves discriminatory conduct on the part of the employer without

reliance upon inference or presumption. *Rogers v. City of Chicago*, 320 F.3d 748, 753 (7th Cir. 2003); *Plair v. E.J. Brach & Sons, Inc.*, 105 F.3d 343, 347 (7th Cir. 1997). A plaintiff who is unable to prevail under the direct method must proceed under the indirect method, *i.e.*, the *McDonnell Douglas* burden-shifting test. *Adams v. Wal-Mart Stores, Inc.*, 324 F.3d 935, 939 (7th Cir. 2003). If the plaintiff is able to establish a *prima facie* case of discrimination, the burden of production then shifts to the defendant to show a legitimate and nondiscriminatory reason for taking the adverse action. *Farrell v. Butler University*, 421 F.3d 609, 613 (7th Cir. 2005). If the defendant is able to do so, the burden of production shifts back to the plaintiff to show that the defendant's explanation is pretextual. *Id.* "Pretext requires more than showing that the decision was mistaken, ill considered or foolish, [and] so long as [the employer] honestly believed those reasons, pretext has not been shown." *Id.* (internal quotation marks omitted). Pretext is a "dishonest explanation, a lie[,] rather than an oddity or an error." *Kulumani v. Blue Cross Blue Shield Ass'n*, 224 F.3d 681, 685 (7th Cir. 2000).

In order to establish a *prima facie* case of sex discrimination, Kays must show that (1) she is a member of a protected class; (2) she was meeting Penske's legitimate performance expectations; (3) she suffered an adverse employment action; and (4) she was treated less favorably than a similarly situated male colleague. *Farrell*, 421 F.3d at 613. Both parties concede that Kays is a member of a protected class, *i.e.*, she is female, and that she suffered an adverse employment action when she Penske terminated her employment on April 25, 2002. Thus, in order to establish a *prima facie* case of discrimination, Kays must establish that she was meeting Penske's legitimate performance expectations and that she was treated less favorably than a similarly situated male colleague.

1. Legitimate Performance Expectations

Kays points to previous audits and job performance evaluations to demonstrate that she was meeting Penske's legitimate performance expectations at the time of her termination. She neglects to mention the fact that she received a written warning for mismanagement regarding her original handling of the Terrell situation. However, this is not necessarily dispositive. Past promotions, raises, or average evaluations do not necessarily prove that Kays was meeting the legitimate expectations of Penske at the time of her discharge. *See Anderson v. Stauffer Chemical Co.*, 965 F.2d 397, 401 (1992) (previous pay raises are not indicative of whether the employee was meeting his employer's legitimate expectations because "[w]hat matters is whether [plaintiff] was meeting his employer's expectations *at the time of his discharge.*") (emphasis in original); *Karazanov v. Navistar Intern. Transp. Corp.*, 948 F.2d 332, 336 (7th Cir. 1991) (holding that the focus must rest on plaintiff's performance at the time of termination because "the fact that an individual may have been qualified in the past does not mean he is qualified at a later time.") (quoting *Grohs v. Gold Bond Bldg. Products, A Div. Of Nat. Gypsum co.*, 859 F.2d 1283, 1287 (7th Cir. 1988)). However, an employer may not rely on this doctrine to argue that anytime it fires an employee it is because the employee is not meeting its expectations; otherwise, "the requirement, then, would be meaningless." *Pilditch v. Board of Educ. Of City of Chicago*, 3 F.3d 1113, 1117 (1993). "The more relevant question is whether the employee is able to put on objective evidence that [she] is sufficiently competent to satisfy the legitimate expectations of an employer." *Id.*

Here, Kays had been reprimanded for her mismanagement of Terrell, but she had taken her supervisor's recommended steps to remedy the situation. She also maintained e-mail contact

with Stucky and Penske HR staff regarding proper steps to take regarding her continued tense working relationship with Terrell. At one point, Stucky referred to her as “high maintenance,” but this phrase does not necessarily connote that she was performing in an objectively substandard way any more than it connotes a sexually discriminatory remark. If we momentarily ignore the findings of the XATA audit and Stucky’s driver interviews, Kays adequately demonstrated that she was meeting Penske’s legitimate expectations at the time of her termination. Even so, this tenuous demonstration would be overcome by the Penske’s non-discriminatory reason for terminating her employment. However, the appropriate way for us to examine this issue is to note that there is no evidence of record to counter Penske’s explanation of what the safety audit revealed. Consequently, at the time she was fired, her performance had sunk below legitimate management expectations.

2. Less Favorable Treatment

Kays points to several male employees who received different discipline when their performance was less than satisfactory and argues that this establishes that Penske treated her less favorably on account of her sex. However, these comparisons fail because the males to whom she compares herself are not in the same position, not under the same supervisor, or not found to have committed acts of similar or worse gravity. To determine whether two employees are similarly situated, we look to all factors relevant to the position. *Radue v. Kimberly-Clark Corp.*, 219 F.3d 612, 617 (7th Cir. 2000). Kays need not show that she was identical in every respect to the employee she proffers, but she must show substantial similarity in all material respects. *Patterson v. Avery Dennison Corp.*, 281 F.3d 676, 680 (7th Cir. 2002). A lack of common supervisor precludes a showing of similarity because when “different decision-makers

are involved, two decisions are rarely similar in all respects.” *Snipes v. Illinois Dept. of Corrections*, 291 F.3d 460, 463 (7th Cir. 2002) (quoting *Radue v. Kimberly-Clark Corp.*, 219 F.3d 612 (7th Cir. 2000)).

Kays bases her *prima facie* case primarily on comparing herself to five employees: Jim Christensen, Chris Gonia, Don Hamaker, James Terrell, and Mike Varkonda. Under *Snipes* Christensen, Gonia and Hamaker are eliminated because none were supervised by Stucky. Even if the *Snipes* exception were overlooked, Hamaker’s demotion from his position as LDC manager at Columbia, Maryland, was precipitated by ongoing issues relating to inventory accuracy, timeliness of delivery, and reporting accuracy. While these problems detract significantly from efficient Penske performance, none of them rises to the level of a federal regulation violation that could result in the suspension of a shipping fleet. Furthermore, Kays provides no support for her allegation that Christiansen’s demotion was related to his performance problems. And, while Penske had performance concerns with regard to Gonia’s monitoring of driver’s hours of service at its Benton Harbor, Michigan location, the very big distinction is that neither Gonia nor any other of the supervisory employees to whom Kays compares herself were accused of actually encouraging or causing violations of the regulations.

Next, Kays compares her treatment to that of Terrell’s. Since Kays was Terrell’s supervisor, such a comparison is inapt. Managers are not similarly situated to their subordinates. *See Sarsha v. Sears, Roebuck, & Co.*, 3 F.3d 1035, 1042 (7th Cir. 1993). Furthermore, Terrell was disciplined and ultimately terminated for his misconduct. Kays concedes that Penske never declined to discipline him when she recommended it. E-mail correspondence regarding Terrell disciplinary issues shows that Penske meted out punishment to him on occasions when Kays

suggested it as well as on occasions when she did not. The comparison is not one that favors Plaintiff.

Kays also compares her treatment to that accorded Varkonda, noting that he was not punished for discrepancies detected during the XATA audit that were traceable to one or more employees under his supervision. In his deposition, Stucky explained that he believed that these were not hours of service violations but rather errant entries by a driver in training, the new driver hired to replace Terrell. In addition, there was no indication at all that Varkonda had encouraged or covered up for violations of the regulations.

Kays also claims that the manner in which Stucky conducted the surprise audit indicates less favorable treatment due to her sex. She states that she had never heard of any safety audit being done on a surprise basis. Again, Kays fails to show by a preponderance of the evidence that her sex had anything to do with the audit or her subsequent termination. The surprise safety audit occurred in response to serious allegations concerning Kays's supervision of the Indianapolis LDC. Since Kays was the object of the investigation, it would be no more reasonable to expect her to be present during the XATA audit as it would be to expect her to be present during the individual driver interviews. From the data gathered from the drivers and the computer, Stucky, Hartweg and Cooley, deduced that Kays had allowed or compelled drivers to drive in violation of hours of service limitations and then attempted to alter the XATA records to conceal the violations. The manner in which she was terminated, *i.e.*, a supervisor conferred with a third party who then authorized termination, is identical to the manner in which Kays terminated the employment of Haynes and Dryden. While these drivers are subordinates to Kays and therefore are not appropriate "comparables" for purposes of a disparate treatment analysis,

the similarity in the procedure used helps to demonstrate a lack of any special processes being adopted for Kays.

Kays also maintains that had the goal of the audit truly been safety, Penske would have followed the investigation with training and explanations on how to improve the problems found. This ignores the fact that Stucky and Hartweg came to investigate allegations that Kays had compelled drivers to violate federal law. In such a case, it is reasonable to infer that Penske thought that the safety problem would be corrected when the person responsible for the malfeasance had been terminated. In any event, this Court does not “sit as superpersonnel department that will second guess an employer’s business decision,” even if the decision was baseless or mistaken, so long as the reason for the decision was honestly believed by the employer. *Gordon v. United Airlines, Inc.*, 246 F.3d 878, 889 (7th Cir. 2001).

C. Retaliation

In order to survive a motion for summary judgment under the indirect method of proving a retaliation claim, a plaintiff must show that “(1) she engaged in statutorily protected activity; (2) she was performing her job according to [her employer’s] legitimate expectations; (3) despite her satisfactory performance, 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.” *Luckie v. Ameritech Corp.*, 389 F.3d 708, 714 (7th Cir. 2004). “Absent direct evidence of retaliation, failure to satisfy any element of the *prima facie* case proves fatal to the employee’s retaliation claim.” *Hilt-Dyson v. City of Chicago*, 282 F.3d 456, 465 (7th Cir. 2002).

Kays asserts that the manner in which the audit was conducted, the close timing between her complaint that the audit was sex-based and her termination, and her previous complaints regarding Penske's tolerance of Terrell's behavior toward her all serve as evidence of retaliatory termination. However, we find no merit in any of these arguments.

In September 2001, Kays complained that Terrell was refusing to follow her direction because of her sex. This occurred seven months before her termination. The Seventh Circuit has established that as the time between the protected activity and the adverse employment action increases, the ability of a jury reasonably to infer discrimination decreases. *Lalvani v. Cook County*, 269 F.3d 785, 790-91 (7th Cir. 2001). It is also noteworthy that these events occurred shortly after Terrell filed his complaint of racial discrimination with the EEOC based on Kays' conduct, making Kays speculation that the reason for his ignoring her direction was her sex as opposed to his belief that she was a racist a bit flimsy. Furthermore, Kays complaints regarding Terrell came at around the same time she spoke to him using vulgar language and warned him, cryptically, "you're next." Penske's supportive actions further compromise Kays's claim. Varkonda informed Terrell that he must still take direction from Kays. In addition, Kays exchanged several e-mails with her supervisor and the human resources department concerning how best to deal with Terrell. Finally, she thanked them for their help.

As explained above, the surprise safety audit occurred in response to serious allegations concerning Kays's supervision of the drivers at the Indianapolis LDC. When the surprise audits of the XATA records began, and Stucky interviewed the drivers under Kays's supervision, Kays's made the assertion that Stucky would not be conducting the audit were she not a woman. Stucky denied that her gender had anything to do with the audit and he said that he did not

appreciate the comment.⁷ Even though she was terminated the next day, temporal proximity alone, however, does not necessarily create a triable issue of fact. *Buie v. Quad/Graphics, Inc.*, 366 F.3d 496, 506-07 (7th Cir. 2004). In *Buie*, the Seventh Circuit rejected plaintiff's claim of discriminatory discharge even though it followed his announcement that he had AIDS. The court found plaintiff's poor attendance persuasive, and that he had every reason to believe he was about to be fired when he made his announcement. *Id.* at 507. The court found no triable issue because an "[eleventh] hour declaration of disability does not insulate an unruly employee from the consequence of his misdeeds." *Id.*

In the instant case, when confronted with the findings of the audit, Kays declared that she had not been trained concerning Department of Transportation regulations. In her deposition, she later conceded that this was untrue, and that she made the claim "as a resource to save her job." Taken in context with her subsequent statement, we are not impressed that her claim that the audit was gender based was any less an attempt to deflect anticipated criticism and hold on to her job. In any event, her protestation as to the basis for the audit ignores the fact that she had been accused of excusing and encouraging regulatory violations and her gripe does not affect the XATA findings or what Stucky discovered during the driver interviews. Whether the XATA findings were incorrect or the drivers lied to protect themselves is also immaterial. As noted above, this Court will not second guess an employer's legitimate business decision. The touchstone for accepting an employer's reason for termination is not its reasonableness or

⁷After Kays made the allegation that the audit was motivated by her sex, Stucky reported her complaint to Cooley at Human Resources. Kays says that "Penske did not conduct any investigation of her complaint." (Pl. Br. in Opp. to Mot. for Summ. J. at 16). However, this is a misrepresentation of the record. In his deposition, Stucky testified that no remedial action was taken in response to the complaint, not that it went uninvestigated.

wisdom, but whether the employer honestly believed it. *Gordon*, 246 F.3d at 889. Here, the important point is that Stucky, Hartweg, and Cooley based their joint decision to terminate Kays's employment on the XATA audits and Stucky's driver interviews, and not on Kays's gender.

IV. CONCLUSION

“Without a *prima facie* case, the plaintiff cannot withstand summary judgment.” *Hong v. Children's Memorial Hosp.*, 993 F.2d 1257, 1261 (7th Cir.1993). Here, Kays has failed to establish a *prima facie* case of discrimination or retaliation, nor has she shown Penske's proffered reason for her termination to be pretextual. Accordingly, Penske's Motion for Summary Judgment (Docket #47) is GRANTED and a judgment consistent with this Entry shall issue.

IT IS SO ORDERED.

December 7, 2005 -- SEB/

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