

NOT INTENDED FOR PUBLICATION IN PRINT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
EVANSVILLE DIVISION

KIM CHONG DALEIDEN,
Plaintiff,

vs.

EVANSVILLE STATE HOSPITAL,
Defendant.

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3:02-cv-149-RLY-WGH

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EVANSVILLE DIVISION

KIM CHONG DALEIDEN,)	
Plaintiff,)	
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vs.)	3:02-cv-149-RLY-WGH
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EVANSVILLE STATE HOSPITAL,)	
Defendant.)	

ENTRY ON DEFENDANT’S MOTION FOR SUMMARY JUDGMENT

Plaintiff Kim Chong Daleiden (“Daleiden”), an Asian female of Korean descent, filed suit against her employer, Defendant Evansville State Hospital (“ESH”), under Title VII of the Civil Rights Act, 42 U.S.C. § 2000e, *et seq.* Daleiden alleges that she was discriminated against in her employment on the basis of race and national origin, giving rise to two claims, one based on disparate treatment and the other based on a hostile work environment. Daleiden’s complaint refers to three specific instances of alleged discrimination: (1) Daleiden was harassed by one of her subordinates, Nancy Rowley; (2) a patient named Marvin attacked Daleiden, and thereafter his doctor denied Daleiden’s request that Marvin be transferred to a different unit; and (3) Daleiden applied for a supervisory position that was given to another nurse, Debra Derr, who is Caucasian.

The case is now before this court on ESH’s Motion for Summary Judgment. ESH argues that Daleiden cannot establish a *prima facie* case of disparate treatment or hostile work environment. For the following reasons, Defendant’s Motion for Summary Judgment is **granted**.

I. Facts¹

A. Background

1. Daleiden began working at ESH in March 1999 as a second shift charge nurse in the Development Transaction Services Unit (DTU). (Daleiden Deposition at 27).
2. Her responsibilities as a charge nurse included supervising licensed practical nurses, qualified medication assistants, and patient attendants. (Daleiden Deposition at 28).
3. Daleiden's direct supervisor at ESH was Donna Adams ("Adams"), and Adams in turn reported to Rebecca Fehd ("Fehd"). Fehd has been the director of nursing at ESH since 1980. (Fehd Deposition at 9, 21).
4. Fehd is empowered to reassign nurses if a change would be good for them (e.g., if the nurses are having difficulty coping with the stress of a particular unit) and/or in the best interest of the hospital and its staffing. (Fehd Deposition at 49-50).
5. Fehd has reassigned nurses in the past. (Fehd Deposition at 47).

B. Nancy Rowley

6. Nancy Rowley is a Caucasian nurse and a former employee of ESH. (Fehd Deposition at 41).
7. In August 1999, Daleiden gave Rowley a negative evaluation in a clinical observation note, which led to conflicts between them. (Daleiden Deposition at 59-60).

¹ In its Reply in Support of Motion for Summary Judgment, ESH objects to many of Daleiden's proffered facts on the grounds that they are inadmissible hearsay, speculative, self-serving, misleading, and so forth. However, even when the facts are accepted as alleged by Daleiden, her claims cannot overcome summary judgment. As such, the court finds it unnecessary to rule on the admissibility of the facts.

8. Following the evaluation, Rowley told Daleiden “don’t mess with the Rowleys,” and Rowley told Daleiden that she (Daleiden) would be sorry if she did not change the evaluation. (Daleiden Deposition at 65-68).
9. Daleiden reported the confrontation to her supervisors, Donna Adams and Judy Conn. (Daleiden Deposition at 69-70).
10. Adams responded that “you know how she [Rowley] is.” (Daleiden Deposition at 69-70). Judy Conn responded that “they should have gotten rid of her [Rowley] a long time ago.” (Daleiden Deposition at 70).
11. Daleiden and Rowley had several other altercations. Daleiden once verbally counseled Rowley regarding job abandonment. (Daleiden Deposition at 73).
12. In another incident, Daleiden reported to Adams that Rowley had threatened to have Daleiden’s license taken away, to which Adams responded that Daleiden should “forget it.” (Daleiden Deposition at 75).
13. In yet another incident, Rowley approached Daleiden with her hand in a fist and called Daleiden a “bitch.” (Daleiden Deposition at 85-86).
14. When Adams heard about the “bitch” incident, she told Daleiden that she (Adams) did not want to get entangled in the situation. (Daleiden Deposition at 87-88).
15. On one occasion, Fehd told Daleiden that she should not leave the hospital until she wrote up Rowley for taking a popsicle. (Daleiden Deposition at 80-81).
16. Daleiden was reluctant to write up the disciplinary statement against Rowley, but she did so after Fehd assured her that she (Fehd) would do something about Rowley. (Daleiden Deposition at 80-81).
17. Daleiden eventually asked that Rowley be transferred to another station. Adams replied

that Rowley had already been moved out of every other ward in the hospital, that nurses in the other wards had refused to work with or supervise Rowley and, as such, Daleiden was essentially stuck with Rowley. (Daleiden Deposition at 76).

18. Rowley had multiple conflicts with other ESH employees, including Caucasian employees. (Fehd Deposition at 144-47; Daleiden Deposition at 62).
19. Myna Jones and Carmen Lampert, both Caucasian nurses in the same position as Daleiden, were not pressured to write up Rowley. (Daleiden Deposition at 121-22).
20. Rowley's behavior toward Daleiden was more severe than it was toward other employees. (Daleiden Deposition at 167-68).
21. In September 2000, Rowley encouraged Jeff Weir ("Weir") to allege that Daleiden was abusing patients. (Daleiden Deposition at 97). Rowley also accused Daleiden of abusing patients. (Fehd Deposition at 42).
22. Weir later admitted that his allegations were false, and he was not punished for making the false statements. (Fehd Deposition at 142).
23. On September 17, 2000, Daleiden wrote to Superintendent Ralph Nichols requesting a transfer to any other shift or location because of the danger posed by Rowley. (Fehd Deposition at 170-71).
24. Following the false allegations of patient abuse, Rowley was terminated; pursuant to union policy, her case was brought before an arbitrator in October 2001. (Daleiden Deposition at 104).
25. Fehd was on vacation and Cheryl Lutey (of the Human Resources Department) was out sick on the day of Rowley's arbitration. (Daleiden Deposition at 104).
26. Daleiden was left at the arbitration to defend herself. (Daleiden Deposition at 104).

27. In December 2001, Daleiden asked her supervisors to notify her when Rowley returned, out of concern for her (Daleiden's) safety. (Daleiden Deposition at 109-112).
28. Daleiden did not receive any such warning before Rowley's return, which Fehd said was because Fehd did not want to bother Daleiden at home. (Daleiden Deposition at 110-112).
29. Daleiden concedes that she did not know if Rowley was harassing her because of her race. Her complaint is that ESH management responded to similarly situated Caucasian nurses' complaints about Rowley but did not respond to her complaints. (Daleiden's Brief in Opposition to Summary Judgment at 3).

C. Marvin's Attack on Daleiden

30. On December 18, 2000, Daleiden was attacked by a patient named Marvin. (Daleiden Deposition at 129; Fehd Deposition at 131).
31. Daleiden asked Doctor Murillo to move Marvin on the night of the attack. (Daleiden Deposition at 149).
32. Marvin was not moved. (Daleiden Deposition at 155).
33. Daleiden was on medical leave until March 7, 2001 because of the attack. (Daleiden Deposition at 151).
34. Two days after her return from medical leave, Marvin said to Daleiden: "Look what I did to this nurse. I almost kill [sic] her and they didn't do anything about it." (Daleiden Deposition at 152).
35. ESH has a unit called K4 where patients can be assigned for anywhere from two weeks to two years. It is a restrictive unit, with increased staff, for violent patients. (Daleiden Deposition at 142).

36. Daleiden asked Marvin's doctor to transfer him to K4, because she (Daleiden) did not feel safe around Marvin. (Daleiden Deposition at 159).
37. K4 houses male patients who are being evaluated for their ability to stand trial, who are psychotic and need to be stabilized, or who are frequently violent. (Fehd Deposition at 156).
38. Daleiden's request that Marvin be transferred was denied. (Daleiden Deposition at 155).
39. Fehd reassigned Rowley on several occasions, including a transfer to the transitional services unit that was granted because Rowley was getting injured on the job when she was stationed at the ACT service line. (Fehd Deposition at 162).
40. Rowley's work-related injuries were not as severe as Daleiden's. (Fehd Deposition at 186).
41. Upon reading his chart, Daleiden discovered that Marvin had previously been moved to K4 for threatening Caucasian nurses. (Daleiden Deposition at 141-42, 146-47).
42. Daleiden later applied for and was granted a transfer to third shift. The third shift hours were unappealing to Daleiden, but she was afraid of Marvin, and so she transferred for her own safety. (Daleiden Deposition at 159-60).
43. It is unclear from the record, but apparently when Daleiden moved to the third shift, she also transferred to work at K4.
44. In August 2001, Marvin was transferred to K4, where Daleiden was working, after hitting Susan Pagett, a Caucasian nurse. (Daleiden Deposition at 172-74).
45. Daleiden requested a transfer in September 2001, and it was denied. (Fehd Deposition at 124).
46. Daleiden lost out on overtime opportunities when she was working third shift. (Daleiden

Deposition at 160-65).

47. After being attacked by Marvin, Daleiden was diagnosed with post traumatic stress disorder. (Daleiden Deposition at 178).

D. Charge Nurse Supervisor 5 Position

48. Debbie Derr (“Derr”), who is Caucasian, was hired in April 2001 as a Charge Nurse 3. (Fehd Deposition at 38-39).
49. On August 21, 2001, Daleiden applied for an open position as Second Shift Supervisor. (Fehd Deposition at 90).
50. Fehd is responsible for promoting nurses, and in September 2001, Fehd promoted Derr to the Second Shift Supervisor position for which Daleiden had applied. (Fehd Deposition at 16-17, 38).
51. When Derr was promoted, she was a probationary employee because she had been working at the hospital less than six months. (Fehd Deposition at 80-81).
52. Fehd explained to Daleiden that the decision regarding the promotion was narrowed to Daleiden and Derr, and when the two candidates were ranked, Derr’s ranking was higher. (Fehd Deposition at 70, 117).
53. Fehd told Daleiden that she did not get the promotion because she lacked management skills and lacked ability when handling patient care. (Daleiden Deposition at 55).
54. Daleiden has more educational experience than Derr, which Fehd knew at the time Derr was promoted. (Fehd Deposition at 90, 104).
55. At the time of the promotion, Daleiden had a bachelor’s degree, a two-year business degree, and had completed nine credit hours toward her master’s degree. Daleiden had management experience, worked 60-90 hours a week, and had worked in every ward and

- on every shift at ESH. (Daleiden Deposition at 48-50).
56. At the time of the promotion, Derr had an associate's degree in nursing and had done self-study of holistic medicine. (Daleiden Deposition at 48-50).
 57. Derr had at least two years of supervisory experience. (Fehd Deposition at 115).
 58. Before promoting Derr, Fehd did not know how much supervisory experience Daleiden had. (Fehd Deposition at 102).
 59. Fehd had a hard time understanding Daleiden because of her accent. (Fehd Deposition at 100).
 60. During the interview for the Second Shift Supervisor position, Fehd did not ask Daleiden about her qualifications or experience. (Daleiden Deposition at 34). Instead, Fehd focused on the issue of Nancy Rowley and on Daleiden's inability to control violent patients. (Daleiden Deposition at 34-38).
 61. Fehd had not personally observed Derr working prior to promoting her. (Fehd Deposition at 115).
 62. Daleiden worked on several committees while employed at ESH. (Daleiden Affidavit).

II. Standard for Summary Judgment

Pursuant to Federal Rule of Civil Procedure 56(c), a party is entitled to summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). A fact is material if it is outcome determinative. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). An issue is genuine "only when a reasonable jury could find for the party opposing the motion based on the record as a whole." *Pipitone v. United States*, 180 F.3d 859, 861 (7th Cir.

1999).

In determining whether a genuine issue of material fact exists, the court must view the record and all reasonable inferences in the light most favorable to the non-moving party.

National Soffit & Escutcheons, Inc. v. Superior Systems, Inc., 98 F.3d 262, 265 (7th Cir. 1996).

The moving party bears the burden of demonstrating the “absence of evidence on an essential element of the non-moving party’s case.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986).

The non-moving party may not, however, simply rest on the pleadings, but must demonstrate by specific factual allegations that a genuine issue of material fact exists for trial. *National Soffit & Escutcheons, Inc.*, 98 F.3d at 265.

III. Analysis

A. Failure to Promote

As a starting point, it should be noted that Daleiden’s factual claims regarding ESH’s decision to promote Derr to the Charge Nurse Supervisor 5 Position are considered here only as background information. Daleiden did not assert a claim for failure to promote either in her EEOC charge or in her Complaint, and a plaintiff may not bring claims in a lawsuit which were not included in the EEOC charge. *See, e.g., Weiss v. Coca-Cola Bottling Co.*, 990 F.2d 333, 337 (7th Cir. 1993) (job transfer claim barred because it was not included in EEOC charge); *Cheek v. Peabody Coal Co.*, 97 F.3d 200, 202 (7th Cir. 1996) (disparate treatment claims based on allegations of sex discrimination in training, job placement and compensation could not be litigated where not included in EEOC charge). Daleiden concedes that her allegations regarding ESH’s failure to promote her are merely “background evidence in support of her actionable claims of disparate treatment.” (Daleiden’s Brief in Opposition to ESH’s Motion for Summary Judgment at 21 n.2).

B. Disparate Treatment

In order for her disparate treatment claim to survive summary judgment, Daleiden must establish ESH's intent to discriminate against her based upon her race and/or national origin.

Miranda v. Wisconsin Power & Light Co., 91 F.3d 1011, 1015 (7th Cir. 1996). Because Daleiden has no direct evidence of discrimination, the parties agree that the court must employ the burden-shifting analysis enunciated by the Supreme Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). *Id.*

Under *McDonnell Douglas*, Daleiden first has the burden to establish a prima facie case of race-based discrimination. *Kariotis v. Navistar Int'l Transp. Corp.*, 131 F.3d 672, 676 (7th Cir. 1997). To establish her prima facie case, Daleiden must show (1) that she is a member of a protected class; (2) that she was performing her job to ESH's legitimate expectations; (3) that she suffered an adverse employment action; and (4) that ESH treated similarly situated employees outside the protected class more favorably. *Peters v. Renaissance Hotel Operating Co.*, 307 F.3d 535, 545 (7th Cir. 2002); *Simpson v. Borg-Warner Auto, Inc.*, 196 F.3d 873, 876 (7th Cir. 1999). A successful prima facie case would establish a rebuttable presumption of discrimination, and the burden would then shift to ESH to articulate a legitimate, non-discriminatory reason for its actions. *Renaissance Hotel*, 307 F.3d at 545. This burden is one of production, not of persuasion. *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 254-55 (1981). ESH is not required to prove the absence of a discriminatory motive but only to explain what it has done. *Board of Trustees of Keene State College v. Sweeney*, 439 U.S. 24, 25 n.2 (1978).

ESH's articulation of a legitimate, non-discriminatory reason for its decision rebuts the presumption of discrimination. *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 506-07 (1993).

Daleiden then has the chance to show that ESH's articulated reasons are merely a pretext for discrimination. *Kariotis*, 131 F.3d at 676; *see Hicks*, 509 U.S. at 515. As long as ESH honestly believed the reasons behind its adverse employment action, Daleiden loses, "even if the reasons are foolish or trivial or baseless." *Kariotis*, 131 F.3d at 676; *McCoy v. WGN Continental Broadcasting Co.*, 957 F.2d 368, 373 (7th Cir. 1992).

In its motion for summary judgment, ESH argues that Daleiden has failed to present evidence to support factors 3 and 4, outlined above. According to ESH, no adverse employment action was taken against Daleiden, and Daleiden has presented no evidence that ESH treated similarly situated persons outside of her protected class more favorably. These factors are considered in turn.

1. Adverse Employment Action

In *Herrnreiter v. Chicago Housing Authority*, the Seventh Circuit outlined three categories of cases where materially adverse employment action can be found. 315 F.3d 742 (7th Cir. 2002). Those categories are:

1. Cases in which the employee's compensation, fringe benefits, or other financial terms of employment are diminished, including, of course, as the limiting case, termination of employment.
2. Cases in which a nominally lateral transfer with no change in financial terms significantly reduces the employee's career prospects by preventing him from using the skills in which he is trained and experienced . . . [and]
3. Cases in which the employee is not moved to a different job or the skill requirements of his present job altered, but the conditions in which he works are changed in a way that subjects him to a humiliating, degrading, unsafe, unhealthful, or otherwise significantly negative alteration in his workplace environment. . . .

Id. at 744 (internal citation omitted). Daleiden was not terminated, nor were the financial terms of her employment diminished, so her case does not fall into the first category. She was

transferred to third shift, but that transfer was made at her own request, so her case does not fit into the second category.

Daleiden's argument seems to be that the incidents with Rowley and Marvin fall into the third category of adverse employment actions, wherein an employee stays at the same job but her environment is changed in a negative way. This category of adverse employment actions includes cases of harassment that are "sufficiently severe to worsen substantially [the employee's] conditions of employment as they would be perceived by a reasonable person in the position of the employee." *Herrnreiter*, 315 F.3d at 745.

Daleiden's job as a charge nurse with psychiatric patients required her both to treat patients and to supervise licensed practical nurses, qualified medication assistants, and patient attendants. (Daleiden Deposition at 28). A reasonable person in Daleiden's position would have to expect that disciplining difficult subordinates would be a part of her job as a supervisor and, furthermore, that dealing with occasional violence would come with the territory of working with mentally ill patients. As such, Daleiden has not shown that the incidents with Rowley and Marvin substantially worsened the conditions of her employment.

2. Similarly Situated Employees

Two ESH employees would be similarly situated if they "dealt with the same supervisor, were subject to the same standards, and had engaged in similar conduct." *Raude v. Kimberly-Clark Corp.*, 219 F.3d 612, 617-18 (7th Cir. 2000). Daleiden alleges that she was treated differently than similarly situated Caucasian employees because Marvin was not transferred to K4 after he injured Daleiden, but he was transferred to K4 after he injured Caucasian employees. She also alleges that similarly situated Caucasian employees were allowed to transfer away from Rowley upon request. However, Daleiden does not allege

sufficiently detailed facts for the court to determine whether she was actually similarly situated to the Caucasian nurses who were injured by Marvin or transferred away from Rowley. The burden is on Daleiden to establish her prima facie case, including the fact that she was similarly situated to more favorably treated employees outside of her protected class, and she has not met this burden.

3. Pretext

Even if Daleiden could make her prima facie case of disparate treatment, summary judgment would have to be granted on the basis of ESH's legitimate, non-discriminatory reasons for its actions. ESH has a reasonable explanation for why Marvin was not transferred to K4 following his attack on Daleiden: the DTS unit was more appropriate for Marvin, given his diagnosis of mild to moderate retardation, and Marvin's doctor, not ESH, controlled where he was held. (*See* Defendant's Statement of Undisputed Material Facts at 30, 34). ESH has also explained that Fehd transferred nurses within ESH for the good of the hospital as a whole, not at the request of Caucasian employees attempting to transfer away from Rowley. (*See* Fehd Deposition at 162-63). Finally, ESH has explained that it progressively disciplined Rowley for the way she treated her coworkers. ESH eventually terminated Rowley but was required to reinstate her following the union arbitration process. (*See* Defendant's Reply in Support of Motion for Summary Judgment at 4, 19-20).

Daleiden has offered no evidence to indicate that ESH's articulated reasons for acting as it did were pretextual. As such, under the *McDonnell Douglas* burden-shifting analysis, Daleiden's disparate treatment claim cannot survive summary judgment. *See, McDonnell Douglas*, 411 U.S. at 803-04; *Williams v. Williams Electronics, Inc.*, 856 F.2d 920, 923-24 (7th Cir. 1988).

C. Hostile Work Environment

For purposes of Title VII, a hostile work environment is one “permeated with discriminatory intimidation, ridicule and insult.” *Cooper-Schut v. Visteon Automotive Systems*, 361 F.3d 421, 426 (7th Cir. 2004). In order to survive summary judgment on her hostile work environment claim, Daleiden must show that: “(1) [s]he was subject to unwelcome harassment; (2) the harassment was based on [her] race; (3) the harassment was severe or pervasive so as to alter the conditions of the employee’s work environment by creating a hostile or abusive situation; and (4) there is a basis for employer liability.” *Smith v. Northeastern Illinois University*, 388 F.3d 559, 566 (7th Cir. 2004) (quoting *Williams v. Waste Mgmt. of Ill.*, 361 F.3d 1021, 1029 (7th Cir. 2004).

Assuming, arguendo, that Rowley’s treatment of Daleiden rose to the level of harassment, Daleiden’s hostile work environment claim fails on the second element of this analysis because she has not established that any of Rowley’s actions were motivated by Daleiden’s race or national origin. (See, e.g, Daleiden’s Brief in Opposition to ESH’s Motion for Summary Judgment at 3: “Daleiden did not know why Rowley was harassing her”). Daleiden’s allegation that she was harassed by Rowley and that ESH’s *response* to the harassment was race-based is not enough to establish the second element of her hostile work environment claim. Daleiden must show that the underlying harassment itself (i.e., how Rowley treated Daleiden) was based on her race, which she has not done.

Daleiden’s hostile work environment claim also fails to meet the fourth necessary element, that of employer liability. In order to establish ESH’s liability, Daleiden must show that ESH was negligent in its response to the conflict between Rowley and Daleiden. See, e.g., *Wyninger v. New Venture Gear, Inc.*, 361 F.3d 965, 976 (7th Cir. 2004). In determining whether

ESH was negligent, “[w]e are not to focus solely upon whether the remedial activity ultimately succeeded, but instead should determine whether the employer’s total response was reasonable under the circumstances as then existed.” *Id.* ESH responded to Rowley’s behavior with reasonable progressive discipline, including verbal counselings, written warnings, termination, and the eventual union arbitration. Therefore, there is no employer liability.

IV. Conclusion

In order to survive summary judgment, Daleiden needed to come forward with specific facts establishing a prima facie case of disparate treatment and/or hostile work environment. She did not do so. Even in the light most favorable to her case, no reasonable jury could find in favor of Daleiden. For the foregoing reasons and in consideration of the record before this court, ESH’s Motion for Summary Judgment is hereby **granted**.

It is so ordered this _____ day of January 2005.

RICHARD L. YOUNG, JUDGE
United States District Court
Southern District of Indiana

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