IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

KIMBERLY NOEL TREAT,	:	
Plaintiff	:	
	:	
v.	:	CIVIL NO. AMD 03-1937
	:	
GARRETT COUNTY MEMORIAL	:	
HOSPITAL, et al.,	:	
Defendants	:	

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MEMORANDUM OPINION

Plaintiff, Kimberly Noel Treat, M.D., brought this multi-count action against numerous defendants alleging, as the sole basis for her federal claims, employment discrimination under Title VII of the Civil Rights Act of 1964("Title VII"), 42 U.S.C. § 2000e, *et seq*. In addition, she seeks relief on the basis of several state law claims. Discovery has concluded and now pending are defendants' motions for summary judgment as to the Title VII claims. I have given careful attention to the parties' memoranda and exhibits, and a hearing is not needed. Local Rule 105.6. For the reasons explained below, I shall grant the motions for summary judgment as to the federal claims, and, in the absence of complete diversity of citizenship, I shall dismiss without prejudice the state law claims for lack of jurisdiction.

I.

Pursuant to Fed. R. Civ. P. 56(c), summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party

is entitled to judgment as a matter of law." *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 247 (1986). A fact is material for purposes of summary judgment, if when applied to the substantive law, it affects the outcome of the litigation. *Id.* at 248. Summary judgment is also appropriate when a party "fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

A party opposing a properly supported motion for summary judgment bears the burden of establishing the existence of a genuine issue of material fact. *Anderson*, 477 U.S. at 248-49. "When a motion for summary judgment is made and supported as provided in [Rule 56], an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavit or as otherwise provided in [Rule 56] must set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e). *See Celotex Corp*., 477 U.S. at 324; *Anderson*, 477 U.S. at 252; *Shealy v. Winston,* 929 F.2d 1009, 1012 (4th Cir. 1991). Of course, the facts, as well as the justifiable inferences to be drawn therefrom, must be viewed in the light most favorable to the nonmoving party. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp*., 475 U.S. 574, 587-88 (1986). The court, however, has an affirmative obligation to prevent factually unsupported claims and defenses from proceeding to trial. *See Felty v. Graves-Humphreys Co*., 818 F.2d 1126, 1128 (4th Cir. 1987).

II.

A.

Dr. Treat completed her residency in emergency medicine in 1999 at West Virginia University Medical Center in Morgantown, West Virginia. In early 2000, through her affiliation with West Virginia University, Dr. Treat was recruited to work at nearby Garrett County Memorial Hospital ("GCMH"), located in Western Maryland near the Maryland/West Virginia boundary, which was experiencing a shortage of emergency room physicians. (As might be imagined, in a tri-state area of ski resorts experiencing increased popularity, the need for trauma physicians can become acute in season.) At about the time that Dr. Treat began working at GCMH through a predecessor physician practice group, defendant United Physicians Care, Inc., ("UPC"), which was affiliated with West Virginia University, entered into an agreement to provide emergency room physicians at GCMH. Dr. Treat formally became an employee of UPC by virtue of a written agreement between them effective January 1, 2001. In consequence of Dr. Treat's contract with UPC, GCMH extended and/or continued to extend staff privileges to her.

Dr. Treat's contract with UPC included a provision purporting to provide for its termination "automatically" upon the occurrence of any one of numerous events, including the "suspension" of Dr. Treat's staff privileges at GCMH. Dr. Treat's immediate superior was another UPC physician, defendant Richard G. Perry, M.D., who also served as Chief of Emergency Services at GCMH.

The summary judgment record makes abundantly clear that, prior to the events of February 2002 which provided the impetus for this action, Dr. Treat's relationship with GCMH personnel, including nurses and others, as well as with patients (e.g., as reported in patient satisfaction surveys) was sometimes problematic, at best. Defendants (and indeed, Dr. Treat herself) have amply documented in the summary judgment record the history of complaints regarding Dr. Treat's "in-your-face" demeanor and questionable professional practices.[1]

One area of particular professional concern to defendants was Dr. Treat's seeming habit of conducting so-called "doorway examinations." That is, Dr. Treat was accused of

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[1]Dr. Margaret A. Kaiser practiced medicine at GCMH for more than 20 years. Dr. Kaiser is a strong supporter of Dr. Treat, and describes herself as a close professional colleague and personal friend of Dr. Treat. Nevertheless, she provides no support for Dr. Treat's various theories of sex discrimination but instead describes Dr. Treat as a person with a "strong personality and a somewhat 'in-your-face' manner. She can easily intimidate her co-workers." Dr. Kaiser further opines, again in an exhibit submitted by Dr. Treat herself, that "the [emergency room] did not want [Dr. Treat] working there anymore and thus systematically went after her, looking for some incident to suspend her. I am aware that her personality and life-style were very unpopular with many of the [emergency room] employees . . . . There are issues in our [emergency room] with strong female personalities, life-style diversity . . . ."

These somewhat cryptic, but telling, comments may be understood as more coherent through a dutiful examination of the record. That is, my careful review of the record discloses what polite counsel on both sides in this case seem largely to have obscured: Dr. Treat is a lesbian. Thus, comments by Dr. Treat's strongest supporter that "personality and life-style" issues were ascendant in this dispute apparently should be understood as related to sexual orientation and not to gender.

This reality may well explain the manifest paucity of truly gender-based evidence in this case, as Dr. Treat's counsel clearly recognize that sexual orientation is not a protected characteristic under Title VII.

Discrimination against persons based on sexual orientation is odious. It is, undeniably, a well-documented form of invidious discrimination in our society. Yet, unless and until the Congress sees fit to prohibit such discrimination, Title VII's prohibition of gender discrimination may not serve as an interim surrogate.

purporting to examine and diagnose patients (and ordering tests and/or a treatment regimen) without laying a hand on the patient, and then charting the examination in a manner (e.g., reporting the condition of the patient's skin to the touch or the patient's pulse rate) which could only be based on a "hands-on" examination. Indeed, a fellow GCMH physician whose daughter presented in the emergency room, as well as two GCMH nurses who presented as patients, allege that Dr. Treat had billed for services she did not perform.

B.

On February 9, 2002, Dr. Treat was on duty in the emergency room when a teenager presented complaining of a broken arm. Dr. Dona Alvarez, an orthopedic surgeon who was acquainted with the young man's family, happened to be present and initially tended to the patient and then asked Dr. Treat to examine the patient for a possible elbow fracture and to provide the appropriate referral if necessary. The following day, February 10, 2002, Dr. Treat completed the patient's chart and noted details of her physical examination. (Dr. Treat also inserted in the chart a note regarding an alleged "reexamination" that even she admits she did not perform.)

Dr. Treat has consistently asserted that she did indeed examine the patient on February 9, 2002, and apparently Dr. Alvarez confirms that Dr. Treat did so. Defendants received allegations, however, from the triage nurse who had helped attend to the patient, and the unit secretary who had been on duty at the time the patient presented, consistent with similar allegations made on prior occasions, that Dr. Treat never examined the patient,

notwithstanding the entries in the patient's chart. Over the next 10 days, Dr. Perry conducted some form of inquiry into the matter without ever confronting Dr. Treat (or conferring with Dr. Alvarez) regarding the allegations, and without giving Dr. Treat an opportunity to respond to the allegations that she had charted the patient and effected billing for an examination that she did not conduct. Ultimately, he conferred with the vice president for clinical services (who had received earlier complaints regarding Dr. Treat), with Dr. William Pope, the chief of staff, and finally with Donald Battista, the chief executive officer of GCMH. Given the perceived gravity of the matter, and with Dr. Perry's apparently strong recommendation, the decision was made that Dr. Treat be summarily suspended pending a full investigation. Thus, on February 20, 2002, Battista telephoned Dr. Treat at home to inform her that her hospital privileges had been summarily suspended for "charting" a patient she had not seen or treated. The telephone call is memorialized in a follow-up letter dated the next day, February 21, 2002.

Pursuant to the Medical Staff Bylaws, Dr. Treat immediately requested a meeting with the Medical Executive Committee ("MEC"), which is chaired by Dr. Pope, to review the justification for the summary suspension. Although the summary judgment record is less than entirely clear as to the authority of the MEC, it seems apparent that the MEC had the power to overrule the initial decision to impose a summary suspension. In any event, the meeting of the MEC was held on February 22, 2002, beginning at 5:08 p.m., and continued until 7:46 p.m. Dr. Treat attended the meeting, as did Dr. Alvarez, as well as a majority of

the physicians comprising the MEC. The committee members heard from Dr. Perry as to the basis for his recommendation of a summary suspension and they apparently questioned Dr. Treat extensively. After a full discussion of all the issues, the MEC voted, with one dissenting vote, that Dr. Treat's suspension be "lift[ed]" but that her hospital privileges be "rescinded" pending the conclusion of a full investigation.

The parties have not explained what, if any, difference there may be, between a "suspension" of an emergency room doctor, on the one hand, and a "rescission of the hospital privileges" of such a doctor, on the other hand, but the difference, if any, does not appear to be material to this case. First, the record shows that "[t]he [GCMH] Board Executive Committee did not feel the need to act on the recommendation of the Medical Executive Committee" and so it appears that Dr. Treat's suspension was never "lifted," notwithstanding the recommendation of the MEC. More fundamentally, it is undisputed that Dr. Treat interpreted the MEC's recommendation as a *de facto* approval of her suspension, as she remained unable to work at GCMH, and consequently she resigned from her position on the same day as the MEC meeting, February 22, 2002.

Thereafter, Dr. Treat timely filed a complaint with the Equal Employment Opportunity Commission alleging discrimination on the basis of sex. The EEOC closed its file on April 4, 2003, because it was "unable to conclude that the information obtained establishes violations of the statutes" and informed Dr. Treat of her right to sue. Thereupon, Dr. Treat filed this action against defendants GCMH (and several related entities), United

Physician Care, Inc., and Dr. Perry. Apparently, Dr. Treat contends that her Title VII claims lie against both GCMH as well as UPC; she seems to contend that while UPC was clearly her employer, she might sue GCMH on the theory that GCMH exercised control over the terms and conditions of her employment and/or that GCMH was her employer's agent. Diversity of citizenship jurisdiction is not available, as Dr. Treat, like the defendants, is a citizen of Maryland.[2]

C.

Dr. Treat purports to assert three distinct claims under Title VII: (1) disparate treatment in respect to certain terms and conditions of employment; (2) disparate discipline in respect to her suspension, which she characterizes as a "constructive discharge;" and (3) hostile work environment. In the following paragraphs, I shall undertake to summarize the facts and circumstances on which Dr. Treat apparently relies as support for her myriad claims.

Dr. Treat posits that her summary suspension pending an investigation into the allegations of fraudulent charting placed against her was the culmination of an 18 month enterprise by her supervisor, Dr. Perry, with the knowledge, approval, and/or acquiescence

[2]A significant question is presented as to whether Dr. Treat may sue GCMH under Title VII. Dr. Treat's memoranda in opposition to the defendants' motions for summary judgment on the Title VII claims present rather opaque arguments as to why the Title VII claims do not lie solely against UPC. Under *Cilecek v. Inova Health Sys. Serv.*, 115 F.3d 256 (4th Cir. 1997), it would appear that Dr. Treat was solely an employee of UPC and was not an employee of GCMH. In view of the failure of the Title VII claims on the merits as a matter of law, however, I need not resolve the issue of whether Dr. Treat may maintain her Title VII claims against GCMH.

of UPC and GCMH, to make her work life miserable and ultimately to effect the termination of her employment through blatant gender-based discriminatory actions. Generally, she alleges that Dr. Perry (and thus, defendants GCMH and UPC) discriminated against her with regard to scheduling work shifts, requirements that she attend meetings, and in respect to other incidents of her daily work life.[3]

As to her summary suspension, which is the centerpiece of her Title VII claims, Dr. Treat argues that the way in which defendants handled the allegations of her alleged fraudulent charting (including, but not limited to, the failure to give her an opportunity to respond to the allegations before she was suspended) was discriminatorily more severe than the manner in which allegations against similarly-situated male physicians were handled. She points out that had she been asked about the disputed charting, she would have explained that the reason the hospital personnel had not seen her examine the patient in the examination room was because she examined the patient in the hallway while Dr. Alvarez

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[3]According to Dr. Treat, Dr. Perry assigned her to work a significant number of the more stressful holiday shifts when there was no financial bonus for working holidays. Allegedly, after UPC began to pay time-and-a-half for holidays, Dr. Treat was no longer assigned the more lucrative weekend and holiday shifts. The documentary record does not support these assertions. Dr. Perry also informed Dr. Treat that she must attend all meetings in order to defend her medical decisions. By contrast, when male physicians' cases were discussed during meetings, in their absence, Dr. Perry advised them that he would discuss the matter with them later.

Dr. Treat also argues that Dr. Perry imposed inconsistent and discriminatory standards in assessing her performance. For instance, he characterized prior patient dissatisfaction with Dr. Treat's examinations as evidence of a pattern for fraudulent documentation by Dr. Treat. However, Dr. Perry characterized similar, multiple complaints against a male doctor as simply poor documentation. Dr. Treat also claims she was held to a higher standard of performance than male physicians because they were not required to be proficient at rapid sequence intubation, a basic life saving technique, while she was.

was discussing surgery options with the patient's mother some distance away. Moreover, she contends, had Dr. Perry conducted an adequate investigation, e.g., by consulting with Dr. Alvarez (allegedly the sole eyewitness to the examination), or reviewed Dr. Alvarez's notes on the patient, he would have had no occasion for alarm over the allegations or to effect a summary suspension.

Dr. Treat emphasizes that summary suspensions are infrequently imposed and their use is intended to deal with critical lapses in patient care, which she avers did not apply in this situation. According to Dr. Treat, the February 2002 incident involved a single instance of alleged "misreporting" rather than an issue of medical judgment, health care, incorrect diagnosis, or chronic mischarting. Consequently, she contends, the severe response by defendants to a mere "administrative issue" that could have been easily resolved, is evidence of gender animus.

Dr. Treat relies heavily on the fact that no written witness statements supporting the allegations of fraudulent documentation were produced until after the summary suspension was imposed. She also asserts that defendants' alleged discovery of additional instances of her alleged "involvement in substantial documentation and billing inaccuracies" after her summary suspension and resignation supports an inference of illegal discrimination. Dr. Treat also emphasizes the lack of any apparent motive for her to chart a patient she had never seen as another basis for inferring that the defendants' acted out of a discriminatory motive.

Recognizing that she has no direct evidence of gender animus, Dr. Treat undertakes to draw comparisons of her summary suspension, on the one hand, to the treatment of certain male physicians who allegedly engaged in similar misconduct.[4] Specifically, Dr. Treat refers to two examples of male physicians allegedly engaging in "fraudulent documentation." First, Dr. Treat points to the lack of disciplinary action taken against male pathologists that she alleges were billing out charts improperly. This alleged billing fraud was a result of technicians choosing the billing codes based on their assessments of the specimen without the required assessment by a pathologist. Allegedly, the pathologists instructed the technicians to act in this manner. GCMH was well aware of this practice, yet did not address it or discipline the pathologists that perpetuated it.

The second example of fraudulent documentation going undisciplined is the back-dating of orders and medical records by Dr. Daniel Miller. Dr. Miller is a family practitioner who works part-time in the emergency department. The back-dating made it appear that Dr. Miller had timely prescribed certain medications, but that the nursing staff had failed to follow his orders. (Also, according to Dr. Treat, on numerous occasions, Dr. Miller had been reported by staff members for failing to make daily rounds, which potentially violates the Joint Commission for the Accreditation of Health Care Organization's requirements for

[4]During discovery in this case, I held an off-the-record telephone conference with counsel to resolve a dispute over the scope of Dr. Treat's discovery requests. It was quite apparent that Dr. Treat was on a classic fishing expedition in her effort to shore up her employment discrimination claims by insisting that defendants produce evidence of a wide range of disciplinary actions taken over an extended period of time against male physicians. The record will reflect that I exercised my discretion to narrow the scope of Dr. Treat's requests.

standard of care.) Despite the determination that Dr. Miller had engaged in back-dating orders and medical records, no further investigatory process was conducted and Dr. Miller remains an active member on the medical staff. (Dr. Treat apparently concedes that a physician other than Dr. Pope (i.e., Dr. Kaiser) was the chief of staff at the time of the incidents involving Dr. Miller and that Dr. Perry was not involved in any manner in the incidents involving Dr. Miller.)

In addition to her general "disparate treatment" claim and her "disparate discipline" claim, Dr. Treat alleges that she was subjected to an ongoing, hostile work environment. In respect to her hostile work environment claim, she relies largely on the same incidents of mistreatment, e.g., disadvantageous scheduling and shift assignments, meeting attendance requirements, and similar slights, as she relies on for her general disparate treatment claim.

In one respect and in *only one* respect, Dr. Treat relies on evidence of alleged explicitly sexual indicia of discrimination. According to Dr. Treat, defendants allegedly did not reprimand male nurses for calling Dr. Treat and other females "crotch munchers or carpet munchers." Dr. Treat avers that the motivation and intent of the male nurses' offensive and sexually vulgar remarks to her, a female physician, was to express hostility, disdain, and aggression toward her in order to undermine her authority, expressly because she is a woman in a non-traditional position of superiority vis-a-vis the male nurses, who are in an uncustomary subordinate position usually occupied by females. According to Dr. Treat, by allowing such comments to go unpunished, defendants implicitly agreed with the

behavior. Notably, Dr. Treat seems to concede that there has been no showing in the record that any of the defendants had knowledge of such statements by members of the nursing staff prior to the institution of this case.

It must be noted that, with few exceptions, in respect to Dr. Treat's claims of employment discrimination on the basis of gender, the entirety of the above litany of alleged incidents of gender-based mistreatment are supported in the summary judgment record by little more than Dr. Treat's own uncorroborated testimony, which consists largely of her own inferences, her own opinions, and her own subjective views characterizing the motivations of various persons for various acts and omissions. Moreover, in many instances, despite detailed allegations in her prolix complaint and on deposition, Dr. Treat sometimes contradicts her own allegations. For example, she conceded on deposition that she exercised virtual plenary control over her work schedule and that she could not recall ever having been denied time off that she wished to have.

III.

A.

The applicable legal standards for Dr. Treat's Title VII claims are familiar. In order to prevail on a claim of disparate treatment, she must first establish that she complains about a materially adverse employment action, an "employment injury," and not simply "interlocutory or mediate decisions having no immediate effect upon employment conditions which were not intended to fall within . . . Title VII." *See Settle v. Baltimore County*, 34

F.Supp.2d 969, 987 (D.Md. 1999) (citations omitted), *aff'd,* 203 F.3d 822, 2000 WL 51283 (4th Cir. 2000)(table); *see also Pennsylvania State Police v. Suders*, 124 S.Ct. 2342, 2353 (2004) (listing hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits as "tangible employment actions"). "Not everything that makes an employee unhappy is an actionable adverse action." *Settle*, 34 F.Supp.2d at 989 (quoting *Montandon v. Farmland Indus., Inc.*, 116 F.3d 355, 359 (8th Cir. 1997)).

Assuming that a plaintiff has appropriately focused on a material adverse employment action, then the plaintiff must project evidence that but for the defendant's discriminatory motive in whole or in part, she would not have been subjected to the adverse action. *Mereish v. Walker,* 359 F.3d 330, 334-35 (4th Cir. 2004); *Williams v. Cerberonics, Inc.* 871 F.2d 452, 458 (4th Cir. 1989); *Malina v. Baltimore Gas and Electric Co.*, 18 F. Supp. 2d 596, 607 (D. Md. 1998). A plaintiff can prove such discriminatory animus under ordinary principles of proof using direct or indirect evidence, or in the alternative, under the judicially created "shifting burdens" method set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). *See Henson v. Liggett Group Inc.,* 61 F.3d 270, 274-75 (4th Cir. 1995)(applying *McDonnell Douglas* proof scheme in ADEA cases).

Under the *McDonnell Douglas* framework, the plaintiff has the initial burden to establish a prima facie case of discrimination. *Texas Dept. of Comty. Affairs v. Burdine*, 450 U.S. 248 (1981). Provided that the plaintiff establishes a prima facie case, the defendant has

the burden of production to articulate that the reason for the adverse action is a legitimate, nondiscriminatory one. *Id.* at 254-55. Upon the defendant's showing that such a reason exists, the burden shifts back to the plaintiff to show that the proffered reasons are pretextual. *Id.*[5]

In evaluating a disparate treatment case at the summary judgment stage, it is important to recall that the subjective beliefs and opinions of the plaintiff will seldom be sufficient to permit plaintiff to avoid summary judgment. *Cf. King v. Rumsfeld*, 328 F.3d 145, 149 (4th Cir. 2003) ("[Plaintiff's] own testimony, of course, cannot establish a genuine issue as to whether [plaintiff] was meeting [the employer's] expectations."), *cert. denied*, 124 S.Ct. 922 (2003); *Hawkins v. PepsiCo, Inc.*, 203 F.3d 274, 279 (4th Cir.) (noting that in adjudicating discrimination claims, courts should not be drawn into the role of mediating differences of opinion as to job performance between supervisors and subordinates), *cert. denied*, 531 U.S. 875 (2000). Likewise, the court is not to serve as a "super personnel administrator" by evaluating the wisdom, fairness or correctness of adverse employment

[5]It is clear that Dr. Treat seriously misapprehends her burden at the summary judgment stage. Seizing on certain casual language in a recent Fourth Circuit case, *see Mackey v. Shalala,* 360 F.3d 463, 469 (4th Cir. 2004)("Under the *McDonnell Douglas* framework, in order to survive a motion for summary judgment, the plaintiff must have developed *some evidence* on which *a juror could reasonably base a finding* that discrimination motivated the challenged employment action.")(both emphases added), Dr. Treat contends that all she need do is produce "some" evidence sufficient to establish a "possibility" of a favorable jury verdict. In so contending, Dr. Treat emphasizes the first italicized portion of the excerpt from *Mackey*, while ignoring the importance of the second italicized portion of the excerpt. Contrary to Dr. Treat's attempt to recast the longstanding and settled summary judgment standards discussed in text, the "some evidence" that she is required to project must be sufficient to support a reasonable juror's decision in her favor. As discussed in text, she plainly has not satisfied her burden.

actions. *DeJarnette v. Corning, Inc.,* 133 F.3d 293, 299 (4th Cir.1998) ("[I]t is not our province to decide whether the reason [for an adverse employment action] was wise, fair, or even correct.").

The elements of Dr. Treat's hostile environment claim have likewise been the subject of a surfeit of judicial explications. To avoid summary judgment on her hostile environment employment discrimination claims, Dr. Treat is required to project evidence sufficient to permit a reasonable juror to find the following elements: "that the offending conduct (1) was unwelcome, (2) was based on [a prohibited factor such as sex or gender], (3) was sufficiently severe or pervasive to alter the conditions of her employment and create an abusive work environment, and (4) was imputable to her employer." *Ocheltree v. Scollon Productions, Inc.,* 335 F.3d 325, 331 (4th Cir. 2003)(en banc).

B.

Judged by the above criteria and standards, it is apparent that Dr. Treat's claims fail as a matter of law. Plaintiff's general "disparate treatment" claims fail to identify material adverse employment decisions that are cognizable under Title VII or, in the alternative, she fails to project evidence sufficient to permit a reasonable juror to conclude that she has been the victim of unlawful discrimination on the basis of gender. Her disparate discipline claim is based on a cognizable adverse employment action, of course, but it falters on the basis that there is no showing that her summary suspension is remotely connected to her gender (or that her summary suspension was a pretext for gender discrimination). Finally, her hostile

environment claim plainly fails to satisfy the elements of a cognizable hostile environment claim. Accordingly, defendants are entitled to summary judgment as to Dr. Treat's federal claims under Title VII.

1.

In order to succeed on her general disparate treatment claim, Dr. Treat must satisfy the following three requirements: (1) she is a member of a protected class; (2) she was subjected to disadvantageous terms and conditions of employment, rising to the level of an adverse employment action; and (3) similarly situated persons outside her protected class were afforded more favorable terms and conditions of employment. *Cf. Settle*, 34 F.Supp.2d at 991. As a woman, Dr. Treat is obviously a member of a protected class. The alleged adverse employment actions relate to scheduling and shift assignments, meeting attendance requirements, and proficiency at rapid sequence intubation.

I have recognized that scheduling matters may have more than a trivial impact on the terms and conditions of employment, and thus could be regarded in an appropriate case as involving adverse employment actions. *Settle*, 34 F.Supp.2d at 1001. Dr. Treat alleges Dr. Perry assigned her a significant number of the more stressful holiday shifts when there was no financial bonus payable for working holidays. After such bonuses (or extra pay) became available, she contends, Dr. Perry no longer assigned her to these more lucrative shifts. However, Dr. Treat does not provide any evidence showing that Dr. Perry refused to assign her the weekend and holiday shifts in a manner that favored male physicians and disfavored

Dr. Treat. Indeed, Dr. Treat concedes that she could control her own schedule by listing the days she wanted off in advance and she admitted in her deposition that sometimes her requests were granted and at other times they were not granted. Therefore, even assuming Dr. Perry's scheduling practices were "material employment actions," Dr. Treat's allegations of disparate scheduling do not survive summary judgment.

Dr. Treat also alleges that she was treated in a discriminatory manner compared to her male colleagues because Dr. Perry informed her that she must attend all emergency department meetings in order to defend her medical decisions. By contrast, when male physicians' cases were discussed during the meetings, Dr. Perry advised them that he would discuss the matter with them later and outside the meeting. As a matter of law, such mediate decision-making relating to the details of the day-to-day employment relationship does not rise to the level of an adverse employment action. But even assuming, *arguendo*, that such action qualifies as an adverse employment action, Dr. Treat again fails to proffer a single instance where her care was reviewed at a meeting in her absence. Morever, Dr. Treat admits that on at least one occasion Dr. Perry spoke with her individually outside the meetings regarding her medical decisions and actions.

Finally, Dr. Treat was allegedly held to a higher standard of performance than male physicians because they were not required to be as proficient as she was at rapid sequence intubation (RSI), a basic life saving technique. Dr. Treat arrived at GCMH with a high proficiency in RSI, and thus was expected to instruct other physicians in the procedure. Dr.

Treat alleges that male physicians were not required to become sufficiently proficient in the procedure. Even if true, these allegations do not qualify as adverse employment actions as defined by Title VII. *Id*. at 987. The disparity of proficiency in RSI does not change the terms and conditions of Dr. Treat's employment especially given the fact that Dr. Treat became proficient in the procedure prior to her arrival at GCMH. Defendants did not, for example, require Dr. Treat to learn a new procedure while her male physician colleagues did not face the same requirement yet received the same compensation.

Based on the aforementioned analysis, Dr. Treat's Title VII general disparate treatment claim fails as a matter of law.

2.

There is not a scintilla of direct evidence that Dr. Treat's suspension was gender-based. Accordingly, in order for Dr. Treat to succeed in her disparate discipline claim, she must first establish a *prima facie* case by showing that: (1) she is a member of a protected class; (2) the prohibited conduct in which she was engaged is comparable in seriousness to misconduct of employees outside the protected class; and (3) the disciplinary measures enforced against her were more severe than those enforced against the other employees outside the protected class. *Id*. at 991-92.

Dr. Treat is a female, and thus a member of a protected class. Moreover, Dr. Treat's suspension clearly qualifies as an adverse employment action.[6] Nevertheless, Dr.

[6]It is quite apparent that the gravamen of Dr. Treat's disparate discipline claim is not (continued...)

Treat fails to provide the court with evidence of misconduct by male employees that is comparable in seriousness to the allegation brought against her of charting an examination of a patient she allegedly did not examine.

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[6](...continued)
really her suspension, but what she asserts was her "constructive discharge." To the extent that she so asserts, Dr. Treat's ostensible claim for constructive discharge plainly fails.

Constructive discharge occurs when an employer deliberately makes an employee's working conditions intolerable and thereby forces the employee to quit her job. "Deliberateness exists only if the actions complained of were intended by the employer as an effort to force the plaintiff to quit." *Taylor v. Virginia Union Univ.*, 193 F.3d 219, 237 (4th Cir. 1999). A constructive discharge claim can arise from discrete acts of discrimination falling short of termination, *id*., or as an aggravated case of hostile work environment. *Cf. Suders*, 124 S.Ct. at 2354. Regardless of the particular factual scenario presented, the plaintiff "must show that the . . . working environment became so intolerable that her resignation qualified as a fitting response." *Id.* at 2347.

Dr. Treat resigned a mere one day after her summary suspension pending an investigation into the allegations of fraud against her. Although the suspension of hospital privileges prevented Dr. Treat from working at GCMH, there is no indication whatsoever that the suspension was intended to compel her resignation. Although her employment contract with UPC provided that a suspension would result in an "automatic" termination of her employment, it is clear that Dr. Treat was not terminated, and there is no reason to believe that she would have been terminated or that the investigation would have been prolonged. Simply put, Dr. Treat did not wait a reasonable amount of time for the results of the investigation, which would have allowed her to actively dispute the allegations with her own evidence. She simply resigned immediately.

Constructive discharge claims are not meant to apply to a dissatisfied employee that cuts her losses at the mere mention of an investigation into her work performance, but are reserved for situations when no reasonable person could be expected to remain on the job given the circumstances. *Suders*, 124 S.Ct. at 2351. At the point in time when Dr. Treat resigned on February 22, 2002, she was still employed with UPC, receiving the same pay and benefits, and thus her working environment was not sufficiently severe or intolerable to justify her immediate resignation. Indeed, it is difficult to see how an adverse employment action whose intent and effect is *to remove the employee from the workplace* might support a claim that *the workplace was intolerable. Cf. Perry v. Harris Chernin, Inc.*, 126 F.3d 1010, 1015 (7th Cir. 1997)("the complaining employee is expected to remain on the job while seeking redress"); *see also Williams v. Giant Food, Inc.,* 370 F.3d 423, 434 (4th Cir.2004); *Young v. Shore Health Sys., Inc.,* 305 F.Supp.2d 551, 559 n. * (D.Md. 2003).

Whether Dr. Treat has a claim for "constructive discharge" under state law is an issue that I need not and do not consider.

In any comparison of the alleged misconduct of the plaintiff with an individual outside of the protected class in a disparate discipline case, the degree of seriousness and gravity of the two acts of alleged misconduct is the most relevant factor. *Moore v. City of Charlotte, NC,* 745 F.2d 1100, 1107 (4th Cir. 1985); *Settle*, 34 F.Supp.2d at 992. Although "the comparison will never involve precisely the same set of work-related offenses occurring over the same period of time and under the same sets of circumstances[,]" merely falling under the category of 'fraud' is insufficient to qualify two or more acts as comparable in the context of a Title VII claim. *Cf. Settle*, 34 F.Supp.2d at 992 (quoting *Cook v. CSX Trans.*, 988 F.2d 507, 511(4th Cir. 1993)). Therefore, the male employees' alleged misconduct must be as serious or more serious in gravity than the allegations made against Dr. Treat. *Id*. Moreover, the disciplinary action taken against the female and male employees must be taken by the same decision maker. *See Smith v. Xerox Corp.*, 196 F.3d 368, 370-71 (2d Cir. 1999) ("Because intent is the critical issue, only a comparison between persons evaluated by the same decision-maker is probative of discrimination.").

In her response to the motions for summary judgment, Dr. Treat focuses on the lack of disciplinary action taken against the male pathologists that were allegedly billing out charts on specimens they had never reviewed. This alleged billing fraud was a result of technicians choosing the billing codes based on their assessments of the specimen without the required assessment of a pathologist. Allegedly, the pathologists instructed the

technicians to act in this manner and GCMH and Dr. Perry were aware of this fraudulent practice yet did not discipline the male pathologists.

Although such practices likely violate hospital procedures as well as commercial contracts between GCMH and insurance companies, they are simply not comparable in gravity to a doctor documenting that she had examined a patient when in fact no such examination had taken place. Fraudulent billing, at most, risks the incorrect transfer of money between two parties. In contrast, fraudulent charting of the nature alleged against Dr. Treat is a very serious allegation that if true could lead to a wrong diagnosis, patient health risks, and perhaps serious injury or death; Dr. Treat concedes as much. Consequently, the allegations in connection with the male pathologists and the GCMH laboratory lack probative value in respect to the disparate discipline claim at bar.

The second example of male physician misconduct relied on by Dr. Treat is the back-dating of orders and medical records by Dr. Daniel Miller, a family practitioner with a part-time schedule in the emergency department at GCMH. The allegations are that Dr. Miller documented that he had examined a patient days prior to the date of the actual examination. In other words, Dr. Miller examined patients on a certain date and then documented the examination days later using the correct date of the examination that took place days prior. The back-dating made it appear that Dr. Miller had timely prescribed the medication but the nurse had failed to follow his orders in a timely manner. Additionally, numerous complaints were filed against Dr. Miller alleging he failed to make daily rounds. Despite the finding that

Dr. Miller had indeed engaged in back-dating orders and medical records, Dr. Miller was not summarily suspended, his hospital privileges were not suspended, and he remains an active member of the medical staff.

To be sure, the back-dating of a medical chart could be viewed as risking a patient's life and health if, for example, the medicine prescribed should have been consumed immediately after the examination rather than days later due to Dr. Miller's failure to timely document the examination. However, as a matter of law (and common sense), the seriousness of the allegations are simply not the same as that involved in a situation where a physician never examines the patient at all. In any event, however, even if the two forms of misconduct were deemed sufficiently alike, the record shows that a different decision maker, Dr. Kaiser and not Dr. Perry, handled the investigation of Dr. Miller. There is no evidence that Dr. Perry, the person Dr. Treat avers illegally discriminated against her in his decision to effect a summary suspension, was involved in any discipline of Dr. Miller. Therefore, the circumstances surrounding Dr. Miller's back-dating cannot be used as a basis for comparison in Dr. Treat's Title VII claim. *Id.*

In the final analysis, Dr. Treat's disparate discipline claim falters at the prima facie case stage because it is *sui generis*. There is no doubting that the allegations against her were grave or that the response of the defendants was harsh, perhaps unduly so given the circumstances. But the fact remains that the allegations were not fanciful, and Dr. Perry cannot be faulted for taking a harder line toward allegations of professional misconduct by

physicians under his supervision than did Dr. Kaiser. In short, there simply is no basis shown in the evidentiary record on which to ascribe gender animus as the motivation for Dr. Treat's suspension. Even though the antipathy felt by Dr. Perry and others in the GCMH emergency department for Dr. Treat was real and substantial, that alone does not satisfy Dr. Treat's burden to project admissible evidence of gender bias. She has not done so. *Cf. Hawkins*, 203 F.3d at 282 ("Law does not blindly ascribe to race all personal conflicts between individuals of different races.").[7]

3.

For the reasons already described, Dr. Treat's gender-based hostile work environment claim fails as a matter of law. Even assuming that the "conduct" complained of was unwelcome and that there is some basis for imposing liability on the employer, there is an utter lack of evidence that the "harassment" was based on gender, or that the "harassment" was sufficiently severe or pervasive so as to create an abusive working environment. *See Ocheltree,* 335 F.3d at 331.[8]

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[7]Even if Dr. Treat were deemed to have satisfied the requirements of her prima facie case of disparate discipline, she would not prevail because she has not rebutted defendants' non-discriminatory reason for her suspension. Dr. Treat devotes considerable space in her memoranda demonstrating that the charges against her were not true and that an adequate investigation would have promptly disclosed the falsity of the allegations. Even if true, however, it is not for this court (or a jury) to assess the wisdom, fairness or correctness of the defendants' procedures.

[8]To the extent that Dr. Treat relies on the alleged practice of male nurses referring to her and other female hospital staff as "crotch munchers or carpet munchers," it is undisputed that Dr. Treat did not report these remarks in writing or file a written complaint in accordance with UPC's employee handbook. Thus, there is no evidence establishing that UPC was aware of these (continued...)

IV.

For the reasons set forth, the motions for summary judgment shall be granted as to the Title VII claims. As complete diversity of citizenship is lacking in this case, I shall decline to exercise supplemental jurisdiction and shall dismiss without prejudice the remaining, state law claims. 28 U.S.C. § 1367(c)(3); *see generally Andrews v. Anne Arundel County, Md.,* 931 F.Supp. 1255, 1267-68 (D.Md.1996), *aff'd,* 114 F.3d 1175 (4th Cir. 1997) (table), *cert. denied,* 522 U.S. 1015 (1997). An order follows.

Filed: December 23, 2004

/s/
ANDRE M. DAVIS
UNITED STATES DISTRICT JUDGE

[8](...continued)
remarks, much less that it failed properly to rectify the misconduct. Thus, as to such indicia of gender discrimination (assuming such remarks may be so viewed), there is no basis on which to impute such "co-worker" harassment to the employer. *See Bernard v. Calhoon MEBA Eng'g School,* 309 F.Supp.2d 732, 738 (D.Md.2004)(racial harassment by co-worker).