UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

LINDA HUNTSBERGER,

Plaintiff,

vs.

CITY OF YERINGTON et al.,

Defendants.

3:13-cv-00270-RCJ-VPC

ORDER AMENDING (ECF #50)
ENTERED JANUARY 5, 2015

This case arises out of an alleged hostile workplace environment and unlawful retaliation. Pending before the Court is a Motion for Summary Judgment (ECF No. 32). For the reasons given herein, the Court grants the motion in part and denies it in part.

I. FACTS AND PROCEDURAL HISTORY

Plaintiff Linda Huntsberger was the City Clerk of Defendant City of Yerington (the "City") from May 29, 2007 until her termination. (*See* Compl. ¶¶ 6, 23, ECF No. 1). During her employment, Defendants Mayor Douglas Homestead and City Manager Dan Newell used derogatory terms to refer to women, i.e., Newell repeatedly called Plaintiff a "fucking bitch" and Homestead referred to non-parties as "fucking cunt," "fucking bitch," and "bitch" in Plaintiff's presence. (*Id.* ¶¶ 9–11). Homestead and Newell also made derogatory remarks about Hispanic people. (*Id.* ¶ 12).[1] Plaintiff complained to Homestead and Newell to no avail. (*Id.* ¶ 13).

1 Plaintiff presumably means to allege a race-based HWE, not a national-origin-based HWE

When Plaintiff complained to the Human Resources office, no corrective action was taken; rather, Defendants retaliated against her for having complained. (*Id.* ¶ 14). First, Homestead and Newell began executing City contracts without Plaintiff's statutorily required signature. (*Id.* ¶¶ 15–17). Plaintiff complained to the Attorney General and met with an investigator. (*Id.* ¶¶ 18–19). When Homestead and Newell learned of the investigation, they further retaliated against Plaintiff. (*Id.* ¶¶ 20–21). Newell ordered Plaintiff not to speak to any other City employees or City Council members under threat of termination. (*Id.* ¶ 22). On one occasion, Newell screamed at Plaintiff for speaking to a City employee and ordered her to leave the building. (*Id.* ¶ 24). Newell and Homestead caused Plaintiff's proposed termination to be placed on a City Council agenda on the pretext of poor performance, and she was terminated. (*Id.* ¶ 23). They also disclosed portions of Plaintiff's confidential employee file to a local newspaper. (*Id.* ¶ 25).

Plaintiff sued Defendants in this Court for: (1)–(2) hostile workplace environment ("HWE") based on sex under Title VII of the Civil Rights Act of 1964 and Nevada Revised Statutes ("NRS") section 613.330; (3) HWE based on national origin (presumably under Title VII and NRS section 613.330); (4) retaliation in violation of the First Amendment (presumably under 42 U.S.C. § 1983); (5) retaliation in violation of NRS section 281.641; (6) retaliation in violation of Title VII; and (7) retaliation in violation of NRS section 613.330. Defendants have moved for summary judgment against all claims.

II. LEGAL STANDARDS

A court must grant summary judgment when "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). Material facts are those which may affect the outcome of the case. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). A dispute as to

a material fact is genuine if there is sufficient evidence for a reasonable jury to return a verdict for the nonmoving party. *See id.* A principal purpose of summary judgment is "to isolate and dispose of factually unsupported claims." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323–24, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986). In determining summary judgment, a court uses a burden-shifting scheme:

> When the party moving for summary judgment would bear the burden of proof at trial, it must come forward with evidence which would entitle it to a directed verdict if the evidence went uncontroverted at trial. In such a case, the moving party has the initial burden of establishing the absence of a genuine issue of fact on each issue material to its case.

C.A.R. Transp. Brokerage Co. v. Darden Rests., Inc., 213 F.3d 474, 480 (9th Cir. 2000) (citations and internal quotation marks omitted). In contrast, when the nonmoving party bears the burden of proving the claim or defense, the moving party can meet its burden in two ways: (1) by presenting evidence to negate an essential element of the nonmoving party's case; or (2) by demonstrating that the nonmoving party failed to make a showing sufficient to establish an element essential to that party's case on which that party will bear the burden of proof at trial. *See Celotex Corp.*, 477 U.S. at 323–24. If the moving party fails to meet its initial burden, summary judgment must be denied and the court need not consider the nonmoving party's evidence. See *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 159–60, 90 S. Ct. 1598, 26 L. Ed. 2d 142 (1970).

If the moving party meets its initial burden, the burden then shifts to the opposing party to establish a genuine issue of material fact. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986). To establish the existence of a factual dispute, the opposing party need not establish a material issue of fact conclusively in its favor. It is sufficient that "the claimed factual dispute be shown to require a jury or judge to resolve the parties' differing versions of the truth at trial." *T.W. Elec. Serv., Inc. v. Pac. Elec.*

Contractors Ass'n, 809 F.2d 626, 631 (9th Cir. 1987). In other words, the nonmoving party cannot avoid summary judgment by relying solely on conclusory allegations unsupported by facts. *See Taylor v. List*, 880 F.2d 1040, 1045 (9th Cir. 1989). Instead, the opposition must go beyond the assertions and allegations of the pleadings and set forth specific facts by producing competent evidence that shows a genuine issue for trial. See Fed. R. Civ. P. 56(e); *Celotex Corp.*, 477 U.S. at 324.

At the summary judgment stage, a court's function is not to weigh the evidence and determine the truth, but to determine whether there is a genuine issue for trial. See *Anderson*, 477 U.S. at 249. The evidence of the nonmovant is "to be believed, and all justifiable inferences are to be drawn in his favor." *Id.* at 255. But if the evidence of the nonmoving party is merely colorable or is not significantly probative, summary judgment may be granted. *See id.* at 249–50.

III. ANALYSIS

A. Gender-Based HWE Under Title VII and NRS Section 613.330

As to the gender-based HWE claims, Defendants argue that the alleged verbal comments are legally insufficient to support the HWE claims. "When the workplace is permeated with 'discriminatory intimidation, ridicule, and insult,' that is 'sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment,' Title VII is violated." *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 21 (citations omitted). A Title VII offense requires more than "mere utterance of an . . . epithet" causing offensive feelings but does not require an environment so severe as to cause a nervous breakdown. *Id.* at 21–22. The conduct must be severe or pervasive enough that a reasonable person would consider it hostile or abusive. *Id.* at 21.

> [W]hether an environment is "hostile" or "abusive" can be determined only by looking at all the circumstances. These may include the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes

> with an employee's work performance. The effect on the employee's psychological well-being is, of course, relevant to determining whether the plaintiff actually found the environment abusive. But while psychological harm, like any other relevant factor, may be taken into account, no single factor is required.

Id. at 23. The upshot of this language is that claims of a working environment where abusive treatment or language is arguably "severe" or "pervasive" ought to be determined by a jury.

Plaintiff has testified that on one occasion, Homestead entered Roy "Mac" MacDonald's office in the Public Works Department when Plaintiff was present and referred to a woman named Colleen as a "fucking bitch" and "fucking cunt" because of a power struggle between them. (*See* Huntsberger Dep. 38–39, ECF No. 36-1). Plaintiff did not report the incident to anyone, although she told Homestead she couldn't believe he was talking that way. (*Id.* 39–40). On another occasion, Homestead said in Plaintiff's presence, "Those fat, fucking bitches are at it again. They fucking filed a suit against me." (*Id.* 70–71). On another occasion, Homestead said about a woman who was leaving the room but still in earshot, "I hate that fucking bitch. I would like to smack her up along side of the head." (*Id.* 76). Newell once referred to Plaintiff as "that fucking bitch" when she was leaving a meeting. (*Id.* 96–98). Newell once referred to a woman from the Department of Taxation as a "that fucking bitch" in Plaintiff's presence while the woman was on speakerphone, and the woman heard the comment. (*Id.* 101). Homestead or Newell (it isn't clear from the excerpt of the transcript) once referred to meetings of the city clerks in Nevada as "just a bunch of cackling old hens" when telling Plaintiff that she didn't need to attend. (*Id.* 142). Newell once commented that no women were smart enough to do the work at the City. (*Id.*). One time, a woman who had been abused had come to City Hall, and Homestead commented that "[m]ost of the time they deserve it." (*Id.* 143). The circumstances do not make clear the remark was meant to refer to women being abused, but that is how Plaintiff perceived it. (*See id.* 143–45). The evidence adduced is sufficient for Plaintiff to satisfy

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