AMERICAN ARBITRATION ASSOCIATION

EMMANUEL D. KEPAS,

Claimant,

vs.

EBAY, INC., a Delaware Corporation,

Respondent.

ORDER ON SUMMARY JUDGMENT

Case No. 77 160 00465 06 DECR

Arbitrator: Theresa L. Corrada

This matter comes before the Arbitrator upon Respondent eBay's Motion for Summary Judgment. The parties have fully and thoroughly briefed the legal issues and have submitted numerous exhibits, deposition excerpts, and affidavits. In addition, a live oral argument, lasting approximately 3 1/2 hours was held in Salt Lake City on July 14, 2008, in which both parties were given ample opportunity to present their arguments, counter-arguments and pertinent evidence. Being fully advised by the parties, and having spent considerable time studying the applicable law and all of the materials, my rulings are as follows.

I. LEGAL STANDARD APPLIED

The parties agree that the standard to be applied is set forth in Fed. R. Civ. P. 56(c) and case law interpreting that rule. Specifically, summary judgment should be granted only if there is no genuine issue as to any material fact and eBay is entitled to judgment as a matter of law. In deciding whether there are issues of material fact, I must draw all *reasonable* inferences from the evidence in favor of Mr. Kepas. To survive summary judgment, the evidence supporting Kepas's claims cannot be merely "colorable"; it must be significantly probative, to the extent that a reasonable factfinder could find in Mr. Kepas's favor on the claim. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986); *Comm. for First Amendment v. Campbell,* 962 F.2d 1517, 1521 (10th Cir. 1992).

II. AGE DISCRIMINATION CLAIMS

A. Mr. Kepas's Allegations

In his Notice of Intent to Arbitrate, Mr. Kepas asserted that in two instances, eBay discriminated against him on the basis of his age: 1) in January 2005, his position was given to Susan Dutton, who was six years younger than Kepas, and he was demoted to supervisor (the "January 2005 demotion"); and 2) in November 2005, another supervisor position was created and Jason Hughes, who was eleven years younger than Kepas, was hired for the position (the "Hughes hiring"). For the first time in his Response to the Motion for Summary Judgment, Kepas also claims that the termination of his employment in June 2006 was due to his age. And,

for the first time in oral argument, Kepas further asserted that he had suffered a hostile work environment on the basis of his age.

B. The January 2005 Demotion Claim is Time-Barred.

Kepas filed his Charge of Discrimination with the Utah Antidiscrimination and Labor Commission alleging age and sex discrimination and retaliation on March 3, 2006. By law, claims based on alleged discrimination or retaliation that occurred before May 7, 2005 (300 days prior to the filing of the charge) are barred. Therefore, all Title VII claims based on the January 2005 demotion are barred.

C. The Hughes Hiring Claim Fails Due to Kepas's Admission that Legitimate Nondiscriminatory Reasons Existed for Hiring Hughes.

Kepas cannot dispute the legitimate, nondiscriminatory reason eBay proffered for creating the new position, for hiring Hughes, or for shifting a portion of Kepas's duties to Hughes. In fact, in his deposition, Kepas testified that the job of supervising all shifts was "too big for one person," that he agreed with Susan Dutton's decision to hire another supervisor, and that Hughes was the best candidate for the job. Moreover, Kepas does not assert that Hughes was hired to replace him, nor is there any evidence that would support such an assertion. Kepas's title and compensation remained the same after the hiring of Hughes. Kepas's dissatisfaction with the fact that Hughes reported directly to Dutton rather than to himself does not constitute an adverse employment action sufficient to form the basis of a discrimination claim. Even if it did, there is no evidence that the reporting structure was due to Kepas's age. Mr. Kepas's age discrimination claim based on the hiring of Mr. Hughes fails.

D. The Termination and Hostile Work Environment Claims Were Not Pled.

Mr. Kepas filed a Notice of Intention to Arbitrate on December 21, 2006, setting forth detailed factual allegations supporting his claims. His Third Claim for Relief, entitled "Claim for Unlawful Age Discrimination in Violation of ADEA" relies on the January 2005 demotion and the Hughes hiring. It does not allege that Mr. Kepas was terminated on the basis of his age; nor does it allege that Mr. Kepas was harassed on the basis of his age. Thus, Mr. Kepas has not properly asserted these claims, and it would be patently unfair to Respondent to allow him to do so via a Response to a Motion for Summary Judgment. Even if Mr. Kepas had properly pled such claims, they would fail for the reasons set forth in section VII,C1 below and because there is no evidence in the record that Mr. Kepas suffered any harassment due to his age.

III. SEXUAL HARASSMENT CLAIM - QUID PRO QUO

Mr. Kepas claims that in March 2005, Ms. Dutton "flirtatiously" invited him to her house "so they could get to know each other better." When he declined, she suggested that Mr. Kepas could bring his son to play basketball with her son outside while she and Mr. Kepas went inside to talk. Again he declined. She told him, "Well, just think about it." And Mr. Kepas said no,

and that was the end of the conversation. Ms. Dutton did not invite him to her house again.[1] Mr. Kepas testified that he considered this invitation "flirtatious" because of "the smile, the gleam in her eye, the raising of her eyebrows, the lilt in her voice." Kepas Depo. pp. 85-86. He testified that "she was inviting me over to her house to spend more time with her one on one. I was very uncomfortable with it." *Id.* Kepas further testified that he did not report the incident because "I didn't think people would believe me." *Id.* at 87.

Mr. Kepas claims that less than two months after he declined Ms. Dutton's invitation, on June 27, 2005, eBay Human Resources changed his title back to Manager, which he claims was a "promotion," but that his pay or pay grade was not increased in connection with the title change/promotion. He claims he was also ineligible for certain bonuses due to eBay's failure to increase his pay grade when it changed his title.[2] During oral argument, Kepas significantly expanded the adverse employment actions to include everything arguably adverse that happened to him after March 2005.

"Quid pro quo sexual harassment involves the conditioning of tangible employment benefits upon submission to sexual conduct." *Sauers v. Salt Lake County,* 1 F.3d 1122, 1127 (10th Cir. 1993). To sustain the claim, Mr. Kepas must offer evidence that Ms. Dutton made a sexual advance, that he rejected it, and that, as a result, he suffered a tangible adverse employment action.

Even assuming that an *implicit* sexual advance might be sufficient to sustain a *quid pro quo* claim (some courts have held to the contrary), on the evidence described above, it cannot be reasonably inferred that Dutton was seeking to have sexual relations with Kepas. There is no evidence suggesting that was the meaning Dutton intended. To the contrary, she explained that what she had in mind was simply *talking* with Kepas while their sons played basketball together outside. Nor is there any evidence that *Mr. Kepas himself* even drew such an inference at the time. He testified that he understood that Dutton was seeking to *spend more time with him* one on one, not that she was asking him to have sexual relations with her. Even if Ms. Dutton's demeanor while she made these comments was "flirtatious," as Mr. Kepas contends, flirting falls short of demanding sexual favors.

Moreover, even if there had been a sexual advance, there is no causal link between this incident and any tangible employment action. Mr. Kepas claims his pay grade should have been increased when his title was changed by Jana Heitland (with Ms. Dutton's approval). Ms. Heitland testified that the change in title was not a "promotion" but merely a change from a "technical" to "exempt" category, and this evidence is uncontradicted. Essentially, Mr. Kepas contends that the tangible employment action was Ms. Dutton's failure to cause Ms. Heitland to increase his pay grade when his title changed. However, a failure to increase a pay grade is not a tangible employment action unless there is evidence that Mr. Kepas was otherwise entitled to the increase and would have received it but for his rejection of Ms. Dutton's invitation. Mr. Kepas

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[1] Although Mr. Kepas argues in his opposition brief that Ms. Dutton made several invitations of this nature to him and that he "repeatedly refused Ms. Dutton's advances," this assertion is flatly contradicted by Mr. Kepas's deposition testimony. Moreover, there is no evidence in the record of any other alleged sexual advances. For example, wearing suggestive clothing is not a sexual overture sufficient to sustain a *quid pro quo* claim.

[2] Because the alleged tangible employment action that completed the alleged *quid pro quo* harassment occurred within 300 days of the filing of Kepas's charge, the *quid pro quo* claim is timely.

obviously suffered no adverse action if he failed to receive a pay grade increase that he was not entitled to and would not have received anyway. No evidence exists in the record that Mr. Kepas was entitled to or even eligible for a pay grade increase due to this title change. No evidence exists that Ms. Dutton caused Ms. Heitland not to increase Mr. Kepas's pay grade. And no evidence exists that Mr. Kepas was treated differently than similarly situated employees.

All of the other adverse events Mr. Kepas alluded to in oral argument (such as being informed that he would be put on a performance improvement plan, and his eventual termination) are likewise without evidence causally linking them to Mr. Kepas's declining Ms. Dutton's invitation to spend time with her. No direct evidence of any causal link exists, and the events are too remote in time to support any inference of causation.

For these reasons, Mr. Kepas's *quid pro quo* sexual harassment claim cannot survive.

IV. SEXUAL HARASSMENT CLAIM - HOSTILE WORK ENVIRONMENT

Mr. Kepas alleges that he was subjected to the following specific incidents[3] while employed at eBay:

- Dutton showed him, on her computer screen, a picture of a bikini she intended to buy. Dutton did not make any sexually suggestive comments about the bikini.
- Dutton showed him, on her computer screen, a picture of a small, black dress she intended to wear to a company party. Dutton did not make any sexually suggestive comments about the black dress.
- In a one-on-one meeting with him, Dutton turned off the lights and said, "I hate doing things with the lights on." Dutton did not make any sexually suggestive comments or sexual advances during the meeting.
- Dutton wore tight fitting clothes with writing or glitter across her chest.
- Dutton wore suggestive clothing and would abruptly stand up when he was sitting at her desk or suddenly bend over while he was talking to her.
- Kepas heard Dutton use the "F word" on average approximately twice a month.
- Dutton told Kepas that she spent the whole weekend in bed with her boyfriend and got a kidney infection.
- Dutton told him her son had been arrested for rape but would not be convicted because one of his friends told the police that the victim had consented.

[3] Claimant's liberal sprinkling of judgment-laden phrases in his briefing and argument, such as "sexual propositions and sexually charged language and behavior," does not constitute evidence. I must consider only the specific evidence in the record.

- Dutton told him and other employees that she had hurt her back in a "circle jerk" that morning.

- Dutton instructed him to write up an employee for failing to report to work and then took an inconsistent position with that employee, making Mr. Kepas look like a poor manager.

- Dutton reassigned employees who reported to Kepas to report to Hughes or herself.

- Dutton told Kepas three times that Jones hated or disliked him and that he needed to find another position.

- Dutton told Kepas she had received an email from Jones personally attacking him, but then refused to read the email to him.

- Dutton instructed Hughes to monitor Kepas's activities.

- Dutton attempted to allocate Kepas's stock options to other employees.

- Jones pointed out Mr. Kepas's absence in a company meeting.

Mr. Kepas also asserts that his demotion and Dutton's inviting him to her house, as described above, were part of the hostile work environment. However, as addressed above, all claims based on the demotion are time-barred. The demotion, as a discrete act, cannot be combined with the other acts under a continuing violation theory, nor does it constitute hostile work environment harassment under the applicable definitions. Likewise, Dutton's invitation, a discrete act, occurred outside the 300-day window. Although these events can be considered as background evidence to explain how other incidents within the 300-day window constitute harassment based on sex, they cannot be considered as part of the actionable hostile work environment.

Mr. Kepas mentions other incidents that he was unaware of at the time they occurred, or at the time the alleged hostile work environment existed, such as Dutton's purported conduct during a Christmas party, at an after-hours gathering and at a bar after an eBay event. Mr. Kepas presents no evidence that these alleged incidents were perceived by him to be hostile or abusive at the time he was employed by eBay. Apparently, he learned of these incidents after his termination; thus, these incidents cannot have contributed to the hostile work environment Mr. Kepas claims to have experienced.

In evaluating whether a working environment is sufficiently hostile or abusive, all of the circumstances must be considered, including the "frequency of the discriminating 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." *Faragher v. City of Boca Raton,* 524 U.S. 775, 141 L. Ed. 2d 662, 118 S. Ct. 2275, 2283 (1998). For Kepas to succeed on his hostile work environment claim, the alleged sexual harassment must be "severe or pervasive" as to "'alter the conditions of [his] employment and create an abusive working

environment.'" *Id.* The work environment "must be both objectively and subjectively offensive, one that a reasonable person would find hostile or abusive, and one that the victim in fact did perceive to be so." *Id.*

eBay contends that most of the incidents cannot be considered because they were never reported to eBay and thus there is no basis for holding eBay liable for the alleged harassment. But even considering *all* of the incidents Mr. Kepas has described, he has failed to show anything other than a few isolated comments or conduct, most of which would have been only mildly offensive to a reasonable person. Kepas has not shown the kind of steady barrage of objectively offensive comments or conduct that would constitute pervasive sexual harassment. Nor has he shown a single incident so objectively extreme or severe that it would amount to a change in the terms and conditions of his employment. *Meritor Sav. Bank, FSB v. Vinson,* 477 U.S. 57, 67, 91 L. Ed. 2d 49, 106 S. Ct. 2399 (1986); *Faragher,* 118 S. Ct. at 2284. There is no contemporaneous evidence that Mr. Kepas found this conduct offensive or unwelcome. He apparently never even told Ms. Dutton that he found her conduct offensive. And he never reported any of the incidents he now claims constituted sexual harassment (with the exception of the "circle jerk" comment). While some of the comments and conduct he alleges may have been somewhat strange or inappropriate in a business setting, they lack the objective severity to be actionable.

Moreover, there is no evidence that Mr. Kepas was subjected to any of these incidents on the basis of his gender. Ms. Dutton did not tell sexually suggestive jokes or describe what she did with her boyfriend in bed; she did not proposition Mr. Kepas or touch him inappropriately. Certainly, she shared more personal information than was appropriate in a business or professional setting, but, as many courts have said, Title VII is not a general civility code, nor is it intended to prevent unprofessional or unbusinesslike behavior. It is intended to prevent harassment *on the basis of one's sex,* a form of sex discrimination. No reasonable factfinder could conclude that such a sexually hostile work environment existed on the basis of the evidence presented here. Thus, Kepas's hostile work environment claim cannot survive.

V. RETALIATION CLAIM

A *prima facie* case of retaliation in violation of Title VII requires the plaintiff to establish that: 1) he engaged in protected opposition to discrimination; 2) he suffered an adverse employment action; and 3) there is a causal connection between the protected opposition and the adverse employment action. *O'Neal v. Ferguson Constr. Co.,* 237 F.3d 1248 (10th Cir. 2001). Kepas alleges that he engaged in protected activity by reporting the unlawful sexual harassment committed by Jones and Dutton and that, as a result, three adverse employment actions were taken against him: 1) within two weeks of Kepas's complaints, Dutton asked Hughes to monitor Kepas's activities, and Hughes began reporting perceived performance deficiencies to Dutton; 2) less than one month after Kepas's complaint, Dutton tried to reduce the stock options assigned to Kepas by allocating the stock options to others contrary to eBay stock allocation guidelines, requiring Kepas to complain to human resources about the improper allocation; and 3) less than a month after his complaint, instead of properly investigating his complaints, eBay's human

resources department conducted a meeting about Kepas's performance and told him he would be put on a performance improvement plan.[4]

A. Performance Monitoring

eBay argues that there is not sufficient evidence that Dutton asked Hughes to monitor Kepas's activities and points out that both Dutton and Hughes testified that this did not occur. However, Clinton Ericson provided a sworn statement in which he claims that Hughes told him that "just prior to Mr. Kepas' leaving, Susan Dutton told him to watch what Mr. Kepas was doing and report back to her on his activities." Kepas also testified that Hughes confessed to him that Dutton had asked him to "watch" Kepas and to observe what he was doing and to "get back with her on it." Kepas testified that he "immediately called the hot line and filed retaliation" about "Jason Hughes observing me at the request of Susan Dutton which I felt was retaliation . . . ." Kepas submits the Alertline Memorandum that was prepared as a result of this telephone complaint of retaliation on January 31, 2006. That Memorandum states that Kepas reported that Hughes informed Kepas that Dutton "had instructed him to monitor [Kepas] for the past two or three days." Kepas also reported that Hughes "said he turned in minor reports, but did not want to do it." Kepas also submits emails Hughes sent Dutton on January 26 and January 27, 2006 commenting on aspects of Kepas's performance. Sufficient evidence exists from which a reasonable inference could be drawn that Dutton did ask Hughes to monitor Kepas's performance.

eBay further argues that Dutton's request that Hughes monitor Kepas's performance and report back to her does not constitute a *materially* adverse employment action sufficient to sustain a retaliation claim. Under *Burlington Northern & Santa Fe Ry. Co. v. White,* 548 U.S. 53, 57 (2006), Title VII's anti-retaliation provision "covers those (and only those) employer actions that would have been materially adverse to a reasonable employee . . . [meaning] that the employer's actions must be harmful to the point that they could well dissuade a reasonable worker from making or supporting a charge of discrimination."

For example, in *Burlington Northern*, the plaintiff suffered a suspension without pay for 37 days, but eventually received reimbursement. She and her family had to live for 37 days without income and did not know during that time whether or when she could return to work. The plaintiff testified about the physical and emotional hardship that resulted from being deprived of her income for 37 days. In such a situation, the Court said, "a reasonable employee facing the choice between retaining her job (and paycheck) and filing a discrimination complaint might well choose the former . . . . That is to say, an indefinite suspension without pay could well act as a deterrent, even if the suspended employee eventually received backpay." Only significant harms, not trivial harms, can sustain a retaliation claim. *Id.*.

Kepas does not describe any specific harm that resulted from having his performance monitored by Hughes. Although Kepas was later told that he would receive a performance improvement plan (PIP), there is no evidence that the PIP would have been based on information gathered during the monitoring, as opposed to all of the other information that was available indicating Kepas's performance issues. Perhaps such monitoring made Kepas uncomfortable, but

[4] Although Kepas initially alleged that other acts were retaliatory, he has apparently abandoned those allegations.

such harm is trivial, not at all analogous to the situation in *Burlington*. Although it is possible that "*sufficiently severe* harassing, following, and monitoring of an employee could create an adverse employment action," *Tapia v. City of Albuquerque,* 170 Fed. Appx. 529, 533 (10th Cir. 2006), no such severe treatment occurred here. For example, Kepas does not assert that Hughes monitored him in a harassing or inappropriate way. Nor does Kepas claim that Dutton told Hughes to concoct unfair, untrue or negative reports about him, or even that Hughes lied to Dutton about his observations. Kepas does not assert that the monitoring continued over an unreasonably long period of time, that it humiliated or intimidated him, or that it interfered with his performance of his job duties.

Moreover, the monitoring apparently did not deter Kepas from pursuing further complaints, as he "*immediately* called the hot line" and filed an internal complaint about the perceived retaliation. *See Somoza v. Univ. of Denver,* 513 F.3d 1206, 1214 (10th Cir. 2008) ("[T]he fact that an employee continues to be undeterred in his or her pursuit of a remedy . . . may shed light as to whether the actions are sufficiently material and adverse to be actionable."). Thus, being subjected to monitoring of the nature described by Kepas does not constitute a *materially* adverse employment action sufficient to sustain his retaliation claim.

B. Stock Option Allocation

Taking the evidence in the light most favorable to Mr. Kepas, Ms. Dutton told Mr. Kepas to allocate stock options in a way that violated eBay policy. Although Kepas told Dutton that the allocation was "outside policy" and "there are not enough stock options assigned to the team for me to do what you are asking me to do," she refused to change it, stating, "Well, there is now." Kepas then emailed Anderson, HR Manager, asking him to review the stock allocations. Anderson advised Kepas that Wakeham, Dutton's supervisor, would review the allocation. Wakeham then instructed Kepas to correct the stock allocation while Dutton was on vacation. Thus, the allocation that Ms. Dutton instructed Mr. Kepas to implement never took effect. Apparently, if the stock options had been distributed as Dutton originally instructed, Kepas and several other management level employees would have received fewer stock options than they otherwise received.

Again, Kepas does not present evidence that he sustained any loss or hardship whatsoever as a result of Dutton's attempt to misallocate the stock options. Again, Kepas was not dissuaded from making a complaint about the stock allocation. He made a complaint, and the matter was quickly rectified. No reasonable employee would have considered this incident to be materially adverse, and it would not have dissuaded a reasonable person from making or supporting a charge of discrimination. "An employee's decision to report discriminatory behavior cannot immunize that employee from those petty slights or minor annoyances that often take place at work and that all employees experience." *Burlington Northern,* 548 U.S. at 68. Having one's stock options misallocated for a few days simply does not constitute a *materially* adverse employment action sufficient to sustain a retaliation claim.

C. Plan to put Kepas on a Performance Improvement Plan

On February 8, 2006, Anderson, HR Manager, met with Kepas to advise him of the outcome of the investigation of his harassment complaint against Dutton and Jones. In that same

meeting, according to Kepas, Anderson told Kepas "that he was aware that there were some issues that [Kepas] had that . . . John Wakeham and Susan Dutton, were going to address as well with [Kepas]." When Kepas asked what those issues were, Anderson "said he didn't know what they were at that time, but they were going to prepare a performance improvement plan and that [Kepas] would receive it." Anderson said that "they would have to get together and figure out what that was and then get back to me." Kepas further testified, "No one shared with me a performance improvement plan . . . . all I was told was one would be given. I was not told what it would be given for nor have I seen it or signed it."

According to Kepas, Anderson mentioned that "depending on how [Kepas] reacted or responded to this PIP would determine [Kepas's] future employment." Kepas felt this was a threat, but agreed that "[i]f I felt the performance improvement plan was false and fabricated, I think I would be able to respond to it appropriately and that it shouldn't affect my future with the company." Kepas Deposition, pp. 157-160. Prior to the meeting on February 8 with Anderson, Kepas had been attempting to arrange a medical leave. Anderson told Kepas that if he took a leave, the "corrective counseling" would occur after he returned. On February 16, Kepas took a medical leave. Shortly after that, Kepas took a leave of absence and was later discharged. Thus, the PIP was never issued.

eBay first contends that no materially adverse action occurred because: 1) the PIP was never issued; and 2) even if it had been issued, a PIP, standing alone, is not an adverse employment action. eBay initially relied on *Haynes v. Level 3 Communications, LLC,* 456 F.3d 1215, 1224 (10th Cir. 2006), but Kepas correctly pointed out that *Haynes* is inapposite because it held that a PIP was not an adverse employment action sufficient to support a *discrimination* claim, not a *retaliation* claim, and, as *Burlington Northern* made clear, "the antiretaliation provision, unlike the substantive provision, is not limited to discriminatory actions that affect the terms and conditions of employment. *Id.* at 64. However, eBay replied to this point by citing several cases from other jurisdictions decided after *Burlington Northern*, holding that even in the context of a retaliation claim, being issued a performance improvement plan or a written reprimand does not rise to the level of being materially adverse sufficient to support a retaliation claim.

To the extent these cases suggest that receiving a PIP can *never* be materially adverse as a matter of law, I disagree. A PIP means that the employee's performance is unsatisfactory in some respect and must improve substantially if he or she is to remain employed. eBay concedes that a PIP carried the possibility of termination if no improvement was made and that a PIP could make an employee ineligible for a transfer or promotion. Whether or not any particular PIP would be materially adverse enough to support a retaliation claim can only be decided by looking at all the surrounding circumstances, as the Court pointed out in *Burlington Northern.*

However, whether an actual PIP, had it been issued, would have constituted a materially adverse action is not the issue here. Kepas never received the PIP. The issue is whether merely *being told* that there will be a PIP is materially adverse under the circumstances that existed on February 8, 2006 in connection with Kepas's employment at eBay. Under these circumstances, that there would be a PIP issued to Mr. Kepas should have come as no surprise to him and did not constitute any material adverse change in his job situation.

Kepas did not engage in any protected activity until late January 2006. Several weeks before his complaints, in November 2005, the eWatch team participated in a Pulse Survey, which evaluated the management of the eWatch team, including Kepas. Kepas's score was 29%, the lowest in Salt Lake City and the lowest in customer support as a whole. In December 2005, before Kepas's protected conduct, Dutton met with Kepas and told him that "he would probably go on a personal improvement plan because he scored so low." Dutton explained that she did not issue the PIP at that time because "what I wanted to do was contact HR, because there were comments, but there wasn't -- I wanted to get more meat around it in order to determine and work with HR and take steps for that. So I think what we were doing is we were outlining specific action items that I was seeing until I got the rest of that meat to determine if we were going to do a personal improvement plan." She further explained that she was waiting until Heitland conducted the skip level meetings with Kepas's direct reports because "there were comments but it wasn't a lot of meat. So I wasn't correlating exactly why the team had scored him so low." Even though Dutton wanted more "meat" before issuing a PIP, she did discuss with Kepas in the December meeting that there would be an "action plan" specifically directed at correcting the issues that had resulted in the low survey score. Heitland testified that Dutton spoke to her in December 2005 about the survey and that they decided to conduct meetings with Kepas's team in order to specifically discuss Kepas's performance issues.

Thus Mr. Kepas is not on the same footing as an employee with a record of good performance, who was never advised of any performance issues until after a complaint was made. Kepas does not deny, or submit any evidence to contradict, this evidence that his performance issues were already under discussion by eBay management before he made his complaints in January 2006. Kepas does not dispute that Dutton met with him in December 2005 to discuss the low scores on his Pulse Survey and to discuss an "action plan" to correct those issues. However, Kepas contends that Dutton did not specifically mention a "PIP" at that time, and that it was not until after his complaint that Dutton and others then determined Kepas would receive a "PIP" rather than an "action plan." Although Mr. Kepas points to Ms. Dutton's testimony that an "action plan" is not the same as a PIP. However, Mr. Kepas fails to demonstrate how the PIP he was later told he would receive was materially more adverse than the "action plan" that was discussed with him *before* he complained. Nor would it be possible to make such a showing, since he never learned what was to be included in the PIP, whether the PIP would have contained reasonable and legitimate expectations, or what the consequences would have been had he failed the PIP. Under these circumstances, being advised that a PIP is imminent is not a materially adverse action sufficient to support a retaliation claim.

Even if Mr. Kepas had made out a prima facie case of retaliation, he has no evidence to show that eBay's proferred nondiscriminatory reason for the decision to give him a PIP was a pretext for retaliation. Kepas's performance issues pre-existing his complaints are well documented and, importantly, the sources of these criticisms are not primarily Dutton. The survey results were driven by the employees who reported to Kepas. There is no evidence that Ms. Dutton, Ms. Patterson, Ms. Jones or any of the others Mr. Kepas blames influenced these scores in any way.

Kepas attempts to explain away his low survey score by submitting the affidavit of Scheuerman, who claims that he and others thought they were evaluating *Dutton's* performance, not Kepas's (even though Kepas's name appeared on the survey and Duttons name appeared on a

different survey), because that is what they had been instructed to do in an earlier survey. At most, Scheuerman's testimony, if believed, could establish that one survey participant was confused about whose performance he was reviewing. (Scheuerman's statements about what others thought is inadmissible hearsay.) Kepas does not show that Scheuerman's confusion significantly skewed the results, or that his confusion was shared by others. Moreover, Kepas's assertion that the other team members were similarly confused about whom they were evaluating is implausible, because they mentioned Kepas *by name* in their written comments and also in the meeting Heitland conducted in late January 2006. Kepas does not dispute that many team members (who had no involvement in any alleged harassment or retaliation) made serious negative comments about his performance and management abilities during that meeting.

In fact, Mr. Kepas essentially admits the performance problems but claims they were caused by Dutton's "harassment" of him. Kepas does not explain how any alleged "harassment" caused his performance to decline. As mentioned above, the alleged harassment was not so severe that it would have affected any reasonable employee's performance. Kepas contends that Dutton gave him "inconsistent directions" that prevented him from managing his team effectively. The sole example of this is that on one occasion, Dutton told Kepas to write up a warning for an employee for failing to call in or come to work, but then told Kepas in front of the employee that Kepas had acted inappropriately in preparing the warning. Kepas also mentions that he was unable to rely on his own judgment because of a disagreement he had with Dutton over whether a certain employee should be promoted and a disagreement he had with Dutton and Hughes over whether another employee should receive a "two" or a "three" performance rating. None of these alleged actions by Dutton could remotely be construed as illegal harassment.

Kepas fails to show how any of the specific criticisms of his performance were related to Dutton's "harassment" when most of them had nothing to do with the incidents he describes. It is undisputed that Kepas's team complained, for example, that Kepas "micromanages insignificant things," "tends not to listen," "doesn't have the technical knowledge to do the job," "is demeaning," "is not receptive to feedback," "doesn't answer the phone," communications are "awkward" and demonstrate poor judgment, and "passes the buck."

Kepas's other evidence of pretext consists of showing that Kepas's conduct in connection with the "sign-in" issue was really not an issue and did not become an issue until after he made his complaints and that Hughes's handling of the sign-in issue was similar to Kepas's, yet Hughes was not issued a PIP. Had the decision to issue the PIP been primarily due to Kepas's handling of the sign-in issue, this evidence might have shown pretext, but such was not the case. There is no evidence that the PIP would have been issued solely because of Kepas's handling of the sign-in issue, as opposed to the numerous other problems that surfaced in the survey. Since the PIP was never issued, there is no way to know whether it would have even included the sign-in issue.

Kepas also points out that he received much better survey results in late 2004; however such evidence does not tend to prove that he did not have poor survey results in late 2005 or that it was illegitimate for eBay to decide to deal with those poor survey results via a PIP.

Kepas further points out that he had received "meets" or "exceeds" quarterly and annual performance ratings prior to the performance improvement plan, and Dutton had never before disciplined Kepas. Again, this is not sufficient evidence that the PIP was pretextual in light of

the abundant evidence of Kepas's performance issues *originating before his complaints*, that would have supported the issuance of a PIP.

In conclusion, Kepas's being informed that he would be issued a PIP did not materially adversely affect him, and, even if it had, Kepas cannot show that eBay's reasons for deciding to issue him a PIP are a pretext for retaliation. Thus, Kepas's retaliation claim fails.

VI. BREACH OF CONTRACT CLAIMS

Kepas contends eBay violated its employment policies, which constituted a contract with him, by retaliating against him for his complaints of discrimination and by failing to discipline Dutton and Jones on the basis of his complaints. Assuming without deciding that the employment policies were enforceable contracts, the claim still cannot survive.

As discussed above, there is insufficient evidence to support the claim that eBay retaliated against Kepas for his complaints. Additionally, eBay did not breach its policy by failing to discipline Dutton and Jones because the policy states that eBay will discipline anyone "who has been found after investigation by eBay to have engaged in conduct in violation of this policy." eBay's internal investigation did not find that Dutton and Jones had engaged in discriminatory and/or retaliatory conduct in violation of the policy. eBay did not make a contract with Kepas that it would discipline anyone about whom he complained regardless of the outcome of its investigation. Therefore, the policy, even if was a contract, was not breached.

VII. DISCRIMINATORY TERMINATION CLAIMS

A. Undisputed Facts Concerning Kepas's Termination

The following facts regarding Kepas's termination are either undisputed by Kepas or, if disputed, taken in the light most favorable to Kepas. Kepas alleges that as a result of the intense stress he experienced at work, he developed tinnitus and anxiety, which grew progressively worse until he could no longer work and had to take a leave of absence. Kepas stated that his tinnitus was noninvasive until January 2006, when Dutton and Jones "escalated their campaign of harassment" against him. It was at that point that he claims the tinnitus grew worse until he was unable to work.

On February 16, 2006, Kepas took a leave of absence due to his tinnitus. His request for paid leave, submitted on February 24, 2006 states: "On February 16th I began a leave of absence from eBay for several reasons. These include, among others: (1) the physical and emotional effects caused by the behaviors of Carolyn Patterson, Wendy Jones and Susan Dutton, which I detailed in eBay ethic hotline complaints on January 20th & 23rd; (2) Tinnitus that has significantly increased in severity since the offending behavior of these individuals escalated."

On March 10, 2006, Patrick R. McDermott, MD, FACP noted "anxiety and depression symptoms," "diagnosis PSTD (sic), panic, anxiety and depression, insomnia ppt by sexual harrisment (sic)," "patient has been advised by psychology and psychiatry to not return to the prior work environment that precipitated his symptoms," "symptoms occurring at the workplace due to PS TD (sic)," "unable to function due to fear of reprisal at work." It is unclear whether McDermott was simply reporting what Kepas told him about the cause of his symptoms, or

whether McDermott himself formed an opinion that the work environment was the cause of Kepas's problems. A summary prepared by Layne Garrett, an audiologist, indicates "onset of clinically significant tinnitus appears to correlate to increased stress in the workplace" and "increase (sic) stress puts pressure on the autonomic nervous system which exacerbates tinnitus which can make the perception of intensity and severity increase . . . ." eBay filed a motion to exclude the opinions of McDermott and Garrett as to the cause of Kepas's problems.

Kepas applied for short term disability benefits, which were denied. He applied for FMLA leave, which was granted. eBay allowed Kepas to remain on unpaid leave after his FMLA leave expired while he appealed the denial of short term disability benefits and while he appealed the denial of worker's compensation benefits. By June 2006, Kepas's leave had expired and his appeals for additional benefits had been denied. On or about June 12, 2006, eBay's counsel, Laurie Chambers, and Kepas's counsel, Scott Crook, discussed Kepas's return to work. In a letter dated June 13, 2006, confirming and following up on that conversation, Crook reported that Kepas was concerned that he would be required to report to Dutton or Jones and would likely be reluctant to transfer to another position in the chain of command of Jones. Crook stated that Kepas "has not foreclosed a return to work if the conditions of the return will not cause his medical conditions to suffer." Crook stated that Kepas's audiologist explained that "it will take 12 to 18 months for Mr. Kepas to reach a final state of recovery" and "identified the stress caused by Mr. Kepas' work environment to be the cause of the tinnitus." Crook stated that Kepas was being treated for panic, anxiety, depressive symptoms and post traumatic stress disorder and that his clinical social worker had stated that "Mr. Kepas requires further intervention before he is allowed to return to work." Crook stated, "Given these significant problems, it is unlikely that Mr. Kepas will be able to immediately return to work."

In a letter dated June 14, 2006, Chambers responded. She stated, "You have not provided any information which supports your client's need for an extended leave. Absent such information, Mr. Kepas must return to work." She stated that the discussion of a transfer was moot, since Kepas had refused any position in Jones' chain of command, and the entire customer support organization was in Jones' chain of command. Chambers stated that since Kepas's claims were not substantiated either by the internal investigation or by an independent investigator, "there is no reason that Mr. Kepas should not return to his position under Ms. Dutton. That said, in order to ensure a smooth return and to allay Mr. Kepas's concerns, I suggested a different reporting relationship. Mr. Kepas has refused that and apparently any position in our customer support organization . . . ."

On June 26, 2006, Chambers wrote Crook stating, "Mr. Kepas has exhausted his available leave under FMLA. His workers' comp claim was denied, as was his Short Term Disability (STD) Claim. eBay had agreed that Mr. Kepas could remain out on unpaid administrative leave pending his STD appeal. The STD denial was upheld on appeal over a month ago. As such, your client's current absence is unapproved and unexcused and he must return to work if he still wants employment with eBay." Chambers stated, "Mr. Kepas will return to his current position. He may report directly to Mr. Wakeham." She advised that Kepas "should plan to return to work on Wednesday, June 28, 2006 . . . . If Mr. Kepas does not return to work, we will assume he is resigning from eBay and will process his separation accordingly.

Thereafter, Mr. Kepas did not report to work and was terminated.

B. eBay's Nondiscriminatory Reason for Termination

eBay asserts that Kepas was terminated as a result of his failure to return to work.

C. Kepas's Evidence of Pretext

1. Age Discrimination

Kepas's sole "evidence" that his termination was motivated by discriminatory animus on the basis of his age consists of one comment made by Jones when she was training to run a race that "I know I have to do this kind of thing now because once I hit a certain age . . . I wouldn't be able to do that anymore. I'll be too old to do that kind of thing."[5] The comment related solely to her own personal physical ability to run a race. It does not indicate that Jones believed that persons Kepas's age were incapable of doing their jobs. Moreover, Mr. Kepas fails to establish even the most tenuous connection between this comment and his termination. There is no evidence that Ms. Jones made or had input into the decision to terminate him. Kepas's claim that he was terminated on the basis of his age, even if properly pled, would fail.

2. Retaliation

Kepas has apparently abandoned his claim that he was terminated in retaliation for his complaints, as he fails to make any argument countering eBay's evidence that the termination was unrelated to his protected activity.

3. Sex Discrimination

It is undisputed that Kepas was invited to return to work and failed to do so, causing his own termination. However, Kepas could still maintain a claim that his termination was discriminatory if he demonstrates that he was constructively discharged. To establish a claim of constructive discharge under Title VII, plaintiff must demonstrate that defendant's discriminatory conduct produced working conditions that a reasonable person would view as intolerable. *Daemi v. Church's Fried Chicken, Inc.*, 931 F.2d 1379, 1386 (10th Cir. 1991). The issue is whether defendant's illegal discriminatory acts made the working conditions so difficult that a reasonable person would feel compelled to resign. *Derr v. Gulf Oil Corp.*, 796 F.2d 340, 344 (10th Cir. 1986); *see also Schweitzer-Reschke,* 874 F. Supp. 1187, 1195-96 (D. Kan. 1995). The standard is an objective one.

Kepas himself described the cause of the medical problems that forced him to take a leave as "the physical and emotional effects caused by the behaviors of Carolyn Patterson, Wendy Jones and Susan Dutton, which I detailed in eBay ethic hotline complaints on January 20th & 23rd." Kepas filed four hotline complaints from January 20-31. The January 20 and 23 calls pertained to Dutton's comment that she had hurt herself while participating in a "circle jerk." The January 24 call complained of the following:

[5] The witness who described this comment, Ms. Whalen, testified that "the implication was that once you got to a certain age, you were not going to be very valuable." Jones did not say such a thing, and the "implication" Whalen read into it is patently unreasonable.

- Dutton told Kepas she got an email from Jones stating that Jones disliked Kepas; Dutton said Jones used words that she could not repeat.

- Dutton met with Kepas and told him two of his employees would be reassigned to report to her. Dutton said she did not understand why Jones dislikes him.

- Dutton told Kepas that Jones hates him and that he needed to post for a position outside of the customer service department so that he was out of Jones' line of authority.

- At a meeting of customer service managers, Jones called on Kepas, even though he had left the meeting early for a physician's appointment, in an attempt to embarrass him in front of his peers.

The January 31 call complained that Dutton had met with Kepas, was upset, and told Kepas "there was a lot of tension between them." Dutton tried to get Kepas to talk, but Kepas was uncomfortable talking. Kepas reported that Hughes informed him that Dutton instructed him to monitor Kepas as a form of retribution.

Giving Kepas the benefit of every doubt, and even assuming that these incidents did, in fact, cause him severe emotional distress and increase the severity of his tinnitus to the extent that he could not return to work, Kepas cannot maintain a claim of sex discrimination resulting in termination because his working conditions were not so intolerable that a *reasonable* person would have felt compelled to resign. Kepas may have perceived the work environment as hostile and abusive, but for Kepas to succeed on his hostile work environment claim, the work environment "must be both *objectively* and subjectively offensive, one that a *reasonable* person would find hostile or abusive." *Faragher v. City of Boca Raton,* 524 U.S. 775, 141 L. Ed. 2d 662, 118 S. Ct. 2275, 2283 (1998). Here, as explained above, the incidents do not even constitute an actionable hostile work environment, let alone an objectively *intolerable* one.

It matters not whether Dutton's or Jones' conduct toward Mr. Kepas actually caused the tinnitus to worsen because, even if it did, there is no evidence that Dutton or Jones engaged in the alleged conduct *because of his gender*. Whalen testified that certain employees, all of whom were female, would fall in and out of favor with Jones. A female employee, Dombrowski, made a sexual harassment complaint against Jones in October 2007. Dutton exposed her breasts to Jones and others at a restaurant before Kepas was demoted and Dutton took his place as eWatch manager. This evidence, Kepas contends, supports the inference that Jones was "placing women in positions where she could have easier access to them," that "Jones discriminated against men in favor of a certain group of women employees that she preferred" and that "it was due to this discrimination that Mr. Kepas was terminated by eBay."

I am not required to draw every inference Mr. Kepas suggests; I am only required to draw *reasonable* inferences. Kepas's suggested inferences are patently unreasonable in light of the undisputed fact that Jones did not terminate his employment or create the circumstances that led to his departure. Kepas voluntarily took a medical leave that was in no way suggested or precipitated by Jones. He was terminated when he failed to return to work after his leave was exhausted, despite eBay's agreement to change his reporting relationship. There is no evidence

to support Kepas's assertion that he was terminated to make way for one of Jones' favored female employees. In fact, Kepas claims he was replaced by Hughes, a male. Kepas has no evidence that similarly situated female employees who failed to return to work after their leaves were exhausted were not terminated. Kepas has neither direct evidence of discrimination, nor indirect evidence sufficient to support a *reasonable probability* that he would not have been terminated but for his gender, as required by *Notari v. Denver Water Dep't,* 971 F.2d 585, 590 (10th Cir. 1992). Kepas's facts fall far short of demonstrating "background circumstances" sufficient to create an inference of reverse discrimination under *Notari's* standards.

VIII. CONCLUSION

Because each of Mr. Kepas's claims fail as a matter of law, there is no need to address eBay's remaining arguments concerning proof of damages. Judgment is hereby entered in favor of eBay on all claims. Emmanuel Kepas's claims are hereby dismissed with prejudice, each party to pay its own costs and attorney's fees.

The administrative fees and expenses of the American Arbitration Association totaling $1,376.48, shall be borne by eBay, Inc., and the compensation and expenses of the arbitrator totaling $31,778.73, shall be borne by eBay, Inc.

This Award is in full settlement of all claims and counterclaims submitted to this Arbitration. All claims not expressly granted herein are hereby, denied.

Dated: July 30, 2008.

Theresa L. Corrada

Theresa L. Corrada, Arbitrator