UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

TERRANCE J. THIEL,

Plaintiff,

v. **MEMORANDUM OPINION AND ORDER**
Civil File No. 08-230 (MJD/AJB)

ENIVA CORPORATION,

Defendant.

Matthew H. Morgan and Steven Andrew Smith, Nichols Kaster, PLLP, Counsel for Plaintiff.

Michael E. Gerould and James F. Baldwin, Moss & Barnett, PA, Counsel for Defendant.

I. INTRODUCTION

This matter comes before the Court on Defendant Eniva Corporation's motion for summary judgment. For the following reasons, the Court will deny Eniva's motion.

II. BACKGROUND

A. Factual Background

Plaintiff Terrance Thiel lives in Minneapolis, Minnesota. Defendant Eniva Corporation is a Minnesota corporation headquartered in Minneapolis,

Minnesota. Eniva manufactures and distributes health and wellness, body care, and household cleaning products.

This is a Title VII case in which Thiel claims that he was fired as retaliation for his reporting sexual harassment on the part of his female boss. Eniva claims that the record shows that the company had made the decision to fire Thiel before he reported the alleged sexual harassment.

Thiel began his employment as an at-will employee of Eniva in August of 2006. At Eniva, Thiel worked in the Quality Assurance Department in the position of Quality Assurance – Analytical Lead Chemist. Eniva's quality systems director Florina Nita hired Thiel and also served as his direct supervisor during the time that Thiel worked at Eniva. According to Thiel, Nita was treated well in the office. This, combined with his belief that anyone who made a complaint about her was fired, led Thiel to the conclusion that Eniva executives favored Nita.

For the purposes of this summary judgment motion, Eniva does not dispute that Nita is a "difficult" person to work with. During the first few months of his employment, however, Thiel generally had a good working relationship with Nita. In July of 2007, Eniva promoted Thiel and gave him a $5,000 salary increase. The promotion entailed a role in the company's

regulatory affairs, to be carried out in addition to the responsibilities that Plaintiff already held.

Thiel submits that, by August 2007, his relationship with Nita had become strained. He claims that Nita's change in attitude happened as a result of his rejection of her sexual advances. He reports that, almost immediately after joining Nita's team, Thiel began experiencing a series of inappropriate actions initiated by Nita. Thiel highlights for the Court Nita's habit of wearing revealing clothing such as short skirts and saying that she had "better legs than her daughter." (Thiel Dep. 118:8-10; Valentine Dep. 70:13-21.) According to Thiel, at least one male employee reported Nita's dress code violations to human resources. (Thiel Dep. 118:20-25.) Nita's habit of wearing short skirts led to the incident that Thiel believes altered his previously good working relationship with Nita.

In August of 2007, Nita summoned Thiel into her office for a closed door meeting. She was dressed in a short skirt. (Thiel Dep. 115:1-10.) During the meeting, Thiel sat on a chair at the table in Nita's office. Instead of sitting on her chair, Nita sat on the table in front of Thiel, "unrealistically close" to him and "kind of open-legged," with her leg touching Thiel's leg. (Id. 115:3-8, 14-15, 116:19-20.) Thiel surreptitiously slid his chair away from Nita in order to remove

himself from the situation. (Id. 115:18-22.) Every time he moved away, however, Nita moved closer. (Id. 116:21-25.) His reluctance in the face of the situation makes Thiel believe that this is the reason Nita's demeanor changed toward him. After the incident in her office, Nita became particularly tough on Thiel.

Eniva presents the Court with a different interpretation of Nita's change in demeanor toward Thiel. Eniva submits email correspondence that is meant to show that Nita had problems with Thiel's lack of communication and lackluster performance. (Email Correspondence, Baldwin Aff. Ex. B.) In the email correspondence, Thiel exhibits some doubt as to whether he would be capable of fulfilling the communication requirements of his new position. On August 13, 2007, Thiel was reprimanded for his communication issues. (Thiel Dep. 91:22-92:10.) And, in an August 19 email, Nita complained to Eniva's Human Resources Manager Ramona Morgan about her disappointment with Thiel's performance and lack of communication. (Baldwin Aff. Ex. B.)

Thiel describes ongoing harassment involving Nita that occurred outside of the time period when Nita complained about Thiel's job performance. On one occasion, during an employee's birthday party in a break room, Thiel noticed Nita giving him an "inappropriate wink." (Thiel Dep. 73:15-19.) On yet another occasion, Nita winked at Thiel from across the table during a meeting. (Id.

107:16-18.) Nita also exhibited body language that Thiel says made him feel uncomfortable. For example, in September 2007, Nita took Thiel to lunch to celebrate his birthday. (Id. 80:8-11.) While at lunch, Nita sat so close to Thiel that they were almost bumping elbows. (Id. 82:9-10) At this point, Nita turned toward Thiel and winked at him. (Thiel Dep. 80:13-14, 82:1-10.)

Thiel also describes some of Nita's less-subtle actions of physical contact that he characterizes as sexual in nature. The incidents involve Nita's touching Thiel in ways that made him feel uncomfortable. First, Thiel recounts a moment that happened within one month of his starting at Eniva. While working in the lab, Nita approached Thiel, sat next to him, and placed her hand on his knee. (Thiel Dep. 77:10-15.) Nita continued a pattern of regularly touching Thiel's wrist and approaching him from behind and rubbing his shoulders. (Id. 75:14-76:12.) In response to the unwanted touching, Thiel told Nita that he was not a "touchy-feely guy" and that he "would appreciate it if she didn't touch [him]." (Id. 85:15-25.) Despite his objections, Nita continued to wink at Thiel, touch him, and make off-the-cuff comments that Thiel believes created a hostile and stressful environment for him.

Thiel testifies that, on one occasion, Nita made statements that led him to think that he could lose his job if he did not succumb to her advances. (Thiel

Dep. 144:24-145:3.) While yelling at Thiel, Nita said something along the lines of "[Y]ou better keep me happy, because I'm the only reason you're keeping your job." (Id. 145:8-9.) Thiel believed that Nita's threat had sexual undertones. (Id. 145:9-21.)

Nita's actions culminated in an October 2007 incident regarding a Food and Drug Administration conference in California. Before leaving for the conference, several Eniva employees were in the lab. Nita entered and, in front of the employees, turned to Thiel and said that once they got to California she wanted to take him out and get him drunk so that she could understand him better. (Romanowski Dep. 72:1-15.) One of the employees who witnessed the interaction said that he was "shocked that a boss would say that to anybody." (Id. 158:8-9.)

After arriving at the conference, the group decided to go to a restaurant for dinner. After they were seated, Nita told Thiel that she sometimes did not understand him. Then, she said that she needed to give him a spanking and she grabbed his wrist. (Thiel Dep. 153:20-23.) On November 5, 2007, shortly after the group returned from the conference in California, Thiel lost the job responsibilities he had been given in July.

On November 9, 2007, Thiel contacted Ramona Morgan and asked to speak with her about Nita's conduct. (Thiel Dep. 143:2-8.) During this meeting, Thiel discussed what he viewed as Nita's inappropriate conduct, including the incidents described above. He also told Morgan that Nita had started yelling at him because he was not responding favorably to her sexual advances and that he did not think that such behavior was appropriate. (Id. 143:17-22.) Thiel also asked to be moved to a different location or to be given a different supervisor. (Id. 149:3-6.) Thiel and Morgan met for a second time regarding Thiel's complaint at the end of November. Eniva fired Thiel on December 6, 2007.

1. The Energy Drink

During his employment with Eniva, Thiel was involved with a group of Eniva employees (the "Energy Group") who, during their term of employment with Eniva, created an energy drink using ingredients and methods developed by and for the company. In addition to Thiel, the Energy Group included Nathan Valentine and Joseph Romanowski. Eniva claims that Thiel's participation in the Energy Group was the reason that the company fired him.

In late 2006, Valentine was involved in creating an energy drink, while at work, for other Eniva employees. In order to create the energy drink, Valentine used the recipe and quantities from the label of an energy drink already on the

market and added leftover caffeine and powdered flavoring samples to purified water. (Valentine Dep. 22:9-20; 23:3-9.) Both of Valentine's direct supervisors, Nita and Lon Jones, knew of and had tasted Valentine's energy drink. (Id. 20:24-25, 93:14-19, 95:13-24.) Neither Nita nor Jones ever told Valentine that creating an energy drink or contacting vendors to obtain samples was a violation of Eniva's Employee Handbook. (Id. 96:3-10.) In addition, Valentine states that Jones provided input to Valentine with respect to flavors and methods, as well as vendors to contact for ingredients. (Id. 25:7-12, 107:6-21.)

Valentine also testifies that Benjamin Baechler, Eniva's Vice Chairman, Chief Medical Officer, and co-owner, knew about the energy drink as well. (Valentine Dep. 93:20-94:1.) During a conference in Las Vegas, Valentine showed Dr. Baechler a sample of the energy drink and told him that he had made it in Eniva's lab. (Id. 93:24-94:1, 105:23-106:10.)

Thiel learned of the energy drink in early 2007, though he did not try the drink until the latter part of that year. Thiel's involvement in the design of the energy drink was limited to suggestions on flavors that might taste good, though Thiel did suggest to Valentine that he could make the energy drink carbonated because Thiel had learned how to do that from a previous employer. Thiel states that his involvement with the production of the energy drink was so limited that

he was not even aware of where Valentine procured the ingredients. (Thiel Dep. 129:18-21.)

In the fall of 2007, Thiel and Romanowski joined Valentine to explore the possibility of creating the energy drink for profit. (Thiel Dep. 128:5-10.) Valentine claims that Thiel was the first one to come up with the idea of making money from the drink. (Valentine Dep. 49:16-50:1.) Romanowski was involved in the potential distribution of the drink through a personal contact at MGM liquors. (Id. 46:15-19.) On September 17, 2007, Thiel met with an individual from MGM liquors to discuss the prospect of distributing the energy drink. (Thiel Dep. 204:19-205:18.) According to Eniva, throughout September and October, the Energy Group used Eniva's computers to exchange emails relative to the prospective business venture, including possible label designs and product formulas. (Email Correspondence, Baldwin Aff. Ex. D.)

2. Meeting with Andrew Baechler

On October 31, 2007, Thiel and Valentine met with Eniva's Chief Executive Officer Andrew Baechler to talk about the energy drink. (Thiel Dep. 132:23-133:16.) Both Valentine and Thiel state that the purpose of this meeting was to alert Baechler to the idea of marketing the energy drink and to ask about renting Eniva's facilities on the weekends in order to produce the drink. At the meeting,

according to Valentine and Thiel, Baechler did not express any concern. In his deposition testimony, Baechler states that, although he was alarmed at how developed the Energy Group's ideas and methods were, "I recall thinking in that entrepreneurial spirit that I certainly didn't want to discourage creative thinking, so I showed a degree of interest." (Baechler Dep. 28:20-29:8.) At the end of the meeting, Baechler told Thiel and Valentine that "'When you're on company time, you need to act appropriately,' but at the same time I was encouraging.'" (Id. 29:9-14.)

After the meeting, Baechler immediately went to Scott Bocklund's office. Bocklund is Eniva's Director of Operations and Senior Vice President. Baechler's "immediate concern was that they [the Energy Group] were doing it [developing the drink] on company time and/or using vendors and/or violating confidentiality agreements and/or using our flavor combinations and/or our raw materials and/or any other multiple of items." (Id. 29:25-30:4.) Baechler then asked Bocklund for his opinion. Baechler testifies that Bocklund stated his belief that if the Energy Group was creating the energy drink on company time "it's inappropriate and we need to immediately terminate them. If there's any inappropriate behavior happening, it's just the gravest . . . of all sins, so to speak, if you work in a laboratory and you are violating that trust." (Id. 30:8-14.)

Baechler then asked Bocklund to begin an investigation into the Energy Group's activities.

In his deposition, Bocklund states that in the days following the October 31 meeting, he decided to conduct an investigation into the Energy Group's activities and that he made the decision to fire the Energy Group on November 2, 2007. Thiel highlights the fact that Bocklund did not document that the alleged investigation took place or tell anyone else at Eniva aside from Baechler that he was conducting an investigation. (Bocklund Dep. 27:13-22.)

3. Termination

On December 6, 2007, the Energy Group was called into a conference room with Baechler. All three of the individuals believed that they were being summoned to discuss the complaint that Thiel had filed against Nita in November. (Thiel Dep. 163:16-25; Romanowski Dep. 11:15-19; Valentine Dep. 58:6-14.) From the conference room, each member of the Energy Group was brought into Bocklund's office and notified of his termination. (Morgan Dep. 45:22-46:7.) After he was fired, Thiel was immediately escorted out of the building. He was not allowed to gather his coat or his other personal belongings from his desk. (Id. 45:24-46:10.)

In a termination letter dated December 17, Eniva cited Thiel's violation of Eniva's Non-Disclosure Agreement and Employee Handbook policies listed in Section 1.6 (Confidentiality, Non-Disclosure, Non-Compete), Section 5.6 (Use of Computers, E-mail and Internet), and Section 5.14 (Outside Employment) as reasons for his termination. (Morgan Aff. Ex. 10.)

The parties do not dispute that Bocklund fired Thiel five weeks after Bocklund claims to have made the decision to fire him. Bocklund states that this delay happened for two reasons. First, Bocklund wanted to confer with legal counsel. (Bocklund Dep. 57:8-12, 20-21.) Second, Bocklund thought that Baechler needed to participate in the termination but was unable to coordinate the termination process with Baechler's schedule until the day the Energy Group was fired. (Id.)

B. Procedural Background

In his Complaint, Thiel alleges two counts: reprisal discrimination in violation of Title VII and reprisal discrimination in violation of the Minnesota Human Rights Act ("MHRA"). Eniva moves for summary judgment on both counts.

III. DISCUSSION

A. Summary Judgment Standard

Under Rule 56(b) of the Federal Rules of Civil Procedure, "a party against whom relief is sought may move at any time, with or without supporting affidavits, for summary judgment on all or part of the claim." "The judgment sought should be rendered if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). See Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986). A fact is material if it will affect the outcome of the suit. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). A dispute is genuine if it could cause a reasonable jury to return a verdict for either party. See id.

The party seeking summary judgment bears the burden of showing that there is no disputed issue of material fact. See Celotex, 477 U.S. at 323. If the opposing party fails to make a showing that supports the existence of an element essential to the case on which that party has the burden of proof at trial, summary judgment must be granted. See id. at 322-23. However, "summary judgment should seldom be granted in the context of employment actions, as such actions are inherently fact based." Haas v. Kelly Servs., Inc., 409 F.3d 1030, 1034-35 (8th Cir. 2005) (quoting Mayer v. Nextel West Corp., 318 F.3d 803, 806 (8th Cir. 2003)).

B. Retaliation under Title VII and the MHRA

The anti-retaliation provisions in Title VII and the MHRA forbid an employer from discriminating against an employee because that individual opposed any practice made unlawful by those laws. See 42 U.S.C. § 2000e-3(a); Minn. Stat. § 363A.15. "The anti-retaliation provision of Title VII protects an individual not from all retaliation, but from retaliation that produces an injury or harm." Burlington N. & Santa Fe Ry. Co. v. White, 548 U.S. 53, 67 (2006).

When there is no direct evidence of retaliation, the McDonnell Douglas test applies for both Title VII retaliation claims as well as MHRA retaliation claims. See Macias Soto v. Core-Mark Int'l, Inc., 521 F.3d 837, 841 (8th Cir. 2008). See generally McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) (establishing the three-part burden shifting test used in Title VII discrimination cases). Under the McDonnell Douglas test, a plaintiff must show that the employee engaged in statutorily protected conduct, that the employer took adverse employment action, and that there is a causal connection between these two actions. See Macias Soto, 521 F.3d at 841. Such a showing establishes a prima facie case of retaliation. If the plaintiff establishes a prima facie case of retaliation, the defendant must then offer a legitimate non-retaliatory reason for the adverse employment action. See id. If the defendant presents a legitimate non-

retaliatory explanation, then the plaintiff must show that the justification is pretext for retaliation. See id. At the summary judgment stage, the plaintiff must establish that "there is a factual dispute whether the defendant's proffered reason is pretextual and whether retaliation was a determinative factor in the defendant's termination." Id. (citing Cronquist v. City of Minneapolis, 237 F.3d 920, 926 (8th Cir. 2001)).

C. Protected Conduct

Eniva argues that Thiel has not engaged in statutorily protected conduct because he could not have reasonably believed that Nita's conduct constituted actionable sexual harassment. "A plaintiff need not establish the conduct which [he] opposed was in fact discriminatory but rather must demonstrate a good faith, reasonable belief that the underlying challenged conduct violated the law." Buettner v. Arch Coal Sales Co., Inc., 216 F.3d 707, 714 (8th Cir. 2000) (citing Wentz v. Maryland Casualty Co., 869 F.2d 1153, 1154-55 (8th Cir. 1989)).

Eniva argues that sexual harassment is only actionable if it is "so 'severe or pervasive' as to 'alter the conditions of [the victim's] employment and creates an abusive working environment.'" Faragher v. City of Boca Raton, 524 U.S. 775, 786 (1998) (citations omitted). As applied to this case, Eniva contends that Nita's conduct was nothing more than the type of "simple teasing, offhand comments,

and isolated incidents" that do not amount to a discriminatory change in the terms of employment. See id. at 788. According to Eniva, no reasonable person could have believed that the incidents involving Nita, taken either in isolation or collectively, constituted sexual harassment.

Thiel argues that complaints regarding discrimination and harassment have routinely been found to constitute protected conduct under Title VII. See, e.g., Green v. Franklin Nat'l Bank of Minneapolis, 459 F.3d 903, 914 (8th Cir. 2006) (finding racial harassment complaint constituted protected activity). In Buettner, the United States Court of Appeals for the Eighth Circuit determined that a plaintiff's report to the defendant's general counsel of one discriminatory comment made by defendant's president was enough to support a finding that the plaintiff had a good faith belief that the comment violated the law. See 216 F.3d at 714-15. Similarly, in Sowell v. Alumina Ceramics, Inc., the Eighth Circuit found that a plaintiff's complaint to the defendant's human resources department of "inappropriate comments" by plaintiff's supervisor, including asking to see plaintiff's tan lines and suggesting that plaintiff had sexual relations with a co-worker on a business trip, was sufficient to satisfy the first prong of the prima facie case of retaliation. See 251 F.3d 678, 681, 684.

In the present case, Eniva does not dispute that Thiel lodged a complaint to Eniva's Human Resources department concerning comments that he felt were inappropriate. Eniva does, however, dispute that Thiel could have had a good faith belief that those comments constituted sexual harassment. In so doing, Eniva highlights for the Court that there is indeed a genuine issue of material fact as to whether Thiel had a good faith belief that Nita's comments constituted sexual harassment. Taking the evidence in light of the nonmoving party, the fact that Thiel made a formal complaint to Eniva's human resources department concerning Nita's conduct of repeated unwanted touching and sexual comments would support a finding that he has demonstrated a good faith, reasonable belief that her conduct violated the law.

D. Adverse Employment Action

The parties do not dispute that Thiel's termination satisfies this prong of his prima facie case.

E. Causal Connection

The Eighth Circuit has directed courts to determine whether "an employer's 'retaliatory motive played a part in the adverse employment action'" when deciding whether an adverse action is causally connected to the employee's protected conduct. Kipp v. Missouri Highway & Transp. Comm'n,

280 F.3d 893, 897 (8th Cir. 2002) (citation omitted). When making this determination, "evidence that gives rise to 'an inference of retaliatory motive' on the part of the employer is sufficient to establish a causal link." Id. (citations omitted). "Generally, more than a temporal connection between the protected conduct and the adverse employment action is required to present a genuine factual issue on retaliation." Kiel v. Select Artifacts, 169 F.3d 1131, 1136 (8th Cir. 1999) (citations omitted). In addition, "a 'mere coincidence of timing' can rarely be sufficient to establish a submissible case of retaliatory discharge." Kipp, 280 F.3d at 897 (citations omitted).

Thiel submits two pieces of evidence that he claims would support an inference of a causal connection. First, Thiel argues that the fact that Morgan did not follow proper procedures in investigating his discrimination complaint supports a finding of reprisal. Second, Thiel focuses on the timing of the adverse action.

Thiel's claim that Morgan did not follow company procedures in investigating his sexual harassment complaint relies on the fact that Morgan did not interview Valentine or Romanowski even though Thiel identified both of them as witnesses to Nita's alleged harassment. On November 30, 2007, Morgan met with Nita. Morgan states that she then did not follow up and interview

Valentine or Romanowski after they were fired along with Thiel on December 6 because she felt that their responses would be biased. In this case, Thiel claims that Eniva failed to abide by its Employee Handbook by conducting investigations into complaints like Thiel's "promptly, fairly and completely."

Thiel also argues that the timing of his firing allows the Court to infer a causal connection. Thiel argues that, viewing the facts in the light most favorable to him as the nonmoving party, there is a sufficient basis for the court to determine that Eniva's adverse action was causally connected to Thiel's complaints of harassment.

The Court agrees with Thiel's arguments on this point. Taken in a light most favorable to Thiel, the evidence establishes a genuine issue of material fact as to whether Eniva's actions with respect to Thiel were causally connected to his complaints of sexual harassment. Thiel does not rely solely on the temporal connection between his sexual harassment complaint and his firing. Accordingly, Thiel has succeeded in surpassing the minimal "threshold of proof necessary to establish a prima facie case." Young v. Warner-Jenkinson Co., Inc., 152 F.3d 1018, 1022 (8th Cir. 1998).

F. Pretext

A plaintiff who establishes a prima facie case of discrimination or retaliation then creates a legal presumption of discrimination. See Vaughn v. Roadway Express, Inc., 164 F.3d 1087, 1090 (8th Cir. 1998). However, "[i]f the employer identifies a legitimate non-discriminatory reason for its action, the presumption created by the prima facie case 'simply drops out of the picture.'" Id. (quoting St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 511 (1993)).

In the present case, Eniva has presented a legitimate non-discriminatory reason for terminating Thiel. It is well settled that a violation of company policy and misuse of company time are sufficient non-discriminatory reasons for termination. See, e.g., Kiel, 169 F.3d at 1135.

In order to establish that a defendant's legitimate non-discriminatory reason is pretextual, a plaintiff must show either (1) that the employer's proffered explanation is unworthy of credence or (2) that a prohibited reason more likely motivated the employer. See Stallings v. Hussman Corp., 447 F.3d 1041, 1052 (8th Cir. 2006).

> Therefore, a plaintiff seeking to avoid summary judgment under the McDonnell-Douglas framework must demonstrate more than a genuine issue of material fact as to whether the employee violated workplace rules. He must show a genuine issue of fact about whether the employer acted based on an intent to retaliate rather than on a good faith belief that the employee violated a workplace rule.

Richey v. City of Independence, 540 F.3d 779, 784 (8th Cir. 2008) (citing Scroggins v. Univ. of Minn., 221 F.3d 1042, 1045 (8th Cir. 2000)). The Eighth Circuit has written that, "[w]hen an employer articulates a reason for discharging the plaintiff not forbidden by law, it is not our province to decide whether the reason was wise, fair, or even correct, ultimately, so long as it truly was the reason for the plaintiff's termination." Wilking v. County of Ramsey, 153 F.3d 869, 874 (8th Cir. 1998) (citation omitted).

Thiel argues that Eniva's proffered reason for firing him has no basis in fact. According to Thiel and Valentine, Baechler was very excited when he heard about their ideas during the October 31, 2007 meeting. Furthermore, Thiel urges the Court to infer pretext from the fact that he was not fired immediately even though Eniva claims that it decided to fire him on November 2, 2007. Rather, Thiel was not fired until after he filed his harassment complaint. According to Thiel, Eniva's reasons for the delay in firing him—that it was waiting for its attorneys to sign off on the decision and that Bocklund wanted Baechler to be present at the firing—is not worthy of credence. To support this position, Thiel points to the fact that he was an at-will employee. Thus, there was no need for Eniva to have its attorneys review the decision to fire him if the true reason for

termination was his violations of company policy. At the very least, Thiel argues, the harassment complaint played a part in Eniva's decision to fire him.

The Court agrees with Thiel's position that the record, taken in a light most favorable to him, would support a finding of pretext. According to Thiel, Baechler was very excited after the meeting and he offered to help the Energy Group with whatever they needed. Baechler himself testified that he was encouraging to the Energy Group even after he found out about their endeavor. In addition, Baechler states that he authorized Bocklund to terminate the Energy Group once Bocklund determined that they should be fired immediately. As mentioned above, however, Thiel was not fired until more than a month after Bocklund claims to have determined that he should have been.

The close temporal proximity between Thiel's report of sexual harassment and his firing combined with the fact that Eniva knew of Thiel's alleged misconduct before Thiel made his complaint would support a finding that Eniva's nondiscriminatory reason for firing Thiel is pretext. Furthermore, as Thiel points out, there is no documentation of Bocklund's investigation into the energy drink incident. Finally, aside from speaking with Thiel's alleged harasser—an employee who Thiel believed was favored by the company's

executives—Eniva did not complete an investigation into Thiel's sexual harassment complaint.

In addition to supporting a finding that Eniva's reasons for firing Thiel are unworthy of credence, the evidence in this case—taken in a light most favorable to Thiel—would support a finding that retaliation for Thiel's sexual harassment complaint against a favorite of company executives was a more likely motivating factor behind Eniva's decision to fire him. The fact that Eniva fired all three members of the Energy Group weighs in favor of Eniva's legitimate nondiscriminatory explanation for firing Thiel. However, in light of the evidence discussed above and the fact that the other two members of the Energy Group happened to also be named witnesses in Thiel's sexual harassment complaint, there is a genuine issue of material fact as to whether Thiel's complaint was a more likely motivating factor behind Thiel's termination.

Accordingly, based on the files, records, and proceedings herein, **IT IS HEREBY ORDERED** that Eniva's Motion for Summary Judgment [Doc. No. 14] is **DENIED**.

Date: August 24, 2009

s/ Michael J. Davis
Michael J. Davis
Chief Judge – U.S. District Court