

1 UNITED STATES COURT OF APPEALS
2 FOR THE SECOND CIRCUIT
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4
5 August Term, 2012
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7 (Argued: March 12, 2013 Decided: April 26, 2013)
8

9 Docket No. 12-3489-cv
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11
12 GAIL KELLY,
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14 *Plaintiff-Appellant,*
15

16 -v.-
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18 HOWARD I. SHAPIRO & ASSOCIATES CONSULTING ENGINEERS, P.C.,
19 LAWRENCE SHAPIRO, JAY SHAPIRO,
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21 *Defendants-Appellees.*
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25 Before:
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27 WALKER, WESLEY, AND DRONEY, *Circuit Judges*
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31 Plaintiff-Appellant Gail Kelly asserts that her
32 employers retaliated against her after she complained about
33 a supervisor's affair with a coworker. The United States
34 District Court for the Eastern District of New York (Spatt,
35 J.) dismissed Kelly's discrimination and retaliation claims
36 under Federal Rule of Civil Procedure 12(b)(6). Kelly
37 appeals the dismissal of her retaliation claims. We AFFIRM.
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42 ANDREW S. GOODSTADT, Goodstadt Law Group, PLLC,
43 Carle Place, NY, *for Appellant.*
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1 HENRY E. KRUMAN, Kruman & Kruman P.C., Malverne,
2 NY, for Appellees Howard I. Shapiro &
3 Associates Consulting Engineers, P.C. and Jay
4 Shapiro.

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6 PHILIP MARK BERNSTEIN, P.M. Bernstein P.C., Garden
7 City, NY, for Appellee Lawrence Shapiro.
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11 PER CURIAM:
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13 Gail Kelly quit her job as a human resources manager at
14 her family business after complaining about an affair that
15 one of her brothers, a vice president of the company, was
16 having with another worker in the office. She sued under
17 Title VII of the Civil Rights Act of 1964 and the New York
18 State Human Rights Law ("NYSHRL"), N.Y. Exec. Law § 290 *et*
19 *seq.*, alleging that the affair created a hostile work
20 environment "permeated by sexual favoritism" and that both
21 of her brothers retaliated against her for complaining about
22 the affair. The United States District Court for the
23 Eastern District of New York (Spatt, J.) dismissed her
24 complaint in its entirety. *Kelly v. Howard I. Shapiro &*
25 *Assocs. Consulting Eng'rs, P.C.*, No. 11-CV-5035, 2012 WL
26 3241402 (E.D.N.Y. Aug. 3, 2012). Kelly appeals the
27 dismissal of her retaliation claims.
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Howard I. Shapiro & Associates Consulting Engineers, P.C. ("HIS") is a third-generation family business founded in 1946 by Kelly's grandfather. In 1989, the company was reorganized into a partnership among Kelly's father, Howard I. Shapiro, and her brothers, defendants and company vice presidents Lawrence and Jay Shapiro.¹ Kelly has worked for the business since 1981, performing various jobs including comptroller, office manager, head of human resources, bookkeeper, and time manager. After Kelly's father passed away in May 2007, her brothers "began to exert control" over the company. Compl. ¶ 21.

¹We will refer to Lawrence Shapiro by his first name.

1 interest, not to mention the adverse effect it was having on
2 Ms. Kelly's employment at HIS," but Lawrence "summarily
3 dismissed Ms. Kelly's complaints out of hand." *Id.* ¶¶ 25-
4 26. Kelly alleges that HIS "became so completely permeated
5 with sexual favoritism towards Ms. Joyce that Ms. Kelly's
6 duties and responsibilities were substantially reduced, and
7 her leadership duties were removed in favor of Ms. Joyce,
8 notwithstanding the fact that she was significantly senior
9 to Ms. Joyce." *Id.* ¶ 28. For example, Kelly alleges that
10 Joyce turned in inaccurate or fabricated timesheets and
11 "berated" Kelly for confronting her about them and that
12 Joyce "left the office early on a number of occasions, took
13 unlimited vacation time, and took days off without notifying
14 Ms. Kelly, all in violation of well-established company
15 protocol." *Id.* ¶¶ 29-34.

16 Kelly alleges that when she spoke to Lawrence about
17 this "favoritism," he "did not discipline Ms. Joyce for her
18 insubordination and patently unprofessional behavior," which
19 Kelly believes created a "sexually-biased environment" that
20 "undermined Ms. Kelly's authority and prevented her from
21 performing her duties as head of Human Resources." *Id.* ¶¶
22 35, 39. Kelly describes how she "frequently complained to

1 [her brothers] about the harassment and discriminatory
2 environment created by [Lawrence's] widespread sexual
3 favoritism" and the "hostile environment created by
4 [Lawrence's] relationship with, and favorable treatment of,
5 his subordinate." *Id.* ¶ 40. She "complain[ed] to [her
6 brothers] about [Lawrence's] clandestine tryst with Ms.
7 Joyce and the discrimination and harassment that she
8 suffered due to such relationship," and she "frequently
9 explained . . . that they were undermining her authority in
10 favor of Ms. Joyce, and that she believed that such
11 misconduct constituted unlawful discrimination." *Id.* ¶ 49.

12 Kelly also alleges that Lawrence's "widespread sexual
13 favoritism . . . created an atmosphere in the workplace that
14 was demeaning to women." *Id.* ¶ 47. "Indeed, veteran female
15 employees complained to Ms. Kelly about the unfair and
16 obvious favoritism shown towards Ms. Joyce." *Id.* ¶ 48. "In
17 fact, several female employees complained that [Lawrence]
18 prevented them from performing their jobs, as they were
19 unable to get into his office to meet with him." *Id.*
20 "Rather, [Lawrence] spent a large portion of each day with
21 Ms. Joyce." *Id.* Kelly does not allege that she reported
22 any of the other female employees' complaints to her
23 brothers.

1 Eventually, Kelly “was left with no option other than
2 to leave the Company after 28 years.” *Id.* ¶ 60. She filed
3 her complaint in district court on October 17, 2011,
4 asserting that she had been subjected to a hostile work
5 environment and to retaliatory treatment in violation of
6 Title VII and the NYSHRL. Defendants moved to dismiss
7 Kelly’s complaint pursuant to Federal Rule of Civil
8 Procedure 12(b)(6).

9 The district court granted the motion. The court first
10 dismissed the hostile environment claim on the ground that
11 Kelly had “failed to plausibly allege the existence of
12 ‘widespread sexual favoritism’ or that any alleged
13 discrimination *was based on the Plaintiff’s gender.*” *Kelly*,
14 2012 WL 3241402, at *7 (emphasis added); *see also id.* at *9
15 (“Absent from the complaint are any allegations suggesting
16 even the slightest ‘semblance of gender-oriented motivation
17 in the events.’” (quoting *Galdieri-Ambrosini v. Nat’l Realty*
18 *& Dev. Corp.*, 136 F.3d 276, 292 (2d Cir. 1998))). Kelly
19 does not challenge the dismissal of her discrimination
20 claims.

21 Second, the court dismissed Kelly’s retaliation claim
22 because Kelly “fail[ed] to sufficiently allege that she had

1 a good faith, reasonable belief that [the allegedly
2 discriminatory] conduct was based on her gender," as
3 required by this court's jurisprudence. *Id.* at *14, see
4 also *Treglia v. Town of Manlius*, 313 F.3d 713, 719 (2d Cir.
5 2002). The court noted that despite Kelly's repeated
6 invocation of "discrimination" and "sexual favoritism," her
7 complaints "were limited to the detrimental impact of the
8 Lawrence-Joyce relationship on the Plaintiff's work and on
9 the company as a whole," and that there was "nothing about
10 the Plaintiff's complaints as alleged that would have put
11 the Defendants on notice that the Plaintiff was complaining
12 of discrimination based on gender." *Id.* at *15, 16.

13 Discussion

14 "In reviewing a motion to dismiss, we accept the
15 allegations in the complaint as true." *Boykin v. KeyCorp*,
16 521 F.3d 202, 204 (2d Cir. 2008). "To survive a motion to
17 dismiss, a complaint must contain sufficient factual matter,
18 accepted as true, to state a claim to relief that is
19 plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662,
20 678 (2009) (quotation marks omitted). "A claim has facial
21 plausibility when the plaintiff pleads factual content that
22 allows the court to draw the reasonable inference that the

1 defendant is liable for the misconduct alleged." *Id.* The
2 standards for evaluating hostile work environment and
3 retaliation claims are identical under Title VII and the
4 NYSHRL. *Weinstock v. Columbia Univ.*, 224 F.3d 33, 42 n.1
5 (2d Cir. 2000).

6 Although Kelly has not appealed the dismissal of her
7 hostile environment claims, we note first that the dismissal
8 was manifestly correct. Our Circuit has long since rejected
9 "paramour preference" claims, which depend on the
10 proposition that "the phrase 'discrimination on the basis of
11 sex' encompasses disparate treatment premised not on one's
12 gender, but rather on a romantic relationship between an
13 employer and a person preferentially [treated]." *DeCintio*
14 *v. Westchester Cnty. Med. Ctr.*, 807 F.2d 304, 306 (2d Cir.
15 1986); see also *id.* at 308 ("Appellees were not prejudiced
16 because of their status as males; rather, they were
17 discriminated against because [their supervisor] preferred
18 his paramour."). "[I]t is axiomatic that in order to
19 establish a sex-based hostile work environment under Title
20 VII, a plaintiff must demonstrate that the conduct occurred
21 because of her sex." *Alfano v. Costello*, 294 F.3d 365, 374
22 (2d Cir. 2002) (quotation marks omitted).

1 To make out a *prima facie* case of retaliation, a
2 plaintiff must demonstrate that “(1) she engaged in
3 protected activity; (2) the employer was aware of that
4 activity; (3) the employee suffered a materially adverse
5 action; and (4) there was a causal connection between the
6 protected activity and that adverse action.” *Lore v. City*
7 *of Syracuse*, 670 F.3d 127, 157 (2d Cir. 2012).

8 An employee’s complaint may qualify as protected
9 activity, satisfying the first element of this test, “so
10 long as the employee has a good faith, reasonable belief
11 that the underlying challenged actions of the employer
12 violated the law.” *Gregory v. Daly*, 243 F.3d 687, 701 (2d
13 Cir. 2001) (quotation marks omitted). And not just any law
14 – the plaintiff is “required to have had a good faith,
15 reasonable belief that [she] was opposing an employment
16 practice made unlawful by Title VII.” *McMenemy v. City of*
17 *Rochester*, 241 F.3d 279, 285 (2d Cir. 2001); see also *id.*
18 (vacating summary judgment where plaintiff’s “belief that
19 [defendant’s] alleged sexual harassment violated Title VII
20 was reasonable”). “The reasonableness of the plaintiff’s
21 belief is to be assessed in light of the totality of the
22 circumstances.” *Galdieri-Ambrosini*, 136 F.3d at 292.

1 A plaintiff's belief on this point is not reasonable
2 simply because he or she complains of something that appears
3 to be discrimination in some form. For example, when a
4 hospital administrator asserted that he had been terminated
5 after complaining that a white employee had been "chosen
6 over qualified black and other minority applicants," we held
7 that the administrator failed to make out a *prima facie* case
8 because his "objections at the time neither pointed out
9 discrimination against particular individuals nor
10 discriminatory practices by [the employer]" and were thus
11 "directed at something that, as it was alleged, is not
12 properly within the definition of an 'unlawful employment
13 practice.'" *Manoharan v. Columbia Univ. Coll. of Physicians*
14 *& Surgeons*, 842 F.2d 590, 593-94 (2d Cir. 1988) (quoting 42
15 U.S.C. § 2000e-2(j) (1982)).

16 Similarly, a black police officer who "reported
17 overhearing racial slurs made by [other] police officers
18 against black citizens" had not engaged in protected
19 activity despite "opposing discrimination by co-employees
20 against non-employees" because his "opposition was not
21 directed at an unlawful *employment practice* of his
22 employer." *Wimmer v. Suffolk Cnty. Police Dep't*, 176 F.3d

1 125, 134-35 (2d Cir. 1999) (emphasis in original); see also
2 *Drumm v. SUNY Geneseo Coll.*, 486 Fed. Appx. 912, 914 (2d
3 Cir. 2012) (“[P]laintiff's allegations that her supervisor
4 ‘berated’ her and made other harsh comments . . . amount
5 only to general allegations of mistreatment, and do not
6 support an inference that plaintiff had a reasonable good
7 faith belief that she was subject to gender
8 discrimination.”).

9 “As to the second element [of the *prima facie* case],
10 implicit in the requirement that the employer have been
11 aware of the protected activity is the requirement that it
12 understood, or could reasonably have understood, that the
13 plaintiff’s opposition was directed at conduct prohibited by
14 Title VII.” *Galdieri-Ambrosini*, 136 F.3d at 292. In
15 *Galdieri-Ambrosini*, we affirmed a district court’s post-
16 trial entry of judgment as a matter of law against a
17 secretary who complained that she had been improperly
18 required to work on her employer’s personal matters. We
19 concluded that “there was no semblance of gender-oriented
20 motivation in the events or conversations to which [the
21 plaintiff] testified” and that the plaintiff’s complaints to
22 her supervisor “did not state that [she] viewed [her

1 supervisor's] actions as based on her gender, and there was
2 nothing in her protests that could reasonably have led [the
3 company] to understand that that was the nature of her
4 objections." *Id.*

5 Here, Kelly's claim founders on both the first and
6 second requirements of the *prima facie* case. Although
7 "[n]othing in our Title VII jurisprudence . . . requires a
8 plaintiff to append to each allegation of harassment the
9 conclusory declaration 'and this was done because of my
10 sex,'" we do require "the allegation of factual
11 circumstances that permit the inference that plaintiff was
12 subjected to a hostile work environment because of her sex."
13 *Gregory*, 243 F.3d at 694. There is nothing in Kelly's
14 complaint, however, to indicate that "her sex, in one way or
15 another, played a substantial role in [her brothers']
16 behavior." *Id.* Although Kelly alleges that she repeatedly
17 used the words "discrimination" and "harassment" when
18 complaining to her employers, her "argument that the
19 widespread sexual favoritism constituted gender
20 discrimination because it resulted in an atmosphere
21 'demeaning to women'[]" is entirely unsupported by the
22 allegations in her complaint." *Kelly*, 2012 WL 3241402, at

1 *11. Kelly “does not allege that Lawrence and Joyce engaged
2 in sexually explicit behavior or conversations in the
3 office, or that Lawrence took *any* actions or made any
4 statement[s] that were of a sexual or gender-specific nature
5 that could be perceived as ‘demeaning to women.’” *Id.*
6 (emphasis in original). Nothing in the complaint indicates
7 that “sexual discourse displaced standard business procedure
8 in a way that prevented [Kelly] from working in an
9 environment in which she could be evaluated on grounds other
10 than her sexuality.” *Drinkwater v. Union Carbide Corp.*, 904
11 F.2d 853, 862 (3d Cir. 1990); *see also id.* at 864
12 (Plaintiff’s “opposition to the liberties which [her
13 supervisors] took with [the company’s] resources, policies
14 and chain of command . . . could [not] reasonably be
15 believed to have resulted from the fact that [plaintiff]
16 possessed the protected characteristic of womanhood.”).

17 Thus, there is no indication either that Kelly herself
18 possessed a good-faith belief that she was complaining of
19 conduct prohibited by Title VII or that her employers could
20 have understood her complaints in this way. Kelly suggests
21 only that she believed her brothers were “undermining her
22 authority in favor of Ms. Joyce, and that she believed that

1 such misconduct constituted unlawful discrimination.”
2 Compl. ¶ 49. Moreover, the complaint does not indicate that
3 the office environment was “demeaning to women.” Kelly’s
4 allegations regarding other female employees in the office
5 state only that they complained to Kelly about the
6 “favoritism shown towards Ms. Joyce” and that they were
7 “unable to get into [Lawrence’s] office to meet with him.”
8 *Id.* ¶ 48. Nothing about these allegations – even if Kelly
9 had repeated them to Lawrence, which she does not claim to
10 have done – indicates that there was discrimination against
11 anyone on the basis of sex. *See Wimmer*, 176 F.3d at 136
12 (“Because [the plaintiff] did not introduce evidence that
13 minority employees of the Department felt that they worked
14 in a racially hostile environment, [he] could not reasonably
15 have believed that he was protesting an unlawful hostile
16 work environment.”).

17 Kelly relies heavily on *Voels v. New York*, 180 F. Supp.
18 2d 508 (S.D.N.Y. 2002), which not only does not support but
19 undermines her case. The male plaintiff, Voels, alleged
20 that his supervisor gave preferential treatment to a female
21 coworker, with whom the supervisor later became romantically
22 involved. *Id.* at 511. The court granted summary judgment

1 for the defendant on Voels's sex discrimination claim,
2 noting that any preferential treatment "was based on the
3 relationship [and] not on gender." *Id.* at 515. The court
4 allowed the retaliation claim to survive, however, noting
5 that Voels had alleged that he first complained of sex-based
6 treatment the year *before* the relationship began, which
7 would allow a jury to find that his belief that he was
8 discriminated against was reasonable. *Id.* at 518 n.49.

9 Kelly protests that as a non-lawyer, she should not be
10 required to understand the "paramour preference" or other
11 intricacies of our Title VII jurisprudence. She argues that
12 her belief that her complaints concerned unlawful activity
13 was sufficiently reasonable to bring the complaints within
14 Title VII's protection. We have indeed held that a
15 "plaintiff may prevail on a claim for retaliation even when
16 the underlying conduct complained of was not in fact
17 unlawful so long as [she] can establish that [she] possessed
18 a good faith, reasonable belief that the underlying
19 challenged actions of the employer violated [the] law."

20 *Treglia*, 313 F.3d at 719 (quotation marks omitted).

21 However, "[m]ere subjective good faith belief is
22 insufficient[;] the belief must be reasonable and

1 characterized by *objective* good faith." *Sullivan-Weaver v.*
2 *N.Y. Power Auth.*, 114 F. Supp. 2d 240, 243 (S.D.N.Y. 2000)
3 (emphasis in original). The objective reasonableness of a
4 complaint is to be evaluated from the perspective of a
5 reasonable similarly situated person.

6 Although it is appropriate to construe Title VII's
7 prohibition on retaliation generously, and we do not require
8 a sophisticated understanding on the part of a plaintiff of
9 this relatively nuanced area of law, it is difficult to see
10 how Kelly could have had even a subjectively reasonable,
11 good-faith belief that her conduct was protected. She made
12 no complaints that suggested a belief that she was being
13 discriminated against on the basis of any trait, protected
14 or otherwise. The success of her claim would require us to
15 endorse not only her belief that the law of Title VII is
16 something other than what it is, but also her apparent
17 belief that the definition of "discrimination" is something
18 other than what it is. We agree with the district court
19 that Kelly has failed to allege facts demonstrating that
20 "even a legally unsophisticated employee would have a good
21 faith, reasonable belief that . . . the Defendants'
22 preferential treatment of Joyce constituted discrimination

1 [against Kelly] based on gender." *Kelly*, 2012 WL 3241402,
2 at *13.

3 Moreover, even if Kelly had possessed such a belief,
4 nothing in her behavior, as described in her complaint,
5 would have allowed her employer to "reasonably have
6 understood[] that [Kelly's] opposition was directed at
7 conduct prohibited by Title VII." See *Galdieri-Ambrosini*,
8 136 F.3d at 292; see also *Manoharan*, 842 F.2d at 594
9 (plaintiff's complaints "neither pointed out discrimination
10 against particular individuals nor discriminatory
11 practices"). Although particular words such as
12 "discrimination" are certainly not required to put an
13 employer on notice of a protected complaint, neither are
14 they sufficient to do so if nothing in the substance of the
15 complaint suggests that the complained-of activity is, in
16 fact, unlawfully discriminatory. See *Foster v. Humane Soc'y*
17 *of Rochester & Monroe Cnty., Inc.*, 724 F. Supp. 2d 382, 395
18 (W.D.N.Y. 2010) (dismissing retaliation claim when the
19 plaintiff's "own allegations . . . show instead that while
20 she did complain about certain problems she was having at
21 work, she did not complain that she was being discriminated
22 against on account of her sex"); *Krasner v. HSH Nordbank AG*,

1 680 F. Supp. 2d 502, 521 (S.D.N.Y. 2010) (Lynch, J.) (“[T]he
2 overall content and context of [the plaintiff’s] internal
3 complaints suggest, at most, a consensual affair that –
4 while perhaps unfair, bad for morale, and detrimental to the
5 department and the company – in itself harmed no one on
6 account of a protected characteristic.”).

7 It is certainly possible to imagine how a plaintiff’s
8 protests about a “paramour preference” scenario could amount
9 to protected activity. Had Kelly complained, or even
10 suggested, that she was being discriminated against because
11 of her sex (or some other trait), we would have a different
12 case. Nothing in her complaint, however – not the
13 accusations of “sexual favoritism,” nor the continual
14 repetition of the words “discrimination” and “harassment” –
15 suggests that she did so. Because there is no indication
16 that Kelly believed that her sex had anything to do with her
17 treatment or that defendants could have understood her
18 statements as such, she has failed to establish a *prima*
19 *facie* case for retaliation under Title VII or the NYSHRL.
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