

OCT 13 2009

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CHARMAINE SMITH,

Plaintiff - Appellant,

v.

JAMES RICHARDSON; et al.,

Defendants - Appellees.

No. 08-16219

D.C. No. 3:05-cv-00503-LRH-
VPC

MEMORANDUM*

Appeal from the United States District Court
for the District of Nevada
Larry R. Hicks, District Judge, Presiding

Submitted October 8, 2009**
San Francisco, California

Before: RYMER and TASHIMA, Circuit Judges, and LEIGHTON,*** District
Judge.

* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

** The panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

*** The Honorable Ronald B. Leighton, United States District Judge for the Western District of Washington, sitting by designation.

Charmaine Smith appeals the district court's grant of summary judgment on her hostile work environment claim under Title VII, 42 U.S.C. section 2000e-2, and her claim of disability discrimination under the Rehabilitation Act, 29 U.S.C. section 794. We affirm.

I

Smith conceded that only the lizard-in-burrito and fish bait incidents had any sort of sexual connotation. Assuming (without deciding) that these two incidents had a sexual connotation, they were isolated and, though in bad taste, were not sufficiently severe or pervasive to alter the conditions of Smith's employment or create an abusive work environment. *See Porter v. Cal. Dep't of Corr.*, 419 F.3d 885, 892 (9th Cir. 2005); *see also Faragher v. City of Boca Raton*, 524 U.S. 775, 788 (1998) (“[S]imple teasing, offhand comments, and isolated incidents (unless extremely serious) will not amount to discriminatory changes in the terms and conditions of employment.”) (citations and internal quotation marks omitted).

II

Assuming (without deciding) that Smith is disabled for purposes of the Rehabilitation Act, she points to no evidence raising a genuine issue that anyone

other than her supervisor knew about her lupus condition or that she suffered any adverse employment action “solely by reason of” of her lupus. *See* 29 U.S.C. § 794(a) & (d); *see also Bates v. United Parcel Serv., Inc.*, 511 F.3d 974, 988 (9th Cir. 2007) (en banc).

AFFIRMED.