UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
OCALA DIVISION

UNITED STATES EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, JOHN FLORIDIA, and ANNETTE FLORIDIA,

Plaintiff,

-vs- Case No. 5:02-cv-169-Oc-10GRJ

MORGAN TIRE & AUTO, INC., d/b/a OLSON TIRE COMPANY,

Defendant.
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ORDER

This action comes before the Court on the Defendant's "Motion to Dismiss" (Doc. 23), to which the Floridias have responded (Doc. 25). The motion is ripe for decision and the Court concludes that it is due to be denied.

Background

The United States Equal Opportunity Employment Commission initiated this Title VII action to provide relief for John Floridia and other male employees who were allegedly sexually harassed by Howard Cooper, a management official and supervisor for the Defendant's corporation (Doc. 1). The Floridias intervened in this matter[1] and assert the following state law claims: Count I and II for sexual harassment and retaliation under the Florida Civil Rights Act; Count III for intentional infliction of emotional distress; Count IV for

[1] See Doc. 11, Order granting the Floridias' motion for intervention and directing the Clerk to file their complaint, Doc. 12.

negligent training, supervision and retention; Count V for battery; and Count VI for loss of consortium (Doc. 12. Specifically, the Plaintiff John Floridia alleges that in addition to the "verbal conduct of a sexual nature," Cooper "physically grabbed him about his body, on numerous occasion[s], rubbed up against him with his genitals, and [committed] other physical acts of touching" (Doc. 12).

The Defendant moves to dismiss Count III for intentional infliction of emotional distress and Count V for battery. The Defendant contends that it cannot be liable for these intentional torts because Cooper was acting outside the scope of his employment, and that it cannot be liable for intentional infliction of emotion distress because Cooper's acts, even if true, were not "outrageous."

Motion to Dismiss Standard

In passing on a motion to dismiss under Rule 12(b)(6), as distinguished from a motion for summary judgment under Rule 56, the Court is mindful that "[d]ismissal of a claim on the basis of barebones pleadings is a precarious disposition with a high mortality rate."[2] As the Supreme Court declared in Conley v. Gibson, a complaint should not be dismissed for failure to state a claim unless it appears "beyond doubt that the plaintiff can prove no set of facts in support of his claim that would entitle him to relief."[3] Thus, if a

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[2] Int'l Erectors, Inc. v. Wilhoit Steel Erectors Rental Serv. 400 F.2d 465, 471 (5th Cir. 1968).

[3] Conley v. Gibson, 355 U.S. 41, 45-46, 78 C. Ct. 99, 101-02, 2 L.Ed 80 (1957). *See* also Cook & Nichol, Inc. v. The Plimsoll Club, 451 F.2d 505 (5th Cir. 1971).

Complaint "shows that the Plaintiff is entitled to any relief that the Court can grant, regardless of whether it asks for the proper relief," it is sufficiently plead.[4]

Discussion

1. *Respondent Superior Liability*

Florida law provides that "[u]nder the doctrine of respondent superior, an employer cannot be held liable for the tortious or criminal acts of an employee, unless the acts were committed during the course of the employment and to further a purpose or interest, however excessive or misguided, of the employer."[5] In particular, it is insufficient to simply allege that the employer was on notice of an employee's misconduct;[6] rather, a plaintiff must allege that the employee's conduct was: (1) of the kind he was employed to perform; (2) substantially within the time and space limits authorized or required by the work to be performed; or (3) activated, at least in part, by a purpose to serve the employer.[7]

In this action, the Plaintiff alleges that the Defendant was on notice of Cooper's misconduct, that such misconduct occurred within the course and scope of employment,

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[4] Dotschay v. Nat. Mut. Ins. Co., 246 F.2d 221 (5th Cir. 1957).

[5] Iglesia Cristiana v. L.M., 783 So. 2d 353, 356 (Fla. 3d DCA 2001).

[6] See, e.g., Resley v. Ritz-Carlton Hotel Co., 9899 F. Supp. 1442, 1448 (M.D. Fla. 1997) (stating that "[t]he standard for an employer's liability for its employee's intentional torts under Florida's common law doctrine of respondent superior is different from the standard for an employer's liability for a hostile work environment under Title VII"); Ayers v. Wal-Mart Stores, Inc., 941 F. Supp. 1163, 1169 (M.D. Fla. 1996) (stating that while notice of an employee's actions is "relevant to a corporation's liability for sexual harassment under Title VII, notice to Wal-Mart does not affect the analysis of respondent superior liability for the state common law tort claims.").

[7] Iglesia, 783 So. 2d at 356-357.

and that the Defendant "encouraged, condoned, and authorized discrimination and harassment of Plaintiff thereby directing and encouraging the acts of Howard Cooper" (Doc. 12). Thus, although sexual batteries are generally outside the scope of employment,[8] a review of the complaint in a light most favorable to the Plaintiff reveals that the Plaintiff has sufficiently alleged that Cooper was acting in the course of his employment, to further a purpose or interest of the Defendant.[9] Accordingly, the Defendant's motion to dismiss is due to be denied.

2. *Intentional Infliction of Emotional Distress*

Florida law imposes a high burden upon a plaintiff alleging intentional infliction of emotional distress: "a plaintiff must allege that the conduct goes beyond all bounds of decency and is regarded as atrocious and utterly intolerable in a civilized society."[10] Indeed, Florida courts have refused to permit claims for intentional infliction of emotion distress predicated solely on allegations of verbal sexual abuse in the workplace.[11] Courts

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[8] Id. at 357.

[9] See Sparks v. Jay's A.C. & Refrigeration, Inc., 971 F. Supp. 1433, 1440 (M.D. Fla. 1997); Vernon v. Medical Management Assoc., 912 F. Supp. 1549, 1556-1557 (S.D. Fla. 1996).

[10] Scelta v. Delicatessen Supoort Services, Inc., 57 F. Supp. 2d 1327, 1357 (M.D. Fla. 1999) (citing Metropolitan Live Insurance Co. v. McCarson, 467 So. 2d 277 (Fla. 1985)).

[11] De La Campa v. Grifols America, Inc., 819 So. 2d 940, 943-944 (Fla. 3d DCA 2002); Johnson v. Thigpen, 788 So. 2d 410, 413 (Fla. 1st DCA 2001).

have, however, recognized a claim for intentional infliction of emotional distress where persistent verbal abuse is coupled with repeated offensive physical contact.[12]

The Plaintiff alleges that he was "physically and mentally tormented" and that on numerous occasions he was grabbed, rubbed, and touched by Cooper (see Doc. 12). Thus, although the Court is not in a position to conclude as a matter of law that the alleged misconduct is "outrageous" or "intolerable in a civilized society," the Plaintiff has plead facts sufficient to survive the Defendant's motion to dismiss on this issue. Accordingly, the Defendant's motion to dismiss is due to be denied.

Conclusion

Upon due consideration and for the forgoing reasons, it is ordered that the Defendant's "Motion to Dismiss" (Doc. 23) is DENIED in all respects.

IT IS SO ORDERED.

DONE and ORDERED at Ocala, Florida this 2d day of June, 2003.

UNITED STATES DISTRICT JUDGE

Copies to: Counsel of Record
Maurya McSheehy

[12] Johnson, 788 So. 2d at 414; Vernon, 912 F. Supp. at 1560-1561.

F I L E C O P Y

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