UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Plaintiff,

SHERI CALVO, et al.,

Intervenor/Plaintiffs,

vs.

RIO BRAVO INTERNATIONAL, et al.,

Defendants.

_____/

CASE NO. 8:99-CV-1371-T-17MAP

ORDER

This cause is before the Court on the following:

Dkt. 100 Motion for Partial Summary Judgment as to Claims of Calvo, Scarborough and Ferek
Dkt. 101 Notice of Filing Deposition Excerpts
Dkt. 102 Deposition -Crenshaw
Dkt. 103 Deposition - Irwin
Dkt. 104 Deposition - Calvo
Dkt. 105 Deposition - Calvo
Dkt. 106 Deposition - Scarborough
Dkt. 107 Deposition - Scarborough
Dkt. 108 Deposition - Ferek
Dkt. 109 Deposition - Ferek
Dkt. 110 Affidavit
Dkt. 189 Response
Dkt. 190 Response

Defendants move for partial summary judgment as to the retaliation claims of Plaintiff/Intervenors Calvo, Ferek and Scarborough. Defendants also move for dismissal of Intervenors'

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claims to the extent that those claims are based on time-barred events, that is, events which occurred beyond the three hundred day limitation under Title VII, and the three hundred sixty five day limitation under the Florida Civil Rights Act.

I. EEOC's Response

Plaintiff requests the denial of the Motion for Partial Summary Judgment. Plaintiff argues that the hostile environment of the workplace constitutes a continuing violation for purposes of Title VII, and therefore the limitation of Intervenors' claims should be denied. As to the retaliation claims, Plaintiff argues that the adverse actions are pretextual, and there is evidence in the record providing a sufficient basis for a reasonable juror to find the actions pretextual. Plaintiff further argues that the Intervenors were intentionally misled by Defendants that their complaints would be taken care of without further action.

II. Intervenors' Response

Intervenors Calvo, Ferek and Scarborough request the denial of the Motion for Partial Summary Judgment based on the application of the continuing violation theory. As to retaliation and constructive discharge, Intervenors argue that the Motion for Partial Summary Judgment should be denied because, under the applicable tests, Intervenors suffered adverse employment actions after filing their charges.

III. Standard of Review

This circuit clearly holds that summary judgment should only

be entered when the moving party has sustained its burden of showing the absence of a genuine issue as to any material fact when all the evidence is viewed in the light most favorable to the nonmoving party. Sweat v. The Miller Brewing Co., 708 F.2d 655 (11th Cir. 1983. All doubt as to the existence of a genuine issue of material fact must be resolved against the moving party. Hayden v. First National Bank of Mt. Pleasant, 595 F.2d 994, 996-7 (5th Cir. 1979), quoting Gross v. Southern Railroad Co., 414 F.2d 292 (5th Cir. 1969). Factual disputes preclude summary judgment.

The Supreme Court held, in Celotex Corp. v. Catrett, 477 U.S. 317 (1986),

> In our view the plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. Id. at 273.

The Court also said, "Rule 56(e) therefore requires that the nonmoving party go beyond the pleadings and by her own affidavits, or by the 'depositions, answers to interrogatories, and admissions on file,' designate 'specific facts showing there is a genuine issue for trial.'" Celotex Corp., at p. 274.

IV. Discussion

A. Continuing Violation

Defendants argue that Intervenors did not file charges after becoming aware of the hostile environment of the workplace, and as a result, the Court should find that events occurring before

the applicable limitation periods should not be considered. Defendants rely on Roberts v. Gadsden Memorial Hospital, 835 F.2d 793 (11th Cir. 1988) and Matthews v. City of Gulfport, 72 F.Supp. 1328 (M.D. Fal. 1999).

Plaintiff argues that courts have consistently found that a complaining party need only show that a violation occurred within 300 days of filing the charge in order for like claims to be timely, and the continuing violation theory is applicable to this hostile environment case. Plaintiff argues that, based on subject matter, frequency and permanence, the factual situation in this case meets the requirements to find a continuing violation. Plaintiff argues that this case is similar to the factual situation in Scelta v. Delicatessen Support Services, Inc., 89 F.Supp.2d (M.D. Fla. 2000). Plaintiff argues that the Intervenors attempted to exhaust the means available to resolve the complaints internally, including verbal complaints to a succession of assistant managers, verbal complaints to a succession of general managers, verbal and written complaints to area directors, and calling the 1-800 hotline for employee complaints.

Plaintiff further argues that the continuing violation doctrine is an equitable doctrine, and Defendants led Intervenors to believe that the complaints would be addressed. After four years, when there was no resolution, Intervenors filed formal charges. Plaintiff argues that Defendants intentionally deceived Intervenors and the Court should not reward the deception.

After consideration, the Court denies the Motion for Partial Summary Judgment. The parties have offered different versions of

what happened, and why it happened that way. The Court may not weigh evidence, and is required to view the evidence in the light most favorable to the nonmoving party. The litany of unwelcome touching, sexual remarks, and other events recounted at length in the depositions appropriately puts this case in the category of continuing violation.

B. Retaliation

In order to establish a prima facie case of retaliation, a party must demonstrate that 1) she engaged in a statutorily protected activity; 2) that she suffered adverse employment action; and 3) that the adverse employment action was causally related to the protected activity. Harper v. Blockbuster Entertainment Corp., 139 F.3d 1385 (11th Cir. 1998).

As to the issue of the presence of adverse employment action, there is no bright line rule to apply; the Court is required to view each fact situation on a case by case basis. The employee's subjective view of the significance and adversity of the employer's conduct is not controlling; the employment action must be materially adverse as viewed by a reasonable person in the circumstances. There are material facts in dispute which prevent the Court from making any determination as a matter of law on the presence of adverse employment action.

Defendants have offered reasonable explanations as to causation, but Plaintiff and Intervenors' explanations may be equally reasonable, viewing the whole background of this case. The Court found the factual scenario that unfolded over an extended period of time to be so extreme as to be incredible.

Doubt has been cast equally on the testimony of all of the witnesses. When which version of the facts is accepted turns on credibility of witnesses, the issue must be turned over to the jury to decide what happened and why it happened. The Court denies the Motion for Partial Summary Judgment as to this issue.

C. Constructive Discharge

To establish constructive discharge, an employee must show that the employer's action was deliberate and that the working conditions were intolerable. Disputed versions of the facts and the reasons for what occurred have been offered, and the Court concludes that which version is accepted will depend on credibility. After consideration, the Court denies the Motion for Partial Summary Judgment as to this issue. Accordingly, it is

ORDERED that the Motion for Partial Summary Judgment (Dkt. 100) is **denied**.

DONE and ORDERED in Chambers, in Tampa, Florida on this 19 day of March, 2002.

ELIZABETH A. KOVACHEVICH
United States District Judge

Copies to:
All parties and counsel of record

Date Printed: 03/22/2002

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