IN THE UNITED STATES DISTRICT COURT FOR

THE WESTERN DISTRICT OF OKLAHOMA

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Plaintiff,

and

JAMES OWINGS and LANCE WHISENNAND,

Plaintiffs-Intervenors,

vs.

ACTION, INC.,

Defendant.

No. CIV-05-749-W

ORDER

This matter comes before the Court on the Motion for Partial Summary Judgment filed pursuant to Rule 56, F.R.Civ.P., by plaintiff Equal Employment Opportunity Commission ("EEOC") and plaintiffs-intervenors Lance Whisennand and James Owings. Defendant Action, Inc., has responded to the motion, and based upon the record, including the following undisputed facts, the Court makes its determination as to those affirmative defenses asserted by Action and challenged by the movants.

1. On July 23, 2003, both Whisennand and Owings submitted information to the EEOC about alleged discrimination at their former place of employment, Action, Inc. ("Action").

2. On November 5, 2003, their complaints were each formalized in a Charge of Discrimination.

3. In his Charge of Discrimination, Whisennand contended

(a) that from January 2, 2003, to January 24, 2003, he was subjected to inappropriate comments and conduct by supervisor Danny Cook;

(b) that "[o]n January 24, 2003, Cook fell on [him] . . . while [he] . . . was in a ditch installing plumbing and began to hump [him] . . . from behind while making sexual comments;"

(c) that he had "witnessed [Cook] . . . attack a co-worker in the same manner earlier;"

(d) that he did not return to work after that day; and

(e) that he had been discriminated against because of his gender.

4. In Owings' Charge of Discrimination, he contended

(a) that beginning on January 6, 2003, he "was subjected to demeaning and harassing comments" from Cook;

(b) that on January 24, 2003, while he "was in a ditch installing plumbing, Cook tackled . . . [him] from behind and began humping . . . [him];"

(c) that several days later, Cook "walked up behind . . . [him], grabbed [him] . . . and began humping [him] . . . again;"

(d) that his employment was thereafter terminated by Jamison Boyster, an apprentice and Cook's "second in command;" and

(e) that he had been discriminated against because of his gender and retaliated against for opposing an unlawful employment practice.

5. Cook had supervisory authority over both Whisennand and Owings.

6. Action had no written policies, rules or procedures designed to prohibit sexual harassment at the time this alleged harassment occurred.

On June 30, 2005, the EEOC brought suit against Action under Title VII of the Civil Rights Act of 1964 ("Title VII"), as amended, 42 U.S.C. § 2000e et seq., to correct alleged unlawful employment practices and to provide relief to Whisennand and Owings. On

October 4, 2005, the Court permitted Whisennand and Owings to intervene, and on October 6, 2005, they filed their complaint in intervention. Both Whisennand and Owings contended that they had been subjected to a hostile work environment in violation of Title VII and that they had suffered intentionally inflicted emotional distress in violation of state common law. Owings also sought relief under Title VII for Action's alleged retaliatory conduct.

In the Motion for Partial Summary Judgment now pending before the Court, the movants have challenged the first, second, third, sixth and seventh affirmative defenses asserted by Action in its answers filed on August 3, 2005, and October 7, 2005 (collectively "answer").[1] Action has advised the Court that it now wishes to withdraw

(1) the first affirmative defense that seeks relief for failure to state a claim upon which relief may be granted;

(2) that portion of the second affirmative defense that seeks relief based upon the doctrines of waiver, laches and/or estoppel;

(3) that portion of the second affirmative defense that seeks relief based upon the statute of limitations applicable to any claim asserted in this case under Title VII;

(4) the third affirmative defense that seeks relief based upon the failure to satisfy all statutory conditions, including exhaustion of administrative remedies; and

(5) the seventh affirmative defense that challenges the constitutionality of any award of punitive damages rendered by the jury.

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[1]The movants did not challenge that portion of Action's second affirmative defense that is based upon the statute of limitations applicable to the state law claim of intentional infliction of emotional distress asserted by Owings and Whisennand or Action's fourth and fifth affirmative defenses.

In light of Action's response, only one challenge remains, and that challenge is directed at Action's sixth affirmative defense, which is based upon the decisions of the United States Supreme Court in Faragher v. City of Boca Raton, 524 U.S. 775 (1998), and Burlington Industries, Inc. v. Ellerth, 524 U.S. 742 (1998). Upon review of the record, the Court finds first as a matter of law that Action cannot rely upon this defense as to Owings. While the parties have disagreed over the reasons for Owings' discharge from employment, there is no dispute that his employment was terminated. Thus, there can be no dispute that Owings suffered a tangible employment action, and the Supreme Court has held that "[n]o affirmative defense is available . . . when . . . [a] supervisor's harassment culminates in a tangible employment action, such as discharge . . . ." E.g., Ellerth, 524 U.S. at 765.

In connection with Action's ability to rely on this affirmative defense to shield itself from liability on Whisennand's Title VII claim, the Court has considered the standards that govern motions seeking summary judgment. In this connection, summary judgment is appropriate only if "there is no genuine issue as to any material fact and . . . the moving party is entitled to judgment as a matter of law." Rule 56(c), F.R.Civ.P. At this stage of the litigation, the Court does not evaluate the credibility of the witnesses, e.g., Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986), or "weigh the evidence and determine the truth of the matter . . . ." Id. at 249. Rather, the Court must decide "whether there is a genuine issue for trial . . . [and] there is no [triable] issue . . . unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party. If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted." Id. at 249-50 (citations omitted). The Court's inquiry must be whether the

evidence, when viewed "through the prism of the substantive evidentiary burden," id. at 254, "presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." Id. at 251-52.

In Faragher and Ellerth, the Supreme Court addressed "the circumstances under which an employer may be held liable under Title VII . . . for the acts of a supervisory employee whose sexual harassment of subordinates has created a hostile work environment amounting to employment discrimination." Faragher, 524 U.S. at 780. In those instances where the employee suffers the unwelcome sexual advances of a supervisor but yet suffers no adverse tangible employment action, a defending employer to escape liability or the imposition of damages must establish by a preponderance of the evidence

> "(a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise."

Ellerth, 524 U.S. at 765; e.g., Faragher, 524 U.S. at 807.

It is undisputed that Action had not promulgated a written "antiharassment policy with complaint procedure," id., at the time the events in this lawsuit occurred. The absence of a written grievance procedure designed specifically to address sexual harassment however is not fatal to Action's ability to rely upon this defense. While "[t]he lack of such a written policy procedure . . . certainly weighs in the . . . [movants'] favor [in this case] in determining whether there is a genuine issue of material fact with regard to whether. . . [Action] exercised reasonable care to prevent any . . . harassing behavior," Walker v. Thompson, 214 F.3d 614, 627 (5th Cir. 2000), it is but one factor to consider.

Action has contended that it had "an informal open door policy for any employee who had a complaint," Response at 3, and that "employee complaints were routed through management at the home office." Id. In support of these statements, Action has submitted the affidavit of Alan Wright, Action's president. In his affidavit, Wright has stated that "information identifying the home office address and telephone number . . . was posted at the job site [where Whisennand was working] and available to employees at the onsite job trailer." Affidavit at ¶ 3 (May 1, 2006).

In reviewing the record, the Court finds no significantly probative evidence that creates a genuine factual dispute over whether Whisennand knew or should have known about this "informal open door policy" or over whether this informal grievance procedure was designed to specifically address complaints about harassment or other discriminatory conduct. Likewise, the Court finds no evidence that creates a sufficient disagreement over whether Whisennand had access to the onsite job trailer or over whether he was ever advised that contact information was posted at this location. Finally, the Court finds no evidence in the record regarding the steps Action took to make its employees aware of this complaint procedure, and as stated, no evidence that Action had any antiharassment policy, written or unwritten, formal or informal, "to prevent and correct promptly any sexually harassing behavior." Ellerth, 524 U.S. at 765. In the absence of the same, the Court finds no genuine dispute exists with regard to the first prong of this affirmative defense sufficient to overcome the movants' request for summary judgment.[2]

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[2]Having determined that no conflict exists with regard to the first prong sufficient to defeat the movants' Motion for Partial Summary Judgment, the Court has not considered the arguments and authorities advanced by the parties in connection with the second prong of this affirmative defense.

Based upon the foregoing, the Court finds that the movants are entitled to summary judgment as to Action's first, second (as it pertains to the doctrines of waiver, laches and/or estoppel as to all claims and to the statute of limitations applicable to the Title VII claims), third and seventh affirmative defenses because Action has advised that it does not now intend to pursue these defenses and as a matter of law as to Action's sixth affirmative defense and GRANTS the movants' Motion for Partial Summary Judgment filed on April 3, 2006, accordingly.

ENTERED this 15th day of May, 2006.

LEE R. WEST
UNITED STATES DISTRICT JUDGE