UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Plaintiff(s),

and

SHERI CALVO, VERONICA FEREK and MELISSA SCARBOROUGH,

Intervenor/Plaintiffs,

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

RIO BRAVO INTERNATIONAL, INC., et al.,

Defendants/
Third Party Plaintiffs,

v.
ROBERT EVANS,

Third Party Defendant.

_____/

ORDER

This cause is before the Court on:

Dkt. 112 Motion for Summary Judgment
Dkt. 135 Motion for Summary Judgment
Dkt. 167 Deposition Excerpts
Dkt. 181 Response
Dkt. 192 Response
Dkt. 198 Deposition - Milcowitz
Dkt. 206 Deposition - Thomas

352

Case No. 8:99-CV-1371-T-17MAP

I. Claims of Gracey, Workman, Smith and Eberhardt

Plaintiff E.E.O.C. has notified the Court that Plaintiff is no longer seeking relief on behalf of Nicole Gracey, Sharlee Workman, Lesley Smith and Heather Eberhardt (Dkt. 341, pp. 5-6). Therefore the Court denies the Motion for Summary Judgment as to the claims of Gracey, Workman, and Smith (Dkt. 112) as moot and denies the Motion for Summary Judgment as to the claims of Eberhardt (Dkt. 135) as moot.

II. 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. `979), quoting Gross v. Southern Railroad Co., 414 F.2d 292 (5th Cir. 1969). Factual disputes preclude summary judgment.

The Supreme Court of the United States held, in Celotex Corp. v Catrett, 477 U.S. 317, 91 L.Ed.2d 265, 106 S.Ct. 2548 (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 the nonmoving party to 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.

III. Hostile Environment Sexual Discrimination in General

In Mendoza v. Borden, Inc., 195 F.3d 1238 (11th Cir. 1999), the Eleventh Circuit Court of Appeals articulates the standards to determine the presence of hostile environment sexual harassment. To establish a hostile environment sexual harassment claim under Title VII based on harassment by a supervisor, an employee must show: 1) that he or she belongs to a protected group; 2) that the employee has been subject to unwelcome sexual harassment, such as sexual advances, requests for sexual favors, and other conduct of a sexual nature; 3) that the harassment must have been based on the sex of the employee; 4) that the harassment was sufficiently severe or pervasive to alter the terms and conditions of employment and create a discriminatorily abusive working environment; and 5) a basis for holding the employer liable. Henson v. City of Dundee, 682 F.2d 897, 901 (11th Cir. 1982). The Court notes that the phrase "terms, conditions or privileges of employment" in Title VII is an expansive concept which sweeps within its ambit the practice of creating a working environment heavily charged with ethnic or racial discrimination.

Although Title VII's prohibition of sex discrimination clearly includes sexual harassment, Title VII is not a federal "civility code." Oncale v. Sundowner Offshore Services, Inc., 523 U.S. 75 (1988)("We have never held that workplace harassment, even harassment between men and women, is automatically discrimination because of sex merely because the words used have sexual content or connotations.") Sexual harassment constitutes sexual discrimination only when the harassment alters the terms or conditions of employment. In hostile environment cases, an employer's harassing actions toward an employee do not constitute employment discrimination under Title VII unless the conduct is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment.

Establishing that harassing conduct is sufficiently severe or pervasive to alter an employee's terms or conditions of employment includes a subjective and an objective component. The employee must "subjectively perceive" the harassment as sufficiently severe and pervasive to alter the terms or conditions of employment, and this subjective perception must be objectively reasonable. The environment must be one that "a reasonable person would find hostile or abusive, and that the victim subjectively perceives to be abusive. The objective severity of harassment should be judged from the perspective of a reasonable person in the plaintiff's position, considering all the circumstances.

The Court is required to consider the following factors in determining whether harassment objectively altered an employee's terms or conditions of employment: 1) frequency of the conduct; 2) severity of the conduct; 3) whether the conduct is physically

threatening or humiliating, or a mere offensive utterance; and 4) whether the conduct unreasonably interferes with the employee's job performance. Courts should examine the conduct in context, not as isolated acts, and determine under the totality of the circumstances whether the harassing conduct is sufficiently severe or pervasive to alter the terms or conditions of the plaintiff's employment.

IV. Factual Background

Kathryn Milcowitz was hired as a server by Rio Bravo in 1995, and was employed there when Robert Evans was the Assistant Manager in 1997 and 1998. In her deposition, Milcowitz testified that during her training, she was instructed on Rio Bravo's sexual harassment policy, and signed a form stating that she had read and understood the policy.

Kathryn Milcowitz testified that Robert Evans commented on her appearance, including her large breasts (Dkt. 193, pp. 15-16), discussed the size of his penis on five occasions (Dkt. 198, p. 112), and discussed his favorite sexual positions (Dkt. 198, pp. 92-3). She further testified that Robert Evans unsnapped her bra on twenty occasions (Dkt. 198, p. 69), pushed himself against her while she was entering orders into the computer (Dkt. 198, p. 70), smacked her on the butt frequently (Dkt. 198, p. 71), and checked what type of underwear she was wearing by rubbing his hand on her low back (Dkt. 198, p. 75). Kathryn Milcowitz testified that she reported a bra-snapping incident to a manager (Dkt. 198, p. 57), and the conduct lessened after that. She did not complain about the continuing conduct.

Christina Lynn Thomas was hired as a server by Rio Bravo in February, 1996, and was employed at the Clearwater Rio Bravo when Robert Evans worked there as an Assistant Manager in 1997 and 1998. She did not recall receiving an employee manual containing Rio Bravo's sexual harassment policy during her training.

Christina Lynn Thomas testified that Robert Evans tried to unsnap her bra on two occasions (Dkt. 206, pp. 45-7), and tried to pull her onto his lap on one occasion (Dkt. 206, p. 51). She further recalled incidents of hugging, tickling and pinching (Dkt. 206, pp. 51-2). Christina Lynn Thomas testified that she told Robert Evans to stop touching her, and pushed his hand away (Dkt. 206, p. 63). She never reported any incident to a manager. She further testified that Robert Evans made sexual comments on numerous occasions, such as "I'd like to bang her," (Dkt. 206, p. 81) or referring to a Corvette as a "pussymobile."(Dkt. 206, p. 82, 84).

VI. Claims of Kathryn Milcowitz and Christina Thomas

Defendants seek summary judgment as to the claims of the Kathryn Milcowitz and Christina Thomas in this hostile environment sexual harassment case.

Defendants argue that Plaintiffs Milcowitz and Thomas have not alleged sufficiently severe and pervasive sexual harassment, and that the undisputed facts show that Defendants are entitled to the affirmative defense established by Burlington Industries v. Ellerth, 118 S.Ct. 2257 (1998) and Faragher v. City of Boca Raton, 118 S.Ct. 2275 (1998).

A. Kathryn Milcowitz

Defendants contend that Kathryn Milcowitz admitted in her deposition that she had sexual discussions in a group setting which included Robert Evans, and Milcowitz, by her conduct, did not indicate that Evans' verbal comments were unwelcome. Defendants further contend that words which engender offensive feelings in an employee are insufficient to affect the conditions of employment. Defendants argue that, after considering all the circumstances, including the frequency of the conduct, its severity, whether it is physically threatening or humiliating, or a mere offensive utterance, and whether it unreasonably interferes with an employee's work performance, the Court should find that the conduct directed to Kathryn Milcowitz is not actionable. Kathryn Milcowitz testified that she found Robert Evans' conduct inconvenient and annoying, but there is no evidence that it interfered with her job duties, and there is no evidence that she was subjected to discipline.

Plaintiff E.E.O.C. responds that Kathryn Milcowitz testified that she was humiliated by the words and actions of Robert Evans, and witnessed the same actions directed to other female employees. Plaintiff further argues that Kathryn Milcowitz testified that Rio Bravo should have done something to alter the behavior of Robert Evans.

The Court is required to assess the offensive acts in context, and examine the totality of the circumstances in determining whether there is an actionable hostile environment sexual harassment claim. The Court understands that the acts

complained of took place over a period of time in a casual dining restaurant in which managers were males, and some servers were young, unsophisticated females. In general, there was a congenial atmosphere. At times, the managers and servers would socialize, such as going out for drinks and dancing. At other times, the managers and employees would "hang out," and have conversations that included sexual jokes and sexual discussions. It was not uncommon for managers to flirt with or date servers. At some point, employees considered that the conduct of Robert Evans was no longer horseplay; other employees no longer "clowned around" with him, but were irritated by his conduct. As part of the backdrop of this claim the Court must also consider the claims of other employees. Some of those claims are pending, and some claims have been extinguished.

The Court notes that words and actions directed to Kathryn Milcowitz by Robert Evans were frequent, and she found them offensive. However, in light of Kathryn Milcowitz' explicit denial that she found the words and actions to be severe, or physically threatening, and her opinion that any interference with her work was annoying more than anything else, the Court concludes that the alleged discriminatory acts fall into the category of "offensive utterances" and "workplace tribulation" rather than sexual harassment. Kathryn Milcowitz admitted that, at the time, she found the acts directed to her merely offensive, and it was only later, after working in other situations, that she came to consider the acts to be sexual harassment. The Court concludes that the subjective element of sexual harassment is not present as to this claimant.

B. Christina Thomas

Defendants argue that the conduct directed to Christina Thomas was not frequent, was not severe or physically threatening, and it did not interfere with Thomas' work performance.

Plaintiff responds that the words and actions of Robert Evans that were directed to Christina Thomas were frequent, and she witnessed the same behavior directed to other employees.

Christina Lynn Thomas' testimony is that she considered the physical acts (hugs, tickles, pinches) directed to her to be flirting. These acts, although they were frequent, and unwelcome, did not interfere with her work, and she did not consider them to be physically threatening. Christina Lynn Thomas testified that she was humiliated by bra-snapping incidents.

After consideration, the Court concludes that the words and actions of Robert Evans as to Christina Lynn Thomas are not actionable sexual harassment. The subjective element of harassment is absent. The Court agrees with Defendant that this claim presents nothing more than the "ordinary tribulations of the workplace, such as the use of abusive language, gender-related jokes and occasional teasing." Faragher, 118 S.Ct. at 2284.

C. Affirmative Defense

Defendants argue that they are entitled to rely on the

affirmative defense that: a) the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior; and b) the plaintiff employee unreasonably failed to take advantage of any preventative or corrective opportunities provided by the employer or to avoid harm otherwise. The Court should consider evidence that the employer promulgated an anti-harassment policy with complaint procedures, and should consider whether the employee unreasonably failed to use the complaint procedures, in applying the affirmative defense.

The Faragher and Ellerth defense is available if no tangible employment action is taken against the complaining employee. A tangible employment action is a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different job responsibilities, or a decision causing a significant change in benefits. Ellerth, 118 S.Ct. at 2270.

Defendants argue that neither Milcowitz nor Thomas were subjected to a tangible employment action, and the affirmative defense is available to them. Defendants argue that Rio Bravo exercised reasonable care to prevent harassment by promulgating a written, effective sex harassment policy with appropriate complaint procedures which prohibited sexual harassment and which provided for multiple reporting mechanisms, and making the policy accessible to each employee.

Kathryn Milcowitz testified that she reviewed the sexual harassment policy as part of her training, and signed a form indicating that she read and understood the policy. Christina Thomas did not have a specific recollection.

Defendants argue that Kathryn Milcowitz acted unreasonably when, after complaining to the then-manager, Brandon Heinsohn, the alleged harassing conduct continued, and she did not against complain.

Defendants argue that Christina Thomas acted unreasonably when she did not report the alleged harassing conduct to any manager, and did not use the 800-number to report any harassing conduct.

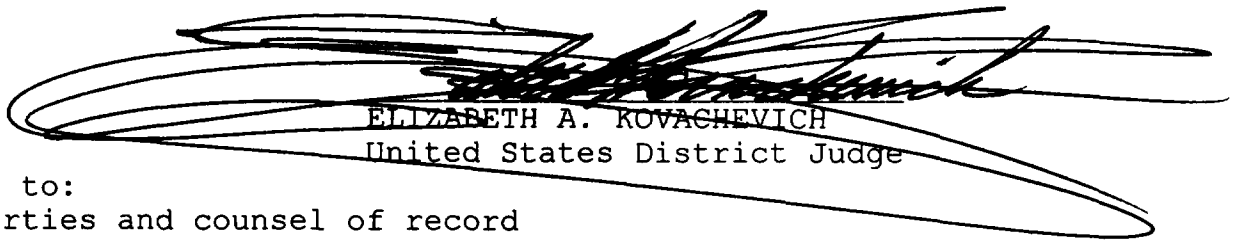
Plaintiff E.E.O.C. responds that many employees complained of offensive remarks that made them feel uncomfortable, as well as unwanted physical conduct. Plaintiffs contends that Rio Bravo was on notice, or should have been on notice, of potential sexual harassment.

It is undisputed that Rio Bravo did have a sexual harassment policy. Kathryn Milcowitz testified that she reported only one incident to a manager, and Christina Lynn Thomas testified she did not report any incidents. Because the Court has concluded that, as to Milcowitz and Thomas, the conduct of Robert Evans did not rise to the level of sexual harassment, it is not necessary for the Court to rule on the application of the affirmative defense. Accordingly, it is

Case No. 8:99-CV-1371-T-17MAP

ORDERED that the Motion for Summary Judgment (Dkt. 112) is **granted** as to the claims of Milcowitz and Thomas, and otherwise **denied as moot**. The Motion for Summary Judgment (Dkt. 135) as to the claim of Heather Eberhardt is **denied** as moot.

DONE and ORDERED in Chambers, in Tampa, Florida on this 12th day of May, 2003.



ELIZABETH A. KOVACHEVICH
United States District Judge

Copies to:
All parties and counsel of record

FILE COPY

5

Date Printed: 05/13/2003

Notice sent to:

___ Michael J. Farrell, Esq.
Equal Employment Opportunity Commission
Miami District Office
One Biscayne Tower
2 S. Biscayne Blvd., Suite 2700
Miami, FL 33131

___ Delner Franklin-Thomas, Esq.
Equal Employment Opportunity Commission
Miami District Office
One Biscayne Tower
2 S. Biscayne Blvd., Suite 2700
Miami, FL 33131

___ Gilbert Carrillo, Esq.
Equal Employment Opportunity Commission
Miami District Office
One Biscayne Tower
2 S. Biscayne Blvd., Suite 2700
Miami, FL 33131

___ Peter W. Zinober, Esq.
Zinober & McCrea, P.A.
201 E. Kennedy Blvd., Suite 800
Tampa, FL 33602

___ Scott T. Silverman, Esq.
Zinober & McCrea, P.A.
201 E. Kennedy Blvd., Suite 800
Tampa, FL 33602

___ Christopher D. Gray, Esq.
Florin, Roebig & Walker, P.A.
777 Alderman Rd.
Palm Harbor, FL 34683

___ Angela E. Outten, Esq.
Florin, Roebig & Walker, P.A.
777 Alderman Rd.
Palm Harbor, FL 34683

___ Wolfgang M. Florin, Esq.
Florin, Roebig & Walker, P.A.
777 Alderman Rd.
Palm Harbor, FL 34683

___ Mark G. Rodriguez, Esq.
Law Offices of Mark G. Rodriguez, P.A.
501 E. Kennedy Blvd., Suite 1200
Tampa, FL 33602

___ Kevin Douglas Zwetsch, Esq.

Fowler White Boggs Banker, P.A.
501 E. Kennedy Blvd.
P.O. Box 1438
Tampa, FL 33601-1438

___ Scott A. Fisher, Esq.
Fowler White Boggs Banker, P.A.
501 E. Kennedy Blvd.
P.O. Box 1438
Tampa, FL 33601-1438

___ John William Robinson IV, Esq.
Fowler White Boggs Banker, P.A.
501 E. Kennedy Blvd.
P.O. Box 1438
Tampa, FL 33601-1438