UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

Equal Employment Opportunity Commission, et al.,

Plaintiffs,

-v-

Cardinal Restaurants, Inc./ Heartland Bell, Inc. dba Taco Bell No. 15464,

Defendant.

Case No. C2-01-941
JUDGE SMITH
Magistrate Judge Abel

OPINION AND ORDER

Plaintiff-intervenor was subject to alleged sexual harassment in violation of Title VII of the Civil Rights Act of 1964. Defendant moves for summary judgment (Doc. 24). For the reasons that follow, the Court grants defendant's summary judgment motion. Plaintiff-intervenor's motion to adopt Equal Employment Opportunity Commission's Memorandum in Opposition to Defendant's motion for summary judgment (Doc. 29) is granted.

I. Facts

Plaintiff-intervenor, Brenda Rowland, is an individual citizen who lives with her parents in Marengo, Ohio. Plaintiff-intervenor has been diagnosed with a learning disability. After failing to pass the ninth grade, plaintiff-intervenor dropped out of school. Defendant, Heartland Bell, operates Taco Bell #15464, located in Sunbury, Ohio.

On September 28, 2001, plaintiff Equal Employment Opportunity Commission ("EEOC") filed a complaint against Heartland Bell alleging that Heartland Bell subjected plaintiff-intervenor to sexual harassment. Plaintiff-intervenor Brenda Rowland filed a motion to intervene on November 14, 2001. The motion to intervene was unopposed by defendant and granted on November 14, 2001.

On July 2, 1997, plaintiff-intervenor began her employment with Taco Bell as a Crew Person. Plaintiff-Intervenor often worked the closing shifts on Friday and Saturday evenings. During the summer months when plaintiff-intervenor started working, the restaurant would stay open extra late to service people leaving concerts at a nearby amphitheater. Plaintiff-Intervenor often worked the closing shifts with alleged harasser Ron Smith. Ron Smith was a shift manager.

Plaintiff-intervenor received permission from her parents to work the closing shifts. However, plaintiff-intervenor's parents were not willing to pick up her up late at night. Because

plaintiff-intervenor did not have a driver's license, she relied on alleged harasser Ron Smith to drive her home after closing the store.

Plaintiff-intervenor alleges Ron Smith made sexually threatening statements and sexually offensive advances towards her throughout her employment. On one occasion, while driving plaintiff-intervenor home from work, Smith allegedly grabbed her breast and told her that she did not want to drop food too many times because he took count. On other occasions, plaintiff-intervenor alleges that Smith repeatedly threatened to write her up for making work-related mistakes such as leaving the water running or dropping food as a means to coerce her into having sex with him. He allegedly made these threats while on store premises as well as in the car while driving plaintiff-intervenor home. Although defendant disputes subjecting plaintiff-intervenor to any sexual harassment, defendant solely focuses on its liability as an employer in its Memorandum in Support for Summary Judgment. Mot. Summ. J. (Doc. 24) at 11.

Plaintiff-intervenor also alleges being sexually harassed by defendant's general manager. When she and the general manager were in the store at the same time, the general manager allegedly would refer to her in a demeaning way and pulled her head down to his genitals while making perverted jokes. Plaintiff-intervenor further claims that the general manager would slam things around and yell at all the female crew members.

Plaintiff and defendant disagree on whether alleged harasser Smith was a co-worker or a supervisor for the purposes of determining employer liability under Title VII.

Plaintiff-Intervenor worked at Taco Bell until July 4, 1998. Plaintiff-intervenor was scheduled to work the closing shift on July 4, 1998. She told the Restaurant General Manager ("RGM") that she would have to leave work by 9:00 p.m. due to a family picnic she wanted to attend. The RGM replied that she would be free to go when her assigned work was completed. Plaintiff-intervenor claims that alleged harasser Smith continued to give her additional work with the intention that she would not be able to leave by 9:00 p.m. Feeling frustrated, Plaintiff-intervenor walked out of the restaurant a few minutes past 9:00 p.m. She called the restaurant the next day to inform them she was quitting. It is uncontroverted that plaintiff-intervenor never was disciplined nor written up for attendance problems.

II. Summary Judgment

The standard governing summary judgment is set forth in Fed. R. Civ. P. 56(c), which provides:

> The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.

Summary judgment will not lie if the dispute about a material fact is genuine; "that is, if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). Summary judgment is appropriate, however, if the opposing party fails to make a showing sufficient 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. Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986); see also Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 588 (1986).

When reviewing a summary judgment motion, the Court must draw all reasonable inferences in favor of the nonmoving party, and must refrain from making credibility determinations or weighing the evidence. Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 150-51 (2000).[1] The Court

[1] Reeves involved a motion for judgment as a matter of law made during the course of a trial under Fed. R. Civ. P. 50 rather than a pretrial summary judgment under Fed. R. Civ. P. 56. Nonetheless, standards applied to both kinds of motions are substantially the same. One notable difference, however, is that in ruling on a motion for judgment as a matter of law, the Court, having already heard the evidence admitted in the trial, views the entire record, Reeves, 530 U.S. at 150. In contrast, in ruling on a summary judgment motion, the Court

disregards all evidence favorable to the moving party that the jury would not be not required to believe. Id. Stated otherwise, the Court must credit evidence favoring the nonmoving party as well as evidence favorable to the moving party that is uncontroverted or unimpeached, if it comes from disinterested witnesses. Id.

The Sixth Circuit Court of Appeals has recognized that Liberty Lobby, Celotex, and Matsushita have effected "a decided change in summary judgment practice," ushering in a "new era" in summary judgments. Street v. J.C. Bradford & Co., 886 F.2d 1472, 1476 (6th Cir. 1989). The court in Street identified a number of important principles applicable in new era summary judgment practice. For example, complex cases and cases involving state of mind issues are not necessarily inappropriate for summary judgment. Id. at 1479.

Additionally, in responding to a summary judgment motion, the nonmoving party "cannot rely on the hope that the trier of fact will disbelieve the movant's denial of a disputed fact, but must 'present affirmative evidence in order to defeat a properly supported motion for summary judgment.'" Id. (quoting Liberty Lobby, 477 U.S. at 257). The nonmoving party must adduce more than a scintilla of evidence to overcome the summary judgment motion. Id. It is not sufficient for the nonmoving party to merely "'show that there is

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will not have heard all of the evidence, and accordingly the non-moving party has the duty to point out those portions of the paper record upon which it relies in asserting a genuine issue of material fact, and the court need not comb the paper record for the benefit of the nonmoving party. In re Morris, 260 F.3d 654, 665 (6th Cir. 2001). The Court agrees with defendant that Reeves did not announce a new standard of review for summary judgment motions.

some metaphysical doubt as to the material facts.'" Id. (quoting Matsushita, 475 U.S. at 586).

Moreover, "[t]he trial court no longer has a duty to search the entire record to establish that it is bereft of a genuine issue of material fact." Id. at 1479-80. That is, the nonmoving party has an affirmative duty to direct the court's attention to those specific portions of the record upon which it seeks to rely to create a genuine issue of material fact. In re Morris, 260 F.3d 654, 665 (6th Cir. 2001).

III. Title VII Standards

Plaintiff asserts hostile work environment sexual harassment under Title VII. Defendant moves for summary judgment arguing (1) it is not liable for Ron Smith's alleged sexual harassment because the facts indicate Ron Smith is a coworker, and, as a coworker, defendant had no reasonable way of knowing of the charged harassment, and (2) it is not liable for any alleged harassment by the assistant manager, Charles Beener, or the restaurant general manger, Jim Lesinbee, because both elements of its affirmative defense against supervisor harassment are satisfied.

To establish a claim under Title VII for hostile work environment sexual harassment based on the conduct of a coworker, the plaintiff must demonstrate that (1) she is a member of a protected class, (2) she was subjected to unwelcome sexual harassment, (3) the harassment was based on her sex, (4) the harassment unreasonably interfered with plaintiff's work performance and created a hostile or offensive work environment that was

severe and pervasive, and (5) the employer knew or should have known of the charged harassment and unreasonably failed to take prompt and appropriate corrective action. Fenton v. HiSAN, Inc., 174 F.3d 827, 829-30 (6th Cir. 1999); Blankenship v. Parke Care Ctrs., Inc., 123 F.3d 868, 872 (6th Cir.1997). The standard for examining an employer's response to allegations of co-worker harassment is that of reasonableness. Fenton, 174 F.3d at 829. Thus, "when an employer responds to charges of coworker sexual harassment, the employer can be liable only if its response manifests indifference or unreasonableness in light of the facts the employer knew or should have known." Blankenship, 123 F.3d at 872-73, cert. denied, 522 U.S. 1110 (1998).

To establish a claim of sexual harassment under Title VII for hostile work environment sexual harassment arising from a supervisor's actions, the plaintiff must prove the first four elements of coworker sexual harassment plus (5) that the supervisor's harassing actions were foreseeable or fell within his or her scope of employment, and the employer failed to respond adequately and effectively. See Kauffman v. Allied Signal, Inc., 970 F.2d 178, 183-184 (6th Cir. 1992). When a supervisor engaged in the alleged harassment and no tangible employment action is alleged, a defending employer may raise an affirmative defense, which comprises two elements: (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 preventative or corrective

opportunities provided by the employer to avoid harm otherwise. Faragher v. City of Boca Raton, 118 S. Ct. 2275, 2293 (1998).

For hostile work environment claims arising from either a coworker's or a supervisor's actions, a hostile work environment occurs "[w]hen the workplace is permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment." Harris v. Forklift Sys., Inc., 510 U.S. 17, 21 (1993) (internal quotations and citations omitted). Both an objective and a subjective test must be applied: the conduct must have been severe or pervasive enough to create an environment that a reasonable person would find hostile or abusive, and the victim must subjectively regard that environment as having been abusive. Id. at 21-22. Isolated incidents, unless extremely serious, will not amount to discriminatory changes in the terms or conditions of employment. Morris v. Oldham County Fiscal Court, 201 F.3d 784, 790 (6th Cir.2000). Appropriate factors for the Court to consider when determining whether conduct is severe or pervasive enough to constitute a hostile work environment include:

1. the frequency of the discriminatory conduct;
2. the severity of the discriminatory conduct;
3. whether the discriminatory conduct is physically threatening or humiliating, or a mere offensive utterance;
4. whether the discriminatory conduct interferes with an employee's work performance; and

5. whether the plaintiff actually found the environment abusive.

Id. at 21-22; see also Bowman v. Shawnee State Univ., 220 F.3d 456, 463 (6th Cir. 2000)(reciting factors from Harris). The Court has explained:

> Title VII does not prohibit "genuine but innocuous differences in the ways men and women routinely interact with members of the same sex and of the opposite sex." Oncale, 523 U.S., at 81. A recurring point in these opinions is that "simple teasing," id., at 82, offhand comments, and isolated incidents (unless extremely serious) will not amount to discriminatory changes in the "terms and conditions of employment." These standards for judging hostility are sufficiently demanding to ensure that Title VII does not become a "general civility code." Id., at 80. Properly applied, they will filter out complaints attacking "the ordinary tribulations of the workplace, such as the sporadic use of abusive language, gender-related jokes, and occasional teasing." B. Lindemann & D. Kadue, Sexual Harassment in Employment Law 175 (1992) (hereinafter Lindemann & Kadue) (footnotes omitted). We have made it clear that conduct must be extreme to amount to a change in the terms and conditions of employment, and the Courts of Appeals have heeded this view. See, e.g., Carrero v. New York City Housing Auth., 890 F.2d 569, 577-578 (C.A.2 1989); Moylan v. Maries County, 792 F.2d 746, 749-750 (C.A.8 1986); See also 1 Lindemann & Grossman 805-807, n. 290 (collecting cases granting summary judgment for employers because the alleged harassment was not actionably severe or pervasive).

Faragher, 524 U.S. at 788.

Defendant contends that alleged harasser Smith did not have significant control over any of the crew members, including plaintiff-intervenor, and, therefore, was merely a coworker. Defendant refers to the depositions of a shift manager, a former crew member, and the affidavit of defendant's V.P. of Human Resources as evidence that alleged harasser Smith was a shift manager who had no authority to hire or fire and had no significant control over the crew members' conditions of employment. Mot. Summ. J. (Doc. 24) at 13.

If the coworker standard applies, defendant is liable for Smith's alleged harassment only if defendant knew or should have known of the charged

harassment and failed unreasonably to take prompt, corrective action. Defendant contends that such a negligence standard is not met because plaintiff-intervenor never followed the complaint procedures of defendant's sexual anti-harassment policy. Plantiff-intervenor never reported her allegations to the Restaurant General Manager, District Manger, or any other management member as required by defendant's sexual anti-harassment policy. Consequently, defendant was never put on notice such that they had no reason to know of the charged harassment. In fact, defendant alleges they did not know of the alleged harassment until after plaintiff-intervenor filed a charge with the EEOC. Miller Aff. ¶5.

Plaintiffs, however, raise a question of fact as to whether Smith is a coworker or supervisor. Plaintiff presents evidence showing Smith could be considered a supervisor with significant control over the plaintiff-intervenor's hiring, firing, or conditions of employment. First, Plaintiff refers to the deposition of Defendant's V.P. of Human Resources in which the V.P. testifies that shift managers may hire crew people. Second, Plaintiff refers to a position statement by the V.P. in which a list of employees supervised by alleged harasser Smith during 1997-1998 is disclosed. Third, Plaintiff refers to another Shift Manger's deposition in which the shift manager testified that shift mangers could fire and write-up employees, and the crew people understood the shift manager to be the supervisor. Mot. Opp. Summ. J. (Doc. 30) at 12-13.

For purposes of defendant's summary judgment, and viewing plaintiff's allegations as true, the Court finds that plaintiff raises a genuine issue of material fact as to whether Smith is a coworker or supervisor. A reasonable jury could conclude from plaintiff's allegations that Smith was a supervisor rather than a coworker. Consequently, defendant's argument that it is not negligent for an alleged coworker's sexual harassment because of insufficient notice fails.

Defendant does not dispute that the Restaurant General Manager ("RGM") and the Assistant Manger ("AM") are considered supervisors who exercise significant control over the hiring, firing, and terms of the crew members' employment. However, defendant contends that they are not liable for any alleged harassment by the RGM or AM because of an affirmative defense. When a supervisor has engaged in the alleged harassment and no tangible employment action is alleged, a defending employer may raise an affirmative defense against alleged supervisor sexual harassment, which consists of two elements: (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 preventative or corrective opportunities provided by the employer to avoid harm otherwise. Faragher v. City of Boca Raton, 118 S. Ct. 2275, 2293 (1998).

Defendant satisfies both elements of the affirmative defense by the required preponderance of evidence. First, it is undisputed that plaintiff-

intervenor resigned by her own choice. No "tangible employment action" of discipline, demotion, discharge, or transfer occurred, and, therefore, the defense is available.

Regarding the first element, there is evidence that defendant did "exercise reasonable care to prevent and cure any harassment." Defendant had an established sexual harassment policy that stated its zero-tolerance approach to sexual harassment. As the Supreme Court has recognized, "While proof that an employer had promulgated an anti-harassment policy with complaint procedure is not necessary in every instance as a matter of law, the need for a stated policy suitable to the employment circumstances may appropriately be addressed in any case when litigating the first element of the defense." Burlington Industries, Inc. v. Ellerth, 118 S. Ct. 2257, 2293 (1998). This policy was disseminated to employees in the form of an Employee Handbook and posted on bulletin board sites. The policy in the

employee handbook provides a detailed procedure for reporting sexual harassment complaints. The policy provided:

> If you feel that you have been subjected to any type or degree of harassment, you are to report the incident immediately to the RGM, DM, VP Operations, President or any member of management in order to see an immediate resolution. Further, each case of harassment is to be reported to the President by you and/or the individual to whom you report the matter. All reports of harassment should be put in writing with a signature, and a copy should be sent to the President. In all instances of harassment, a thorough investigation will be conducted by management and appropriate remedial action taken.
>
> Any employee found to have violated the harassment policy will be disciplined, up to and including termination. The same disciplinary measures will be applied in any instance determined to have been fabricated.

It is undisputed that plaintiff-intervenor received a copy of the employee handbook. It is also undisputed that plaintiff-intervenor signed an Acknowledgement of Understanding form in which she acknowledged receiving the handbook, reviewing its contents, and fully understanding its

contents. Although plaintiff-intervenor does not recall the specific contents of the employee handbook, the requirement for exercising reasonable care to prevent and correct promptly any sexually harassing behavior does not require every employee know the intricacies of the policy. Defendant has provided more than reasonable preventive and reporting strategies for sexual harassment in its workplaces. In addition to providing each employee with employee handbooks, defendant made further handbooks accessible to employees in the utility room. Furthermore, defendant posted information about a general open door policy and provided a hot line phone number for employees to call should they have a concern or problem. The posting stated that the purpose of such a hot line was to provide employees with a confidential way of reporting harassment, including sexual harassment. Plaintiff-intervenor has conceded to reading the general policy and complaint procedures posted on the bulletin board sites. Considering these facts in their

entirety, defendant satisfies the first element of the affirmative defense as a matter of law.

Regarding the second element, there is evidence that the plaintiff-intervenor employee unreasonably failed to take advantage of any preventative or corrective opportunities provided by the employer. Plaintiff-intervenor has demonstrated an unreasonable failure to pursue a remedy through defendant's detailed grievance procedure. At no time during her employment did plaintiff-intervenor report the alleged harassment to the restaurant general manager, district manager, vice president of operations, or any other management member as required by defendant's sexual harassment policy. "…While proof that an employee failed to fulfill the corresponding obligation of reasonable care to avoid harm is not limited to showing an unreasonable failure to use any complaint procedure provided by the employer, a demonstration of such failure will normally suffice to satisfy the

employer's burden under the second element of the defense." Burlington Industries, 118 S. Ct. at 2293. Defendant had a detailed complaint policy for combating sexual harassment which plaintiff-intervenor unreasonably failed to avail herself of. Hence, the second element of the affirmative defense against supervisor sexual harassment is satisfied thereby establishing the affirmative defense as a matter of law.

Even if Ron Smith is a coworker, as alleged by plaintiffs, the claim must fail because of plaintiff's failure to establish the fifth element that the "employer knew or should have known of the charged harassment and unreasonably failed to take prompt and appropriate corrective action." As a result of plaintiff-intervenor not reporting any of the allegations during her employment, defendant did not learn of the claims until after plaintiff-intervenor filed a charge with the EEOC. Miller Aff. ¶5. Consequently, plaintiff-intervenor's unreasonable failure to promptly put defendant on

notice of the alleged sexual harassment charges, despite numerous opportunities to do so, prevents defendant from taking "prompt and appropriate corrective action." Therefore, plaintiffs fail to establish each and every element of sexual harassment based on conduct of a coworker.

Given these facts, no reasonable trier of fact could hold defendant liable for any injury or damages plaintiff-intervenor has suffered as a result of alleged coworker or supervisor sexual harassment.

The Court concludes that defendant is entitled to summary judgment in its favor on plaintiffs' sexual harassment claim.

V. Disposition

Based on the above, the Court **GRANTS** defendant's motion for summary judgment (Doc. 24).

The Clerk shall remove Doc. 24 from the Court's pending motions list.

The Clerk shall enter final judgment in favor of defendant, and against plaintiffs, dismissing this action with prejudice.

IT IS SO ORDERED.

s/ George C. Smith
GEORGE C. SMITH, JUDGE
UNITED STATES DISTRICT COURT