IN THE UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

UNITED STATES EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Plaintiff,

and

VICTORIA BRIGGS and RESA GASTON,

Intervenors,

v.

CIVIL ACTION NO. 2:00-CV-409 FtM-29D

MEMORANDUM & ORDER

KRONBERG BAGEL COMPANY d/b/a BAKIN' BAGELS,

Defendant.

_____/

APPEARANCES:

For Plaintiffs

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KEVIN THOMAS DUFFY, U.S.D.J.[1]

Plaintiff Equal Employment Opportunity Commission ("EEOC") brings this action pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et. seq., on behalf of Plaintiff-Intervenors Victoria Briggs ("Briggs") and Resa Gaston ("Gaston") and charging party Jacqueline Speaker ("Speaker").

The EEOC brought this action to correct unlawful employment practices on the basis of sex. In particular the EEOC charges that Defendant Kronberg Bagels, doing business as Bakin' Bagels ("Defendant") knew or should have known that the charging Plaintiffs and other similarly situated females were subjected to sexual harassment in the form of a hostile work environment.

In a separate Memorandum and Order dated January 23, 2002, I denied Defendant's motion to dismiss Gaston's claims and granted its motion for summary judgment as to the claims of Lauren Henderson.[2] This Memorandum and Order addresses the outstanding motions by all parties for partial summary judgment.

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[1] United States District Judge for the Southern District of New York, sitting by Designation in the Middle District of Florida.

[2] Henderson's married name is Adema.

FACTUAL ALLEGATIONS

The EEOC and charging parties all complain about the behavior of Kevin Healy, a baker employed by Bakin' Bagels at the times relevant to this action. The first to file a charge of discrimination was Briggs on November 2, 1999. Briggs was employed by Bakin' Bagels from September 27, 1999 to October 28, 1999 and claims to have been repeatedly subjected to derogatory and sexually charged comments by Healy. Among other things, he allegedly called her a "cunt" and suggested having a "quickie". Healy further commented that he wanted to grab her pigtails and "ride [her] for a good night of fucking". Briggs also claims that Healy assaulted her in the walk-in cooler, fondled her breasts and crotch, forced her to touch his penis and asked if she wouldn't like to feel it up inside her.

On November 15, 1999, Resa Gaston filed a charge of discrimination with the EEOC. Gaston was employed by Bakin' Bagels from August 24, 1999 until October 15, 1999. Gaston also claims to have been subjected to sexually inappropriate and threatening behavior by Healy. She claims Healy rubbed against her and made comments about her "liking it". He would also grab her buttocks and put his hand between her legs. Gaston claims that not only did management witness such

incidents, but actually encouraged them by laughing and "egging" Healy on. Gaston alleges that such conduct occurred daily.

Finally, Jackie Speaker filed a charge of discrimination with the EEOC on December 21, 1999. Speaker was employed by Bakin' Bagels from August 1, 1999 until October 27, 1999. She claims that Healy also subjected her to a variety of sexual harassment including touching her buttocks and making sexual and other degrading comments.

All three aggrieved parties claim to have informed management of Healy's behavior and all claim to have been constructively discharged because of the sexual harassment they suffered.

STANDARD FOR SUMMARY JUDGMENT

Summary judgment is appropriate where there is no genuine issue of material fact and the "moving party is entitled to judgment as a matter of law." Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). While the court must construe all evidence and inferences in favor of the nonmoving party, to sustain its burden, the nonmoving party "must do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 586-87 (1986). The party seeking

summary judgment bears the burden of showing the lack of a genuine factual issue. American Viking Contractors, Inc. Scribner Equip. Co., 745 F.2d 1365, 1369 (11th Cir. 1984). Once the moving party has provided adequate support for its motion, the non-moving party must provide "specific facts showing that there is a genuine issue for trial." Matsushita, 475 U.S. at 587.

MOTIONS AS TO AFFIRMATIVE DEFENSES

Both the EEOC and the Intervenors have moved for partial summary judgment against several of the affirmative defenses asserted by the Defendant. Defendant has agreed to withdraw its First, Third and Seventh Affirmative Defenses.[3] These are deemed withdrawn.

All Plaintiffs also seek summary judgment against Defendant's Sixth Affirmative Defense for failure to exhaust administrative remedies. Defendant admits that Briggs and Speaker have exhausted their administrative remedies and questions only whether Gaston has. The basis of their argument is that they have not deposed Gaston and are therefore "unable to determine the period of time over which Gaston is claiming that she was subjected to harassment."

[3] These three defenses are identical as to the EEOC and Intervenors and are withdrawn as to all.

Defendant's Response to Plaintiff EEOC's Motion for Partial Summary Judgment, Document # 110 at 6. This argument not only does not raise a genuine issue of material fact, but borders on the frivolous. According to the Defendant's own employment records Gaston worked at Bakin' Bagels from August 24, 1999 until October 15, 1999. Gaston filed her complaint with the EEOC on November 15, 1999. She was sexually harassed, if at all, during her employment at Bakin' Bagels, the entire course of which occurred within the 300 preceding days. In other words, for her to have been harassed while working at Bakin' Bagels, it must have occurred within the preceding 300 days. Moreover, I previously denied Defendant's motion to dismiss Gaston's complaint for failure to show for her deposition and have provided Defendant adequate time to depose Gaston prior to trial. Plaintiffs' motion for summary judgment on Defendant's Sixth Affirmative Defense is granted.[4]

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[4] As against the Intervenors, Defendant has also asserted additional "failure to exhaust administrative remedies" claims in its Ninth and Tenth Affirmative Defenses. According to the Worksharing Agreement between the EEOC and the Lee County Office of Equal Opportunity, charges are automatically dual filed with the Florida Commission on Human Relations. Neither party has provided any additional information, however, and I am therefore unable at the present time to determine whether the state charges were also timely filed. Thus, for the time being, the motion for summary judgment as to these defenses is denied.

Whether Healy is a Co-Worker or Supervisor

The remaining disputes center primarily on the basis for holding the Defendant liable for the acts of its employee, Kevin Healy. Defendant has pled alternative defenses based on whether Healy is determined to be a supervisor or co-worker and would withdraw its Fifth Affirmative Defense, if Healy is found to be a co-worker.

It is undisputed that Healy did not have a supervisory title. In her affidavit Gaston admits that after initially believing otherwise, she was told by a manager that Healy was not management. Gaston Affidavit ¶ 18. There appears to be no evidence that any management employee ever held Healy out to the other employees as having supervisory authority or that they ever officially delegated any such authority to him.

There is evidence in the record, however, that Healy did hold himself out as a supervisor. Healy allegedly told Speaker that he "could fire her" and she perceived him to be a "third supervisor". Speaker Deposition at 45. Other aggrieved parties also indicated that Healy "bossed" them around. Briggs Deposition at 32-35; Gaston Affidavit ¶ 18. Henderson (Adema) also indicated that Healy disciplined her. Adema Deposition at 93. Thus, there is a dispute in the record about the extent of Healy's supervisory authority. If

Plaintiffs can show that Healy had the authority to direct the daily activities of the aggrieved parties, then they may be permitted to impute vicarious liability to the Defendant. Llampallas v. Mini-Circuits, Lab, Inc., 163 F.3d 1236, 1247 n. 20 (11th Cir. 1998)("[A]pparent authority serves just as well to impute liability to the employer for the employee's action").

In Faragher v. City of Boca Raton, 524 U.S. 775, 807 (1998), the Supreme Court held that an employer may be held vicariously liable for the acts of its supervisory employees for the creation of a hostile work environment, subject to the defense that it exercised reasonable care to prevent and correct such harassment and that the employee unreasonably failed to take advantage of the remedy available.[5] Whether Healy had the authority to act as a supervisor is a question of fact for the jury to decide. The Defendant has indicated its willingness to withdraw its Fifth Affirmative

[5] The parties dispute whether the Defendant actually had any process or remedy available. It is undisputed that they had no formal written policy, no employee handbooks, offered no classes or training on how to handle complaints of sexual harassment. Defendant claims, with only minimal support however, that it had an informal procedure of some sort for handling such complaints. I would note, that passing the buck up the line of supervisors is not an adequate procedure. Again, however, this is a highly material factual question which is appropriately decided by the jury.

Defense should Healy be found to be a co-worker rather than a supervisor. If that is the finding at trial, then the defense will be deemed withdrawn. Plaintiffs' motion for summary judgment as to Defendant's Fifth Affirmative Defense is denied.

All other requests by plaintiffs EEOC and the intervenors for partial summary judgment as to Defendant's Affirmative Defenses are denied.

DEFENDANT'S MOTION FOR PARTIAL SUMMARY JUDGMENT

Defendant has moved for partial summary judgment on several grounds: 1) that Speaker was not subjected to harassment based on her sex and that any such harassment was not severe enough to alter the terms and conditions of her employment; 2) that there is no basis for holding Defendant liable as Plaintiffs did not provide it adequate notice of the harassment and cannot show that Defendant did not take prompt remedial action and 3) that Plaintiffs cannot show they were constructively discharged. Because I find there are genuine issues of material fact regarding all of Defendant's claims, the motions for summary judgment are denied.

Whether Speaker's Claims are Based on Sex and Their Severity

One of the elements in a claim for sexual harassment is that the harassment be based on the Plaintiff's sex. Henson

v. Dundee, 682 F.2d 897, 903-04 (11th Cir. 1982); Breda v. Wolf Camera & Video, 222 F.3d 886, 889 n. 3 (11th Cir. 2000).

Defendant argues that Healy's comments about Speaker being a "little girl" are not sexual. It further argues that Healy did not get along with any of Bakin' Bagel's employees, male or female and treated them all equally badly. Defendant admits that much of Healy's other conduct, making passes at Speaker, talking to her about her sexual activities with her boyfriend and inappropriately touching her buttocks were sexual but not severe enough to change the conditions and terms of her employment.

Defendant's selective discussion of Healy's remarks, taken out of context, are wholly inadequate to establish the absence of a genuine issue of material fact. "The 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 and create a hostile or abusive working environment." Mendoza, 195 F.3d at 1246 (citations omitted); Griffin v. Opa-Locka, 261 F.3d 1295, 1305 (11th Cir. 2001)(whether harassment occurred under color of law depended on "the entire pattern of abuse and harassment").

Taken in context, there is ample testimony to support the aggrieved parties' allegations that they were subjected to severe harassment based on their gender and which was sufficient to alter their working conditions. They allege numerous instances of Healy using offensive sexual language and numerous instances of inappropriate sexual touching. There is also evidence that such comments were primarily directed at Bakin' Bagels female employees. Any ambiguity about the sexual nature of specific comments must be resolved at trial not on a motion for summary judgment.

Basis for Defendant's Liability

If it is determined that Healy was a supervisor then Defendant can defend against liability by showing that it took adequate steps to prevent and correct the harassment and that the aggrieved parties unreasonably failed to take advantage of the remedy provided. Faragher, 524 U.S. at 807. If Healy is determined to be a co-worker Defendant would be liable if it knew or should have known of the harassment and did nothing to rectify it. Henson, 682 F.2d at 905; Breda, 222 F.3d at 889.

In either case the question of if or when Defendant had notice of the harassment is relevant. When the Defendant had notice, either actual or constructive, is a material fact which the parties hotly dispute. Defendant claims it did not

have notice until immediately preceding the resignations of Speaker and Briggs and that upon receiving such notice it took prompt remedial action by suspending Healy without pay and performing an internal investigation. Plaintiffs allege that Defendants were aware or should have been aware of the harassment much earlier, possibly as early as August 1998 when Lauren Henderson claims to have complained about Healy's conduct.[6] In addition, Plaintiffs allege that they informed management of the problems with Healy on several occasions prior to their resignations and that management was aware of the harassment because they witnessed and even participated in it. Obviously summary judgment would be inappropriate on this issue. See Breda, 222 F.3d at 890 (remanding for factual determination of the number and timing of complaints made to employer).

Constructive Discharge

"When 'an employee involuntarily resigns in order to escape intolerable and illegal employment requirements' to which he or she is subjected because of race, color, religion, sex, or national origin, the employer has committed a constructive discharge in violation of Title VII." Henson,

[6] Henderson is a former employee of Bakin' Bagels who resigned in December 1998. See Memorandum and Order dated January 23, 2002.

682 F.2d 897, 907 (quoting Young v. Southwestern Savings & Loan Assoc., 509 F.2d 140, 144 (5th Cir. 1975)). Whether the Plaintiffs were constructively discharged in this case depends on the answers to the questions of fact discussed above. Defendant's motion for summary judgment is therefore denied.

CONCLUSION

Defendant's First, Third and Seventh Affirmative Defenses are deemed withdrawn. Summary judgment is granted on Defendant's Sixth Affirmative Defense for failure to exhaust administrative remedies. The motions for summary judgment as to the remaining Affirmative Defenses are denied.

All Defendant's motions for partial summary judgment are denied.

SO ORDERED.

Dated: New York, New York
January 23, 2002

KEVIN THOMAS DUFFY, U.S.D.J.

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Date Printed: 01/24/2002

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