**IN THE UNITED STATES DISTRICT COURT**
**FOR THE WESTERN DISTRICT OF TENNESSEE**
**WESTERN DIVISION**

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| **EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,** | ) | |
| **Plaintiff,** | ) | |
| | ) | **No. 06-2179 Ma/P** |
| **v.** | ) | |
| **A&I PRODUCTS, INC.,** | ) | |
| **Defendant.** | ) | |

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**ORDER DENYING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT**

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Plaintiff, the Equal Employment Opportunity Commission ("the EEOC"), brings suit against Defendant A&I Products, Inc. ("A&I Products") on behalf of A&I Products employees Ann Boyd ("Boyd") and Jennifer Wilson ("Wilson"). The EEOC alleges that Boyd and Wilson were subjected to sexual harassment and retaliation in violation of Title VII of the Civil Rights Act, 42 U.S.C. § 2000e et seq.

A&I Products filed a motion for summary judgment on April 30, 2007, to which Plaintiff responded on June 4, 2007.[1] For the reasons below, A&I Products' motion is DENIED.

**I. Jurisdiction**

[1] On June 18, 2007, the court granted A&I Products' June 13, 2007 motion for leave to file a reply brief. No reply has been filed.

The court has jurisdiction under 28 U.S.C. §§ 1331 and 1343(a)(3) and (4).

**II. Background**

A&I Products is a manufacturer and distributor of agricultural parts. (Van Der Vliet dep., 6:5-6.)[2] It maintains ten warehouses in the United States and two in Canada, including one warehouse in Memphis, Tennessee. (Id., 7:1-8.) Each warehouse is staffed by between two and five employees. (Id., 7:9-14.)

Boyd has worked as a shipping clerk for A&I Products in the Memphis warehouse since June 2001. (Boyd dep., 6:14-23, 7:8-13.) Wilson has worked as an order picker[3] for A&I Products in the Memphis warehouse since August 2001. (Wilson dep., 6:17-25.) Boyd and Wilson are the only two women who work at the Memphis warehouse. (Waller dep., 32:24-33:6.)[4]

Anthony Reynolds ("Reynolds") was the assistant warehouse manager supervising Boyd and Wilson until he was fired in August 2004.[5] (Boyd dep., 12:18-19, 14:10-14.) When Reynolds left the company, Kevin Culver ("Culver") was promoted to assistant

[2] Brian Van Der Vliet is an operations manager for A&I Products. (Van Der Vliet dep., 4:3-5.)

[3] An order picker fills orders that come into A&I Products by locating, packing, and shipping the ordered parts. (Wilson dep., 7:1-10.) The parties' submissions suggest that "shipping clerk" and "order picker" refer to the same position.

[4] George Waller is the manager of the Memphis warehouse. (Waller dep., 8:14-16.)

[5] The parties agree that Reynolds left A&I Products in August 2004, although neither party cites any evidence confirming when Reynolds' employment ended.

warehouse manager and became Boyd and Wilson's supervisor. (Id., 22:24-23:7.) Culver had been working as an employee in the warehouse before he was promoted to assistant warehouse manager. (Waller dep., 20:1-13.) Culver reported to George Waller ("Waller"), the warehouse manager. (Id., 8:14-16, 14:12-16.)

One of Boyd and Wilson's co-workers was Apolonia Ruiz ("Ruiz"), who went by the nickname Apollo. (Wilson dep., 9:24-10:5.) Sometime in 2002, while Reynolds was the assistant warehouse manager, Ruiz began behaving inappropriately at work by making comments about the size of his genitals and by exposing and fondling his genitals in front of Boyd and Wilson. (Boyd dep., 12:2-15; Wilson dep., 19:3-20:25.) Ruiz also made comments about Wilson's breasts. (Wilson dep., 12:17-21.) Although Ruiz was not fluent in English, his comments were made primarily in English. (Id., 12:10-21.)

Boyd told Reynolds about Ruiz's behavior, and Ruiz ceased the inappropriate activity. (Boyd dep., 12:18-25.) Boyd does not know what steps Reynolds took to stop Ruiz's behavior, but she testified that she believes Reynolds took care of the problem appropriately. (Id., 12:19-21, 14:7-9.)

When Reynolds left A&I Products in August 2004, Ruiz again began behaving inappropriately. (Id., 12:23-25.) Nearly every day, Ruiz would sit in the back of the warehouse touching his exposed genitals. (Id., 24:6-22.) Boyd testified that she

reported Ruiz's behavior to Culver on one occasion. (Id., 23:23-25:9.)[6] Culver testified that he did not learn of Boyd and Wilsons's allegations about Ruiz's inappropriate behavior until Boyd filed a sexual harassment charge with the EEOC. (Culver dep., 37:1-24.)

In September 2004, Ruiz came into the employee lounge when Boyd and Wilson were there taking a break. (Boyd dep., 26:2-15; Wilson dep., 22:13-17.) Ruiz called to the women to get their attention, and when they turned to look at Ruiz they saw that his genitals were exposed and he was ejaculating. (Boyd dep., 26:12-15; Wilson dep., 21:8-14, 22:2-12.)

Boyd and Wilson testified that they immediately reported Ruiz's conduct to Culver, and Culver responded by laughing and telling Apollo that he was "a nasty motherfucker." (Boyd dep., 26:16-22; Wilson dep., 21:13-18.) Culver did not take any disciplinary action against Ruiz, instead suggesting that Boyd and Wilson enjoyed Ruiz's behavior. (Boyd dep., 26:23-25; Wilson dep., 61:25-62:7.) Ruiz's conduct did not improve after Boyd and Wilson informed Culver of Ruiz's actions. (Wilson dep., 64:9-12.)

[6] Although the parties agree that Culver did not become assistant warehouse manager until August 2004, Boyd testified that she reported Ruiz's behavior to Culver once in 2003, before an incident that occurred in September 2004. (Boyd dep., 23:22-24:1.) Boyd could not recall relevant dates with specificity and testified that she had reported Ruiz's behavior to Culver after Reynolds left A&I Products in August 2002 or 2003. (Boyd dep., 14:10-14, 23:15-24.) Viewing the evidence in the light most favorable to the EEOC, it is possible that Boyd reported Ruiz's behavior to Culver once between the time Culver became assistant warehouse manager and the incident that occurred in September 2004.

Both before Culver became the assistant warehouse manager and while he held that position, Culver encouraged Ruiz to act inappropriately by telling Ruiz to grab Wilson's breasts and behind and to expose himself to Wilson and Boyd. (Wilson dep., 20:2-5, 20:22-25, 62:11-23.) Ruiz continued to expose and fondle his genitals on a nearly daily basis in the warehouse after the September 2004 incident. (Boyd dep, 28:17-20, 33:19-34:5.)

Wilson testified that she reported the September 2004 incident to Waller immediately after it occurred. (Wilson dep., 14:24-15:5.) Waller testified that he did not learn about Ruiz exposing himself or masturbating in the employee break room until Boyd filed her EEOC complaint in November 2004. (Waller dep., 51:12-23.)

A&I Products asserts that, in September 2004, Boyd and Wilson each received a verbal warning for failing to conduct manual inventory counts in the warehouse, instead relying on the inventory counts displayed on the company computers. (A&I Products' April 12, 2005 responses to the EEOC's Request for Information, question 7.)[7] Boyd and Wilson testified that they did not receive verbal warnings in September 2004. (Boyd dep., 27:10-28:4; Wilson dep., 35:6-8.)

On November 5, 2004, Boyd filed a sexual discrimination charge with the EEOC. (Boyd dep., 28:24-29:1.) Wilson later

[7] This document is attached as Exhibit 1 to Waller's deposition.

participated in the EEOC's investigation of Boyd's claim by making a statement to the EEOC investigator.[8] (Wilson dep., 32:12-33:1, 57:1-16.)

Shortly after Boyd filed her complaint with the EEOC, Waller, Culver, Boyd, Wilson, Ruiz, and another employee named Eddie Bonner ("Bonner") met.[9] (Wilson dep., 14:17-15:23; Boyd dep., 31:9-33:11.) Wilson testified that, at the meeting, the employees discussed Ruiz's behavior and Waller stated that he had not been aware of Ruiz's prior misconduct. (Wilson dep., 15:25-16:6.) Ruiz neither admitted nor denied the behavior, instead saying "me no comprende, me no understand." (Id., 16:7-13.) Waller told the employees that they should inform him if similar incidents happened again. (Id., 26:5-7.) Waller testified that he remembers having a meeting with his employees, but that he does not recall discussing Boyd's allegations against Ruiz. (Waller dep., 63:21-65:1. 66:20-67:7.)

Boyd testified that Culver and Waller told Wilson about Boyd's EEOC complaint and that Boyd was unhappy that Culver and Waller had shared her "business" with Wilson. (Boyd Dep., 33:5-11; 63:25-64:8.) At the meeting, Boyd asked Waller why he had

[8] It is not clear from the evidence when Wilson gave the EEOC her statement.

[9] Boyd testified that there was not a formal meeting, but that all of the employees and managers at the Memphis warehouse were present in the same place and Boyd's allegations and EEOC complaint were raised. (Boyd dep., 63:9-17.)

told Wilson about Boyd's complaint, and he replied that he had assumed Boyd had already told Wilson. (Boyd dep., 33:3-11.)

Wilson testified that Culver told her about Boyd's complaint and stated that Wilson should be on the company's side or Wilson would lose her job. (Wilson dep., 52:23-53:1.) Culver testified that he did not tell Wilson about Boyd's EEOC charge. (Culver dep., 39:23-40:11.)

Neither Waller nor Culver took any action against Ruiz after Boyd filed her EEOC charge, and Waller told Boyd that management could not take any action against Ruiz until a supervisor caught him behaving inappropriately. (Boyd dep., 34:6-14.) Waller did not conduct an investigation of Ruiz's behavior after Boyd filed the discrimination charge because he thought "there was very little investigation [he] could do without accusing somebody of something that [he] had not seen or heard about." (Waller dep., 53:17-21.) Waller did not ask Ruiz if he had engaged in the behavior that Wilson had alleged, and Waller did not tell Ruiz not to engage in similar behavior in the future. (Id., 54:1-6.)

Shortly after the meeting with Waller about Ruiz's behavior, in either December 2003 or January 2004, Wilson again saw Ruiz masturbating in the warehouse. (Wilson dep., 23:5-17.) Wilson immediately reported Ruiz's conduct to Culver, who reported it to

Waller.[10] (Id., 23:19-24.) After that incident, Wilson avoided Ruiz completely, including making sure that Ruiz was not in an area in which she needed to work before entering the area. (Id., 24:9-25.)

Boyd was so upset by Ruiz's behavior that she would cry every morning before work and throughout the day while at work. (Boyd dep., 21:1-5, 37:14-18.)

On either December 6 or December 12, 2004, Boyd and Wilson received written warnings from Waller for failing to conduct manual inventory counts in the warehouse, instead relying on the company's computer inventory report. (Wilson dep., 35:23-36:9; A&I Products' April 12, 2005 responses to the EEOC's Request for Information, question 7.) They were informed that future errors in inventory count could lead to further disciplinary actions. (Id.) Wilson testified that she had conducted a manual inventory count and that her inventory count was correct. (Wilson dep., 36:6-25.)

Boyd and Wilson testified that they had never received any discipline based on their inventory counts before December 2004. (Boyd dep., 44:10-13; Wilson dep., 35:13-15.) A&I Products states that both Boyd and Wilson had received prior discipline, in that they had received verbal reprimands in September 2004. (A&I

[10] Wilson did not testify about what corrective actions, if any, Culver and Waller took against Ruiz in response to Wilson's complaint.

Products' April 12, 2005 responses to the EEOC's Request for Information, question 7.)

On January 5, 2005, A&I Products discovered that Boyd and Wilson's inventory counts were incorrect. (Id.) A&I Products asserts that Boyd and Wilson wilfully falsified the counts by relying on the inventory counts on the company computers rather than performing physical counts. (Id.) Boyd and Wilson testified that they had miscounted a shipment of belts, failing to count four belts out of approximately five hundred in the shipment.[11] (Boyd dep., 45:20-24; Wilson dep., 38:2-11.) Waller gave Boyd and Wilson written warnings on January 6, 2005 and three-day, non-paid suspensions for Friday, January 7 through Tuesday, January 11. (Id.)

Other employees occasionally rely on computer inventory numbers instead of conducting manual inventory counts, and Waller sometimes instructs the employees to do so. (Boyd dep., 60:5-24.) For as long as the Memphis warehouse has been open, employees have routinely made errors in counting inventory. (Van Der Vliet dep., 18:19-19:11, Waller dep., 24:1-4.)

When Boyd and Wilson were suspended, the assistant warehouse manager was responsible for investigating any inventory discrepancies. (Waller dep., 21:23-23:5.) If errors were

[11] Wilson and Boyd were responsible for counting the same shipments. (Boyd dep., 45-20-46:6.)

discovered, employees were told to re-count the inventory, but generally were not disciplined. (Bonner dep., 45:13-47:18; Wilson dep., 38:19-25; Waller dep., 25;10-18.) If an employee in the warehouse miscounted when conducting an inventory, Waller would ask the employee about the error and might verbally warn the employee. (Waller dep., 25:10-26:6.) Since approximately April 2006, each employee has been responsible for investigating inventory discrepancies that she discovers. (Id. 23:6-21.) Under that system, Culver and Waller are not notified about or aware of inventory discrepancies. (Culver dep., 23:17-24:22.)

No A&I Products employees except Boyd and Wilson have ever been suspended for falsifying inventory counts, and no other employee in the Memphis warehouse has ever been suspended for any reason. (Van Der Vliet dep., 89:2-15.) None of the employees in the Memphis warehouse has been disciplined for inventory errors since Boyd and Wilson's suspension. (Culver dep., 23:9-13.)

Since her suspension in January 2005, Wilson has been more careful to ensure that her inventory counts are correct. (Wilson dep., 39:3-14, 67:5-13.) She has not received any further discipline based on her inventory counts. (Id., 39: 19-22.) Boyd has not conducted her inventory counts any differently since her suspension and has not had any further problems with her inventory counts. (Boyd dep., 46:10-18.)

In July 2005, both Culver and Boyd saw Ruiz fondling his

exposed genitals in the warehouse. (Id., 35:19-23.) Culver also heard Ruiz offer to pay Boyd if she would perform a sexual favor for him.[12] (Culver dep., 44:3-5, 48:4-16; Wilson dep., 25:1-17.) Ruiz was fired the same day. (Culver dep., 44:3-5.) No one other than Boyd and Wilson had seen Ruiz masturbate at work until Culver saw Ruiz's behavior in July 2005. (Boyd dep., 14:21-15:1.)

A&I Products has a one-page sexual-harassment policy, a copy of which it gives to all employees. (Van Der Vliet dep., 90:19-91:11; Bosler dep., 20:15-21:12.)[13] Boyd and Wilson received a copy of A&I Product's sexual harassment policy when they were hired. (Boyd dep., 9:23-10:5; Wilson dep., 69:7-17.) Employees do not receive any other harassment training. (Bosler dep., 20:15-21:12; Van Der Vliet dep., 90:19-91:11.)

**III. Summary Judgment Standard**

Summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure is appropriate "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." Fed. R. Civ. P. 56(c). The party moving for summary judgment "bears the burden of clearly and

[12] Culver testified that he heard Ruiz offering Boyd twenty dollars if she would watch him masturbate. (Culver dep., 44:3-17.) Boyd testified that Ruiz offered her money if she would "jack him off." (Boyd dep., 15:5-10.)

[13] Laura Bosler works in the human resources department of A&I Products. (Boyd dep., 30:14-15.)

convincingly establishing the nonexistence of any genuine issue of material fact, and the evidence as well as all inferences drawn therefrom must be read in a light most favorable to the party opposing the motion." Kochins v. Linden-Alimak, Inc., 799 F.2d 1128, 1133 (6th Cir. 1986). The moving party can meet this burden, however, by pointing out to the court that the respondent, having had sufficient opportunity for discovery, has no evidence to support an essential element of her case. See Street v. J.C. Bradford & Co., 886 F.2d 1472, 1479 (6th Cir. 1989).

When confronted with a properly supported motion for summary judgment, the nonmoving party must set forth specific facts showing that there is a genuine issue for trial. A genuine issue for trial exists if the evidence is such that a reasonable jury could return a verdict for the nonmoving party. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). The party opposing the motion must "do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986). The nonmoving party may not oppose a properly supported summary judgment motion by mere reliance on the pleadings. See Celotex Corp. v. Catrett, 477 U.S. 317, 324 (1986). Instead, the nonmoving party must present "concrete evidence supporting its claims." Cloverdale Equip. v. Simon Aerials, Inc., 869 F.2d 934,

937 (6th Cir. 1989). The district court does not have the duty to search the record for such evidence. See Interroyal Corp. v. Sponseller, 889 F.2d 108, 111 (6th Cir. 1989). Parties have the duty to point out specific evidence in the record that would be sufficient to justify a jury decision in their favor. Id.

**IV. Analysis**

**A. Hostile Work Environment Claim**

A plaintiff can establish a Title VII violation by proving that sex discrimination created a hostile or abusive work environment. Bowman v. Shawnee State Univ., 220 F.3d 456, 462 (6th Cir. 2000). To establish a hostile-work-environment claim, the EEOC must show that: (1) the employee belongs to a protected class; (2) the employee was subjected to unwelcome sexual harassment; (3) the harassment complained of was based on sex; (4) the harassment created a hostile work environment; and (5) the employer is liable. Randolph v. Ohio Dep't of Youth Servs., 453 F.3d 724, 733 (6th Cir. 2006)(citing Hafford v. Seidner, 183 F.3d 506, 512 (6th Cir. 1999)); Bowman, 220 F.3d at 462-63.

A&I Products does not dispute the first two Randolph factors, but argues that there is insufficient evidence to support a finding that Ruiz's alleged harassment of Boyd and Wilson was based on their sex, that the harassment created a hostile work environment, or that A&I Products is liable.

**1. Based on Sex**

To establish that the harassment complained of was based on sex, the EEOC must show that, but for the fact of Boyd and Wilson's sex, they would not have been the object of harassment. Williams v. Gen. Motors Corp., 187 F.3d 553, 565 (6th Cir. 1999). Harassing behavior need not be sexually explicit; any harassing behavior motivated by sex-based discriminatory animus will satisfy the "based on sex" requirement. Id.

The record could support a finding that Boyd and Wilson would not have been subjected to the alleged harassment but for their sex. Ruiz's comments and behaviors were sexually explicit, and he made references to Wilson's breasts. Wilson has sworn that Culver encouraged Ruiz to grab Wilson's breasts and behind and to expose himself to Boyd and Wilson, the only two females working in the warehouse. Although none of the male employees had seen Ruiz masturbate until Culver witnessed that behavior on the day Ruiz was fired, Ruiz actively sought Boyd and Wilson's attention while he was masturbating.

There is no evidence in the record suggesting that Ruiz commented on the physical attributes of his male co-workers or that he purposefully drew their attention to his lewd behavior. Because the harassing behavior was sexual in nature and targeted the only two females working in the Memphis warehouse, a reasonable jury could find that the harassment was based on Boyd and Wilson's sex.

**2. Hostile Work Environment**

The fourth Randolph factor requires that the charged sexual harassment create a hostile work environment. Harassment creates a hostile work environment "[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." Randolph, 453 F.3d at 733 (citing Harris v. Forklift Sys., Inc., 510 U.S. 17, 21 (1993)). The test must be met both from the employee's subjective position and from the objective position of a reasonable person. Id.

The court must consider the totality of the circumstances in determining whether harassment is sufficiently severe or persuasive to constitute a hostile work environment. Id. Specifically, the court must consider "the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's performance." Bowman, 220 F.3d at 463 (citing Harris, 510 U.S. at 23).

Considering the evidence in a light most favorable to the Plaintiff, Ruiz exposed and fondled his genitals in front of Boyd and Wilson repeatedly over a period of many months and, for a period of time, almost on a daily basis. That harassment is

"commonplace, ongoing, and continual" indicates that it might be sufficiently pervasive to support a hostile-work-environment claim. Abeita v. TransAmerica Mailings, Inc., 159 F.3d 246, 252 (6th Cir. 1998). In Abeita, the court of appeals reversed the district court's grant of summary judgment for the defendant in a case in which the plaintiff described multiple sexual comments that had been made in her presence and stated that similar comments were commonplace. The conduct that the EEOC alleges here is as pervasive as that alleged in Abeita and, because Ruiz's conduct was not limited to sexual comments, more severe. Certainly, it was more humiliating and exceeded mere offensive utterance. Ruiz's behavior interfered with Wilson's ability to perform her job, in that she became so determined to avoid any contact with Ruiz that she would ensure he was not in an area in which she needed to work before she would enter the area. It also interfered with Boyd's ability to do her job, because she was so upset by Ruiz's behavior that she cried through the day while at work. For these reasons, a reasonable jury could find that Boyd and Wilson were subjected to a hostile work environment.

**3. Employer Liability**

The fifth Randolph factor requires employer liability. When a hostile-work-environment claim stems from a coworker's actions, the plaintiff must show that the employer "knew or should have known of the charged sexual harassment and failed to implement

prompt and appropriate corrective action." Williams, 187 F.3d at 561. "In determining whether a response was 'prompt and appropriate,' negligence in fashioning a remedy is not sufficient fo the employer to incur liability." Nievaard v. City of Ann Arbor, 124 F. App'x 948, 954 (6th Cir. 2005). In cases of co-worker harassment, an employer is liable only if its response "exhibits such indifference as to indicate an attitude of permissiveness that amounts to discrimination." McCombs v. Meijer, Inc., 395 F.3d 346, 353 (6th Cir. 2005)(quoting Blankenship v. Parke Care Ctrs., Inc., 123 F.3d 868, 872 (6th Cir. 1997)).[14]

Questions of material fact remain about when Culver and Waller first learned of Ruiz's behavior. Although Culver and Waller testified that they did not learn about Ruiz's behavior until Boyd filed her EEOC complaint in November 2004, Boyd and Wilson's testimony indicates that Waller and Culver had notice of Ruiz's harassment in September 2004.

Wilson and Boyd testified that they immediately informed Culver and Waller after Ruiz masturbated in the employee break room in September 2004. Wilson also testified that Culver knew about Ruiz's history of harassing conduct and that Culver

[14] Blankenship has been overruled in part by Burlington Indus. v. Ellerth, 524 U.S. 742 (1998) and Faragher v. Boca Raton, 524 U.S. 775, 808 (1998) as to employer liability in cases of supervisor harassment. Collette v. Stein-Mart, Inc., 126 F. App'x. 678, 684 n.3 (6th Cir. 2005). Blankenship continues to govern cases addressing employer liability in cases of harassment by a co-worker. Rudd v. Shelby County, 166 F. App'x 777, 778 n. 1 (6th Cir. 2006).

encouraged that conduct both before and after becoming the assistant warehouse manager in August 2004. Although Culver knew about Ruiz's history of harassing Boyd and Wilson and about the September 2004 incident, no disciplinary action was taken against Ruiz until July 2005. That Culver encouraged Ruiz's behavior and took no action to discipline Ruiz indicates an "attitude of permissiveness" amounting to discrimination.

Even if Culver and Waller did not learn about Wilson and Boyd's allegations against Ruiz until November 2004, A&I Products would be liable for its failure to take prompt and appropriate action at that time. Neither Waller nor Culver investigated the allegations in Boyd's complaint, and Waller indicated that he believed an investigation would be inappropriate because no manager had witnessed Ruiz's actions. Waller and Culver did not reemphasize or redistribute the company's anti-harassment policy, nor did they offer Boyd or Wilson any assistance in preventing future harassment. Wilson testified that Culver threatened that Wilson would lose her job if she did not take the company's side against Boyd on Boyd's EEOC complaint. These actions do not constitute a prompt and appropriate response to allegations of sexual harassment. Cf. Swanson v. Livingston County, 121 F. App'x 80, 84 (6th Cir. 2005)(employer took prompt and appropriate action to combat co-worker harassment where department promptly began internal investigation regarding employee's allegations and

meted out disciplinary measures to those individuals found to have violated department policy); Nievaard v. City of Ann Arbor, 124 F. App'x 948, 955 (6th Cir. 2005)(employer took prompt and appropriate action to combat co-worker harassment where city repeatedly met with employees to discuss anti-harassment policy, provided employee with assistance in dealing with harassment, and disciplined employees who had engaged in harassing behavior.)

For eight months, from the time Boyd filed her EEOC complaint until Culver fired Ruiz after seeing him soliciting sexual favors from Boyd, Culver and Waller took no action to remedy or prevent Ruiz's harassment. Therefore, a reasonable jury could find that A&I Products "knew or should have known of the charged sexual harassment and failed to implement prompt and appropriate corrective action."

A&I Products asserts that it is entitled to rely on the affirmative defense established in Burlington Indus. v. Ellerth, 524 U.S. 742 (1998) and Faragher v. Boca Raton, 524 U.S. 775, 808 (1998). Under Ellerth and Faragher, an employer is strictly liable for harassment of an employee by the employee's supervisor if the harassment culminates in a tangible employment action. Ellerth, 524 U.S. at 765; Faragher, 524 U.S. at 808. If no tangible employment action is taken, the employer can avoid liability by showing that: (1) the employer exercised reasonable care to prevent and correct promptly any sexually harassing

behavior, and (2) the 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; Faragher, 524 U.S. at 808.

The Ellerth/Faragher defense is available only in cases where the alleged harassment is perpetrated by a supervisor. Here, the EEOC alleges that Boyd and Wilson were subjected to harassment by a co-worker. Therefore, the Ellerth/Faragher defense is inapplicable. A&I Products is liable for Ruiz's harassment of Boyd and Wilson if it knew or should have known of the alleged harassment and failed to implement prompt and appropriate corrective action.

Because a reasonable jury could find that the EEOC has established each of the five factors of the Randolph test, A&I Products' motion for summary judgment on the EEOC's hostile-work-environment claim is DENIED.

**B. Retaliation**

To establish a prima facie case of retaliation, the EEOC must show that:

> 1) the employee engaged in protected activity; 2) the employer knew of the protected activity; 3) the employer thereafter took an adverse employment action; 4) there is a causal connection between the protected activity and the adverse action.

E.E.O.C. v. SunDance Rehab. Corp., 466 F.3d 490, 501 (6th Cir. 2006). If the plaintiff establishes a prima facie case, the

burden shifts to the defendant to articulate a legitimate, nondiscriminatory reason for the adverse action. Johnson v. Univ. of Cincinnati, 215 F.3d 561, 578-79 (6th Cir. 2000) (citations omitted). The plaintiff must then demonstrate that the proffered reason was a mere pretext for discrimination. Id. (citations omitted.)

A&I Products contends that Wilson did not engage in any protected activity, and, therefore, the EEOC cannot establish the first two elements of its prima facie retaliation claim as to Wilson. A&I Products also argues that, assuming the EEOC can establish its prima facie case as to Boyd or Wilson, it cannot rebut A&I Products' legitimate, non-discriminatory reason for suspending Boyd and Wilson: that they had falsified inventory counts.

**1. Protected Activity**

A&I Products asserts that, although it knew that Boyd had engaged in an activity protected under Title VII by filing a complaint with the EEOC, Wilson did not file a complaint with the EEOC and, therefore, did not engage in any protected activity.

Title VII provides that:

> [i]t shall be an unlawful employment practice for an employer to discriminate against any of his employees ... because [the employee] has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

42 U.S.C. § 2000e-3(a). The first clause, the "opposition clause," "prohibits an employer from retaliating against an employee who has 'opposed' any practice by the employer made unlawful" under the statute. Johnson, 215 F.3d at 578. The second portion, the "participation clause," "prohibits an employer from retaliating against an employee who has 'participated' in any manner in an investigation under Title VII." Id.

Complaining to management about allegedly unlawful practices qualifies for protection under the opposition clause. Id., 579-80. Here, Wilson engaged in protected activity by complaining repeatedly about Ruiz's behavior to Culver and to Waller. Because her complaints were directed to Culver and Waller, A&I Products knew that Wilson was engaging in protected activity.[15] Therefore, the EEOC has established the first two elements of its prima facie retaliation claim on behalf of Wilson.

A&I Products does not dispute the remaining elements of the EEOC's prima facie retaliation claims.

**2. Legitimate, Non-discriminatory Reason**

A&I Products argues that, even if the EEOC could establish its prima facie retaliation claim, A&I Products has shown that it suspended Boyd and Wilson for a legitimate, non-discriminatory

[15] Wilson also engaged in protected activity under the participation clause because she participated in the EEOC's investigation of Boyd's pending EEOC harassment charge. Although Culver indicated that he knew Wilson was named as a witness in Boyd's complaint, it is not clear whether Wilson participated in the EEOC's investigation before or after her suspension, nor is it clear when A&I Products knew that Wilson had participated.

reason. A&I Products asserts that Boyd and Wilson were suspended because they had falsified their inventory counts by relying on computer inventory numbers instead of performing manual inventory checks.

Because it is undisputed that Boyd and Wilson were suspended after Waller discovered their incorrect inventory counts, A&I Products has set forth a legitimate, non-discriminatory reason for their suspensions.

**3. Pretext**

The EEOC asserts that A&I Products' proffered reason for suspending Boyd and Wilson is pretextual. Pretext can be established by showing one of the following: (1) that the proffered reason had no basis in fact; (2) that the proffered reason did not actually motivate the adverse action; or (3) that the proffered reason was insufficient to motivate the adverse action. Tuttle v. Metro. Gov't of Nashville, 474 F.3d 307, 319 (6th Cir. 2007). The EEOC contends that Boyd and Wilson's inventory count errors were insufficient to motivate their suspensions.

Viewing the evidence in a light most favorable to the EEOC, a reasonable jury could find that A&I Products' asserted reason for suspending Boyd and Wilson is pretextual. Boyd and Wilson testified that they miscounted a shipment of belts. The discrepancy was minimal. The evidence indicates that inventory

counting errors are routine and that no other employee has ever been suspended for such errors. Waller testified that he generally responds to inventory discrepancies by talking to the employee who erred and, sometimes, issues a verbal warning. Boyd and Wilson testified that they did not receive verbal warnings before they received written warnings in December 2004 and suspensions in January 2005.

Because employees generally are not disciplined or receive only verbal warnings in response to inventory errors, a reasonable jury could find that Boyd and Wilson's inventory errors were not sufficient to motivate their suspensions. Because a reasonable jury could conclude that A&I Products' stated reason for the suspensions was pretextual, A&I Products' motion for summary judgment on the EEOC's retaliation claim is DENIED.

**V. Conclusion**

For the foregoing reasons, A&I Products' motion for summary judgment is DENIED.

So ordered this 13th day of July 2007.

s/ Samuel H. Mays, Jr.
SAMUEL H. MAYS, JR.
UNITED STATES DISTRICT JUDGE