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United States District Court, N.D. Texas, Dallas Division.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Plaintiff,
v.
I–SECTOR CORPORATION, Defendant.

No. 3:01–CV–2240–R. | Jan. 2, 2003.

Opinion

MEMORANDUM OPINION AND ORDER

BUCHMEYER, J.

***1** Now before this Court are PLAINTIFF EEOC'S MOTION FOR PARTIAL SUMMARY JUDGMENT (filed November 4, 2002), and DEFENDANT I–SECTOR CORPORATION'S MOTION FOR SUMMARY JUDGMENT (filed November 6, 2002). For the reasons discussed below, Plaintiff's motion is GRANTED IN PART and DENIED IN PART, and Defendant's motion is DENIED.

I. Introduction

This is a gender discrimination case. The Equal Employment Opportunity Commission ("EEOC" and "Plaintiff") and Intervenors, Dana Bartlett ("Bartlett") and Carrie Harris ("Harris") seek injunctive relief and damages from I–Sector Corporation (f/k/a Allstar Systems) ("I–Sector" and "Defendant") for alleged violations of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.,* and the Civil Rights act of 1991. Specifically, Plaintiffs allege that Bartlett and Harris "were subjected to a sexually hostile work environment, sex-based discrimination and constructive discharge." *Complaint* at 1. Harris was employed by Defendant for approximately thirteen months, from October 1998 to November 12, 1999. *Appendix to Plaintiff's Motion for Partial Summary Judgment ("Appendix"*) at 6. Bartlett was employed by Defendant from July 1998 to September 1999.

II. ANALYSIS

A. SUMMARY JUDGMENT STANDARD

Rule 56(c) of the Federal Rules of Civil Procedure allows summary judgment when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. FED. R. CIV. P. 56(c); *Celotex Corp. v. Catrett,* 477 U.S. 317, 322 (1986); *Melton v. Teachers Ins. & Annuity Ass'n of Am.,* 114 F.3d 557, 559 (5th Cir.1997). The court must decide all reasonable doubts and inferences in the light most favorable to the party opposing the motion. *Lemelle v. Universal Mfg. Corp.,* 18 F.3d 1268, 1272 (5th Cir.1994); *Walker v. Sears, Roebuck & Co.,* 853 F.2d 355, 358 (5th Cir.1988). As long as there appears to be some support for the disputed allegations such that "reasonable minds could differ as to the import of the evidence," the motion must be denied. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 250 (1986).

The party moving for summary judgment bears the initial burden of identifying those portions of the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, which it believes demonstrate the absence of a genuine issue of material fact. *Celotex,* 477 U.S. at 323; *Lynch Properties, Inc. v. Potomac Ins. Co.,* 140 F.3d 622, 625 (5th Cir.1998). Where the non-moving party bears the burden of proof on a claim upon which summary judgment is sought, the moving party may discharge its summary judgment burden by showing that there is an absence of evidence to support the non-moving party's case. *Celotex,* 477 U.S. at 325. Once the moving party has satisfied this burden, the non-moving party must go beyond the pleadings and by its own affidavits or depositions, answers to interrogatories, and admissions on file set forth specific facts showing a genuine issue for trial. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574, 587 (1986); *Edwards v. Your Credit, Inc.,* 148 F.3d 427, 431–32 (5th Cir.1998). Summary judgment will be granted "against a party who 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,* 477 U.S. at 322.

***2** Because employment discrimination claims "involve nebulous questions of motivation and intent," summary judgment is generally an inappropriate tool for resolving these cases. *Thornbrough v. Columbus & Greenville R.R. Co.,* 760 F.2d 633, 640–41 (5th Cir.1985) (citations omitted). However, if Plaintiff fails to establish a prima facie case, *Bauer v. Albermarle Corp.,* 169 F.3d 962, 966 (5th Cir.1999), or if defendant presents strong evidence of a legitimate, nondiscriminatory reason for its actions and

the plaintiff is unable to counter with additional evidence of pretext, summary judgment may be properly granted. *Enplanar, Inc. v. Marsh,* 11 F.3d 1284, 1295 (5th Cir.1994).

B. PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT

The EEOC argues that the summary judgment evidence clearly establishes the inapplicability of the Second and Third Defenses raised by Defendant in its Answer to the Complaint, that there are no disputed material facts relating to either the Second or Third Defenses, and thus that the EEOC is entitled to judgment as a matter of law on these two defenses.

Partial summary judgment can be used to "dispose of affirmative defenses." *Koch Industries v. United Gas Pipe Line Co.,* 700 F.Supp. 865, 867 (M.D.La.1988). Prior to addressing the substance of Plaintiff's motion, this Court notes that the motion is, with one exception, unaffected by the filing of the First Amended Answer subsequent to the filing of Plaintiff's motion.[1] The two defenses at issue have not substantively changed. The wording of the Third Defense, quoted *infra,* is unchanged in the First Amended Answer. The Second Defense alleges that the Plaintiff's actions are time barred. The Second Defense, as stated in the Answer, was: "Harris did not timely file her Charge of Discrimination; Bartlett has filed no Charge of Discrimination, i.e., the claims are barred by limitations." *Answer* at 2. In the First Amended answer, the Second Defense states:

1 This Court granted leave for Defendant to file its First Amended Answer on December 10, 2002.

SECOND DEFENSE

> Harris did not timely file her Charge of Discrimination; Bartlett has filed no Charge of Discrimination; i.e., *all claims, including, but not limited to state law torts, e.g., infliction of mental anguish and punitive damages, as alleged by [the EEOC], are barred by limitations.* All claims of the EEOC are barred by the applicable statue of limitations.
>
> *First Amended Answer to the Complaint* at 2–3 (emphasis added). The additional language in the second clause of this defense does not substantively change the defense, it merely replaces the statement in the Answer that "the claims" are barred with a stronger statement that "all claims" are barred and adds a non-exclusive list of the types of barred claims. However, the final sentence of the Second Defense is entirely new, and has not been briefed by the parties as part of Plaintiff's motion for partial summary judgment. Plaintiff's motion for partial summary judgment is, therefore, DENIED IN PART, regarding the final sentence of the Second Defense: "All claims of the EEOC are barred by the applicable statute of limitations."

***3** Turning to the remainder of the second defense, the analysis of the assertion that Harris did not timely file a charge, turns on the definition of "charge" used to determine if a charge has been filed within the 300 day deadline required in Texas under 42 U.S.C. § 2000e–5(e)(1). *See Griffin v. City of Dallas,* 26 F.3d 610, 612 (5th Cir.1994); *Adams v. Cal–Ark Intern. Inc.,* 159 F.Supp.2d 402, 406–07 (E.D.Tex 2001). On August 9, 2000, approximately 270 days after Harris left employment at Defendant, the EEOC received a letter (the "August 9th letter") from Harris in which she alleges sexual harassment at her workplace and expresses her "utter disgust at the kind of subhuman behavior that I witnessed ... for a over a year."[2] *Appendix* at 6–7. Subsequently, on December 18, 2000, Harris filed a formal Form 5 Charge of Discrimination with the EEOC. *Appendix* at 8. On or around January 18, 2001, the EEOC sent a Notice of Charge of Discrimination to Defendant. *Appendix* at 18. On September 25, 2001 an unsuccessful conciliation session was held. *Appendix* at 5.

2 The August 9th letter also alleges racial and religious discrimination, however, those allegations are not currently before this Court.

The question is whether the August 9th letter qualifies as a "charge." Defendant argues that this letter does not qualify as a charge because it was not signed or verified by Harris as required under 29 CFR § 1601.9, which states that "a charge shall be in writing and signed and shall be verified".[3] Defendant asserts that Harris did not file a document qualifying as a charge until she submitted the Form 5 on December 18, 200, which was more than 300 days after the end of her employment (and thus the end of any claimed offense). Thus, Defendants contend that Harris's claims as well as those of the EEOC and Bartlett are time barred.

3 Defendant does not base its argument on 42 U.S.C. § 2000e–5(b), which states that "[c]harges shall be in writing under oath or affirmation." Perhaps this is due to the fact that this provision was squarely addressed in *Edelman v. Lynchburg College* (see *infra*).

The Supreme Court, in the recent case of *Edelman v. Lynchburg College,* construed the statutory provisions relating to what constitutes a "charge" under 42 U.S.C §

2000e–5. *Edelman v. Lynchburg College,* 535 U.S. 106, 122 S.Ct. 1145 (2002). Uncertainty regarding the definition of charge had arisen from attempts to reconcile 42 U.S.C. § 2000e–5(b), which requires that a charge "be in writing under an oath or affirmation and ... in such form as the [EEOC] requires," with § 2000e–5(e)(1) which mandates that a charge must be filed within 180 or, in the case of deferral states such as Texas, 300 days. In *Edelman,* the complainant had faxed a letter to the EEOC which did not contain an oath or affirmation, and the EEOC did not receive the completed Form 5 until 313 days after the alleged offense. The 4th Circuit Court of Appeals held that §§ 2000e–5(b) and (e)(1) together provide a definition for a charge, and thus that the oath or affirmation must be submitted prior to the expiry of the deadline for timely filing. In so holding, the 4th Circuit ruled that the EEOC's regulation, 29 CFR § 1601.12(b) which "permit[s] an otherwise timely filer to verify a charge after the time for filing has expired" was an impermissible interpretation of the statute. *Id.,* 122 S.Ct. at 1147. The Supreme Court reversed the 4th Circuit and upheld the EEOC's relation back regulation as "an unassailable interpretation" of 42 U.S.C.2000e–5. *Edelman,* 122 S.Ct. at 1152. Explaining its reasoning, the Supreme Court stated:

> ***4** Section [2000e–5(b)] merely requires the verification of a charge, without saying when it must be verified; § [2000e–5(e)(1)] provides that a charge must be filed within a given period, without indicating whether the charge must be verified when filed. Neither provision incorporates the other so as to give a definition by necessary implication.
>
> ... The point of the time limitation is to encourage a potential charging party to raise a discrimination claim before it gets stale, for the sake of a reliable result and a speedy end to any illegal practice that proves out. The verification requirement has the different object of protecting employers from the disruption and expense of responding to a claim unless a complainant is serious enough and sure enough to support it by oath subject to liability for perjury. This object, however, demands an oath only by the time the employer is obliged to respond to the charge, not at the time an employee files it with the EEOC....

The Supreme Court also emphasized the remedial purpose of the Civil Rights Act and the balancing inherent in Title VII between the rights of complainants and of employers, stating:

> In requiring the oath or affirmation, however, Congress presumably did not mean to affect the nature of Title VII as "a remedial scheme in which laypersons, rather than lawyers, are expected to initiate the process." ... Construing § [2000e–5] to permit the relation back of an oath omitted from an original filing ensures that the lay complainant, who may not know enough to verify on filing, will not risk forfeiting his rights inadvertently. At the same time, the [EEOC] looks out for the employer's interest by refusing to call for any response to an otherwise sufficient complaint until the verification has been supplied.

Id. at 1149–1150 (citations and other footnotes omitted); *see also Sanchez v. Standard Brands, Inc.,* 431 F.2d 455, 461 (5th Cir.1970)(noting that "courts confronted with procedural ambiguities in the [Title VII] statutory framework have, with virtual unanimity, resolved them in favor of the complaining party"); *Becker v. Montgomery,* 532 U.S. 757, 765 (2001)(holding that failure to sign a notice of appeal within the required period was not a jurisdictional defect). Defendant attempts to avoid the implications of *Edelman* by asserting that the relation back regulation "simply does not apply" to the signature regulation, 29 CFR § 1601.9. *Defendant I–Sector Corporation's Response to Plaintiff EEOC's Motion for Partial Summary Judgment ("Defendant's Response Brief")* at 3. In light of *Edelman,* such an attempt must fail. The receipt of the completed Form 5, through the operation of the relation back regulation, enabled the August 9th letter to meet the requirements of the signature provisions.

The August 9th letter, as amended by the Form 5, meets the other requirements necessary to qualify as a charge as stated in 29 CFR § 1601.12, which provides that:

> ***5** (a) Each charge should contain the following:
>
> (1) The full name, address and telephone number of the person making the charge ...
>
> (2) The full name and address of the person against whom the charge is made, if known ...
>
> (3) A clear and concise statement of the facts, including pertinent dates, constituting the alleged unlawful employment practices ...
>
> (4) If known, the approximate number of employees of the respondent employer ...
>
> (5) A statement disclosing whether proceedings involving the alleged unlawful employment practice have been commenced before a State or local agency ...
>
> (b) Notwithstanding the provisions of paragraph (a) of this section, *a charge is sufficient when the [EEOC] receives from the person making the charge a written statement sufficiently precise to identify the parties, and to describe generally the action or practices complained of.* A charge may be amended to cure technical defects or omissions, including failure to verify the charge, or to clarify and amplify allegations

> made therein. Such amendments and amendments alleging additional acts which constitute unlawful employment practices related to or growing out of the subject matter of the original charge will relate back to the date the charge was first received.

29 CFR § 1601.12 (emphasis added). The August 9th letter, meets the standard set out in § 1601.12(b) of providing "a written statement sufficiently precise to identify the parties, and to describe generally the action or practices complained of." *Id.; see also Price v. Southwestern Bell Telephone Co.,* 687 F.2d 74, 78 (5th Cir.1982)(quoting *Sanchez,* 431 F.2d at 462)(stating that "the crucial element of a charge of discrimination is the factual statement contained therein"). The August 9th letter provides the full name, address and telephone number of Harris; the name of Defendant company; and a concise statement of her gender discrimination allegations.[4] *Appendix* at 6–7. Detailing her allegations, Harris provides the dates she was employed by Defendant and the name of her supervisor, states that she experienced sexual harassment "on a daily basis," recounts examples of the various types of gender discrimination, and describes the lack of adequate response provided when she reported these incidents to management. *Id.*

4 The August 9th letter also contains a statement, "I would like to file a complaint," which implies that Harris had not filed an action in state court. *Appendix* at 7.

Defendant also argues that the delay in its receiving notice from the EEOC of the charge demonstrates that the EEOC did not consider the August 9th letter to be a charge. The statute, 42 U.S.C. § 2000e–5(b) provides that the EEOC, after receiving a charge, shall "serve a notice of the charge ... on such employer ... within ten days." The Supreme Court, in *Edelman,* noted that the EEOC generally does not require a response from a defendant until the charge has been perfected. 122 S.Ct. at 1150 n. 9. Although Harris perfected her charge on December 18, 2000, notice was not provided until January 18, 2001—a period of 31 days. As the 4th Circuit stated in its remand of *Edelman,* "failures of the EEOC to carry out its responsibilities under Title VII" "are not deficiencies in the charge." *Edelman v. Lynchburg College,* 300 F.3d 400, 404 (4th Cir.2002)(remand opinion); A leading employment law treatise states:

> ***6** Employers who receive untimely notice have argued that this precludes subsequent investigation or suit. This argument normally fails, absent a showing that the employer was significantly disadvantaged by the failure to give timely notice. This outcome is bolstered by the legislative history of the 1972 amendments, which reveals that "[I]t is not intended, however, that failure to give notice of the charge to the respondent within 10 days would prejudice the rights of the aggrieved party." Because the responsibility for giving notice rests with the EEOC, a notoriously over-burdened agency, courts are reluctant to deny judicial redress to a plaintiff because the EEOC failed to act with the requisite diligence or within the allotted time.

4 *Lex K. Larson & Arthur Larson, Employment Discrimination* § 73 .01[2] (2002)(footnotes and citations omitted). While the EEOC has not offered an explanation for the delay, Defendant has not pointed to any evidence showing that it was prejudiced by the delay. *Edelman,* 300 F.3d at 405 n. 2. More importantly, for the purposes of this Court's review of Plaintiff's motion, Defendant's Response Brief fails to point to any facts linking this delay to any part of its Second Defense. Without such a link, or a showing of prejudice, Defendant has failed to create a fact issue.

The Second Defense also states that Bartlett's claims are barred because she never filed a charge. As the claims of Harris and Bartlett arise from the same factual circumstances, this Court granted Bartlett's motion to intervene on March 4, 2002. Under the "single filing rule," "co-plaintiffs with individual claims arising out of similar discriminatory treatment in the same time frame need not have satisfied the filing requirement." *Allen v. U .S. Steel Corp.,* 665 F.2d 689, 695 (5th Cir.1982)(citing *Crawford v. U.S. Steel Corp.,* 660 F.2d 665–66). Bartlett was a colleague of Harris and allegedly suffered the same type of discrimination over the same period. Thus, the single-filer rule applies.[5]

5 This Court also notes, although it need not decide, that Rule 24 of the Federal Rules of Civil Procedure may serve as another possible basis for intervention by Harris and Bartlett.

Defendant also asserts that Plaintiff has failed to provide adequate summary judgment evidence as required under Rule 56 of the Federal Rules of Civil Procedure. *Defendant's Response Brief* at 2. Plaintiff has provided an affidavit from Janet V. Elizondo, Acting Director of Dallas District Office of the EEOC, supporting the authenticity of the case file it has produced. *Appendix* at 55–56. After considering the evidence, this Court concludes that Plaintiff has provided this Court with adequate summary judgment evidence in support of its motion. *See Appendix* at 1–56.

In sum, as amended by the subsequently filed Form 5 through the relation back provision, Harris's letter of August 9, 2000 meets the requirements of 42 U.S.C. § 2000e–5, 29 CFR §§ 1601.9, 1601.12 and is thus a timely filed charge.[6] Plaintiff's Motion for Partial Summary

Judgment is therefore GRANTED IN PART as to the Second Defense, except as to the newly added final sentence: "All claims of the EEOC are barred by the applicable statute of limitations."

6 Moreover, even if this Court were to conclude that the letter received August 9, 2000 did not qualify as a charge, courts have stated that technical filing requirements of Title VII such as that of timely filing of a charge contained in 42 U.S.C. § 2000e–5(1) are not jurisdictional. *See, e.g., Zipes v. Trans World Airlines, Inc.,* 455 U.S. 385 (1982); *Jackson v. Seaboard Cost Line R.R..,* 678 F.2d 992 (11th Cir.1982). However, this Court does not need to address this question as a timely charge was filed in this case.

***7** Defendant's Third Defense states:

THIRD DEFENSE

> Harris, Bartlett and the [EEOC] failed to meet all conditions precedent including their failure to exhaust administrative remedies in that the "conciliation" sessions that was had was not done in good faith.

First Amended Answer to the Complaint at 3. This defense can be more quickly disposed of than the second defense. The EEOC, as documented in the *Appendix* and discussed in Plaintiff's brief, has satisfied the requirements of 42 U.S.C.2000e–5(f)(1) regarding conditions precedent to filing a suit. *Plaintiff EEOC's Brief in Support of Its Motion for Summary Judgment* at 7–9. Defendant has pointed to no evidence of bad faith or failure to meet the conditions precedent to the filing of a suit by the EEOC, nor of any evidence of bad faith relating to the conciliation session, other than the notice provision addressed *supra.* Thus Defendant has failed to create an issue of fact as to the Third Defense, and summary judgment is therefore GRANTED as to the Third Defense.

C. DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Defendant seeks summary judgment on the issues of: 1) the existence of a hostile work environment, 2) constructive discharge of Harris and Bartlett, 3) liability of Defendant for the alleged harassment, 4) applicability of the affirmative defense provided for by the Supreme Court's decisions in *Farragher v. City of Boca Raton,* 524 U.S. 775 (1998) and *Burlington Industries, Inc., v. Ellerth,* 524 U.S. 742 (1998), and 5) liability for state law tort claims. *Defendant I–Sector Corporation's First Amended Motion for Summary Judgment* at 1–2. After reviewing the copious summary judgment evidence provided by the parties, which includes sharply conflicting deposition testimony from several current and former employees of Defendant, it is apparent that there are disputes of material fact relating to these issues. Therefore, summary judgment on defendant's motion is inappropriate and is hereby DENIED.

III. Conclusion

For the foregoing reasons, Plaintiff's Motion for Partial Summary Judgement is hereby GRANTED IN PART and DENIED IN PART, and Defendant's Motion for Summary Judgment is DENIED.

It is so ORDERED.