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United States District Court,
W.D. Texas, San Antonio Division.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Plaintiff,
and
Terrance JOHNSON, Plaintiff-Intervenor,
v.
NEXION HEALTH AT BROADWAY, INC. d/b/a Broadway Lodge, Defendant.

No. Civ.A.SA-04-CA-872FB. | Sept. 28, 2005.

Attorneys and Law Firms

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Opinion

ORDER ACCEPTING MEMORANDUM AND RECOMMENDATION OF THE UNITED STATES MAGISTRATE JUDGE

BIERY, J.

***1** Before the Court are the Memorandum and Recommendation (docket no. 37) of the United States Magistrate Judge and the written objections (docket no. 39) thereto filed by plaintiff and plaintiff-intervenor ("plaintiffs").

Where no party has objected to a Magistrate Judge's Memorandum and Recommendation, the Court need not conduct a de novo review of the Memorandum and Recommendation. *See* 28 U.S.C. § 636(b)(1) ("A judge of the court shall make a de novo determination of those portions of the report or specified proposed findings and recommendations to which objection is made."). In such cases, the Court need only review the Memorandum and Recommendation and determine whether it is clearly erroneous or contrary to law. *United States v. Wilson,* 864 F.2d 1219, 1221 (5th Cir.), *cert. denied,* 492 U.S. 918, 109 S.Ct. 3243, 106 L.Ed.2d 590 (1989).

On the other hand, any Memorandum and Recommendation to which objection is made requires de novo review by the Court. Such a review means that the Court will examine the entire record, and will make an independent assessment of the law. The Court need not, however, conduct a de novo review when the objections are frivolous, conclusive, or general in nature. *Battle v. United States Parole Comm'n,* 834 F.2d 419, 421 (5th Cir.1987).

The Court has thoroughly analyzed plaintiffs' submission in light of the entire record. As required by Title 28 U.S.C. § 636(b)(1)(c), the Court has conducted an independent review of the entire record in this cause and has conducted a *de novo* review with respect to those matters raised by the objections. After due consideration, the Court concludes plaintiffs' objections lack merit.

The Equal Employment Opportunity Commission ("EEOC") instituted this lawsuit pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000 et seq. and 42 U.S.C. § 1981a, alleging Terrance Johnson, a former employee of Nexion Health at Broadway, Inc. d/b/a Broadway Lodge ("Nexion"), was subjected to a racially hostile work environment by the behavior of a non-employee third party. Mr. Johnson subsequently intervened as a plaintiff. Nexion filed a motion for summary judgment, to which the EEOC and Mr. Johnson jointly responded. The Magistrate Judge recommends the motion be granted and summary judgment entered in Nexion's favor.

STANDARD OF REVIEW

Summary judgment is proper when the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, show there is no genuine issue as to any material fact and the movant is entitled to judgment as a matter of law. FED. R. CIV. P. 56(c); *Celotex Corp. v. Catrett,* 477 U.S. 317, 322, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). A dispute is "genuine" if the evidence is such that a reasonable jury could return a verdict for the nonmoving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574, 586, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986); *Thurman v. Sears, Roebuck & Co.,* 952 F.2d 128, 131 (5th Cir.), *cert. denied,* 506 U.S. 845, 113 S.Ct. 136, 121 L.Ed.2d 89 (1992). A fact is "material" if it might reasonably affect the outcome of the case. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986); *In re Gleasman,* 933 F.2d 1277, 1281 (5th Cir.1991).

***2** A party seeking summary judgment bears the initial

burden of informing the Court of the basis for its motion, and identifying those portions of the record which it believes demonstrate the absence of a genuine issue of material fact. *Celotex,* 477 U.S. at 323. The party opposing a motion must present affirmative evidence in order to defeat a properly supported motion for summary judgment. *Anderson,* 477 U.S. at 257. All of the evidence and inferences drawn from the evidence must be viewed in the light most favorable to the party opposing the motion for summary judgment. *Matsushita Elec. Indus. Co.,* 475 U.S. at 587.

TITLE VII

Title VII makes it "an unlawful employment practice for an employer ... to discharge ... or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race...." 42 U.S.C. § 2000e-2(a)(1). The standard of proof for employment discrimination under Title VII also applies to 42 U.S.C. § 1981 claims. *Davis v. Dallas Area Rapid Transit,* 383 F.3d 309, 316-17 (5th Cir.2004). Under the shifting burden framework established in *McDonnell Douglas Corporation v. Green,* 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973), for circumstantial evidence cases of employment discrimination, a plaintiff must first make a prima facie showing of discrimination, after which the employer must articulate a legitimate, non-discriminatory reason for the adverse employment action, followed by the plaintiff's opportunity to establish by a preponderance of the evidence that the articulated reason was merely a pretext for unlawful discrimination. *Gowesky v. Singing River Hosp. Sys.,* 321 F.3d 503, 511 (5th Cir.2003).

To prevail on a hostile work environment claim, a plaintiff must prove: (1) he belongs to a protected group; (2) he was subjected to unwelcome harassment; (3) the harassment of which plaintiff complained was based on race; (4) the harassment affected a term, condition, or privilege of employment; and (5) the employer knew or should have known of the harassment and failed to take remedial action. *Frank v. Xerox Corp.,* 347 F.3d 130, 138 (5th Cir.2003); *see also Septimus v. University of Houston,* 399 F.3d 601, 611 (5th Cir.2005). He must subjectively perceive the harassment as sufficiently severe or pervasive, and this subjective perception must be objectively reasonable. *Frank,* 347 F.3d at 138. The fact-finder must consider the frequency of the discriminatory conduct, its severity, whether it is physically threatening or humiliating, and whether it unreasonably interferes with an employee's work performance. *Id.*

BACKGROUND

As set forth in the Memorandum and Recommendation, Mr. Johnson, who is African-American, belongs to a protected group. The summary judgment evidence establishes he was subjected to unwelcome harassment based upon his race. Nexion operates nursing home facilities, whose residents consist mainly of elderly persons with various physical and mental ailments such as dementia, neuroses, schizophrenia, and Alzheimer's disease. Mr. Johnson was employed at a Nexion facility as a certified nurse's assistant caring for the daily needs of the patients. One of the residents Mr. Johnson cared for was a seventy-year-old Hispanic man, Pete Patino, who had been diagnosed with schizophrenia and who had a history of mental illness since the age of thirteen.

***3** Medical records indicate Mr. Patino was delusional about Blacks and Hispanics. Beginning in the spring of 2003, Mr. Patino repeatedly made racially disparaging remarks about Caucasians, African-Americans and Hispanics. For example, he used terms such as "wetback," "gringo," "stupid Anglo," and "white trash." Mr. Patino's remarks about Blacks were directed against Mr. Johnson. He repeatedly referred to Mr. Johnson as a "n ____ r" and made statements such as "What are you doing in my room n ____ r!," "I don't want n ____ rs in my room.," "There's an ____ r in the building, call the cops.," and "all n ____ r are rapists and murders; n ____ r are no good; they steal; I hope they all burn in hell." Mr. Patino made these disparaging comments three to four times per week and they were often witnessed by other Nexion employees. Mr. Johnson maintains he reported this racial harassment to charge nurses, the assistant director of nursing, the director of nursing and the facility administrator, but no remedial action was taken.

On July 12, 2003, Mr. Patino complained that Mr. Johnson entered his restroom, put a finger in his face, and stated: "Don't you cause anymore trouble." Nexion suspended Mr. Johnson pending an investigation. During the investigation, Mr. Johnson stated he had no contact with Mr. Patino on July 12th. However, another employee stated she did see Mr. Johnson enter Mr. Patino's room that day. Based upon management's belief that Mr. Johnson had lied about his involvement, Nexion terminated his employment on July 23, 2003, for resident abuse. Mr. Johnson asserts that Mr. Patino's racial harassment, which was known to Nexion management and was unremedied, led to his being discharged.

DISCUSSION

The Magistrate Judge relies on *Cain v. Blackwell,* 246 F.3d 758 (5th Cir.2001), as authority which precludes plaintiffs from establishing a hostile work environment. Plaintiff, Eva L. Cain, was a nurse employed by defendant Cindy Blackwell, the owner and manager of Advanced Home Health, which provided care-taking services in the home, such as bathing, grooming, cooking and shopping. *Id.* at 759. Ms. Cain agreed to work with Harry Marcus, an elderly man suffering from Alzheimer's and Parkinson diseases, who was often disoriented and irritable and who had been declared incompetent by a Texas state court. *Id.* Mr. Marcus repeatedly propositioned Ms. Can for sex and repeatedly called her disparaging names, including racial epithets. *Id.* Ms. Cain reported the comments to her immediate supervisor and to Ms. Blackwell. *Id.* When Ms. Cain also reported that another employee had committed a lewd sex act in front of her while at Mr. Marcus's home, she was offered a reassignment. *Cain,* 246 F.3d at 759. Ms. Cain chose to remain with Mr. Marcus so long as the other employee did not work with her. *Id.*

Sometime later, Ms. Blackwell met with Ms. Cain to discuss her nursing notes which contained references to Mr. Marcus's inappropriate behavior. *Id.* Ms. Blackwell told Ms. Cain the information belonged in an incident report, not in her nursing notes, and asked Ms. Cain to rewrite her notes. *Id.* Ms. Blackwell suspended Ms. Cain for a week with pay and Ms. Cain agreed to rewrite the notes. *Id.* Ms. Cain, however, returned the next day and informed Ms. Blackwell her nursing notes were not inappropriate and refused to re-write them. *Cain,* 246 F.3d at 759. Based on Ms. Cain's insubordination and Ms. Blackwell's belief that Ms. Cain lied about a conversation with another Advanced employee, Ms. Blackwell terminated Ms. Cain's employment. *Id.* at 759-60. Ms. Cain brought suit against her former employer alleging she was subjected to a hostile work environment based on sexual harassment. *Id.* at 760. The Honorable Walter S. Smith, Jr., Chief United States District Judge for the Western District of Texas, granted defendant's summary judgment. *Id.*

***4** The Fifth Circuit Court of Appeals affirmed, finding the summary judgment evidence failed to establish a prima facie hostile work environment claim. *Id.* After noting the requirement that the fact-finder must consider the frequency of the discriminatory conducts, its severity, whether it is physically threatening or humiliating, and whether it unreasonably interferes with an employee's work performance, the Court concluded the behavior of which Ms. Cain complained, though clearly crude, humiliating, and insensitive, did not rise to the level of harassment. *Cain,* 246 F.3d at 760. The Court set forth its reasons for finding the comments of an elderly and impaired individual were insufficient to establish harassment. Id. at 760-61. The Fifth Circuit Court of Appeals explained:

> The home health care industry was created to assist individuals who lack the ability to care for themselves. Many of these individuals become dependent on home health care as a direct result of debilitating diseases such as Alzheimer's and Parkinson's. As an Advanced employee, Cain's daily routine included dealing with the victims of those diseases and their particular failings. In this context, Marcus's improper requests and tasteless remarks can not form the basis of a justiciable claim for sexual harassment.... Marcus's unacceptable but pitiable conduct was not so severe or pervasive as to interfere unreasonably with Cain's work performance or, given the circumstances, to create an abusive working environment.

Id.

The Magistrate Judge noted the behaviors which were found to be insufficient in *Cain* are almost identical to those in the case at bar. He also noted the Fifth Circuit found such behavior cannot constitute actionable harassment under Title VII because individuals such as Mr. Marcus and Mr. Patino are restricted to receiving health care at home or placed in such residential facilities precisely because of their uncontrollable propensities. Relying upon *Cain,* the Magistrate Judge concluded plaintiffs are precluded from establishing a hostile work environment claim based on race under the circumstances of this case.

In their objections, plaintiffs reargue their position that the *Cain* case should not be read so broadly. However, the Fifth Circuit Court of Appeals in *Cain* specifically referenced the "unique circumstances" which rendered "the elderly and obviously impaired Marcus's commentary insufficient to establish harassment." 246 F.3d at 760. The unique circumstances to which the Fifth Circuit referred involved the health care setting "created to assist individuals who lack the ability to care for themselves." *Id.* As the plaintiff in *Cain,* Mr. Johnson agreed to work with Mr. Patino and other elderly individuals whose debilities required them to have special care.

Plaintiffs attempt to distinguish *Cain* on several grounds. They argue there is no evidence Mr. "Patino's racial harassment was the uncontrollable product of his mental illness." The offender in *Cain* was an elderly man suffering from Alzheimer's and Parkinson diseases, who

often was disoriented and irritable and who had been declared incompetent by a Texas state court. *Id.* at 759. However, the Fifth Circuit in *Cain* did not cite to or rely upon any evidence showing the patient's harassment was an uncontrollable by-product of his illnesses. *See id.* In any event, the summary judgment evidence shows Mr. Patino did suffer from emotional and behavioral problems, including schizophrenia and delusions, for which he received mental health treatment.

***5** Plaintiffs assert, unlike Mr. Johnson, the plaintiff in *Cain* was offered a reassignment. While this is true, it does not appear to be a fact critical to the Court's determination in *Cain.* As discussed in the Memorandum and Recommendation, the important facts of the cases are more similar than different. Like *Cain,* the harassment of Mr. Johnson was repeated and offensive. Like the plaintiff in *Cain,* Mr. Johnson was not physically threatened in any way. In both cases, the offender was an elderly, impaired individual in need of personal care who could not be held accountable for his actions. If, as the *Cain* Court seems to presume, he cannot be controlled, the nursing home should not be held liable for failing to try to control him.

Plaintiffs state *Cain* should not be read to mean a third-party hostile work environment claim cannot exist simply because the offender is an impaired patient in a nursing facility. This, however, does appear to be the holding of *Cain,* at least when the harassment is verbal only and does not impact the physical safety or integrity of the employee. As explained in the Memorandum and Recommendation, the cases cited by plaintiffs are distinguishable on this basis. The *Cain* opinion seems to suggest that persons who work in these types of environments do so knowing their patients are impaired and will at times speak inappropriately.

Aside from the decision in *Cain,* plaintiffs fail to establish an essential element of a hostile work environment claim. They are required to prove the harassment affected a term, condition, or privilege of employment. *Frank v. Xerox Corp.,* 347 F.3d 130, 138 (5th Cir.2003); *see also Septimus v. University of Houston,* 399 F.3d 601, 611 (5th Cir.2005). They argue Mr. Johnson's employment was affected because he was ultimately terminated based upon a "false" allegation by Mr. Patino. Whether Nexion correctly believed Mr. Patino's allegation of patient abuse, which resulted in the termination of Mr. Johnson's employment, is a separate issue from Mr. Patino's racial harassment. It does not follow, as plaintiffs argue, Mr. Patino's harassment led to the termination of Mr. Johnson's employment.[1] While asserting that the harassment was embarrassing, Mr. Johnson does not allege the harassment affected a term, condition or privilege of his employment in any way besides termination.

[1] As discussed in the Memorandum and Recommendation, Nexion believed Mr. Patino because another employee contradicted Mr. Johnson's statement that he had not gone into Mr. Patino's room on the day in question.

IT IS THEREFORE ORDERED that the Memorandum and Recommendation (docket no. 37) of the United States Magistrate Judge is ACCEPTED pursuant to 28 U.S.C. § 636(b)(1) such that defendant's motion for summary judgment (docket no. 27) is GRANTED and plaintiff's claims against defendant are dismissed.

IT IS FURTHER ORDERED that the above-styled and numbered cause is DISMISSED. Motions pending with the Court, if any, are dismissed as moot.

It is so ORDERED.