UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

EQUAL EMPLOYMENT OPPORTUNITY COMISSION,

Plaintiff,

vs.

GNLV CORP. d/b/a GOLDEN NUGGET HOTEL AND CASINO, and DOES 1-10, inclusive,

Defendants.

2:06-cv-01225-RCJ-PAL

ORDER

This case arises from Defendant GNLV Corporation's ("GNLV") alleged discrimination against various employees. Plaintiff Equal Employment Opportunity Commission ("EEOC") brought claims on behalf of six individually named complainants in addition to alleging that GNLV harbored a pattern or practice of discriminatory conduct. The pattern-or-practice claim was resolved in GNLV's favor on summary judgment and the Ninth Circuit Court of Appeals affirmed. However, since the claims of the individual complainants had not been addressed, the Ninth Circuit remanded. The case was subsequently assigned to this Court.

I. BACKGROUND

On December 18, 2014, the Court granted GNLV's motions for summary judgment as to all claims of the six individual complainants with the exception of three. (ECF No. 160). The Court found triable issues of material fact as to Susie Fein's third-party hostile work environment

claim and as to whether GNLV retaliated against Ervin Nixon, Jr. and Tequella Candice Smith for reporting discriminatory conduct. On June 1, 2015, the Court ruled on the EEOC's motion for summary judgment on a number of GNLV's affirmative defenses. The motion was granted in part and denied in part. (ECF No. 166). The EEOC has now filed a Motion to Amend (ECF No. 167) that ruling pursuant to Federal Rule of Civil Procedure 59(e).

II. LEGAL STANDARD

District courts should reconsider and amend previous orders only as an "extraordinary remedy" that is "used sparingly in the interests of finality and conservation of judicial resources." *Carroll v. Nakatani*, 342 F.3d 934, 945 (9th Cir. 2003). A motion for reconsideration should not be granted unless the court "is presented with newly discovered evidence, committed clear error, or if there is an intervening change in the controlling law." *Kona Enters., Inc. v. Estate of Bishop*, 229 F.3d 877, 890 (9th Cir. 2000) (citation omitted). However, a district court "possesses the inherent procedural power to reconsider, rescind, or modify an interlocutory order" if proper cause is shown. *City of L.A., Harbor Div. v. Santa Monica Baykeeper*, 254 F.3d 882, 887 (9th Cir. 2001).

III. DISCUSSION

The EEOC challenges the Court's ruling as to GNLV's third, ninth, tenth, fourteenth, and sixteenth affirmative defenses. The EEOC argues that the Court erred in failing to grant summary judgment on these defenses.

A. Third Affirmative Defense – Privilege of Employer

GNLV's third affirmative defense asserts that the claims against it are barred because its conduct "at all times was privileged in that [GNLV] and its authorized agents at all times engaged in conduct within [GNLV's] rights and did so in a permissible way . . . ." (Answer 2,

ECF No. 4). In its previous order, the Court stated that this defense remained viable as it was raised as part of the *Faragher/Ellerth* framework. (June 1, 2015 Order 6, ECF No. 166). The EEOC argues that since none of the remaining claims allege harassment by a supervisor, the *Faragher/Ellerth* defense is inapplicable and summary judgment on this defense is appropriate. (Mot. to Amend 2, ECF No. 167).

The Court acknowledges that none of the remaining claims, third-party hostile work environment and retaliation, involve allegations of harassment by GNLV supervisors. As such, the Court agrees that a rote application of *Faragher/Ellerth* likely does not apply in this case. *See Vance v. Ball State Univ.*, 133 S. Ct. 2434, 2439 (2013). The only hostile work environment claim left in this case arises from Fein's allegations that customers, not supervisors, subjected her to harassment. Nevertheless, the third affirmative defense remains viable.

GNLV claims that it acted properly in disciplining employees for inappropriate conduct, including in its handing Nixon a three-day suspension. As the Court stated in its previous order, the third affirmative defense is similar to the second and seventh affirmative defenses, each of which alleges that GNLV acted legally in its treatment of employees. The third affirmative defense specifically adds that GNLV did not abuse the privilege of an employer in its treatment of employees, which is relevant as to whether Nixon's suspension was lawful. (Answer 2). Therefore, the Court denies the EEOC's Motion on this defense.

B. Ninth Affirmative Defense – Mitigation of Damages

GNLV's ninth affirmative defense alleges that damage suffered by the complainants is a result, at least in part, of their own failure to mitigate. The parties agree that the defense is applicable to damages for back pay. However, the EEOC argues that none of the remaining claims are of the nature for which the failure-to-mitigate defense would apply, though the agency

is adamant that it is still seeking an award of back pay. (*See* Reply 2, ECF No. 169). Regardless of the context in which the damages are asserted, the Court does not find that granting summary judgment on this defense is appropriate notwithstanding the EEOC's contentions to the contrary. Accordingly, the Motion is denied as to this defense.

C. Tenth Affirmative Defense – Proximate Cause

The Motion is also denied as to GNLV's tenth affirmative defense. This defense alleges that any harm suffered by the complainants was proximately caused by "their own willful acts, negligence, or omissions and/or from acts and/or omissions of persons other than [GNLV] or its authorized agents." (Answer 4). The EEOC argues that this defense no longer is applicable since no claims of supervisor harassment remain and that imposing a burden on victims to report harassment is unfair and not required by law.

GNLV responds that the defense is relevant to even third-party harassment claims because it pertains to whether the employer knew or should have known of harassment committed by customers. *See Little v. Windermere Relocation, Inc.*, 301 F.3d 958, 968 (9th Cir. 2001) (articulating the negligence standard for non-employee harassment). The Court agrees. This defense remains valid as to whether GNLV negligently failed to respond to customers' alleged harassment. The Court denies the EEOC's request to amend its ruling as to this defense.

D. Fourteenth and Sixteenth Affirmative Defenses – State Law

GNLV's fourteenth and sixteenth affirmative defenses argue that the EEOC's complaint was untimely and that the claims for emotional distress are barred by state law. (Answer 4). As the Court stated in its previous order, Title VII claims are not subject to a statute of limitations when brought by the EEOC. *See Occidental Life Ins. Co. of Cal. v. EEOC*, 432 U.S. 355, 369–70 (1977). The fourteenth affirmative defense therefore fails. The Court initially kept the defense

alive because it appeared that the complainants were also seeking state law damages to which state law limitation periods would apply. The EEOC has now clarified, however, that "the damages that the EEOC [is] seeking are governed by federal, not state law." (Mot. to Amend 4). Because no damages are being sought under state law, the statute of limitations defense does not apply. Summary judgment is therefore warranted in the EEOC's favor on this defense, and the Court grants the Motion by which it amends its previous order accordingly.

Summary judgment on the sixteenth affirmative defense is also appropriate. In its previous order the Court denied the EEOC's motion, finding that claims for emotional distress arising from workplace harassment and discrimination were governed by state law rather than Title VII. (*See* June 1, 2015 Order 10–11). To reach this conclusion, the Court relied on a case that has since been superseded by statute, as pointed out by the EEOC. (Mot. to Amend 5). In its order, the Court cited *Williams v. U.S. General Services Administration*, 905 F.2d 308, 311 (9th Cir. 1990) for the proposition that emotional distress damages are not available under Title VII.

However, subsequent amendment of the applicable statute authorized plaintiffs in employment discrimination cases to "recover compensatory and punitive damages." 42 U.S.C. § 1981a(a)(1); *see also Canada v. Boyd Grp., Inc.*, 809 F. Supp. 771, 779 (D. Nev. 1992) (recognizing that the rule in *Williams* regarding emotional distress damages was "reversed" by the Civil Rights Act of 1991). The statute currently states that compensatory damages awarded thereunder may include "future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses." 42 U.S.C. § 1981a(b)(3); *Ahlmeyer v. Nev. Sys. of Higher Educ.*, 555 F.3d 1051, 1059 (9th Cir. 2009) ("[T]he Civil Rights Act of 1991 made available compensatory damages for emotional pain and suffering and punitive damages under Title VII.").

Since the EEOC is not bringing a tort claim for infliction of emotional distress, which would be governed by state law, and instead only seeks an award for emotional distress as a compensatory remedy as provided by Title VII, the sixteenth affirmative defense based on a state law bar to recovery is inapplicable. The Court thus finds that summary judgment on the defense should have been granted and it hereby amends its previous order.

CONCLUSION

IT IS HEREBY ORDERED that the EEOC's Motion to Amend (ECF No. 167) is GRANTED in part and DENIED in part.

The Motion is DENIED as to GNLV's third, ninth, and tenth affirmative defenses.

The Motion is GRANTED as to GNLV's fourteenth and sixteenth affirmative defenses. Summary judgement is granted in the EEOC's favor on those defenses.

IT IS SO ORDERED.

Dated: July 6, 2015

ROBERT C. JONES
United States District Judge