IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

JACK R KELLY	§	
	§	
V.	§	**A-01-CA-551 AWA**
	§	
REGIS CORPORATION	§	

ORDER

Before the Court is Defendant's Motion for Summary Judgment filed on January 6, 2003 (Clerk's Docket No. 98). Plaintiff failed to file a response to the motion. Under Rule CV-7(d) of the Local Court Rules for the Western District of Texas, the Court may grant the Motion for Summary Judgment as unopposed. Because this motion is dispositive, however, the Court will nevertheless address the merits of the motion below.

I. GENERAL BACKGROUND

On May 11, 2001, the Equal Employment Opportunity Commission ("EEOC") brought this employment discrimination lawsuit under Title VII of the Civil Rights Act of 1964 as amended, and Title I of the Civil Rights Act of 1991, against Regis Corporation ("Regis"). The EEOC filed this suit on behalf of Jack Kelly, Michael Hayes, and other similarly situated individuals, alleging that these individuals were subject to a sexually hostile work environment while employed by Regis. The EEOC also alleged that the employees were subjected to disparate treatment and ultimately discharged in retaliation for complaining about sexual harassment.

After the EEOC and Regis participated in extensive discovery and numerous discovery disputes in this case, the parties notified the Court on September 5, 2002, that they had settled the case. *See* Joint Advisory to the Court (Clerk's Docket No. 74). However, the parties did not file a

consent decree at that time because the EEOC requested that the Charging Parties, Michael Sean Hayes and Jack Kelly, and Interested Party Helio Arizola, be given intervention notice.

On September 19, 2002, Charging Party Jack Kelly ("Kelly") filed a motion to intervene as a Party-Plaintiff in this lawsuit pursuant to Federal Rule of Civil Procedure 24(a)(2). After the Court determined that Kelly had an unconditional right to intervene in the lawsuit and that the motion was timely, the Court recommended that the District Court grant Kelly's Motion to Intervene. The Court further recommended that the District Court enter the Consent Decree between the EEOC and Regis, thereby dismissing the EEOC from the case. On November 7, 2002, the District Court adopted this Court's Report & Recommendation in full.

After the Parties consented to trial by the instant Magistrate Court, the case was reassigned to the instant court for all purposes on December 6, 2002. After being granted permission to file a dispositive motion beyond the deadline contained in the scheduling order, Regis filed the instant motion for summary judgment. As noted above, Plaintiff has failed to file a response to the motion.

II. STANDARD OF REVIEW

Summary judgment is appropriate under Rule 56(c) of the Federal Rules of Civil Procedure only "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with 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 seeking summary judgment bears the burden of showing that there is an absence of evidence to support the non-movant's case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548, 2553-54 (1986); *Coleman v. Houston Independent School District*, 113 F.3d 528, 533 (5th Cir. 1997). After a proper motion for summary judgment is made, the non-movant must set forth specific facts showing that

there is a genuine issue of material fact for trial. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250, 106 S.Ct. 2505, 2511 (1986).

The Court views facts in the light most favorable to the non-movant and draws all reasonable inferences in the non-movant's favor. *Coleman*, 113 F.3d at 533. If the non-movant sets forth specific facts in support of allegations essential to his claim, a genuine issue of material fact is presented, and summary judgment is inappropriate. Unsupported allegations or affidavit or deposition testimony setting forth ultimate or conclusory facts and conclusions of law are insufficient to defeat a proper motion for summary judgment. *Duffy v. Leading Edge Products, Inc.*, 44 F.3d 308, 312 (5th Cir. 1995). Rather, the nonmoving party must set forth specific facts showing the existence of a "genuine" issue concerning every essential component of its case. *Lusk v. Foxmeyer Health Corp.*, 129 F.3d 773, 777 (5th Cir. 1997). The standard of review "is not merely whether there is a sufficient factual dispute to permit the case to go forward, but whether a rational trier of fact could find for the non-moving party based upon the record before the court." *James v. Sadler*, 909 F.2d 834, 837 (5th Cir. 1990) (citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S.Ct. 1348, 1356 (1986)). Applying these standards, the Court turns to the merits of the motion for summary judgment.

III. ANALYSIS

Kelly was employed as a hairstylist at the Regis salon ("Salon") located in the Barton Creek Mall in Austin, Texas. Kelly claims that during his employment at the Salon, he was subjected to a sexually hostile work environment on the basis of his sex, male, in the form of sexually derogatory comments, sexual advances and unwanted touching in violation of Title VII of the Civil Rights Act of 1964. Kelly also alleges that he was retaliated against for complaining about the harassment by

being denied commission increases and for being terminated. Kelly was employed at Regis from February 1998 until his termination on October 23, 1998.

Regis argues that Kelly's factual allegations fail to support either a prima facie case of hostile work sexual harassment or retaliation. Thus, Regis contends that it is entitled to summary judgment.

A. Hostile Work Environment Claim

Title VII makes it "an unlawful employment practice for an employer . . . to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex." 42 U.S.C. § 2000e-2(a)(1). "[A] plaintiff may establish a violation of Title VII by proving that discrimination based on sex has created a hostile or abusive working environment." *Shepherd v. Comptroller of Public Accounts of the State of Texas*, 168 F.3d 871, 873 (5th Cir.) (quoting *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 66 (1986)), *cert. denied*, 528 U.S. 963 (1999). In order to establish a prima facie case of hostile work environment based on sexual harassment, Kelly must show that: (1) he belongs to a protected class; (2) he was subjected to unwelcome sexual harassment; (3) the harassment was based on his sex; (4) the harassment affected "a term, condition, or privilege" of his employment; and (5) Regis knew or should have known of the harassment and failed to take remedial action. *Cain v. Blackwell*, 246 F.3d 758, 760 (5th Cir. 2001).

The Court finds that Kelly has failed to establish a prima facie case of hostile work environment based upon sexual harassment because he has failed to show that the harassment affected a term, condition, or privilege of his employment. In order for sexual harassment to be actionable, "it must be sufficiently severe or pervasive 'to alter the conditions of [the victim's] employment and create an abusive working environment.'" *Shepherd*, 168 F.3d at 874 (quoting *Meritor*, 477 U.S. at 67). Thus, not all harassment will affect a term, condition, or privilege of employment. *Id.* For example, the "mere utterance of an . . . epithet" which engenders offensive feelings in an employee does not

sufficiently affect the conditions of employment. *Id.* (quoting *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993)). In order to be actionable under Title VII, "a sexually objectionable environment must be both objectively and subjectively offensive, one that a reasonable person would find hostile or abusive, and one that the victim in fact did perceive to be so." *Faragher v. City of Boca Raton*, 524 U.S. 775, 787 (1998). When determining whether a workplace constitutes a hostile work environment, courts should consider the totality of the circumstances, including: 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 work performance. *Id.* at 787-88. The Supreme Court has clarified that simple teasing, offhand comments, and isolated incidents (unless extremely serious) will not amount to discriminatory changes in the "terms and conditions of employment." *Id.* at 788. In addition, Title VII was not intended to become a "general civility code" for the workplace. *Id.*

The Court finds that the harassment of which Kelly complains of does not rise to the level of sexual harassment under Title VII. Kelly alleges that he was subject to numerous inappropriate comments from the Salon Manager, Scott Baker, and from his co-worker, Jimmy Burt. Specifically, Kelly alleges that Mr. Baker commented to him that he liked "young men," stated that "you are full of testosterone and you need to let it all out," stated that he "needed to get laid" due to his bad mood, wrote "jailbird" and female names on the back of his pay stub, invited him to dinner once, and on one occasion inappropriately touched his knee. Kelly also alleges that Mr. Burt repeatedly told Kelly that he had "a nice ass,"and inquired into his sex life with women. In addition, Kelly alleges that both Mr. Baker and Mr. Burt frequently stared at his "mid-section." While the Court finds that these comments and actions were clearly inappropriate and offensive, they are not the type of severe and pervasive conduct that courts have found to create a hostile work environment. *Compare Waltman v. Int'l Paper*

Co., 875 F.2d 468, 478 (5th Cir. 1989) (concluding hostile environment existed where female employee sexually groped repeatedly); *Hall v. Gus Const. Co.*, 842 F.2d 1010, 1012 (8th Cir. 1988) (finding hostile work environment where male coworkers cornered women and rubbed their thighs, grabbed their breasts, and held a woman so that a man could touch her) *with Mendoza v. Borden, Inc.*, 195 F.3d 1238, 1247 (11th Cir. 1999) (holding that conduct alleged by female employee including one instance where supervisor said to employee "I'm getting fired up," one occasion where supervisor rubbed his hip against the employee's hip while touching her shoulder and smiling, two instances in which supervisor made sniffing sound while looking at employee's groin area, and supervisor's constant following of and staring at employee in a "very obvious fashion" did not rise to the level of hostile work environment), *cert. denied*, 529 U.S. 1068 (2000); *Shepherd*, 168 F.3d at 874-875 (finding that co-worker's sexual harassment of employee over a two year period, which included incidents of unwanted touching of the employee's arm, attempts to look down the employee's clothing and make offensive remarks such as "your elbows are the same color as your nipples,"did not render employee's work environment objectively hostile); *Adusumilli v. City of Chicago*, 164 F.3d 353, 361-62 (7th Cir. 1998) (finding that plaintiff failed to allege sufficient hostile work environment claim where co-employees teased plaintiff, made sexual jokes aimed at her, commented about her low-neck tops, repeated staring at her breasts with attempts to make eye contact, and four incidents of touching her arm, fingers and buttocks), *cert. denied*, 528 U.S. 988 (1999); *Pfullman v. Texas Dep't of Transportation*, 24 F. Supp.2d 707 (W.D. Tex. 1998) (finding that male plaintiff was not subject to hostile work environment even where male supervisor sat on employee's lap and commented "that sure feels good right here," male supervisor made fellatio insinuations when plaintiff was eating a sausage, and where plaintiff witnessed a supervisor telling another coworker to "bend over and he would fit test" the coworker). The Court finds that the conduct complained of in this case is not so severe and extreme

as to alter the terms and conditions of Kelly's employment. Rather, it appears that the conduct complained of is better classified as "simple teasing," offhand comments and isolated incidents which do not amount to discriminatory changes in the "terms and conditions of employment." *See Faragher*, 524 U.S. at 788. Kelly has failed to demonstrate that the conduct was so severe and pervasive that it destroyed his "opportunity to succeed in the workplace." *Shepherd*, 168 F.3d at 874. Because the conduct that Kelly was subjected to during his employment at Regis was not so severe or pervasive as to alter the conditions of Kelly's employment, Kelly has failed to demonstrate that he was subjected to an objectively hostile work environment.

B. Retaliation Claim

Kelly alleges that after he complained of the sexual harassment to Regis' area supervisor, Boyce McConnell, he was retaliated against by failing to receive a pay raise and by being terminated from his employment. Title VII makes it unlawful for an employer to discriminate against an employee "because [that employee] has opposed any practice made an unlawful employment practice by this subchapter, or because the [employee] has made a charge . . . under this subchapter." *Rios v. Rossotti*, 252 F.3d 375, 380 (5th Cir. 2001) (quoting 42 U.S.C. § 2000e-3(a)).

In order to establish a prima facie case of retaliation under Title VII, a plaintiff must prove by a preponderance of the evidence that: (1) he engaged in activity protected by Title VII, (2) an adverse employment action occurred, and (3) a causal link existed between the protected activity and the adverse employment action. *Evans v. City of Houston*, 246 F.3d 344, 352 (5th Cir. 2001) (quoting *Long v. Eastfield College*, 88 F.3d 300, 304 (5th Cir. 1996)). The Court will assume for the purposes of this summary judgment motion only that Plaintiff has established a prima facie case of unlawful retaliation.

Once the plaintiff has established a prima facie case of unlawful retaliation, the burden shifts to the defendant to articulate a legitimate, nondiscriminatory reason for the adverse employment action. *Rios*, 252 F.3d at 380. Regis contends that Kelly failed to meet the requirements necessary to receive a pay increase because he had not been at the Salon for a sufficient period of time. The summary judgment evidence shows that stylists had to be at the Salon for at least one year before they could receive a pay raise. Kelly was only employed at the Salon for nine months. In addition, Regis has adduced summary judgment evidence that Kelly was terminated because of excessive absences from work and poor work performance. Specifically, Regis contends that Kelly's secondary job at an area restaurant interfered with his attendance at the Salon. In addition, Regis points out that Kelly had far more customers request that their hairstyles be re-styled compared to other stylists at the Salon.

Because Regis has articulated a legitimate, nondiscriminatory reason for not granting Kelly a pay raise and for terminating him, the final burden shifts to Plaintiff to "adduce sufficient evidence that would permit a reasonable trier of fact to find that the proffered reason is a pretext for retaliation." *Rios*, 252 F.3d at 380 (quoting *Sherrod v. American Airlines, Inc.*, 132 F.3d 1112, 1122 (5th Cir. 1998)). This final burden requires the plaintiff to demonstrate that the adverse employment action would not have occurred "but for" the protected activity. *Rios*, 252 F.3d at 380. Other than his subjective belief as exhibited in the deposition excerpts that Regis retaliated against him, Plaintiff has failed to adduce any evidence of discriminatory or retaliatory animus behind Regis' actions. A general subjective belief on the part of the employee that he was retaliated against is insufficient to establish pretext. *Elliot v. Group Medical & Surgical Service*, 714 F.2d 556, 564 (5th Cir. 1983),

cert. denied, 467 U.S. 1215 (1984). Because Plaintiff has failed to assert more than his subjective belief that his failure to receive a pay increase and his termination was retaliatory, he has failed to present evidence from which a reasonable jury could infer that the Defendants' articulated reasons for failing to promote Plaintiff were merely a pretext for discrimination or retaliation. *See Rios*, 252 F.3d at 382 (holding that plaintiff failed to demonstrate that her employer's proffered reason for her nonselection was a pretext where plaintiff presented no evidence of retaliatory of discriminatory animus in the selection process); *Grimes v. Texas Dep't of Mental Health and Mental Retardation*, 102 F.3d 137, 143 (5th Cir. 1996) (holding that plaintiff failed to prove that employer's reasons for not promoting plaintiff were a pretext where plaintiff failed to present any evidence of racial or retaliatory animus on the part of the employer). In summary, Kelly has failed to establish with competent summary judgment evidence that "but for" his protected activity he would have received a pay increase and that he would not have been terminated. Accordingly, Plaintiff has failed to establish a Title VII retaliation claim.

C. Conclusion

In summary, the Court finds that Kelly has failed to establish a prima facie case of hostile work environment based upon sexual harassment because he has failed to show that the harassment affected a term, condition, or privilege of his employment. With regard to Kelly's retaliation claim, Regis has demonstrated a legitimate, non-discriminatory reason for its decisions to deny Kelly a pay increase and to terminate him. Kelly has failed to present any summary judgment evidence that the proffered reason

was a pretext for discrimination. Accordingly, the Court HEREBY GRANTS Defendant's Motion for Summary Judgment (Docket No. 98) in its entirety.

SIGNED this the 24th day of January, 2003.

ANDREW W. AUSTIN
UNITED STATES MAGISTRATE JUDGE