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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Plaintiff,

v.

WORLD SERVICE WEST, L.A. INFLIGHT SERVICE COMPANY, LLC.,

Defendant.

CV 04-8009 ABC (RZx)

ORDER RE: CROSS-MOTIONS FOR SUMMARY JUDGMENT

Pending before the Court are Defendant's Motion for Summary Judgment, and Plaintiff's Motion for Partial Summary Judgment. The motions are set for hearing on December 4, 2006. The Court finds the above-referenced matters appropriate for submission without oral argument. See Fed. R. Civ. P. 78; Local Rule 7-15. Accordingly, the scheduled hearing date of December 4, 2006 is VACATED. Upon consideration of the parties' submissions and the case file, the Court hereby DENIES Defendant's Motion for Summary Judgment, and GRANTS Plaintiff's Motion for Summary Judgment.

I. FACTUAL AND PROCEDURAL BACKGROUND

This lawsuit, brought by the U.S. Equal Employment Opportunity Commission ("EEOC"), arises from sexual harassment complaints made by employees of Defendant World Service West, L.A. Inflight Service Company, LLC ("Defendant"). The EEOC asserts claims of hostile work environment sexual harassment on behalf of Norma Suazo ("Suazo"), Elvia Figueroa ("Figueroa"), and Hilda De La Paz ("De La Paz") (collectively, the "Charging Parties"). Specifically, the Charging Parties claim that Dae Koh ("Koh"), a former supervisor for Defendant, created a hostile work environment by making sexual comments and sexually touching the Charging Parties. Additionally, the EEOC asserts a claim of retaliation on behalf of De La Paz.[1] The EEOC seeks damages for emotional distress suffered by all three of the Charging Parties. The EEOC also seeks payment of lost wages for De La Paz stemming from her retaliation claim.

Defendant moves for summary judgment on the hostile work environment and retaliation claims, arguing that the actions complained of by the Charging Parties do not rise to the level of hostile work environment sexual harassment. Further, Defendant argues that there was a legitimate, non-discriminatory reason to terminate De La Paz's employment.

The EEOC moves for partial summary judgment on Defendant's affirmative defenses arguing: (1) that Defendant cannot assert the Faragher/Ellerth defense because its policies and practices were

[1] The EEOC is not proceeding with Figueroa and Suazo's claims of retaliation. Thus, the only remaining retaliation claim is as to De La Paz. Facts relating to alleged retaliation against Figueroa and Sauzo are therefore irrelevant.

inadequate, and because Defendant waived its right to assert the Faragher/Ellerth defense by failing to plead it, (2) the affirmative defense of business necessity does not apply to sexual harassment cases, (3) the affirmative defenses of contributory or comparative fault do not apply to sexual harassment cases, (4) the Charging Parties did not waive their rights under Title VII, (5) the affirmative defense of consent does not apply to sexual harassment cases, (6) there are no facts to support Defendant's affirmative defenses of estoppel and unclean hands, (7) Defendant's defenses under the Fifth and Eighth Amendments do not apply here, and (8) the Charging Parties complied with any applicable Statutes of Limitations. Additionally, the EEOC argues that it has satisfied the conditions precedent for suit. Defendant asserts various arguments in opposition to the EEOC's motion.

A. Facts Relating To Figueroa's Sexual Harassment Claim.

Figueroa alleges that Koh sexually propositioned her and made vulgar sexual comments and gestures to her. (Figueroa Depo. 37:18-38:2, 41:8-15 and 93:6-9). Among the vulgar sexual comments were descriptions of his genitalia, and comments about the genitalia of Latin women. (Figueroa Depo., 37:18-38:2 and 92:19 -22). Figueroa also alleges that Koh touched Figueroa's buttocks without her consent, and that he ran his hand up the outside of her shirt near her breast. (Figueroa Depo., 39:10-24, 92:19-22, 115:8-12).

B. Facts Relating To Sauzo's Sexual Harassment Claim.

Sauzo alleges that Koh harassed her by making inappropriate and unwelcome sexual comments and lewd gestures. (Sauzo Depo., 9:7-23 and 10:2-15). Sauzo also alleges that on approximately twenty occasions Koh whispered things like "I love you" and "You

are very pretty" in her ear. (Sauzo Depo., 35:23-36-22). On fifteen to twenty occasions, Koh also grabbed Sauzo's face in his hands, and attempted to kiss her. (Sauzo Depo., 39:12-16 and 40:17-23). Further, Sauzo alleges that on one occasion, Koh trapped her, held her tightly against her will, pressed his body against hers, and choked her. (Suazo Depo., 15:3-13).

C. Facts Relating To De La Paz's Sexual Harassment and Retaliation Claims.

De La Paz alleges that on a daily basis Koh "would come close to her" when she was having lunch, yell about her work performance, and make lewd comments to her, such as asking about the size of her husband's "organ." (De La Paz Depo., 76:11-77:19 and 100:24-101:5). De La Paz alleges that on one occasion Koh grabbed her by the waist and attempted to pull her toward him, and on another two occasions Koh grabbed her by the hands and attempted to pull her toward him. (De La Paz Depo., 88:5-17 and 90:13-92:10). Additionally, De La Paz alleges that Koh commented about the size of her buttocks, made physical gestures to describe the size of her buttocks, and made comments and physical gestures about the size of his "organ." (De La Paz Depo., 80:3-82:2).

The parties do not dispute that De La Paz complained to Defendant about the sexual harassment in June 2002. (Defendant's Response to EEOC's Statement of Uncontroverted Facts in Support of EEOC's Summary Judgment Motion ("DRF") No. 37). It is also undisputed that Defendant investigated the allegations in June 2002, and that Koh remained De La Paz's supervisor following the investigation. (DRF 53 and 64). On October 25, 2002, after receiving notice of the EEOC charge, Defendant suspended Koh. (DRF

74 and 78). Thereafter, Defendant terminated Koh. (DRF 80).

In November 2002, five months afer her sexual harassment complaint, Defendant terminated De La Paz. Around this time, Defendant lost its contract with Continental Airlines, and De La Paz was informed that she could either work a reduced schedule (i.e., part-time) for Defendant, or she could take a full time position with the company that had taken over the Continental Airlines Contract. (De La Paz Depo., 14:14-24 and 27:7-28:14). De La Paz chose the latter option and began working for the new company. (Id.).

D. Defendant's Sexual Harassment Policy.

Defendant has a written sexual harassment policy. However, the policy is maintained only in English. (Decl. of EEOC's Counsel in Support of EEOC's Motion for Summary Judgment ("EEOC Decl.") Ex. 366 (Affidavit of Tautrim at pp. 2-3)). According to Defendant's Director of Human Resources, Martin Tautrim ("Tautrim") only one in four of Defendant's employees is fluent enough in English to read Defendant's sexual harassment policy. (Id.).

III. STANDARD OF REVIEW

It is the burden of the party who moves for summary judgment to establish that there is "no genuine issue of material fact, and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c); British Airways Bd. v. Boeing Co., 585 F.2d 946, 951 (9th Cir. 1978). If the moving party has the burden of proof at trial (the plaintiff on a claim for relief, or the defendant on an affirmative defense), the moving party must make a showing sufficient for the court to hold that no reasonable trier of fact could find other than for the moving party. See Calderone

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1 v. United States, 799 F.2d 254, 259 (6th Cir. 1986) (quoting W.
2 Schwarzer, Summary Judgment Under the Federal Rules: Defining
3 Genuine Issues of Material Fact, 99 F.R.D. 465, 487-88 (1984)).
4 This means that, if the moving party has the burden of proof at
5 trial, that party "must establish beyond peradventure all of the
6 essential elements of the claim or defense to warrant judgment in
7 [that party's] favor." Fontenot v. Upjohn Co., 780 F.2d 1190, 1194
8 (5th Cir. 1986).

9 If the opponent has the burden of proof at trial, then the
10 moving party has no burden to negate the opponent's claim. See
11 Celotex Corp. v. Catrett, 477 U.S. 317, 323, 106 S. Ct. 2548
12 (1986). In other words, the moving party does not have the burden
13 to produce any evidence showing the absence of a genuine issue of
14 material fact. Id. at 325. "Instead, . . . the burden on the
15 moving party may be discharged by 'showing'--that is, pointing out
16 to the district court--that there is an absence of evidence to
17 support the nonmoving party's case." Id.

18 Once the moving party satisfies this initial burden, "an
19 adverse party may not rest upon the mere allegations or denials of
20 the adverse party's pleadings . . . [T]he adverse party's response
21 . . . must set forth specific facts showing that there is a genuine
22 issue for trial." Fed. R. Civ. P. 56(e) (emphasis added). A
23 "genuine issue" of material fact exists only when the nonmoving
24 party makes a sufficient showing to establish the essential
25 elements to that party's case, and on which that party would bear
26 the burden of proof at trial. Celotex, 477 U.S. at 322-23. "The
27 mere existence of a scintilla of evidence in support of the
28 plaintiff's position will be insufficient; there must be evidence

on which a reasonable jury could reasonably find for plaintiff. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252, 106 S. Ct. 2505 (1986). The evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in favor of the nonmovant. Id. at 248. However, the court must view the evidence presented to establish these elements "through the prism of the substantive evidentiary burden." Id. at 252.

IV. ANALYSIS

A. Defendant's Motion For Summary Judgment On The Charging Parties' Hostile Work Environment Claims Is DENIED.

1. The standard for a hostile work environment claim under Title VII.

A plaintiff asserting a Title VII claim under a hostile work environment sexual harassment theory must show: (1) the existence of a hostile work environment to which the plaintiff was subjected, and (2) that the employer is liable for the harassment that caused the hostile environment to exist. See Faragher v. City of Boca Raton, 524 U.S. 775, 787-89 (1998).

To establish the existence of a hostile work environment, a plaintiff must prove that: (1) she was subjected to verbal or physical conduct of a sexual nature, (2) the conduct was unwelcome, and (3) the conduct was sufficiently severe or pervasive to alter the conditions of employment and create an abusive working environment. Id. (internal citations omitted); see also Ellison v. Brady, 924 F.2d 872 (9th Cir. 1991) (citing Jordan v. Clark, 847 F.2d 1368, 1373 (9th Cir. 1991)).

A hostile work environment exists where "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.'" Harris v. Forklift Sys., Inc., 510 U.S. 17, 21 (1993) (quoting Meritor Sav. Bank FSB v. Vinson, 477 U.S. 57, 65 (1986)); see also Faragher, 524 U.S. at 788 ("Conduct must be extreme to result in a change in the terms and conditions of employment."); Draper v. Coeur Rochester, Inc., 147 F.3d 1105, 1108 (9th Cir. 1998) (a hostile work environment exists when there is a pattern of ongoing and persistent harassment severe enough to alter the conditions of the employment.). The conduct must be such that "a reasonable woman would consider [the conduct] sufficiently severe or pervasive to alter the conditions of employment and create an abusive working environment." Ellison, 924 F.2d at 879.

To make this determination, the court must examine all of the circumstances. Harris, 510 U.S. at 23. "The real social impact of workplace behavior often depends on a constellation of surrounding circumstances, expectations, and relationships which are not fully captured by a simple recitation of the words used or the physical acts performed." Oncale v. Sundowner Offshore Svcs., 523 U.S. 75, 81-82 (1998). Thus, the court should consider such factors as: "the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating or mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." Harris, 510 U.S. at 23.

Further, "the required showing of severity or seriousness of the harassing conduct varies inversely with the pervasiveness or frequency of the conduct." Ellison, 924 F.2d at 878. "The 'mere utterance of [a sexual] epithet which engenders offensive feelings in an employee' is not, by itself, actionable under Title VII."

Ellison, 924 F.2d at 876 (citing Meritor Sav. Bank, 477 U.S. at 67). However, "[s]exual or gender-based conduct which is abusive, humiliating, or threatening violates Title VII, . . . if such hostile conduct pollutes the victim's workplace, making it more difficult for her to do her job, to take pride in her work, and to desire to stay on in her position" is actionable under Title VII. Steiner v. Showboat Operating Co., 25 F.3d 1459, 1463 (9th Cir. 1994).

2. The Charging Parties have raised a genuine issue of fact as to whether they were subjected to a hostile work environment.

Figueroa alleges that Koh sexually propositioned her, directed vulgar sexual comments and gestures at her, and touched her buttocks and breast area. Similarly, De La Paz alleges that Koh grabbed her hands and waist, would "come close to her" when she was having lunch, yelled about her work performance, asked about the size of her husband's "organ", and made comments and gestures about the size of her buttocks.

The testimony of both Figureoa and De La Paz shows that Koh repeatedly subjected them to inappropriate touching, numerous insults, and lewd comments and gestures. Koh's conduct toward Figueroa and De La Paz was offensive and unwelcome, and created a workplace that was "permeated with discriminatory intimidation." Brooks v. City of San Mateo, 229 F.3d 917, 923 (9th Cir. 2000) (internal citations omitted). Thus, the Court finds that a reasonable jury could conclude that the conduct identified by Figueroa and De La Paz is "sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment." Harris, 510 U.S. at 21 (internal

citations omitted).

Like Figueroa and De La Paz, Sauzo alleges that Koh harassed her by directing inappropriate and unwelcome sexual comments and lewd gestures at her. In addition to the gestures and comments, Sauzo also alleges that on numerous occasions Koh whispered inappropriate comments in her ear, grabbed her face, and attempted to kiss her. Further, Sauzo alleges that on one occasion Koh trapped her, held her tightly against her will, pressed his body against hers, and choked her. Sexual or gender-based conduct which is abusive, humiliating and threatening, constitutes hostile work environment sexual harassment. Steiner, 25 F.3d at 1463. Koh's attempt to trap and choke Sauzo is both highly abusive and threatening. Given the severity of this incident, and the physically abusive nature of Koh's conduct toward Sauzo, the Court finds that a reasonable trier of fact could find that Sauzo was subjected to a hostile work environment.

The Court therefore DENIES Defendant's motion for summary judgment as to the hostile work environment sexual harassment claims by all three of the Charging Parties.

B. Defendant's Motion For Summary Judgment On De La Paz's Retaliation Claim Is DENIED.

In addition to sexual harassment, De La Paz alleges a claim of retaliation in violation of Title VII. De La Paz contends that Defendant's decision to terminate her employment in November 2002 was made in retaliation for her complaints regarding Koh's offensive behavior. Defendant, in turn, asserts that De La Paz cannot establish a prima facie case of retaliation, or rebut the purportedly legitimate reasons for terminating her employment.

In order to make a prima facie case for retaliation under Title VII, a plaintiff must show: (1) involvement in protected activity opposing an unlawful employment practice, (2) an adverse employment action, and (3) a causal link between the protected activity and the adverse action. See Texas Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 252-53 (1981) (citing McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973)). Once the plaintiff makes out a prima facie case, the defendant then has the burden of producing evidence that it had a non-retaliatory reason for its action. Id. Although the defendant must produce some evidence of non-retaliatory motive, the burden of proof remains with the plaintiff to prove by a preponderance of the evidence that the defendant's articulated reasons are a pretext for unlawful retaliation. Id. at 256.

1. De La Paz has made a prima facie case of retaliation.

De La Paz alleges that she engaged in protected activity by complaining to Defendant about the sexual harassment in June 2002. "Asserting one's civil rights by complaining of [a coworker's] conduct is a protected activity under Title VII." Brooks, 214 F.3d at 1092. Therefore, De La Pas has met her prima facie burden to show she engaged in protected activity.

To prove retaliation, De La Paz must also show she suffered an adverse employment action. Here, De La Paz argues that the adverse employment action was the termination of her employment. Ultimate employment decisions include hiring, granting leave, discharging, promoting, and compensating. Kortan v. California, 5 F. Supp. 2d 843, 853 (C.D. Cal. 1998). Thus, the Court finds De La Paz has met her burden of showing that she suffered an adverse employment action.

Finally, De La Paz must show a causal link between the protected activity and the adverse employment action. Under the McDonell Douglas framework, the plaintiff's initial burden on causation "is not onerous." Texas Dep't of Cmty. Affairs, 450 U.S. at 253. A plaintiff typically can satisfy the causation element by establishing that the protected activity preceded the adverse action, and that the employer was aware of the plaintiff's protected participation before taking the adverse action. See Aguirre v. Chula Vista Sanitary Serv., 542 F.2d 779, 781 (9th Cir. 1976) ("A showing by plaintiff that he was discharged following protected activities of which the employer was aware establishes a prima facie case of [retaliation]."); see also Yartzoff v. Thomas, 809 F.2d 1371, 1376 (9th Cir. 1987) ("Causation sufficient to establish the third element of the prima facie case may be inferred from circumstantial evidence, such as the employer's knowledge that the plaintiff engaged in protected activities and the proximity in time.").

Here, De La Paz has asserted that she complained to Defendant about Koh's offensive conduct approximately five months before she was terminated. Further, very shortly before she was terminated, Defendant received the EEOC charge and suspended Koh. Thus, De La Paz has made a prima facie case of retaliation in violation of Title VII.

2. Defendant's has alleged a legitimate reason for the adverse employment action.

Because De La Paz has shown a prima facie case of retaliation, the burden shifts to Defendant "to present legitimate reasons for the adverse employment action." Brooks, 214 F.3d at 1092.

Defendant has presented evidence that its reason for terminating De La Paz's employment was that its contract with Continental Airlines was terminated, and thus her services were no longer needed.

3. De La Paz has raised a genuine factual issue regarding whether Defendant's explanation is pretextual.

Because Defendant has come forth with a nondiscriminatory explanation for its actions, the burden shifts back to De La Paz to raise a genuine factual issue as to whether Defendant's articulated explanation is pretextual. Brooks, 214 F.3d at 1092. De La Paz need not, however, present much more than her prima facie case to rebut Defendant's explanation. See Reeves v. Sanderson Plumbing Products, Inc., 120 S. Ct. 2097, 2108 (2000) (stating that "[t]he factfinder's disbelief of the reasons put forward by the defendant . . . may, together with the elements of the prima facie case, suffice to show intentional discrimination.").

Here, De La Paz argues that she was terminated after she complained to Defendant about Koh's conduct, and after Defendant received the EEOC charge. Additionally, De La Paz claims that by terminating her after losing the Continental Airlines contract, Defendant treated her less favorably than other similarly situated employees. Defendant correctly points out that the statements in De La Paz's deposition regarding whether other employees were treated more favorably are vague and likely based upon inadmissible hearsay. However, Defendant's own employee, James Satoshi Kawashima, testified during his deposition that not all of the employees who worked on the Continental Airlines contract were laid off at the time De La Paz was terminated. (Kawashima Depo., 66:4-22 and 71:12-72:13). Further, De La Paz has presented evidence to

show that the employees who were laid off were selected because they had low performance reviews, and that De La Paz's performance reviews were impacted by her sexual harassment complaint against Koh. (See EEOC Decl. in Support of EEOC's Opposition, Ex. 319). Based on this, the Court finds that De La Paz has presented sufficient evidence to raise a triable issue of fact regarding whether Defendant's claimed legitimate reason for terminating her was pretextual. Accordingly, the Court DENIES Defendant's motion for summary judgment on De La Paz's retaliation claim.

C. EEOC's Motion For Partial Summary Judgment On Defendant's Affirmative Defenses is GRANTED.

1. The Court finds that Defendant cannot assert a Faragher/Ellerth defense because its policies and practices were inadequate.

In order to assert a Faragher/Ellerth defense, Defendant must be able to demonstrate that: (1) it exercised reasonable care to prevent and promptly correct any sexually harassing behavior, and (2) that the Charging Parties unreasonably failed to take advantage of any preventative or corrective opportunities provided by Defendant. Faragher, 542 U.S. 775; Burlington Industries, Inc. v. Ellerth, 542 U.S. 742 (1998).

Defendant argues that it had a written sexual harassment policy, and that its employees were given training with respect to the policy. However, Defendant's own employee admits that 75% of Defendant's employees are not fluent enough in English to read the sexual harassment policy. Further, Defendant's own President, Charlie Yoon, admitted that he had never read the sexual harassment policy. (Yoon Depo., 129:7-9). Defendant does not provide any evidence to show that Defendant had a practice of providing all

1 employees with training (bi-lingual, if necessary) regarding the
2 sexual harassment policy. Further, in his deposition Koh states
3 that the only sexual harassment training he received when hired by
4 Defendant was an instruction not to "humiliate" the workers. (Koh
5 Depo., 58:19-59:10). Thus, while Defendant may have a written
6 policy, the policy was of little or no use because it was not
7 disseminated to the employees in a meaningful way. See Faragher,
8 524 U.S. 775.

9 Defendant attempts to argue that the fact that the Charging
10 Parties complained about the sexual harassment somehow demonstrates
11 that Defendant had an adequate policy in place. However, an
12 employee's decision to complain is distinct from the inquiry about
13 whether the employer had taken reasonable preventative measures.
14 Id., at 783. In other words, the fact that the Charging Parties
15 made complaints about Koh's conduct is not evidence that Defendant
16 had adequate preventative measures in place.

17 Additionally, Defendant's own Director of Human Resources
18 admits that Defendant did not have a sexual harassment training
19 program for its managers prior to 2002. (Tautrim Depo., 59:21-24
20 and 61:14-16). As a result, the Court finds that Defendant did not
21 have adequate preventative measures in place to prevent sexual
22 harassment. Because of the Defendant's lack of preventative
23 measures, the Charging Parties were left to essentially fend for
24 themselves – bringing their complaints without the protection or
25 guidance of a known sexual harassment policy.

26 Even after the Charging Parties complained about Koh's conduct,
27 Koh received only a warning that he should refrain from
28 discriminatory conduct, and was allowed to remain their supervisor.

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(Barba Depo., 116:3-117; Tautrim Depo., 109:8-17). This is not sufficient to correct harassing conduct. See Ellison, 924 F.d 882.

Further, as the EEOC points out, Defendant's own human resources notes and memoranda indicate that Defendant was highly skeptical of the accusations against Koh, telling the Charging Parties that "Mr. Koh did not do those things." (DRF 69). Defendant even went as far as to force Figueroa to sign a document agreeing that she "isn't going to accuse Mr. Koh of anything in the future." (DRF 68). Upon careful review of the documents, discovery responses and deposition testimony provided by both parties, the Court finds that Defendant's investigation into the Charging Parties' allegations was incomplete at best. At worst, the investigation appears to be an attempt by Defendant to sweep the Charging Parties' complaints under the rug, and to intimidate the Charging Parties into keeping quiet about any future harassment. Thus, the Court finds that the Charging Parties did not "unreasonably fail to take advantage of any preventative or corrective opportunities . . . or to avoid harm otherwise." Ellerth, 524 U.S. at 765; see also Faragher, 524 U.S. at 807.

Thus, the Court GRANTS the EEOC's motion for partial summary judgment on Defendant's Faragher/Ellerth defense.[2]

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[2] Given that the Court grants the EEOC's motion for summary judgment on Defendant's Faragher/Ellerth on the merits, is unnecessary to address the EEOC's arguments regarding waiver of the Faragher/Ellerth defense.

2. The Court finds that the affirmative defenses of business necessity, contributory or comparative fault, waiver, consent, estoppel, unclean hands, and Fifth and Amendments do not apply here.

The EEOC is correct in its assertion that business necessity is not a valid affirmative defense to a Title VII claim of hostile work environment sexual harassment or retaliation. Rather, with respect to the retaliation claim, Defendant may present evidence that it had a legitimate, non-discriminatory reason for the adverse employment action (i.e., terminating De La Paz). Brooks, 214 F.3d at 1092. However, Defendant's arguments in response to the retaliation claim may not be brought in the form of a separate affirmative defense of "business necessity." See 42 U.S.C. §2000e-2(k)(2).

The EEOC argues that contributory or comparative fault are appropriate defenses to tort claims, and not to claims of hostile work environment sexual harassment and retaliation under Title VII. The Court agrees. Defendant's argument that the Charging Parties did not take advantage of the "avenues available to them to rectify the purported sexual harassment" is essentially the same argument that Defendant raised in support of its failed Faragher/Ellerth defense. As discussed above, the Court finds that Defendant is not entitled to raise a Faragher/Ellerth defense. Defendant may not attempt to borrow the defenses of contributory or comparative fault from tort law in order to evade this ruling. Similarly, Defendant may not attempt to invoke the affirmative defense of waiver in an attempt to circumvent this Court's ruling on the Faragher/Ellerth defense. Moreover, Defendant has presented no evidence that either the EEOC or the Charging Parties voluntarily or intentionally

waived their rights under Title VII. Thus, Defendant's attempt to invoke the affirmative defense of waiver is both inappropriate and meritless.

The EEOC is also correct in its assertion that like contributory and/or comparative fault, consent is an affirmative defens to tort claims. While Title VII does not prohibit consensual sexual relationships among co-workers, raising consent as an affirmative defense is not the proper method of attacking the Title VII claim. Rather, Defendant must directly rebut the elements of the EEOC's case - here, by attempting to bring evidence to show that the alleged conduct was not "unwelcome" as required by Title VII. However, the Court notes that upon reviewing the voluminous evidence provided by both parties in support of their respective motions for summary judgment, there does not appear to be any indication that Koh's conduct was "welcome" or "consensual." In fact, the evidence provided by both parties indicates that the Charging Parties were highly offended by Koh's inappropriate behavior, and that they made serious efforts to seek help from management in order to put a stop to his behavior.

The Court also finds that Defendant has not raised a triable issue of fact as to either its unclean hands or its estoppel affirmative defenses. Defendant has not presented evidence sufficient to show that either the EEOC or the Charging Parties engaged in any misconduct, or acted inequitably or in bad faith.

Finally, Defendant appears to argue that since the Fifth and Eighth Amendments to the United States Constitution prohibit excessive punitive damages awards, Defendant should be allowed to bring affirmative defenses under each amendment. The Court agrees

excessive punitive damages awards are improper. See BMW of North America v. Gore, 517 U.S. 559 (1996). However, this is simply not the correct way to assert this right. Plaintiffs in a Title VII case are clearly allowed to seek punitive damages. In the event that punitive damages are awarded, if Defendant believes that the punitive damage award is excessive, Defendant may seek an appropriate remedy at that time. However, bringing an affirmative defense as a preemptive strike to attempt to bar a plaintiff from seeking punitive damages is improper.

3. The Court finds that the EEOC has satisfied the conditions precedent to suit.

In its opposition to the EEOC's motion for partial summary judgment, Defendant argues that the EEOC has not satisfied the conditions precedent to suit. Specifically, Defendant argues that the EEOC has not established that Defendant received the EEOC charges, and that the EEOC has not established that it conducted an investigation. The Court finds that both of these contentions lack credibility.

As the EEOC points out in its reply, at multiple points throughout discovery in this case, Defendant has acknowledged that it received the EEOC charges relating to Figueroa and Sauzo. The Court agrees with the EEOC that for Defendant to now claim that it did not receive notice of the EEOC charges is "puzzling." It is also inconsistent with the position taken by Defendant in its response to the statement of uncontroverted facts filed by the EEOC in support of its motion for summary judgment. Specifically, that Defendant does not dispute that by October 18, 2002, Defendant had notice of the EEOC charge. (DRF 74).

Similarly, Defendant's argument that the EEOC has not presented evidence that to show that the EEOC conducted an investigation and attempted to resolve the matter is also without merit. The EEOC has presented numerous documents and deposition testimony, as well as Defendant's own discovery responses - all of which demonstrate that the EEOC investigated the matter and attempted to conciliate the case with Defendant. (See e.g., EEOC Decl., Ex. 353 (Defendant's Responses to Requests for Admission Nos. 28-29)). In sum, the Court finds that Defendant's argument that the EEOC has failed to satisfy the conditions precedent to suit is entirely without merit.

Accordingly, the EEOC's motion for partial summary judgment is GRANTED in its entirety.[3]

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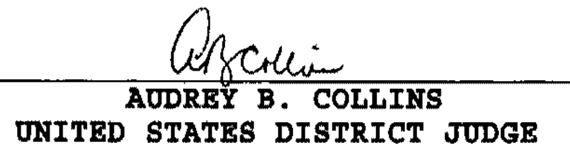
[3] Defendant did not oppose the EEOC's motion for summary judgment on Defendant's statute of limitations defense. Thus, EEOC's motion for summary judgment on the statute of limitations defense is GRANTED. In addition, the Court has reviewed the EEOC's arguments on this issue and finds that it is correct on the merits as well.

V. CONCLUSION

For the reasons articulated herein, the Court DENIES Defendant's motion for summary judgment in its entirety, and GRANTS the EEOC's motion for partial summary judgment in its entirety.[4]

IT IS SO ORDERED.

DATED: Nov 17, 2006



AUDREY B. COLLINS
UNITED STATES DISTRICT JUDGE

[4] Based upon its extensive review of the evidence which would be admissible at trial, the Court ORDERS the parties to conduct a further settlement conference well in advance of the Final Pretrial Conference scheduled for January 22, 2007.