UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Plaintiff(s),

and

SHERI CALVO, VERONICA FEREK and MELISSA SCARBOROUGH,

Intervenor/Plaintiffs,

vs. CASE NO. 8:99-CV-1371-T-17MAP

RIO BRAVO INTERNATIONAL, INC., et al.,

Defendants/
Third Party Plaintiffs,

v.
ROBERT EVANS,

Third Party Defendant.

_____/

ORDER

This cause is before the Court on:

Dkt. 157 Motion for Summary Judgment - Blair
Dkt. 159 Deposition - Blair
Dkt. 161 Motion for Summary Judgment - Rush
Dkt. 163 Deposition - Rush
Dkt. 181 Response

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Case No. 8:99-CV-1371-T-17MAP

This case is a hostile environment sexual harassment case. Defendants seek summary judgment on the claims of Summer Blair and Laura Rush.

I. Standard of Review

This circuit clearly holds that summary judgment should only be entered when the moving party has sustained its burden of showing the absence of a genuine issue as to any material fact when all the evidence is viewed in the light most favorable to the nonmoving party. Sweat v. The Miller Brewing Co., 708 F.2d 655 (11th Cir. 1983). All doubt as to the existence of a genuine issue of material fact must be resolved against the moving party. Hayden v. First National Bank of Mt. Pleasant, 595 F.2d 994, 996-7 (5th Cir. 1979), quoting Gross v. Southern Railroad Co. 414 F.2d 292 (5th 1969). Factual disputes preclude summary judgment.

The Supreme Court of the United States held, in Celotex Corp. v. Catrett 477 U.S. 317, 91 L.Ed.2d 265, 106 S.Ct. 2548 (1986),

> In our view the plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails 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. Id. At 273.

The Court also said, "rule 56(e) therefore requires the nonmoving party to go beyond the pleadings and by her own affidavits, or by the 'depositions, answers to interrogatories, and admissions on file,' designate 'specific facts show there is

a genuine issue for trial.'" Celotex Corp. At p. 274.

II. Hostile Environment Sexual Discrimination in General

In Mendoza v. Borden, Inc., 195 F.3d 1238 (11th Cir. 1999), the Eleventh Circuit Court of Appeals articulates the standards to determine the presence of hostile environment sexual harassment. To establish a hostile environment sexual harassment claim under Title VII based on harassment by a supervisor, an employee must show; 1) that he or she belongs to a protected group; 2) that the employee has been subject to unwelcome sexual harassment, such as sexual advances, requests for sexual favors, or other conduct of a sexual nature; 3) that the harassment must have been based on the sex of the employee; 4) that the harassment was sufficiently severe or pervasive to alter the terms and conditions of employment and create a discriminatorily abusive working environment; and 5) a basis for holding the employer liable. Henson v. City of Dundee, 682 F.2d 897, 901 (11th Cir. 1982). The Court notes that the phrase "terms, conditions or privileges of employment" in Title VII is an expansive concept which sweeps within its ambit the practice of creating a working environment heavily charged with ethnic or racial discrimination.

Although Title VII's prohibition of sex discrimination clearly includes sexual harassment, Title VII is not a federal "civility code." Oncale v. Sundowner Offshore Services, Inc., 523 U.S. 75 (1988) ("We have never held that workplace harassment, even harassment between men and women, is automatically discrimination because of sex merely because the words used have sexual content or connotations.") Sexual

harassment constitutes sexual discrimination only when the harassment alters the terms or conditions of employment. In hostile environment cases, an employer's harassing actions toward an employee do not constitute employment discrimination under Title VII unless the conduct is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment.

Establishing that harassing conduct is sufficiently severe or pervasive to alter an employee's terms or conditions of employment includes a subjective and an objective component. The employee must "subjectively perceive" the harassment as sufficiently severe and pervasive to alter the terms or conditions of employment, and this subjective perception must be objectively reasonable. The environment must be one that a reasonable person would find hostile or abusive. The objective severity of harassment should be judged from the perspective of a reasonable person in the plaintiff's position, considering all the circumstances.

The Court is required to consider the following factors in determining whether the harassment objectively altered an employee's terms or conditions of employment: 1) the frequency of the conduct; 2) severity of the conduct; 3) whether the conduct is physically threatening or humiliating, or a mere offensive utterance; and 4) whether the conduct unreasonably interferes with the employee's job performance. Courts should examine the conduct in context, not as isolated acts, and determine under the totality of the circumstances whether the harassing conduct is sufficiently severe or pervasive to alter the terms or conditions of the plaintiff's employment.

IV. Factual Background

A. Summer Blair

Summer Blair was employed by Rio Bravo as a hostess from August, 1997 to January, 1998. She worked twenty hours a week. Robert Evans was her supervisor. Summer Blair testified that when she was hired she was informed of Rio Bravo's sexual harassment policy (Dkt. 159, p. 28), and was aware that sexual harassment should be reported to a manager (Dkt. 159, p. 29).

Summer Blair testified that Robert Evans frequently touched her waist, arm and shoulder, and would put his arm around her. (Dkt. 159, p. 31). She testified this occurred more than ten times (Dkt. 159, p. 34), but less than fifty times (Dkt. 159, p. 35). On one occasion, Robert Evans grabbed her chest, and she filed a formal complaint (Dkt. 159, p. 34). Summer Blair informed Jim McDonald and Philip Crenshaw (Dkt. 159, p. 139). After the complaint, Robert Evans telephoned Summer Blair, and she told him not to touch her again (Dkt. 159, p. 40). Later Philip Crenshaw asked Summer Blair if the situation had improved, and she told him it had, to the extent that Robert Evans was removed from the hostess stand (Dkt. 159, p. 42). Summer Blair further testified that after the formal complaint, Robert Evans did not speak to her or touch her (Dkt. 159, pp. 43-4).

Summer Blair testified that at times Robert Evans would comment on the appearance of customers (Dkt. 159, p. 46) and would say something of a "verbal sexual harassing nature" (Dkt. 159, p. 47) between one and five times per shift. At times he complimented her on her appearance (Dkt. 159, p. 66).

Summer Blair testified that Robert Evans' conduct did not prevent her from doing her job, and did not impact her performance in any way (Dkt. 159, p. 48). Other than the touching incident, Summer Blair testified that she did not regard Robert Evans' behavior towards her to be highly offensive (Dkt. 159, p. 67). She testified that after her complaint about Robert Evans, the atmosphere was less relaxed (Dkt. 159, p. 50), and Robert Evans was not easy to work with (Dkt. 159, p. 51). There were times when he did not permit her to leave early (Dkt. 159, p. 52). Summer Blair ended her employment at Rio Bravo because she had another job she liked better, was changing school schedules, and wanted to reduce her workload (Dkt. 159, p. 53).

Summer Blair testified that Robert Evans dealt with another hostess, Leslie Cucinotta, the same way he behaved toward her (Dkt. 159, p. 58). That is, Robert Evans touched Leslie Cucinotta's waist, and put his arm around her shoulders, when she was at the hostess stand (Dkt. 159, p. 58). She testified this was his general behavior to the hostesses (Dkt. 159, p. 58).

B. Laura Rush

Laura Rush was employed by Rio Bravo from 1997 through April, 1998. She began as a hostess and later became a server. Laura Rush testified that she recalled reading the employee handbook when she was hired (Dkt. 163, p. 24), including the sexual harassment policy. She testified that she knew she was supposed to report any problem as to harassment to a manager (Dkt. 163, p. 25).

Laura Rush testified that Robert Evans unsnapped her bra (Dkt. 163, p. 32) on one occasion, and also felt her legs to see if they were shaved (Dkt. 163, p. 32) on one or two occasions. In addition, Robert Evans put his hand on her lower back and her upper back (Dkt. 163, p. 35). Laura Rush further testified that Robert Evans' conduct was an "all-the-time" thing (Dkt. 163, p. 34, 35), and there were so many incidents and comments she could not recall them (Dkt. 163, p. 39).

On three or four occasions, Robert Evans asked for a kiss on the cheek before checking Laura Rush out for the night (Dkt. 163, pp. 35-6). On one occasion, Robert Evans attempted to kiss Laura Rush on the mouth, but she pushed him away and told him to stop (Dkt. 163, p. 36). Laura Rush did not make a complaint about the incident because she did not want to lose her job (Dkt. 163, p. 60). Later, when an investigation was conducted by Rio Bravo, she gave a written statement that the incident was "no big deal. (Dkt. 163, p. 62), meaning that it happened all the time.

Laura Rush testified that Robert Evans made comments on her appearance that had sexual content (Dkt. 163, p. 38) on four or five occasions. Laura Rush further testified that it was common knowledge that Robert Evans said sexual things to the servers, and touched them in an inappropriate manner (Dkt. 163, p. 47).

Laura Rush denied that Robert Evans' conduct did not prevent her from performing her job tasks (Dkt. 163, p. 44), although his conduct did make the situation uncomfortable.

Laura Rush testified she left her employment with Rio Bravo because she was dating Jim McDonald, a manager, which was not

permitted by Defendants' employment policies. Philip Crenshaw, the General Manager, became aware of the dating relationship, and Laura Rush was offered the choice of ending the relationship or her employment. (Dkt. 163, p. 50). She chose to end her employment with Rio Bravo.

V. Claims of Summer Blair and Laura Rush

Defendants seek summary judgment as to the hostile environment sexual harassment claims of Summer Blair and of Laura Rush because they did not suffer acts which were severe enough or pervasive enough to create a sexually hostile working environment. Defendants also argue that they are entitled to the affirmative defense established by Burlington Industries v. Ellerth, 118 S.Ct. 2257 (1998) and Faragher v. City of Boca Raton, 118 S.Ct. 2275 (1998)

VI. Response

Plaintiff E.E.O.C. responds that the motion for summary judgment is due to be denied, because, based on the totality of the circumstances, the alleged conduct of Robert Evans meets the requirements for actionable sexual harassment. That is, the alleged conduct of Robert Evans is severe, pervasive and humiliating to the alleged victims. Plaintiff E.E.O.C. also argues that the consensual relationships between managers and employees reinforced the general atmosphere that the employees were there for the entertainment of the male managerial staff. Plaintiff further argues that the alleged conduct was unwelcome, and unreasonably interfered with the Claimants' work performance. Plaintiff further argues that Defendants cannot satisfy the

Ellerth and Faragher defense.

VII. Discussion

The Court is required to assess the offensive acts in context, and examine the totality of the circumstances in determining whether there is an actionable hostile environment sexual harassment claim. The Court understands that the acts complained of took place over a period of time in a casual dining restaurant in which the managers were males, and the hostesses and servers were young, unsophisticated females. In general, there was a congenial atmosphere. At times, the managers and other employees would socialize outside of the workplace. It was not uncommon for managers to flirt with or date servers. It was common knowledge among the employees that Robert Evans often made comments with sexual content and often touched the employees by putting his arm around their shoulders or waist. At some point, employees considered that the conduct of Robert Evans was no longer horseplay; other employees no longer "clowned around" with him, but were irritated by his conduct. As part of the backdrop of this claim, the Court must also consider the claims of other employees. Some of those claims are pending, and some claims have been extinguished.

A. Summer Blair

The Court notes that the words and actions directed to Summer Blair were frequent, and the sexual content of those words and actions was unwelcome. The Court further notes that there was one incident that prompted a formal complaint to other managers at Rio Bravo, and Summer Blair testified that after the

complaint Robert Evans no longer touched or spoke to her. She was aware that Robert Evans directed similar words and actions to other employees. Summer Blair testified that Robert Evans' conduct did not prevent her from doing her job, and did not impact her performance in any way. She further testified that, other than the touching incident, she did not regard Robert Evans' behavior towards her to be highly offensive, although it made her uncomfortable.

After considering the totality of the circumstances, the Court concludes that the severity of the conduct of Robert Evans as to Summer Blair does not meet the threshold established by the Eleventh Circuit Court of Appeals for a hostile environment sexual discrimination claim. The conduct of Robert Evans falls into the category of "offensive utterances" and "workplace tribulation" rather than actionable sexual discrimination.

B. Laura Rush

The Court notes that the words and actions directed to Laura Rush by Robert Evans were frequent, and were unwelcome. Laura Rush testified that Robert Evans' conduct did not prevent her from performing her job.

After considering the totality of the circumstances, the Court concludes that the severity of the conduct of Robert Evans as to Laura Rush does not meet the threshold established by Eleventh Circuit Court of Appeals for a hostile environment sexual discrimination claim. The conduct of the alleged harasser falls into the category of "offensive utterances" and "workplace tribulation" rather than actionable sexual discrimination.

VII. Affirmative Defense

Defendants argue that they are entitled to rely on the Faragher/Ellerth affirmative defense.

Both Summer Blair and Laura Rush admitted that they were aware of the Rio Bravo's sexual harassment policy. Summer Blair utilized the policy to interrupt the offensive conduct of Robert Evans. Laura Rush testified that she feared losing her job if she made a complaint.

Because the Court has concluded that, as to Blair and Rush, the conduct of Robert Evans does not rise to the level of actionable sexual harassment, it is not necessary for the Court to rule on the application of the affirmative defense. Accordingly, it is

ORDERED that Defendants' Motion for Summary Judgment (Dkt. 157) and Defendants' Motion for Summary Judgment (Dkt. 161) are **granted.**

DONE and ORDERED in Chambers, in Tampa, Florida on this 14th day of May, 2003.

ELIZABETH A. KOVACHEVICH
United States District Judge

Copies to:
All parties and counsel of record

F I L E C O P Y

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