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 Defendant's Rule 50 Motions as to the following issues, and the responses.

In ruling on a Motion for Judgment as a matter of law, the district court must deny the motion unless the evidence, viewed in the light most favorable to the nonmoving party, is such that there can be only one conclusion. There must be a complete lack of evidence for the moving party to prevail.

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I. Timely Filing of EEOC Charges for All Sexual Harassment at Issue

Defendants argue that under National Railroad Passenger Corp. v. Morgan, 122 S.Ct. 2061 (2002), the allegations of sexual harassment prior to January 23, 1997, when Robert Evans returned to the Clearwater Rio Bravo as an Assistant Manager, cannot be found to be a continuing violation of the hostile environment sexual harassment claims after that date. Robert Evans had a break in service at the Clearwater Rio Bravo between October 7, 1996 and January 23, 1997. When Rob Evans left, he was a "co-worker;" when he returned, he was a supervisor.

The Court has previously considered this issue fully (Dkt. 347). The break in service does not have any connection to an attempt to remediate the conduct of which Plaintiffs complained. The alleged harasser returned to the same workplace, and the same group of employees. The alleged sexual harassment in the form of a hostile environment continued. After consideration, the Court **denies** the Motion for Judgment as a Matter of Law as to this issue.

II. Melissa Scarborough - Faragher Defense

Defendants seek judgment as a matter of law on the Faragher defense as to Melissa Scarborough. In sexual harassment cases, where the alleged harasser is the claimant's supervisor, and where the supervisor's harassment involves no tangible adverse employment action, the employer may avoid liability by establishing a two-pronged affirmative defense:

> 1. That the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior; and
>
> 2) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.

Faragher v. City of Boca Raton, 524 U.S. 775, 807 (1998).

Defendants argue that the existence of a clear and effectively disseminated anti-harassment policy weighs heavily in favor of a conclusion that the employer exercised reasonable care to prevent sexual harassment. Faragher, 524 U.S. at 807.

Defendants argue that an employer is not deemed to have notice of harassment sufficient to trigger its duty to take remedial action where the complaint is general, or fails to disclose the extent and precise nature of the underlying harassment. Madray v. Public Supermarkets, Inc., 208 F.3d, 1290, 1300 (11th Cir.), cert. denied. 531 U.S. 926 (2000); Coates v. Sundor Brands, Inc., 164 F.3d 1361, 1364-64 (11th Cir. 1999). An employee must articulate her complaint in a manner reasonably calculated to trigger the supervisor's duty of care. Coates, 164 F.3d at 1364-66. Factors to consider include the time, place and manner of the complaint. Defendants argue that Melissa Scarborough's "dog in heat" statement is subject to many interpretations, and is not specific enough to put Defendants on notice and trigger the duty to correct the alleged sexual harassment toward her.

Plaintiffs respond that Defendants have not proven as a matter of law that they took reasonable steps to prevent and

correct the hostile environment at issue. They argue that notification of sexual harassment to the employer need not come solely from the victim for knowledge to be imputed to the employer. Sims. v. Health Midwest Physician Services Corp., 196 F.3d 915, 920 (8th Cir. 1999). Plaintiffs further argue that Defendants have not proven as a matter of law that Melissa Scarborough unreasonably failed to take advantage of remedial measures.

Melissa Scarborough testified that she notified Rio Bravo of the alleged harassing conduct through her statement "I told Benn Irwin Rob is like a dog in heat and he needed to put a leash on him" while she was rolling silverware one night, sitting at a table with Benn Irwin, the General Manager. She also testified that Benn Irwin responded that he would talk to Rob. She further testified that the conduct of Rob Evans toward her did not change after that. Melissa Scarborough testified that she later complained to Shawn Corway, an Assistant Manager, that Rob Evans was a pervert. In her deposition, Melissa Scarborough testified that Shawn Corway was Rob Evans' "best friend" and that he laughed and said "I know" when she complained.

Melissa Scarborough testified that she also complained to Jim McDonald, an Assistant Manager, early in 1998, about incidents of being locked in the linen closet, panty checks and leg checks. She testified that Jim McDonald's response was that he did not schedule her for closing shifts with Rob Evans. Melissa Scarborough testified that she was aware of Rio Bravo's sexual harassment policy, and thought she was following it by going to her managers. She testified that she did not think of consulting the handbook and taking further actions to solve her

complaints.

1. Sexual Harassment Policy

Defendants' sexual harassment policy was incorporated into the "Crewmember Handbook." Employees were required to acknowledge that they read and understood the policy during their orientation. Melissa Scarborough testified she was aware of the policy.

A. "Dog in Heat" Statement

The Court is required to evaluate the time, place and manner of the complaint. As far as this Court is concerned, there are no magic words required to make a complaint under the applicable policy. There is nothing that intrinsically prevents a verbal complaint from being a valid complaint. It is not necessary that a formal meeting be conducted, as long as the person to whom the complaint is presented has the authority to act on the complaint. Melissa Scarborough was sitting at a table with the General Manager, Benn Irwin, completing her side work. The context is informal, but the Court finds this factor is not dispositive.

The Court agrees that Melissa Scarborough's "dog in heat" statement is subject to interpretation, and does require that an inference be drawn. Defendants argue that one interpretation of the content of the statement is that Evans was out of control on a power trip as a manager, and acted like a dog in heat because he was moody and agitated. Defendants argue that the statement is not specific enough to trigger the duty to correct sexual harassment.

After consideration, the Court finds that the statement is specific enough to require a duty to investigate. "Dog in heat" behavior in a male/female context has a common-sense meaning, and the sexual component is obvious. "Dog in heat" behavior commonly includes a whole spectrum of conduct, from roaming, aggressive behavior to other males, and urine-marking to inappropriate mounting. "Roaming" refers to the males being drawn to females by scent, sometimes from great distances, and scent commonly triggers inappropriate mounting. The usual reason for inappropriate mounting behavior in a male to male context is a display of social dominance--to let the other dog know who is boss. Here, the complainant is a female, and that makes the sexual connotation somewhat more probable. Melissa Scarborough did not spell it out, and Benn Irwin did not inquire; he appeared to understand. Benn Irwin testified that Rob Evans was a good manager, although he was aggressive and needed work on his interpersonal skills. Reasonable care in this context would have included some inquiry to distinguish between dominance aggression and goofy, adolescent humping-of-anything-that-moves behavior, typical of a dog in heat. In other words, the Court finds that Benn Irwin had actual notice of Melissa Scarborough's sexual harassment complaint.

B. Failure to Take Advantage of Corrective/Preventive Measures

It is not disputed that Rio Bravo had a sexual harassment policy, and that the sexual harassment policy was disseminated. In some instances, the sexual harassment policy appeared to work. For example, when Summer Blair notified Rio Bravo managers of her complaint about Rob Evans, circumstances changed and Summer Blair testified that Rob Evans no longer spoke to or touched her in an offensive way.

The Court further notes while Melissa Scarborough worked at Rio Bravo, she was attending college. Melissa Scarborough could read and write. The Crewmember Handbook is written in plain English. There were other means available to present a complaint besides notifying the General Manager. Melissa Scarborough admitted she did not pursue these measures.

The Court found above that Melissa Scarborough's statement was sufficiently specific. Defendants had actual notice of her complaint, or at least a duty to investigate. The conduct of which Melissa Scarborough complained continued, and she made additional complaints.

The Court cannot find a company sexual harassment policy to be effective where company practice indicates a tolerance towards harassment or discrimination. Miller v. Kenworth of Dothan, Inc., 277 F.3d 1269 (11th Cir. 2002). Benn Irwin, a General Manager, testified that he resolved complaints on an ad hoc basis--he did whatever the complainant indicated she wanted. If a complainant requested a verbal warning, that is what he gave. Benn Irwin testified that he thought Rob Evans was good manager. The trier of fact could find that since Rob Evans contributed to the bottom line of Rio Bravo's profit margins, and probably any bonus received by general managers or area directors, the conduct complained of continued until it could no longer be ignored. The effectiveness of Rio Bravo's sexual harassment policy is a disputed issue.

The Court agrees with Plaintiff that Defendants cannot use their own policies to insulate themselves from liability by placing an increased burden on complainants to provide notice

beyond that required by law. Madray v. Public Supermarkets, Inc., 208 F.3d 1290, 1301 (11th Cir. 2000); Breda v. Wolf Camera & Video, 222 F.3d 886, 889 (11th Cir. 2000). In addition, testimony in this case shows that other employees knew that the managerial staff was aware of Rob Evans' behavior through other complaints or direct observation, but did not act on that knowledge, so that further complaint would be futile.

After consideration, the Court **denies** the Motion for Judgment as a Matter of Law as to Melissa Scarborough.

III. Sheri Calvo - Retaliation Claim - Causal Link

Sheri Calvo testified that after Rio Bravo became aware that she retained counsel, and had made a Charge of Discrimination to the EEOC, her work schedule was cut for a four-month period, and eventually she was not put on the schedule at all. Sheri Calvo was a long-time employee, and she testified that before the formal Charge of Discrimination, Rio Bravo accommodated her school schedule. Sheri Calvo testified that as a result of her alleged constructive discharge, she had serious financial difficulties.

There is testimony from other witnesses that Sheri Calvo was "hard to manage," that she wanted things her own way, and had conflicts with managers when they disagreed with her.

After consideration, the Court finds that Sheri Calvo has shown that she engaged in a statutorily protected activity, that there was an adverse employment action, and a causal link between the protected actions and the adverse employment action. Her

version of the facts could be accepted by the trier of fact, or Defendants' different version could be accepted. Because there are a number of material disputed fact issues as to Sheri Calvo, the Court **denies** the Motion for Judgment.

IV. Veronica Ferek - Retaliation Claim - Causal Link

Veronica Ferek testified that Defendant retaliated against her by not permitting other employees to help her with heavy food trays. She testified that she was given the choice of returning to a hostess job under the supervision of Rob Evans, or continuing as a server without assistance. She testified that she was unable to carry the heavy trays required for the server position, and was unable to work as a hostess due to the presence of Rob Evans. She testified that she elected to quit her job.

Veronica Ferek complained about Rob Evans' conduct to Dave Welch in 1996. She later complained to Benn Irwin, a General Manager, in August and December, 1996. She complained to Shawn Corway early in 1997. In 1997, Veronica Ferek worked as a server rather than a hostess in order to avoid Rob Evans. Philip Crenshaw, the General Manager who succeeded Benn Irwin in July, 1997, terminated Veronica Ferek's employment with Rio Bravo in August, 1997.

In order to establish a prima facie case of retaliation, a plaintiff must show: 1) a statutorily protected activity; 2) an adverse employment action; and 3) a causal link between the protected actions and the adverse employment decision. Weaver v. Casa Gallardo, Inc., 922 F.2d 1515 (11th Cir. 1991). The causal link element requires merely that the plaintiff establish that

the protected activity and adverse action are not wholly unrelated. At a minimum, the plaintiff must establish that the employer was actually aware of the protected expression at the time it took adverse employment action. If a court finds that the plaintiff has established a prima facie case, the burden shifts to the defendant to proffer a legitimate, non-discriminatory reason for the adverse employment action. Once the defendant meets the burden of production, the plaintiff must then demonstrate that the defendant's proffered explanation was a pretext for discrimination. The burden of persuasion always remains with the plaintiff.

The Court notes that there is no direct testimony that Philip Crenshaw knew about Veronica Ferek's prior complaints, but this issue is not dispositive because such knowledge can be established by circumstantial evidence. In Goldsmith v. City of Atmore, 996 F.2d 1155 (11th Cir. 1993), the Eleventh Circuit Court of Appeals found that a causal link was demonstrated by circumstantial evidence where the plaintiff presented deposition testimony which impeached the mayor's claim of ignorance that he knew of a certain conversation, together with evidence demonstrating a curious temporal proximity between the plaintiff's transfer and that conversation. In Weaver v. Casa Gallardo, Inc., 922 F.2d 1515 (11th Cir. 1991), the Eleventh Circuit found that plaintiff's circumstantial evidence satisfied the causal link where the plaintiff presented testimony that management personnel were acutely aware of the plaintiff's EEOC charge, as well as evidence of a sudden increase in plaintiff's negative reviews and heightened scrutiny of his job performance.

In this case, in order to meet the requirement of a causal link, circumstantial evidence must be brought forth to show that Philip Crenshaw, the corporate agent who took the adverse action, was aware of Veronica Ferek's protected expression, and acted within the scope of his agency when he required Ms. Ferek to either carry her own trays, or return to work as a hostess.

The Court notes that some managers permitted Veronica Ferek to have assistance with her food trays. After consideration, the Court concludes that it is a close question whether the causal connection has been established. The Court will permit the jury to weigh the evidence on this issue and draw reasonable inferences. Therefore, the Court will **deny** the Motion for Judgment as a matter of law on the issue of retaliation as to Veronica Ferek.

The standard for establishing constructive discharge is high. To establish constructive discharge, the plaintiff must prove that working conditions were "so intolerable that a reasonable person in [her] position would have been compelled to resign. Griffin v. GTE Florida, Inc., 182 F.3d 1279, 1283 (11th Cir. 1999). The standard for proving constructive discharge is higher than the standard for proving a hostile work environment claim. Hipp v. Liberty National Life Insurance Co., 252 F.3d 1208, 1231 (11th Cir. 2002)("To prove constructive discharge, the plaintiff must demonstrate a greater severity or pervasiveness of harassment than the minimum requirement to prove a hostile working environment.")

In assessing a constructive discharge claim, the plaintiff's subjective feelings about his employer are not considered. The

Court is required to employ an objective standard: whether a reasonable person in the plaintiff's position would have been compelled to resign. See Doe v. Dekalb County Sch. Dist., 145 F.3d 1441, 1450 (11th Cir. 1998). A plaintiff must show both that the employer's actions were impermissibly motivated and that the actions made plaintiff's working conditions so intolerable that her resignation is deemed involuntary.

The Court notes that Veronica Ferek is not complaining that she was constructively discharged due to the "ratcheting up" of any alleged sexual harassment by Rob Evans. There is an open issue as to whether Philip Crenshaw knew that Veronica Ferek did not want to work under the supervision of Rob Evans. After consideration, the Court will **deny** the Motion for Judgment as a matter of law as to constructive discharge.

V. Punitive Damages

Defendants request judgment as a matter of law on the issue of punitive damages as to Melissa Scarborough, Veronica Ferek, and Leslie Cucinotta. Defendants concede that Sheri Calvo and Rene Brown have submitted admissible evidence that individuals above the store level allegedly knew of their claims.

Defendants rely in Miller v. Kenworth of Dothan, Inc., 277 F.3d 1269 (11th Cir. 2002), Kolsted v. American Dental Ass'n, 527 U.S. 526 (1999) and Dudley v. Wal-Mart Stores, Inc., 166 F.3d 1317 (11th Cir. 1999).

In Miller, supra, the Eleventh Circuit Court of Appeals explains that "punitive damages may only be considered in cases

where the discriminating employee was high upon on the corporate hierarchy" or where "higher management countenanced or approved his behavior."

In Kolstad, supra, the Supreme Court held that employers may assert a good faith defense to vicarious liability for punitive damages where the "employment decisions of managerial agents are contrary to the employer's good faith efforts to comply with Title VII." A plaintiff must come forward with substantial evidence that the employer acted with actual malice or reckless indifference to his federally protected rights. Malice or reckless indifference is established by a showing that the employer discriminated in the face of the knowledge that its actions would violated federal law.

In Dudley, supra, the Eleventh Circuit Court of Appeals held that punitive damages should not be assessed as to the decisions of managerial agents at the store level of a large corporation, where there was no evidence that any official above the store level had knowledge of the discriminatory acts undertaken by two individuals at one of its thousands of stores.

Defendants argue that Melissa Scarborough, Veronica Ferek and Leslie Cucinotta, have not established that a management official above the store level was aware of the alleged sexual harassment toward them. Defendants argue that judgment as a matter of law is therefore appropriate.

Plaintiff EEOC responds that the Court must consider the following factors as to the assertion of punitive damages:

a) the degree, nature and egregiousness of Defendant's conduct;
b) nature, extent and severity of harm to the claimant;
c) the duration of the alleged discriminatory conduct;
d) the existence and frequency of past discriminatory conduct;
e) the actions of the defendant after being informed of the discriminatory conduct;
f) evidence of a concealment or "coverup" by Defendant;
g) proof of threats or deliberate retaliatory conduct of defendant.

Plaintiff argues that the conduct complained of is egregious and outrageous, and that there is testimony from Marion Wolfe that from 1995 onward the complained of conduct was ignored and minimized. Instead, the managerial staff allegedly paid lip service to their sexual harassment policy and allowed the offensive conduct to continue. Plaintiff argues that the offensive conduct was frequent, and continued for a considerable period of time.

Plaintiff further argues that Defendants did not take any steps to address the alleged harassment, and instead of rendering discipline, Defendants promoted and financially rewarded the alleged harasser.

Plaintiff argues that there is testimony from John Moore, Defendants' Human Resources Officer, that Defendant was unable to corroborate allegations of sexual harassment, and that Defendants' took prompt remedial action. However, John Moore also asserted his Fifth Amendment privilege when asked if he made misrepresentations to the EEOC.

Plaintiff further argue there was retaliation against employees Blair and Calvo after each made a formal complaint.

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After consideration, the Court **grants** the Motion for Judgment as a Matter of Law on the issue of punitive damages as to Melissa Scarborough, Veronica Ferek and Leslie Cucinotta. There are some troubling aspects to this case. However, it is plain that Defendants have a corporate structure in place, and that there was a means to communicate with higher management, i.e. management above the local level. In this Circuit, ordinarily punitive damages are not awarded against employers who may be liable only by implication of law. To get punitive damages, a Title VII plaintiff must show either that the discriminating employee was "high up on the corporate hierarchy," or that "'higher management' countenanced or approved [his] behavior." In this case, there was one alleged harasser at one store, and no evidence that levels of management above the local level were aware of the alleged conduct as to Ferek, Scarborough and Cuccinotta until 1998, when Rob Evans' employment was terminated.

Notwithstanding this ruling, the issue of punitive damages as to Sheri Calvo and Rene Brown remains available for resolution by the jury.

DONE and ORDERED in Chambers, in Tampa, Florida on this 18th day of June, 2003.

ELIZABETH A. KOVACHEVICH
United States District Judge

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All parties and counsel of record

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