UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

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EQUAL EMPLOYMENT OPPORTUNITY COMMISSION and GLENNDA HERRING,

Plaintiff,

v. CASE NO: 8:01-cv-379-T-26EAJ

NORSTAN APPAREL SHOPS, INC., d/b/a FASHION CENTS,

Defendant.
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ORDER

Before the Court is Defendant's Motion for Summary Judgment, Statement of Facts, and supporting memorandum (Dkts. 55, 56, and 57), Defendant's Notice of filing Supplemental Authority (Dkt. 58), Plaintiff Glennda Herring's Responses (Dkts. 82, 83, 84, 99, 100, and 102), Plaintiff EEOC's Response and Statement of Facts (Dkts. 87 and 88), Defendant's Reply (Dkt. 95),[1] and the numerous depositions, affidavits, declarations, exhibits and other documents. After careful consideration of the entire file, the Court concludes that the motion should be granted in part and denied in part.

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[1] On July 16, 2002, this Court ordered that Defendant's Motion to Strike (Dkt. 95) would be treated as a reply. (Dkt. 96).

106

Title VII Retaliation

In viewing the facts in the light most favorable to the non-moving party, the Court finds that the Plaintiff may be able to establish a causal connection between her termination and her complaints to her supervisor and the management regarding the sexual harassment occurring at the store. There is evidence supporting a finding that Defendant's management knew of Plaintiff's protected activity—the complaints of sexual harassment— before the decision to discharge her. In this respect, the protected activity and the negative employment action are "not completely unrelated." See Olmsted v. Taco Bell Corp., 141 F.3d 1457, 1460 (11th Cir. 1998). Moreover, Plaintiff has come forward with contradictory evidence in regard to the legitimacy of Defendant's reasons for termination. Accordingly, the Court finds genuine issues of material fact with regard to Plaintiff's retaliation claim.

Conspiracy

Count II of the First Amended Complaint, titled "Conspiracy," alleges a claim for violation of Plaintiff's civil rights and also attempts to assert a conspiracy under Florida law. The intracorporate conspiracy doctrine applies in actions brought pursuant to 42 U.S.C. § 1985(3). See McAndrew v. Lockheed Martin Corp., 206 F.3d 1031, 1036-38 (11th Cir. 2000); Foster v. Pall Aeropower Corp., 111 F. Supp. 2d 1320, 1324 (M.D. Fla. 2000) (citing McAndrew). In other words, the employees, agents and officers of the Defendant corporation cannot conspire among themselves, because there is no

"multiplicity of actors necessary for the formulation of a conspiracy." See McAndrew, 206 F.3d at 1036. Although the intracorporate conspiracy doctrine does not extend to criminal conspiracies, Plaintiff has failed to allege or demonstrate a conspiracy to commit a crime.

Plaintiff has also failed to establish that her claim falls within the personal stake exception to the intracorporate conspiracy doctrine. See McAndrew, 206 F.3d at 1037 n. 6, citing Benningfield v. City of Houston, 157 F.3d 369, 378 (5th Cir. 1998), cert. denied, 526 U.S. 1065 (1999). Under this exception, if a corporate employee acts for his or her own personal purposes, then a conspiracy may be established. See H & B Equipment Co., Inc. v. International Harvester Co., 577 F.2d 239, 244 (5th Cir. 1978), cited with approval in Benningfield, 157 F.3d at 378.

In Benningfield, the plaintiffs alleged that one of the defendants had a personal stake in retaliating against the plaintiffs. The plaintiffs asserted that because the defendant's father had been terminated, the defendant intended to avenge his father by retaliation against those individuals responsible for the termination. The defendant "retaliated" by permitting a hostile work environment to continue despite repeated reports of the problems. The Benningfield court held that the plaintiffs must show that the alleged conspiracy was "motivated by class-based animus." See Benningfield, 157 F.3d at 379, quoting Hilliard v. Ferguson, 30 F.3d 649, 653 (5th Cir. 1994). In Benningfield, the plaintiffs' theory that the defendant's motivation for the conspiracy was his desire to

get even with the individuals who forced his father's resignation, did not establish the necessary animus.

In the instant case, Plaintiff submits that Plaintiff's direct supervisor, Monica Barr, had a personal stake in having Plaintiff terminated. Ms. Barr's purported motivation to conspire with the Defendant was "to keep from getting fired herself" because of her failure to report the Plaintiff's complaints to her superiors. Monica Barr is in the same protected class–females—as is Plaintiff. Consequently, no class-based animus could possibly exist in this case.

To the extent Plaintiff attempts to circumvent the intracorporate conspiracy doctrine on a non-discriminatory theory, Plaintiff may not do so. Plaintiff submits that Ms. Barr stood to lose her job, and therefore her salary, if the Plaintiff was not terminated. Thus, Plaintiff claims that Ms. Barr had a personal stake, her salary, in keeping her job. The "personal stake" intended to be gained, however, must flow from a source independent of the defendant corporation. See H & B Equipment, 577 F.2d at 244. There is no separate entity in which Ms. Barr held an interest; her compensation flows directly from the Defendant, not from an independent source. Thus, the "personal stake" exception does not apply under any circumstances.

To the extent Plaintiff alleges a state law claim for conspiracy, Florida law holds that an employee cannot conspire with his or her corporate employer. See Lipsig v. Ramlawi, 760 So. 2d 170, 180 (Fla.Dist.Ct.App. 2000). Florida also recognizes the

"personal stake" exception. See Greenberg v. Mount Sinai Med. Ctr. of Greater Miami, Inc., 629 So. 2d 252, 256 (Fla.Dist.Ct.App. 1993). For the reasons set forth above, Plaintiff cannot establish this exception. Accordingly, the Court finds that no reasonable jury could reach a verdict in Plaintiff's favor on the claims of conspiracy.

State Law Claims

Fraud/Constructive Fraud

Plaintiff contends that either fraud or a constructive fraud occurred in the termination process. She claims that she signed, under duress, the Defendant's version of a termination report, wherein she admitted to falsehoods, giving the Defendant just reason for termination. The Court finds that generally, there is no fiduciary relationship between an employer and employee giving rise to the tort of constructive fraud. Accordingly, Plaintiff cannot establish a claim for constructive fraud.

As to fraud in the inducement or duress, Plaintiff has failed to show that any employment contract existed which would give her any rights in this terminable-at-will state. Plaintiff cannot show any damages resulting from her signing false statements used to justify her termination when she could have been terminated for any reason absent her signing the termination document. Consequently, Plaintiff cannot establish a claim for fraud in the inducement.

False Imprisonment

Count IV of the original Plaintiff/Intervenor's Complaint (Dkt. 13) seeks damages for false imprisonment.[2] The Court finds a genuine issue of material fact as to this count.

Defamation

Plaintiff alleges that defamatory statements were made by employees of the Defendant. The Court finds that a genuine issue of fact exists as to whether the statements were true and whether a privilege applies.

Negligent Retention, Training and Supervision

The Court agrees with Defendant that Plaintiff's claims for negligence are based on the alleged acts of sexual harassment committed against other employees and the Defendant's investigation and response regarding the complaints. Plaintiff contends that the underlying wrong committed by Mr. Moyer was sexual harassment. In Florida, sexual harassment was not a recognized cause of action at common law. See Scelta v. Delicatessen Support Services, Inc., 57 F. Supp. 2d 1327, 1348 (M.D. Fla. 1999). Accordingly, Plaintiff has failed to establish the elements of claims for negligent training, supervision and retention.

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[2] Plaintiff/Intervenor did not request that the original Intervenor Complaint be amended with respect to Count IV for false imprisonment.

Assault and Battery

Plaintiff cannot show that the Defendant employer is vicariously liable for the tortious acts of Mr. Moyer, because Plaintiff has failed to establish that the massages or neck rubs were committed in the scope of his employment. An employee's conduct is within the scope of his employment when "(1) the conduct is of the kind he was employed to perform, (2) the conduct occurs substantially within the time and space limits authorized or required by the work to be performed, and (3) the conduct is activated at least in part by a purpose to serve the master." Iglesia Cristiana La Casa Del Senor v. L.M., 783 So. 2d 353, 357 (Fla.Dist.Ct.App. 2001). "Generally, sexual assaults and batteries by employees are held to be outside the scope of an employee's employment, and therefore, insufficient to impose vicarious liability on the employer." Iglesia, 783 So. 2d at 357, quoting Nazareth v. Herndon Ambulance Serv., Inc., 457 So.2d 1076, 1078 (Fla.Dist.Ct.App. 1985). Nothing in the record suggests that the neck rubs, or any other alleged unwanted touches, constituted anything other than independent, self-serving acts by Mr. Moyer. Thus, Defendant cannot be held liable for Mr. Moyer's actions.

It is therefore **ORDERED AND ADJUDGED** that Defendant's Motion for Summary Judgment (Dkt. 55) is **GRANTED in part and DENIED in part.** Summary judgment is denied as to the original Complaint brought by the EEOC and as adopted by reference as Count I in Plaintiff/Intervenor Glennda Herring's First Amended Complaint. Summary judgment is granted as to Counts II, III, VI, VII, VIII, and IX of the

Plaintiff/Intervenor's First Amended Complaint. (Dkt. 20). Summary judgment is denied as to Count V in the of the Plaintiff/Intervenor's First Amended Complaint, (Dkt. 20), and to Count IV for false imprisonment in the original Plaintiff/Intervenor Complaint. (Dkt. 13). The Clerk is directed to enter final judgment as to Counts II, III, VI, VII, VIII, and IX of the Plaintiff/Intervenor's First Amended Complaint in favor of Defendant and against Plaintiff/Intervenor Glennda Herring. This case shall proceed to trial on the original Complaint filed by the EEOC (Dkt. 1), Counts I and V of the Plaintiff/Intervenor's First Amended Complaint (Dkt. 20), and Count IV of the original Plaintiff/Intervenor Complaint (Dkt. 13).

DONE AND ORDERED at Tampa, Florida, on July 29, 2002.

RICHARD A. LAZZARA
UNITED STATES DISTRICT JUDGE

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F I L E C O P Y

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