UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
CASE NO. 01-7543-CIV-SEITZ/BANDSTRA

UNITED STATES EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Plaintiff,

and

MARITZA OSORIO,

Plaintiff/Intervenor,

v.

MORTGAGE INFORMATION SERVICES, INC.,

Defendant.
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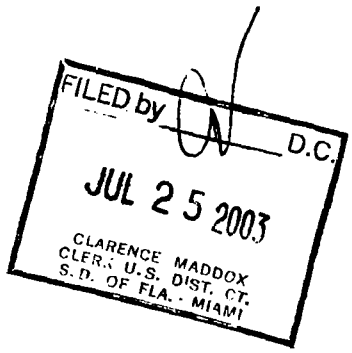

ORDER GRANTING IN PART AND DENYING IN PART DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

THIS MATTER is before the Court on Defendant Mortgage Information Services, Inc.'s ("MIS") Motion for Summary Judgment [DE-72]. This is an action for sexual harassment and retaliation that the United States Equal Employment Opportunity Commission ("EEOC") has brought on behalf of Plaintiff/Intervenor Maritza Osorio ("Osorio") and other similarly situated female employees who worked at MIS. Defendant MIS maintains that it is entitled to summary judgment because the EEOC and Osorio have not established sufficient facts to create a genuine issue for trial on their sexual harassment and retaliation claims. Having considered Defendant's motion, the EEOC's and Osorio's responses in opposition, Defendant's reply thereto, and the record in this action, the Court will deny Defendant's motion as to Osorio's sexual harassment and retaliation claims, and grant Defendant's motion as to the EEOC's sexual harassment and retaliation claims brought on behalf of other female employees, including Christine

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Gordon ("Gordon"), Paula Chin ("Chin"), and Tamberly Juda ("Juda").[1]

Factual and Procedural Background

A. MIS Operating and Management Structure

Defendant MIS is a mortgage service provider that has provided title insurance, title searches, and real estate appraisals to customers in South Florida since 1990. Joseph Gilson ("Gilson") is a co-founder and president of MIS, and is responsible for supervising MIS's Miramar office. Frank Nowicki ("Nowicki") serves as the company's vice-president and is responsible for assisting president Gilson in supervising and managing the business.

One of the departments within the MIS Miramar office is the appraisal department, which consists of appraisal coordinators and a chief appraiser. John Robinson ("Robinson"), who began his employment at MIS on April 1, 1999, served as chief appraiser for the time period at issue in this lawsuit. Robinson reported to vice-president Nowicki, and directly supervised appraisal coordinators including Osorio and Juda. Two other female employees at issue in this suit, Gordon and Chin, worked in customer service and data entry. Gordon and Chin did not work in the appraisal department and did not report to Robinson. Their complaints center solely on president Gilson.

B. Osorio's Complaints About Robinson in the Appraisal Department

Osorio, the Plaintiff/Intervenor in this action, began working as an appraisal coordinator on January 4, 1999, approximately three months prior to Robinson becoming her supervisor. Osorio claims that after Robinson began work as chief appraiser, the atmosphere in the appraisal department changed. In particular,

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[1] As a preliminary matter, on July 8, 2003, the EEOC informed the Court that it has agreed to withdraw its claims on behalf of Juda, Kristina Brown ("Brown"), and Carlie Gilles ("Gilles"). See EEOC's July 8, 2003 Notice. However, because the EEOC withdrew its claims on behalf of Juda after MIS moved for summary judgment, the Court will grant Defendant's motion for summary judgment as to Juda. Because MIS was previously aware of the EEOC's decision to withdraw its claims on behalf of Brown and Gilles, MIS's motion did not address Brown and Gilles. Additionally, the Court notes that other than pursuing its claims on behalf of Osorio, Gordon, and Chin, the EEOC has not indicated that it wishes to pursue claims on behalf of any other female employees. Thus, the only claims presently before the Court are those brought by the EEOC on behalf of Osorio, Gordon, and Chin.

Osorio claims that Robinson constantly made sexual jokes in front of the appraisal department employees and made offensive remarks to female subordinates. (Osorio Dep. at 160-88). As examples of the many sexual jokes and comments, Osorio testified that Robinson referred to employee Karen Yee as a "slippery little Chinese girl, KY jelly;" said that "Chinese girls like it slippery" and "like to be spanked in the ass;" referred to a fellow employee's breasts as "those big balloons" that he would "like to pop;" and stated that he had "a big banana." (Osorio Dep. at 180-88).

In addition, Osorio claims that Robinson continuously touched her and other females in the workplace. (Osorio Dep. at 215-19). Specifically, Osorio alleges that Robinson would rub and caress her arms, hands, shoulders, legs, thighs, hair, and buttocks, and would place his face on her neck, sniff her hair, and tell her that he loved her perfume. (Osorio Dep. at 215-33). MIS admits that Robinson's "supervisory style was different from that of his predecessors," and that he would "tell jokes on occasion to relieve the stress of the job." (Def.'s Mot. for S.J. at 4). MIS also concedes that "[w]hile talking to employees [Robinson] would sometime put his hands on their hands, arms or shoulders." (Def.'s Mot. at 4).

Osorio alleges that she complained to Robinson about his offensive jokes and touching, and also complained to Robinson's supervisor, vice president Nowicki, at least three times during the course of her employment. (Osorio Dep. at 191-93; 235; 251). Osorio contends that the complaints to Robinson and Nowicki did nothing to resolve the problem. MIS terminated Osorio's employment in August of 2000.

C. Gordon's Complaints About Gilson

Gordon began work at MIS in March of 2000 in customer service and data entry. Gordon's primary claim is that MIS president Gilson would stare at her body every time she went into his office, approximately three times per week, and make comments like "nice blouse" or "you look nice today." (Gordon Dep. at 46-49). Gordon also testified that on just one occasion, Gilson called her on the phone to say that she has a "nice smile." (Gordon. Dep. at 43, 48). Gordon admits that Gilson never made any sexually explicit remarks to her, and never commented on her legs, breasts, genitals, or bottom. (Gordon Dep. at 52-53). While

Gilson's stares made Gordon uncomfortable, Gordon claims that after she gave a statement to the EEOC in June or July of 2001, Gilson's uncomfortable stares completely stopped. (Gordon Dep. at 43-49). Gordon quit in January of 2002 without any advance notice, and testified that her decision to leave had nothing to do with any harassment by Gilson. (Gordon Dep. at 72).

D. Chin's Complaints About Gilson

Chin began working at MIS on March 9, 1998 in customer service and data entry, and served as an administrative assistant to Gilson for approximately three to four months beginning in May or June of 1998. Chin claims that Gilson often stared at her body, particularly around her bottom and genital areas, which made her feel uncomfortable. (Chin Dep. at 75). Chin testified that on one occasion, Gilson "looked down at [her] vagina area, then he looked up and he said, 'Wow.'" (Chin Dep. at 78). Chin also alleges that one time when they passed each other in the staircase, Gilson "stuck his hand out and touched [her] thigh." (Chin Dep. at 104). This was the only time Chin alleges that Gilson touched her. (Chin Dep. at 106).

Chin also claims that Gilson called her four to five times a day, placed cookies with a note in her desk, asked her out to lunch once, gave her his cell phone number, and blew kisses to her over the telephone. (Chin Dep. at 87, 92, 113-14). Chin did note that Gilson never asked her for sexual favors, never threatened her with job loss or reduction in pay, or any other adverse employment action. (Chin Dep. at 84). Chin reported Gilson's behavior to her direct supervisor, Cindy Majack, who offered to speak to Gilson about the problem. (Chin Dep. at 104-05). Chin voluntarily resigned from MIS, not because of Gilson's harassment, but because she feared losing her job after speaking with an EEOC investigator. (Chin Dep. at 115-16).

Discussion

A. Standard of Review

Summary judgment is appropriate only when "the pleadings . . . show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247 (1986). Once the moving party demonstrates the absence of a genuine

issue of material fact, the non-moving party must "come forward with 'specific facts showing that there is a genuine issue for trial.'" Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986) (quoting Fed. R. Civ. P. 56(e)). Accepting this evidence as truthful, the Court must view the record and all factual inferences therefrom in the light most favorable to the non-moving party and decide whether "'the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.'" Allen v. Tyson Foods, Inc., 121 F.3d 642, 646 (11th Cir. 1997) (quoting Anderson, 477 U.S. at 251-52).

B. Sexual Harassment

To establish a *prima facie* case of sexual harassment under Title VII and the Florida Civil Rights Act,[2] the plaintiff must show that: (1) she belongs to a protected group; (2) she has been subject to unwelcome sexual harassment, such as sexual advances, requests for sexual favors, and other conduct of a sexual nature; (3) the harassment was based on her sex; (4) the harassment was sufficiently severe or pervasive to alter the terms and conditions of employment and create a discriminatorily abusive working environment; and (5) there is a basis for holding the employer liable. Johnson v. Booker T. Washington Broadcasting Serv., Inc., 234 F.3d 501, 508 (11th Cir. 2000).

A plaintiff satisfies the "severe and pervasive" prong only if she shows that the harassment "is both subjectively and objectively severe and pervasive." Johnson, 234 F.3d at 509 (citing Mendoza v. Borden, Inc., 195 F.3d 1238, 1246 (11th Cir. 1999)). *Subjectively* severe and pervasive harassment exists where the complaining employee perceives the harassment as severe and pervasive. Johnson, 234 F.3d at 509. *Objectively* severe and pervasive harassment exists "if a reasonable person in the plaintiff's position would adjudge the harassment severe and pervasive." Id. In determining whether the harassment is *objectively* severe and pervasive, a court must consider: (1) the frequency of the conduct; (2) the severity of the conduct;

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[2] The Court analyzes Florida Civil Rights Act claims in the same manner as Title VII claims. Harper v. Blockbuster Entm't Corp., 139 F.3d 1385, 1387 (11th Cir. 1998).

(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. Id.

1. Osorio

Viewing all of the evidence in the light most favorable to Osorio, there is a genuine issue of fact for the jury as to whether Osorio is entitled to relief on her claim for sexual harassment against MIS. It is undisputed that Osorio belongs to a protected group. As to the questions of whether Osorio was subject to unwelcome sexual harassment that was based on her sex and was sufficiently severe or pervasive, Osorio has set forth sufficient evidence to create a genuine issue of fact for the jury. Specifically, Osorio has shown that from the spring of 1999 to the summer of 2000, Robinson constantly made sexual jokes and comments to female subordinates including Osorio, and that he constantly touched, rubbed, and caressed Osorio's arms, hands, shoulders, legs, thighs, hair, and buttocks. There is no doubt that Osorio subjectively perceived Robinson's actions as harassing. Additionally, in evaluating the four objective factors, Osorio has sufficiently demonstrated that: (1) Robinson's alleged conduct occurred frequently over the course of more than one year; (2) Robinson's conduct was severe to the extent that he constantly touched, rubbed, and caressed Osorio's various body parts and made sexually explicit comments; (3) Robinson's conduct was physically humiliating to Osorio; and (4) Robinson's conduct unreasonably interfered with Osorio's job performance. Thus, the Court will deny MIS's motion for summary judgment on Osorio's sexual harassment claim.[3]

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[3] As to the fifth element necessary to prevail on a sexual harassment claim (i.e. employer liability), MIS contends that it is entitled to summary judgment because it has established an affirmative defense to liability. Where a plaintiff has established a claim for sexual harassment, the defendant-employer is entitled to assert the *Faragher/Ellerth* affirmative defense. Faragher v. Citry of Boca Raton, 524 U.S. 775 (1998); Burlington Industries, Inc. v. Ellerth, 524 U.S. 742 (1998). To prevail on the *Faragher/Ellerth* affirmative defense, the defendant-employer must establish: "(1) that the employer exercised reasonable care to prevent and promptly correct harassing behavior; *and* (2) that the plaintiff employee unreasonably failed to take advantage of any preventative or corrective opportunities provided by the employer, or to otherwise avoid harm." Frederick v. Sprint/United Management Co., 246 F.3d 1305, 1313 (11th Cir. 2001) (quoting Faragher, 524 U.S. at 807; Ellerth, 524 U.S. at 765). Here, Osorio claims that notwithstanding her complaints to Robinson about his offensive comments and touching, and her complaints to vice-president Nowicki on at least three occasions, Robinson's behavior continued. Viewing the evidence in the light most favorable to Osorio, there is a genuine issue of fact for the jury as to whether Defendant MIS can prevail on its *Faragher/Ellerth* affirmative defense.

2. Gordon and Chin

Although there is a genuine issue for trial on Osorio's sexual harassment claim, viewing the evidence presented by Gordon and Chin in the light most favorable to them, the Court finds that they have not demonstrated that Gilson's actions were sufficiently severe or pervasive to create a question of fact for the jury. Although Gordon and Chin *subjectively* perceived Gilson's behavior as harassing, they have not set forth sufficient evidence showing that Gilson's acts were *objectively* severe or pervasive.

In Gupta v. Florida Bd. of Regents, the Eleventh Circuit cautioned that Title VII is "not a general civility code" and innocuous statements or conduct do not rise to the level of constituting sexual harassment. 212 F.3d 571, 583 (11th Cir. 2000). Specifically, the Eleventh Circuit noted that "[a] man can compliment a woman's looks. . .on one or several occasions, by telling her that she is looking 'very beautiful,' or words to that effect, without fear of being found guilty of sexual harassment for having done so." Id. at 584. The Eleventh Circuit also emphasized that Title VII does not mandate that "an employer be required under pain of legal sanctions to ensure that supervisors never look or stare at a subordinate whom they are supervising in such a way that she might think they are 'coming on' to her." Id. at 585. Additionally, Title VII does not "mandate that an employer be required to ensure that supervisors never touch employees on the hand or finger or ask them to lunch." Id.

Here, Gordon's allegations that Gilson frequently stared at her, made comments like "nice blouse" or "you look nice today," and called her once to tell her that she has a "nice smile," do not rise to the level of severe and pervasive sexual harassment. Gordon has not alleged that Gilson ever touched her in an offensive manner or that he ever made sexually explicit remarks to her. Thus, the Court will grant MIS's motion for summary judgment as to claims brought on behalf of Gordon.[4]

As to Chin, the Court likewise finds that she has not sufficiently demonstrated that Gilson's actions

[4] As there is no indication that the EEOC wishes to pursue a claim for retaliation as to Gordon, and Gordon testified that her abrupt decision to leave MIS in January of 2002 had nothing to do with Gilson, the Court will not entertain any retaliation claim related to Gordon.

were sufficiently severe or pervasive to create a question of fact for the jury on a sexual harassment claim. Chin's claims that Gilson would frequently stare at her body, that he once looked at her vagina area and said "wow," and that he once touched her thigh while passing her in the staircase, do not rise to the level of constituting objectively severe and pervasive sexual harassment. Additionally, Chin's claims that Gilson frequently called her, placed cookies on her desk, asked her out to lunch once, gave her his cell phone number, and blew kisses over the phone do not constitute severe and pervasive sexual harassment. Although Gilson's conduct may have been flirtatious, boorish, and extremely annoying, as the Eleventh Circuit cautioned, "to punish mere bothersome and uncomfortable conduct. . .would trivialize true instances of sexual harassment." Gupta, 212 F.3d at 586 (internal quotations omitted). Thus, the Court will grant MIS's motion for summary judgment as to claims brought on behalf of Chin.[5]

C. Retaliation

In order to establish a *prima facie* case of retaliation under Title VII, a plaintiff must show that: (1) she participated in an activity protected by Title VII; (2) she suffered an adverse employment action; and (3) there is a causal connection between the participation in the protected activity and the adverse employment decision. Gupta, 212 F.3d at 587. Once a plaintiff establishes a *prima facie* case of retaliation, the defendant has the burden of demonstrating legitimate reasons for the adverse employment action. See Hairston v. Gainesville Sun Publishing Co., 9 F.3d 913, 919 (11th Cir. 1993).

Here, it is undisputed that Osorio's complaints to Robinson and Nowicki up to February 2000 constitute protected activity. Although MIS denies that it discharged Osorio, MIS's primary argument against her retaliation claim is that Osorio has failed to demonstrate a causal connection between her complaints of harassment and her termination. Specifically, MIS contends that because six months passed

[5] Like Gordon, there is no indication that the EEOC wishes to pursue a claim for retaliation as to Chin. Additionally, Chin testified that she voluntarily resigned from MIS not because of Gilson's behavior, but because she feared losing her job after speaking with the EEOC. She did not elaborate on the basis for this conclusion. As Chin has failed to set forth sufficient allegations to state a claim for retaliation, the Court will not entertain any retaliation claim related to Chin.

between the last time Osorio complained of harassment and August of 2000 when her employment ended, she has not demonstrated a causal link.

The Eleventh Circuit has construed the "causal link" element of a retaliation claim "to require merely that the plaintiff establish that the protected activity and the adverse action were not wholly unrelated." Hairston, 9 F.3d at 920 (reversing district court and finding a genuine issue of fact on plaintiff's retaliation claim, even where ten (10) months elapsed between plaintiff's filing of EEOC complaint and being suspended). Viewing all of the evidence in the light most favorable to Osorio, the Court finds that there is a genuine issue of fact for the jury as to whether there is a causal connection between Osorio's complaints to Robinson and Nowicki, and her termination in August of 2000. Additionally, because MIS has not even attempted to set forth legitimate reasons for terminating Osorio, the Court will deny MIS's motion for summary judgment as to Osorio's retaliation claim.

Conclusion

Based upon the foregoing reasons, it is hereby

ORDERED that:

(1) Defendant MIS's Motion for Summary Judgment [DE-72] is GRANTED IN PART and DENIED IN PART;

(2) Defendant is entitled to summary judgment as to all claims brought by the EEOC on behalf of Gordon, Chin, Juda and any other female employees that the EEOC has declined to pursue relief for in this lawsuit;

(3) This action will proceed to trial solely on Plaintiff/Intervenor Osorio's claims for sexual harassment and retaliation; and

(4) In light of the fact that the sole remaining claims in this action are Osorio's claims for sexual harassment and retaliation, the Court encourages the parties to continue to explore the possibility of amicably

resolving this matter so as to minimize any further unnecessary litigation expenses.

DONE and ORDERED in Miami, Florida, this 25th day of July, 2003.

PATRICIA A. SEITZ
UNITED STATES DISTRICT JUDGE

cc:

Magistrate Judge Ted E. Bandstra

Michael J. Farrell, Esq.
Maria Teresa Rodriguez, Esq.
Rachel H. Shonfield, Esq.
Cheryl A. Cooper, Esq.
Counsel for Plaintiff EEOC
U.S. Equal Employment Opportunity Commission
One Biscayne Tower
2 S. Biscayne Blvd., Suite 2700
Miami, FL 33131
fax 305-536-4494

Lee Friedland, Esq.
Counsel for Plaintiff/Intervenor Osorio
Downs and Associates
255 University Drive
Coral Gables, FL 33134
fax 305-444-6773

Michael G. Whelan, Esq.
Stanley Kiszkiel, Esq.
Counsel for Defendant MIS
Whelan, DeMaio & Kiszkiel, P.A.
1401 Brickell Ave., Suite 500
Miami, FL 33131
fax 305-374-0456

Steven S. Kaufman, Esq.
Nancy M. Barnes, Esq.
Counsel for Defendant MIS
Thompson Hine
127 Public Square
Suite 3900 Key Center
Cleveland, OH 44114-1216
fax 216-566-5800