IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,	)	
Plaintiff,	)	
v.	)	**CIV-00-751-R**
EAGLE USA AIRFREIGHT, INC.,	)	
Defendant.	)	

O R D E R

Before the Court is Plaintiff Equal Employment Opportunity Commission's motion for partial summary judgment on any Faragher[1]/Ellerth[2] affirmative defense asserted by Defendant. Based upon what it contends are undisputed facts, the EEOC first asserts that the Faragher/Ellerth defense is inapplicable to this case because Plaintiff/Intervenor Jimmie Lewis suffered tangible employment action – suspension and termination. Even if the defense were applicable, the EEOC asserts that Defendant should be precluded from asserting it because it did not plead that affirmative defense. Even if Defendant is permitted to interpose that defense, however, Plaintiff EEOC argues that Defendant cannot prove both prongs of that defense by a preponderance of the evidence.

Plaintiff EEOC's motion for partial summary judgment on the Faragher/Ellerth defense is DENIED. The Faragher/Ellerth affirmative defense is not available when the

[1] Farragher v. City of Boca Raton, 524 U.S. 775, 118 S.Ct. 2275, 141 L.Ed.2d 662 (1998).

[2] Burlington Industries v. Ellerth, 524 U.S. 742, 118 S.Ct. 2257, 141 L.Ed.2d 633 (1998).

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supervisor's harassment culminates in a tangible employment action, such as discharge, demotion, or undesirable reassignment." Faragher, 118 S.Ct. at 2293; Burlington, 118 S.Ct. at 2270. Accord, Rubidoux v. Colorado Mental Health Institute, 173 F.3d 1291, 1295 (10th Cir. 1999); Harrison v. Eddy Potash, Inc., 158 F.3d 1371, 1377 (10th Cir. 1998). Where the supervisor takes no tangible employment action against the employee, the Faragher/Ellerth affirmative defense is available to an employer alleged to be vicariously liable for the supervisor's harassment. See Harrison v. Eddy Potash, Inc., 158 F.3d at 1377 ("Brown took no tangible employment action against Harrison, thereby entitling Eddy Potash to assert the affirmative defense outlined in Faragher and Burlington"); Wright-Simmons v. City of Oklahoma City, 155 F.3d 1264, 1271 (10th Cir. 1998) (under a theory of misuse of actual supervisory authority or "aided in the agency relation" standard, the employer will be liable for the supervisor's conduct when the supervisor takes a tangible employment action against a subordinate and the Faragher/Ellerth affirmative defense will not be available; remand necessary to determine, inter alia, whether alleged supervisor took tangible employment action against the plaintiff).[3] There is no evidence in the record before this Court that Bobby

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[3] See also Lissau v. Southern Food Service, Inc., 159 F.3d 177, 182 (4th Cir. 1998) ("If [plaintiff's termination did not result from a refusal to submit to [the harasser's] sexual harassment, then [the employer] may advance [the affirmative] defense."); Llampallas v. Mini-Circuits Lab, Inc., 163 F.3d 1236, 1249-51 & n. 23 (11th Cir. 1998) (holding that an employer may not be held strictly liable for supervisory harassment under Ellerth where the tangible employment action was not taken by the harasser, but rather by another manager who was not acting as the harasser's "cat's paw"), cert. denied, 528 U.S. 930, 120 S.Ct. 327, 145 L.Ed.2d 255 (1999); Corcoran v. Shoney's Colonial, Inc., 24 F. Supp.2d 601, 606 (W.D. Va. 1998) ("Though the Supreme Court does not specifically state that the tangible employment action required to disable the affirmative defense must be taken by the harassing supervisor, that is the most logical interpretation of the court's discussion of the matter."); Ponticelli v. Zurich American Insurance Group, 16 F. Supp.2d 414, 430 (S.D.N.Y. 1998) (". . . because there is no actionable quid pro quo harassment - in that the harassing conduct did not culminate in a tangible job detriment for failure to succumb to the sexual advances of a superior - the affirmative defense . . . is available to [defendant].")

Ledford, Plaintiff Jimmie Lewis' supervisor and the alleged harasser, suspended or terminated Lewis' employment or took any tangible employment action against him. It is undisputed that Cliff Bryant made the decision to terminate Plaintiff Lewis. Mr. Bryant testified that he based his decision to terminate Lewis on his refusal to do his job requirements. While there is evidence that Plaintiff complained to Steve Williams, Bobby Ledford's boss, Cliff Bryant and by letter to Sam Slater of Ledford's belittling and disrespectful conduct or manner, Lewis never expressly complained that Ledford was racially derogatory, discriminatory or hostile to him.[4] See Deposition of Jimmie Leroy Lewis at pp. 202-207 and Exhibits "D" to Plaintiff's Brief. Based upon the complaints made and the testimony before the Court, none of Defendant's employees understood that Jimmie Lewis was complaining about racially hostile or disparate treatment. Mr. Ledford did not have authority to hire or fire employees but he could make recommendations; however, Cliff Bryant, who actually terminated Plaintiff Lewis, testified that Bobby E. Ledford never recommended to Bryant that someone be fired. Deposition of Clifford Bryant, Jr. at p. 58. Ledford did inform Bryant that Lewis was refusing to clean the offices, warehouse and bathroom. Id. at p. 80. Given these facts, at a minimum a genuine issue of material fact exists as to whether the allegedly racially hostile work environment allegedly created by Bobby Ledford culminated or resulted in a tangible employment action – Plaintiff Lewis' suspension and/or termination. Also, to the extent Plaintiff Lewis is making a separate claim

[4]The single exception is that, according to Plaintiff Lewis' testimony, he told Cliff Bryant that he didn't like the idea that Bobby Ledford went around calling him [Lewis] "boy." Deposition of Jimmie Leroy Lewis at p. 203.

for a racially hostile work environment, disjoined from his suspension and termination claims, Defendant is entitled to assert the Faragher/Ellerth affirmative defense.

The Court has now granted leave to Defendant to assert that defense. On this record, genuine issues of material fact exist as to whether 1) Defendant exercised reasonable care to prevent and promptly correct any racially harassing behavior and 2) Plaintiff Lewis unreasonably failed to take advantage of any preventive or corrective opportunities or otherwise avoid harm. Faragher, 524 U.S. at __, 118 S.Ct. at 2284-85, 141 L.Ed.2d at 689; Ellerth, 524 U.S. at ___, 118 S.Ct. at 2269, 141 L.Ed.2d at 655. Notwithstanding Plaintiff's failure to show the non-existence of genuine material factual issues, Defendant has submitted evidence from which reasonable jurors could find that Defendant exercised the requisite care and that Plaintiff unreasonably failed to take advantage of preventive or corrective opportunities. Defendant had a written anti-harassment policy and complaint procedure in place during Lewis' employment and both Lewis and Ledford received copies of it and were aware of it. Deposition of Jimmie Lewis at p. 81; Deposition of Bobby Ledford at pp. 64-65. Material issues of fact exist as to whether reasonable persons would perceive the complaints made by Plaintiff Lewis to any of Defendant's employees as complaints of racial harassment or discrimination. Additionally, all of the facts on which Plaintiff EEOC relies to show that Defendant cannot establish the second prong of the Faragher/Ellerth affirmative defense are disputed by Defendant. Lewis did not ever expressly complain about racial harassment or discrimination. See Deposition of Jimmie Lewis at pp. 162-167 & 201-207; Deposition of Cliff Bryant at pp. 75-79 & 131; Deposition of Bobby Ledford at pp. 28-50. Ledford and

Bryant testified that they never received a complaint of racial harassment or discrimination from Jimmie Lewis until after he had been terminated for refusing to perform his job responsibilities. Ledford Deposition at p. 50; Bryant Deposition at p. 131. Plaintiff has produced letters addressed to Mr. Sam Slater, Regional Vice President, dated April 17, 1998, but Bryant, who made the decision to terminate Plaintiff Lewis, testified that he never received a copy of one of the letters and testified that he received a copy of the other letter only after terminating Plaintiff Lewis for refusing to perform his job responsibilities. Bryant Deposition at p. 120. Moreover, while the letters complain that Bobby Ledford treated Lewis "disrespectfully," there is no mention in the letters of racial slurs, race-based comments or other race-related harassing conduct. See Exhibit "D" to Plaintiff's Brief.

In accordance with the foregoing, Plaintiff Equal Employment Opportunity Commission's motion for partial summary judgment is DENIED.

IT IS SO ORDERED this 13th day of February, 2001.

DAVID L. RUSSELL
CHIEF UNITED STATES DISTRICT JUDGE