IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

Case No. 06-61483-CIV-MOORE

UNITED STATES EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Plaintiff,

and

DANIEL WOLANSKY,

Plaintiff/Intervenor,

v.

UNITED HEALTHCARE OF FLORIDA, INC.,

Defendant .
_____/

ORDER DENYING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT; DENYING PLAINTIFF AND PLAINTIFF/INTERVENOR'S MOTION FOR SUMMARY JUDGMENT

THIS CAUSE came before the Court upon Defendant's Motion for Summary Judgment (DE # 63) and Plaintiff and Plaintiff/Intervenor's Motion for Summary Judgment (DE # 73).

UPON CONSIDERATION of the motions and being otherwise fully advised in the premises, the Court enters the following Order.

I. Background

The United States Equal Employment Opportunity Commission (the "EEOC") filed this complaint against United Healthcare of Florida alleging "unlawful employment practices on the basis of sex and retaliation" by the Defendant. Compl. at 1. Defendant is a Florida corporation. Compl. at 2. The EEOC filed the Complaint as a result of a charge filed by Daniel Wolansky

("Wolansky," and together with the EEOC, "Plaintiffs"), a former employee of the Defendant. Compl. at 2-3.

Wolansky worked for Defendant as an account executive. Pl. Amended Statement of Facts ("Pl. Facts") at 1. Wolansky is not a homosexual. Id. at 2. William Condon ("Condon") was hired as Regional Vice President for the Defendant in February 2004. Pl. Mot. for Sum. J. at 4. Condon is an "openly homosexual male." Pl. Facts at 2. According to the Plaintiffs, Condon called Wolansky "hot" and "cute," made unwelcome sexual advances toward Wolansky, suggested Wolansky hug and kiss him, called male employees "sweetie" and "honey," attempted to caress male employees, including Wolansky, and told stories about his sexual activities and interests. Pl. Facts at 2-3. Wolansky complained to several people about this behavior. Id. at 3-4. Wolansky's complaints were never investigated. Id. at 3.

Plaintiffs claim that, as a result of Wolansky's complaints, Condon acted to deny Wolansky commissions and stock options, which Wolansky otherwise would have received. Pl. Facts at 5-6. Condon also "impaired Wolansky's ability to perform key job functions" by isolating him from key brokers and underwriters, closely monitoring and supervising him, taking other unwarranted disciplinary action, and ruining his reputation. Id. at 6-9. Plaintiffs claim Wolansky was constructively discharged in January 2005. Id. at 10.

Defendant denies that there was either harassment or retaliation and asserts the after-acquired evidence defense, among other arguments. Defendant claims that Wolansky used the Defendant's computer to download and view a variety of extreme pornographic images and video, and that "the undisputed evidence in this case establishes that Wolansky's misuse of business resources violated Company policy and that [Defendant] would have terminated [Wolansky's] employment immediately upon learning of such violations." Def. Resp. in Opp. to Pl. M. for Sum. J. (hereinafter "Def. Resp.") at 1.

Plaintiffs move for summary judgment on Defendant's after-acquired evidence defense, claiming that Defendant's computer use policy would not call for Wolansky to be fired for receiving or forwarding the files by e-mail, or having the pornographic files on his office computer. Pl. Mot. at 2. Defendant moves for summary judgment on the grounds that Condon's alleged conduct was not directed at Wolansky because of Wolansky's sex, Wolansky could not have subjectively been offended, Defendant took reasonable steps to prevent harassment and Wolansky failed to take advantage of Defendant's policies, the alleged retaliatory acts were not materially adverse actions, there was no causal link between Wolansky's protected actions and those acts, and, finally, that the disciplinary actions taken were for other reasons, which Plaintiffs cannot show are pretextual. Id. at 2.

II. Standard of Review

The applicable standard for reviewing a summary judgment motion is unambiguously stated in Rule 56(c) of the Federal Rules of Civil Procedure:

> The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.

Summary judgment may be entered only where there is no genuine issue of material fact. Twiss v. Kury, 25 F.3d 1551, 1554 (11th Cir. 1994). The moving party has the burden of meeting this exacting standard. Adickes v. S.H. Kress & Co., 398 U.S. 144, 157 (1970). An issue of fact is "material" if it is a legal element of the claim under the applicable substantive law which might affect the outcome of the case. Allen v. Tyson Foods, Inc., 121 F.3d 642, 646 (11th Cir. 1997). It is "genuine" if the record taken as a whole could lead a rational trier of fact to find for the nonmoving party. Id.

In applying this standard, the district court must view the evidence and all factual inferences therefrom in the light most favorable to the party opposing the motion. Id. However, the nonmoving party:

> may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial.

Fed. R. Civ. P. 56(e). "The mere existence of a scintilla of evidence in support of the [nonmovant's] position will be insufficient; there must be evidence on which the jury could reasonably find for the [nonmovant]." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252 (1986).

In other words, the party opposing summary judgment "must do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita Elec. Indus. Co. v. Zenith Radio, 475 U.S. 574, 586 (1986). In determining whether this evidentiary threshold has been met, the trial court "must view the evidence presented through the prism of the substantive evidentiary burden" applicable to the particular cause of action before it. Anderson, 477 U.S. at 254. Summary judgment may be granted if the nonmovant fails to adduce evidence which, when viewed in a light most favorable to him, would support a jury finding in his favor. Id. at 254-55. Additionally, the nonmoving party must "make a showing sufficient 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." Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986). The failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial and requires the court to grant the motion for summary judgment. Id.

III. Discussion

A) Whether the Conduct at Issue was Motivated by Wolansky's Sex is an Issue of Fact for the Jury

Defendant claims that Condon's behavior was not actionable because, for one, "Plaintiffs have no evidence that Condon treated men and women differently in the workplace." Def. Mem. in Support of Mot. for Sum. J. (hereinafter "Def. Mem.) at 2. Plaintiffs bring evidence to show that while Condon behaved poorly toward both men and women in the workplace, his behavior with Wolansky had sexual overtones not present in his interactions with women, and that Wolansky's complaints about Condon were distinct from the complaints raised by women. Id. at 3. Accordingly, it is an issue of fact for the jury whether Condon's conduct was motivated by Wolansky's gender.

B) Whether the Work Environment was Subjectively Hostile is an Issue of Fact

Defendant claims that because Wolansky received and sent the pornographic files via e-mail, also called co-workers "honey" and "sweetie," and did not immediately complain about Condon's conduct, "no reasonably [sic] jury could believe that Wolansky was subjectively offended by Condon's alleged conduct." Def. Mem. at 7. Plaintiffs dispute that Wolansky ever viewed those pornographic images, and claim that Wolansky did make it clear to Defendant and to Condon that Condon's conduct was unwelcome. Pl. Resp. at 6. As the parties dispute the facts, summary judgment is inappropriate.

C) Whether the Work Environment was Objectively Hostile is an Issue of Fact

Defendant claims that "the undisputed fact that the alleged harassment . . . did not interfere with Wolansky's ability to perform his job undermines any claim that the conduct was sufficiently severe or pervasive to alter the terms and conditions of his employment." Def. Mem. at 8.

Plaintiffs state, however, that "[a]s a result of Condon's actions Wolansky was unable to sleep, unable to concentrate, and was subjected to stress that was not associated with simply working." Pl. Resp. at 4. The touching, staring, sexual advances, and Condon's descriptions of sexual encounters, which are alleged by Plaintiffs to have occurred during a period of four months, could be found to be objectively hostile. See Johnson v. Booker T. Washington Broadcasting Service, Inc., 234 F.3d 501, 509 (11th Cir. 2000).

D) Defendant's Affirmative Defense that Wolansky Unreasonably Failed to Use Defendant's Established and Reasonable Harassment Policy is Available, but an Issue of Fact.

Defendant claims it is exempt from liability because it "has policies against harassment, discrimination, and retaliation, with multiple avenues for employees to make complaints, and that Wolansky was well-aware of these policies and procedures." Def. Mem. at 10. When there has been no "tangible employment action," a defendant may raise this affirmative defense by showing

> (a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) 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. Boca Raton, 524 U.S. 775, 807 (1998). Here, Plaintiffs claim Condon initiated tangible employment actions against Wolansky including the denial of commissions and disciplinary actions. Pl. Resp. at 7. However, a case cited by Plaintiffs, Pennsylvania State Police v. Suders, undercuts Plaintiffs' argument. Pl. Resp. at 7, citing 542 U.S. 129 (2004). In Pennsylvania State Police, the Supreme Court held that the Ellerth/Faragher defense invoked by the Defendant may be available in a case where a plaintiff alleges hostile work environment and constructive discharge claims. See 542 U.S. at 152.

Defendant claims Wolansky and another employee complained about Condon, and an

investigation took place. Def. Mem. at 10. As a result of the investigation, Condon was counseled and asked to retake the sexual harassment training. Id. at 10. Defendant claims that the harassment ended as a result of its actions. Id. Plaintiffs dispute that Wolansky's complaints, which were distinct from the complaints of other employees, were ever investigated. Pl. Resp. at 8. The nature and adequacy of the action taken by the Defendant in response to Wolansky's complaints is an issue of fact which prohibits granting summary judgment.

E) The Merit of Plaintiffs' Retaliation Claims is a Question of Fact

Defendant claims that Plaintiffs cannot establish a *prima facie* case of retaliation or that Defendant's reasons for making the challenged decisions are pretextual.

1) Plaintiffs' *Prima Facie* Case for Retaliation

Defendant does not dispute that Wolansky eventually complained about Condon's behavior or that such complaints were protected activity under the statute. Plaintiffs must also show Wolansky suffered employment actions which "would have been materially adverse to a reasonable employee" and which "could well dissuade a reasonable worker from making or supporting a charge of discrimination," and that there was a causal link between the protected activity and the employment action. See Burlington Northern and Santa Fe Ry. Co. v. White, 126 S. Ct. 2405, 2409 (2006); Morgan v. City of Jasper, 959 F.2d 1542, 1547 (11th Cir. 1992). Defendant claims that "Condon's August 24, 2004 e-mail to Kelly, the reassignment of brokers, the two warnings in late 2004, the initial denial (but subsequent approval) of Wolansky's request for vacation, and asking Wolansky to come in the office earlier and more regularly [do not] rise to the level of materially adverse actions." Def. Mem. at 13. However, Plaintiffs' claims are based on more than those allegations. Pl. Resp. at 10. In addition to the conduct described by

Defendant, Plaintiffs allege Wolansky was denied commissions, forced to report directly to his harasser, and constructively discharged. Id.

Defendant also claims that Plaintiffs cannot show the required causal link between the protected activity and the employment actions because "Condon testified that he was not aware that Wolansky had made sexual harassment complaints about him until the lawsuit was filed." Def. Mem. at 13. Plaintiffs reference deposition testimony from several witnesses who worked with Condon and Wolansky which support Plaintiffs' contention that Wolansky's complaints were general knowledge, Condon may have been told directly that Wolansky had complained, and that it would have been easy for Condon to either discover or deduce that Wolansky had made formal complaints. Pl. Facts at 9. Plaintiffs also point to the temporal proximity between the complaints and the employment actions. Pl. Resp. at 16. Based on this evidence, a reasonable jury could find that Condon knew about Wolansky's complaints. Accordingly, summary judgment cannot be granted on this issue.

2) Pretext issue

Defendant claims the negative employment actions alleged by Plaintiffs were taken for legitimate, nondiscriminatory reasons. Plaintiffs counter with evidence that the reasons were pretextual. Pl. Resp. at 17. Plaintiffs point to internal guidelines on commissions, and argue that under Defendant's policy, Wolansky should have received commissions, and yet he was unfairly denied them. Id. As to Wolansky's disciplinary reports, Plaintiffs provides facts going to show that Wolansky had received positive reports and feedback until he complained about Condon and that Condon began a campaign to "dig up anything on Wolansky that could be used to discipline

him." Pl. Resp. at 18-19. Plaintiffs also assert facts supporting their argument that Wolansky was not disciplined according to Defendant's policies, and that the policies, including Defendant's stock option policy, were not uniformly followed. Id. Plaintiffs' claims raise issues of material fact as to whether Defendant's reasons for taking disciplinary actions were pretextual, and summary judgment will not be granted on this issue.

F) Plaintiffs' Constructive Discharge Claim

As this Court has denied summary judgment on Plaintiffs' other claims for the reasons discussed above, Defendant's argument that summary judgment on Plaintiffs' "hostile worn [sic] environment and retaliation claims" necessitates summary judgment on Plaintiffs' constructive discharge claim is moot. Def. Mem. at 17. Defendant also misstates the law on the requirements for proving constructive discharge. Id. The proper standard requires Plaintiffs to "demonstrate that [Wolansky's] working conditions were so intolerable that a reasonable person in their position would be compelled to resign." Steele v. Offshore Shipbuilding, Inc., 867 F.2d 1311, 1317 (11th Cir. 1989). To survive this motion for summary judgment, Plaintiffs must "produce substantial evidence that conditions were intolerable." Atkins v. Fulton County, 420 F.3d 1293, 1302 (11th Cir. 2005).

Defendant cites a variety of cases in support of its position that Plaintiffs' allegations do not rise to the level of constructive discharge. Def. Mem. at 19-20. The only binding precedent cited by Defendant is Fitz v. Pugmire Lincoln-Mercury, in which Fitz claimed constructive discharge based on "a withdrawn reprimand; statements of supervisors that Fitz concedes were not supposed to be revealed to him; cartoons that were admittedly not condoned by Pugmire; a job

offer; and a baseless claim of unequal pay" 348 F.3d 974, 978 (11th Cir. 2003). Plaintiffs' allegations are closer to the allegations in a case described in Fitz, Morgan v. Ford. See Fitz, 348 F.3d at 979. In Morgan, the "plaintiff was subjected to a host of vulgar comments by her immediate supervisor. [Morgan] went higher up the ladder and reported the comments to the prison administrators, but no corrective measures were taken. Indeed, the prison administrators looked the other way when the supervisor took retaliatory action." Fitz, 348 F.3d at 979, citing Morgan, 6 F.3d 750 at 753 (11th Cir. 1993). Viewing the facts in the light most favorable to the non-moving Plaintiffs, this Court, like the Morgan court, holds a material issue of fact remains to be determined by the jury as to Plaintiffs claim for constructive discharge.

G) The After-Acquired Evidence Defense

Defendant claims that after Wolansky's departure, Defendant discovered a variety of pornographic still image and video files on the computer used by Wolansky and evidence that Wolansky received those files on his company e-mail account and used that account to forward the files to others, as well as to his personal account. Def. Statement of Material Facts at 3-9. Defendant further asserts that "the extremely offensive nature of the materials Wolansky received and sent to others . . . , the sheer quantity of pornography, and the fact that Wolansky did not take any steps from discouraging his friends from sending him extremely offensive pornographic materials to his work e-mail account, would have warranted the immediate termination of Wolansky's employment." Id. at 9. Plaintiffs dispute this assertion, claiming that according to Defendant's human resource director, Harriet McCrickert, Defendant has no penalty for receiving e-mails with pornographic contents. Pl. Mot. at 2. Plaintiffs further contend that an employee with pornography on his computer would first be "verbally counseled" and later "written up," if

there were multiple subsequent violations, and that the former regional CEO had no recollection of anyone being fired for a similar offense. Id. at 2-3. The parties also dispute whether Wolansky actually viewed the images and videos from the office. Pl. Reply at 1. These are issues of material fact for the jury.

IV. Conclusion

Based on the foregoing, it is

ORDERED AND ADJUDGED that Defendant's Motion for Summary Judgment (DE # 63) and Plaintiff and Plaintiff/Intervenor's Motion for Summary Judgment (DE # 73) are both DENIED.

DONE AND ORDERED in Chambers at Miami, Florida, this 31st day of August, 2007.

K. MICHAEL MOORE
UNITED STATES DISTRICT JUDGE

cc: All Counsel of Record