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United States District Court, N.D. Illinois.

UNITED STATES EQUAL EMPLOYMENT COMMISSION, Plaintiff,
James FERGUSON, Plaintiff–Intervenor
v.
FOSTER WHEELER CONSTRUCTORS, INC., Foster Wheeler Illinois, Inc., Foster Wheeler USA, Inc., Foster Wheeler Corporation, and Pipe Fitters Association, Local Union 597 Defendant.

No. 98 C 1601. | July 6, 1999.

Opinion

MEMORANDUM OPINION AND ORDER

COAR, J.

***1** Before this court is Defendant Pipe Fitters Association, Local Union 597's ("Union") motion for summary judgment. For the following reasons, the Union's motion is denied.

I. Facts

The Equal Employment Opportunity Commission ("EEOC") and Plaintiff–Intervenor James M. Ferguson ("Ferguson") allege that there was a racially hostile work environment at the Robbins Resource Recovery Facility in Robbins, Illinois ("Robbins project") and that the Union was somehow responsible because it supposedly "permitt[ed]" the portable toilets or port-a-johns at the Robbins Project "to remain covered with racially offensive graffiti" and did not "take effective action to remove such graffiti and prevent its recurrence." (Dft's 12(M) Stmt. ¶ 3.)

Ferguson is an African–American who resides in Markham, Illinois. (Dft's 12(M) Stmt. ¶ 4.) The Union represents pipefitters and welders in Northeastern Illinois and Northwestern Indiana. (Dft's 12(M) Stmt. ¶ 5.) At the present time, the Union has approximately 7,000 members. (Dft's 12(M) Stmt. ¶ 5.) Defendant Foster Wheeler Constructors, Inc. ("FW Const.") constructed the mechanical portion of the Robbins Project. (Dft's 12(M) Stmt. ¶ 6.)

Members of the Union worked for FW Const. during the construction of the Robbins Project. (Dft's 12(M) Stmt. ¶ 8.) Steve Kokosa ("Kokosa") was the site construction manager for FW Const. at the Robbins Project. (Dft's 12(M) Stmt. ¶ 9.) Les Jordan was the project manager for the so-called "direct hires," the people who actually built the plant, in the mechanical part of the project. (Dft's 12(M) Stmt. ¶ 10.) Jordan reported to Frank Dejackma. (Ptf's 12(N) Stmt. ¶ 10; Jordan Dep. at 17.)[1] For most of the relevant period, Richard "Red" LeBarre ("LeBarre") was the field superintendent for direct hires and reported to Jordan, who called him his "No. 2 man." (Dft's 12(M) Stmt. ¶ 11.) Dennis Hahney ("Hahney") was FW Const.'s piping superintendent at the Robbins Project. (Dft's 12(M) Stmt. ¶ 12.) The Union members working for FW Const. at the Robbins Project, including the foremen and general foreman for piping, reported to Hahney. (Dft's 12(M) Stmt. ¶ 12.) Hahney was and is a member of the Union. (Dft's 12(M) Stmt. ¶ 13.) Steve Toth ("Toth") was the Union's business agent responsible for the geographical area in which the Robbins Project was located. (Dft's 12(M) Stmt. ¶ 14.)

The parties dispute issues regarding Toth's actions in collecting resumes for the position of piping or pipe fitting superintendent at the Robbins Project. The Union states that, before the pipefitting work began at the Robbins Project, FW Const. asked Toth to submit resumes for the piping superintendent position. (Dft's 12(M) Stmt. ¶ 15; Roach Dep. at 48.) The EEOC disputes it, pointing to Hahney's testimony that the "common practice" at the Union is to single out individuals with strong past performance and request that those individuals submit resumes. (Ptf's 12(N) Stmt. ¶ 3; Hahney Dep. at 10–11.)

However, while Hahney *did* testify that the common practice was for persons to be singled out, Hahney *did not* testify as to whether the common practice was actually followed in this case. (Hahney Dep. at 10.)[2] By contrast, Toth testified that he put up a notice about the position in the union hall and asked interested persons to submit resumes, which he then submitted to FW Const. (Dft's 12(M) Resp. ¶ 3; Toth Dep. at 45–46, 50–51.) The EEOC also does not proffer any evidence to challenge the claim that FW Const. asked Toth to submit resumes. The parties also dispute whether Toth spoke to Jordan about hiring Hahney, with the EEOC stating that Toth specifically recommended Hahney for the position, (Ptf's 12(N) Stmt. ¶ 3; Jordan Dep. at 66–67), and the Union stating that Toth did not speak to Hahney about any candidate. (Dft's 12(M) Resp. ¶ 3; Toth Dep. at 53.)

***2** Toth collected at least four resumes from people in the Union and submitted them to Jim Roach ("Roach"), the FW Const. labor relations manager. (Dft's 12(M) Stmt. ¶ 16.) Roach passed the four resumes on to Jordan. (Dft's 12(M) Stmt. ¶ 17.) Jordan decided to hire Hahney without interviewing or meeting him. (Ptf's 12(N) Stmt. ¶ 3.) Jordan and Roach testified that it was Jordan's decision to hire Hahney and that he was under no obligation to accept Hahney for the position. (Dft's 12(M) Stmt. ¶ 18.)[3]

The parties dispute the role that Hahney played at the Robbins Project. The EEOC claims that the Union has a practice of having the lead pipefitter (here, Hahney) on a project act as the union steward on behalf of the pipefitters, thus causing the lead pipefitter to wear "two hats," one as the lead pipefitter (here, piping superintendent) and one as the union steward. (Ptf's 12(N) Stmt. ¶¶ 1–2; Roach Dep. at 15, 37–38; Jordan Dep. at 69–70.) Hahney, however, testified that the Union does not actually have stewards but, instead, expects the lead pipefitter to address the problems of the union pipefitters working for him. (Dft's 12(M) Resp. ¶¶ 1–2; Hahney Dep. at 99. *See also* Klicker Dep. at 17–18 (testifying that the Union does not actually have stewards.) The EEOC claims that Hahney equally represented management and the Union at the Robbins Project. (Ptf's 12(N) Stmt. ¶ 2; Hahney Dep. at 99, 122.)[4] However, Ross P. Klicker ("Klicker"), the Financial Secretary/Treasurer for the Union, states in his affidavit that the Union did not have a representative at the Robbins Project, that some members have a misconception that the piping superintendents at projects represent the union, but that "[t]he only people who represent and can bind the Union are its officers and its business agents. The piping foremen and other supervisors have no more authority to represent the Union than any other member at a job site ." (Dft's 12(M) Resp. ¶ 2; Klicker Dep. ¶¶ 2, 6–7.)

Hahney's responsibilities over the pipefitters included assignment of pipefitting work, hiring, promotions, demotions, and layoffs, as well as discipline of pipefitters, other than termination for cause. (Ptf's 12(N) Stmt. ¶ 5; Dft's 12(M) Resp. ¶ 5.) Hahney testified that his responsibilities as the Robbins Project piping superintendent "were to hire the pipe fitters as needed upon request from the company, to lay out the work that has to be complete and just, I guess, make sure everything runs smooth between the company and the pipe fitters." (Dft's 12(M) Stmt. ¶ 19.) Hahney selected the area general foreman for the pipefitters, Warren Mrowczynski ("Mrowczynski"), and the other piping foremen at the Robbins Project. (Dft's 12(M) Stmt. ¶ 20.) In doing so, Hahney did not consult with the Union or with anyone else at FW Const.; rather, the promotion decisions were his own. (Dft's 12(M) Stmt. ¶ 20.) In hiring journeymen pipefitters for the Robbins Project, Hahney was required to use the Union's hiring hall system. (Dft's 12(M) Stmt. ¶ 21.) In general, Hahney used the Union's hiring hall system, but did make some "emergency hires" when he was unable to contact the Union. (Dft's 12(M) Stmt. ¶ 21; Ptf's 12(N) Stmt. ¶ 21; Hahney Dep. at 21; Dft's 12(M) Stmt. ¶ 25.)[5] Under the Union's hiring hall system, Union members who are out of work and wish to get job referrals through the Out of Work List must register at one of the two Union hiring halls. (Dft's 12(M) Stmt. ¶ 22.) The Out of Work list is a computerized list, kept in the order in which members register; the earlier a member registers, the higher he or she is on the list. (Dft's 12(M) Stmt. ¶ 23.) When a contractor needs to hire a pipefitter or welder, it will fax a request to the Union hiring hall indicating the number of persons and the qualifications needed. (Dft's 12(M) Stmt. ¶ 23.) The Union business agent who is dispatching at that time will refer to the Out of Work list on the computer and will call the members highest on the list who claim to have the requisite qualifications, in the order in which they appear on the list. (Dft's 12(M) Stmt. ¶ 23.) Contractors generally must obtain referrals through the Out of Work list, but there are a few exceptions. (Dft's 12(M) Stmt. ¶ 24.) For example, if the contractor needs to hire someone on a Saturday, Sunday, or other time when the Union hiring halls are closed, or otherwise needs to fill a job in an emergency situation, it is permitted to make so-called 'emergency hires' without using the list. (Dft's 12(M) Stmt. ¶ 24.) The contractor is required to promptly inform the Union of any emergency hires. (Dft's 12(M) Stmt. ¶ 24.) On at least one occasion, Hahney made use of the energency hire procedure. (Dft's 12(M) Stmt. ¶ 25.)[6]

***3** The Industrial Maintenance Agreement ("IMA") governed pipefitting work done at the Robbins Project. (Dft's 12(M) Stmt. ¶ 26.) Under the IMA, "[t]he Employer shall have the sole and exclusive responsibility for hiring" and "shall have the sole and exclusive right of accepting or rejecting applicants for work." (Dft's 12(M) Stmt. ¶ 27.) The Hiring Hall Amendment and Supplement to the Area Agreement ("Amendment")(likewise state that "[t]he Employer shall have the sole and exclusive right of accepting or rejecting applicants for work." (Dft's 12(M) Stmt. ¶ 28.) Roach, who received the Union hiring hall procedures "as an employee of Foster Wheeler" understood that the provisions of the IMA and Amendment were "how the process worked" at the Robbins Project. (Dft's 12(M) Stmt. ¶ 29.) FW Const. rejected certain referrals made by the Union because they failed FW Const.'s weld test. (Dft's 12(M) Stmt. ¶ 30.) The Union hiring hall system described above went into effect in April 1994, as part of a settlement and consent decree entered by Judge Alesia in *Daniels v. Pipefitter's Assoc., Local Union 597,* 84 C 5224 (N.D.Ill.). (Dft's 12(M) Stmt. ¶ 31.) On April 22, 1996, while the Robbins Project was in progress, Judge Alesia vacated the consent decree; nevertheless, the Union continued to operate under the hiring hall system. (Dft's 12(M) Stmt. ¶ 32.) There is no evidence that Hahney or anyone else at FW Const. ever hired any pipefitters for the Robbins Project except under the procedures of the hiring hall system, including the emergency hire procedure. (Dft's 12(M) Stmt. ¶ 33; Ptf's (N) Stmt. ¶¶ 21, 33.) When FW Const. needed to hire workers from other trade unions, such as the ironworkers or carpenters, it had to go through the hiring hall for those trades. (Dft's 12(M) Stmt. ¶ 34.) While FW Const. could just call the other unions when it needed workers, it had to fill out and fax a form to the Union (Local 597), because of the requirements of the hiring hall system. (Dft's 12(M) Stmt. ¶ 35.)

The standards for weld testing at the Robbins Project were provided by FW Const. (Dft's 12(M) Stmt. ¶ 36.) Larry Ayres ("Ayres"), who was responsible for inspecting welds under a Quality Assurance–Quality Control ("QA/QC") program at the Robbins Project, reported directly to Jordan. (Dft's 12(M) Stmt. ¶ 37.) FW Const. gave out a set of work rules to all of its employees when they were hired and made the decision about scheduling overtime. (Dft's 12(M) Stmt. ¶ 38.) FW Const. retained sole responsibility for terminating workers for cause. (Dft's 12(M) Stmt. ¶ 39.) Jordan testified that "the final decision to terminate anybody was only mine," and LeBarre testified that "no one ha[d] the right to fire anyone on the project except Foster Wheeler supervision, period ." (Dft's 12(M) Stmt. ¶ 39.) Hahney had no authority to fire anyone for cause, not even the pipefitters working under him. (Dft's 12(M) Stmt. ¶ 40.) Hahney was responsible for deciding which pipefitters would be laid off when FW Const. told him that a given number of people had to be let go because of a reduction in force. (Dft's 12(M) Stmt. ¶ 41.) In deciding which pipefitters would be laid off, Hahney never consulted with the Union or with anyone else from FW Const. (Dft's 12(M) ¶ 42.)

***4** FW Const. paid for the port-a-johns at the Robbins Project. (Dft's 12(M) Stmt. ¶ 43.) Hahney, as piping superintendent, did not have the authority to have the prot-a-johns at the Robbins Project replaced on his own. (Dft's 12(M) Stmt. ¶ 44.)

When asked at his deposition whether he "controlled the work site," Jordan testified, "That's correct." (Dft's 12(M) Stmt. ¶ 45.) During the course of the Robbins Project, a dispute arose between Jordan and the business agent for the millwrights union. (Dft's 12(M) Stmt. ¶ 46.) The millwrights claimed jurisdiction over the installation of certain equipment at the Robbins Project, out Jordan rejected their claim because the millwright business agent had agreed at the beginning of the project that this work should be assigned to the pipefitters. (Dft's 12(M) Stmt. ¶ 46.) Nevertheless, the millwrights "quit working" or at least slowed the job down in protest. (Dft's 12(M) Stmt. ¶ 46.) FW Const. tried to convince the millwright business agent to keep working while they tried to resolve the issue, but to no avail. (Dft's 12(M) Stmt. ¶ 46.) Jordan "laid every one of [the millwrights] off with one whack, cut them loose, [the] only people [he] ever did that to." (Dft's 12(M) Stmt. ¶ 46.) At his deposition, Jordan testified that "I had a conflict with [the millwright] business agent. And he lost ." (Dft's 12(M) Stmt. ¶ 47.) At his deposition, Jordan testified that he would have gotten rid of the pipefitters working at the Robbins Project in a similar situation. (Dft's 12(M) Stmt. ¶ 48.)

When members of the Union have complaints of any kind at a jobsite, there are a number of ways they might be dealt with: members are told they can try to resolve any problems by going to their foreman, and "if they are not satisfied, they go to the general foreman. If they are not satisfied from the general formen, they go to the superintendent. If they are not satisfied with the superintendent's answer, they contact" a business agent. (Dft's 12(M) Stmt. ¶ 49.)[7] Jordan, the FW Const. project superintendent, testified that he preferred to have matters resolved on the site, without the involvement of the business agent, and stated that "any good project superintendent that is fair can work a problem out without having to go to the hall or the business agent ." (Dft's 12(M) Stmt. ¶ 50.) Members of the Union, if they so desire, can go directly to a business agent with any problem that they have. (Dft's 12(M) Stmt. ¶ 51.) The "only way [the Union] would know about" a complaint is if it is brought to a business agent's attention, either as an initial matter, or after the member has attempted to resolve the matter with his supervisor at the site. (Dft's 12(M) Stmt. ¶ 52.)[8] If it is necessary, a complaint brought by a member may be discussed before the Union's executive board at their Tuesday evening meeting. (Dft's 12(M) Stmt. ¶ 53.) These various avenues for addressing complaints are communicated to Union members orally; the same avenues are used whether a given complaint involves safety issues or complaints of racial or sexual harassment. (Dft's 12(M) Stmt. ¶ 54.) The Union does not provide racial or sexual harassment training for any of its members, including those who act as lead pipefitters on any projects, and the Union does not have a written procedure for handling complaints about discrimination at a work site. (Ptf's 12(N) Stmt. ¶ 10.)

***5** In April 1996, Ferguson had a dispute with one of the foremen at the Robbins Project; he wrote in his notebook that "I'm debating whether to take it to the union hall," which he knew he could do when he started at the Robbins Project. (Dft's 12(M) Stmt. ¶ 55.) However, Hahney told Ferguson that he would try to resolve the matter, and Ferguson decided not to pursue the issue with the Union." (Dft's 12(M) Stmt. ¶ 55.)

One of the issues in this motion is when the Union received notice of the graffiti at issue in this case. Hahney saw racial graffiti in the port-a-johns at the Robbins site on, or soon after, the day he started at the site, approximately October 1995; the graffiti was in nearly all of the port-a-johns. (Ptf's 12(N) Stmt. ¶ 6.) Hahney told no action regarding the racial graffiti until late in the project when Ferguson complained to him about graffiti specifically referring to Ferguson as a "nigger"; Hahney is certain that other, less specific racial graffiti was also present in the port-a-johns at that time. (Ptf's 12(N) Stmt. ¶ 7.) The racial graffiti that mentioned Ferguson by name began to appear soon after he complained to Hahney about being moved to the field from his job in the material trailer. (Ptf's 12(N) Stmt. ¶ 7.) Hahney was also aware that a noose was hanging at the Robbins Project; it was not until two months later when Ferguson complained about the noose that Hahney says that he took the noose down. (Ptf's 12(N) Stmt. ¶ 8.) Toth visited the Robbins Project approximately 20 times during the 14 months it was being constructed. (Dft's 12(M) Stmt. ¶ 57.) Toth often walked through the site unaccompanied, would meet the pipefitters, and would ask, "how are things going, do you have a problem, let me know." (Dft's 12(M) Stmt. ¶ 58.) Toth testified that he never saw any racial graffiti at the Robbins Project. (Dft's 12(M) Stmt. ¶ 59.) The EEOC argues that this statement is non-credible, on the grounds that Toth used the port-a-johns during his 20 visits to the Robbins Project and that racial graffiti was in nearly all of the port-a-johns. (Ptf's 12(N) Resp. ¶ 59.)

In July 1996, Ferguson requested a meeting with Toth because he believed that a summer apprentice was replacing him in his job in the materials trailer. (Dft's 12(M) Stmt. ¶ 60.) Toth went out to the Robbins Project the very next day and met with Ferguson and Hahney at a trailer at the site. (Dft's 12(M) Stmt. ¶ 61.) Toth, Ferguson, and Hahney first discussed Ferguson's complaint about the summer apprentice. (Dft's 12(M) Stmt. ¶ 62.) Hahney explained that LeBarre, of FW Const., had determined that, because of the amount of piping left on the Robbins Project, no one was needed full time in the materials trailer and that the summer apprentice was only doing general clean up work. (Dft's 12(M) Stmt. ¶ 62.) LeBarre testified at his deposition that he was the one who made the decision that no one was needed full time in the material trailer and that the summer apprentice was doing clean up work. (Dft's 12(M) Stmt. ¶ 63.) Toth told Ferguson that he could not argue with the decision not to have anyone full time in the material trailer, but, because the summer apprentice was not a Union member, he also told Ferguson that "if you have an objection to this young man picking up material and bringing it back to the material trailers," he would tell Hahney to let the summer apprentice go. (Dft's 12(M) Stmt. ¶ 64.) Ferguson told Toth and Hahney that he "didn't want to hurt the kid," and Ferguson's contemporaneous notes for the day state that "I haven't made up my min[d] just what I want to do yet." (Dft's 12(M) Stmt. ¶ 65.) A few days after the meeting with Toth, Hahney put Ferguson back in the materials trailer, and Ferguson stayed there until he was laid off in a reduction in force. (Dft's 12(M) Stmt. ¶ 69.) Although Ferguson alleged that he was discharged from the Robbins Project in retaliation for his previous complaints about offensive graffiti, he testified at his deposition that he saw no evidence that he was laid off for discriminatory reasons or in retaliation for his prior complaints. (Dft's 12(M) Stmt. ¶ 79.)

***6** According to Toth, after he spoke with Ferguson and Hahney about the summer apprentice, Ferguson mentioned racial graffiti; Toth stated that he told Hahney that if such graffiti existed, Hahney should "instruct the laborer supervisor to get rid of it" and noted at his deposition that "there was no room on the site for anything like that." (Dft's 12(M) Stmt. ¶ 66.) Toth stated that Ferguson's alleged complaint about racial graffiti at this meeting was the only time that anyone complained to Toth about any form of racial harassment or about a racially hostile environment at the Robbins Project. (Dft's 12(M) Stmt. ¶ 67.) Ferguson, however, testified that he did not remember complaining to Toth about racial graffiti. (Dft's 12(M) Stmt. ¶ 68.)

At some point, Ferguson complained to Hahney about the noose that had been hung on the site. (Dft's 12(M) Stmt. ¶ 69.) Hahney testified that he removed the noose, but Ferguson testified that he removed the noose himself. (Dft's 12(M) Stmt. ¶ 79; Ptf's 12(N) Stmt. ¶ 70.) Brian Speers made the noose; he testified that it was directed at Ayres, the white welding QA/QC inspector, who was very demanding. (Dft's 12(M) Stmt. ¶ 71.)[9] When Ferguson, after originally being told that he would no longer be working in the materials trailer, complained to Hahney about certain racially offensive graffiti directed specifically at Ferguson and his wife, Hahney contacted the lead man for the laborers on the Robbins Project and had someone paint over the graffiti. (Dft's 12(M) Stmt. ¶ 72.) Both Ferguson and the EEOC's Michael Thomas ("Thomas") stated that they did not know whether Hahney had taken steps to have the racial graffiti removed after Ferguson complained about it. (Dft's 12(M) Stmt. ¶ 73.) At a weekly safety meeting held in late July or early August 1996 and through the foremen working for him, Hahney instructed the pipefitters that there was to be no writing on the port-a-johns or anywhere else. (Dft's 12(M) Stmt. ¶ 74.) Hahney talked to his supervisor, LeBarre, about the racial graffiti at the site. (Dft's 12(M) Stmt. ¶ 75.) When Jordan decided that something had to be done about the graffiti, he told Hahney and the general foremen for the other trades that the graffiti had to stop, and Hahney "passed [the word] down his chain of command" through the foremen to the pipefitters working in the field. (Dft's 12(M) Stmt. ¶ 76.) Jordan and LeBarre both testified that they had worked on construction projects for many years and knew of no way to get rid of graffiti. (Dft's 12(M) Stmt. ¶ 77.) Jordan testified that the graffiti he saw on nonunion jobs was worse than the graffiti he saw on union jobs. (Dft's 12(M) Stmt. ¶ 78.)

Ferguson's complaints about racial graffiti and the noose were close in time. (Ptf's 12(N) Stmt. ¶ 9.) At that time, Hahney "was losing [his] patience with the whole thing." (Hahney Dep. at 75.) While he believed that Ferguson's complaints were reasonable, Hahney believed that Ferguson would have complained earlier if it really bothered him. (Ptf's 12(N) Stmt. ¶ 9.) Ferguson's complaints came after Ferguson was told that he was losing his position in the materials trailer. (Hahney Dep. at 74–75.)

***7** Neither Thomas nor Ferguson could identify any evidence that the Union instigated, supported, ratified, or encouraged racially offensive graffiti in the port-a-johns at the Robbins Project. (Dft's 12(M) Stmt. ¶ 81.)

II. Summary judgment standard

Summary judgment is proper "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 a judgment as a matter of law." Fed.R.Civ.P. 56(c); *Cox v. Acme Health Serv., Inc.,* 55 F.3d 1304, 1308 (7th Cir.1995). A genuine issue of material fact exists for trial when a reasonable jury, viewing the record and all reasonable inferences drawn from it in a light most favorable to the non-movant, could return a verdict for the non-movant. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248, 106 S.Ct. 2505, 2510 (1986); *Hedberg v. Indiana Bell Tel. Co.,* 47 F.3d 928, 931 (7th Cir.1995). The movant has the burden of establishing that there is no genuine issue of material fact. *Celotex Corp. v. Catrett,* 477 U.S. 317, 323, 106 S.Ct. 2548, 2553 (1986); *Hedberg,* 47 F.3d at 931. If the movant meets this burden, the non-movant must set forth specific facts that demonstrate the existence of a genuine issue for trial. Rule 56(e); *Celotex,* 477 U.S. at 324, 106 S.Ct. at 2553. Rule 56(c) mandates the entry of summary judgment against a party "who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and in which that party will bear the burden of proof at trial." *Celotex,* 477 U.S. at 322, 106 S.Ct. at 2552–53. A scintilla of evidence in support of the non-movant's position is not sufficient to oppose successfully a summary judgment motion; "there must be evidence on which the jury could reasonably find for the [non-movant]." *Anderson,* 477 U.S. at 250, 106 S.Ct. at 2511.

III. Analysis

A. Standard for union liability

In its opinion on the Union's motion to dismiss, this court held that "a labor union is subject to liability for a hostile work environment at an employer's worksite if the union contributes to the alleged discriminatory action or intentionally acquiesces in an employer's discriminatory policies and procedures." *EEOC v. Foster Wheeler,* 98 C 1601, Mem. Op. at 4 (Nov. 30, 1998). The Union cites to the same cases—which do not address union liability under Title VII—that it cited in its motion to dismiss to argue that this court should instead adopt the standard that a union is liable only if it "instigated, supported, ratified or encouraged" the discriminatory conduct. *See Carbon Fuel Co. v. United Mine Workers of America,* 444 U.S. 212, 218, 100 S.Ct. 410, 414 (1979) (affirming dismissal of Labor Management Relations Act ("LMRA") claim against union where there was no evidence that the union "instigated, supported, ratified or encouraged" a work stoppage; specifically citing to agency principles embodied in LMRA §§ 301(b) and (e) as premise for the standard); *Reed v. International Union of UAW,* 945 F.2d 198, 203 (7th Cir.1991) (requiring showing of intentional misconduct for breach of fair representation claim under the LMRA); *Cole v. Appalachian Power Co .,* 1995 WL 370400,*2 (S.D.W.V.1995) (considering standard of liability for unions under LMRA § 301; "A union may be held responsible for the illegal acts of its members only if it directed, induced, authorized or ratified such acts."). This court again declines the Union's invitation to apply the LMRA standard to claims against unions under Title VII and reaffirms its prior decision that the proper standard to apply to the Union is the "contributes or intentionally acquiesces" standard. *See Goodman v. Lukens Steel Co.,* 482 U.S. 656, 665–67, 107 S.Ct. 2617, 2623–24 (1987) (finding union liability where union intentionally refused to file grievances regarding racial discrimination due to union's belief that the grievances were "unworthy of pursuit").

B. Application

***8** The EEOC seeks to find the Union liable for the alleged hostile working environment at the Robbins Facility site under the theory that the Union had joint control of the working conditions for pipefitters. The key to the EEOC's theory is the role that Hahney played as the lead pipefitter at the Robbins Facility project. It is undisputed that Hahney was aware of the racial graffiti on the site starting in October 1995 but did not take any action until late July 1996. According to the EEOC, Hahney acted as both the piping superintendent for FW Const. and as the union steward for the Union. If this is correct, then the Union, through Hahney, controlled the hiring, promotion, demotion, and layoffs of pipefitters (though not dismissal for cause) and also controlled the assignment of work to pipefitters at the Robbins Facility project. The Union argues that Hahney was not the union steward, that Hahney acted solely for FW Const., and, therefore, that the Union had no control over the Robbins Facility project.

Regardless of the role that Hahney played at the Robbins Facility site, the court agrees with the Union that the EEOC's theory is extremely novel. The EEOC attempts to analogize its theory of "joint control" to the theory of "joint employers." The joint employer theory "looks to the control two separate companies exert over the same employees." *National Labor Relations Board v. Western Temporary Services, Inc.,* 821 F.2d 1258, 1266 (7th Cir.1987). Neither the EEOC nor this court could locate any case law applying the joint employer theory (or the mutated form proffered by the EEOC as the "joint control" theory) to a labor union. Indeed, in the two cases cited by the EEOC, the two "joint employers" were (1) an employer and a temporary employment agency that supplied employees to the employer, *id.,* and (2) an employer and its subcontractor, *G. Heileman Brewing Co., Inc. v. National Labor Relations Board,* 879 F.2d 1526 (7th Cir.1989). The EEOC's argument is an unprecedented expansion of union liability which the court cannot accept as a matter of law. As previously noted, the standard for union liability under Title VII requires a showing that the union contributed to or intentionally acquiesced in the discriminatory behavior. A showing that the union had a great deal of control over the workplace is neither necessary nor sufficient to meet that standard. *Cf. Parkins v. Civil Constructors of Illinois, Inc.,* 163 F.3d 1027, ––––, 1998 WL 909885,*5 (7th Cir.1998) (addressing employer liability for harassment by employee who is a co-worker (i.e., not a supervisor) of the harassee; "[E]mployers are liable for a co-employees harassment only when they have been negligent either in discovering or remedying the harassment.").

Having rejected the overlaying "joint control" theory in the EEOC's argument, the court now turns to the core question at issue in this motion: namely, did the union contribute to or intentionally acquiesce in the hostile work environment at the Robbins Facility site? The EEOC offers neither evidence nor argument in favor of a claim that the Union contributed to the hostile work environment at the Robbins Facility site. Instead, the EEOC argues that the Union intentionally acquiesced in the hostile work environment by refusing to act despite having clear knowledge of the existence of racial graffiti in the portable toilets on the Robbins Facility site. At this point, the disputes regarding the role of Hahney are critical.[10] The court finds that there is a dispute as to whether Hahney was the agent of the Union with the responsibility for responding to complaints about working conditions at the Robbins Facility project and as to whether Hahney intentionally acquiesced in the hostile work environment at the Robbins Facility site. The facts indicate that certain people, including Hahney, believed that he was the union steward and, indeed, believed that the Union had a policy of having its lead pipefitter (here, Hahney), act as the union steward.[11]

***9** The court now turns to the issue of whether Hahney's alleged failure to respond to the racial graffiti, if imputed to the Union, is sufficient to cause the Union to be liable under Title VII. To illustrate the problem, assume that the Union was aware of a hostile environment in an area of a plant in which union members work. Further, assume that no worker has complained about the hostile environment. The legal question is whether the Union has a duty under Title VII to report the situation to the employer and/or to remedy the problem. In *Goodman,* the seminal case regarding union liability under Title VII, the Supreme Court deliberately bypassed the question of whether unions "had an affirmative duty to combat employer discrimination in the workplace" because the lowers courts had found that the unions at issue in that case had deliberately chosen not to process grievances regarding racial harassment while continuing to process other grievances. 482 U.S. at 666–67, 107 S.Ct. at 2624. The District Court and the Court of Appeals held that the "Unions had an affirmative duty to combat employer discrimination."[12] The Supreme Court found it unnecessary to reach the issue based upon its conclusion that the refusal to process racial harassment grievances, in light of the unions' practice of processing other grievances, amounted to discrimination "in the way [the unions] represented the workers," and, thus, violated § 701(c)(1) of Title VII, 42 U.S.C. § 2000e–2(c)(1).[13] *Id.* at 667, 107 S.Ct. at 2624.

It may be that a union representative in Hahney's position regularly reports (or otherwise seeks to remedy) workplace conditions and/or activities that adversely impact members of the union. If that is so, Hahney's refusal to seek to remedy the offensive graffiti may have been "discrimination" under § 701(c)(1). On the other hand, if the facts establish that, in the absence of a grievance or complaint, the Union does not, in other contexts, assume the initiative to report or remedy other conditions, neither the statute nor case law provides a basis for concluding that the Union violates Title VII. The parties in this case, however, have not presented facts as to the normal manner that the union and, specifically, Hahney dealt with problems in the workplace in the absence of a grievance. If Hahney is found to be a union official and if Hahney ignored the racial graffiti while acting on other problems in the workplace without waiting for workers to complain, then the Union would be liable under the *Goodman* case. In the absence of evidence and argument on this issue, summary judgment is inappropriate.

IV. Conclusion

For the foregoing reasons, the Union's motion for summary judgment is denied.

Footnotes

1 The Union asserts that Jordan reported to Kokosa, (Dft's 12(M) Stmt. ¶ 10), but the cited materials do not support that claim. (*See* Jordan Dep. at 16; LeBarre Dep. at 16–17.)

2 The relevant portion of Hahney's Dep. states:

Q. Was the position generally advertised at the pipe fitters—your union hall or wherever?
A. It's not common practice to do that.
Q. What is the common practice?
...
A. It's usually based on past performance, whether you are the lead pipe fitter at one place or the superintendent; and the hall recognizes the fact that you can, in fact, do the work. And those individuals are usually singled out and asked to submit resumes.

(Hahney Dep. at 10–11.) Hahney was not asked whether the common practice was followed with respect to *this* position.

3 The EEOC cites to its 12(N) Stmt. ¶ 3 to dispute this claim, that statement does not dispute this claim. It suggests that Jordan may have *relied* on Toth's suggestion of Hahney, but does not state or imply that Jordan was obligated to accept Toth's suggestion.

4 While Hahney agreed with the statement that he was "equally representing management and the union," the context was one where Hahney was denying any favoritism in his actions:

Q. [W]ould you agreement this statement that at the Foster Wheeler project, you, as the pipe fitter superintendent, wore two hats, one for management and one for the union?
A. No, I don't think that that's termed that way, no.
Q. What don't you agree with?
A. I don't agree with the fact that they think I would be—favored Foster Wheeler over the union or the union over Foster Wheeler.
Q. So you think this implies that you would favor one over the other?
A. Right.
Q. Whereas, it is fair to say then how you would view it is that you were equal, you were equally representing management and the union?
A. That's what I tried to do.

(Hahney Dep. at 122.)

5 As Dft's 12(M) Stmt. ¶¶ 24–25 indicate, it is not clear that the use of the emergency hire procedure violates the Union's hiring hall system.

6 The EEOC responds that "Hahney used the emergency hire procedure on at least four occasions." (Ptf's 12(N) Resp. ¶ 25.) This response, however, does not dispute the claim that Hahney used the emergency hire procedure "[o]n at least one occasion," which is still correct.

7 The EEOC disputes this statement on the grounds that the sources (Toth and Klicker) did not work at the Robbins Project and that pipefitters with complaints at the Robbins Project would go to Hahney. (Ptf's 12(N) Resp. ¶ 49.) However, the statement itself is a general one: Toth and Klicker are testifying to the general means that a disgruntled employee could use. Also, Hahney *was* the piping superintendent; thus, evidence that disgruntled employees complained to Hahney does not dispute the claim that a disgruntled employee could go to the superintendent.

8 The EEOC disputes this statement on the ground that pipefitters with complaints at the Robbins Project would go to Hahney. (Ptf's 12(N) Resp. ¶ 52.) This argument assumes that notice to Hahney is the equivalent to notice to the Union, i.e., to its business agent or leadership. Indeed, Plaintiff's 12(N) Statement specifically states that Hahney would call the business agent "*if* Hahney couldn't handle" a complaint. (Ptf's 12(N) Stmt. ¶ 4 (emphasis added).)

9 The EEOC challenges (without citation or argument) Speers' testimony as noncredible. This fails to dispute this factual statement pursuant to the Local Rules and, accordingly, Dft's 12(M) Stmt. ¶ 71 is deemed admitted.

10 The EEOC argues that Toth must have been aware of the graffiti at the Robbins Facility because he used the portable toilets, most of which were marked with the graffiti. "Most" is an important word: if some (even if only a few) of the portable toilets were not marked, it is possible that Toth both used the toilets and never saw the graffiti. The court could not deny summary judgment based on this argument. However, because a jury could find the Union liable based on the actions of Hahney, the court need not rule on the issue of Toth's knowledge.

11 One of the cases cited by the Union for the standards for union liability states that "proof of actual authorization is not necessary for union liability to attach; however, it must appear that the union members were acting within the scope of their express or apparent authority." *Cole,* 1995 WL 370400 at *2. While, as the court previously noted, *Cole* was an LMRA case, recent Supreme Court case law makes clear that express or apparent authority can be sufficient to ground liability for some entities under Title VII. *See Burlington Indus. v. Ellerth,* – U.S. at –, 118 S.Ct. 2257, 2267–68 (analyzing supervisor liability under Rest. (2d) Agency § 219(2)) However, the EEOC does not address whether apparent authority is sufficient to find a union liable under Title VII and, therefore, the court will not rule on that issue.

12 This court will assume for purposes of this discussion that a racially hostile work environment would constitute "employer discrimination" even where the employer was (allegedly) unaware of the condition.

13 Section 701(c)(1) states that it is unlawful for a union to "exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin." 42 U.S.C. § 2000e–2(c)(1).