1999 WL 528192
Only the Westlaw citation is currently available.
United States District Court, N.D. Illinois, Eastern Division.

UNITED STATES EQUAL EMPLOYMENT COMMISSION, Plaintiff,
James FERGUSON, Plaintiff–Intervenor
v.
FOSTER WHEELER CONSTRUCTORS, INC., et al Defendants.

No. 98 C 1601. | July 12, 1999.

Opinion

MEMORANDUM OPINION AND ORDER

COAR, J.

***1** Before this court is Defendants Foster Wheeler Construction's[1] and Pipe Fitters' Association, Local Union 597's ("Union")[2] motion for summary judgment as to the EEOC's claims for injunctive relief. The EEOC has brought this class action against Defendant [s] pursuant to Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e *et seq.* and Title I of the Civil Rights Act of 1991, 42 U.S.C. § 1981(a). For the following reasons, summary judgment is denied.

I. Facts

The EEOC brings this action on behalf of a class of African–Americans and a class of females once employed as construction and office workers at the Robbins Resource Recovery Facility construction site ("Robbins Facility") in Robbins, Illinois. (Dft's 12(M) Stmt. ¶ 3.) Foster Wheeler Constructors, Inc. ("FW Const.") and the Pipe Fitters Association, Local Union 597 ("Union"), were named as Defendants in the EEOC's original Complaint. (Dft's 12(M) Stmt. ¶ 4.) FW Const. is a Delaware corporation based in New Jersey; it constructs large-scale manufacturing and other industrial facilities throughout the world and was responsible for constructing the Robbins Facility. (Dft's 12(M) Stmt. ¶ 4.) The EEOC alleges that during construction of the Robbins Facility, from March 1995 through October 1996, the Foster Wheeler Defendants engaged in unlawful employment practices based on race and sex at the Robbins Facility's construction site in violation of Title VII and § 1981(a). (Dft's 12(M) Stmt. ¶ 5.) The EEOC's Complaint does not contain allegations concerning any construction site other than Robbins. (Dft's 12(M) Stmt. ¶ 6.) The EEOC seeks to recover broad compensatory, punitive, permanent injunctive, and affirmative equitable relief. (Dft's 12(M) Stmt. ¶ 6.)

In April 1995, FW Const. began construction of the Robbins Facility, which is a recycling plant that recovers recyclable material and produces energy from solid waste. (Dft's 12(M) Stmt. ¶ 7.) At each of its construction sites, including the Robbins Facility, FW Const. typically hires locally the hourly construction and office workers needed for the construction project. (Dft's 12(M) Stmt. ¶ 8.) This practice of hiring workers specifically for each construction site is common in the construction industry. (Dft's 12(M) Stmt. ¶ 8.) As each construction project nears completion, FW Const. lays off its non-supervisory construction and office workers. (Dft's 12(M) Stmt. ¶ 8.) As the Robbins Facility neared completion, the construction and office workers were laid off the project as the need for their services diminished. (Dft's 12(M) Stmt. ¶ 9.) One of the named charging parties, James Ferguson ("Ferguson"), a pipefitter, was laid off toward the end of the Robbins Facility project, in August 1996, while the other named charging party, Theodore Moore, ("Moore"), a clerical worker, was laid off at the end of the project, in October 1996. (Dft's 12(M) Stmt. ¶ 9.)[3] In October 1996, construction work on the Robbins Facility was finished; by November 1996, all clean-up work at the site was complete. (Dft's 12(M) Stmt. ¶ 10.) All employees of FW Const. were off the Robbins Facility site by late November or early December 1996. (Dft's 12(M) Stmt. ¶ 10.) There has been no construction work by FW Const. in Robbins, Illinois since the end of construction in November 1996. (Dft's 12(M) Stmt. ¶ 10.) FW Const. has not conducted any business in Robbins since the completion of the Robbins Facility.

(Dft's 12(M) Stmt. ¶ 10.)

***2** In October 1996, immediately prior to the completion of the Robbins Facility, the EEOC brought a preliminary injunction action against FW Const. to remove racially derogatory graffiti allegedly located in portable toilets at the Robbins Facility site. (Dft's 12(M) Stmt. ¶ 11.) Aside from allegations relating to racial graffiti, the EEOC did not claim that FW Const. was engaging in any discriminatory practice either at the Robbins Facility site or at any other construction site in the United States. (Dft's 12(M) Stmt. ¶ 12.) To resolve the EEOC's preliminary injunction action, FW Const. entered into an agreed order to inspect and clean the portable toilets at the Robbins Facility site, to have the portable toilets patrolled by security personnel, and to send a notice to all employees onsite explaining that "[i]t is the policy of [FW Const.] that racial graffiti of any nature will not be tolerated by [FW Const.] at the Robbins facility construction jobsite." (Dft's 12(M) Stmt. ¶ 12; Dft's Ex. A (Roder Decl.) at Ex. 3 (Agreed Order) ¶ 1.) FW Const. complied with the Court's agreed order, including the portion of the agreed order stating that racial graffiti would not be tolerated at the Robbins Facility site. (Dft's 12(M) Stmt. ¶ 12 .)

Although the Robbins construction project was completed over two years ago, when the last of FW Const.'s workers were laid off, the EEOC now seeks permanent injunctive relief and affirmative equitable relief against FW Const. (Dft's 12(M) Stmt. ¶ 13.)

The EEOC has offered a number of additional facts about the Robbins Facility project and about the way that Foster Wheeler does business. At the Robbins Facility project, Steve Kokosa ("Kokosa") was the Construction Manager, Les Jordan ("Jordan") was the Project Superintendent, Troy Roder ("Roder") was the Construction Superintendent, Richard LeBarre ("LeBarre") was a field superintendent, and Michael Woods ("Woods") was the Administrative Manager. (Ptf's 12(N) Stmt. ¶ 1.) The Foster Wheeler affiliates utilize a system where they send construction managers and supervisors from one project to another throughout the United States. (Ptf's 12(N) Stmt. ¶ 2.) Dave Semerad ("Semerad") was the Manager of Labor Relations for FW Const.; his "direct" employer was Foster Wheeler Corp., but he held the same position, Manager of Labor Relations, for several other Foster Wheeler entities, including FW Const. (Ptf's 12(N) Stmt. ¶ 3.) Semerad was responsible for planning, organizing, and directing the labor relations activities of FW Const. and his activities included responding to labor relations issues at various project sites and supporting the activities of project managers and on-site labor relations managers at job sites. (Ptf's 12(N) Stmt. ¶ 4.) Semerad reported to James Schlesser ("Schlesser"), the FW Corp. Vice President for Human Resources. (Ptf's 12(N) Stmt. ¶ 5.) Schlesser directed Semerad, who advised and directed the Robbins on-site managers regarding the racial harassment complaints. (Ptf's 12(N) Stmt. ¶ 6.) Semerad also negotiated with the EEOC regarding the terms of the agreed order. (Ptf's 12(N) Stmt. ¶ 6.) At the Robbins Facility project, James Roach ("Roach") was the Site Labor Relations Manager, and Leonard Wallace was the Site Human Resources Manager. (Ptf's 12(N) Stmt. ¶ 9.) Roach and Wallace reported to Semerad. (Ptf's 12(N) Stmt. ¶ 10.) Neither Roach, Wallace, nor Defendants' locally hired on-site supervisors, foremen, and employees received training regarding racial or sexual harassment. (Ptf's 12(N) Stmt. ¶ 11–15.) The EEOC alleges that Ferguson complained to Wallace about a swastika, a noose, and the alleged presence of the KKK at the Robbins Facility site, that Wallace did not investigate the claims regarding the swastika or the KKK because no one else had complained, and that Wallace looked once for the noose, didn't see it, and then took no further action. (Ptf's 12(N) Stmt. ¶ 16.)

***3** The Code of Ethics that governed the workers at the Robbins Project was created for FW Corp. and then adopted by the Foster Wheeler subsidiaries, including FW Const. (Ptf's 12(N) Stmt. ¶ 17.) As part of its policy and procedure for handling complaints about harassment and other work place issues, the Code of Ethics referred FW Const. employees to a 24–hour hotline operated by FW Corp. (Ptf's 12(N) Stmt. ¶ 17.) The Code of Ethics requires FW Const. managers and supervisors to "seek the advice of the [FW Corp .] Compliance Officer" when the receive reports of violations of the Code of Ethics. (Ptf's 12(N) Stmt. ¶ 17.) The EEOC alleges that the Foster Wheeler defendants have not changed their policies or procedures regarding racial or sexual harassment since the Robbins Facility project. (Ptf's 12(N) Stmt. ¶ 18.) FW Const. disputes this claim and states that the Foster Wheeler entities have instituted extensive training programs concerning racial and sexual harassment for supervisory and management personnel, including programs for managers and supervisors on the anti-discrimination laws, including training on racial and sexual harassment, a general supervision training course for home office managers, and an on-site education and training program on racial and sexual harassment for permanent field managers and locally hired supervisors. (Dft's 12(M) Resp. ¶ 18; Schlesser Decl. ¶¶ 4–5). Schlesser avers that the institution of these training programs was influenced by the Robbins situation. (Dft's 12(M) Resp. ¶ 18; Schlesser Decl. ¶ 7.)

Wallace remained at the Robbins Facility after it became operational and continued his work for FW Illinois. (Ptf's 12(N) Stmt. ¶ 21.) The EEOC alleges that racial graffiti continued to appear in the port-a-johns after the Robbins Facility began operation. (Ptf's 12(N) Stmt. ¶ 18.) FW Const. disputes this claim on the grounds that the cited source, Wallace, identified a single incident of graffiti, which occurred in January 1997, after FW Const. had ceased working on the Robbins Facility project and after dismissed Defendant FW Illinois had begun operating the Robbins Facility. (Ptf's 12(N) Stmt. ¶ 20.) After

Wallace and Ruben Compean ("Compean"), the Safety Engineer for the project, discovered the graffiti (which was racial and sexual in nature), Wallace did not personally act to remove or have removed the graffiti but, instead, reported this graffiti to the Plant Manager and to Semerad. (Ptf's 12(N) Stmt. ¶ 22.) The graffiti was not removed until January 23, 1997. (Ptf's 12(N) Stmt. ¶ 23.) On January 23, 1997, Wallace wrote a memo questioning whether management understood the importance of eliminating racial and sexual graffiti in the workplace. (Ptf's 12(N) Stmt. ¶ 24.)[4]

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, in viewing the record and all reasonable inferences drawn from it in a light most favorable to the non-movant, a reasonable jury 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

***4** At issue in this motion is the EEOC's demand for injunctive relief against Defendants FW Const. and the Union should survive summary judgment. Defendants argue that an injunction is inappropriate because a violation is unlikely to recur. In considering this claim, the court's touchstone is the Supreme Court's decision in *United States v. W.T. Grant Co.:*

> Along with its power to hear the case, the court's power to grant injunctive relief survives discontinuance of the illegal conduct. The purpose of an injunction is to prevent future violations and, of course, it can be utilized even without a showing of past wrongs. But the moving party must satisfy the court that relief is needed. The necessary determination is that there exists some cognizable danger of recurrent violation, something more than the mere possibility which serves to keep the case alive.

345 U.S. 629, 633, 73 S.Ct. 894, 897–98 (1953) (citations omitted). Applying the principles of *W.T. Grant* to discrimination cases, the Seventh Circuit has stated that courts should consider "the bona fide intention of the party found guilty of discrimination to presently comply with the law, the effective discontinuance of the discriminatory practices in question, and in some cases, the character of past violations," such that "affirmative injunctive relief for past discriminatory practices is appropriate where the court believes that 'the vestiges of prior discrimination linger and remain to be eliminated." ' *United States v. Di Mucci,* 879 F.2d 1488, 1498 (7th Cir.1989) (quoting *United States v. Hunter,* 459 F.2d 205, 220 n. 21 (4th Cir.), *cert. denied,* 409 U.S. 934, 93 S.Ct. 235 (1972)). The EEOC, acting as a plaintiff in a discrimination case, may seek an injunction in order to protect a class of employees generally by informing an employer of its duty to follow federal law and by subjecting the employer to the risk of contempt sanctions for failure to follow that law. *Equal Employment Opportunity Commission v. Harris Chernin, Inc.,* 10 F.3d 1286, 1292 (7th Cir.1993). The court may order injunctive relief once the court finds "that the defendant intentionally engaged in an unlawful employment practice" if "the discriminatory conduct could possibly persist in the future." *Equal Employment Opportunity Commission v. Ilona of Hungary, Inc.,* 108 F.3d 1569, 1578–79 (7th Cir.1997). Indeed, the EEOC need not prove the existence of a "pattern or practice" of discrimination in order to attain injunctive relief; a showing of discrimination against a particular defendant, when coupled with the risk of future discrimination, is sufficient to justify imposition of a permanent injunction. *Id.* at 1578. In particular, injunctive relief is particularly appropriate where the "individuals who were found to have discriminated remain the defendant's primary decision-makers." *Id.* at 1579.

Here, FW Const. argues injunctive relief is inappropriate because there is no likelihood of recurrence. First, FW Const. states that it has put in place an anti-discrimination policy and program, including training of relevant persons. *See United States Equal Employment Opportunity Commission v. Gurnee Inn Corp.,* 914 F .2d 815, 817 (7th Cir.1990) (upholding injunctive relief where defendant "had neither an anti-discrimination policy nor a grievance procedure" that employees could use to complaint about harassment; also noting that the decision maker who ignored the harassment remained as defendant's management). Second, FW Const. has complied with the agreed order in this case.[5] However, while FW Const. avers that it is following its anti-discrimination policy and has learned a valuable lesson from the Robbins experience, there is no evidence to show that FW Const. has changed the composition of its decisionmakers, including Semerad and Schlesser. The evidence regarding the January 1997 graffiti tends to show that FW Const.'s and Semerad's allegedly lackadaisical response to racial and sexual graffiti may recur. The court, therefore, cannot find that injunctive relief would necessarily be inappropriate at this stage.

IV. Conclusion

***5** For the foregoing reasons, summary judgment is denied.

Footnotes

1 This motion was originally joined by three other Foster Wheeler entities, (Foster Wheeler Corporation, Foster Wheeler Illinois, and Foster Wheeler USA), who were dismissed by a separate order of this court and, accordingly, will not be addressed in this opinion.

2 While the Union did not participate in the originally filed motion, it has adopted FW Const's motion. The court notes, however, that the lack of specific facts regarding the Union in this motion renders it impossible for the court to determine whether injunctive relief would be inappropriate as to the Union. Accordingly, the Union's motion for summary judgment as to injunctive relief is denied.

3 The EEOC admits these facts but denies "any implication that James Ferguson's 'lay-off' was not racially motivated." (Ptf's 12(N) Resp. ¶ 9.) The question of whether Ferguson's lay-off was racially motivated is the subject of a separate motion for partial summary judgment to be addressed in a separate opinion.

4 The EEOC states that a suit was filed in Massachusetts against Foster Wheeler Environmental Corp. alleging a racially hostile work environment, including racial graffiti on toilet walls, a noose, and verbal racial epithets. (Ptf's 12(N) Stmt. ¶ 25.) The EEOC does not allege that the Massachusetts lawsuit involves any parties to *this* suit or that an injunction in this case would affect Foster Wheeler Environmental.

5 FW Const. argues that has no presence on the Robbins site or in Illinois. The requested permanent injunction, however, is not limited to the Robbins site or to the state of Illinois.