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United States District Court,
D. Oregon.

EQUAL EMPLOYMENT OPPORTUNITY
COMMISSION, Plaintiff,
Laurie DAMEZ, Donna Emerson, Wendy Baker,
and Christine Thompson, Plaintiff Intervenors,
v.
UNITED STATES BAKERY, INC. Defendants.

No. CV 03-64-HA. | Aug. 9, 2004.

Attorneys and Law Firms

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Opinion

OPINION AND ORDER

HAGGERTY, Chief J.

*1 Plaintiff Equal Employment Opportunity Commission (EEOC) filed a complaint in January 2003, alleging violations of Title VII of the Civil Rights Act of 1964 and Title I of the Civil Rights Act of 1991 for sex and race discrimination. In May 2003, Laurie DaMetz (DaMetz), Donna Emerson (Emerson), Wendy Baker (Baker), and Christine Thompson (Thompson) (collectively plaintiff intervenors) formally intervened in this action. On April 21, 2004, defendant United States Bakery filed a Motion for Partial Summary Judgment (Doc. # 97), plaintiff intervenors filed a Motion for Partial Summary Judgment (Doc. # 101), and plaintiff filed a Motion for Partial Summary Judgment (Doc. # 106). The court heard oral arguments on August 2, 2004.

FACTUAL BACKGROUND

Plaintiff intervenors allege that they were sexually harassed by Jeff Fahlman (Fahlman) and Tom Caudle (Caudle), both foremen at defendant United States

Bakery. Baker and Thompson allege that Fahlman harassed them based on their gender. Thompson alleges that Fahlman harassed her based on her race. DaMetz alleges that defendant unlawfully retaliated against her for opposing unlawful employment practices.

In 1990, Fahlman began working for defendant as a checker. A year or two later, defendant promoted Fahlman to a foreman position in the checking department and in 1998, defendant promoted Fahlman to the head foreman position. With these promotions, Fahlman received an increased salary and more responsibility. As a foreman and later as a head foreman, Fahlman had the responsibility of managing up to thirty employees, including organizing work schedules, evaluating employee work performance, counseling, and disciplining employees. Fahlman had the ability to recommend to management that certain employees be hired, fired, or disciplined. DaMetz and Emerson never worked in the same department as Fahlman. Baker and Thompson worked in the checking department with Fahlman, although they did not work the same shifts as Fahlman.

Defendant implemented a sexual harassment policy in 1993. The policy did not provide a complaint mechanism, provided no assurance that violators would be punished, or included safeguards against retaliation. The policy was in effect for five years until it was revised in 1998 to include an anti-retaliation provision and a complaint procedure. Employees were required to sign a pledge acknowledging that they read, understood, and supported the policy.

Defendant maintains that it provided annual sexual harassment and diversity training to managers, supervisors, and foremen, including Fahlman. However, aside from the sexual harassment policy that each employee was required to sign, non-supervisory employees were not provided training on sexual harassment or discrimination.

The following is a summary of the individual plaintiff intervenors' allegations:

Laurie DaMetz:

DaMetz began working for defendant as an administrative assistant in 1995. She worked in the production office from approximately September 1998 until November 2003. In November 2003, she was transferred to the HR department and reported to Diana Rak (Rak), an HR manager. DaMetz never worked in the checking department with Fahlman. DaMetz alleges, and Fahlman denies, that Fahlman regularly made comments of a sexual nature to her, including requests for oral sex.

*2 In June 2000, DaMetz informed Marc Albers (Albers), general manager, about Fahlman's behavior and that she wanted it to stop. Albers asked DaMetz if she wanted to file a sexual harassment complaint against Fahlman but DaMetz declined. Shortly thereafter, Albers informed Bill McCarthy (McCarthy), a department manager, and Susan Ingram (Ingram), an HR manager, about DaMetz's concerns. Defendant alleges that McCarthy met with Fahlman and told him to watch his language and warned Fahlman to stop telling dirty jokes and making sexual comments.

DaMetz also told Claude Sammons (Sammons), a supervisor, on several occasions that Fahlman had made sexual comments to her and regularly told sexual jokes at work. Fahlman also brought pornography to work and showed it to Sammons and DaMetz, and told them about a bestiality site he saw on the internet.

Defendant submitted an affidavit of Sammons that is inconsistent and materially contradicts his deposition testimony. In the affidavit, Sammons denied that DaMetz and the other plaintiff intervenors ever told him about Fahlman's conduct. Conversely, in his later deposition, Sammons admitted that plaintiff intervenors did notify him on several occasions about Fahlman's conduct. The court finds that the rule set forth in *Kennedy v. Allied Mutual Insurance Company*, 952 F.2d 262, 266 (9th Cir.1991) regarding "sham" affidavits to be instructive in this case. Accordingly, the court finds that Sammons' affidavit was produced as a sham to avoid summary judgment and the court therefore strikes Sammons' affidavit.

In December 2000, DaMetz had a conversation with Albers wherein she stated that she was considering joining the lawsuit against Fahlman. The following day, Albers sent an e-mail to Ingram about his conversation with DaMetz and stated: "Quite frankly, I did not want her in my office at all, but if I had kicked her out I felt it would have fanned the flames." Three months later, DaMetz filed a claim against defendant with the Oregon Bureau of Labor and Industries (BOLI) based upon Fahlman's sexually harassing conduct.

When DaMetz began working for defendant she was assigned some managerial job functions, including payroll. Ken Sturdy (Sturdy) later became the production manager but he did not assume the managerial job duties assigned to DaMetz. In August 2000 and February 2002, DaMetz received "very good performance appraisal [s]." In February 2001, two months after DaMetz notified Albers of her intent to join the lawsuit, DaMetz claims that defendant began eliminating her job duties, including payroll and production data accounting. In June 2002, defendant reorganized its accounting and HR departments. DaMetz began reporting to McCarthy and

Rak, and was moved to an office in the HR department without a door. Defendant also changed her work hours. By October 2003, DaMetz's only remaining job duty consisted of data entry.

On October 6, 2003, defendant deposed DaMetz. The next day, DaMetz left work to attend Baker's deposition. On October 8, 2003, Rak sent an e-mail to DaMetz stating that she was investigating DaMetz's absence from work the previous day. On October 17, 2003, DaMetz received a "Corrective Action Review" (CAR) from Sturdy and Rak for an "unauthorized absence from work station." The CAR stated that similar future conduct by DaMetz would result in her termination. DaMetz testified that her understanding of company policy was that a second or third similar infraction would subject her to a final written notice and termination would not occur until a third or fourth similar infraction.

*3 Defendant has a written attendance policy that applies to all employees. The policy provides that defendant may in its discretion immediately terminate an employee for a single "unauthorized absence from company premises during work time." Thus, according to defendant, because DaMetz had no authorization to leave work on October 7, she was subject to immediate termination. However, defendant claims it downgraded DaMetz's punishment to "unauthorized absence from a work station," which carries a penalty of a final written notice plus a three-day suspension without pay. Defendant issued a final written notice to DaMetz but did not suspend her.

Donna Emerson:

Emerson worked for defendant from October 1988 to March 2002. In 1995 she was transferred from Franz Bakery to Pierre's Bakery, where she remained for one and one-half years until she returned to Franz. Pierre's, like Franz, is a subdivision of United States Bakery. Emerson never worked in the checking department with Fahlman. Emerson alleges, and Fahlman denies, that Fahlman regularly made comments of a sexual nature to her, including requests for oral sex.

Emerson never reported Fahlman's conduct to the HR department, but did report to Sammons prior to Fahlman's termination that Fahlman had made sexual remarks to her.

Wendy Baker:

The parties agree that Fahlman made the following comments to Baker over the course of four to five months, including statements referring to his genitalia. Baker told Fahlman to stop making offensive remarks to her but he continued. In June 2000, Baker requested to be transferred out of the checking department. Two months

later, Baker wrote a letter to management stating that Fahlman had been making sexual comments to her during the period of time that she worked under his supervision. In that letter, Baker also described regular incidents of sexual harassment by Caudle.

Christine Thompson:

Thompson began working for defendant in 1998 in its production department under the supervision of Sammons. In January 2000, Thompson transferred to the checking department for six months before returning to production. Upon return to production, her supervisor was Kevin Sturdy (Sturdy). During the period of time that Thompson worked in checking, Fahlman was the head foreman but worked a different shift than Thompson. Thompson alleges, and Fahlman denies, that Fahlman made several sexual and racial comments to her, including a joke that contained the word “nigger.” Fahlman admitted telling the joke, but claims that Thompson was not offended. Thompson also reported Fahlman’s behavior to several people prior to Fahlman’s termination, including Sammons.

Plaintiffs allege that defendant had knowledge about Fahlman’s behavior since 1993 but did almost nothing to prevent him from continuing. In 1993, Fahlman allegedly told Donna Brotherton (Brotherton), a co-worker, that her high-school daughter was good-looking and to let Fahlman know when the daughter lost her virginity. Brotherton reported Fahlman’s comments to Lynette Hansen, an HR manager, Sturdy, and McCarthy. Fahlman also allegedly made several other comments of a sexual nature that Brotherton reported to management. In April 1995, Brotherton signed a note confirming that she had complained about Fahlman’s comments and that she had spoken with Lynette Hansen and McCarthy. Defendant claims that McCarthy spoke to Fahlman regarding his comments and placed a note in his file. One month later, after some employees complained to management about Fahlman’s behavior, defendant reminded Fahlman of the company policy against harassment and notified him that if any inappropriate comments were made by him in the future, he would be disciplined.

*4 Sammons testified that DaMetz told him on at least ten occasions that Fahlman had made several inappropriate comments of a sexual nature to her. He testified that Thompson told him approximately a year before Fahlman was terminated that Fahlman had made inappropriate comments of a sexual nature to her and told a “nigger” joke that offended her. He testified that both Baker and Emerson told him at least a year prior to Fahlman’s termination that Fahlman made inappropriate comments of a sexual nature to them.

Sammons never reported the information he received

from plaintiff intervenors to other management personnel because he claims plaintiff intervenors “weren’t desperate for [him] to take it further. They didn’t suggest that [he] take it further.” Sammons also testified that his failure to report Fahlman’s conduct was the result of poor judgment on his part. Aside from the note in 1995, defendant never disciplined Fahlman for his inappropriate conduct in the workplace until defendant terminated him in December 2000. In Fahlman’s termination paperwork, Ingram stated that Fahlman’s conduct was an “egregious violation of the company’s harassment policy, and of state and federal law.”

STANDARDS

Summary judgment is appropriate when there is no genuine issue as to any material fact, and the moving party is entitled to a judgment as a matter of law. Fed.R.Civ.P. 56(c). The initial burden is on the moving party to point out the absence of any genuine issue of material fact. Once the initial burden is satisfied, the burden shifts to the opponent to demonstrate through the production of probative evidence that there remains an issue of fact to be tried. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). On a motion for summary judgment, the evidence is viewed in the light most favorable to the nonmoving party. *Margolis v. Ryan*, 140 F.3d 850, 852 (9th Cir.1998).

To prevail at summary judgment on a claim for discrimination or retaliation, the plaintiff must first establish a *prima facie* case. *Wallis v. J.R. Simplot Co.*, 26 F.3d 885, 889 (9th Cir.1994). Sexual and racial harassment in the form of a hostile work environment constitute unlawful discrimination. *Vasquez v. County of Los Angeles*, 349 F.3d 634, 642 (9th Cir.2003). The plaintiff must show that: (1) he or “she was subjected to verbal or physical conduct of a sexual nature; (2) this conduct was unwelcome; and (3) the conduct was ‘sufficiently severe or pervasive to alter the conditions of [his or her] employment and create an abusive working environment.’” *Fuller v. City of Oakland, Cal.*, 47 F.3d 1522, 1527 (9th Cir.1995) (quoting *Ellison v. Brady*, 924 F.2d 872, 875-76 (9th Cir.1991)). Furthermore, the plaintiff must prove that the employer should be liable for the harassment. *Little v. Windermere Relocation, Inc.*, 301 F.3d 958, 966, 968-69 (9th Cir.2002) (Title VII plaintiff must also provide a basis for holding the employer liable for the harassment) (citations omitted).

*5 The plaintiff must also prove that his or her workplace was both objectively and subjectively offensive and hostile. *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 23 (1993). To determine if a work environment is sufficiently offensive or hostile the court looks at all the circumstances, including the frequency of the discriminatory conduct, its severity, and whether it

unreasonably interfered with the plaintiff's work environment. *Id.* The requisite level of severity "varies inversely with the pervasiveness or frequency of the conduct." *Ellison*, 924 F.2d at 878. In this case, the objective severity of harassment is evaluated from the perspective of a reasonable woman and in Thompson's case, from the perspective of a reasonable African-American woman. See *Oncale v. Sundowner Offshore Serv. 's, Inc.*, 523 U.S. 75, 79 (1998); *Harris*, 510 U.S. at 23. Evidence that permits an inference of discrimination is sufficient to establish a *prima facie* case. *Texas Dep't of Comm. Affairs v. Burdine*, 450 U.S. 248, 253 (1981). The courts examine the totality of the circumstances to determine whether a triable issue exists concerning the defendant's motives for its actions. *Coszalter v. City of Salem*, 320 F.3d 968, 978 (9th Cir.2003).

In the context of a retaliation claim, evidence presented beyond that establishing the *prima facie* case is evaluated in accordance with the burden-shifting framework established by the Supreme Court's opinion in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). *Snead v. Metro. Prop. & Cas. Ins. Co.*, 237 F.3d 1080, 1093 (9th Cir.2001). Only the burden of production shifts; the ultimate burden of persuasion always remains with the plaintiff. *Burdine*, 450 U.S. at 253. This burden merges with the plaintiff's ultimate burden of persuading the court that he or she is the victim of unlawful retaliation. *Id.* Under this framework, once the plaintiff has established the *prima facie* case, the defendant has the burden to produce a "legitimate, non-discriminatory reason" for the adverse employment action. *Id.*

If the defendant shows a legitimate reason for terminating plaintiff, the burden returns to the plaintiff to show that the employer's explanation is a pretext for discrimination and "unworthy of credence." *Arago v. Republic Silver State Disposal, Inc.*, 292 F.3d 654, 659 (9th Cir.2002) (citing *Chuang v. Univ. of Cal. Davis*, 225 F.3d 1115, 1124 (9th Cir.2000)). It is generally true "that a plaintiff at the pretext stage must produce evidence *in addition* to that which was sufficient for her *prima facie* case in order to rebut the defendant's showing." *Godwin v. Hunt Wesson, Inc.*, 150 F.3d 1217, 1220 (9th Cir.1998) (emphasis added). Otherwise, the "mere existence of a *prima facie* case, based on the minimum evidence necessary to raise a *McDonnell Douglas* presumption" would preclude summary judgment. *Wallis*, 26 F.3d at 890. A plaintiff can survive summary judgment, however, without producing any additional evidence of discrimination beyond that constituting the *prima facie* case, "if that evidence raises a genuine issue of material fact regarding the truth of the employer's proffered reasons." *Chuang*, 225 F.3d at 1127 (citing *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 146 (2000)).

ANALYSIS

*6 Plaintiffs move for summary judgment on defendant's liability for Fahlman's and Caudle's alleged harassment and for a judgment that plaintiff is entitled to punitive damages as a matter of law. Defendant cross-moves for summary judgment on Baker's and Emersons' claims for sexual harassment, the gender harassment claims, and for a judgment that plaintiff is not entitled to punitive damages as a matter of law. Finally, plaintiff intervenors move for summary judgment on DaMetz's claim for retaliation.

1. Hostile Work Environment

Plaintiffs argue that defendant is liable under Title VII because Fahlman and Caudle subjected plaintiff intervenors to unwelcome verbal and/or physical conduct of a sexual and racial nature that was sufficiently severe and pervasive to alter the terms and conditions of their employment and created an abusive working environment. This conduct, plaintiffs assert, was both objectively and subjectively offensive and hostile.

Defendant concedes the absence of any disputed material facts with regard to the first prong of plaintiff's *prima facie* case-that plaintiff intervenors were subjected to sexual and racial comments. Defendant also concedes that with respect to Baker and Emerson, this conduct was unwelcome. However, defendant contends that Fahlman's isolated comments were not sufficiently severe and pervasive and do not rise to the level of an actionable hostile work environment. The court disagrees. The court finds that DaMetz and Thompson have presented sufficient evidence that Fahlman's conduct was unwelcome. The court also finds that each plaintiff intervenor has presented sufficient evidence that Fahlman's conduct was sufficiently severe and pervasive to alter the terms and conditions of her employment and create an abusive working environment. Accordingly, plaintiffs have established a *prima facie* case.

Defendant contends that a portion of Emerson's sexual harassment claim is barred by the statute of limitations. To maintain a claim under Title VII, the plaintiff must file a charge of discrimination with the EEOC or BOLI within the statutory time period or lose the ability to recover for it. 42 U.S.C. § 2000e-5; *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 110 (2002). In *Morgan*, the Court resolved the question of when conduct falling outside the statutory time period for filing charges was actionable. The Court substantially limited the doctrine of continuing violations by holding that discrete acts of discrimination are not actionable if time-barred, even when they are related to acts alleged in timely filed charges. *Morgan*, 536 U.S. at 122. The Court, however, carved out an

exception for hostile work environment claims: such claims will not be time-barred provided that “all acts which constitute the claim are part of the same unlawful employment practice and at least one act falls within the time period.” *Id.* at 123. Thus, claims based on discrete discriminatory acts are only timely when such acts occurred within the limitations period, whereas claims based on a hostile work environment are only timely when at least one act occurred during the limitations period.

*7 Emerson worked for defendant for approximately fifteen years. In 1995 she left defendant’s Franz bakery to work at Pierre’s for one and one-half years. She returned to Franz in 1996 until her resignation in 2003. Defendant asserts that Emerson’s one and one-half year hiatus makes her claim for a hostile work environment between 1990 and 1995 untimely. Defendant relies on a Third Circuit case that found that a significant hiatus in the plaintiff’s employment destroys a hostile work environment claim brought under the continuing violation doctrine. See *Konstantopoulos v. Wetvaco Corp.*, 112 F.3d 710, 716 (3d Cir.1997).

The court finds that there was not a hiatus in the harassment. Fahlman continued to subject Emerson to sexual remarks during the time she worked at Pierre’s. While at Pierre’s, Emerson regularly went to Franz to get her uniforms and pick up her time cards and paychecks. Emerson testified that when she would go over to the Franz facility, Fahlman would make sexual comments to her. Contrary to the facts in *Konstantopoulos*, Emerson continued to regularly see Fahlman during the time she worked at Pierre’s. Thus, because several of Fahlman’s sexual comments were made to Emerson within the 300 day time-period for filing a charge, all of Fahlman’s comments are viewed as one continuing violation.

Because the court determines that plaintiffs have presented a *prima facie* case of harassment, the court now turns to the question of whether defendant should be held liable for the harassment.

2. Vicarious Liability

Plaintiff contends that defendant is vicariously liable for Fahlman’s and Caudle’s alleged harassment. An employer may be held vicariously liable under Title VII when a supervisor sexually harasses a subordinate over whom he has immediate or successively higher authority. *Faragher v. City of Boca Raton*, 524 U.S. 775, 780 (1998). When the harasser is a supervisor, the employer is presumed to be absolutely liable. *Id.* However, if no tangible employment action has been taken, the employer may raise an affirmative defense. *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 765 (1998).

Subject to proof by a preponderance of the evidence, the employer may avoid liability or damages if it is able to show that: (1) it “exercised reasonable care to prevent and correct promptly any sexually [or racially] harassing behavior”; and (2) “the plaintiff unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.” *Faragher*, 524 U.S. at 807; see also *Ellerth*, 524 U.S. at 765. Relevant to the first element of the affirmative defense is whether the employer had an anti-harassment policy, *Ellerth*, 524 U.S. at 765, although such a policy is not an automatic bar to the imposition of punitive damages. *Swinton v. Potomac Corp.*, 270 F.3d 794, 803 (9th Cir.2001) (citations omitted). Further, an employee’s failure to avail himself or herself of the policy’s complaint procedure “will normally suffice to satisfy the employer’s burden under the second element of the defense.” *Ellerth*, 524 U.S. at 765.

*8 An employer’s liability for harassing conduct is evaluated differently when the harasser is a supervisor as opposed to a coworker. *Swinton*, 270 F.3d at 803. As stated above, an employer is vicariously liable for a supervisor’s harassing conduct, subject to an affirmative defense. However, if the harasser is a coworker, the plaintiff must prove that the employer knew or should have known of the harassment and failed to take adequate steps to prevent it. *Id.*

In determining whether an alleged harasser is a supervisor or a coworker depends not on the harasser’s job title but whether the harasser had the authority to demand obedience from his or her employees. *McGinest v. GTE Serv. Corp.*, 360 F.3d 1103, 1119 n. 13 (9th Cir.2004). If the harasser engaged in supervision of or had authority over the plaintiff, the harasser would qualify as the plaintiff’s supervisor regardless of whether the employer defined the harasser’s role in that way. See *Swinton*, 270 F.3d at 803-05.

The court finds that both Fahlman and Caudle held supervisory roles, regardless of how defendant characterized their positions. Both Fahlman and Caudle supervised plaintiff intervenors and others at the bakery and also had the authority to implement disciplinary action. As such, to avail itself of any liability, defendant must show that it “exercised reasonable care to prevent and correct promptly any sexually [or racially] harassing behavior” and that plaintiff intervenors “unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.” *Faragher*, 524 U.S. at 807.

Turning to the first prong of the *Faragher* affirmative defense, the court finds that defendant did not exercise reasonable care to prevent harassing behavior and that defendant did not promptly correct any harassing behavior that did occur. Defendant’s 1993

anti-harassment policy was inadequate because it failed to include a reporting procedure, a notice that offending employees would be subject to discipline, and an anti-retaliation provision. It was not until 1998 that defendant implemented a policy that included a detailed discussion of harassment, a reporting procedure, and an anti-retaliation provision. In addition, defendant did not train all of its non-supervisory employees in sexual harassment until March 2002, more than a year after Fahlman's termination.

The court also finds that defendant has failed to establish that it promptly corrected either Fahlman's or Caudle's sexual harassment. The employer's remedies for sexual harassment should be reasonably calculated to end the harassment and persuade individual harassers to refrain from unlawful conduct. *Ellison*, 924 F.2d at 882. Between 1993 and 2000, several complaints were made to management regarding Fahlman's and Caudle's behavior. For example, Fahlman showed Sammons pornographic pictures and heard Fahlman make several sexual jokes at work but never took action to stop Fahlman's behavior. McCarthy never conducted an investigation into Fahlman's harassment after he received complaints. It was not until December 2000 that defendant took action to stop Fahlman's behavior when it terminated him.

*9 Turning to the second prong of the *Faragher* defense, the court finds that defendant has failed to establish that plaintiff intervenors unreasonably failed to complain or to otherwise avail themselves of any preventive or corrective measures. At various times throughout plaintiff intervenors' employment they complained about Fahlman's and Caudle's behavior to their supervisors, foremen, and managers. Specifically, plaintiff intervenors complained to Sammons about Fahlman's harassment but Sammons failed to report it because plaintiff intervenors "weren't desperate for [him] to take it further." Sammons' subjective impression of the situation is no excuse for defendant's inaction. This brings the court to the separate basis for imputing vicarious liability to defendant: Sammons' failure to report plaintiffs' complaints of sexual harassment.

A supervisor's knowledge is properly imputed to the employer where the supervisor "has an official or strong de facto duty to act as a conduit to management for complaints about work conditions." *Swinton*, 270 F.3d at 805; see also *EEOC v. Hacienda Hotel*, 881 F.2d 1504, 1515-16 (9th Cir.1984) (holding that "employers are liable for failing to remedy or prevent a hostile or offensive work environment of which management-level employees knew, or in the exercise of reasonable care should have known."). A supervisor's knowledge will be imputed to the employer when: "the [supervisor] is at a sufficiently high level in the company's management hierarchy to qualify as a proxy for the company; or the [supervisor] is charged with a duty to act on the

knowledge and stop the harassment; or the [supervisor] is charged with a duty to inform the company of the harassment." *Torres v. Pisano*, 116 F.3d 625, 636-37 (2d Cir.1997).

Sammons was a supervisor at the bakery and had received discrimination and harassment training and was therefore charged with a duty to stop the harassment, or at the very least inform higher management of the harassment. Accordingly, defendant is vicariously liable for Fahlman's and Caudle's harassment.

3. Punitive damages

The Supreme Court has provided a three-part inquiry to determine when punitive damages are appropriate under Title VII. To succeed on a claim for punitive damages, the plaintiff must: (1) prove that the employer engaged in a discriminatory practice with malice or a reckless indifference to the federally protected rights of an aggrieved individual; (2) prove that liability is properly imputed to the employer; and (3) defeat the employer's affirmative defense that it made good faith efforts to comply with Title VII. *Kolstad v. Am. Dental Ass'n*, 527 U.S. 526, 534-35 (1999); see also 42 U.S.C. § 1981a(b)(1). The terms "malice" or "reckless indifference" pertain to the harasser's knowledge that it may be acting in violation of federal law, not its awareness that it is engaging in unlawful discrimination. *Kolstad*, 527 U.S. at 535.

*10 To impute liability to the employer, "the plaintiff must show that the intentional discrimination by an employee is attributable to the employer by using traditional agency principles, e.g., that a managerial employee acted within the scope of his or her employment." *Hemmings v. Tidyman's Inc.*, 285 F.3d 1174, 1198 (9th Cir.2002) (citing *Kolstad*, 527 U.S. at 540-41). The court finds that plaintiff has not presented sufficient evidence that, as a matter of law, defendant acted either with malice or a reckless indifference to plaintiff intervenors' federally protected rights. There is a genuine issue of material fact on this point. Accordingly, both parties' motions are denied with respect to the punitive damages claims.

4. Gender Discrimination

To present a *prima facie* claim for disparate treatment in a Title VII claim, the plaintiff must show that: (1) he or she is a member of a protected class; (2) he or she was qualified for the job position; (3) he or she was subjected to an adverse employment action; and (4) similarly situated individuals outside of the plaintiff's protected class were treated more favorably. *McDonnell Douglas*, 411 U.S. at 802.

Defendant argues that Baker's disparate treatment claim based on her gender fails because she cannot prove the third and fourth elements of a *prima facie* case. In support of her claim, Baker alleges that she received "bogus" performance evaluations and Fahlman told her that the checking department was targeted for young white males. Yet, Baker testified that she was generally treated the same as her male coworkers and has presented no evidence in support of her assertion that she received "bogus" performance evaluations.

The court finds that Baker has failed to meet her burden of proof. She offers no evidence that she received disparate treatment because of her gender. She fails to present evidence that she suffered an adverse employment action because of her gender or that male employees similarly situated were treated more favorably. Accordingly, defendant's motion is granted insofar as it seeks to dismiss Baker's claim for disparate treatment because of her gender.

Baker and Thompson also assert separate claims for gender harassment. Sexual harassment is a species of gender harassment and the elements to prove sexual harassment are virtually indistinguishable from those required to prove a gender harassment claim. *See, e.g., Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 64-67 (1986); *Brooks*, 229 F.3d at 923; *Steiner v. Showboat Operating Co.*, 25 F.3d 1459, 1462 (9th Cir.1994). Accordingly, because the court finds that Baker's and Thompson's gender harassment claims are encompassed within their hostile work environment claim based upon their sex, defendant's motion is granted in this respect and the gender harassment claims are dismissed.

5. DaMetz's Retaliation Claim

In response to filing her BOLI claim, DaMetz claims that defendant took the following acts in retaliation: (1) defendant moved DaMetz to a different office without a door; (2) defendant decreased her job responsibilities; (3) defendant moved DaMetz's work schedule; (4) defendant changed DaMetz's supervisor; and (5) the issuance of the CAR was inappropriate under the circumstances.

***11** The court finds that there are genuine factual issues as to defendant's motivations for taking these actions. Accordingly, plaintiff intervenors' motion is denied.

CONCLUSION

For the foregoing reasons, plaintiff EEOC's Motion for Partial Summary Judgment (Doc. # 106) is GRANTED in part and DENIED in part. It is granted insofar as it pertains to a judgment that defendant is liable as a matter of law for Fahlman's and Caudle's harassment. It is denied insofar as it pertains to a judgment that plaintiffs are entitled to punitive damages. Plaintiff intervenors' Motion for Partial Summary Judgment (Doc. # 101) is DENIED. Finally, defendant's Motion for Partial Summary Judgment (Doc. # 97) is GRANTED in part and DENIED in part. It is granted insofar as it seeks to dismiss Baker's disparate treatment claim and Baker's and Thompson's gender harassment claims. The remainder of the motion is denied.

IT IS SO ORDERED.