2006 WL 328355
United States District Court,
E.D. Pennsylvania.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
v.
BARE FEET SHOES OF PA, INC.

No. Civ.A. 04-3788. | Feb. 10, 2006.

Attorneys and Law Firms

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Opinion

MEMORANDUM AND ORDER

MCLAUGHLIN, J.

***1** The Equal Employment Opportunity Commission (EEOC) filed suit on behalf of Gail Watson, alleging that Ms. Watson was subjected to a sexually hostile work environment while employed at one of the defendant's stores. The defendant has moved for summary judgment on the grounds that Ms. Watson did not exhaust administrative remedies and that the EEOC cannot make a prima facie case of sexually hostile work environment. The Court concludes that the EEOC has authority to sue on behalf of Ms. Watson even though she did not file a charge of discrimination with the EEOC, and that the EEOC has raised genuine issues of material fact as to the existence of, and the defendant's liability for, a sexually hostile work environment.

I. ***Facts and Procedural History***

Gail Watson began her first term of employment in the defendant's Wyncote, Pennsylvania store in August 2002. Viewing the evidence in the light most favorable to the EEOC, the following occurred during Ms. Watson's first term of employment.[1] One of Ms. Watson's supervisors, David (whose last name is unknown), stared at Ms. Watson's breasts constantly, licked his lips while standing close behind her, touched and commented on her jewelry, and talked about how her clothes fit her body. Once, he suggested to Ms. Watson that they make a bed in the store and sleep together. Another time, he grabbed her around the waist. On several occasions, when Ms. Watson objected to his conduct, he told her that she could clock out and leave work early if she did not like it. Ms. Watson also complained about David's behavior to another of her supervisors, Mamoun Kabbadj, but Mr. Kabbadj told her that she had to listen to David because he was her supervisor. Pl's Ex. 3 (Watson Dep.) 15:8-17:11, 21:13-16, 22:20-26:9, 65:9-68:9, 81:6-85:3.

1 On a motion for summary judgment, a court must view the evidence and draw reasonable inferences therefrom in the light most favorable to the party opposing summary judgment. *See, e.g., Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 255, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). Summary judgment is proper if the pleadings and other evidence on the record "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).

Mr. Kabbadj also constantly stared at Ms. Watson's breasts, licked his lips and winked his eyes at her, and repeatedly asked if she had a boyfriend. On one occasion, he asked her about the size of her breasts. On another occasion, he grabbed and pulled down her shirt after staring at her breasts. In addition, once when Ms. Watson was in the store shopping (not during work hours), Mr. Kabbadj peered over Ms. Watson's dressing room stall as she was changing. Ms. Watson resigned in May 2003. *Id.* at 26:24-28:14, 37:5-40:5, Pl's Ex. 6 (Departure Form).

Ms. Watson returned to work at the defendant's store in November 2003. Ms. Watson returned because she believed that David and Mr. Kabbadj no longer worked there. During her second term of employment, Ms. Watson worked with a different supervisor, Yehouda "Udi" Sharabi. Mr. Sharabi looked at Ms. Watson's breasts on a daily basis, told her that she would look good in low-cut shirts, and stood behind her in a close and inappropriate manner. He repeatedly told Ms. Watson that he wanted to marry her. Once, he intentionally walked in on Ms. Watson when she was using the restroom. When Ms. Watson told Mr. Sharabi that she would report his behavior, he attempted to intimidate her by telling her that he used to be a police officer and she could not do anything about it. Ms. Watson learned from a co-worker that when another female employee had complained to the defendant's owner that Mr. Sharabi had made an offensive comment about "sucking D" to her, the owner did not take any action, and the employee quit. Ms. Watson's second term of employment with the defendant ended in December 2003. Pl's Ex. 3 (Watson Dep.)

30:22-31:21, 48:16-50:5, 54:23-59:8, 60:21-61:16, 72:12-19, 85:5-20.

***2** Meanwhile, LaTanya Garner worked at the defendant's Wyncote, Pennsylvania store from December 10, 2002 to January 17, 2003. On January 21, 2003, Ms. Garner filed a charge of sex discrimination against the defendant with the EEOC and the Pennsylvania Human Relations Commission (PHRC). In the charge, Ms. Garner alleged that she was subjected to numerous unwelcome sexual advances by her manager, "Udi." Pl's Ex. 9 (EEOC Charge); Pl's Ex. 10 (PHRC Charge).

Ms. Watson never filed a charge of discrimination with the EEOC. The EEOC uncovered her experiences at the defendant's store during its investigation into Ms. Garner's charge. Pl's Ex. 12 (EEOC Determination). The EEOC filed suit on behalf of Ms. Watson and Ms. Garner in August 2004, alleging that the defendant had subjected both women to a sexually hostile work environment and constructively discharged Ms. Watson. The EEOC voluntarily dismissed its claims on behalf of Ms. Garner in September 2005. Ms. Garner remained in the case as an intervener plaintiff until October 2005, when she voluntarily dismissed her claims against the defendant. The only claims remaining in the case are the EEOC's claims on behalf of Ms. Watson.

II. *Analysis*

The defendant has moved for summary judgment on two grounds. First, the defendant argues that the EEOC cannot bring suit on behalf of Ms. Watson because she never filed a charge of discrimination with the agency. Second, the defendant challenges the EEOC's ability to establish a prima facie case of sexually hostile work environment.

A. *EEOC's Authority to Litigate on Behalf of an Individual Who Did Not Exhaust Administrative Remedies*

Section 706 of Title VII of the Civil Rights Act of 1964 authorizes the EEOC, upon the filing of a charge of discrimination, to notify the employer, investigate the charge, attempt to conciliate, and if conciliation fails, to bring a civil action against the employer. 42 U.S.C. § 2000e-5 (b), (f). The United States Court of Appeals for the Third Circuit has not considered whether the EEOC may bring suit on behalf of an individual who did not file a charge with the EEOC, but the Courts of Appeals for the Fourth, Fifth, Sixth, Seventh, and Ninth Circuits have held that the EEOC may do so.

Most of these circuit courts have held that the EEOC may bring suit for any other violations of the employment discrimination laws that it discovers in the course of a reasonable investigation into a valid charge. *EEOC v. General Electric Co.,* 532 F.2d 359, 366 (4th Cir.1976) (*"So long as the new discrimination arises out of the reasonable investigation of the charge filed,* it can be the subject of a 'reasonable cause' determination, to be followed by an offer by the Commission of conciliation, and if conciliation fails, by a civil suit, without the filing of a new charge on such claim of discrimination.") (emphasis in original); *EEOC v. Huttig-Sash & Door Co.,* 511 F.2d 453, 455 (5th Cir.1975) (EEOC may take appropriate action on other discriminatory practices it discovers upon investigating a particular charge); *EEOC v. UPS,* 94 F.3d 314, 318 (7th Cir.1996) (same); *EEOC v. Occidental Life Ins. Co. of Am.,* 535 F.2d 533, 541-542 (9th Cir.1976) (same).[2]

2 At least two district courts, including one in this district, have also upheld the EEOC's authority to litigate on behalf of noncharging individuals in circumstances similar to the one in this case. *See EEOC v. Equicredit Corp. of America,* Civ. Act. No. 02-844, 2002 U.S. Dist. LEXIS 19985, at *16-17 (E.D.Pa. Oct. 10, 2002) (EEOC may bring suit on behalf of a non-charging individual that it identifies, but does not name, in its letter of determination); *EEOC v. Air Line Pilots Ass'n,* 885 F.Supp. 289, 292-293 (D.D.C.1995) (EEOC may bring suit on behalf of a non-charging individual even though it decides to not bring suit on behalf of the individual who made the charge).

***3** The United States Court of Appeals for the Sixth Circuit only permits the EEOC to bring claims that are *"reasonably expected* to grow out of the initial charge of discrimination." *EEOC v. Keco Industries,* 748 F.2d 1097, 1101 (6th Cir.1984) (emphasis in original). In that case, the charging party alleged that the employer had discriminated against her because of her sex. The EEOC found that the employer had discriminated against females generally, and brought suit on behalf of all female employees. The court held that the class-based claim could have reasonably been expected to grow out of the individual charge, because the only difference was the number of persons victimized by the defendant's discriminatory practices. *Id.*

The Courts of Appeals for the Fifth and Sixth Circuits have explicitly held that the EEOC may pursue claims on behalf of non-charging parties even after the charging party has settled its claims with the employer. *Huttig-Sash & Door,* 511 F.2d at 455; *EEOC v. McLean Trucking Co.,* 525 F.2d 1007, 1010 (6th Cir.1975).

The Supreme Court cited this line of circuit court cases with approval in *General Telephone Co. of the Northwest, Inc. v. EEOC,* 446 U.S. 318, 331, 100 S.Ct. 1698, 64 L.Ed.2d 319 (1980). In that case, the Court held that the EEOC does not have to comply with the requirements of

Fed.R.Civ.P. 23 when it brings suit on behalf of groups of similarly situated employees. *Id.* at 323.

The Supreme Court and circuit courts have recognized that the EEOC has independent authority to bring claims because it acts in the public interest. *See id.* at 326; *General Electric Co.,* 532 F.2d at 373; *McLean Trucking Co.,* 525 F.2d at 1010. The EEOC has this authority whether it is suing to obtain class-wide relief, or victim-specific relief for just one individual. *See EEOC v. Waffle House,* 534 U.S. 279, 291-292, 122 S.Ct. 754, 151 L.Ed.2d 755 (2002) (EEOC has authority to seek relief in court on behalf of an employee who signed a binding arbitration agreement because "it is the public agency's province-not that of the court-to determine whether public resources should be committed to the recovery of victim-specific relief.")

The Court is persuaded by these decisions that the EEOC may bring claims on behalf of individuals who have not filed a charge of discrimination with the agency.[3] Whether the Court applies the "discovered in the course of a reasonable investigation" standard established by the United States Courts of Appeals for the Fourth, Fifth, Seventh, and Ninth Circuits, or the higher "reasonably expected to grow out of the initial charge" standard used by the Court of Appeals for the Sixth Circuit, the Court finds that, in this case, the EEOC had authority to bring claims on behalf of Ms. Watson.

3 *EEOC v. Northwestern Human Services,* 04-CV-4531, 2005 U.S. Dist. LEXIS 23768 (E.D.Pa. Oct. 14, 2005), cited by the defendant at oral argument, is not on point. In that case, the court held that non-charging individuals may *intervene* in an action brought by the EEOC where their claims are nearly identical to the claims raised by the charging individuals. *Id.* at *8-9. The court did not address the EEOC's authority to bring claims on behalf of non-charging individuals.
The defendant's arguments that the "single filing rule" does not apply to the present case because neither Ms. Garner nor the EEOC has alleged class based discrimination are similarly inapposite. The EEOC's authority to pursue claims on behalf of Ms. Watson in this case is not based on the single filing rule.

The EEOC discovered that Ms. Watson had been sexually harassed during both of her terms of employment in the course of its investigation into Ms. Garner's charge, and so notified the defendant in its letter of determination. The defendant then had an opportunity for conciliation. There is no evidence that the defendant ever objected to the scope of the EEOC's investigation. The sexual harassment claim on behalf of Ms. Watson could reasonably be expected to grow out of the investigation into Ms. Garner's charge of sexual harassment, where the women worked with some of the same alleged perpetrators in overlapping terms of employment. *See* Pl's Ex. 12 (EEOC Determination); Oral Arg. Tr. at 10:2-8.[4]

4 The Courts of Appeals have not expressly placed time limits on the EEOC's authority to bring claims on behalf of non-charging individuals. In this case, the EEOC's claims are timely even by the standards imposed upon private plaintiffs. In Pennsylvania, individuals must file a charge with the EEOC or the PHRC within 300 days of the discriminatory act; claims are timely if they arise within the 300 days before the charge is filed. *Watson v. Eastman Kodak Co.,* 235 F.3d 851, 854 (3d Cir.2000). The EEOC's earliest claim on behalf of Ms. Garner arose approximately 175 days before Ms. Garner filed her charge. *See* Compl. ¶ 8(a) (Ms. Watson's first term of employment began in August 2002); Pl's Ex. 9 (Ms. Garner filed the EEOC charge on January 21, 2003).

B. *Prima Facie Case of Sexually Hostile Work Environment*

***4** The EEOC has raised a genuine issue of material fact as to whether the defendant subjected Ms. Watson to a hostile work environment. Sexual harassment is actionable under Title VII when it is "so severe or pervasive as to alter the conditions of the victim's employment and create an abusive working environment." *See, e.g., Clark County School Dist. v. Breeden,* 532 U.S. 268, 270, 121 S.Ct. 1508, 149 L.Ed.2d 509 (2001) (internal quotations omitted). A hostile work environment claimant must show that:

> (1) the employee[ ] suffered intentional discrimination because of [her] sex; (2) the discrimination was pervasive and regular; (3) the discrimination detrimentally affected the plaintiff; (4) the discrimination would detrimentally affect a reasonable person of the same sex in that position; and (5) the existence of *respondeat superior* liability.

Kunin v. Sears Roebuck & Co., 175 F.3d 289, 293 (3d Cir.1999) (quoting *Andrews v. City of Philadelphia,* 895 F.2d 1469, 1482 (3d Cir.1990)).

The defendant has challenged the EEOC's ability to satisfy the "pervasive and regular" and *respondeat superior* elements of the claim.

i. *Pervasive and Regular*

In *Andrews,* the United States Court of Appeals for the

Third Circuit held that “pervasive and regular” sexual harassment could give rise to a hostile work environment claim even if individual incidents were not sufficiently severe to detrimentally affect a female employee. 895 F.2d at 1485. In *Spain v. Gallegos,* 26 F.3d 439, 449 (3d Cir.1994), the court held that the plaintiff presented a fact question for trial on the “pervasive and regular” element, when she alleged that her supervisor’s conduct in meeting with her privately (to pressure her to loan him money) caused rumors to develop, over a period of several years, that she was having an affair with him. *See also Smith v. Pathmark Stores,* Civ. Act. No. 97-1561, 1998 U.S. Dist. LEXIS 8631 at *12-13 (E.D. Pa. June 11, 1998) (plaintiff who alleged that her supervisor said “let’s get naked” while placing his arm around her shoulder, told her “you need a man,” asked whether she lived alone, and touched her buttocks once in a two-month period established a genuine issue of material fact as to whether her supervisor created a hostile work environment).

The EEOC has alleged sufficient facts for a reasonable fact-finder to find that Ms. Watson experienced harassment that was pervasive and regular in both her first and second terms of employment. During her first term, Ms. Watson’s supervisors stared at her breasts constantly, made repeated sexually-charged comments about her physical appearance, asked unwelcome questions about her personal life, and touched her inappropriately on at least two occasions. During her second term, Ms. Watson’s supervisor also regularly stared at her breasts and made sexually-charged comments. On one occasion, he walked in on her in the restroom.

ii. *Employer Liability*

***5** An employer may be held vicariously liable for a hostile work environment created by a supervisor who has authority over the victim employee. *Burlington Industries, Inc. v. Ellerth,* 524 U.S. 742, 765, 118 S.Ct. 2257, 141 L.Ed.2d 633 (1998); *Faragher v. City of Boca Raton,* 524 U.S. 775, 807, 118 S.Ct. 2275, 141 L.Ed.2d 662 (1998). An employer will be held strictly liable if “the supervisor’s harassment culminates in a tangible employment action, such as discharge, demotion, or undesirable reassignment.” *Burlington Industries,* 524 U.S. at 765; *Faragher,* 524 U.S. at 808. Otherwise, the employer may raise an affirmative defense that “(a) the employer exercised reasonable care to prevent and correct any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventative or corrective opportunities provided by the employer or to avoid harm otherwise.” *Burlington Industries,* 524 U.S. at 765; *Faragher,* 524 U.S. at 807.

A constructive discharge may or may not involve “official action” equivalent to a tangible employment action. *Pennsylvania State Police v. Suders,* 542 U.S. 129, 148, 124 S.Ct. 2342, 159 L.Ed.2d 204 (2004). If the constructive discharge does not involve an official act, such as a demotion or a deduction in compensation reflected in company records, then the employer is entitled to present the two-pronged affirmative defense outlined in *Burlington Industries* and *Faragher. Id.*

Here, the parties agree that David, Mr. Kabbadj, and Mr. Sharabi were Ms. Watson’s supervisors. Def’s MSJ Mem. at 21. The parties disagree as to whether the defendant took a tangible employment action against and/or constructively discharged Ms. Watson and, assuming that the defendant is entitled to present an affirmative defense, whether the defendant has met its burden of proof on the affirmative defense. Because Ms. Watson’s alleged harassers were her supervisors, the EEOC has raised a question of material fact as to the defendant’s liability, regardless of whether that liability is strict or rebuttable. Thus, the Court will deny the defendant’s motion for summary judgment without prejudice to the defendant making an argument at a later time that it is entitled to present an affirmative defense under *Burlington Industries* and *Faragher.*

An appropriate Order follows.

ORDER

AND NOW, this 10th day of February, 2006, upon consideration of the defendant’s Motion for Summary Judgment (Doc. No. 20), the plaintiff’s opposition thereto, and after oral argument on January 13, 2006, for the reasons stated in a memorandum of today’s date, IT IS HEREBY ORDERED that the motion is DENIED.

IT IS FURTHER ORDERED that a telephone conference is scheduled for February 21, 2006 at 4:30 p.m. Plaintiff’s counsel shall initiate the call. Judge McLaughlin’s chambers telephone number is 267-299-7600.

Parallel Citations

97 Fair Empl.Prac.Cas. (BNA) 884, 87 Empl. Prac. Dec. P 42,251