

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CURTIS OUTLAW : CIVIL ACTION  
: :  
: :  
v. : :  
: :  
KERRY PACIFICO'S FORD : NO. 00-6509

O R D E R

AND NOW, this *10<sup>th</sup>* day of November, 2001, upon consideration of the Motion for Summary Judgment of Defendant, Kerry Pacifico's Ford (Docket No. 10), and the plaintiff's opposition thereto, IT IS HEREBY ORDERED that the motion is DENIED for the reasons set forth below.

In deciding a motion for summary judgment, the Court must view the facts and "any inference to be drawn from the facts contained in depositions and exhibits in the light most favorable to the non-moving party." Josey v. John R. Hollingsworth Corp., 996 F.2d 632, 637 (3d Cir. 1993).

To make out a hostile work environmental sexual harassment claim under Title VII, a plaintiff must show the convergence of five constituents:

- (1) intentional discrimination because of 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) respondeat superior liability.

Andrews v. City of Philadelphia, 895 F.2d 1469, 1482 (3d Cir. 1990).

Defendants here move for summary judgment on three of these five grounds. First, defendants argue that the plaintiff has not shown that any discrimination occurred because of his sex. The Supreme Court held in Oncale v. Sundowner Offshore Serv., 523 U.S. 75, 78-79 (1998), that claims of same-sex sexual harassment could be sustained under Title VII. Our Court of Appeals, in Bibby v. Phila. Coca-Cola Bottling Co., 260 F.3d 257, 264 (3d Cir. 2001), articulated at least three ways in which such same-sex sexual harassment would qualify under the "because of sex" prong: where the harasser was motivated by sexual desire for the victim; where the harasser was expressing a general hostility to the presence of one **sex** in the workplace; or where the harasser was acting to punish the victim's noncompliance with gender stereotypes. Viewing the record most favorably for plaintiff, this case could fall under the first prong; Outlaw at one point speculates that the four men who allegedly harassed him are gay. Furthermore, the holding in Bibby recognized that there could be other ways to state an effective same-sex harassment claim based on sex. Here, Outlaw has commented that he feels his harassment claims would have been addressed differently had he been a woman. I thus find that summary judgment is inappropriate on this ground.

Defendants next argue that any harassment alleged by plaintiff is not sufficiently pervasive and severe to warrant Title VII redress. Under Meritor Savings Bank v. Vinson, 477 U.S. 57, 67 (1986), sexual harassment is only actionable where it is "sufficiently severe or pervasive to alter the conditions of [the victim's] employment and create an abusive working environment" (internal quotations omitted). Factors to consider in determining whether action rises to that level include: "the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; [and] whether it unreasonably interferes with an employee's work performance." Harris v. Forklift Sys., Inc., 510 U.S. 17, 23 (1993).

The record here is sufficient to survive summary judgment on this ground. In terms of frequency, plaintiff alleges up to 16 incidents over an eight-month period. This case is thus distinguishable from those in which incidents were found to be sporadic or isolated. See, e.g., Saidu-Kamara v. Parkway Corp., 155 F. Supp.2d 436, 439-440 (E.D. Pa. 2001) (four incidents over a year and a half); Bonora v. UGI Utilities, Inc., No. 99-5539, 2000 U.S. Dist. LEXIS 15172, at \*11-\*12 (E.D. Pa. Oct. 18, 2000) (nine events over two-year period). The alleged incidents here all involved touching of sexual body parts, and thus also appear to be sufficiently severe. Cf. Saidu-Kamara, 155 F. Supp.2d at 440 (unwelcomed touching could be sufficiently severe behavior). Moreover, although these incidents were not physically threatening, they may have been humiliating. Furthermore, because they involved bodily contact, they were more than merely offensive utterings. Finally, as to an effect on performance,

plaintiff alleges that his mood was altered at work as a result of this harassment, and he eventually felt compelled to quit to exit the hostile environment,

Finally, defendants argue that the plaintiff has not sufficiently made out a case to hold the dealership liable for the actions alleged here under a theory of respondeat superior. Employer liability exists where that employer either knew, or should have known, of harassment, and yet still failed to take prompt remedial action. See Kunin, 175 F.3d 289, 293-4. Prompt remedial action is action "reasonably calculated to prevent further harassment." Bonenberser v. Plymouth Twp., 132 F.3d 20, 26 (3d Cir. 1997).

The circumstances in which an employer is liable for the harassment of one of its employees varies based on whether the harasser is a co-worker or a supervisor. Compare Kunin v. Sears Roebuck & Co., 175 F.3d 289, 293-94 (3d Cir. 1999) (co-employee) with Faragher v. City of Boca Raton, 524 U.S. 775, 807 (1998) (supervisor). For a co-employee, a court need only determine whether the employer knew or should have known, and whether prompt remedial action was taken. Mark Sharlot and Jim Loftus were both co-workers of Outlaw. Although the harassment by Sharlot was reported and redressed, plaintiff maintains that it was not to his satisfaction. Meanwhile, plaintiff reports that the incident with Jim Loftus occurred in a public area, and that he thereafter approached a manager to convene a meeting about being touched by "these guys." The Third Circuit has held that there can be constructive notice where an employee provides management personnel with enough information to raise a probability of sexual harassment in the mind of a reasonable employee, or else where the harassment is

pervasive and open enough that a reasonable employer should have been aware. See Kunin, 175 F.3d at **294**. It is not clear to this Court that managers did not have explicit, or at least, constructive notice, of the incident with Jim Loftus.

As for supervisors, employers are liable for their harassing actions, but may raise an affirmative defense rooted in the Supreme Court cases of Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 760-63 (1998), and Faragher v. City of Boca Raton, 524 U.S. 775, 806-7 (1998), to shift the burden to plaintiffs. Under the Ellerth/Faragher defense, employers under certain circumstances can assert that they exercised reasonable care to prevent and correct any harassing behavior, and that a plaintiff unreasonably failed to take advantage of the corrective opportunities. The burden then shifts to plaintiff to support the reasonableness of its actions. See Durham Life Ins. v. Evans, 166 F.3d 139, 149-50 (3d Cir. 1999) (describing Ellerth/Faragher defense). The existence of a sexual harassment policy with an effective grievance procedure will satisfy the burden of the defendant with regard to the first prong. See Bonenberger, 132 F.2d at 27 (citations omitted).

Here, two supervisors are implicated: David Bowman and Arnie Silver. Plaintiff did not successfully report harassment by these two individuals.' The existence of a harassment policy with an effective grievance procedure advances the defense to the second prong. Factual questions, however, remain as to whether Outlaw's actions in failing to report the harassment were reasonable, and also whether

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He claims that he tried to report Bowman's harassment to Pacifico, but was cut short by Pacifico before he was able to.

Pacifico and other managers should otherwise have been on constructive notice. Accordingly, I would not feel comfortable granting summary judgment on this ground either.

BY THE COURT:

  
M. A. McLAUGHLIN, J.

del to:

George D. Wallace, Esq.  
John P. Gonzalez, Esq.