

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

PAMELA DIVINY, : CIVIL ACTION
Plaintiff :
 :
v. :
 :
VILLAGE OF COTTAGE GREEN, :
INC., et al., :
Defendants : NO. 03-5096

MEMORANDUM AND ORDER

McLaughlin, J.

November 1, 2004

Pamela Diviny is suing her former employer, Village of Cottage Green, and its president, Allen Giannone, for hostile work environment sexual harassment and constructive discharge under Title VII of the Civil Rights Act of 1964. The plaintiff alleges that she was subjected to inappropriate sexual comments and unwelcome touching by a fellow employee and that the defendants' failure to take appropriate remedial action upon learning of the harassment resulted in her constructive discharge. The defendants argue, among other things, that they were not aware of the harassment until Ms. Diviny reported it to them and that her contemporaneous decision to quit her job prevented them from taking appropriate remedial action to correct the situation. Currently before the Court is the defendants' motion for summary judgment. The Court will grant the motion.

I. Facts

Following is a recitation of the evidence, presented in the light most favorable to the plaintiff. Where the plaintiff has direct knowledge of events related to this litigation, the Court accepted the evidence from the plaintiff's deposition testimony and her testimony before the Unemployment Compensation Review Board. Where the plaintiff does not have direct knowledge of events, the Court considered the evidence from Allen Giannone's deposition testimony and his testimony before the Unemployment Compensation Review Board, as well as the testimony of the parties' witnesses before the Unemployment Compensation Review Board. If the Court found a discrepancy in the testimony, the Court accepted the evidence most favorable to the plaintiff.

Village of Cottage Green (the "Cottage Green") is a catering facility, located in Philadelphia, Pennsylvania which provides onsite catering for weddings, funerals, banquets and other social events. Allen Giannone is the president of the Cottage Green. Pamela Diviny was employed by the Cottage Green as a server from September 23, 2001, until October 23, 2002, when she resigned from her position.

Mr. Kevin Evans, the cook at the Cottage Green, regularly made inappropriate sexual comments to Ms. Diviny throughout her employment. These comments included: statements about Ms. Diviny's body and the size of her breasts; comments

directed to Ms. Diviny as she was bending over that Mr. Evans liked her in that position and wanted her to stay in that position; comments that Mr. Evans wished Ms. Diviny was a lesbian because he would "get off on" that; requests for Ms. Diviny to dance; and comments directed toward Ms. Diviny like "sexy" and "hey, good-looking." Initially, Ms. Diviny did not report these comments to anyone at the Cottage Green.

Ms. Diviny testified at her deposition that three other waitresses, Kathy Meserole, Christine Berson, and Colleen Sciarra, heard Mr. Evans make inappropriate comments to her. Ms. Diviny also testified that she overheard Mr. Evans making similar comments to these waitresses. Ms. Meserole testified on behalf of Ms. Diviny before the Unemployment Compensation Review Board that she heard Mr. Evans make inappropriate comments to Ms. Diviny and one other waitress.

Ms. Diviny further testified that she did not report these comments to management at the Cottage Green because the comments did not bother her. Ms. Diviny testified that she did not pay attention to the comments and did not think they were anything to worry about.

Over the course of three months, from July to October, 2002, Mr. Evans inappropriately touched Ms. Diviny on three separate occasions. The first touching incident occurred in mid-July, 2002, when Mr. Evans approached Ms. Diviny from behind,

grabbed her by the waist, and kissed her on the neck. Ms. Diviny pushed Mr. Evans away and asked him to stop. Ms. Diviny did not report this incident to anyone at the Cottage Green, and nobody witnessed this incident.

The second touching incident occurred on Wednesday, October, 15, 2002, when Mr. Evans grabbed Ms. Diviny by the shoulder, leaned forward, and tried to kiss her. Ms. Diviny pushed Mr. Evans away, and he started to laugh. Nobody witnessed this incident.

Three days later, on Friday, October 18, 2002, Ms. Diviny went to see Mr. Giannone in his office before her shift started. Ms. Diviny told Mr. Giannone that she wanted to quit her job because Mr. Evans was making inappropriate comments and touching her. Mr. Giannone told Ms. Diviny that he would talk to Mr. Evans and try to resolve the situation. Ms. Diviny decided to work her regular shifts that weekend; but, she asked Mr. Giannone not to speak to Mr. Evans until she left work on Sunday because she wanted to avoid a confrontation.

Immediately after Ms. Diviny left Mr. Giannone's office, Mr. Giannone called the manager at the Cottage Green, Lewis Quieti, and informed Mr. Quieti of Ms. Diviny's complaint against Mr. Evans. Mr. Giannone instructed Mr. Quieti to watch Mr. Evans and asked that the waitress captain, Mary Kay Abrams, follow Ms. Diviny as she performed her duties to make sure that

nothing happened to her.

Ms. Diviny returned to the Cottage Green that evening and worked her regular shifts that weekend. The third touching incident occurred that same evening, October 18, 2002, when Mr. Evans grabbed Ms. Diviny from behind, put his arms around her waist, and kissed her neck. Nobody witnessed this incident.

The following morning, Saturday, October 19, 2002, Ms. Diviny reported the incident from the previous evening to Mr. Quietti and Ms. Abrams. Mr. Quietti and Ms. Abrams told Ms. Diviny that they were not surprised because Mr. Giannone had already informed them of her complaint against Mr. Evans. Mr. Quietti and Ms. Abrams also told Ms. Diviny that Mr. Giannone had scheduled a meeting to be held on Monday to discuss her complaint. Mr. Quietti and Ms. Abrams asked Ms. Diviny whether she would consider staying at the Cottage Green if appropriate action were taken to correct the situation. Ms. Diviny agreed to stay if appropriate action were taken.

On Monday, October 21, 2002, Mr. Giannone met with Mr. Evans concerning Ms. Diviny's complaint. Mr. Evans denied the allegations, and Mr. Giannone issued a verbal warning that any form of sexual harassment would not be tolerated in the future. During the next two weeks, Mr. Giannone questioned three waitresses, Colleen Sciarra, Rosemarie St. Marie, and Agnes Bolger, as well as Ms. Abrams, about inappropriate behavior by

Mr. Evans. In response to Mr. Giannone's questions, these individuals denied that they had either experienced or witnessed inappropriate behavior by Mr. Evans at the Cottage Green.

Ms. Diviny called Mr. Quietti and Ms. Abrams multiple times that week to discuss what, if any, actions had been taken to remedy the situation. Neither Mr. Quietti nor Ms. Abrams provided any information to Ms. Diviny concerning Mr. Giannone's investigation of her complaint or Mr. Giannone's meeting with Mr. Evans. Ms. Diviny did not attempt to contact Mr. Giannone directly. On Thursday of that week, October 23, 2002, Ms. Diviny told Ms. Abrams that, because she had not received any information concerning the defendants' efforts to remedy the situation with Mr. Evans, she would not be returning to work.

II. Discussion

Currently before the Court is the defendants' motion for summary judgment.¹ The defendants argue that the Court

¹ A motion for summary judgment shall be granted where all of the evidence demonstrates "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). The moving party has the initial burden of demonstrating that no genuine issue of material fact exists. Once the moving party has satisfied this requirement, the non-moving party may not simply rest on the pleadings, but must go beyond the pleadings in presenting evidence of a dispute of fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323-24 (1986). Entry of summary judgment is appropriate against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case. Id. at 322-23. In deciding a motion for

should grant their motion for summary judgment on the plaintiff's hostile work environment claim because (1) the incidents of sexual harassment were not sufficiently severe or pervasive to state a claim under Title VII; and (2) the plaintiff has failed to establish employer liability for the harassment by Mr. Evans because they took immediate and prompt action after Ms. Diviny complained about Mr. Evans' conduct to Mr. Giannone.

The defendants also argue that the Court should grant their motion for summary judgment as to the plaintiff's constructive discharge claim because it was not reasonable for Ms. Diviny to quit her job under the circumstances. Finally, the defendants argue that the Court should grant summary judgment as to all claims against Mr. Giannone because, under the law of this circuit, individuals cannot be held liable for sexual harassment under Title VII.

A. Claim for Hostile Work Environment Sexual Harassment

To establish a hostile work environment claim against an employer under Title VII, a plaintiff must show the convergence of five elements: (1) the plaintiff suffered intentional discrimination because of her sex; (2) the

summary judgment, the Court must view the facts and "[a]ny inference to be drawn from 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).

discrimination was pervasive and regular; (3) the discrimination detrimentally affected the employee; (4) the discrimination would detrimentally affect a reasonable person of the same sex in that position; and (5) the employer should be held liable for the harassment under a theory of respondeat superior liability.

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

The defendants move for summary judgment based on the second and fifth elements only. Although it is doubtful that the incidents alleged here were sufficiently severe or pervasive to make out a prima facie case of hostile work environment, the Court will grant the motion on the ground that there is insufficient evidence to establish employer liability for the conduct of Mr. Evans.

1. Severe or Pervasive Sexual Harassment

A hostile work environment exists "[w]hen the workplace is permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment." Harris v. Forklift Sys., Inc., 510 U.S. 17, 21 (1993) (internal quotations and citations omitted). The harassment must create an environment that is both objectively and subjectively offensive, i.e., the harassment must create an

environment that a reasonable person would find hostile or abusive and that the victim, in fact, did perceive to be hostile or abusive. Faragher v. City of Boca Raton, 524 U.S. 775, 787 (1998); Harris, 510 U.S. at 21-22.

The Court must consider the totality of the circumstances when determining whether the alleged harassment is sufficiently severe or pervasive to constitute a hostile work environment. Andrews, 895 F.2d at 1482. Factors to consider in determining whether the conduct 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, 510 U.S. at 23.

The defendants contend that Mr. Evans' inappropriate comments should not be considered in the hostile work environment analysis because the plaintiff did not subjectively perceive the comments to be offensive. In her deposition testimony, Ms. Diviny conceded that the inappropriate comments by Mr. Evans did not bother her. Ms. Diviny testified that she "loved" her job prior to the time that Mr. Evans first touched her. Def.'s Ex. A at 14. Ms. Diviny further testified that she did not report these comments to management because "[t]hey were just comments. I didn't think it was anything to worry about." Id. at 22. When asked whether the comments bothered her, Ms. Diviny replied, "Not

really. I didn't pay attention to them." Id. at 22-23.

The Court is persuaded by the defendants' argument as to the statements. The Court finds it doubtful that the three touching incidents constitute conduct that is sufficiently severe or pervasive to make out a prima facie case of hostile working environment. The Court need not resolve this issue, however, because there is insufficient evidence to establish employer liability for the conduct of Mr. Evans.

2. Respondeat Superior Liability

The circumstances under which an employer may be held liable for the sexual harassment of an employee vary 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) (if harasser is a co-worker, burden is on plaintiff to establish employer's knowledge and failure to take appropriate remedial action) with Faragher, 524 U.S. at 807 (if harasser is a supervisor, employer is held strictly liable, subject to a potential affirmative defense). In the instant case, the plaintiff attempts to raise an issue as to whether Mr. Evans was her supervisor or merely a co-worker.

Viewing the facts, and any inferences to be drawn therefrom, in the light most favorable to the plaintiff, the Court finds insufficient evidence in the record to suggest that

Mr. Evans was anything other than Ms. Diviny's co-worker. At her deposition, Ms. Diviny testified that Mr. Giannone was her boss. Def.'s Ex. A at 45. Ms. Diviny also testified that Mr. Evans managed the kitchen and instructed the waitresses about the food for the various events at the Cottage Green; but, when asked if Mr. Evans was "in charge" of her, Ms. Diviny replied that he was not. Id. at 44-45, 62. During her testimony before the Unemployment Compensation Review Board, Ms. Diviny identified Mr. Quietti and Ms. Abrams as management at the Cottage Green. Pl.'s Ex. A at 5.

Nor is there any indication in the record that Mr. Evans had the ability to hire, fire, evaluate, or discipline Ms. Diviny, or that he could influence Ms. Diviny's working schedule, assignments, or salary. The Court finds insufficient evidence as a matter of law to support the plaintiff's assertion that Mr. Evans was her supervisor. The Court, therefore, will consider whether the plaintiff has established the defendants' liability for the harassment of a co-worker.

To hold an employer liable for the sexual harassment of a co-worker, the plaintiff must establish that management-level employees "had actual or constructive knowledge about the existence of a sexually hostile environment and failed to take prompt and adequate remedial action." Andrews, 895 F.2d at 1486.

The Court finds that the defendants did not have actual

or constructive knowledge of the harassment until Ms. Diviny reported it to Mr. Giannone on October 18, 2002. Ms. Diviny asserts that the defendants did know of the harassment earlier because Mr. Evans told Ms. Diviny that he had been instructed "to leave the women alone at the Cottage Green." Def.'s Ex. A at 43-44. Additionally, Mr. Evans told another waitress, Kathy Meserole, that Mr. Giannone had instructed him to stop "making passes" at the female employees. Pl.'s Ex. A. at 10-11. These two statements by Mr. Evans are insufficient to establish actual knowledge on the part of management at the Cottage Green that Mr. Evans was sexually harassing female employees.

Nor does the evidence support the conclusion that the defendants had constructive knowledge of the harassment. The Third Circuit has recognized constructive notice in two situations: (1) where an employee provides management level personnel with enough information to raise a probability of sexual harassment in the mind of a reasonable employer; and (2) where the harassment is so pervasive and open that a reasonable employer would have had to be aware of it. Kunin, 175 F.3d at 294.

The plaintiff fails to establish that the defendants had constructive knowledge under the first test because Ms. Diviny testified at her deposition that she did not speak to management about Mr. Evans' behavior until October 18, 2002.

Def.'s Ex. A at 20-24. The plaintiff also fails to establish constructive knowledge under the second test. Ms. Diviny testified that nobody witnessed Mr. Evans touching her in an inappropriate manner. Id. at 15, 25, 29. Ms. Diviny contends that three other waitresses overheard the comments by Mr. Evans; but, this does not establish constructive knowledge on the part of management at the Cottage Green for sexual harassment.

The plaintiff has failed to present any evidence by which a reasonable fact-finder could conclude that the harassment was so open and pervasive that a reasonable employer would have known about it. The Court finds that the defendants did not have knowledge of the sexual harassment by Mr. Evans until Ms. Diviny complained to Mr. Giannone on October 18, 2002.

The question then becomes whether the defendants took prompt and adequate action after receiving notice of Mr. Evans' alleged conduct on October 18, 2002. For an employer's remedial action to be considered adequate, the action must be "reasonably calculated to prevent further harassment." Knabe v. Boury Corp., 114 F.3d 407, 412-13 (3d Cir. 1997) (internal quotations and citations omitted).

In Knabe, the Third Circuit found, as a matter of law, that an employer's remedial action was reasonably calculated to stop further instances of harassment. Id. at 413. In Knabe, the employer issued a verbal and written warning to the harassing

employee that "the company does not tolerate any sexual comments or actions. Any company violations of this policy will receive possible suspension and/or termination." Id. The employer also provided the complaining employee with the names and telephone numbers of four members of the company's management who should be contacted with any future complaints. Id. The court found that the plaintiff failed to produce any evidence to show that the harassment would have continued if she had returned to work or that the remedial action was not reasonably calculated to prevent further acts of harassment. Id. at 413, 415.

In this case, after Ms. Diviny reported the sexual harassment to Mr. Giannone on October 18, 2002, he took immediate action to investigate and remedy the situation. Mr. Giannone told Ms. Diviny that he would talk to Mr. Evans and attempt to resolve the situation. Pl.'s Ex. A at 6. Mr. Giannone immediately notified management personnel, Mr. Quietti and Ms. Abrams, of Ms. Diviny's complaint and scheduled a meeting with the harassing employee. Def.'s Ex. A at 30-32; Def.'s Ex. B at 25, 37. Additionally, Mr. Quietti and Ms. Abrams told Ms. Diviny that Mr. Giannone had scheduled a meeting with Mr. Evans, and they asked her to re-consider her resignation. Def.'s Ex. A at 31-32.

Within three days of Ms. Diviny's complaint, Mr. Giannone confronted Mr. Evans with the allegations and warned Mr.

Evans that sexual harassment would not be tolerated in the future. Def.'s Ex. B at 37-38, 47. Even after Ms. Diviny resigned her position, Mr. Giannone continued to investigate her complaint and conducted sexual harassment sensitivity training with the entire staff. Id. at 39-42, 57-60. Each staff member received and signed a copy of the company's policies, including the policy related to sexual harassment. Id. at 60-61.

To withstand a motion for summary judgment, the plaintiff must present enough evidence to show that, taking all the evidence as true and in the light most favorable to the plaintiff, the employer's remedial action was not reasonably calculated to prevent further acts of harassment. See Knabe, 114 F.3d at 415. Here, the plaintiff has produced no evidence to suggest that the defendants' actions were not reasonably calculated to end the harassment by Mr. Evans.

B. Constructive Discharge

The plaintiff also has not adduced sufficient evidence to establish a constructive discharge. To state a claim for constructive discharge, the plaintiff must first establish the existence of a hostile work environment. Pennsylvania State Police v. Suders, 124 S. Ct. 2342, 2347 (2004). The plaintiff must show "harassing behavior 'sufficiently severe or pervasive to alter the conditions of [her] employment.'" Id. at 2347,

citing Meritor Savings Bank, FSB v. Vinson, 477 U.S. 57, 67 (1986). To establish a constructive discharge, "the plaintiff must make a further showing: She must show that the abusive working environment became so intolerable that her resignation qualified as a fitting response." Id. at 2347.

Although not intended as an exhaustive list, the following factors are commonly cited in constructive discharge cases: (1) the threat of discharge; (2) suggestions or encouragement of resignation; (3) a demotion or reduction of pay or benefits; (4) involuntary transfer to a less desirable position; (5) alteration of job responsibilities; and (6) unsatisfactory job evaluations. Clowes v. Allegheny Valley Hosp., 991 F.2d 1159, 1161 (3d Cir. 1993).

The Court finds that Ms. Diviny has not come forward with sufficient evidence to survive a motion for summary judgment on her constructive discharge claim. First, the Court notes that none of the Clowes factors are present in this case. Second, the Court finds it unreasonable as a matter of law for Ms. Diviny to have resigned her position just six days after she first reported the harassment to Mr. Giannone. Although not necessary in every situation, "a reasonable employee will usually explore . . . alternative avenues thoroughly before coming to the conclusion that resignation is the only option." Clowes, 991 F.2d at 1161; see also Connors v. Chrysler Fin. Corp., 160 F.3d 971, 975 (3d

Cir. 1998) (finding that the employee had a duty to attempt to clarify the situation before retiring).

Ms. Diviny told Mr. Giannone that she wanted to quit her job at the same time that she first reported the incidents of sexual harassment. Def.'s Ex. A at 26. Ms. Diviny then attempted to contact Mr. Quieti and Ms. Abrams by telephone over a four day period. Id. at 34. When Ms. Abrams was unable to provide any information to Ms. Diviny on the fourth day, Ms. Diviny resigned her position. Id. at 35. Under these circumstances, the Court finds that a reasonable employee in Ms. Diviny's situation would not have felt compelled to resign.²

An appropriate Order follows.

² Allen Giannone also moves for summary judgment on plaintiff's claims for individual liability. The Third Circuit has held that individuals, who are not themselves the employing entity, cannot be held liable for sexual harassment under Title VII. Sheridan v. E.I. DuPont de Nemours and Co., 100 F.3d 1061, 1077 (3d Cir. 1996). Summary judgment is appropriate for Mr. Giannone on this basis as well.

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PAMELA DIVINY,	:	CIVIL ACTION
Plaintiff	:	
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v.	:	
	:	
VILLAGE OF COTTAGE GREEN,	:	
INC., et al.,	:	
Defendants	:	NO. 03-5096

ORDER

AND NOW, this 1st day of November, 2004, upon consideration of the defendants' Motion for Summary Judgment (Docket No. 10), the plaintiff's response, the defendants' reply, and after a hearing held on October 21, 2004, IT IS HEREBY ORDERED that said motion is GRANTED for the reasons given in the Memorandum of today's date. Judgment is hereby entered for the defendants and against the plaintiff.

BY THE COURT:

/s/ Mary A. McLaughlin

MARY A. McLAUGHLIN, J.