

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

ROXANN LAPPIN	:	CIVIL ACTION
	:	
v.	:	05-1068
	:	
LEEFSON TOOL & DIE COMPANY	:	

MEMORANDUM AND ORDER

JOYNER, J.

February 28, 2006

Via the motion now pending before this Court, Defendant Leefson Tool & Die Company ("Defendant"), moves for summary judgment of Plaintiff Roxann Lappin's ("Plaintiff") employment discrimination claims. Plaintiff claims that she was subjected to a hostile work environment as a result of sexual harassment, and that such harassment resulted in her constructive discharge from Defendant's employ. For the reasons which follow, Defendant's Motion shall be granted in part and denied in part.

Legal Standard for Summary Judgment

In deciding a motion for summary judgment under Fed. R. Civ. P. 56(c), a court must determine "whether there is a genuine issue of material fact and, if not, whether the moving party is entitled to judgment as a matter of law." Medical Protective Co. v. Watkins, 198 F.3d 100, 103 (3d Cir. 1999) (internal citation omitted). Rule 56(c) provides that summary judgment is properly rendered:

. . . 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.

Thus, summary judgment is appropriate only when it is demonstrated that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Celotex Corp. v. Catrett, 477 U.S. 317, 322-32 (1986). An issue of material fact is said to be genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986).

A party seeking summary judgment bears the initial burden of identifying portions of the record that demonstrate the absence of issues of material fact. Celotex, 477 U.S. at 323. The party opposing a motion for summary judgment cannot rely upon the allegations of the pleadings, but instead must set forth specific facts showing the existence of a genuine issue for trial. Id. at 324; Fed. R. Civ. P. 56(e).

Where, as here, a non-moving party fails to timely oppose a motion for summary judgment, the motion cannot simply be granted as uncontested.¹ See Loc. R. Civ. P. 7.1(c). An unopposed

¹Defendant's motion was filed on November 2, 2005. Proceedings in this case were stayed by the order of this Court dated November 8, 2005 and Plaintiff was granted thirty (30) days to obtain new representation after Plaintiff's former counsel was permitted to withdraw from the case. Plaintiff did not have an attorney enter an appearance on her behalf. On January 26, 2006, this Court issued an Order to show cause why Defendant's motion

motion for summary judgment may only be granted where the Court determines that summary judgment "appropriate" pursuant to Rule 56. Anchorage Assoc. v. Virgin Islands Bd. of Tax Review, 922 F.2d 168, 175 (3d Cir. 1990); Fed. R. Civ. P. 56(e). Summary judgment is "appropriate" where the movant has "shown itself to be entitled to judgment as a matter of law." Anchorage, 922 F.2d at 175. The Third Circuit has explained that the analysis of whether summary judgment is "appropriate" absent opposition depends on which party bears the burden of proof. Id.

Where the moving party has the burden of proof on the relevant issues, this means that the district court must determine that the facts specified in or in connection with the motion entitle the moving party to judgment as a matter of law. Where the moving party does not have the burden of proof on the relevant issues, this means that the district court must determine that the deficiencies in the opponent's evidence designated in or in connection with the motion entitle the moving party to judgment as a matter of law.

Id. Thus, the court concluded, a local rule cannot provide that a motion for summary judgment be automatically granted upon a failure to respond. Id.

The Third Circuit instead interpreted the local rule, which allowed motions not opposed to be deemed conceded, as giving the

should not be granted. Plaintiff was given fourteen days to submit a brief in opposition, but failed to do so. Although, as discussed above, we cannot dismiss Plaintiff's case based on her failure to respond to the summary judgment motion, Plaintiff is warned that continued failure to comply with the rules of procedure and the orders of this Court may result in dismissal for failure to prosecute.

failure to respond to a motion for summary judgment the effect of a waiver of the right to controvert the facts asserted by the movant. Anchorage, 922 F.2d at 175-76. The Third Circuit expressed reluctance to limit this waiver to only those facts adequately supported by the record. Id. at 176. The court noted that a local rule "could provide, or be construed to mean, that all of the uncontroverted facts stated in or in connection with the motion may be accepted as true by the court whether or not so evidenced." Id. The court, however, declined to decide that issue because the facts alleged in the motion before it were supported by previous filings of the non-movant or within the personal knowledge of counsel Id.

Unlike the Virgin Islands local rule considered in Anchorage, however, the applicable local rule in this district does not purport to allow summary judgment motions to be granted as uncontested or conceded when the non-movant fails to timely respond. See Loc. R. Civ. P. 7.1(c). Instead, this rule specifically directs the Court to apply the standards set forth in Rule 56(c) in determining the appropriateness of summary judgment. Id. Thus, we remain bound by Rule 56 and its attendant decisional law to consider all facts and inferences in the light most favorable to the non-movant - a mandate which seems incompatible with crediting unsupported assertions of fact made in a summary judgment motion. See Fed. R. Civ. P. 56;

Matsushita, supra.

Factual Background

Defendant Leefson Tool and Die Company is a metal stamping business located in Folcroft, Pennsylvania. (Dep. of Daniel Leefson ("Leefson Dep.") at 4-5.) Daniel Leefson and his brother, Richard Leefson, are co-owners of the company. (Id.) at 4. Daniel Leefson handles the "business" aspects of Defendant's operations, including personnel matters. (Id. at 6.)

Plaintiff Roxann Lappin started her employment with Defendant in late October, 2003. (Dep. of Roxann Lappin ("Pl.'s Dep.") at 23; Leefson Dep. at 6.) Before beginning her employment, Plaintiff was interviewed by Daniel Leefson. (Pl.'s Dep. at 23.) Plaintiff's initial work assignment was in the machine shop. (Id. at 24.) In December, 2003, Plaintiff began working in the mint area. (Id. at 24-25.) Plaintiff claims that she was harassed by mint supervisor William Chandler. Plaintiff does not claim that she was harassed during her employment with Defendant by anyone other than Chandler. (Id. at 17.)²

Plaintiff's allegations of harassment focus on a number of remarks, mostly in the form of questions, made by Chandler towards Plaintiff. According to Plaintiff's testimony, Chandler asked "do you swallow?" approximately fifteen or twenty times, "do you take it up the ass?" seven or eight times, "do you do it

²Mr. Chandler is now deceased. (Pl.'s Dep. at 17.)

with other women?" twenty-five or thirty times, "do you do it with animals?" approximately ten times, and "how would you like to do it with a horse's big dick?" on more than five, but less than ten, occasions. (Pl.'s Dep. at 103-107.) Plaintiff alleges that these statements were all made during the time she was working in the mint, but that none of these statements were made in March or April of 2004. (Id. at 103-108.)

Plaintiff did not respond to these statements until, in February of 2004, she confronted Chandler in his office and told him that she didn't like the way he was speaking to her. (Pl.'s Dep. at 53.) When Mr. Chandler replied that he was no longer satisfied with her job performance, Plaintiff indicated that she intended to seek a transfer out of the mint. (Id. at 53-54.) Shortly thereafter, Plaintiff asked Daniel Leefson to transfer her back to the machine shop from the mint. (Id. at 55.)

Plaintiff did not provide Daniel Leefson with a reason for this request. (Id.) Plaintiff's request was granted, and she returned to the machine shop by March, 2004. (Id. at 55-56.) Plaintiff worked in the machine shop through the end of her employment with Defendant, except that she worked the night shift in the mint for two weeks in March, 2004. (Id. at 57.) Chandler was not present during those night shifts. (Id.)

In 2004, Plaintiff was provided with an employee information

booklet.³ (Pl.'s Dep. at 28.) Plaintiff, by her signature, acknowledged receipt of the "Leefson Tool & Die Co./Keystone Mint Employee Information Booklet for 2004." (Def.'s Br. Ex. 3.) This information booklet included a harassment policy. (Def.'s Br. Ex. 5.) This policy stated that harassment based on "race, sex, religion, national origin, age (height, weight, marital status), or disability will not be tolerated." (Id.) The policy provided more detailed information concerning sexual harassment, explaining the prohibition on quid pro quo harassment, and specifying that

³Defendant asserts in its motion that Plaintiff received an employee information booklet "at the commencement of her employment." (Def.'s Br. at 2.) It is undisputed that Plaintiff's employment commenced in October of 2003. The cited support for this statement, however, establishes only that Plaintiff received such a booklet at some time in 2004. Specifically, the relevant cited portion of Plaintiff's transcript reads as follows:

- Q: Let me show you Exhibit Leefson-1. Is this your signature on this page? You need to verbalize your answer.
- A: Yes.
- Q: You were provided with an employee information booklet in 2004?
- A: Yes.
- Q: You signed acknowledging that you had received it?
- A: Yes.
- Q: As far as you know this was given to the other employees as well?
- A: Yes.
- Q: Do you know when you received this in 2004?
- A: No. I don't know the actual date, no.

(Pl.'s Dep. at 27-28.) The signature page bears no date indicating either the date that the booklets were received or the date that the page was signed. (Def.'s Br. Ex. 4.)

[s]exual harassment also includes unwelcome sexual flirtations, advances, or propositions, verbal abuse of a sexual nature, subtle pressure or requests for sexual activities, unnecessary touching of an individual, graphic or verbal commentaries about an individual's body, sexually degrading words used to describe an individual, an [sic] display of sexually suggestive objects or pictures in the workplace, sexually explicit or offensive jokes, or physical assault.

(Id.) The policy further provided that complaints should be directed to Myrna Wolman or Daniel Leefson or, if that "would prove to be uncomfortable," to any other manager. (Id.) The policy promised that confidential investigations would be promptly conducted and appropriate corrective actions taken if warranted, and that complaints could be made "without fear of retaliation." (Id.)

On April 22, 2004, Plaintiff sought out Daniel Leefson because Chandler was making faces and laughing at her while she performed work at a machine near the mint door. (Pl.'s Dep. at 67.) According to Plaintiff, Chandler was standing approximately seven feet away, and the behavior continued for three or four minutes. (Id. at 67-68.) Plaintiff left her work area and went to Daniel Leefson's office. (Id. at 68, 70.) Plaintiff told Daniel Leefson that she felt she had been harassed by Chandler, and described the comments that she felt were inappropriate. (Id. at 70.)

April 22, 2004 was the first time that Plaintiff complained about sexual harassment. (Pl.'s Dep. at 28.) Plaintiff did not

complain to Daniel Leefson about Chandler making faces or laughing at her. (Id. at 59.) Plaintiff did indicate that she and other employees were hesitant to complain "because of their jobs." (Id.) According to Plaintiff, Daniel Leefson's initial response to her explanation of what she perceived as harassment was to ask her why she would "lie about something like this." (Id. at 72.) Daniel Leefson indicated that he would investigate by interviewing the other women that worked in the mint area, but asked her "why would you want to make an asshole out of yourself." (Id.)

Plaintiff testified that, as a result of Daniel Leefson's response to her complaint, she decided that she would quit immediately rather than "make an asshole out of [her]self." (Leefson Dep. at 73.) Once Plaintiff decided to leave, she sought out her sister, Lisa Hales, who was also working for Defendant, and told Hales of her decision. (Pl.'s Dep. at 74.) Hales decided to leave with Plaintiff. (Id. at 74-75.) Both women left work, and did not return. (Id.) After leaving, Plaintiff told Hales about the perceived harassment. (Lisa Hales Dep. at 19.)

Plaintiff filed a complaint with the Equal Opportunity Employment Commission ("EEOC"). (Pl.'s Dep. at 103.) The EEOC declined to conduct an investigation, and issued a right to sue letter. (Def.'s Br. Ex. 6.)

Discussion

Defendant proffers three arguments for summary judgment in its favor. First, Defendant argues that Plaintiff has not established that any harassment was sufficiently severe or pervasive to support a prima facie case for sexual harassment under Title VII.⁴ (Def.'s Br. at 5-11.) Next, Defendant argues that it is protected by the affirmative defense available pursuant to the Supreme Court's decisions in Faragher and Ellerth because they had a sexual harassment policy in place and Plaintiff failed to avail herself of its protections. (Id. at 11 (citing Faragher v. City of Boca Raton, 524 U.S. 775, 807 (1998); Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 765 (1998)).) Last, Defendant argues that Plaintiff fails to show that she has suffered a tangible employment action because the circumstances under which she left Defendant's employ do not meet the requirements for constructive discharge. (Id. at 12-13.) Because of the interplay between the different aspects of Plaintiff's claims called into question by Defendant's arguments, we consider these in a different order than that presented in Defendant's motion.

⁴Plaintiff also set forth claims under the Pennsylvania Human Relations Act ("PHRA"), but PHRA claims are considered within the same legal framework as Title VII claims. See, e.g., Weldon v. Kraft, Inc., 896 F.2d, 793, 796 (3d Cir. 1990).

Failure to Show Sufficiently Severe or Pervasive Harassment

To support a claim of discrimination under the hostile work environment framework, Plaintiff must prove that (1) she suffered intentional discrimination because of her sex; (2) the discrimination was severe or pervasive;⁵ (3) the discrimination detrimentally affected her; (4) it would have detrimentally affected a reasonable person in like circumstances; and (5) a basis for employer liability exists. See Kunin v. Sears Roebuck & Co., 175 F.3d 289, 293 (3d Cir. 1999), cert. denied, 528 U.S. 964 (1999). Defendant argues that Plaintiff's testimony regarding the frequency and nature of the comments made by Chandler cannot, as a matter of law, support a hostile work environment claim because they do not establish that any sufficiently severe or pervasive harassment took place. (Def.'s Br. at 7.)

The Supreme Court has explained that "in order to be actionable under the statute, a sexually objectionable environment must be both objectively and subjectively offensive, one that a reasonable person would find hostile or abusive, and

⁵Third Circuit cases have often phrased this element as requiring "pervasive and regular" harassment. The Third Circuit recently acknowledged, however, that the difference between its own formulation of this element and that of the Supreme Court, which requires "severe or pervasive" harassment, is significant, and that the latter must control. See Jensen v. Potter, No. 04-4078, 2006 U.S. App. LEXIS 2316, *11 n.3 (3d Cir. Jan. 31, 2006)(internal citations omitted).

one that the victim in fact did perceive to be so." Faragher, 524 U.S. at 787 (citing Harris v. Forklift Sys., Inc., 510 U.S. 17, 21-22 (1993)). In determining whether an environment is sufficiently hostile or abusive to support a claim of discrimination, courts are directed to examine the totality of the circumstances, including 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." Id. at 787-88 (quoting Harris, 510 U.S. at 23)). The Supreme Court has further explained that Title VII does not prohibit "genuine but innocuous differences in the ways men and women routinely interact with members of the same sex and of the opposite sex." Oncale, 523 U.S. 75, 81 (1998).

Plaintiff bears the burden of showing that the alleged harassment was severe or pervasive. Because Plaintiff has not responded to Defendants motion, the question before us is whether "deficiencies in the opponent's evidence designated in or in connection with the motion entitle the moving party to judgment as a matter of law." See Anchorage, 922 F.2d at 175. In support of its argument that Plaintiff fails to establish sufficiently severe or pervasive harassment, Defendant cites an abundance of cases where, according to Defendant, summary judgment was granted "based upon more egregious conduct." (Def.'s Br. at 8-10.) In

light of the proffered cases, Defendant concludes that no reasonable jury could find that Plaintiff was subjected to sexual harassment. (Id. at 11.) We disagree.

Defendant relies heavily upon Hilt-Dyson v. City of Chicago, 282 F.3d 456 (7th Cir. 2001), cert. denied, 537 U.S. 820 (2002). Hilt-Dyson considered a hostile work environment claim based on two instances of inappropriate touching, which involved a supervisor touching the Plaintiff's back and shoulder. Hilt-Dyson, 282 F.3d at 459. The Seventh Circuit found this to be inactionable under Title VII , because it "involved no threats, intimidation or humiliation" and also because the behavior ceased after the second incident. Id. at 463. We agree with the Seventh Circuit's holding in Hilt-Dyson, but fail to see its applicability in this case.

It is undisputed that Plaintiff does not allege any improper touching. She does, however, describe repeated instances of comments of a clearly sexual nature. Her testimony, which is not challenged by Defendant, sets out a total of at least sixty-three such comments over a period of approximately two and one half months. This claim of repeated, overtly sexual comments is distinguishable from the two questionable, but not explicitly sexual, touching incidents considered in Hilt-Dyson.

Furthermore, we are not persuaded that any of other cases cited by Defendant represents a comparable and "more egregious"

pattern of harassment such that Defendant is entitled to judgment as a matter of law. Many of the cited cases, like Hilt-Dyson, involve allegations of inappropriate touching, either alone or in conjunction with other non-physical behavior. (See Def.'s Br. at 8-10.) The absence of an allegation or evidence of physical conduct, however, does not itself entitle Defendant to judgment as a matter of law. Nor are we convinced that egregiousness is tied solely to the severity, and never the pervasiveness, of harassment. None of the cases cited considered and rejected the type of constant verbal sexual harassment described by Plaintiff's testimony. (See Def.'s Br. at 8-10; Pl.'s Dep. at 103-108.)

Defendant has not shown that no reasonable jury could conclude that the behavior described by Plaintiff amounts to severe or pervasive sexual harassment. Defendant has, therefore, failed to show that the claimed evidentiary deficiency with regards to the severity or pervasiveness entitles Defendant to judgment as a matter of law. Thus, summary judgment on the basis that Plaintiff cannot show sufficiently severe or pervasive harassment must be denied.

Failure to Show a Tangible Employment Action

Defendant argues that Plaintiff fails to show that she was subject to a tangible employment action because she cannot establish that she was constructively discharged. (Def.'s Br. at

12-13.) We consider this issue before analyzing Defendant's invocation of the Faragher-Ellerth affirmative defense because, where a constructive discharge is the result of an official act by an employer, that employer is not protected by the Faragher-Ellerth defense. Pa. State Police v. Suders, 542 U.S. 129, 148 (2004). If no official act underlies a constructive discharge, or if an employee cannot successfully support the constructively discharge claim, no tangible employment action has occurred, and the employer may assert the Faragher-Ellerth defense. See Id.

Plaintiff bears the burden of showing that she was constructively discharged. Because Plaintiff has not responded to Defendants motion, we examine whether the asserted deficiencies in Plaintiff's evidence of constructive discharge entitle Defendant to judgment as a matter of law. See Anchorage, 922 F.2d at 175. To establish constructive discharge based on a hostile work environment, Plaintiff must show that Defendant knowingly permitted conditions of discrimination in the workplace, and that those conditions of discrimination rendered her working conditions were "so intolerable that a reasonable person would have felt compelled to resign." Suders, 542 U.S. at 147; Aman v. Cort Furniture Rental Corp., 85 F.3d 1074, 1084 (3d Cir. 1999).

Plaintiff admits that she was not subjected to Chandler's comments after her transfer back to the machine shop. (Pl.'s

Dep. at 103-108.) Plaintiff does not claim that anyone other than Chandler sexually harassed her. (Id. at 17.) Thus, Plaintiff was, based on her testimony, free from Chandler's harassment for at least a month and a half before she complained. (Id. at 28.)

Because Plaintiff did not complain of the harassment, and because Plaintiff sets forth no evidence that Defendant knew of Chandler's harassment before she made her complaint, Plaintiff fails to establish that Defendant knew of the harassment that took place while Plaintiff worked in the mint and allowed it to continue. Although Defendant became aware of the alleged harassment on April 22, 2004, we cannot conclude that Defendant knowingly allowed it to continue such that it became intolerable, because Plaintiff left Defendant's employ of her own volition before an investigation could be carried out and any necessary remedial action taken. Furthermore, that Daniel Leefson's response to Plaintiff's complaint was, according to Plaintiff's testimony, negative and even insulting, is not itself enough to create an objectively intolerable work environment, particularly where Plaintiff does not complain that Daniel Leefson harassed her or retaliated against her.

In the absence of evidence of an objectively intolerable environment that persisted despite Defendant's knowledge thereof, Plaintiff cannot show that she was constructively discharged.

Thus, we find that Defendant has successfully identified deficiencies in Plaintiff's evidence of constructive discharge that entitle Defendant to judgment as a matter of law. The effect of this conclusion is limited to the dismissal of Plaintiff's claims to the extent that they are based on the alleged constructive discharge and to confirming that Defendant may raise a Faragher-Ellerth defense. Because the absence of the constructive discharge or other tangible employment action does not negate the underlying hostile work environment claim, we consider Defendant's affirmative defense.

Affirmative Defense to Employer Liability

Defendant argues that Plaintiff's claim must fail because Defendant is protected from employer liability by the Faragher-Ellerth affirmative defense. (Def.'s Br. at 11.) The Supreme Court in Faragher and Ellerth sought to limit the scope of employer liability under Title VII. See Faragher, 524 U.S. at 807; Ellerth, 524 U.S. at 765. To do so, the Court held that an employer may establish an affirmative defense against liability or damages by showing (1) that the employer exercised reasonable care to prevent and promptly correct sexually harassing behavior; and (b) that the plaintiff employee unreasonable failed to take advantage of the preventive or corrective measures provided by the employer or to otherwise mitigate the harm. Id. In asserting this affirmative defense, Defendant bears the burden of

proof. Our inquiry, therefore, is whether the facts specified by Defendant in support of its motion entitle it to judgment as a matter of law. See Anchorage, 922 F.2d at 175.

In support of its affirmative defense, Defendant states that “[d]uring Lappin’s employment, Leefson had in effect a harassment-free workplace policy.” (Def.’s Br. at 11.) Defendant, however, has shown only that Plaintiff received a booklet that included a harassment policy at some point before she left on April 22, 2004. See supra n.3. Defendant has not established that it implemented and distributed this policy before, or even during, the time that Plaintiff was working in the mint and subject to Chandler’s alleged harassing comments. Daniel Leefson’s response to Plaintiff’s complaint, by discouraging Plaintiff from pursuing the matter, creates an issue of material fact as to the efficacy of the harassment policy. The response to Plaintiff’s complaint also raises issues of material fact as to whether Plaintiff’s was objectively unreasonable both in delaying her complaint and in leaving before an investigation could be conducted. Thus, Defendant has failed to present facts in support of its Faraqher-Ellerth defense that entitle it to judgment as a matter of law, and summary judgment as to Plaintiff’s hostile work environment claim is not appropriate.

For all of the reasons set forth above, Defendant's Motion for Summary Judgment is granted in part and denied in part pursuant to the attached order.

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

ROXANN LAPPIN	:	CIVIL ACTION
	:	
v.	:	05-1068
	:	
LEEFSON TOOL & DIE COMPANY	:	

ORDER

AND NOW, this 28th day of February, 2006, upon consideration of Defendant's Motion for Summary Judgment (Docs. No. 17, 18), it is hereby ORDERED that the motion is GRANTED IN PART and DENIED IN PART as follows:

- (1) Summary judgment is GRANTED and Plaintiff's claim for damages on the basis of constructive discharge are DISMISSED.
- (2) Summary judgment as Plaintiff's claim for damages on the basis of sexual harassment resulting in a hostile work environment is DENIED.

BY THE COURT:

s/J. Curtis Joyner
J. CURTIS JOYNER, J.