IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

Chastity Shields, et al.,	)	
	)	
Plaintiffs,	)	Case No. 1:09-CV-309
	)	
vs.	)	
	)	
FedEx Customer Information Services, Inc., and James Klingenberg,	)	
	)	
	)	
	)	
Defendants.	)	

MEMORANDUM OPINION

Plaintiffs Mercedes Davis, Angela Williams, and Theah Barber each filed claims against FedEx Customer Information Services, Inc. ("FCIS") pursuant to the Ohio Civil Rights Act alleging that they were subjected to a sexually hostile work environment by their supervisor, James Klingenberg, who was also a defendant in this case. After the close of discovery, FCIS moved for summary judgment on the claims of each of these Plaintiffs. Doc. Nos. 71, 73, 75. On November 2, 2010, the Court entered a brief order (Doc. No. 114) granting FCIS's motions for summary judgment. This memorandum explains the Court's reasoning and analysis for granting FCIS's motions.

I. Background

At the relevant times in this case, Plaintiffs Mercedes

Davis, Angela Williams, and Theah Barber were customer service representatives in FCIS's Cincinnati call center. Each of the plaintiffs was supervised by Defendant James Klingenberg. Each of the Plaintiffs alleges, and the record fairly reflects, that Klingenberg subjected them to a sexually hostile work environment in the form of persistent unwelcome sexual advances and sexually suggestive comments. A precise description of the harassment is not required because the Court assumes for purposes of this motion that Klingenberg's harassment was severe and pervasive and sufficient to alter the terms of conditions of Plaintiffs' employment. In general, however, from roughly October of 2005 through November of 2007, Klingenberg constantly subjected these Plaintiffs to unwelcome sexual advances and comments during one-on-one conversations, and by phone, by text messaging and by computer instant messages. Klingenberg also touched these Plaintiffs inappropriately on occasion. In contrast to their co-Plaintiff Chastity Shields, however, none of these Plaintiffs succumbed to or complied with Klingenberg's advances and they did not suffer any subsequent job detriment, such as a demotion or loss of pay, as a result of their refusal to comply.

In January 2007, during an audit, one of FCIS's computer network administrators flagged a series of instant messages from Klingenberg to Shields during December 2006 and January 2007 as being inappropriate and suggestive of sexual

harassment. After an internal investigation, Howard Schmid, the senior manager of the call center, decided that these messages reflected a consensual personal relationship between Klingenberg and Shields and did not constitute harassment. Schmid did not, however, discuss these communications with Shields, or in fact talk to her at all, during his investigation. Schmid did suspend Klingenberg for three days for using the messaging system to send personal messages. As described elsewhere by the Court, Klingenberg was in fact subjecting Shields to sexual harassment and sexual abuse at this time. See Doc. No. 109, at 2-6. Klingenberg's harassment of Davis, Williams, and Barber came to light in November 2007 after Shields transferred to a new department. Shields reported to her new supervisor, Pam Frye, that Klingenberg had been sexually harassing her. While investigating Shields's harassment claims, Frye learned from Shields that Davis, Williams, and Barber might also have been harassed by Klingenberg. When approached by Frye, each of the Plaintiffs admitted that Klingenberg had been harassing her. Frye then immediately reported Klingenberg's conduct to Schmid. Plaintiffs filed formal complaints against Klingenberg on November 20, 2007. Klingenberg was out the office for several days on sick leave starting on November 21, 2007 and then remained out of the office on a medical leave of absence until FCIS formally terminated him in January 2008.

It is not disputed that FCIS promulgated an anti-harassment policy that was available in Plaintiffs' employment handbooks and online through the company website. It is furthermore undisputed that none of the Plaintiffs complained or spoke up about Klingenberg's harassment until Frye approached them in the course of investigating Shields's complaints. Additionally, Williams and Barber attended anti-harassment training courses provided by FCIS and Davis started, but did not complete, an on-line anti-harassment training course provided by FCIS.

FCIS moved for summary judgment on Plaintiffs' sexual harassment claims on the grounds of, inter alia, the Faragher/Ellerth affirmative defense[1] because it took reasonable care to promulgate and disseminate an anti-harassment policy and Plaintiffs unreasonably failed to take advantage of the available complaint procedure. As indicated, on November 2, 2010, the Court entered a summary order granting FCIS's motions for summary judgment on this ground.

II. Summary Judgment Standard of Review

Summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no

[1] Faragher v. City of Boca Raton, 524 U.S. 775 (1998) and Burlington Ind., Inc. v. Ellerth, 524 U.S. 742 (1998). See discussion, infra at 8-9.

genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." FED. R. CIV. P. 56(c). The evidence presented on a motion for summary judgment is construed in the light most favorable to the non-moving party, who is given the benefit of all favorable inferences that can be drawn therefrom. United States v. Diebold, Inc., 369 U.S. 654 (1962). "The mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986) (emphasis in original). The Court will not grant summary judgment unless it is clear that a trial is unnecessary. The threshold inquiry to determine whether there is a need for trial is whether "there are any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party." Id. at 250. There is no issue for trial unless there is sufficient evidence favoring the non-moving party for a jury to return a verdict for that party. Id.

The fact that the weight of the evidence favors the moving party does not authorize a court to grant summary judgment. Poller v. Columbia Broadcasting System, Inc., 368 U.S. 464, 472 (1962). "[T]he issue of material fact required by Rule 56(c) . . . to entitle a party to proceed to trial is not

required to be resolved conclusively in favor of the party asserting its existence; rather, all that is required is that sufficient evidence supporting the claimed factual dispute be shown to require a jury or a judge to resolve the parties' differing versions of the truth at trial." First National Bank v. Cities Service Co., 391 U.S. 253, 288–89 (1968). Moreover, although summary judgment must be used with extreme caution because it operates to deny a litigant his day in court, Smith v. Hudson, 600 F.2d 60, 63 (6th Cir.), cert. dismissed, 444 U.S. 986 (1979), the United States Supreme Court has stated that the "[s]ummary judgment procedure is properly regarded no as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed to 'secure the just, speedy and inexpensive determination of every action.'" Celotex Corp. v. Catrett, 477 U.S. 317, 327 (1986). According to the Supreme Court, the standard for granting summary judgment is appropriate if the moving party establishes that there is insufficient evidence favoring the non-moving party for a jury to return a verdict for that party. Id. at 323; Anderson, 477 U.S. at 250.

Accordingly, summary judgment is clearly proper "against a party who fails to make a showing sufficient to establish the existence of an element essential to the party's case and on which that party will bear the burden of proof at

trial." Celotex Corp., 477 U.S. at 322. Significantly, the Supreme Court also instructs that the "plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion," against a party who fails to make that showing with significantly probative evidence. Id.; Anderson, 477 U.S. at 250. Rule 56(e) requires the non-moving party to go beyond the pleadings and designate "specific facts showing that there is a genuine issue for trial." Id.

Further, there is no express or implied requirement in Rule 56 that the moving party support its motion with affidavits or similar materials negating the opponent's claim. Id. Rule 56(a) and (b) provide that parties may move for summary judgment "with or without supporting affidavits." Accordingly, where the non-moving party will bear the burden of proof at trial on a dispositive issue, summary judgment may be appropriate based solely on the pleadings, dispositions, answers to interrogatories, and admissions on file.

III. Analysis

Plaintiffs sued FCIS for sexual harassment pursuant to the Ohio Civil Rights Act. Ohio courts apply federal case law interpreting Title VII of the Civil Rights Act of 1964 to violations of the Ohio Civil Rights Act. Hampel v. Food Ingredients Specialties, Inc., 729 N.E.2d 726, 731 (Ohio 2000).

In order to establish a prima facie case of a hostile

work environment based on sexual harassment, a plaintiff must show: (1) that she was a member of a protected class; (2) that she was subjected to unwelcome sexual harassment; (3) that the harassment was based on gender; (4) that the harassment unreasonably interfered with her work performance by creating a hostile, offensive, or intimidating work environment; and (5) that there is a basis for employer liability. Hafford v. Seidner, 183 F.3d 506, 512 (6th Cir. 1999). If the plaintiff establishes the first four elements and the harasser is a supervisor with immediate or successively higher authority over the plaintiff, the employer will be strictly liable for the harassment and the plaintiff will have proved the fifth element. Clark v. United Parcel Service, Inc., 400 F.3d 341, 348 (6th Cir. 2005).

If, however, the plaintiff establishes each of the elements of a hostile environment claim, but did not suffer a tangible employment action as a result of the harassment, the employer may be entitled to an affirmative defense to liability. An employer establishes its affirmative defense by demonstrating: (a) that it exercised reasonable care to prevent and correct promptly any sexually harassing behavior; and (b) that plaintiff unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise. Burlington Industries, Inc. v. Ellerth, 524 U.S.

742, 765 (1998). Generally, an employer satisfies the first part of this two-part standard when it has promulgated and enforced an effective sexual harassment policy. Id. The employer generally will satisfy the second element by proof that the plaintiff unreasonably failed to utilize the complaint procedure provided by the employer. Id.

As stated, for purposes of the motions for summary judgment the Court assumes that each Plaintiff can establish a prima facie hostile environment claim. Nevertheless, FCIS is entitled to judgment as a matter of law because the record establishes that FCIS is entitled to the Faragher/Ellerth affirmative.

First, it is not disputed that none of the Plaintiffs suffered a tangible employment action, such as termination, demotion, or reassignment to a less desirable position, as a result of Klingenberg's harassment. E.g., Ellerth, 524 U.S. at 761. Barber transitioned from customer service representative to senior customer service representative and received a pay raise. Barber Dep. at 47, 49-50. Williams also transitioned to senior customer service representative and remains in that position. Williams Dep. at 33. Davis left FCIS for reasons apparently unrelated to Klingenberg's harassment. Davis Dep. at 24-25.

Second, FCIS promulgated and enforced an effective sexual harassment policy. FCIS provided Plaintiffs with

handbooks describing its anti-harassment policy and made it available to them online. These actions are sufficient to promulgate and disseminate the policy to employees. Thornton v. Federal Express Corp., 530 F.3d 451, 457 (6th Cir. 2008) (anti-harassment policy effectively disseminated where included in employee handbook); Idusuyi v. State of Tennessee Dept. of Children's Serv., 30 Fed. Appx. 398, 403 (6th Cir. 2002) (employer effectively disseminated anti-harassment policy to employees through computer server).[2]

In order to be considered effective, the employer's policy should 1) require supervisors to report incidents of sexual harassment; 2) permit formal and informal complaints of harassment; 3) provide a mechanism to bypass a harassing supervisor to make a complaint; and 4) provide for training regarding the policy. Thornton, 560 F.3d at 456. FCIS's anti-harassment policy generally meets these criteria. It allows for reports of harassment to both the employee's supervisor and

[2] Plaintiff Davis argues in her brief that she was unaware of FCIS's anti-harassment policy at the time Klingenberg was harassing her and did not taking any training on the policy until afterward. This is insufficient, however, for the Court to conclude that FCIS did not effectively disseminate the anti-harassment policy because "'reasonableness'" does not require that every single employee know the intricacies of the policy." Idusuyi, 30 Fed. Appx. at 403. As stated, the policy was posted on FCIS's website and Davis admitted that she received the employee handbook containing the policy during orientation and that she could have reviewed the policy online. Davis Dep. at 29-30.

directly to the human resources department. Additionally, supervisors are required to immediately report complaints of harassment directly to human resources even if the complaining employee requests that no action be taken. Doc. No. 72-3, at 14. Finally, as already discussed, FCIS provides training on sexual harassment to its employees and Plaintiffs actually participated in those training programs. Thus, FCIS' anti-harassment policy was effective.

Plaintiffs contend, however, that FCIS failed to use reasonable care to prevent Klingenberg's harassment and that FCIS knew or had reason to know that Klingenberg was a serial harasser. While Klingenberg may have been a serial harasser in fact, there is no evidence which supports a reasonable conclusion that FCIS knew or should have known that he was a serial harasser. In support of this argument, Plaintiffs rely on a single harassment complaint about Klingenberg that predates the events in this case by almost ten years. See, e.g., 89-2, at 18-19. Plaintiffs also rely on performance review comments and/or disciplinary actions taken against Klingenberg over the years that have nothing whatever to do with sexually harassing employees. For instance, Plaintiffs cite incidents concerning insubordination, allowing outside distractions to interfere with his performance, and failing to control his emotions during stressful situations. See generally Doc. No. 90. While these

exhibits perhaps demonstrate that Klingenberg was a poor manager, they do not provide any indication that FCIS knew or should have known that he was a serial harasser.

Plaintiffs also claim that had Schmid conducted a more thorough investigation of the inappropriate instant messages that Klingenberg was sending to Shields, FCIS would have become aware that Klingenberg was harassing them. Plaintiffs apparently believe that had Schmid talked to Shields during his investigation, she would have admitted that Klingenberg was harassing her and would have also identified these Plaintiffs as additional victims of Klingenberg's conduct. This is just speculation, however. In fact, it is just as likely that Shields would not have said anything about being harassed by Klingenberg had she been approached. As the Court indicated in its analysis of Shields's claims, she did not gain the confidence to report Klingenberg's harassment until after she left his department and Frye "essentially ran Klingenberg out of Shields's work area one afternoon when Klingenberg was bothering her." Doc. No. 109, at 6-7. Given that Shields endured Klingenberg's abuse for ten more months, that it took a transfer out of his department, and a specific affirmative act by another supervisor to protect her for Shields to come forward, it seems unlikely that she would have been forthcoming had Schmid interviewed her in January 2007.

Third, and finally, Plaintiffs unreasonably failed to take advantage of FCIS's anti-harassment policy. Plaintiffs all knew about the policy but failed to utilize it because of their own subjective fears of retaliation. These fears, however, are insufficient to excuse an employee from reporting harassment. Thornton, 530 F.3d at 457 ("[A]n employee's subjective fears of confrontation, unpleasantness or retaliation do not alleviate the employee's duty under Ellerth to alert the employer to the allegedly hostile environment."). Instead, the plaintiff must produce evidence that she was under a credible threat of retaliation. Gallagher v. C.H. Robinson Worldwide, Inc. 567 F.3d 263, 276 (6th Cir. 2009). Klingenberg's threats to Plaintiffs that "Wendy's and McDonald's are hiring" are too vague to constitute credible threats of retaliation. See, e.g., Reed v. MBNA Marketing Systems, Inc., 333 F.3d 27, 36 (1st Cir. 2003) ("[G]eneral statements by a supervisor that a complaint will be futile or will get the employee in trouble cannot be an automatic excuse for failing to use the complaint mechanism."). Additionally, Plaintiffs' belief that resort to FCIS's complaint system would be futile is insufficient to excuse their duty to register harassment complaints. See id.

Therefore, FCIS is entitled to judgment as a matter of law on its affirmative defense.

Conclusion

For the reasons stated above, the record demonstrates that FCIS is entitled to summary judgment on its affirmative defense to Plaintiffs' sexual harassment claims. Accordingly, FCIS's motions for summary judgment are well-taken and are **GRANTED.**

IT IS SO ORDERED

Date December 21, 2010

s/Sandra S. Beckwith
Sandra S. Beckwith
Senior United States District Judge