

1 UNITED STATES DISTRICT COURT
2 DISTRICT OF PUERTO RICO

3 CARMEN NIEVES,

4
5 Plaintiff,

6 v.

7 UNIVERSAL SOLAR PRODUCTS, INC.,

8
9 Defendant.

Civil No. 07-2089 (JAF)

10 **OPINION AND ORDER**

11 Plaintiff, Carmen Nieves, brings this diversity action against
12 Defendant, Universal Solar Products, Inc., seeking damages and
13 injunctive relief for sexual harassment, sex discrimination, and
14 retaliation in violation of Puerto Rico Law No. 17, of April 22,
15 1988, 29 L.P.R.A. § 155-155j ("Law 17"), and Law No. 69, of July 6,
16 1985, 29 L.P.R.A. § 1321-41 ("Law 69"). Docket No. 60. Defendant
17 moves for summary judgment. Docket No. 24. Plaintiff opposes, Docket
18 No. 26, Defendant replies, Docket No. 62, and Plaintiff surreplies,
19 Docket No. 64.

20 **I.**

21 **Factual and Procedural Synopsis**

22 _____We derive the following factual summary from the parties'
23 motions, statements of material facts, and exhibits. Docket Nos. 24,
24 26, 27, 65, 68, 73.

1 From March 16 to May 11, 2005, Plaintiff sold Defendant's solar
2 energy products door-to-door and at Defendant's booths in various
3 malls in Puerto Rico. Prior to working as a salesperson for
4 Defendant, Plaintiff worked in sales for other companies selling
5 solar water heaters, liquid chemicals, and cemetery lots.
6 Christopher Alers, a supervisor with Defendant, recruited Plaintiff
7 to come work for Defendant.

8 Plaintiff filled out a job application to work for Defendant on
9 March 16, 2005. Docket No. 65-2. On the same day, she also signed a
10 sales contract for sale of Defendant's products. Id. The contract
11 stated that "the existent relationship . . . is chiefly that of an
12 independent contractor" and that "the sales representative shall not
13 be considered an employee or agent of [Defendant]." Id. It provided
14 that either party could terminate the sales contract with thirty
15 days' notice. Id. It further stated that the sales person would be
16 responsible for paying booth expenses. Id. However, Plaintiff
17 maintains that Defendant provided an assigned booth at booth malls,
18 and that she was not responsible for expenses for the booth.

19 Under the agreement, Defendant paid Plaintiff solely on
20 commission, so if Plaintiff did not make any sales, she received
21 nothing from Defendant. Defendant's materials suggest that for the
22 first fourteen sales that a new associate made, she would receive an
23 18% commission. Docket No. 65-3. As the associate made more sales,

1 her commission would increase. Id. After an associate made a certain
2 number of sales, she would have the opportunity to recruit new
3 associates and earn commissions off of their sales. Id.

4 _____Defendant's associates' handbook defines the different types of
5 sales associates, including a category described as independent
6 contractors. Docket No. 73-2. The handbook states that all associates
7 are required to work either 8:00 a.m. to 5:00 p.m. or 9:00 a.m. to
8 6:00 p.m., five days a week, with a one-hour lunch break. Id. The
9 handbook also indicates that Defendant keeps track of the absences
10 and late arrivals of associates, which are taken into consideration
11 in performance evaluations. Id.

12 Immediately after Plaintiff filled out the sales contract, Alers
13 instructed her to go to Plaza Las Américas, a mall in Hato Rey,
14 Puerto Rico, so he could train her in how to work the booth there.
15 Plaintiff worked five or six hours that day. For the next eight
16 weeks, Plaintiff worked more than ten hours a day, seven days a week.
17 She never requested or received overtime payments for this work.
18 Plaintiff was almost always working with Alers and one or two other
19 associates. Alers was responsible for establishing the work schedules
20 at the malls, and training Plaintiff and several other sales
21 associates.

22 Plaintiff alleges that, from her first full day of work, Alers
23 made unwelcome sexual advances toward her. He attempted to kiss her,

1 touched her leg, called her his "sweet black babe," told her she was
2 hot, and stared at her buttocks and breasts. Plaintiff states that at
3 some point, she spoke with Alers' supervisor about this behavior.
4 Shortly thereafter, on May 11, 2005, Alers fired Plaintiff, with the
5 stated reason that she had refused to pick up a check from a client.
6 However, Plaintiff maintains that she was fired for refusing Alers'
7 sexual advances and/or that Alers made her work environment so
8 unpleasant that she was forced to quit.

9 Plaintiff filed a complaint before the Anti-Discrimination Unit
10 of the Department of Labor of Puerto Rico ("ADU"), the administrative
11 agency in Puerto Rico that reviews employment discrimination charges,
12 and the federal Equal Employment Opportunity Commission ("EEOC"). On
13 September 6, 2006, at Plaintiff's request, the ADU issued a letter
14 informing Plaintiff that she had the right to sue Defendant. The ADU
15 forwarded Plaintiff's request to the EEOC. On November 20, 2006, the
16 EEOC issued a letter informing Plaintiff that she had the right to
17 sue Defendant within ninety days of receipt of the letter.

18 On November 16, 2007, Plaintiff filed the present diversity
19 complaint in federal district court. Docket No. 1. Defendant moved
20 for summary judgment on August 25, 2008, asserting that (1) Plaintiff
21 was an independent contractor and, therefore, not covered by Puerto
22 Rico anti-discrimination laws, and (2) Defendant did not discriminate
23 against Plaintiff. Docket No. 24. Plaintiff opposed on September 9,

1 2008, Docket Nos. 26, 27, Defendant replied on September 26, 2008,
2 Docket No. 62, and Plaintiff surreplied on September 30, 2008, Docket
3 No. 64. Plaintiff filed an amended complaint on September 29, 2008.
4 Docket No. 60.

5 II.

6 Summary Judgment Standard under Rule 56(c)

7 We grant a motion for summary judgment "if the pleadings, the
8 discovery and disclosure materials on file, and any affidavits show
9 that there is no genuine issue as to any material fact and the movant
10 is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c).
11 A factual dispute is "genuine" if it could be resolved in favor of
12 either party, and "material" if it potentially affects the outcome of
13 the case. Calero-Cerezo v. U.S. Dep't of Justice, 355 F.3d 6, 19 (1st
14 Cir. 2004). The moving party carries the burden of establishing that
15 there is no genuine issue as to any material fact; however, the
16 burden "may be discharged by showing that there is an absence of
17 evidence to support the nonmoving party's case." Celotex Corp. v.
18 Catrett, 477 U.S. 317, 325, 331 (1986). The burden has two
19 components: (1) an initial burden of production, which shifts to the
20 nonmoving party if satisfied by the moving party; and (2) an ultimate
21 burden of persuasion, which always remains on the moving party. Id.
22 at 331.

1 L.P.R.A. § 1321. Law 17 states that a protected employee is "any
2 person who works for an employer and receives compensation therefor,
3 or any job applicant. For the purposes of [this provision], the term
4 employee shall be interpreted in the broadest sense possible."
5 § 155a. Law 69 does not contain the same term; however, "Law 17 and
6 Law 69 are . . . to be interpreted in pari materia." Valentin-Almeyda
7 v. Municipality of Carolina, 447 F.3d 85, 102 n.20 (1st Cir. 2006).

8 In determining whether a party is an employee or an independent
9 contractor under Puerto Rico law, we look to several factors,
10 including (1) the form of the employment contract; (2) whether the
11 work was full or part time; (3) whether the contract provides for
12 vacation time, sick leave, or a retirement program; (4) the extent
13 and nature of control the putative employer has over the worker;
14 (5) the form of payment; (6) the ownership status of any equipment;
15 (7) whether the worker has an independent business that contracts
16 with the putative employer; and (8) the right of both parties to
17 terminate the relationship at any time. López v. Nutrimix Feed Co.,
18 Inc., 27 F. Supp. 2d 292, 298 (D.P.R. 1998) (citing Rivera v Hosp.
19 Universitario, 762 F. Supp. 15, 17 (D.P.R. 1991)); Lugo v. Matthew
20 Bender & Co., 579 F. Supp. 638, 641-42 (D.P.R. 1984) (citing, inter
21 alia, Avon Products, Inc. v. Secretario del Trabajo, 106 P.R. Dec.
22 803 (1977); Nazario v. González, 101 P.R. Dec. 569 (1973)). The most

1 important factor is the control the employer has over the work
2 performed. López, 27 F. Supp. 2d at 298.

3 Here, the factors point in different directions. The contract
4 stated that Plaintiff was an independent contractor and did not
5 provide for vacation time, sick leave, or retirement, and provided
6 that Plaintiff was paid purely on commission. Docket No. 65-2. These
7 factors point to a finding that Plaintiff was an independent
8 contractor. See López, 27 F. Supp. 2d at 298; Lugo, 579 F. Supp. at
9 641-42. However, the parties could not terminate the relationship
10 without giving thirty days' notice, Plaintiff worked full time or
11 more than full time, and she did not have an independent business
12 that contracted with Defendant. See Docket No. 65-2. These factors
13 point to a finding that Plaintiff was an employee. See López, 27
14 F. Supp. 2d at 298; Lugo, 579 F. Supp. at 641-42. The ownership status
15 of the equipment used is unclear. The contract states that sales
16 representatives are responsible for "paying the booth shifts [they
17 are] willing to cover," see Docket No. 65-2; however, Plaintiff
18 maintains that she did not have to pay to rent the booth space.

19 Finally, as to the amount of control Defendant had over
20 Plaintiff, the evidence is inconclusive. Defendant argues that
21 Plaintiff had complete control over her hours; however, Plaintiff
22 states that Alers assigned her to work at various booths, determined
23 her work schedule, and was always working with her. Defendant's

1 associate's handbook states that all associates are required to work
2 either 8:00 a.m. to 5:00 p.m. or 9:00 a.m. to 6:00 p.m., five days a
3 week, with a one-hour lunch break. See Docket No. 73-2. The handbook
4 also indicates that Defendant keeps track of the absences and late
5 arrivals of associates, which are taken into consideration in
6 performance evaluations. Id. Taken with Plaintiff's allegations about
7 the supervision by Alers, this manual indicates that Defendant had a
8 substantial amount of control over Plaintiff's day-to-day work.
9 However, the record does not establish to what extent Defendant
10 actually followed the protocol set forth in the manual.

11 We find that issues of fact remain as to the extent and nature
12 of the control Defendant had over Plaintiff and the ownership status
13 of Defendant's booths. Since the most important factor is the control
14 the Defendant had over the work performed, see López, 27 F. Supp. 2d
15 at 298, these factual issues could be material to our determination
16 of whether Plaintiff was an employee or an independent contractor.
17 Therefore, Defendant is not entitled to summary judgment on this
18 issue.¹

¹ To the extent that Defendant argues for summary judgment on the grounds that Alers is himself an independent contractor, and not an agent, of Defendant, we note that there is even less evidence in the record about the terms and conditions of Alers' employment.

1 **B. Sexual Harassment**

2 Defendant contends that we should grant summary judgment in its
3 favor because Plaintiff cannot establish that she was sexually
4 harassed under either a quid pro quo or hostile work environment
5 theory. Docket No. 24.

6 Law 17 defines sexual harassment in employment as “any type of
7 undesired sexual approach, demand for sexual favors and other verbal
8 or physical behavior of a sexual nature” when (1) submission to the
9 conduct becomes a condition of employment; (2) submission to or
10 rejection of the conduct becomes grounds for a decision regarding the
11 person’s job; or (3) the conduct unreasonably interferes with the
12 persons’s work, or creates an intimidating, offensive, or hostile
13 work environment. 29 L.P.R.A. § 155b. The first two types constitute
14 quid pro quo harassment, while the third is hostile environment
15 harassment. Hernández Loring v. Universidad Metropolitana, 186
16 F.Supp.2d 81, 85-86 (D.P.R. 2002) (“Hernández II”). We note that “the
17 substantive law of Puerto Rico on sexual harassment appears to be
18 aligned . . . with Title VII law, and Title VII precedents are used
19 freely in construing commonwealth law.” Hernández Loring v.
20 Universidad Metropolitana, 233 F.3d 49, 52 (1st Cir. 2000)
21 (“Hernández I”).

1 **1. Quid Pro Quo**

2 Defendant argues that Plaintiff cannot establish quid pro quo
3 harassment because she admits that she was fired for failing to
4 complete an assigned task, not for refusing Defendant's sexual
5 advances. Docket No. 24-1.

6 In a quid pro quo case, an employer may be liable where a
7 supervisor punishes a subordinate for refusing to comply with sexual
8 demands. See Hernández I, 233 F.3d at 52. A plaintiff must show that
9 a tangible job benefit or privilege was conditioned on her submission
10 to unwelcome sexual advances. Hernández II, 186 F. Supp. 2d at 86.

11 Plaintiff asserts that, shortly after she complained about
12 Alers' behavior to a supervisor, Alers fired her for objecting to his
13 continued sexual advances. Docket No. 65-6. Defendant counters that
14 Plaintiff was fired for failing to pick up a check from one of her
15 clients. Docket No. 24-1. Defendant attempts to show that this charge
16 is undisputed using Plaintiff's own deposition testimony reciting the
17 reason that Alers gave for firing her. See Docket Nos. 24-1, 24-2,
18 65-6. In the deposition, Plaintiff stated that Alers told her she was
19 fired for failing to pick up a check. Docket No. 65-6. However, later
20 in the deposition, she insisted that Alers' explanation was
21 pretextual; in fact, she stated, "[Alers] had made sexual advances to
22 me, and . . . because I did not give in to his wishes, then he fired
23 me without justification." Id. Based on our reading of this

1 testimony, Plaintiff does not agree to Defendant's version of events.
2 Accordingly, there exists a triable issue of material fact as to why
3 Plaintiff was fired and, therefore, whether she suffered quid pro quo
4 sexual harassment.

5 **2. Hostile Work Environment**

6 Defendant asserts that Plaintiff cannot establish that she was
7 subjected to a hostile work environment because her recollections of
8 the harassment lack specificity as to the details of the alleged
9 incidents and are in apparent conflict with other facts in the
10 record. Docket No. 24-1.

11 In a hostile work environment case, the plaintiff must allege
12 "more than a mere isolated incident of sexual harassment." Rivera v.
13 DHL Global Forwarding, 536 F. Supp. 2d 148, 154 (D.P.R. 2008) (citing
14 Puerto Rico cases). We consider the nature of the offensive conduct,
15 the frequency and intensity of the conduct, the context in which it
16 occurs, its duration, and the victim's own actions and circumstances.
17 Id. The summary judgment standard "polic[es] the baseline for hostile
18 environment claims." Billings v. Town of Grafton, 515 F.3d 39, 50
19 (1st Cir. 2008) (quoting Pomales v. Celulares Telefónica, Inc., 447
20 F.3d 79, 83 (1st Cir. 2006)) (internal quotation marks omitted).
21 However, whether a hostile work environment exists is generally to be
22 determined by the finder of fact. Id. at 47 n.7, 50.

1 An employer can be held liable for (1) its own actions,
2 (2) those of its agents or supervisors, or (3) the actions of
3 employees, if the employer knew or should have known of the offensive
4 conduct. Rivera, 536 F. Supp. 2d at 154.; see 29 L.P.R.A. § 155d. A
5 plaintiff can establish employer liability based on the actions of
6 non-supervisory employees by showing that the employer directly knew
7 of the conduct or that it had constructive knowledge through its
8 agents or supervisors. Rivera, 536 F. Supp. 2d at 154.

9 Plaintiff alleges that, from her first full day of work, Alers
10 made unwelcome sexual advances toward her. He attempted to kiss her,
11 touched her leg, called her his "sweet black babe," told her she was
12 hot, and stared at her buttocks and breasts. She asserts that she and
13 Alers were constantly together during the time that she worked for
14 Defendant. As Defendant notes, Plaintiff is vague as to the exact
15 dates of each incident; nonetheless, she maintains that the
16 harassment was ongoing during the period that she worked for
17 Defendant. These alleged remarks and comments, if true, would surely
18 suffice to establish the existence of a hostile work environment.
19 See Billings, 515 F.3d at 48 (stating that "for a male supervisor to
20 stare repeatedly at a female subordinate's breasts is inappropriate
21 and offensive, not merely unprofessional," and denying summary
22 judgment where such conduct occurs in connection with other offensive
23 actions).

1 Defendant contends, however, that it has presented evidence that
2 undercuts Plaintiff's version of the facts. Docket No. 24-1.
3 Defendant asserts that Plaintiff and Alers made sales to people
4 residing in remote areas of Puerto Rico, indicating that Plaintiff
5 and Alers did not spend as much time together as Plaintiff claimed,
6 and demonstrating that certain instances of harassment could not have
7 occurred on the dates alleged. Id. For example, Defendant states that
8 Plaintiff testified to working in a booth at Plaza Las Américas on
9 the date of the first incident of sexual harassment, but that her
10 sales indicate that she made a sale on that date to a person residing
11 in Río Grande, Puerto Rico, while Alers made a sale on that same date
12 to a person residing in Dorado, Puerto Rico. Id. at ¶ 60. Defendant
13 cites several similar apparent discrepancies in the sales record to
14 argue that the alleged harassment could not have occurred. Id.
15 However, this circumstantial evidence does not negate Plaintiff's
16 version of the facts. Because Plaintiff and Alers often worked at
17 booths in malls, they could have made sales to people from all over
18 the island in a single day. Similarly, Plaintiff could have
19 accompanied Alers while he made sales, even though she did not record
20 any sales herself. Defendant's evidence does not foreclose the
21 possibility that Plaintiff and Alers spent a substantial amount of
22 time together, during which he had the opportunity to harass her.

