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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

MELISSA CHINN,

Plaintiff,

v.

WHIDBEY PUBLIC HOSPITAL
DISTRICT, d/b/a WHIDBEY
HEALTH MEDICAL CENTER,

Defendant.

C20-995 TSZ

MINUTE ORDER

The following Minute Order is made by direction of the Court, the Honorable Thomas S. Zilly, United States District Judge:

(1) Plaintiff’s motion, docket no. 49, for partial summary judgment on certain affirmative defenses (6, 7, 9, 10, 11, 13, 15, 16, 17, 18, 19, and 23) is GRANTED in part, DENIED in part, and DEFERRED in part, as follows:

a. The motion is GRANTED, in part, as to Defendant’s sixth affirmative defense that the discriminatory treatment was based on one or more bona fide factors or occupational qualifications; provided, however, Defendant may raise the issue in connection with pay disparity.

b. The motion is DENIED as to Defendant’s seventh affirmative defense that the pay disparity was the result of (a) a seniority system; (b) a merit system; (c) a system that measures earnings by quantity or quality of production; (d) a bona fide job-related factor or factors; and/or (e) any factors other than sex. There are material issues of fact concerning Defendant’s use of Medical Group Management Association (“MGMA”) earnings data that preclude summary judgment.

1 c. The unopposed motion is GRANTED as to Defendant's ninth
affirmative defense that the equitable doctrine of unclean hands bars some, or all,
2 of Plaintiff's claims.

3 d. The unopposed motion is GRANTED as to Defendant's tenth
affirmative defense that Laches bars some, or all, of Plaintiff's claims.

4 e. The motion is GRANTED, in part, as to Defendant's eleventh
affirmative defense that sovereign immunity bars some, or all, of Plaintiff's
5 claims; provided, however, Defendant is not subject to punitive damages. Though
6 Plaintiff asserts that the Ninth Circuit has left open the question of whether
"punitive damages are available at all under section 1981 where the defendant is a
7 municipality," see *White v. Wash. Pub. Power Supply Sys.*, 692 F.2d 1286, 1290
(9th Cir. 1982), the ruling was superseded by the Civil Rights Act of 1991, which
8 "made available compensatory damages for emotional pain and suffering and
punitive damages under Title VII." *Ahlmeyer v. Nevada Sys. of Higher Educ.*, 555
9 F.3d 1051, 1059 (9th Cir. 2009). 42 U.S.C. § 1981a(b)(1) provides that a plaintiff
may recover punitive damages against a defendant "other than a government,
10 government agency or political subdivision." The parties do not dispute that
Whidbey Health is a municipal corporation. Plaintiff's claim of punitive damages
11 under state law and its reliance on RCW 4.96.010 which subjects "[a]ll local
government entities" to "liab[ility] for damages arising out of their tortious
12 conduct . . . to the same extent as if they were a private person or corporation" is
misplaced. See Resp. at 24 (docket no. 56). Washington law does not allow for
13 punitive damages against any person or corporation. *Barr v. Interbay Citizens
Bank of Tampa, Fla.*, 96 Wn.2d 692, 697 635 P.2d 441 (1981) ("Under the law of
14 this state, punitive damages are not allowed unless expressly authorized by the
legislature."). Punitive damages are unavailable under the Washington Law
15 Against Discrimination, see *Chuong Van Pham v. City of Seattle, Seattle City
Light*, 159 Wn.2d 527, 537, 151 P.3d 976 (2007) (citing *Dailey v. N. Coast Life
16 Ins. Co.*, 129 Wn.2d 572, 575, 919 P.2d 589 (1996)), and the Washington Equal
Pay and Opportunities Act. See RCW 49.58.070. Accordingly, Defendant is not
17 subject to a claim for punitive damages.

18 f. The motion is GRANTED as to Defendant's thirteenth affirmative
defense that the *Ellerth/Faragher* defense bars some, or all, of Plaintiff's claims.
19 *Ellerth* and *Faragher* established a test for determining whether an employer is
vicariously liable for a hostile work environment created by a supervisor. See
20 *Burlington Indus. Inc. v. Ellerth*, 524 U.S. 742 (1998); *Faragher v. City of Boca
Raton*, 524 U.S. 775 (1998). "The Supreme Court made clear that the affirmative
21 defense outlined in *Ellerth* and *Faragher* applies only in cases of vicarious
liability, where the harasser is the victim's supervisor." *Swinton v. Potomac
22 Corp.*, 270 F.3d 794, 803 (9th Cir. 2001). If harassment is committed by a co-

1 worker of the plaintiff's, the employer is liable only under a negligence theory and
2 the employer may not invoke the *Ellerth/Faragher* affirmative defense. *See id.* at
3 803–04. The record contains no allegation that Plaintiff's supervisor created a
4 hostile work environment and Plaintiff does not allege discrimination on a theory
of hostile work environment. *See* Compl. (docket no. 1). Defendant's discussion
of Plaintiff's interactions with Dr. Giem is misplaced, as Dr. Giem was not
Plaintiff's supervisor.

5 g. The motion is DEFERRED as to Defendant's fifteenth affirmative
6 defense that Plaintiff failed to mitigate her damages.

7 h. The motion is DENIED as to Defendant's sixteenth affirmative
8 defense that an applicable statute of limitations bars some, or all, of Plaintiff's
9 claims. The federal Equal Pay Act, 29 U.S.C. § 255(a), has a two-year statute of
10 limitations (or three years for willful conduct) and the Washington Equal Pay and
11 Opportunities Act, RCW 49.58.070(1), has a three-year statute of limitations. The
12 Court will address the applicable statute of limitations and the limit of any
13 damages recovered under these acts as part of its jury instructions.

14 i. The unopposed motion is GRANTED as to Defendant's seventeenth
15 affirmative defense that Plaintiff failed to exhaust contractual and administrative
16 remedies as required by law.

17 j. The unopposed motion is GRANTED as to Defendant's eighteenth
18 affirmative defense that the doctrine of after-acquired evidence bars Plaintiff's
19 claims and/or damages.

20 k. The unopposed motion is GRANTED as to Defendant's nineteenth
21 affirmative defense that Plaintiff is estopped from raising her claims if she
22 declared bankruptcy.

23 l. The motion is DEFERRED as to Defendant's twenty-third
affirmative defense that reinstating Plaintiff would produce undue hardship.
Reinstatement is an equitable remedy that will be resolved by the Court, if
necessary, after trial.

(2) The Clerk is directed to send a copy of this Minute Order to all counsel of
record.

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Dated this 18th day of November, 2021.

Ravi Subramanian
Clerk

s/Gail Glass
Deputy Clerk