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United States District Court,
N.D. Texas, Fort Worth Division.

Pamela POLK, Plaintiff,
v.
7–ELEVEN, INC., et al., Defendants.

No. 4:01–CV–0069–A.
|
Jan. 24, 2002.

MEMORANDUM OPINION and ORDER

MCBRYDE, District J.

***1** Came on for consideration the motion of defendant 7–Eleven, Inc., ("7–Eleven") for summary judgment. The court, having considered the motion, the response of plaintiff, Pamela Polk, the reply, the record, and applicable authorities, finds that the motion should be granted in part.

I.

Plaintiff's Claims

On January 18, 2001, plaintiff filed her original complaint. Plaintiff alleges that 7–Eleven subjected her to a sexually hostile work environment by placing defendant John D. Martindale ("Martindale") in a position where he could harass and assault plaintiff. Plaintiff asserts claims against 7–Eleven for discrimination and retaliation under Title VII, 42 U.S.C. §§ 2000e to 2000e–17, negligence, discrimination and retaliation under the Texas Commission on Human Rights Act ("TCHRA"), TEX. LABOR CODE ANN. § 21.051 (Vernon 1996), assault, and intentional infliction of emotional distress.

II.

Grounds of the Motion

7–Eleven urges eight grounds in support of its motion for summary judgment:

(1) Plaintiff cannot prevail on her claims under Title VII and the TCHRA because plaintiff cannot show that 7–Eleven failed to take prompt remedial action.

(2) Plaintiff failed to exhaust her administrative remedies and cannot proceed with her claims under the TCHRA.

(3) Plaintiff's claims for negligent hiring, retention and supervision are barred by the exclusive remedy provisions of the Texas Workers' Compensation Act, TEX. LABOR CODE § 406.034(a).

(4) Plaintiff cannot prevail on her claims for retaliation under Title VII and the TCHRA because she cannot show that she suffered any adverse employment action.

(5) Plaintiff cannot prevail on her claims for retaliation because she cannot show a causal connection between 7–Eleven's actions and her harassment complaint.

(6) Plaintiff cannot prevail on her claims for assault and intentional infliction of emotional distress because she cannot establish that Martindale's actions were within the scope of his employment or that 7–Eleven ratified his actions.

(7) Plaintiff cannot prevail on her claim for intentional infliction of emotional distress because she cannot show that the alleged conduct was sufficiently extreme or outrageous to establish liability.

(8) Plaintiff cannot prevail on her claim for intentional infliction of emotional distress because she cannot show that she suffered severe distress that no reasonable person could be expected to endure.

III.

Applicable Summary Judgment Principles

A party is entitled to summary judgment on all or any part of a claim as to which there is no genuine issue of material fact and as to which the moving party is entitled to judgment as a matter of law. FED. R. CIV. P. 56(c); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986).

The moving party has the initial burden of showing that there is no genuine issue of material fact. *Anderson,* 477 U .S. at 256. The movant may discharge this burden by pointing out the absence of evidence to support one or more essential elements of the non-moving party's claim "since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial." *Celotex Corp. v. Catrett,* 477 U.S. 317, 323–25 (1986). Once the moving party has carried its burden under Rule 56(c), the non-moving party must do more than merely show that there is some metaphysical doubt as to the material facts. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.,* 475 U.S. 574, 586 (1986). The party opposing the motion may not rest on mere allegations or denials of pleading, but must set forth specific facts showing a genuine issue for trial. *Anderson,* 477 U.S. at 248, 256. To meet this burden, the nonmovant must "identify specific evidence in the record and articulate the 'precise manner' in which that evidence support[s] [its] claim[s]." *Forsyth v. Barr,* 19 F.3d 1527, 1537 (5th Cir.1994). An issue is material only if its resolution could affect the outcome of the action. *Anderson,* 477 U.S. at 248. Unsupported allegations, conclusory in nature, are insufficient to defeat a proper motion for summary judgment. *Simmons v. Lyons,* 746 F.2d 265, 269 (5th Cir.1984).

***2** The standard for granting a summary judgment is the same as the standard for a directed verdict. *Celotex Corp.,* 477 U.S. at 323. If the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no genuine issue for trial. *Matsushita,* 475 U.S. at 597.

IV.

Undisputed Evidence

The following is an overview of evidence pertinent to the motion for summary judgment that is undisputed in the summary judgment record:

Plaintiff began her employment with 7–Eleven as a sales associate in 1995. In 1997, she was promoted to the position of shift manager. A shift manager is responsible for overseeing store operations during his or her shift, assigning duties and communicating with store associates, and ensuring that new associates receive effective training. After her promotion, plaintiff began assisting several different stores in the Fort Worth area. Effective January 7, 1999, plaintiff was assigned to the Azle Avenue store in Fort Worth. Late in the evening on November 11, 1999, plaintiff arrived to work the third shift (11:00 p.m. to 7:00 a.m.) and to continue the second day of training a new store associate, Martindale. Martindale had done nothing during the first night of work to cause plaintiff to feel uncomfortable in any way. On November 11 and in the early morning hours of November 12, Martindale rubbed his genitals against her, told plaintiff that she smelled good, held a quarter-pound hotdog in his hand and told her that he was "bigger," told her that he wanted to lick and taste her, and grabbed her, unbuckled her belt and unzipped her pants and attempted to kiss her there. Despite plaintiff's pleas, Martindale refused to leave plaintiff alone. Ultimately, plaintiff fled the store, went home, and called the store manager, Rhonda Luker ("Luker"), to tell her what had happened.

Luker was familiar with Martindale, because he had worked for her once before. He made her feel uncomfortable by hugging her and coming in close proximity to her. By the time she rehired Martindale, he had gotten married and had a child, so Luker thought his behavior would have changed.

Later on the morning of November 12, Luker asked plaintiff to come to the store. Luker advised plaintiff to file a police report about the incident and told plaintiff that she had fired Martindale. Luker allowed plaintiff to work day shifts for a week or two after the incident. Thereafter, Luker requested plaintiff to work the second (3:00 p.m. to 11:00 p.m.) or third shift. Luker told plaintiff she made this request because the third shift employee was on vacation. Plaintiff perceived Luker's request for her to work second or third shift as an ultimatum to leave the store. Plaintiff left a note for Luker on November 27, 1999, telling Luker to consider that her last day. Plaintiff left her keys in the cash register drawer.

Plaintiff spoke to Carol Brackeen ("Brackeen"), store manager of 7–Eleven's River Oaks store. Plaintiff then went to work at the River Oaks store. Plaintiff's compensation and benefits were not reduced when she made the transfer. Plaintiff was able to walk to the River Oaks store and was able to work the day shift as she desired.

***3** Plaintiff took a disability leave of absence for personal reasons from the River Oaks store in January 2000, because she was allegedly raped by an attorney on January 5, 2000. Plaintiff was reinstated from disability leave at the River Oaks store effective February 18, 2000. Several weeks later, plaintiff transferred to 7–Eleven's Camp Bowie store. Plaintiff does not believe that Brackeen had done anything to retaliate against her. At the Camp Bowie store, plaintiff maintained the same job title and received the same pay and benefits as before. Effective March 31, 2000, she received a pay increase from $9.50 to $9.75 an hour. After working for approximately four months, plaintiff voluntarily resigned her employment with 7–Eleven without notice. Her resignation was effective July 10, 2000. Although plaintiff does not believe that the store manager, Carolyn Mackey ("Mackey"), did anything to retaliate against her, plaintiff does believe that certain unnamed district managers wanted Mackey to fire plaintiff.

V.

Law Applied to the Facts

A. *Sexual Harassment*

To establish a claim of sexual harassment under Title VII and under the TCHRA,[1] plaintiff must show that she belongs to a protected group, that she was subjected to unwelcome harassment, based upon her sex, which affected a term, condition or privilege of her employment, and that her employer knew, or should have known, of the harassment and failed to take prompt remedial action. *Skidmore v. Precision Printing & Packaging, Inc.,* 188 F.3d 606, 615 (5th Cir.1999). 7–Eleven focuses on the fifth element, arguing that it took prompt remedial action reasonably calculated to end the harassment and, therefore, cannot be held liable. The summary judgment evidence establishes that this is so. 7–Eleven immediately terminated Martindale upon learning what he had done. That action may not be enough, however, if 7–Eleven put plaintiff in a position where she was subject to harassment. As the Supreme Court has noted, an employer can be liable where its own negligence is the cause of the harassment. *Burlington Indus., Inc. v. Ellerth,* 524 U.S. 742, 759 (1998).[2] Employer liability for sexual harassment by co-workers is direct liability for negligently allowing such harassment. *Williamson v. City of Houston,* 148 F.3d 462, 465 (5th Cir.1998). Here, plaintiff argues that the harassment occurred because of 7–Eleven's negligence in scheduling her to work alone with Martindale during the middle of the night. And, plaintiff's summary judgment evidence creates a fact issue as to 7–Eleven's knowledge of Martindale's propensity to act in an unacceptable manner. Specifically, plaintiff says that when told about Martindale's conduct, Luker replied, "Oh, my God, I can't believe he tried it again." The evidence shows that Luker had worked with Martindale on a prior occasion and that he made her feel uncomfortable by doing things like putting an arm around her shoulders. Whether 7–Eleven negligently put plaintiff in a position to be sexually harassed is a fact question.

B. *Exhaustion of Remedies Under the TCHRA*

***4** Defendant next contends that plaintiff's claims under the TCHRA must be dismissed because of her failure to exhaust state remedies. Such a failure to exhaust state administrative remedies would deprive the court of jurisdiction. *Jones v. Grinnell Corp.,* 235 F.3d 972, 974–75 (5th Cir.2001). An EEOC right-to-sue letter is not interchangeable with a TCHR right-to-sue letter. *Id.*

Here, the record reflects that plaintiff filed her complaint with the EEOC and the Fort Worth Human Relations Commission. There is no evidence that she filed a complaint with the Texas Commission on Human Rights. Because that is a jurisdictional prerequisite, *Schroeder v. Texas Ironworks, Inc.,* 813 S.W.2d 483, 485 (Tex.1991), plaintiff cannot proceed with her TCHRA claims.

C. *Plaintiff's Negligence Claims*

Defendant contends that plaintiff's negligence claims (for negligent hiring, retention, and supervision of Martindale) are barred by the exclusive remedy provision of the Texas Workers' Compensation Act. TEX. LABOR CODE ANN. § 406.034 (Vernon 1996). Plaintiff does not dispute this contention, apparently conceding that her negligence claims are barred. *See Ward v. Bechtel Corp.,* 102 F.3d 199, 203–04 (5th Cir.1997); *Pfeil v. Intecom Telecomms.,* 90 F.Supp.2d 742, 753 (N.D.Tex.2000).

D. *Adverse Employment Action*

Defendant contends that plaintiff cannot prevail on her retaliation claims because she did not suffer any adverse employment action. A purely lateral transfer is not an

adverse employment action. *Burger v. Cent. Apartment Mgmt., Inc.,* 168 F.3d 875, 880 (5th Cir.1999). The only evidence plaintiff presents in this regard is a self-serving statement parroting the magic language from cases holding that a transfer may be equivalent to a demotion where it affects the plaintiff's ability to move up within the company or provides less room for advancement. Plaintiff's conclusory speculation is insufficient to defeat defendant's motion for summary judgment. *Hathcock v. Acme Truck Lines, Inc.,* 262 F.3d 522, 526–27 (5th Cir.2001); *Wallace v. Tex. Tech Univ.,* 80 F.3d 1042, 1047 (5th Cir.1996). Moreover, plaintiff's conclusory allegations are belied by her testimony that she requested the transfers for her own convenience. There is no evidence to support a claim that plaintiff was adversely effected as a result of her having reported Martindale's actions. When asked in her deposition what was done in retaliation for her report, plaintiff responded, "nothing." Def.'s App. at 52–53.

E. *Liability for Martindale's Actions*

7–Eleven contends that it cannot be held liable for assault and intentional infliction of emotional distress by Martindale. 7–Eleven may be liable for Martindale's conduct (1) if he was acting within the course and scope of his employment at the time of his tortious acts; (2) if Martindale was a vice-principal of 7–Eleven; or (3) if 7–Eleven ratified his conduct. *GTE Southwest, Inc. v. Bruce,* 998 S.W.2d 605, 618 (Tex.1999). 7–Eleven has shown that it cannot be held liable under any of these theories. Plaintiff has not made any response, once again apparently conceding that she cannot prevail.

VI.

ORDER

***5** For the reasons discussed herein,

The court ORDERS that 7–Eleven's motion for summary judgment be, and is hereby, granted in part; that plaintiff take nothing on her claims against 7–Eleven for negligence (Count II), retaliation (Count IV), assault (Count V), and intentional infliction of emotional distress (Count VI); that plaintiff's claims under the TCHRA be, and are hereby, dismissed for want of jurisdiction; and that 7–Eleven's motion be, and is hereby, otherwise denied.

The court determines that there is no just reason for delay in, and hereby directs, entry of final judgment as to the dismissals ordered above.

All Citations

Not Reported in F.Supp.2d, 2002 WL 122519

Footnotes

1 Texas follows the standards that apply to Title VII claims in interpreting the Texas Commission on Human Rights Act. *Daniels v. City of Arlington,* 246 F.3d 500, 507 (5th Cir.), *cert. denied,* 122 S.Ct. 347 (2001).

2 As discussed *infra,* plaintiff's state law negligence claims are barred by the Texas Workers' Compensation Act. Whether the discrimination claim based on negligence is likewise barred is not an issue raised by the summary judgment motion.