UNITED STATES DISTRICT COURT

MIDDLE DISTRICT OF LOUISIANA

SANDRA LYNN NOTO

VERSUS

REGIONS BANK

CIVIL ACTION

NUMBER 02-207-C-1

RULING ON MOTION FOR SUMMARY JUDGMENT

This matter is before the court on a motion for summary judgment filed by defendant Regions Bank. Record document number 21. The motion is opposed.[1]

Plaintiff Sandra Lynn Noto was employed by the defendant as a commercial loan assistant from March 1999 until her termination in June 2001. Plaintiff alleged that she was sexually harassed by her supervisor, Paula Faron, and terminated in retaliation for complaining about Faron's conduct. Plaintiff filed this action claiming sexual harassment in violation of both 42 U.S.C. §2000e-2, (Title VII) and La.R.S. 23:332, Louisiana's Employment Discrimination Law (LEDL). Plaintiff also alleged state law claims for intentional infliction of emotional distress and retaliation in violation of LSA-R.S. 23:967.[2]

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[1] Record document number 25.

[2] Plaintiff's charge of discrimination filed with the Equal Employment Opportunity Commission also indicated retaliation as a basis for the charge. Exhibit 5 attached to defendant's exhibit B. However, neither the plaintiff's complaint or opposition to the summary judgment asserted that the plaintiff was bringing a

(continued...)

Defendant moved for summary judgment as to all federal and state law claims alleged by the plaintiff, and maintained that the evidence offered demonstrates that the plaintiff cannot establish essential elements of her claims. Defendant advanced the following arguments in support of the motion: (1) there is insufficient summary judgment evidence to support a reasonable inference that the plaintiff was subjected to unwelcome harassment because of her sex or gender; (2) based on the evidence no reasonable inference can be drawn that the conduct the plaintiff complained of was so severe or pervasive that it altered the conditions of the plaintiff's employment; (3) assuming that the plaintiff has enough evidence to support a sexual harassment claim, the evidence establishes that the defendant is entitled to an affirmative defense because the plaintiff unreasonably failed to utilize its workplace harassment policy, (4) plaintiff cannot prove that she was terminated in retaliation for disclosing a practice that is in violation of state law, and (5) based on the summary judgment record the plaintiff cannot satisfy any elements of her state law claim for intentional infliction of emotional distress.

In support of its motion, the defendant offered excerpts from

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[2](...continued)
retaliation claim under Title VII. Plaintiff's complaint, paragraph 24; plaintiff's memorandum in opposition, record document number 25, pp. 8-10.

the plaintiff's deposition,[3] with attached exhibits 1, 2, 3 and 5. Defendant also submitted the affidavits of Frank J. Greely, Jr.,[4] Paula Faron,[5] Vicky Borne,[6] Jennifer Lee Wilming,[7] Sue Condon,[8] Connie Mathews,[9] Janet Lucia,[10] and Brigg A. Baechle.[11]

Plaintiff opposed the motion and argued that she has come forward with sufficient evidence to present all of her claims to the jury. Plaintiff cited excerpts from her own deposition testimony which she claimed demonstrate that there is a genuine

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[3] Defendant's exhibit B.

[4] Defendant's exhibit C. Since September 1996, Greely has been employed by Regions Bank as president and chief executive officer of central Louisiana. Greely made the decision to terminate the plaintiff's employment. Greely affidavit, ¶8.

[5] Defendant's exhibit D. Faron was a loan officer at Regions Bank from May 2, 2000, to March 1, 2003. She was the plaintiff's immediate supervisor.

[6] Defendant's exhibit E. Borne was a loan assistant at Regions. She worked for Faron before the plaintiff became Faron's loan assistant.

[7] Defendant's exhibit F. Wilming was also a loan assistant at Regions. Her office was located on the same floor as the offices of the plaintiff and Faron.

[8] Defendant's exhibit G. Condon was employed in the same building as the plaintiff.

[9] Defendant's exhibit H. Mathews was also employed in the same building as the plaintiff.

[10] Defendant's exhibit I. Lucia was employed as Regions' human resource manager from March 1992 until April 2002.

[11] Defendant's exhibit J. Baechle is employed by Regions as executive vice president and has held this position since January 1981. His office was located on the same floor of the building as the offices of the plaintiff and Faron.

dispute for trial, and that the defendant's summary judgment motion should be denied.

Summary Judgment Standard and Applicable Law

Summary judgment is only proper when the moving party, in a properly supported motion, demonstrates that there is no genuine issue of material fact and that the party is entitled to judgment as a matter of law. Rule 56(c), Fed.R.Civ.P.; Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247, 106 S.Ct. 2505, 2510 (1986). If the moving party carries its burden under Rule 56(c), the opposing party must direct the court's attention to specific evidence in the record which demonstrates that it can satisfy a reasonable jury that it is entitled to verdict in its favor. Anderson, 477 U.S. at 252, 106 S.Ct. at 2512. This burden is not satisfied by some metaphysical doubt as to the material facts, conclusory allegations, unsubstantiated assertions or only a scintilla of evidence. Little v. Liquid Air Corp., 37 F.3d 1069, 1075 (5th Cir. 1994) (en banc). In resolving the motion the court must review all the evidence and the record taken as a whole in the light most favorable to the party opposing the motion, and draw all reasonable inferences in that party's favor. Anderson, 477 U.S. at 255, 106 S.Ct. at 2513. The court may not make credibility findings, weigh the evidence, or resolve factual disputes. Id.; Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133, 150, 120 S.Ct. 2097, 2110 (2000).

The substantive law dictates which facts are material. Nichols v. Loral Vought Systems Corp., 81 F.3d 38, 40 (5th Cir. 1996). In this case the court must apply the law applicable to sexual harassment claims under federal and state law.[12] The court must also look to the Louisiana law applicable to claims for intentional infliction of emotional distress and retaliation under LSA-R.S. 23:967.

Sexual Harassment Claim under Title VII and LEDL

Sexual harassment in the form of discriminatory intimidation, ridicule and insults may be so severe or pervasive that the conditions of employment are altered, creating a hostile or abusive working environment that violates Title VII. Meritor Savings Bank, FSB v. Vincent, 477 U.S. 57, 66, 106 S.Ct. 2399, 2405 (1986). In Harris v. Forklift Systems, Inc.,[13] the Supreme Court reaffirmed the standard set forth in Meritor.[14] Under Supreme Court and Fifth Circuit precedents, a plaintiff must demonstrate the following elements to establish an actionable claim of sexual harassment in the workplace: (1) that she belongs to a protected class; (2) that

[12] Sexual harassment claims brought under Louisiana's employment discrimination laws are governed by the same principles which control under Title VII. See, Le Day v. Catalyst Technology, Inc., 302 F.3d 474, 477 (5th Cir. 2002).

[13] 510 U.S. 17, 21 114 S.Ct. 367, 370 (1993).

[14] Harris, 510 U.S. at 21, 114 S.Ct. at 370; Meritor, 477 U.S. at 66, 106 S.Ct. at 2405.

she was subject to unwelcome sexual harassment;[15] (3) that the harassment was based on sex; (4) that the harassment affected a term, condition or privilege of employment, and (5) that the employer either knew or should have known of the harassment and failed to take remedial action. Mota v. The University of Texas Houston Health Services Center, 261 F.3d 512, 523 (5th Cir. 2001).

In cases such as this one involving allegations of same-sex harassment, the court must first look at whether the alleged harassing conduct constitutes discrimination because of the individual's sex. La Day, 302 F.3d at 478; Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 80, 118 S.Ct. 998, 1002 (1998).[16] A plaintiff can establish that incidents of same-sex harassment constitute discrimination because of sex by: (1) showing that the alleged harasser made explicit or implicit proposals of sexual activity and provide credible evidence that the harasser was homosexual, (2) demonstrating that the harasser was motivated by general hostility to the presence of members of the same sex in the workplace, or (3) offering direct, comparative evidence about how the alleged harasser treated members of both sexes in a mixed-sex workplace. Id.

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[15] It is undisputed that the plaintiff belongs to a protected class. For purposes of this summary judgment motion, the court assumes the conduct the plaintiff complained of was unwelcome.

[16] This is the third essential element of a sexual harassment claim. Mota, supra; Shepherd v. The Comptroller of Public Accounts, State of Texas, 168 F.3d 871, 873 (5th Cir.), cert. denied, 528 U.S. 963, 120 S.Ct. 395 (1999).

If the plaintiff provides adequate evidence that she was harassed based on sex, the court may proceed to evaluate whether the alleged harassment was severe or pervasive such that it altered the terms or conditions of the plaintiff's employment. Conduct that is not severe or pervasive enough to create an environment that a reasonable person would find hostile or abusive is beyond Title VII's purview. At the same time, if the victim does not subjectively perceive the environment to be abusive, the conduct has not actually altered the conditions of employment, and Title VII is not violated. Harris, 510 U.S. at 21-22, 114 S.Ct. at 370. By its nature this cannot be a mathematically precise test. Whether an environment is hostile can only be determined by looking at all the circumstances, including the frequency and severity of the discriminatory conduct, whether it is physically threatening or humiliating or only an offensive utterance, and whether it unreasonably interferes with the employee's work performance. Harris, 510 U.S. at 23, 114 S.Ct. at 371; La Day, 302 F.3d at 482.

"Title VII was only meant to bar conduct that is so severe and pervasive that it destroys a protected classmember's opportunity to succeed in the workplace." Shephard, supra, citing, Weller v. Citation Oil & Gas Corp., 84 F.3d 191, 194 (5th Cir. 1996), cert. denied, 519 U.S. 1055, 117 S.Ct. 682 (1997). Not all harassment affects a term, condition, or privilege of employment. Thus, conduct that is merely offensive, or the mere utterance of an epithet which engenders offensive feelings in an employee does not

sufficiently affect the conditions of employment. Likewise, simple teasing, offhand comments, and isolated incidents, unless extremely serious, will not amount to discriminatory changes in the terms and conditions of employment. Id.

In order to recover under state law for intentional infliction of emotional distress, a plaintiff has the burden of proving: (1) that the conduct of the defendants was extreme and outrageous; (2) that the emotional distress suffered by her was severe; and (3) that the defendants desired to inflict severe emotional distress or knew that severe emotional distress would be certain or substantially certain to result from their conduct. White v. Monsanto Co., 585 So.2d 1205, 1209-10 (La. 1991); Deus v. Allstate Insurance Co., 15 F.3d 506, 514 (5th Cir.), cert. denied, 513 U.S. 1014, 115 S.Ct. 573 (1994); La Day, 302 F.3d at 483-84. The conduct complained of must be so outrageous in character and so extreme in degree that it goes beyond all possible bounds of decency and is regarded as utterly intolerable in a civilized community. Id.[17] Liability arises only where the mental suffering or anguish is extreme, and the distress suffered must be such that no reasonable person could be expected to endure it. White, 585 So.2d at 1210.

Louisiana law protects employees from reprisals by employers

[17] Liability does not extend to mere insults, indignities, threats, annoyances, or petty oppressions. White, 585 So.2d at 1209. See, Webb v. Theriot, 704 So.2d 1211, 1214-15 (La. App. 3 Cir. 1997) (liability only arises when there is extreme mental anguish or suffering).

under the provisions set forth in LSA-R.S. 23:967. The statute provides in pertinent part as follows:

> A. An employer shall not take reprisal against an employee who in good faith, and after advising the employer of the violation of law;
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> (1) Discloses or threatens to disclose a workplace act or practice that is in violation of state law.
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> (2) Provides information to or testifies before any public body conducting an investigation, hearing, or inquiry into any violation of law.
>
> (3) Objects to or refuses to participate in an employment act or practice that is in violation of law.

Under the statute an employer must have committed a violation of state law in order for an employee to be protected from reprisal. Nolan v. Jefferson Parish Hospital Service District No. 2, 790 So.2d 725, 732 (La. App. 5th Cir. 2001).

Analysis

Plaintiff argued that the nature of Faron's actions in a professional office environment, Faron's statement that she had gay friends, coupled with plaintiff's repeated requests to not engage in hugging and kissing, are implicit indication of sexual advances. However, no trier of fact could reasonably draw this conclusion based on the evidence. Clearly, there are no facts in the record that Faron ever requested or demanded that the plaintiff engage or participate in hugging or kissing or any sexual act.[18] The plaintiff's own description of Faron's words and actions did not include the type of personal contact generally associated with

[18] Plaintiff's deposition, pp. 60-63, 117-18.

sexually harassing behavior.[19] Moreover, throughout her deposition testimony, the plaintiff never described Faron's behavior toward her as sexual harassment. Plaintiff consistently reported Faron's actions as unprofessional in an office environment, and asserted that it made her feel uncomfortable and embarrassed, but never indicated in any way that it was sexual in nature.[20]

There is also no evidence that Faron engaged in disparate treatment when exhibiting the alleged harassing behavior. Defendant presented uncontradicted evidence that Faron was not homosexual or bisexual, and displayed conduct similar to that directed to the plaintiff to both men and women in the workplace.[21] In light of the plaintiff's own testimony about the nature of the conduct, and the other undisputed summary judgment evidence, the plaintiff's testimony that Faron once stated that she had gay friends is wholly insufficient to create a genuine dispute for trial on the issue of whether the alleged harassment was because of the plaintiff's gender.

Even assuming the evidence was sufficient to show that Faron's

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[19] Plaintiff's deposition, pp. 60-64, 71-73, 93-94.

[20] Plaintiff's deposition, pp. 93, 94, 97, 98.

[21] Defendant's exhibits C, D, E and I. Plaintiff had no knowledge that Faron was homosexual or bisexual, and conceded in her deposition that she had no factual basis for the allegation in her charge of discrimination that Faron had sexually harassed Borne. Plaintiff's deposition, pp. 63-64, 131, 122-24; exhibit 5 (plaintiff's EEOC charge dated June 15, 2001). Plaintiff's testimony that she did not remember seeing Faron hug anyone else does not contradict the defendant's affirmative evidence that she did. Plaintiff's deposition, pp. 61, 123-24.

conduct constituted discrimination because of sex, it is apparent that the plaintiff cannot sustain her burden of demonstrating that Faron's actions were either subjectively or objectively severe enough to create a hostile working environment.

Plaintiff's own testimony establishes that she did not subjectively perceive Faron's contact as so severe that it altered the conditions of the plaintiff's employment. Plaintiff stated unequivocally in her deposition that she did not want to quit her job, and could have continued working for Faron.[22] Equally clear from the summary judgment evidence is that no rational trier of fact could conclude that Faron's alleged conduct was so severe or pervasive that a reasonable person would find it hostile or abusive. Plaintiff recounted only five or six incidents over approximately a four month period of working with Faron.[23] There is no evidence that the physical contact or words were physically threatening, intimidating or humiliating. Faron hugged and kissed her on the cheek five or six times, and the plaintiff stated that all but one of the hugs was with one arm around her shoulder. While the plaintiff asserted that Faron would wrap her arms around her, give her a hug and kiss and say "I love you," the plaintiff's deposition testimony does not support this assertion. Plaintiff's

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[22] Plaintiff's deposition, p. 96.

[23] The evidence shows that the plaintiff began working with Faron in January 2001, and claimed that the alleged harassment occurred from February 2001 until her termination the first week in June 2001.

actual testimony was that on a couple of occasions, Faron ended her conversation with a statement like "love you," "see you Monday."[24]

At most a jury could infer that there were times when Faron's manner of supervision, words and actions were personally offensive, unprofessional or embarrassing to the plaintiff. The nature, severity and frequency of this conduct is such that no rational trier of fact could conclude that these actions created an objectively hostile or abusive work environment for the plaintiff. This conclusion is also supported by additional evidence that the plaintiff never reported this conduct as sexual harassment to any higher supervisor or to anyone in the bank's human resources department,[25] and the fact that the plaintiff testified that the behavior did not affect her work or even her ability to continue working for Faron.

Thus, viewing the summary judgment record in the light most favorable to the plaintiff, it is apparent that the plaintiff does not have sufficient evidence to support a verdict in her favor on the third and fourth elements of her sexual harassment claim. Defendant's motion for summary judgment as to this claim brought

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[24] Plaintiff's deposition, pp. 60-64, 72-73, 93-94.

[25] Plaintiff's deposition, pp. 96-99, 151-52. It is undisputed that the plaintiff received a copy of Regions' associate handbook, which included a company policy on workplace harassment based on gender. Plaintiff's deposition, pp. 45-47; defendant's exhibit B, attached exhibits 1 and 2.

under Title VII and the LEDL will be granted.[26]

State Law Claim of Intentional Infliction of Emotional Distress

Review of the summary judgment record as a whole establishes that there is no genuine issue for trial on the plaintiff's claim for intentional infliction of emotional distress. Plaintiff must prove that the emotional distress she suffered was severe. Based on the evidence no reasonable trier of fact could draw this conclusion. Plaintiff testified that even considering the conduct of her supervisors, she did not want to quit her job, and that she wanted to and could have continued to work for Faron.[27] Plaintiff also testified that after the alleged offensive contact by Faron she was not angry or upset, and had no problem doing her job, functioning or going to work. While the plaintiff asserted that there is uncontradicted evidence that she received medical treatment for illness caused as a result of the defendant's extreme and outrageous conduct, there is no summary judgment evidence to support this assertion.[28]

Plaintiff argued that the facts supporting her sexual

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[26] In light of this finding it is unnecessary to address the defendant's other arguments or any other elements of the sexual harassment claim.

[27] Plaintiff's deposition, pp. 96, 116-17.

[28] Plaintiff cited pages 170 and 171 of her deposition in support of this statement. However, page 171 was not submitted by the plaintiff.

The summary judgment evidence also shows that the plaintiff was able to obtain new employment in the month following her discharge from Regions. Plaintiff's deposition, pp. 19-20.

harassment claim support her claim that the defendant's conduct was extreme and outrageous. The evidence discussed in evaluating the harassment claim demonstrates that at most a rational trier of fact could infer that the defendant's conduct was occasionally annoying or embarrassing, and only rarely insulting or oppressive. Plaintiff also asserted that the alleged sexual harassment was not a one time incident, but a series of incidents that grew worse after each complaint. Noticeably, the plaintiff failed to cite any evidence to support this assertion, and a review of the summary judgment record shows that there is no evidence to support it. No reasonable inference can be drawn that any of the alleged harassment cited by the plaintiff was so outrageous in character and so extreme in degree that it went beyond all possible bounds of decency and could regarded as utterly intolerable in a civilized community.

Finally, the evidence already discussed, as well as the affidavits of Faron, Greely and Lucia, establish that there is no evidence from which a rational trier of fact could infer that the defendant desired to inflict severe emotional distress on the plaintiff, or knew that such distress would be substantially certain to result from their conduct. The record clearly supports summary judgment in defendant's favor as to the plaintiff's claim for intentional infliction of emotional distress.

Retaliation Claim Under LSA-R.S. 23:967

Plaintiff claimed she objected to workplace acts--Faron's

advances--which are violations of both Title VII and Louisiana's employment discrimination law.[29] Plaintiff asserted that she has provided sufficient evidence to support a verdict in her favor on the issue of whether she objected to unlawful employment acts, and that it is a question for the jury whether her termination was due to deficiencies in her job performance, or because she complained of Faron's behavior.

Clearly, sexual harassment is a violation of state law. However, as demonstrated in the part of this ruling addressing that claim, there is no evidence to support a finding that the plaintiff reported a violation of state law to anyone.

It is uncontradicted that the plaintiff never advised Greely, Lucia or any other supervisor she was being sexually harassed or believed she was being discriminated against by Faron. Plaintiff also testified that she never disclosed or threatened to disclose to the defendant or any state or federal agency anything that she thought was against the law.[30] There is no evidence that the plaintiff availed herself of the defendant's workplace harassment policy. Plaintiff did testify that she complained to Faron and Greely about Faron's office behavior--hugs, kisses on the cheek, and yelling. Plaintiff characterized and reported this to her

[29] Record document number 25, pp. 8-9.

[30] Plaintiff's deposition, pp. 40-41.

supervisors as unreasonable and unprofessional conduct.[31] However, no rational trier of fact could conclude from these facts that the plaintiff was disclosing or advising the defendant of workplace acts or practices in violation of the state's discrimination laws. Since there is no evidence to support a finding for the plaintiff on this essential element, summary judgment is warranted, dismissing any claim of retaliation under LSA-R.S. 23:967.

Accordingly, the motion for summary judgment filed by defendant Regions Bank is granted. Judgment will be entered in favor of the defendant, dismissing all of the plaintiff's claims.

Baton Rouge, Louisiana, June ____, 2003.

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STEPHEN C. RIEDLINGER
UNITED STATES MAGISTRATE JUDGE

[31] Plaintiff's deposition, pp. 96-99, 151-52.