UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

UNITED STATES EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
MITZI B. SMITH,
HOLLY DANIELS, and
BARBARA NEEL

Plaintiffs,

V. CASE NO. 3: 01-CV-216-J-21-HTS

GEOLOGISTICS AMERICAS, INC.,

Defendant.
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ORDER

This cause comes before the Court on Defendant's Motion for Summary Judgment (Dkt. 52), the Intervenor-Plaintiffs' Response (Dkt. 55) in opposition thereto, and Plaintiff EEOC's Response (Dkt. 57) in opposition thereto.

I. Introduction

In this suit, the Plaintiffs asserts claims for gender discrimination and harassment, as well as retaliation. The Plaintiffs are the United States Equal Employment Opportunity Commission ("EEOC"), Mitzi Smith ("Smith"), Holly Daniels ("Daniels"), and Barbara Neel ("Neel").[1] The

[1] The three individual Plaintiffs will be collectively referred to as "Intervenor-Plaintiffs." Any general reference hereafter to "Plaintiffs" is meant to include both the EEOC and the Intervenor-Plaintiffs.

Defendant is Geologistics Americas, Inc. ("Geologistics"), employer of Smith, Daniels, and Neel at the relevant times.

Initially, Smith, Daniels, and Neel each filed administrative charges of discrimination with the EEOC alleging various violations of Title VII. The EEOC elected to file suit only as to Smith's retaliation claim and filed its one-count Complaint (Dkt. 1) asserting such a claim. Thereafter, Smith, Daniels, and Neel filed a Motion to Intervene (Dkt. 2) in this action. That motion was granted, whereupon they filed their nine-count Amended Complaint (Dkt. 16). The claims therein include:

- Count I, gender disparate treatment claim under Title VII by all Intervenor-Plaintiffs;
- Count II, gender hostile work environment claim under Title VII by all Intervenor-Plaintiffs;
- Count III, hostile work environment and gender discrimination under the Florida Civil Rights Act ("FCRA") by all Intervenor-Plaintiffs;
- Count IV, Title VII retaliation claim by Smith; Count V, FCRA retaliation claim by Smith;
- Count VI, Title VII retaliation claim by Daniels;
- Count VII, FCRA retaliation claim by Daniels;
- Count VIII, Title VII retaliation claim by Neel; and
- Count IX, FCRA retaliation claim by Neel.

As a result, there are currently two complaints in this case. Moreover, the EEOC's Complaint and the Intervenor-Plaintiff's Amended Complaint overlap as each asserts a claim

under Title VII for the retaliation in the firing of Smith. See Dkt. 1 at 3 (sole Count of EEOC's Complaint); Dkt. 16 at 18-20 (Count IV of Intervenor-Plaintiff's Amended Complaint).

II. Background

The Court's effort to streamline the consideration of what portended–and has, in fact, turned out–to be lengthy submissions by requiring the parties to prepare and file statements of undisputed facts supported by record citations and similar oppositions, see Dkt. 45 (Order of June 4, 2002), has proven less useful than anticipated.[2] Nonetheless, the following undisputed

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[2] The non-movants appear to have become so consumed with disputing every factual assertion made by their opponent that their asserted disputations are frequently meaningless and often contradict subsequent factual assertions they have made.

For example, as to Plaintiff Neel, the Defendant asserts that Mr. Barrineau met with her on April 19, 2000, and asked her if she was filing suit against the company, to which she untruthfully replied that she was not. See Dkt. 52 at ¶ 49. The Intervenor-Plaintiffs dispute the correctness of this assertion, contending that Barrineau harassed Neel for over thirty minutes, repeatedly asking her if she was suing the company, causing her to deny involvement in the suit for fear of being fired. See Dkt. 55 at ¶ 49. But it is, in fact, the crux of Neel's retaliation claims (Counts VIII and IX) that Barrineau did call her into his office and ask her if she was going to sue the Defendant. See Dkt. 16 at ¶¶ 125-27, 137-38 (allegations of Counts VIII and IX of Intervenor-Plaintiffs' Amended Complaint).

Likewise, as to Smith and the EEOC, the Defendant asserts that Mr. Barrineau met with Smith on April 24, 2000, and asked her if she was filing suit against the company, to which she untruthfully replied that she was not. See Dkt. 52 at ¶ 62. The EEOC disputes the correctness of this assertion, contending that Barrineau was aggressive, repeatedly asking Smith if she were involved in the suit, causing her to deny involvement in the suit for fear of being fired. See Dkt. 57 at ¶ 7. But, as above, the EEOC later relies on the occurrence of this meeting and Barrineau's having asked Smith if she was going to sue the Defendant as some of its key evidence in support of its retaliation claim. See Dkt. 57 at p.18, ¶ 18.

Thus, neither of the above is a good faith disputation, as no party denies that these meetings took place or that Barrineau asked Neel and Smith about their intentions to file suit. Quite to the contrary, those facts underpin seven of the ten claims asserted by Plaintiffs in this suit. Any additional facts the respective Plaintiffs may have wished to add to the calculus regarding Barrineau's attitude, persistence, or the length of the meeting do not dispute the fact that the meeting took place and what it regarded. Rather, those additional matters were ones the Plaintiffs were clearly afforded an opportunity to address in their Statement of Additional Material Facts. See Dkt. 45 at 3 (providing for such statements).

The purpose of recounting the above is to admonish counsel to be more thoughtful in the future, whether in argument or submissions (e.g., joint pretrial statement). This case already portends to be somewhat lengthy, see 18 at 9 (Case Management Report estimating 5-day jury trial), particularly given the number of parties-plaintiff. The Court will not abide the unnecessary consumption of time caused by disputation of such points.

facts, taken in a light most favorable to the Plaintiffs for purposes of considering the subject motion, have been distilled by the Court. Particularly material disputed facts that have become evident are noted.

Defendant operates a warehouse in Jacksonville, Florida, that receives freight destined to be shipped to retail stores in the Caribbean and South America. That freight is received into two areas of Defendant's warehouse: the Receiving Department and the Processing Department. However, the fact of this separate designation is disputed by the Intervenor-Plaintiffs, who assert that these designations were not created until at or after the time of the alleged discriminatory practices.[3] Nevertheless, to avoid confusion, this terminology will be used to distinguish between these two groups of employees. All four Processing Department employees at the relevant time, including the Intervenor-Plaintiffs, are female. Although no party has pointed to any specific portion of the record, it appears from many portions of the record reviewed by the Court–and is thus accepted for purposes of this motion–that all of the Receiving Department employees were male at the times relevant to this suit.[4]

The genesis of this case can be traced to the fact that the Receiving Department employees are trained, and thus permitted, to use forklifts in unloading the freight delivered to

[3] In this regard, the Intervenor-Plaintiffs have pointed the Court to the deposition testimony of James Barrineau, their supervisor during the relevant times, who testified that he wrote job descriptions for the Defendant's facility in June of 2000 and was not aware that any such descriptions had existed previously.

[4] The one portion of the parties' submissions that expressly asserts that the Receiving Department was all male is not supported by the portions of the record cited therein. See Dkt. 57 at p.13-14, ¶ 2 (EEOC's Response to summary judgment).

their area, while the Processing Department employees must use other means (manual lifting, non-motorized pallet jacks) to move and unload the freight delivered to their area. Further, the Intervenor-Plaintiffs assert that they were frequently required to help the Receiving Department employees unload freight delivered to the Receiving Department, but were not allowed to use a forklift when doing so. Both sides agree that it is necessary to use a forklift to unload the freight delivered to the Receiving Department.

Prior to March 1, 2000, the Receiving and Processing Department employees were supervised by William Neel ("William Neel"), who happens to be the husband of Intervenor-Plaintiff Barbara Neel but who left Defendant's employment to take a job in South Florida. After March 1, 2000, Receiving and Processing Department employees were supervised by Jessie Dear ("Dear"). Dear was himself supervised by Branch Manager Jim Barrineau ("Barrineau") who also oversaw Administration Manager Roberto Valdomar ("Valdomar"). Barrineau reported to Regional Vice-President Ron Caplinger ("Caplinger").

On several occasions after March 1, 2000, the Intervenor-Plaintiffs asked Dear and/or Barrineau to let them become certified to operate forklifts, but they were denied such training. At least one of the Intervenor-Plaintiffs asserts that she also complained to Caplinger about the lack of forklift training. Smith claims that, on at least one occasion, Barrineau stated to her, Daniels, and Neel that he did not like supervising women and did not think that women should be working in a warehouse such as Defendant's.

On April 19, 2002, Barrineau separately called Daniels and Neel to his office and asked them whether they intended to file a lawsuit against Defendant and if they had any complaints about how they were being treated. Both women falsely denied that they were contemplating suit against Defendant because, as later stated, they felt they would be fired if they admitted their true intentions. Both women claim that Barrineau was aggressive towards them during the meeting and otherwise harassed them during that day.

Specifically, Daniels claims throughout the remainder of April 19, after the meeting, Barrineau criticized how she worked and later caller her back to his office and forced her to sign a memorandum regarding their meeting. Daniels has alternately stated that she did not read the memorandum and that she disagreed with its contents. In general terms, the memorandum states that Barrineau spoke with Daniels regarding "discrimination issues" and that she said she had no such concerns. Daniels still works for Defendant, was provided forklift training in June of 2000, was later promoted to a low-level supervisory position, and has received two raises since May of 2000.[5]

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[5] The Intervenor-Plaintiffs' Response asserts that these facts are "disputed." See generally Dkt. 55 at 20-21. But what follows thereafter are merely the Intervenor-Plaintiffs' arguments regarding the relevance of the Defendant's factual assertions. And where contrary assertions are made, they either do not create a genuine issue or are not supported by the portion of the record cited. Some examples follow.

Defendant asserts that Daniels was provided forklift training in June of 2000. See Dkt. 52 at ¶ 37 (citing portion of Daniels' deposition in which she admits she was given forklift training in June of 2000). The Intervenor-Plaintiffs state this fact is disputed, then go on to argue that the fact that Daniels was provided forklift training in June 2000 does not mitigate her claims or undo Defendant's discrimination. See Dkt. 55 at ¶ 37. (Leaving aside the implicit admission of the fact assertedly disputed.)

The Intervenor-Plaintiffs' Response claims that Daniels has suffered financial damage by being unable to obtain other employment as a result of Defendant's alleged discrimination, see Dkt. 55 at pp.20-21, ¶ 38 (citing Daniels depo, Dkt. (continued...)

Neel had sustained an on-the-job injury on March 30, 2000, and was thereafter placed on light duty. She was still on light duty on April 19, 2000, when she states she was sent home early following her meeting with Barrineau and thus concluded that she had been fired. Neel's time cards do reflect that, after working full days on April 17 and 18, 2000, (Monday and Tuesday), she punched out after only one hour on April 19, 2000, and did not work the rest of that week. However, while those time cards also show that she did not work at all the weeks ending April 29 and May 6, 2000, they do show that she worked full-time (40 hours) plus some overtime (4.25 hours) the week ending May 13, 2000, and worked a full day on Monday, May 15, 2000, her last day. According to a "Worker's Compensation Medical Treatment and Status Report" form, on Wednesday, May 17, 2000, she was examined again; restricted to sedentary work only and prohibited from lifting more than 10 pounds; and cleared to return to work that day. After that, Neel went on full-time Worker's Compensation benefit. Within the next few months, she sold her house in the Jacksonville area and moved to South Florida, where her husband had relocated.

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[5](...continued)
56, Ex. 1 at 241-42); yet in the cited portions of Daniels' deposition she states that she does not know why she did not get the other job she interviewed for while employed by Defendant. See Dkt. 56, Ex. 1 at 242.

Regarding subsequent pay raises, in her deposition, Daniels stated that she has received two pay raises since May of 2000. However, in her affidavit filed in response to the summary judgment motion, she avers that she was entitled to two other raises (in March and July of unspecified year(s)) and that "everybody [else]" got such raises. These assertions do not raise a genuine dispute because Daniels' affidavit does not disclose how these matters are within her personal knowledge. See Rule 56(d), Federal Rules of Civil Procedure (requiring affidavits in opposition to summary judgment motion, inter alia, to be made on personal knowledge, show affirmatively the basis of the affiant's knowledge on the particular matter, and to include, where applicable, documents). Daniels' averments regarding her entitlement to raises and the fact that "everybody [else]" got such raises are simply not properly supported.

On April 24, 2000, Barrineau called Smith to his office and asked her whether she intended to file a lawsuit against Defendant and if she had any complaints about how she was being treated. As had Daniels and Neel, Smith falsely denied that she was contemplating suit against Defendant because, as later stated, she felt she would be fired if she admitted her true intentions. Smith was terminated later that day, based on Defendant's contention that there was a lack of work and that Smith was a disruptive employee who had made ethnically insensitive comments to Indian and Black co-employees. As set forth below in the discussion of Intervenor-Plaintiff Smith and the EEOC's retaliation claims, these latter two facts are disputed and thus are not accepted as true for purposes of this motion. See, infra, part VII.B.

III. Summary Judgment Standard

Defendant has filed the instant motion seeking the entry of summary judgment pursuant to Rule 56, Federal Rules of Civil Procedure ("FRCP"). Summary judgment is appropriate only when a court is satisfied "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). In making this determination, a court must view all the evidence in the light most favorable to the non-moving party. See Samples on Behalf of Samples v. City of Atlanta, 846 F.2d 1328, 1330 (11th Cir. 1988). The burden of establishing the absence of a genuine issue is on the moving party. See Celotex Corp. v. Catrett, 477 U.S. 317 (1986). However, the burden extends only to facts that might affect the outcome of the suit under the governing law. "Factual disputes that are irrelevant or unnecessary will not be counted." Anderson v. Liberty Lobby, Inc., 477 U.S. 242,

248 (1986). Once this burden is met, the non-moving party must "go beyond the pleadings and by her own affidavits, or by the 'depositions, answers to interrogatories, and admissions on file,' designate 'specific facts showing that there is a genuine issue for trial.'" Celotex Corp., 477 U.S. at 342. However, a plaintiff need only present evidence from which a jury might return a verdict in his favor in order to survive a summary judgment motion. See Samples on Behalf of Samples v. City of Atlanta, 846 F.2d at 1330.

Lastly, as the Defendant has addressed each of the Plaintiffs' claims under a McDonnell–Douglas-type circumstantial evidence analysis, and all Plaintiffs have responded in kind, the Court will only address such a framework in considering the instant motion.

IV. Intervenor-Plaintiffs' Title VII Disparate Treatment Claim, Count I

In order to establish a Title VII disparate treatment gender discrimination claim under a circumstantial evidence analysis, a plaintiff must first establish a prima facie case, by showing that: (1) she is a member of a protected class; (2) that she suffered an adverse employment action; (3) her employer gave favorable treatment to similarly situated employees who were not within the protected class; and (4) she was qualified for her job. Compare Holifield v. Reno, 115 F.3d 1555, 1562 (11th Cir. 1997)(setting forth prima facie case for race discrimination under Title VII). If the plaintiff establishes her prima facie case, the defendant must then proffer a legitimate non-discriminatory reason for its different treatment. See id. at 1564. If the defendant meets this burden of production, it is then incumbent on the employee to demonstrate that such reason is merely a pretext for discrimination. See id.

By only presenting argument regarding the second and third elements of the prima facie case, Defendants implicitly concede the first and fourth elements which, in any event, are sufficiently supported by the evidence for purposes of this motion.

As to the third element, Defendants argue that the Intervenor-Plaintiffs cannot establish the requisite adverse employment action because there is no evidence that the inability to use the forklift affected their jobs in a tangible way and, in any event, use of a forklift was not required for Processing Department employees such as the Intervenor-Plaintiffs. The Court concludes that the Intervenor-Plaintiffs have presented sufficient evidence as to this third element through the evidence that the freight delivered to the Receiving Department often required the use of a forklift and that the Processing Department employees were routinely called upon to assist the Receiving Department employees but not permitted to use a forklift when doing so by virtue of not also being provided with forklift training. A genuine issue of material fact thus appears to exist as to the third element.

As to the fourth element of the prima facie case, Defendants argue that the Intervenor-Plaintiffs, as Processing Department employees, are not similarly situated to the Receiving Department employees and thus cannot compare themselves to those employees. The crux of this argument hinges upon Defendant's reliance on a set of facts under which the Processing and Receiving Department employees are separate and under which the Processing Department employees are only required to handle the lighter freight delivered to their area. As set forth above, both these facts are sufficiently disputed and the Intervenor-Plaintiffs have presented

sufficient evidence that they were called upon to do the same work, in the same area, and with the same freight as the Receiving Department employees. Thus a genuine issue of material fact appears to exist as to the fourth element.

For its legitimate non-discriminatory reason, Defendant offers that: (1) forklift use is not an essential function of a Processing Department employee's job; (2) that it is impractical to use a forklift in the Processing Department because of the small size of that area; (3) that it is unnecessary to use a forklift in that area both because of its small size and the relative lighter weight of the freight delivered there; and (4) that there are a limited number of forklifts available in Defendant's facility and such must be assigned where essential. While at least the first and third of these reasons are factually disputed, Defendant has still met its low burden of production in this regard.

The Court concludes that the Intervenor-Plaintiffs have pointed to sufficient facts to create a genuine dispute as to whether the above proffered reasons are merely a pretext for discrimination. Contrary to Defendant's assertion, Plaintiffs have presented testimony that they were routinely called upon to perform the same work as the Receiving Department employees but not permitted to use a forklift when doing so. This testimony, when coupled with the Intervenor-Plaintiffs' testimony about their requests of Barrineau to receive forklift training, his denial of such, and his alleged sexist comments made when so denying them the training, create a genuine dispute as to whether the real reason Defendant would not give the Intervenor-Plaintiffs forklift training was because of their gender. Accordingly, the Defendant's Motion

for Summary Judgment is due to be denied as to Count I of the Intervenor-Plaintiffs' Amended Complaint.[6]

V. Intervenor-Plaintiffs' Title VII Hostile Work Environment Claim, Count II

In order to prove sexual harassment–which includes so-called hostile work environment claims–a plaintiff must show that: (1) she belongs to a protected class; (2) she was subjected to unwelcome sexual harassment, such as sexual advances, requests for sexual favors, and other conduct of a sexual nature; (3) the harassment was based on her sex; (4) the harassment was sufficiently severe or pervasive to alter the terms and conditions of employment and create a discriminatorily abusive working environment; and (5) a basis for holding the employer liable. See Mendoza v. Borden, Inc., 195 F.3d 1238, 1245 (11th Cir. 1999).

Defendant has presented two arguments in favor of summary judgment, one procedural and the other substantive. As to the former, Defendant asserts that, because the Intervenor-Plaintiffs' hostile work environment claims were not included in their administrative complaints filed with the EEOC, those claims cannot be asserted in this suit. As to the latter, Defendant attacks the second element set forth above: the severity and pervasiveness of the alleged harassment. As set forth below, the Court finds that the Intervenor-Plaintiffs cannot prevail on the second element of their claim–although for a slightly different reason than argued by

[6] Defendant has also argued that the Intervenor-Plaintiffs' claims are moot as the Defendant provided forklift training to all employees in approximately June of 2000, leaving only a small period of time during which the Intervenor-Plaintiffs were denied forklift training and use. However, based on the evidence presented by the Intervenor-Plaintiffs, including that those female employees who were later provided with the training were effectively denied the actual use of forklifts when they were required to assist the Receiving Department employees, summary judgment will also be denied on this basis.

Defendant–and thus their claims fails on substantive grounds. Accordingly, the Court need not decide the procedural issue.

The Intervenor-Plaintiffs' argument regarding the severity and pervasiveness of the alleged sexual harassment is minimal and conclusory. See Dkt. 55 at 41-2 (comprising barely one-half page). Therein, the Intervenor-Plaintiffs simply assert that they did "suffer[] a severe and pervasive hostile work environment that was permeated with discriminatory intimidation, ridicule, and insult" and that they have proven such through the evidence they have marshaled. See id. (citing depositions of Daniels and Barbara Neel, affidavit and deposition of Fred Cole,[7] and deposition of William Neel). However, examination of the cited portions of these submissions reveals that they do not support the Intervenor-Plaintiffs' arguments or this claim, and these submissions separately point up the overall deficiency in the Intervenor-Plaintiffs' hostile work environment claim.

The cited portions of Daniels' deposition contain her testimony that she heard Barrineau state that a woman doing a man's job will do so without a forklift as well as her conclusion that her work environment was hostile because she was not permitted to use a forklift when she was required to do the same work as the male Receiving Department employees. The cited portions of Barbara Neel's deposition contain her testimony that she heard Barrineau state that he would not give women forklift training. The cited portion of Cole's deposition and his affidavit both

[7] Fred Cole was also an employee of Defendant, but had a different immediate supervisor from the Intervenor-Plaintiffs.

state that he heard Barrineau state that if he (Barrineau) had his way, no women and no Hispanics would work for Defendant. The cited portion of William Neel's deposition contains Neel's opinion that Barrineau was not happy that women worked in the Defendant's facility, but lacks reference to any underlying facts or quotations from Barrineau which support that opinion.

The above-marshaled evidence is consistent with the apparent theory of the Intervenor-Plaintiffs' Count III hostile work environment claim, as can be inferred from the allegations thereof. Specifically, Count III of their Amended Complaint alleges that they were subjected to a gender-hostile work environment by virtue of: (1) being subjected to numerous, gender-based derogatory comments; (2) having a heavy workload; (3) being forced to move heavy items without the use of a forklift; and (4) being denied certification that would allow them to use a forklift. See Dkt. 16 at ¶ 57.

Aside from those comments made by Barrineau in relation to forklift training and the actual denial of such training, the Intervenor-Plaintiffs have simply not adduced any evidence of being subjected to numerous, gender-based derogatory comments or other actions. Those comments made by Barrineau in relation to forklift training, like the allegations of the Amended Complaint discussed above, are some of the things the Intervenor-Plaintiffs may arguably use to support certain elements of their Count I disparate treatment claim. However, they are not properly recast as hostile work environment claims. Accordingly, the Defendant's Motion for

Summary Judgment is due to be granted as to Count II of the Intervenor-Plaintiffs' Amended Complaint.

VI. Intervenor-Plaintiffs' Florida Civil Rights Act Claims, Count III[8]

As the FCRA is patterned after the relevant federal anti-discrimination laws, claims under the FCRA are governed by the same analysis as such claims under the analogous federal law.[9] Accordingly, the analysis applicable to a federal claim is equally applicable to the analogous FCRA claim. Thus, to the extent that Count III purports to state a claim for disparate treatment under the FCRA for failure to provide forklift training to women, Defendant's summary judgment motion is due to be denied for the same reasons set forth in part IV., above. Likewise, to the extent that Count III purports to state a claim for hostile work environment under the FCRA, Defendant's summary judgment motion is due to be granted for the same reasons set forth in part IV., above.

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[8] The Intervenor-Plaintiffs separately stated their Title VII disparate treatment and hostile work environment claims in Counts I and II of their Amended Complaint (Dkt. 16). However, it appears that they intended for their Count III FCRA claim to state theories of both gender hostile work environment, see Dkt. 16 at ¶¶ 66, 67 (second sentence), 69b, 70, and 71, and disparate treatment on the basis of gender. See id. at ¶¶ 67 (first sentence), 68, 69a, 69c, and 72. But see Dkt. 55 at 2 (Intervenor-Plaintiff's Response to summary judgment motion)(referring, confusingly, to Count III as alleging FCRA claims "based on gender and hostile work environment").

While this assertion of two theories in one count is contrary to Rule 10(c), Federal Rules of Civil Procedure (requiring that separate claims be stated in separate counts), as this case is already well beyond the pleading stage, the Court will not require a repleader. Count III of the Amended Complaint will thus be addressed as asserting FCRA claims of gender hostile work environment and disparate treatment on the basis of gender.

[9] Florida laws which are mirrored after federal laws are construed, and claims thereunder analyzed, in accord with those federal laws. See Brand v. Florida Power Corp., 633 So.2d 504, 507-09 (Fla. 1st DCA 1994).

VII. Intervenor-Plaintiffs' Federal and State Retaliation Claims, Counts IV-IX, and EEOC's Title VII Retaliation Claim on Behalf of Intervenor-Plaintiff Smith

In order to establish a claim of retaliation under a circumstantial evidence analysis under Title VII, a plaintiff must first establish a prima facie case, by showing (1) that she engaged in some statutorily protected activity; (2) that she suffered an adverse employment action; and (3) that there is some causal relationship between the two events. See Holifield v. Reno, 115 F.3d 1555, 1566 (11th Cir. 1997). If the plaintiff establishes her prima facie case, the defendant must then proffer a legitimate non-discriminatory reason for the adverse employment action. See id. If the defendant meets this burden of production, it is then incumbent on the employee to demonstrate that such reason is merely a pretext for retaliation. See id.[10]

As set forth below, the analyses as to the retaliation claims of the EEOC and Smith versus those of Daniels and Neel diverge after consideration of the first element of the prima facie case. Thus, following a discussion of that element applicable to all Plaintiffs' retaliation claims, the Court will discuss the claims of the former and the latter groups separately.

The anti-retaliation provision of Title VII, 42 U.S.C. § 2000e-3(a), prohibits

> discriminat[ion] against any . . . employee[] because he has opposed any practice made an unlawful employment practice by this subchapter, or because he had made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

[10] As set forth above in part VI., the analysis applicable to a claim under the federal anti-discrimination laws is equally applicable to analogous claims under the FCRA. Hence the analysis set forth herein for Title VII retaliation claims is equally applicable to such claims under the FCRA.

It has been held, and is consistent with § 2000e-3(a), that complaining to management about perceived discrimination or otherwise expressing one's belief to supervisors that particular conduct is discrimination, even where no administrative complaint is ever filed with the EEOC, is "opposition" within the meaning of the anti-retaliation provision. See Iannone v. Frederic R. Harris, Inc., 941 F.Supp. 403, 410 (S.D.N.Y. 1996); Arzate v. City of Topeka, 884 F.Supp. 1494, 1503 (D.Kan. 1995); Cobb v. Anheuser Busch, Inc., 793 F.Supp. 1457, 1489-90 (E.D. Mo. 1990).

Plaintiffs have marshaled sufficient evidence that they complained to management of the perceived inequity in forklift training prior to the asserted adverse employment actions.[11]

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[11] Such "opposition" (i.e., Smith's complaining to her supervisors) is the theory of protected activity argued by the EEOC in support of the first element of the prima facie case as to the Title VII retaliation claim in its Complaint. See Dkt. 57 at 22. However, it is not clear from the Intervenor-Plaintiffs' Response what protected activity they assert they engaged in to satisfy the first element of the prima facie case as to Counts IV through IX of their Amended Complaint. See Dkt. 55 at 42(Intervenor-Plaintiffs' Response)(stating merely, "The Defendant was aware of the statutorily protected behavior." without providing further explanation or providing a record citation). The Court infers this cryptic statement to refer to the evidence that the Intervenor-Plaintiffs communicated to various of their supervisors that they thought Defendant's failure to provide them forklift training constituted gender discrimination.

However, the Intervenor-Plaintiffs' Amended Complaint alleges that it was their consultation with their attorney that constituted "participation" protected by the anti-retaliation provision of § 2000e-3(a). See Dkt. 16 at ¶¶ 81, 89, 102, 116, 129, 140 (Counts IV, V, VI, VII, VIII, IX, resp.). It appears to be an issue of first impression whether mere consultation with an attorney, without a communication to the employer asserting that an unlawful employment practice is occurring, is activity protected by § 2000e-3(a). The few reported cases in which a retaliation claim was based on an employee's consultation with an attorney are cases in which the employee and/or her attorney had also already communicated to the employer the employee's belief that an unlawful employment practice was occurring. See, e.g., Rhoads v. Federal Deposit Ins. Corp., 257 F.3d 373, 392 (4th Cir. 2001). These cases can thus be grouped with the above-cited "opposition" cases based on that latter fact.

The Court's somewhat limited research thus far has only uncovered one case that *discusses* mere consultation with an attorney. See Doe v. Kohn, Nast, & Graf, P.C., 862 F.Supp. 1310, 1316 (E.D. Penn. 1994)(citing 1984 EEOC Decision as representing EEOC's position that consultation with an attorney is protected activity). However, it seems doubtful that such consultation would constitute "participation . . . in an investigation, proceeding, or hearing under this subchapter," where consultation is with a private attorney, although such could possibly be "opposition." If the Intervenor-Plaintiff Smith still intends to pursue her retaliation claims under a theory of "participation" or "opposition" based solely on her consultation with her private attorney–as contrasted with an opposition theory based on her informal complaints to her

(continued...)

Plaintiffs have thus satisfied the first element of their prima facie case of retaliation under Title VII and the FCRA as to Counts IV through IX of the Intervenor-Plaintiffs' Amended Complaint and the sole count of the EEOC's Complaint.

A. Intervenor-Plaintiffs Daniels and Neel (Counts VI-IX of Intervenor-Plaintiffs' Amended Complaint)

As set forth above, the second element of a prima facie case of retaliation is that the employee have suffered some "adverse employment action."

> An adverse employment action is an ultimate employment decision, such as a discharge or failure to hire, or other conduct that "alters the employee's compensation, terms, conditions, or privileges of employment, deprives him or her of employment opportunities, or adversely affects his or her status as an employee." Conduct that falls short of an ultimate employment decision must meet "some threshold level of substantiality . . . to be cognizable . . . ."

Gupta, 212 F.3d at 587(internal citations omitted).

The civil rights statutes were not intended to become "general civility code[s];" thus the determination of whether an employer's action or omission constitutes adverse employment action, i.e., whether something alters or changes a term or condition of employment, is judged, at least in part, from an objective standpoint. See Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 81 (1998). For example, in order to constitute actionable harassment, a hostile work environment must be both objectively and subjectively offensive. See Harris v. Forklift

[11](...continued)
supervisors or other management–counsel shall be expected to muster further legal and factual support for such a theory.

Sys., Inc., 510 U.S. 17, 21-22 (1993). Such a standard serves to "filter out complaints attacking 'ordinary tribulations of the workplace,'" Faragher v. City of Boca Raton, 524 U.S. 775, 788 (1998), because

> [m]inor matters do not constitute adverse employment actions. "A materially adverse change in the terms and conditions of employment must be more disruptive than a mere inconvenience or an alteration of job responsibilities."

Hartsfield v. Miami-Dade County, 90 F.Supp.2d 1363, 1374 (S.D. Fla. 2000)(quoting Crady v. Liberty National Bank, 993 F.2d 132, 136 (7th Cir. 1993)).

Unlike Intervenor-Plaintiff Smith, discussed below in part VII.B., Intervenor-Plaintiffs Daniels and Neel were not terminated. Hence, it is necessary to more closely examine the acts and omissions that they assert constitute retaliatory conduct. Doing so, the Court concludes that neither Daniels nor Neel can show the requisite adverse employment action necessary to make out a prima facie case of retaliation under Title VII or the FCRA. Each points to a discrete act by Barrineau on April 19, 2000, that constituted retaliation, as well as his general demeanor that day, including during the meeting. See Dkt. 55 at 42-43. The former and then the latter categories are discussed below.

Daniels claims that being forced to sign the memorandum that she disagrees with was a retaliatory act. However even assuming the memorandum does not accurately recount the meeting, she has not shown how such has effected a material change in her work terms. To the contrary, the record shows that she has continued in Defendant's employ since that time,

ultimately receiving forklift training, was promoted, and received pay raises. Neel states she thought she was terminated on April 19, 2000. However, while work records show she left early that day, she returned to work within three weeks, worked a full week, and then worked a full day the following week before being placed on working restrictions that would appear to preclude completely the very type of work her job entailed.

Both women claim, without sufficient substantiation, that Barrineau harassed each of them during their respective meetings and otherwise during the day of April 19, 2000. However, neither has meaningfully elaborated on those assertions. Nor has either pointed to any facts that show, or provide a basis for inferring, that they suffered a tangible job detriment as a result of this meeting. See Dkt. 55 at 41-42.[12]

There is clearly a dispute as to Barrineau's demeanor during the April 19, 2002, meetings with Daniels and Neel. While employers are clearly entitled to undertake their own investigations if they suspect or learn of discrimination, allowing the alleged discriminator to question the complaining employees is arguably not the wisest practice. But where the complaining employee cannot show that she suffered any detriment as a result of one such incident, the adverse employment action element is simply not met. Accordingly, the

[12] The Intervenor-Plaintiffs have not cited to the Court any caselaw regarding whether and under what circumstance the questioning of an employee about administrative charges or a lawsuit can constitute retaliation under § 2000e-3(a). The Court's research has disclosed one case concluding that "intensive interrogation" of an employee as to why he filed a charge of discrimination did violate § 2000e-3(a). See Paxton v. Union Nat'l Bank, 688 F.2d 552, 572 (8th Cir. 1982). However, that opinion provides so few of the underlying facts, and those facts provided are so general, that the case effectively cannot be analogized. See id. (stating merely that employee was "questioned at great length" and later characterizing such as "intensive interrogation").

Defendant's Motion for Summary Judgment is due to be granted as to Counts VI, VII, VIII, and IX of Intervenor-Plaintiffs Daniels and Neel's Amended Complaint.

B. Intervenor-Plaintiff Smith (sole Count of EEOC's Complaint and Counts IV and V of Intervenor-Plaintiffs' Amended Complaint)

It is not contested that Smith was terminated in April of 2000 after "opposing" Defendant's alleged unlawful practice of denying forklift training to women by complaining to her supervisors and management. This is sufficient to establish an adverse employment action, the second element of the prima facie case. Further, the short time between Smith's complaints and her termination suggests the existence of a genuine issue regarding the necessary causal relationship, the third element of the prima facie case.

For its proffer of a legitimate nondiscriminatory reason for terminating Smith, Defendant asserts that, due to a down-turn in its business, it needed to reduce its overall workforce and had been doing so for some time before April 2000. Defendant proffers that when it came time to reduce the workforce in the Processing Department, Defendant selected Smith because she was "disruptive," a judgment based on her having previously made ethnically insensitive comments to an Indian co-employee and having called a Black co-employee a "black bitch." While Plaintiff disputes the factual issues of whether Defendant actually needed to reduce its workforce and whether Smith did use the above-offensive language, Defendant has still met its minimal burden of production in this regard.

In attacking the above-stated proffered legitimate non-nondiscriminatory reason for Smith's termination, she and the EEOC point to evidence which: (1) attacks the documentation and other evidence upon which Defendant relies to show a downturn in its business and to show that it had actually been decreasing the size of its workforce; and (2) questions whether Smith made the asserted offensive remarks. As to this second category of evidence, the EEOC argues that pretext is shown because, even if Plaintiff had made the alleged statements, the Defendant did not discipline Smith immediately, but instead waited to do so, only terminating her after she had complained about employment practices. The above-cited evidence is sufficient to rebut Defendant's asserted legitimate nondiscriminatory reasons and to raise a genuine issue of material fact as to whether Defendant retaliated against Smith in violation of Title VII and the FCRA. Accordingly, the Defendant's Motion for Summary Judgment is due to be denied as to the sole Count of the EEOC's Complaint and as to Counts IV and V of Intervenor-Plaintiff Smith's Amended Complaint.

VIII. Miscellaneous Arguments

The Defendant has made various other arguments in support of summary judgment on particular issues that are not entirely dispositive. For example, Defendant has sought summary adjudication that certain of the Intervenor-Plaintiffs have not properly mitigated their damages or that punitive damages are not appropriate on the evidence adduced to date. The highly-disputed nature of many of the facts relevant to these issues preclude summary judgment on

these grounds. Accordingly, to the extent not expressly granted herein, the Defendant's summary judgment motion will otherwise be denied, including on these miscellaneous grounds.

Upon consideration of the foregoing, it is hereby **ORDERED**:

1. Defendant's Motion for Summary Judgment (Dkt. 52) is **GRANTED in part** as follows:

- Summary judgment is **GRANTED** in favor of Defendant and against Intervenor-Plaintiffs Mitzi Smith, Holly Daniels, and Barbara Neel on Count II of their Amended Complaint (Dkt. 16);

- Summary judgment is **GRANTED** in favor of Defendant and against Intervenor-Plaintiffs Mitzi Smith, Holly Daniels, and Barbara Neel on that portion of Count III of their Amended Complaint (Dkt. 16) which asserts a claim for hostile work environment under the Florida Civil Rights Act; and

- Summary judgment is **GRANTED** in favor of Defendant and against Intervenor-Plaintiffs Holly Daniels and Barbara Neel on Counts VI, VII, VIII, and IX of their Amended Complaint (Dkt. 16).

In all other respects, the Motion for Summary Judgment (Dkt. 52) is **DENIED**.

2. Pursuant to Rule 54(b), Federal Rules of Civil Procedure, the Clerk is directed to withhold entry of judgment on the above rulings until further order of the Court.

DONE AND ORDERED, at Jacksonville, Florida, this 19th day of September, 2002.

RALPH W. NIMMONS, JR.
UNITED STATES DISTRICT JUDGE

Copies to:

Counsel of record
Pro se party, if any
Courtroom Deputy Clerk
Judicial Assistant

F 3:01-216 mwp wpd

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Date Printed: 09/19/2002

Notice sent to:

Cheryl A. Cooper, Esq.
Equal Employment Opportunity Commission
Miami District Office
One Biscayne Tower
2 S. Biscayne Blvd., Suite 2700
Miami, FL 33131

Gwendolyn Y. Reams, Esq.
Equal Employment Opportunity Commission
Miami District Office
One Biscayne Tower
2 S. Biscayne Blvd., Suite 2700
Miami, FL 33131

Delner Franklin-Thomas, Esq.
Equal Employment Opportunity Commission
Miami District Office
One Biscayne Tower
2 S. Biscayne Blvd., Suite 2700
Miami, FL 33131

Michael J. Farrell, Esq.
Equal Employment Opportunity Commission
Miami District Office
One Biscayne Tower
2 S. Biscayne Blvd., Suite 2700
Miami, FL 33131

David E. Block, Esq.
Jackson Lewis LLP
First Union Financial Center - Suite 2600
200 S. Biscayne Blvd.
Miami, FL 33131-2374

Jay F. Romano, Esq.
Law Offices of Jay F. Ramano, P.A.
10 Fairway Dr., Suite 131
Deerfield Beach, FL 33441-6797