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IN THE UNITED STATES DISTRICT COURT 2002 JAN 24 AM 11:56
MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

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FORT MYERS DIVISION

UNITED STATES EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION,

Plaintiff,

and

VICTORIA BRIGGS and
RESA GASTON,

Intervenors,

v.

CIVIL ACTION NO. 2:00-CV-409
FtM-29D
MEMORANDUM & ORDER

KRONBERG BAGEL COMPANY d/b/a
BAKIN' BAGELS,

Defendant.

APPEARANCES:

For Plaintiffs

Equal Employment Opportunity Commission
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Intevenor Victoria Briggs
Intevenor Resa Gaston
Kendra Presswood, Esq.
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For Defendant

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KEVIN THOMAS DUFFY, U.S.D.J.¹:

Plaintiff Equal Employment Opportunity Commission ("EEOC") brings this action pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et. seq., on behalf of Plaintiff-Intervenors Victoria Briggs ("Briggs") and Resa Gaston ("Gaston") and charging party Jacqueline Speaker ("Speaker"). The EEOC has identified Lauren Henderson² ("Henderson") as being a "similarly situated female" and thus seeks relief on her behalf and for unidentified others who are "similarly situated".³

The EEOC brought this action to correct unlawful employment practices on the basis of sex. In particular the EEOC charges that Defendant Kronberg Bagels, doing business as Bakin' Bagels ("Defendant") knew or should have known that the charging Plaintiffs and other similarly situated females were

¹ United States District Judge for the Southern District of New York, sitting by designation in the Middle District of Florida.

² Lauren Henderson's married name is Lauren Adema. Henderson will be used throughout this memorandum.

³ Charges were filed with the EEOC by Plaintiffs Speaker, Briggs and Gaston. Only Briggs and Gaston have intervened in this action. Henderson has not intervened or filed private charges.

subjected to sexual harassment in the form of a hostile work environment.

There are several motions pending in this action. This Memorandum and Order will address Defendant's motion for summary judgment as to the claims of Lauren Henderson and Defendant's motion to dismiss the claims of Resa Gaston. Plaintiff intervenor Gaston's motion for partial summary judgment, Plaintiff EEOC's motion for partial summary judgment and Defendant's motion for partial summary judgment will be addressed in a separate Memorandum and Order.

FACTUAL ALLEGATIONS

The EEOC and charging parties all complain about the behavior of Kevin Healy, a baker employed by Bakin' Bagels at the times relevant to this action.

The first to file a charge of discrimination was Briggs on November 2, 1999. Briggs was employed by Bakin' Bagels from September 27, 1999 to October 28, 1999 and claims to have been repeatedly subjected to derogatory and sexually charged comments by Healy. Among other things, he allegedly called her a "cunt" and suggested having a "quickie". Healy further commented that he wanted to grab her pigtails and "ride [her] for a good night of fucking". Briggs also claims that Healy assaulted her in the walk-in cooler, fondled her breasts and

crotch, forced her to touch his penis and asked if she wouldn't like to feel it up inside her.

On November 15, 1999, Resa Gaston filed a charge of discrimination with the EEOC. Gaston was employed by Bakin' Bagels from August 24, 1999 until October 15, 1999. Gaston also claims to have been subjected to sexually inappropriate and threatening behavior by Healy. She claims Healy rubbed against her and made comments about her "liking it". He would also grab her buttocks and put his hand between her legs. Gaston claims that not only did management witness such incidents, but actually encouraged them by laughing and "egging" Healy on. Gaston alleges that such conduct occurred daily.

Finally, Jackie Speaker filed a charge of discrimination with the EEOC on December 21, 1999. Speaker was employed by Bakin' Bagels from August 1, 1999 until October 27, 1999. She claims that Healy subjected her to a variety of sexual harassment including touching her buttocks and making sexual and other degrading comments.

All three aggrieved parties claim to have informed management of Healy's behavior and all claim to have been constructively discharged because of the sexual harassment they suffered.

MOTION TO DISMISS CLAIMS OF RESA GASTON

This motion can be disposed of quickly. The motion is made pursuant to FED.R.CIV.P. Rule 37(d) based on Gaston's failure to appear for her deposition scheduled for August 22, 2001. Gaston did not appear for her deposition, not out of bad faith or a desire to impede the discovery process, but because she was out of town and did not receive actual notice to appear.

Under these circumstances dismissal would effect a totally unjust and unfair result. Defendant has shown no resulting prejudice and still has time to depose Gaston, if it has not done so already, before the trial begins in March 2002. Defendant's motion to dismiss the claims of Resa Gaston is denied.

CLAIMS OF LAUREN HENDERSON

Defendant also moves for summary judgment pursuant to FED.R.CIV.P. 56 alleging that Henderson has failed to exhaust her administrative remedies in that she did not file a charge of discrimination with the EEOC. Further, Defendant alleges that her claims cannot be revived by application of either the continuing violation doctrine or the single-filing rule.

Standard for Summary Judgment

Summary judgment is appropriate where there is no genuine issue of material fact and the "moving party is entitled to judgment as a matter of law." Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). While the court must construe all evidence and inferences in favor of the nonmoving party, to sustain its burden, the nonmoving party "must do more than simply 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, 586-87 (1986). Because I find Henderson's claims to be time-barred, Defendant's motion is granted.

Analysis of Ms. Henderson's Claims

Ms. Henderson worked for Bakin' Bagels from June 14, 1998 until December 11, 1998 and claims that during her employment, she was subjected to insulting, threatening and sexually explicit comments by Healy. Healy allegedly called her a "bitch" and "whore", threatened to "kick her ass" and frequently and inappropriately touched her. Henderson further claims to have told the store manager about Healy's behavior. Henderson claims her fears grew to the point where she was concerned that Healy would corner her in the walk-in freezer and rape her. In December 1998, Henderson left her job, but

did not file a charge with the EEOC. She contacted the EEOC only after reading an article in the local paper about the sexual harassment charges filed against her former employer.

Because Florida is a "deferral" state, aggrieved parties have 300 days in which to file a charge of discrimination with the EEOC. Henderson has never done so and it is undisputed that more than 300 days had passed between the time that Henderson left Bakin' Bagels employ and the time when Briggs filed her charge on November 2, 1999. The EEOC, however, alleges that it is permitted, pursuant to the continuing violation doctrine, to seek relief on her behalf.

The EEOC cites cases in support of its argument that where there is a continuing violation it should be permitted to pursue relief on behalf of all members of the aggrieved class. See EEOC v. Peterson, Howell & Heather, Inc., 702 F. Supp. 1213, 1225 (D.C. Md. 1989); EEOC v. Chicago Miniature Lamp Works, 640 F. Supp. 1291, 1296 (N.D. Ill. 1986) ("...even persons who suffered discrimination during the earlier part of that continuous period (and not just within the 300 days) can become class members entitled to relief"). These cases, however, are not binding authority in the instant case and I am inclined to follow the more recent reasoning by the Eleventh Circuit in Hipp v. Liberty Nat'l Life Co., 252 F.3d

1208, 1220 (11th Cir. 2001) petition for cert. filed, 70
U.S.L.W. 3374 (Nov. 13, 2001) (No. 01-726).

While Hipp involved the "opt-in" provisions of the Age Discrimination in Employment Act ("ADEA") and the instant case is brought pursuant to Title VII, the court's analysis of what constitutes the "same time frame" is equally applicable here. In Hipp the court disallowed a plaintiff's effort to piggyback his untimely claim onto the representative claim. The court held that only those claims occurring within "the same time frame" could be piggybacked onto the representative charge. It then defined the "same time frame" to include only those claims occurring within the preceding 180 to 300 days before the filing of the representative charge. Id.

In Hipp, the plaintiff whose claims fell outside of the rearward scope of the 300 days claimed to have been forced to retire a year prior to the filing of the representative charge. Evidence indicated that he believed at the time he retired that he was being discriminated against but failed to file a charge with the EEOC. The court held that his claim could not be revived by the single filing rule. Id. He then argued that his claim should be revived by the continuing violation doctrine. The court disagreed and stated, "We can find no authority . . . for allowing one plaintiff to revive a

stale claim simply because the allegedly discriminatory policy still exists and is being enforced against others." Id. The court went to say that permitting the continuing violation doctrine to revive the claims in that case would "contravene the doctrine's purpose". Id.

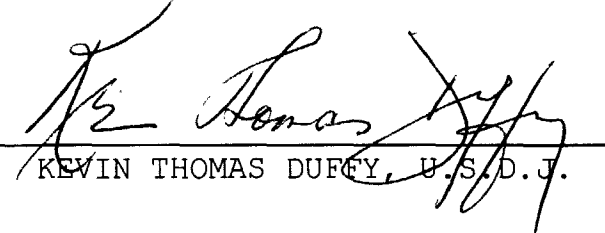
As in Hipp, piggybacking a claim onto the representative charge is permitted in Title VII cases so long as "(1) the charge being relied upon [is] timely and not otherwise defective; and (2) the individual claims of the filing and non-filing plaintiffs must have arisen out of the similar discriminatory treatment in the same time frame." Calloway v. Partners National Health Plans, 986 F.2d 446, 449 (11th Cir. 1993) (emphasis added).

I see no legitimate reason why the Eleventh Circuit's definition of "the same time frame" in Hipp should not be extended to the instant case as well. I recognize that the theories of discrimination in the two cases are different and that the plaintiff in Hipp suffered a discrete employment action, a forced retirement whereas the EEOC has alleged a continuing violation in the nature of a hostile work environment here. Allowing the EEOC to sue on behalf of similarly situated individuals going back indefinitely in time, serves only to eradicate the purpose of the timely

filing requirement. This case presents exactly the situation the court wished to avoid in Hipp, in that it would allow the plaintiff, in this case the EEOC, to revive a stale charge because the same sort of discrimination was allegedly being practiced against other employees. This does not prevent the EEOC from representing the interests of those similarly situated, if their claims arose within the proper filing period. To hold otherwise would render the timely filing requirement null and void. Defendant's motion to dismiss the claims of Lauren Henderson is granted.

SO ORDERED.

Dated: New York, New York
January 23, 2002



KEVIN THOMAS DUFFY, U.S.D.J.

Date Printed: 01/24/2002

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