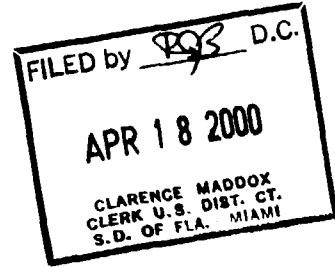


UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

CASE NO. 98-1458-CIV-JORDAN



EQUAL EMPLOYMENT OPPORTUNITY)
COMMISSION)
)
Plaintiff)
)
vs.)
)
PACIFIC INTERNATIONAL EQUITIES, INC.,)
SOUTHEASTERN FLORIDA PROPERTIES,)
INC., and SOUTHEASTERN FLORIDA)
MANAGEMENT, INC.)
)
Defendants)
)

ORDER ON MOTION FOR JUDGMENT AS A MATTER OF LAW

The Equal Employment Opportunity Commission sues defendants Pacific International Equities, Inc., Southeastern Florida Properties, Inc., and Southeastern Florida Management, Inc., under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e *et seq.*, and § 102 of the Civil Rights Act of 1991, 42 U.S.C. § 1981. The EEOC’s complaint brings a single count of discrimination on the basis of gender under theories of disparate treatment, hostile work environment, and retaliatory discharge. Trial of this matter began April 11, 2000. The parties have rested and the jury will begin its deliberations today.

The defendants move for judgment as a matter of law on the EEOC’s disparate treatment theory on the ground that no adverse employment action was proven or alleged. *See* Memorandum of Law in Support of Defendants’ Rule 50(a) Motion [D.E. 77] (April 14, 2000). At trial, Ms. Sambino testified that Jorge Cordovez threw a filing cabinet, a telephone, and a set of keys at her, and the EEOC contends that Mr. Cordovez’s actions constitute gender discrimination which is distinct and separate from the hostile work environment claim. The EEOC insists that Ms. Sambino was subjected to “constant unwelcome sexual advances and abusive verbal and physical behavior ... which was severe and pervasive enough that it altered Ms. Sambino’s terms and conditions of employment and created an abusive working environment.” Plaintiff’s Response to Defendant’s

Motion for Judgment as a Matter of Law at 6 (April 17, 2000). The EEOC, however, fails to identify any tangible employment action that would support its disparate treatment theory.

Title VII makes it unlawful to discriminate on the basis of gender. *See* 42 U.S.C. § 2000e-2(a)(1). “Title VII is not limited to ‘economic’ or ‘tangible’ discrimination.” *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 64 (1986). Thus, gender discrimination can be proven under various theories.

Where there is no economic or tangible harm, “a plaintiff may establish a violation of Title VII by proving that discrimination based on sex has created a hostile or abusive work environment.” *Id.* at 66. To do so, a plaintiff is required to show that the harassment was “sufficiently severe or pervasive ‘to alter the conditions of the victim’s employment and create an abusive working environment.’” *Id.* at 67 (citation omitted).

A plaintiff pursuing a gender discrimination claim under a disparate treatment or *quid pro quo* sexual harassment theory must allege and prove a tangible employment action, among other elements. *See Maniccia v. Brown*, 171 F.3d 1364, 1368 (11th Cir. 1999). “A tangible employment action constitutes a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits.” *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 762 (1998).


Thus, without a tangible employment action, there can be no recovery on a disparate treatment theory. The case on which the EEOC now relies, *Luttjohann v. Goodyear Tire & Rubber Co.*, 927 F. Supp. 403 (D. Kan. 1996), is in accord. In that case, the plaintiff brought claims under theories of hostile work environment, retaliation, and disparate treatment. Her disparate treatment claims alleged these tangible adverse employment actions: “transfers without independent grounds, closer scrutiny from supervisors, nonpayment for days off, forced use of vacation time for days off and special reporting requirements.” *Id.* at 406.

Ms. Sambino has not alleged any tangible employment action in connection with the alleged sexual harassment. (She does not contend that her termination was not part of the alleged harassment; she contends that she was fired in retaliation for complaining about the alleged harassment.) Thus, her only viable claims are for gender discrimination under a hostile work environment theory and for retaliatory discharge. To instruct the jury on a disparate treatment theory where no tangible employment action has been alleged, much less proven, would risk unnecessarily

confusing the jury. The defendants' motion for judgment on the EEOC's disparate treatment theory is therefore GRANTED.

The defendants also move for judgment as a matter of law on the EEOC's other theories, arguing that the EEOC did not prove that the alleged harasser was Ms. Sambino's supervisor or that Ms. Sambino engaged in statutorily protected activity before being fired. The defendants' motion is DENIED with respect to these arguments.

DONE and ORDERED in chambers in Miami, Florida, this 18th day of April, 2000.



Adalberto Jordan
United States District Judge

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