

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF GEORGIA  
ATLANTA DIVISION

FILED IN CHAMBERS  
THOMAS W. THRASH JR.  
U. S. D. C. Atlanta

APR 27 2004 *dl*

LUTHER D. THOMAS, Clerk  
By: *S. Sewell*  
Deputy Clerk

EQUAL EMPLOYMENT  
OPPORTUNITY COMMISSION,

Plaintiff,

v.

NEWNAN TRADING  
CORPORATION,

Defendant.

CIVIL ACTION FILE  
NO. 1:01-CV-1062-TWT

ORDER

This is an employment discrimination case. It is before the Court on the Report and Recommendation [Doc. 113] of the Magistrate Judge recommending granting the Defendant's Motion for Summary Judgment [Doc. 74-1] and Motion for Sanctions [Doc. 74-2]. The EEOC filed this action based upon a charge of discrimination filed by the Plaintiff-Intervenor Maria Garcia. Plaintiff Garcia alleged that the Defendant discriminated against female employees by requiring them to obtain a pass to go to the bathroom between scheduled breaks. On February 8, 1999, the Defendant's used clothing supervisor announced that employees seeking to use the restroom between breaks would have to get a pass and return the pass after returning to their work

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station. The new policy went into effect the next day. Plaintiff Garcia testified that the supervisor said the bathroom pass policy only applied to the female employees. The next day, Plaintiff Garcia told her supervisor that she would not comply with the bathroom pass policy, and the used clothing supervisor saw her go to the bathroom without getting a pass. She was fired for insubordination. It is undisputed that on February 19, 1999, the Defendant issued a written amendment to its Policies and Procedures that applied the pass system to bathroom visits by all employees. Thus, the allegedly discriminatory policy was in effect for only 10 days.

In her Report and Recommendation, the Magistrate Judge found that requiring employees to get a pass to go to the bathroom between breaks did not amount to an adverse employment action. She noted that an adverse employment action is an action 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.” (Report and Recommendation, at 51) (quoting Gupta v. Florida Bd. of Regents, 212 F.3d 571, 587 (11th Cir. 2000)). The Magistrate Judge noted that there is “some threshold level of substantiality that must be met for unlawful discrimination to be cognizable.” (Report and Recommendation, at 51) (quoting Wideman v. Wal-Mart Stores, Inc., 141 F.3d 1453, 1456 (11th Cir. 1998)). The Magistrate Judge then stated that “[a] plaintiff must therefore show that a

reasonable person would find that the action seriously and materially adversely changed the terms, conditions, and privileges of employment.” (Report and Recommendation, at 51) (citing Davis v. Town of Lake Park, Fla., 245 F.3d 1232, 1239 (11th Cir. 2001)); Doe v. DeKalb County School Dist., 145 F.3d 1441, 1453 (11th Cir. 1998)). The Magistrate Judge then stated that “not ‘every unkind act’ amounts to an adverse employment action; an employment action that imposes some de minimis inconvenience or alteration of responsibilities does not rise to the level of substantiality necessary to constitute an adverse employment action.” ( Report and Recommendation, at 52) (citing Wu v. Thomas, 996 F.2d 271, 274 n.3 (11th Cir. 1993)).

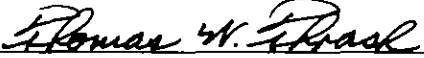
Applying this standard, the Magistrate Judge concluded that the Defendant’s bathroom pass policy did not amount to an adverse employment action. The Magistrate Judge made the appropriate comparison to other cases in which the courts have found a violation of Title VII in analogous circumstances. (Report and Recommendation, at 53-54) (citing Kilgo v. Bowman Transp., Inc., 789 F.2d 859, 874 (11th Cir. 1986) (finding disparate treatment sex discrimination against women where defendant used various devices to discourage women from becoming over-the-road drivers, such as refusing to provide separate sleeping, shower and bathroom facilities for its women drivers)); Hall v. Gus Const. Co., Inc., 842 F.2d 1010 (8th Cir. 1988)

(holding that plaintiff could make out hostile work environment sexual harassment when, among other things, defendant refused to give women a truck to go to town to use the bathroom and the women had to urinate in ditches with the men watching through surveying equipment and defendant's management knew about, but failed to remedy the situation); Baker v. John Morrell & Co., 220 F. Supp. 2d 1000 (N.D. Iowa 2002) (holding that denial of access to the bathroom is an adverse employment action that affects the terms and conditions of employment for a disparate treatment case); but see Reeves v. Federal Reserve Bank of Chicago, 2003 WL 21361735, at \*9-10 (N.D. Ill. June 12, 2003) (holding that reprimands for tardiness, restrictions on communication with co-workers, and monitoring employee's bathroom breaks was not actionable sex discrimination). The EEOC responded to the careful analysis of the Magistrate Judge with the bold statement that the "Plaintiffs are not required to show that the stick policy is an 'adverse action.'" (Plaintiffs' Objections, at 15). The EEOC cited no authority for this assertion which seems directly contrary to the caselaw relied upon by the Magistrate Judge. The Court concurs with the thorough and well reasoned Report and Recommendation of the Magistrate Judge on this fundamental issue. The Court also agrees with the Magistrate Judge with respect to the Plaintiffs' constructive discharge and retaliation claims.

The Magistrate Judge also recommended granting the Defendant's Motion for Sanctions [Doc. 74-2]. After careful consideration, the Court is not persuaded that the EEOC acted unreasonably in its conciliation efforts. The Court agrees with the Magistrate Judge that the EEOC's disparate impact and constructive discharge claims were frivolous. However, the Plaintiffs at least arguably established a prima facie case for the retaliation claim involving Plaintiff Garcia. Therefore, sanctions or an award of attorney's fees are unwarranted.

For the reasons set forth above, the Court approves and adopts the Report and Recommendation as the judgment of the Court with respect to the Defendant's Motion for Summary Judgment [Doc. 74-1]. The Defendant's Motion for Summary Judgment [Doc. 74-1] is GRANTED. The Defendant's Motion for Sanctions [Doc. 74-2] is DENIED. The Clerk is directed to enter judgment in favor of the Defendant.

SO ORDERED, this 23 day of April, 2004.

  
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THOMAS W. THRASH, JR.  
United States District Judge