IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF IDAHO

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, et al.,

Plaintiffs,

v.

J.C. PENNEY CO., INC., et al.

Defendants.

CASE NO. CV00-0570-E-BLW

REPORT AND RECOMMENDATION

INTRODUCTION

Currently pending before the Court for its consideration are the following motions: (1) Defendant Gee's Motion for Leave to File Counterclaim (Dkt #49), filed September 14, 2001; (2) Defendant Gee's Motion to Set Aside Default Judgment (Dkt #51), filed September 17, 2001; (3) Defendants' Motion to Sever Claims (Dkt #71), filed October 16, 2001; (4) Plaintiffs' Motion for Partial Summary Judgment (Dkt #75), filed November 7, 2001; (5) Defendants' Motion for Summary Judgment (Dkt #82), filed November 7, 2001; and (6) Defendants' Motion to Strike (Dkt #102), filed December 13, 2001. On April 1, 2002, the Court conducted a hearing in this matter with counsel for all parties present. Having considered the parties' oral arguments, as well as the briefing on the above motions, the Court is now prepared to issue its Report and Recommendation.

118

REPORT

I.

BACKGROUND.

The parties are quite familiar with the facts of this case. However, given the nature of the motions presently before the Court, it is necessary to set forth a cursory recitation of the events underlying this action.

This lawsuit involves claims by EEOC and several former employees at J.C. Penney Company's ("J.C. Penney") Idaho Falls store (the "store"). The majority of these former employees worked in the beauty salon ("Salon") at the store and were supervised by former Salon Manager Christopher Gee. From a time prior to 1997 until at least August of 1999, Defendant Gee was the Salon Manager and acted as the immediate supervisor for intervening Plaintiffs Becky Turner, Merribeth Parris Hicks, Troy Hurley, and Sarah Johnson. Gee continued to work in the Salon until late September of 1999, at which time he resigned.

Defendant Pat Boyce was the Store Manager and Gee's supervisor. Boyce also exercised supervisory authority over intervening Plaintiff Carol Mayer, the store's former Loss Prevention Manager. Defendant Boyce continues to work as the Store Manager.

Intervening Plaintiffs Turner, Hicks, Hurley, Johnson and Mayer maintain that during the course of their employment with J.C. Penney, Defendants Gee and J.C. Penney subjected them and several of their co-workers in the Salon to a continuing course of obscene, offensive, degrading, and intimidating comments and physical acts of a sexual nature. These comments and acts included, *inter alia*, Gee's telling graphic sexual stories, requesting sexual favors, and making other sexually oriented comments toward the intervening Plaintiff's and their co-

workers. Defendant Gee's comments included remarks about intervening Plaintiffs Turner, Hicks, Johnson, Hurley, and others giving him oral sex or having sex with him, or about various of the intervening Plaintiffs' children or spouses doing those things.[1]

The intervening Plaintiffs also maintain that Gee's sexual comments and requests were frequently tied to requests for time off, scheduling accommodations, or other job benefits. To the observation of the intervening Plaintiffs, Gee treated favorably those employees who submitted to his sexual propositions and/or tolerated his offensive language. The intervening Plaintiffs specifically maintain that Gee gave better working hours, better job assignments, and more referral business to employees who consented to his behavior.

The intervening Plaintiffs contend that they and several other employees complained about Gee's behavior and the work environment in the Salon to J.C. Penney management. Numerous reports were made to Loss Prevention Manager Mayer. Mayer maintains that she passed along these reports to Pat Boyce. Several other reports about Gee and the Salon work

---

[1] Specifically, among numerous other incidents, the intervening Plaintiffs maintain that Gee engaged in the following: (1) repeatedly told Turner that he wanted to see her minor daughter wearing lingerie or a bikini; (2) repeatedly invited Turner, Hicks and Johnson to have sex with him; (3) falsely told other employees that Turner had engaged in sexual relations with him; (4) talked on repeated occasions in the presence of various of the intervening Plaintiffs about his sexual activities with various other employees at the Salon; (5) repeatedly commented in the presence of various of the intervening Plaintiffs about his desire to have oral and anal intercourse; (6) in the presence of various of the intervening Plaintiffs, described in graphic detail his sexual activities with his ex-wife, his subordinates and others; (7) told Hicks that he wanted to have anal intercourse with her son; (8) spoke on repeated occasions about having sexual and anal intercourse with Hicks' daughter; (9) made statements about getting oral sex from Hicks, her daughter and her son; (10) threatened Hurley that he was going to take Hurley's wife out and have sexual intercourse with her; (11) repeatedly expressed to Hurley his desire to have intercourse with Hurley; (12) made repeated comments in Mayer's presence about the breasts or buttocks of female subordinates, customers and others; (13) made repeated comments in Mayer's presence about women, such as "I wish I could get her into bed," as well as statements about his homosexual and heterosexual relationships; (14) falsely told other employees that he had engaged in group sexual activity with Johnson and her husband; and (15) subjected Johnson to repeated unwelcome touching and other behavior of a sexual nature.

environment were made to Boyce, her predecessor, Steve Aller, and other members of J.C. Penney management.

J.C. Penney's own documentation demonstrates that written complaints of sexual harassment in the Salon date back to at least March of 1997. Further, Aller admits that Mayer came to him during the period he served as Store Manager to report the bad language and off-color jokes being told in the Salon by Gee.

Among other complaints were oral and written complaints from J.C. Penney employee Rebecca Ord-Page. Ord-Page alleges that although she complained to management about foul sexual language, demands and threats from Gee, she was told, "Oh, that's just Chris." Ord-Page further alleges that shortly after reporting Gee's conduct, she was in the back room of the Salon when Gee sexually assaulted her and threatened that he would kill her if she reported his conduct. Ord-Page reported the matter to Store Manager Aller but nothing was done to remedy the problem. Ord-Page subsequently left J.C. Penney. Shortly thereafter, Gee was promoted to the Salon Manager position.

Multiple reports were made to J.C. Penney management regarding Gee and the work environment in the Salon even after Aller left and was replaced by Boyce in early 1998. For example, Plaintiff Hicks complained to Boyce about Gee's "inappropriate discussions" in 1998. Also, in a letter dated December 6, 1998, Troy Hurley complained about Gee playing favorites and discriminating against him. Further, Becky Turner reported Gee's harassment of her herself and her daughter to Natalee Madsen, the then Merchandise Manager at the store, and requested that her complaint be relayed along to Boyce. When Madsen reported to Boyce, Boyce allegedly responded: "Don't tell anyone. I am not worried. Forget you heard anything."

In February of 1999, Gee exposed his penis to at least one female subordinate in the Salon. This exhibition occurred during work hours in the salon dispensary and was reported by several persons to J.C. Penney management. Among other reports made to J.C. Penney management regarding that incident and Gee's other inappropriate conduct was a written report from Mayer. According to J.C. Penney, Boyce received that report on February 18, 1999.

Boyce claims that she initially interviewed five selected stylists in the salon regarding Gee's penis exhibition. She claims that even those selected employees reported favoritism in the Salon and fear of retaliation if they reported any problems to management. Her written report regarding the incident indicates that the selected stylists confirmed that Gee had exposed his penis in the Salon and that Gee admitted exposing himself to his female subordinates.

Concerning the penis exposure incident, Boyce admitted that Gee's conduct was "outrageous" and that Gee's dismissal was appropriate. Nevertheless, Gee was permitted to retain his Salon Manager position and continued to exercise supervisory and managerial authority over various of the intervening Plaintiffs and other similarly situated employees.

During the remainder of the Spring and into the Summer of 1999, complaints about Gee and the work environment in the Salon continued to be made to J.C. Penney. In addition to those made to Mayer, Boyce's own notes reflect that several of the stylists reported Gee's favoritism and others reported Gee making unwanted remarks.

Multiple complaints to J.C. Penney management about Gee and the work environment in the Salon continued during August and September of 1999. These included several complaints to Boyce herself. Notwithstanding these complaints, J.C. Penney's own documents reflect the fact that Gee was never terminated. Rather, he resigned and left J.C. Penney in late September of

1999.

This action originated with discrimination charges filed by Turner and Hicks with the Idaho Human Rights Commission (IHRC) on June 9, 1999, and July 28, 1999, respectively. Hurley, Johnson and Mayer filed additional discrimination charges with the IHRC on January 31, 2000, May 11, 2000, and July 20, 2000, respectively. With regard to the Turner and Hicks charges of discrimination, the IHRC issued probable cause determinations on January 12, 2000, and January 24, 2000, respectively. The Turner and Hicks charges were transferred to EEOC for further processing and, on May 4 and 5, 2000, EEOC sent J.C. Penney Letters of Determination, finding reasonable cause that J.C. Penney violated Title VII.

On September 29, 2000, EEOC filed a lawsuit against J.C. Penney in the United States District Court for the District of Idaho. In its Complaint, EEOC alleges that J.C. Penney subjected Turner, Hicks, and a group of similarly situated employees to sex discrimination and retaliation in violation of Title VII of the Civil Rights Act of 1964 and Title I of the Civil Rights Act of 1991. The EEOC's Complaint seeks monetary and injunctive relief, including pecuniary and nonpecuniary compensatory damages on behalf of Tuner, Hicks and similarly situated employees. Further, the EEOC's Complaint prays that J.C. Penney be ordered to pay to Turner, Hicks and similarly situated employees punitive damages for its malicious and reckless conduct.

Intervening Plaintiffs Turner, Hicks, Hurley, Johnson and Mayer sought and obtained leave to intervene and their consolidated Complaint was filed on January 17, 2001. In addition to claims based upon sexual harassment, ongoing hostile work environment, gender discrimination and retaliation of Title VII of the Civil Rights Act of 1964 and the Idaho Human Rights Act, the intervening Plaintiffs' Consolidated Complaint included claims for infliction of emotional

distress and negligence under Idaho law. The intervening Plaintiffs' Consolidated Complaint also indicated leave would be sought to amend and add a claim and prayer for punitive damages.

On July 31, 2001, the intervening Plaintiffs sought leave to amend the Consolidated Complaint to add a claim for punitive damages. This Court issued an Order dated October 29, 2001, granting the intervening Plaintiffs' Motion to Amend the Consolidated Complaint.

III.

DEFENDANT GEE'S MOTION TO SET ASIDE DEFAULT JUDGMENT.

At the time the Complaint was served upon Defendant Gee, he was an inmate in maximum security at the Idaho State Penitentiary. Gee contends that he was unable to obtain legal counsel to take action on his behalf. In July of 2001, Gee was able to secure counsel by accepting Defendant J.C. Penney's offer of representation. Now that Gee has obtained legal counsel, he requests that this Court set aside the entry of default against him to allow him to fully participate in this action on the merits. In response, intervening Plaintiffs argue that Defendant Gee has not established the prerequisites for setting a default aside.

A default entered pursuant to Rule 55(a) may only be set aside for "good cause shown." Fed. R. Civ. P. Rule 55(c). In determining whether to set a default aside, a trial court should consider three factors: (1) whether the plaintiff will not suffer any prejudice if the default is set aside; (2) whether the defendant has a meritorious defense; and (3) whether the defendant's culpable conduct led to the entry of default. *See O'Connor v. State of Nevada*, 27 F.3d 357, 364 (9th Cir. 1994). A defendant must make a sufficient showing on each of these factors before a default may be set aside. *See Benny v. Pipes*, 799 F.2d 489, 494 (9th Cir. 1986) (stating that defendants' conduct in allowing default was culpable; thus, factors of whether the plaintiff will

not suffer any prejudice if the default is set aside and whether the Defendant has a meritorious defense need not be considered).

The procedural history of this case establishes that the intervening Plaintiffs' Complaint was filed on January 17, 2001, naming Chris Gee and Pay Boyce as individual defendants and naming J.C. Penney as a corporate defendant. The return of service establishes that Defendant Gee was personally served at the prison on January 30, 2001. On February 21, 2001, counsel appeared and answered on behalf of J.C. Penney and Boyce, but not on behalf of Gee.

Default was entered against Gee on February 28, 2001. On April 10, 2001, counsel for intervening Plaintiffs met with Gee at the prison and advised him that he had been defaulted. *See* Affidavit of Counsel in Opposition to Motion to Set Aside Entry of Default at ¶ 4. On June 5, 2001, after learning of Plaintiffs' counsel's contact with Gee, counsel for Boyce and J.C. Penney advised counsel for Plaintiffs that they were in the process of retaining separate counsel for Gee and objected to Plaintiffs' contact with him. *See* Aff. of Counsel in Opposition to Motion to Set Aside Entry of Default, Exh. A. On June 15, 2001, counsel for Plaintiffs responded regarding Gee's unrepresented status, noting that J.C. Penney had consciously elected not to defend Gee. Later, counsel for J.C. Penney met with Gee at the prison and expressed a willingness to defend Gee. *See* Gee Aff. at ¶¶ 6 and 7. On July 10, 2001, counsel currently representing Gee appeared on behalf of J.C. Penney. On July 27, 2001, counsel filed an additional notice of appearance on behalf of Defendant Gee.

In light of the above procedural history, the Court finds that Defendants have failed to establish that the default entered against Gee was not the result of Defendants' culpable conduct. *See O'Connor*, 27 F.3d at 364; *see also Benny*, 799 F.2d at 494 (holding that culpable conduct

exists when a defendant receives actual or constructive notice of the pending suit and does nothing in a timely manner in response). At the time of the motion to set aside default, both Defendant Gee and J.C. Penney had actual notice of the claims against Gee and the entry of default for several months. Further, as the Court pointed out during the course of the April 1, 2002, hearing, Gee could have represented his own interests. Like many other inmates who file civil rights claims in this Court, Gee could have utilized the prison legal resources appeared pro se if he so desired.

Given the Court's determination that Defendants' conduct in allowing the entry of default against Gee was culpable, the Court need not determine whether Plaintiffs will not suffer any prejudice if the default is set aside[2] or whether Gee has a meritorious defense. *See Benny*, 799 F.2d at 494. Accordingly, the Court will recommend that Defendant Gee's Motion to Set Aside Entry of Default be denied.

II.

DEFENDANT GEE'S MOTION TO FILE COUNTERCLAIM.

Defendant Gee requests leave of this Court to file a Counterclaim against intervening Plaintiffs Johnson and Hurley. Intervening Plaintiffs have asserted that, as a result of certain conduct by Gee, they were forced to endure a hostile work environment such that they ultimately were compelled to resign their positions at J.C. Penney Company, Inc. Gee denies these allegations and asserts that two of the intervening Plaintiffs, Johnson and Hurley, conspired to publish such false and slanderous comments for the purpose of causing Gee to be terminated

---

[2] It should be noted that Plaintiffs have strenuously argued that actual prejudice would occur if the default was set aside and Gee was permitted to file a counterclaim in view of the fact that discovery has closed and the trial is within sixty (60) days.

from his employment at J.C. Penney. Gee maintains that his counterclaim stems from the same facts and occurrences as those alleged by intervening Plaintiffs, and thus his counterclaim could be considered compulsory in nature and could be asserted to have been waived if not presented in these proceedings. Accordingly, pursuant to Fed. R. Civ. P. Rule 13(f), Gee requests that he be allowed to file his counterclaim.

Intervening Plaintiffs point out that Defendant Gee filed the present motion for leave to file a counterclaim prior to filing the pending motion to set aside the default which was entered against him in this case. Intervening Plaintiffs also argue that Gee has not established that he is entitled to have the default set aside. Further, intervening Plaintiffs argue that the counterclaim Gee seeks to bring is time-barred and otherwise without merit.

As noted *supra*, the Court finds that Defendant Gee has not shown good cause for setting the entry of default aside. Absent the setting aside of the default, Gee does not have standing to bring the counterclaim. According, the Court will recommend that Gee's Motion for Leave to File Counterclaim be denied.[3]

///

///

---

[3] Assuming *arguendo* that this Court was to find that Gee's default ought to be set aside, his requested counterclaim would be time-barred. Idaho's statute of limitations for claims relying upon defamatory and slanderous conduct is two years. *See* Idaho Code § 5-219(5). The statute begins to run when there is some objectively ascertainable damage. *See Bonner v. Roman Catholic Diocese of Boise*, 128 Idaho 351, 352, 913 P.2d 567, 568 (1996). In Gee's proposed counterclaim, he alleges that he was damaged when he was forced to leave his employment at J.C. Penney on September 15, 1999. Therefore, the two-year statute of limitations ran on September 15, 2001. Accordingly, it would be futile for Gee to bring said counterclaim.

IV.

DEFENDANTS' MOTION TO SEVER CLAIMS.

In December of 2000, counsel for all parties participated in a scheduling conference with the Hon. B. Lynn Winmill. Based upon the parties' agreements, Judge Winmill issued a Scheduling Order dated December 12, 2000, specifying that this case was to have a single jury trial commencing in February of 2002.[4] Further, on January 11, 2001, Judge Winmill issued an Order allowing intervening Plaintiffs to join in this case.

Defendants now move this Court for an Order (i) severing the claims of the five individual intervening Plaintiffs for purposes of trial in accordance with Fed. R. Civ. P. Rule 42(b); (ii) designating which Plaintiff's claims will commence trial as currently scheduled; and (iii) setting the other individual Plaintiffs' claims for trial on dates mutually convenient to this Court and all counsel.

Intervening Plaintiffs responded to Defendants' Motion to Sever by pointing out that the claims set forth in the Motion to Intervene and the proposed Complaints by each of the intervening Plaintiffs are essentially identical to the claims set forth in the intervening Plaintiffs' Amended Consolidated Complaint. Plaintiff EEOC responded to Defendants' Motion to Sever by noting that the parties have proceeded from the beginning of this case on the basis that this case is a single lawsuit involving multiple employees of Defendant J.C. Penney.

As a preliminary matter, this Court notes that the EEOC has a statutory right under Title VII to institute a single lawsuit and pursue class-wide relief in cases similar to the present one

---

[4] Judge Winmill issued an Amended Scheduling Order on January 28, 2002, vacating the February 2002 trial date and setting forth a new trial date of June 17, 2002.

without seeking certification as a class representative. *See General Telephone Co. of the Northwest v. EEOC*, 446 U.S. 318, 324-25, 100 S.Ct. 1698, 64 L.Ed.2d 319 (1980); *EEOC v. Dinuba Medical Clinic*, 222 F.3d 580, 588 (9th Cir. 2000). The intervening Plaintiffs in this case also have a statutory right under 42 U.S.C. § 2000e-5(f)(1) to intervene in the EEOC's lawsuit; a right which they appropriately exercised by filing a Motion to Intervene. Said Motion to Intervene was granted on January 10, 2001, without any objection from Defendants.

As to Defendants' contention that "the differing circumstances of each [intervening plaintiff's] claims" will result in "an extreme likelihood of confusion to the jury" and "prejudice to defendants' fundamental right to defend themselves," the Court finds that such arguments are without basis. Like the EEOC, each intervening Plaintiff seeks damages based upon sexual harassment, ongoing hostile work environment, gender discrimination and retaliation in violation of Title VII. Intervening Plaintiffs also seek relief under parallel provisions of the Idaho Human Rights Act and for Defendants' related negligence and infliction of emotion distress. The only other claim made by any of the intervening Plaintiffs is the defamation/false light/public disclosure claim arising from comments Gee allegedly made in the Salon at the Idaho Falls Store during the same time period. Therefore, Defendants' request to hold at least five separate trials is unwarranted.

Under the above-stated circumstances, this Court finds no compelling reason to disturb Judge Winmill's Scheduling Order, dated December 12, 2000, specifying that this case is to have a single jury trial. Defendants have also failed to convince this Court as to why intervening Plaintiffs' claims should be severed from the EEOC's lawsuit. Accordingly, the Court will recommend that Defendants' Motion to Sever Claims be denied.

V.

MOTIONS FOR SUMMARY JUDGMENT.

A. Standard of Review.

When reviewing a motion for summary judgment, the proper inquiry is whether "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, show 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) (1993). A moving party who does not bear the burden of proof at trial may show that no genuine issue of material fact remains by demonstrating that "there is an absence of evidence to support the non-moving party's case." *Celotex Corp. v. Catrett*, 477 U.S. 317, 325, 106 S. Ct. 2548, 91 L.Ed.2d 265 (1986). Once the moving party meets the requirement of Rule 56 by either showing that no genuine issue of material fact remains or that there is an absence of evidence to support the non-moving party's case, the burden shifts to the party resisting the motion who "must set forth specific facts showing that there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256, 106 S. Ct. 2505, 91 L.Ed.2d 202 (1986). It is not enough for the [non-moving] party to "rest on mere allegations or denials of his pleadings." *Id.* Genuine factual issues must exist that "can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party." *Id.* at 250.

"When determining if a genuine factual issue . . . exists, . . . a trial judge must bear in mind the actual quantum and quality of proof necessary to support liability." *Id.* at 249-50. "The mere existence of a scintilla of evidence in support of the [non-moving party's] position will be insufficient; there must be evidence on which the jury could reasonably find for the [non-moving

party]." *Id.*

The Ninth Circuit has consistently applied the standard for granting summary judgment. *Musick v. Burke*, 913 F.2d 1390 (9th Cir. 1990); *Pelletier v. Federal Home Loan Bank*, 968 F.2d 865 (9th Cir. 1992); *Bieghler v. Kleppe*, 633 F.2d 531 (9th Cir. 1980).

In determining whether a material fact exists, facts and inferences must be viewed most favorably to the non-moving party. To deny the motion, the Court need only conclude that a result other than that proposed by the moving party is possible under the facts and applicable law. *Aronsen v. Crown Zellerbach*, 662 F.2d 584, 591 (9th Cir. 1981).

The Ninth Circuit has emphasized that summary judgment may not be avoided merely because there is some purported factual dispute, but only when there is a "genuine issue of material fact." *Hanon v. Dataproducts Corp.*, 976 F.2d 497 (9th Cir. 1992).

In order to withstand a motion for summary judgment, the non-moving party (1) must make a showing sufficient to establish a genuine issue of fact with respect to any element for which it bears the burden of proof; (2) must show that there is an issue that may reasonably be resolved in favor of either party; and (3) must come forward with more persuasive evidence than would otherwise be necessary when the factual context makes the non-moving party's claim implausible. *British Motor Car Distrib. Ltd. v. San Francisco Automotive Indus. Welfare Fund*, 882 F.2d 371, 374 (9th Cir. 1989).

B. Plaintiffs' Motion for Partial Summary Judgment and Defendants' Motion for Summary Judgment.

Plaintiff EEOC and intervening Plaintiffs (collectively "Plaintiffs") request that the Court grant partial summary judgment on Defendants' assertion of the *Faragher/Ellerth* affirmative defense to Plaintiffs' claims of sexual harassment. Plaintiffs argue that it is incumbent on

Defendants, as the party with the burden of proof on the *Faragher/Ellerth* affirmative defense, to come forward with specific, probative facts to establish each element of such affirmative defense.

In response, Defendants argue that the facts in the record do not support Plaintiffs' assertion that the *Faragher/Ellerth* defense is not available as a matter of law to J.C. Penney. Rather, Defendants insist that the record demonstrates that J.C. Penney had in place clear and prominent policies and procedures regarding the reporting of any perceived sexual harassment and discrimination by its employees. Additionally, Defendants maintain that in those instances when such procedures were utilized, J.C. Penney responded promptly and took reasonable action to prevent any further unlawful behavior. Accordingly, Defendants move for summary judgment on all of the claims set forth in the intervening Plaintiffs' Amended Consolidated Complaint.

In *Burlington Industries v. Ellerth*, 524 U.S. 742, 118 S.Ct. 2257, 141 L.Ed.2d 633 (1998) and *Faragher v. City of Boca Raton*, 524 U.S. 775, 118 S.Ct. 2275, 141 L.Ed. 662 (1998), the United States Supreme Court held that employers are subject to vicarious liability for unlawful harassment by supervisors. When harassment by a supervisor creates an unlawful hostile environment which culminates in a tangible employment action, the employer's presumption of liability is conclusive – no affirmative defense is available in such cases. *See Ellerth*, 118 S.Ct. at 2269; *Faragher*, 118 S.Ct. at 2284-85. Where issues of fact exist regarding tangible job action, "a defending employer may raise an affirmative defense to liability or damages, subject to proof by a preponderance of the evidence . . . . The defense comprises two necessary elements: (a) that the employer exercised reasonable care to prevent and correct promptly any [unlawful] harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer

or to avoid harm otherwise." *Faragher*, 118 S.Ct at 2293; *Ellerth*, 118 S.Ct. at 2270. In sum, if the employer failed to exercise reasonable care to prevent harassment, it will be liable even if the employee unreasonably failed to complain to management or even if the employer took prompt and appropriate corrective action once it received notice of the harassment.

In the present case, Defendants point out that J.C. Penney's policies and procedures were clearly explained in written documents such as the J.C. Penney Associate Handbook ("Handbook") and postings throughout the store. Defendants also maintain that the Idaho Falls store manager, Defendant Boyce, made herself available with respect to any employee complaints. Defendants insist that intervening Plaintiffs either wholly failed to utilize said procedures or unreasonably delayed in utilizing these procedures. Lastly, Defendants note that each Plaintiff resigned his/her employment voluntarily without mention of any conduct by Mr. Gee.

Despite Defendants' assertions to the contrary, the record reflects that the intervening Plaintiffs and their co-workers repeatedly complained about Gee's sexual language and actions to members of J.C. Penney management. Such complaints included multiple reports to Store Manager Pat Boyce, former Store Manager Steve Aller, and Loss Prevention Manager Carol Mayer. These reports commenced as early as 1995 and continued until Gee resigned from J.C. Penney in September of 1997.

Notwithstanding J.C. Penney's sexual harassment policy and the repeated complaints regarding Gee's behavior, J.C. Penney management decided to hire, promote and retain Gee as its Salon Manager and to allow his direct supervisory control over the intervening Plaintiffs.

In the record that is presently before the Court, it is clear that this dispute presents several

genuine issues of material fact. If Plaintiffs' evidence is believed, there is ample evidence from which a jury could find that Defendants failed to exercise reasonable care to prevent and promptly correct any sexually harassing behavior. Likewise, a jury could conclude that the intervening Plaintiffs failed to take advantage of preventive or corrective opportunities provided by J.C. Penney. On the one hand, J.C. Penney points to its policies and procedures regarding the reporting of any perceived sexual harassment and discrimination by its employees. However, the record also reflects multiple reports to J.C. Penney management concerning Gee, Gee's sexual language and actions, and the work environment in the Salon. All of these contentions are matters that need to be sorted out in the trial itself.

For the above-listed reasons, this Court finds that genuine factual issues exist that "can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250, 106 S. Ct. 2505, 91 L.Ed.2d 202 (1986). Accordingly, the Court will recommend that Defendants' Motion for Summary Judgment and Plaintiffs' Motion for Partial Summary Judgment be denied.

VI.

DEFENDANTS' MOTION TO STRIKE.

Defendants move the Court to strike certain paragraphs contained in the affidavits of intervening Plaintiffs, offered in opposition to Defendants' Motion for Summary Judgment. Specifically, Defendants move to strike Paragraph 2 from the Hurley, Johnson, Hicks and Turner affidavits on the basis that those paragraphs constitute inadmissible hearsay and are conclusory with inadequate foundation. Further, Defendants move to strike Paragraphs 17, 14, and 11, respectively, of the Hurley, Johnson, and Hicks affidavits on the basis that those paragraphs

contradict each Plaintiff's prior deposition testimony.

The Court has reviewed the subject affidavits and has determined that the challenged testimony does not include any statement by a non-testifying declarant offered to prove the truth of the matters asserted. Rather, Paragraph 2 from the Hurley, Johnson, Hicks and Turney affidavits merely illustrates the knowledge, understanding and state of mind of the intervening Plaintiffs during the period each was employed by J.C. Penney with respect to past complaints. Further, Defendants' objections go to the weight the testimony should be accorded rather than to its absolute admissibility.

As to Defendants' assertions that certain paragraphs contained in the Hurley, Johnson, and Hicks affidavits contradict each Plaintiff's prior deposition testimony, the Court has reviewed Paragraphs 17, 14, and 11 of the subject affidavits and notes that they do not contradict earlier testimony. Accordingly, the Court will recommend that Defendants' Motion to Strike be denied.

RECOMMENDATION

Based upon the foregoing, the Court being otherwise fully advised in the premises, the Court **hereby RECOMMENDS that**

(1) Defendant Gee's Motion to Set Aside Default Judgment (Dkt #51), filed September 17, 2001, be DENIED;

(2) Defendant Gee's Motion for Leave to File Counterclaim (Dkt #49), filed September 14, 2001, be DENIED;

(3) Defendants' Motion to Sever Claims (Dkt #71), filed October 16, 2001, be DENIED;

(4) Plaintiffs' Motion for Partial Summary Judgment (Dkt #75), filed November 7, 2001, be DENIED;

(5) Defendants' Motion for Summary Judgment (Dkt #82), filed November 7, 2001, be DENIED; and

(6) Defendants' Motion to Strike (Dkt #102), filed December 13, 2001, be DENIED.

Written objections to this Report and Recommendation must be filed within ten (10) days pursuant to 28 U.S.C. § 636(b)(1) and Local Rule 72.1(b), or as a result of failing to do so, that party may waive the right to raise factual and/or legal objections to the United States Court of Appeals for the Ninth Circuit.

DATED: April 19, 2002.

MIKEL H. WILLIAMS
UNITED STATES MAGISTRATE JUDGE

dkh

United States District Court
for the
District of Idaho
April 19, 2002

* * CLERK'S CERTIFICATE OF MAILING * *

Re: 4:00-cv-00570

I certify that a copy of the attached document was mailed or faxed to the following named persons:

A Luis Lucero Jr, Esq.
US EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Seattle District Office
909 First Ave #400
Seattle, WA 98104-1061
fax: (206) 220-6911

Claire Cordon, Esq.
US EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Seattle District Office
909 First Ave #400
Seattle, WA 98104-1061

Lisa Guarnero, Esq.
US EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Seattle District Office
909 First Ave #400
Seattle, WA 98104-1061

Bradley J Williams, Esq.
MOFFATT THOMAS BARRETT ROCK & FIELDS
PO Box 1367
Idaho Falls, ID 83403-1367
fax: (208) 522-5111

Chrys Meador, Esq.
JC Penney Co., Inc.
PO Box 10001
Dallas, TX 75301-0001
fax:

Nicholas A O'Kelly, Esq.
JC PENNEY CO., INC.
6501 Legacy Dr MS-1122
Plano, TX 75024
fax:

Richard H Greener, Esq. 1-208-338-3290
COSHO HUMPHREY GREENER & WELSH
815 W Washington
Boise, ID 83702

Daniel Loras Glynn, Esq. 1-208-338-3290 : fax
COSHO HUMPHREY GREENER & WELSH
815 W Washington

Boise, ID 83702

Daniel L Glynn, Esq. 1-208-338-3290
COSHO HUMPHREY GREENER & WELSH
815 W Washington
Boise, ID 83702

Steve Brown, Reed Andrus
~~Gary S Larson~~, Esq.
HOPKINS RODEN CROCKETT HANSEN & HOOPES
PO Box 51219
Idaho Falls, ID 83405-1219

fax: (208) 523-4474

Paul faxed to all but Meadon and O'Kelley 4/19/02

__✓__ Chief Judge B. Lynn Winmill
_____ Judge Edward J. Lodge
_____ Chief Magistrate Judge Larry M. Boyle
__✓__ Magistrate Judge Mikel H. Williams

Cameron S. Burke, Clerk

Date: 4-19-02

BY: _____
(Deputy Clerk)