1998 WL 1472862
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United States District Court, W.D. North Carolina.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Plaintiff,
and
Mary C. JOHNSON; Amber Frederick; April Ledford; Sandra Colleen Bussey; and Shannon McCall Fisher, Intervenor–Plaintiffs,
v.
TAR HEEL CAPITAL, INC., d/b/a Wendy's, Defendant.

No. 1:98CV84. | Dec. 3, 1998.

Opinion

MEMORANDUM AND ORDER

THORNBURG, J.

I. *INTRODUCTION*

***1** THIS MATTER is before the Court on the Plaintiff/Intervenors' Objections to the Memorandum and Recommendation of the United States Magistrate Judge Max O. Cogburn, Jr. The Defendant filed a motion to dismiss the Intervenors' second claim for failure to state a claim under North Carolina law, pursuant to Fed.R.Civ.P. 12(b)(6). Pursuant to standing orders of designation and 28 U.S.C. § 636, this Court referred the Defendant's motion to dismiss to the Magistrate Judge for a recommendation as to disposition. The Intervenors filed timely objections to the Magistrate Judge's Recommendation that the motion be allowed. Having reviewed the Magistrate Judge's Memorandum and Recommendation, this Court sustains the Intervenors' Objections and denies Defendant's motion to dismiss for the reasons stated below.

II. *STANDARD OF REVIEW*

The district court conducts a *de novo* review of those portions of a Magistrate Judge's Memorandum and Recommendation to which specific objections are filed. 28 U.S.C. § 636(b). This Court will not address general objections to the Magistrate Judge's final Recommendation. "A general objection ... has the same effects as would a failure to object. The district court's attention is not focused on any specific issues for review, thereby making the initial reference to the magistrate useless." *Howard v. Secretary of Health & Human Servs.,* 932 F.2d 505, 509 (6 th Cir.1991). In this Circuit, *de novo* review is unnecessary "when a party makes general and conclusory objections that do not direct the court to a specific error in the magistrate's proposed findings and recommendations." *Orpiano v. Johnson,* 687 F.2d 44, 47 (4 th Cir.1982).

The Plaintiffs make five objections to the Magistrate Judge's findings and recommendation. This Court will address Intervenors' specific objections 1, 2 and 4, but will not address general objections 3 and 5 except as otherwise incident to this ruling.

III. *STATEMENT OF FACTS*

The Plaintiff, the Equal Opportunity Employment Commission, filed this action in April of 1998, alleging sexual discrimination and harassment in violation of Title VII, 42 U.S.C. § 2000e–5 *et seq.,* by the Defendant Tar Heel Capital, Inc., d/b/a Wendy's restaurants. The women who were allegedly subjected to the illegal conduct of the Defendant moved to intervene, and were permitted to file their claims against the Defendant in August of 1998. Intervenors' Objections, at 1–2. Among the incidents the Intervenors complained of were: 1) unwelcome sexual touching and other physical contact; 2) solicitation of sexual relationships; 3) telling unwelcome sexual jokes, and 4) unwelcome sexual innuendo and gesturing. Claims of Intervenors, at ¶ 's 11, 17, 23, 29, 35.

Intervenors seek relief under Title VII for sexual harassment, unlawful discrimination and retaliatory treatment on the basis of sex, and under North Carolina law for wrongful treatment (unlawful sexual harassment and discrimination) and constructive discharge in violation of public policy. Intervenors' Claims, at ¶ 's 8–9.

***2** The Defendant filed an answer to the Intervenors' claims, and moved to dismiss the state law claim. The Intervenors did not timely respond to the Defendant's motion. However, the Memorandum and Recommendation is not based on this failure to comply with applicable time restraints.

The Intervenors filed timely objections to the Magistrate Judge's Recommendation, and the Defendant timely responded.

IV. *DISCUSSION*

Defendant moved for dismissal of the Intervenors' state law claim on the grounds that North Carolina does not recognize a claim for retaliatory discharge for opposition to sexual harassment. Defendant's Motion, at 2–3. The Defendant characterizes the Intervenors' claim in this limited fashion, and does not address it as a general claim of sexual harassment and discrimination. *Id.* The Intervenors' claim, however, is not so limited. The claim is in fact one for sexual harassment and unlawful discrimination on the basis of sex, including retaliatory treatment and constructive discharge, in violation of the public policy of the State of North Carolina. Intervenors' Claims, at ¶ 's 48–49; Intervenors' Objections, at 1–8. The Court will review the Defendant's motion and the Intervenors' claim *de novo.*

A. North Carolina's Public Policy Exception to the At–Will Employment Rule

North Carolina is an "at-will" employment state, and thus "[o]rdinarily, an employee without a definite term of employment is an employee at will and may be discharged without reason." *Coman v. Thomas Mfg. Co., Inc.,* 325 N.C. 172, 175, 381 S.E.2d 445, 446 (1989). The Supreme Court of North Carolina ruled, though, that:

> "While there may be a right to terminate a contract at will for no reason, or for an arbitrary or irrational reason, there can be no right to terminate such a contract for an unlawful reason or purpose that contravenes public policy." ... [P]ublic policy "has been defined as the principle of law ... that no citizen can lawfully do that which has a tendency to be injurious to the public or against the public good."

Amos v. Oakdale Knitting Co., 331 N.C. 348, 350–51, 416 S.E.2d 166, 168 (1992) (quoting *Sides v. Duke University,* 74 N.C.App. 331, 342, 328 S.E.2d 818, 826 (1985)). Thus, a public policy exception to the at-will rule is well established under North Carolina law. In this case, the parties do not contest the at-will status of the Intervenors, thus the primary issue is the nature and scope of the public policy exception to the at-will rule.

B. Sexual Harassment as a Cause of Action under N.C. Gen.Stat. § 143–422.2

Section 143–422.2 of the North Carolina General Statutes states in relevant part:

> It is the public policy of this State to protect and safeguard the right and opportunity of all persons to seek, obtain and hold employment without discrimination or abridgement on account of race, religion, national origin, age, sex or handicap by employers[.]

N.C. Gen.Stat. § 143–422.2. The North Carolina Supreme Court ruled that the "ultimate purpose of ... G.S. 143–422.2 and Title VII (42 U.S.C. § 2000e, *et seq.*) is the same," and thus the statute is co-extensive with the federal statute, evaluated under the same standards of evidence and principles of law. *N.C. Dept. of Correction v. Gibson,* 308 N.C. 131, 141, 301 S.E.2d 78, 85 (1983). This interpretation of the overlap of the state and federal statutes is the rule of the Fourth Circuit as well. *Hughes v. Bedsole,* 48 F.3d 1376, 1383 (4th Cir.), *cert. denied,* 516 U.S. 870 (1995).

***3** Under Title VII, sexual harassment resulting in a constructive discharge is a valid cause of action. *Meritor Savings Bank v. Vinson,* 477 U.S. 57, 66–67 (1986). A plaintiff pleading the acts of an employer demanding sexual favors and engaging in unwelcome fondling states a claim under Title VII; acts such as intimidation, ridicule, and insult can also give rise to a valid claim of sexual harassment under Title VII. *Id.,* at 67; *see also Harris v. Forklift Sys., Inc.,* 510 U.S. 17, 21–22 (1993). Sexual harassment as alleged in this case is thus well established as a valid claim under Title VII. *See Meritor,* 477 U.S. at 57; *Harris,* 510 U.S. at 22; *Oncale v. Sundowner Offshore Servs., Inc.,* 523 U .S. 75, ___, 118 S.Ct. 998, 1001–02 (1998); *Burlington Indus., Inc. v. Ellerth,* 524 U.S. 742, ___, 118 S.Ct. 2257, 2264 (1998). Thus, as a cause of action for sexual harassment exists under Title VII, pursuant to the reasoning set forth by the North Carolina Supreme Court in *Gibson,* a cause of action for sexual harassment also exists under N.C. Gen.Stat. § 143–422.2 *See Gibson,* 308 N.C. at 141, 301 S.E.2d at 85.

Also, the Fourth Circuit ruled expressly that a cause of action exists for sexual harassment under the North Carolina statute. *Harrison v. Edison Bros. Apparel Stores, Inc.,* 924 F.2d 530, 533–34 (4th Cir.1991); *Hughes,* 48 F.3d at 1383. The Fourth Circuit ruled that, even when North Carolina's public policy exception is construed as being limited to only prohibiting the solicitation of criminal acts, allegations of sexual harassment, including the solicitation of sexual relationships, state a claim under N.C. Gen.Stat. § 143–422.2. *Harrison,* 924 F.2d at 533–34; *Hughes,* 48 F.3d at 1383. The Fourth Circuit further ruled that the unlikelihood or outright lack of prosecution for an employer's acts is irrelevant to the application of the public policy exception of § 143–422.2. *Harrison,* 924 F.2d at 534. Significant as well is that the North Carolina Court of Appeals recently ruled that a

plaintiff's claim of wrongful discharge under § 143–422.2 is *not* limited to only circumstances where the employee was requested to engage in illegal activity and refused, which is the circumstance most commonly and clearly addressed by the North Carolina courts. *Garner v. Rentenbach Constructors, Inc.,* 129 N.C.App. 624, ___, 501 S.E.2d 83, 86 (June 2, 1998).

Thus, under the law of this Circuit and the State of North Carolina, this Court is required to recognize a cause of action for sexual harassment and constructive discharge under § 143–422.2.

C. Stating a Claim for Sexual Harassment under N.C. Gen.Stat. § 143–422.2.

Claims made under § 143–422.2 must be evaluated under the evidentiary standards and principles of law of Title VII. *Gibson,* 308 N.C. at 141, 301 S.E.2d at 85; *Hughes,* 48 F.3d at 1383. "The gravamen of any sexual harassment claim is that the alleged sexual advances were 'unwelcome'." *Meritor,* 477 U.S. at 67. As to stating a claim for sexual harassment under § 143–422.2, the Fourth Circuit ruled that: "She [the plaintiff] was asked to commit an act [sexual intercourse for the economic benefit of continued employment] prohibited by the criminal law. She refused ... and her complaint states a claim for wrongful discharge." *Harrison,* 924 F.2d at 534.

***4** In this case, the Intervenors claim that the Defendant's employee, the Intervenors' supervisor, engaged in "touching ... hugging ... soliciting sexual relationships ... and ... sexual innuendo and gesturing," and that "to each and every act ... intervenor ... requested that her supervisor stop ... indicated her displeasure, disgust and lack of consent." Intervenors' Claims, at ¶ 's 11, 12, 17, 18, 23, 24, 29, 30, 35, 36. Thus, the Intervenors demonstrate that the conduct was of a sexual nature, and that it was unwelcome. The Intervenors allege that their supervisor made sexual solicitations to them, and that they refused. The Intervenors further allege that as the result of the unwelcome sexual conduct, they were forced to leave their jobs, thereby suffering a wrongful constructive discharge. *Id.* Therefore, based on the holding of the Fourth Circuit in *Harrison,* N.C. Gen.Stat. § 143–422.2, and ruling of the North Carolina Supreme Court in *Gibson,* the Intervenors state a claim upon which relief may be granted.

V. *ORDER*

IT IS, THEREFORE, ORDERED that the Defendant's motion to dismiss for failure to state a claim is hereby DENIED.