IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
FLORENCE DIVISION

Equal Employment Opportunity Commission,	)	
Plaintiff,	)	
v.	)	C.A. #4:99-2157-23BF
Fleming, Inc., d/b/a J. Edward's,	)	**ORDER**
Defendant,	)	
Matthew Morrison,	)	
Intervenor.	)	

This matter is before the court upon Defendant Fleming, Inc.'s Motion to Dismiss, or in the Alternative for Clarification, and its Motion for Summary Judgment. Magistrate Judge Terry L. Wooten filed a Report and Recommendation ("R&R") recommending this court deny these motions. Defendant timely objected to the R&R. The R&R correctly and accurately summarizes the facts and arguments in this case, and this court accepts in whole the findings and recommendation of the R&R. Accordingly, the motions are denied.

I. BACKGROUND

The Plaintiff, Equal Employment Opportunity Commission (EEOC), filed this action on June 30, 1999, alleging violations of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000(e) et seq. The Plaintiff alleges the male owner of the Defendant, J. Edward Fleming,[1] subjected employees Brian Stahl, Matthew Goheen, Matthew Morrison, and other similarly

[1] Defendant operates a restaurant in Myrtle Beach, South Carolina. J. Edward Fleming is the owner and general manager of the restaurant.

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situated male employees to sexual harassment, such as offensive comments and physical touching. Defendant denies all of these allegations. The R&R sets forth in detail the facts involved in this case, and the court incorporates, without a full recitation, those facts as described in the R&R.

Defendant filed its Motion to Dismiss, or in the Alternative for Clarification,[2] and its Motion for Summary Judgment on August 31, 2000. Magistrate Judge Wooten's R&R was filed on December 8, 2000. A party may object, in writing, to a magistrate's report within ten days after being served with a copy of that report. 28 U.S.C. § 636(b)(1). Defendant timely filed objections on December 20, 2000. The court reviews *de novo* any portion of a magistrate judge's report to which a specific objection is registered and may accept, reject, or modify, in whole or in part, the recommendations contained in that report. 28 U.S.C. § 636(b)(1). Any written objections must specifically identify the portions of the R&R to which objections are made and the basis for those objections. *Id.*

II. DISCUSSION

A. Summary Judgment Standard

To grant a motion for summary judgment, this court must find that "there is no genuine issue as to any material fact." Fed. R. Civ. P. 56(c). The judge is not to weigh the evidence, but rather to determine if there is a genuine issue for trial. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). If no material factual disputes remain, then summary judgment should be granted against a party who fails to make a showing sufficient to establish the existence of an

[2] This Motion is directed towards the class action aspect of Plaintiff's complaint and prayer for class relief.

element essential to that party's case, and on which the party bears the burden of proof at trial. *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). All evidence should be viewed in the light most favorable to the non-moving party. *Perini Corp. v. Perini Constr., Inc.*, 915 F.2d 121, 123-24 (4th Cir. 1990).

"[W]here the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, disposition by summary judgment is appropriate." *Teamsters Joint Council No. 83 v. Centra, Inc.*, 947 F.2d 115, 119 (4th Cir. 1991). "[T]he plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex*, 477 U.S. at 322. The "obligation of the nonmoving party is 'particularly strong when the nonmoving party bears the burden of proof.'" *Hughes v. Bedsole*, 48 F.3d 1376, 1381 (4th Cir. 1995) (quoting *Pachaly v. City of Lynchburg*, 897 F.2d 723, 725 (4th Cir. 1990)). Summary judgment is not "a disfavored procedural shortcut," but an important mechanism for weeding out "claims and defenses [that] have no factual bases." *Celotex*, 477 U.S. at 327.

B. <u>Defendant's Objections</u>

1. Failure to Give Notice of Class-Wide Violations in EEOC Administrative Charge and Notice of Failure of Conciliation

The EEOC is required to give defendants notice of its class claims and an opportunity to conciliate those claims. *See EEOC v. General Elec. Co.*, 532 F.2d 359, 366 (4th Cir. 1976); *Bryson v. Fluor Corp.*, 914 F. Supp. 1292, 1296 (D.S.C. 1995). Defendant takes issue with the Magistrate's conclusion that it "was on notice that a class of persons were seeking relief as early

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as February 19, 1999, the date of the EEOC determination." (R&R at 19.) Defendant asserts that neither the EEOC's Notice of Charge of Discrimination, issued before February 19, 1999, nor the Failure of Conciliation, issued after February 19, 1999, make any mention of allegations of class-wide discrimination. (Def.'s Obj. to R&R at 1.) Defendant contends that it is therefore entitled to an opportunity to pursue conciliation of the class-wide allegations.

The court has found no case which requires the Notice of Failure of Conciliation to reiterate that the charge involves class-wide allegations. The EEOC put the Defendant on notice of the class-wide allegations in its determination, (Treeter Aff., Ex. 8a), and that notice is enough. Defendant attempts to rely on *EEOC v. Chesapeake and O.R. Co.*, 577 F.2d 229 (4th Cir. 1978), as support for its position. In that case, the Fourth Circuit was faced with determining the sufficiency of a proposed conciliation agreement. The court noted that "[t]he reasonable cause determination is not designed to adjudicate an employer's alleged violations of the Act but to notify an employer of the commission's findings and to provide common ground for conciliation." *Id.* at 232. The court found that the EEOC's investigation of the initial charge satisfied these requirements, and the EEOC determination and proposed conciliation were sufficient. *Id.* Defendant asserts that, unlike the situation in *Chesapeake*, the additional class-wide violations were not the subject of the EEOC's proposed conciliation agreement.

However, it appears that the EEOC never reached the stage of proposing a conciliation agreement because six days after the EEOC issued its determination Defendant refused unequivocally to participate in any conciliation process. (*See* Treeter Aff., Ex. 8b.) Defendant cannot now, after being put on notice of the class-wide allegations and then refusing to participate in any conciliation process, claim that it is entitled to conciliation of the class-wide

allegations.

2. Matthew Goheen has not Produced any Evidence of Damages

Defendant assert that Matthew Goheen should be dismissed as a member of the class because he has failed to produce any evidence upon which a reasonable jury could rely in awarding damages. Defendant notes that Goheen has testified that he has suffered no loss wages, no emotional distress, and no medical or other special expenses. (Goheen Dep. at 61).

To be actionable, "sexually objectionable environment must be both objectively and subjectively offensive, one that a reasonable person would find hostile or abusive, and one that the victim in fact did perceive to be so." *Faragher v. City of Boca Raton*, 524 U.S. 775, 788 (1998) (citing *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 21-22 (1993)). The conduct need not seriously affect an employee's psychological well-being to be actionable under Title VII, so long as the environment would reasonably be perceived as hostile or abusive. *Harris*, 510 U.S. at 22.[3] Furthermore, this cause of action is not limited to claims of economic harm, but addresses all harms that arise from a hostile work environment. *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 65 (1986).

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[3] The Court went on to state:

> But we can say that whether an environment is "hostile" or "abusive" can be determined only by looking at all the circumstances. These may include the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance. The effect on the employee's psychological well-being is, of course, relevant to determining whether the plaintiff actually found the environment abusive. But while psychological harm, like any other relevant factor, may be taken into account, no single factor is required.

Harris, 510 U.S. at 23.

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While overemphasizing Goheen's asserted lack of damages, Defendant fails to recognize the ample testimony regarding the alleged conduct of Mr. Fleming which suggests that such conduct altered the conditions of his employment and created an abusive working environment. Goheen has stated that such conduct caused him "anger, embarrassment, and humiliation." (Goheen Dep. at 63-64.) Goheen considered much of the alleged conduct as offensive to him, and he testified that it was uncomfortable to do his work, (Goheen Dep. at 63.)

Accordingly, Goheen's testimony provides sufficient evidence to survive summary judgment that a claim on his behalf is actionable.

3. Magistrate Should Identify the Members of Plaintiff's Class

Defendant complains that Plaintiff has failed to adequately identify the members of its class.[4] Plaintiff has stated that it only seeks monetary relief for Brian Stahl, Matthew Morrison, and Matthew Goheen.[5] Plaintiff has also stated that it will not name any additional persons for whom monetary relief will be sought. Therefore, only Stahl, Morrison, and Goheen are members of the class for which monetary relief is available. That the EEOC named three other individuals as having been subjected to the alleged offensive conduct is of no real consequence because EEOC admits it is not seeking monetary relief for these individuals. Therefore, the members of Plaintiff's class are sufficiently identified.

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[4] This assertion lies in the Defendant's Motion to Dismiss or in the Alternative, for Clarification.

[5] The court understands the Defendant's confusion in that the EEOC also listed three other individuals as having been subjected to sexually offensive conduct.

4. Plaintiff and Intervenor Failed to Demonstrate that Any Alleged Harrassment was Based on or Because of Sex

In *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75 (1998), the Supreme Court stated that a plaintiff "must always prove that the conduct at issue was not merely tinged with offensive sexual connotations, but actually constituted 'discrimination . . . because of . . . sex.'" *Id.* at 81. Defendant contends that Plaintiff has not done so, and therefore the Magistrate's conclusion is in error.

Defendant argues that *Oncale* establishes three evidentiary routes to show same-sex harassment: (1) credible evidence that the alleged harasser was homosexual; (2) evidence that the alleged harasser was motivated by a general hostility to the presence of his or her same gender in the workplace; and (3) direct comparative evidence of how the alleged harasser treated members of the both sexes in the workplace. *See id.* at 80-81. Defendant further contends that there is no credible evidence as to any of these three routes.

Defendant overstates the significance of the examples provided by the Court. These examples were not intended, as is evident from the Court's language, to provide the only evidentiary routes plaintiffs in same-sex harassment cases could follow. Instead, the Court's focus was that plaintiffs ultimately show that they were discriminated against "because of sex" and not subject to conduct "merely tinged with offensive sexual connotations." Therefore, a plaintiff's case is not doomed merely because he or she does not provide evidence relating to the examples provided by the Court.

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Nevertheless, the record contains ample evidence from which a reasonable jury could find that Mr. Fleming is homosexual and that the work-environment was permeated with male-

specific sexual references and contact. For example, Mr. Fleming allegedly inquired about the size of the claimants' penises (Stahl Dep. at 118-19, 127-28, 136; Goheen Dep. at 46-47, 59; Watson Dep. at 16-17; Morrison Dep. at 226, 262-63); told a claimant that he masturbated while thinking of the claimant and that he would like to have sex with the claimant (Stahl Dep. at 119-20); Mr. Fleming allegedly attempted to kiss one claimant (Morrison Dep. at 266); and Mr. Fleming continuously poked and tapped claimants in the groin area and their backsides. Such alleged conduct, along with its frequency and duration, clearly extends beyond that which is merely tinged with offensive sexual connotations. Further, such conduct does not constitute the ordinary socializing of the work place discussed in *Oncale* such as male-on-male horseplay or flirtation. Therefore, a material issue of fact exists sufficient to survive summary judgment.

5. Plaintiff and Intervenor Failed to Demonstrate any Effect on the Terms or Conditions of Their Employment

Defendant claims that the Magistrate failed to identify with reasonable specificity any change in the terms and conditions of any member of the Plaintiff's class or the Intervenor's employment. Defendant notes that no evidence has been presented of a depravation or change in salary, a decrease in work, or termination of employment. However, Plaintiff and Intervenor are not required to show such tangible changes in order to have an actionable claim under Title VII. *See, eg., Faragher*, 524 U.S. at 807; *Harris*, 510 U.S. at 67; *see also Meritor Savings Bank v. Vinson*, 477 U.S. 57, 65 (1986) (hostile work environment claims not limited to claims of economic harm but encompasses all harms of a hostile work environment).

As Plaintiff notes, a reasonable jury could conclude from the record that the working environment was both subjectively and objectively hostile as evidenced by the allegations of Mr.

Fleming's multiple sexual advances, frequent offensive touching, and continuous sexual comments. Therefore, Defendant's objection fails.

IV. CONCLUSION

It is, therefore,

ORDERED, for the foregoing reasons court adopts in full the attached Magistrate's Report and Recommendation, and Defendant's Motion to Dismiss, or in the Alternative for Clarification, and its Motion for Summary Judgment are **DENIED.**

AND IT IS SO ORDERED.

PATRICK MICHAEL DUFFY
UNITED STATES DISTRICT JUDGE

Charleston, South Carolina
March 1, 2001

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