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UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
SOUTHERN DIVISION



CLERK

EQUAL EMPLOYMENT OPPORTUNITY *
COMMISSION (EEOC) *

Plaintiff, *

and *

ELIZABETH FAWKES, *

Intervenor Plaintiff, *

-vs- *

G & N ENTERPRISES, INC, *
(d/b/a Western Way Work Warehouse), *

Defendant. *

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CIV 98-4195

ORDER DENYING PLAINTIFFS'
MOTION FOR
PARTIAL SUMMARY JUDGMENT

Pending before the Court is Plaintiffs' Motion for Partial Summary Judgment (Doc. 19). This is an action brought pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, et seq., for sexual harassment and retaliatory discharge. (Doc. 1, Complaint.) On April 5, 1997, Elizabeth Fawkes ("Fawkes") was terminated from her employment with defendant, G&N Enterprises. Plaintiffs allege that Fawkes' dismissal was an act of unlawful retaliation because of her reports of sexual harassment. Defendant denies the plaintiffs' claims entirely and contends that Fawkes was discharged for "telling lies, spreading rumors, and causing disruption in the workplace." (Doc. 23, Defendant's Statement of Disputed Facts in Opposition to Plaintiff's Motion for Partial Summary Judgment, ¶24.) The plaintiffs also claim that Fawkes was subjected to sexual harassment in the form of a hostile work environment. Both plaintiffs move for summary judgment on the

retaliation claim set forth in count II of the Complaint.¹ For the following reasons, plaintiffs' motion for partial summary judgment will be denied.

Plaintiffs' retaliation claim revolves around the events that occurred at Western Way on April 5, 1997. On that day, Fawkes' co-worker, Keith De Pauw, heard Fawkes say that James Greenfield, Fawkes' supervisor, had offered Fawkes time off if she would give him a "blow job."² (Doc. 24, Attachment C, De Pauw deposition, at 62-63.) De Pauw told another co-worker, Dianne Barney (f/n/a Dianne Hoffman) what he had heard Fawkes say, and Barney reported it to James Greenfield. (Doc. 24, De Pauw deposition at 65-66 and Barney deposition, Attachment D at 56-57.) James Greenfield telephoned his father, the president of G&N Enterprises, Harvey Greenfield, for advice. (Doc. 21, Exhibit B, James Greenfield deposition at 194; Exhibit C, Harvey Greenfield deposition at 198-199.) Harvey Greenfield advised James Greenfield to ask Fawkes, in front of employees De Pauw and Barney, whether she was saying that James Greenfield offered her days off in exchange for oral sex, and if so, he said, "we'll have to let her go." (Docs. 20 and 23, ¶ 11.) James Greenfield called Fawkes into his office, with De Pauw and Barney present, and confronted Fawkes about the allegations of sexual harassment. (*Id.* at ¶ 12.) Barney testified that Fawkes initially denied making the allegations against Greenfield. (Barney deposition at 57.) Fawkes admitted she told a co-worker that James Greenfield had offered Fawkes time off in exchange for oral sex. (James Greenfield deposition at 230, 234; Barney deposition at 94-95; De Pauw deposition at 67.) Fawkes was terminated by James Greenfield. After she was terminated, Fawkes asked to speak to Harvey

¹The underlying discrimination charge need not be meritorious for the related activity to be protected from retaliation under Title VII. *See, e.g., Brower v. Runyon*, 178 F.3d 1002, 1006 (8th Cir. 1999); *cf. Montandon v. Farmland Indus., Inc.*, 116 F.3d 355, 359 (8th Cir. 1997) ("To establish that he engaged in statutorily protected activity, Montandon need not prevail on his underlying Title VII claim. He must, however, have a reasonable belief that his activity (complaining about his supervisor's behavior) was protected by Title VII. . . .")

²Fawkes testified that she was talking to her co-worker, Jessica Peters, and she "explained what was going on with Jim, and I told her that from then on I was going to make a journal of when he touched me and when he said things to me. At that point, if things continued, that I would file a sexual harassment suit against Jim." (Fawkes deposition at 78.)

Greenfield. James Greenfield got Harvey Greenfield on the telephone to speak with Fawkes. Fawkes asked for her job back. (Docs. 20 and 23, ¶ 18.) Harvey Greenfield testified that he told Fawkes "if this is true what she was saying about Jim, if she was actually saying those things, which Keith and Dianne told James they overheard, I would have to end her employment." (Harvey Greenfield deposition at 200.) The plaintiffs allege that Fawkes' termination was the result of her opposition to sexual harassment. James Greenfield denies offering Fawkes time off in exchange for oral sex (Doc. 4, Answer at ¶ 11), and he contends that he terminated Fawkes for spreading rumors. (Doc. 23, ¶ 14.)

The Eighth Circuit has cautioned that "summary judgment should seldom be used in employment-discrimination cases." Crawford v. Runyon, 37 F.3d 1338, 1341 (8th Cir. 1994). Summary judgment is appropriate in employment discrimination cases only in "those rare instances where there is no dispute of fact and where there exists only one conclusion." Johnson v. Minnesota Historical Society, 931 F.2d 1239, 1244 (8th Cir. 1991); cf. Snow v. Ridgeview Medical Center, 128 F.3d 1201, 1205 (8th Cir. 1997) ("Because discrimination cases often turn on inferences rather than on direct evidence, we are particularly deferential to the nonmovant.")

Title VII of the Civil Rights Act of 1964 protects employees and applicants for employment from discrimination on the basis of race, color, religion, sex, or national origin. 42 U.S.C. §§ 2000e-2000e-17. The clause at issue in the pending motion is the "opposition clause" which prohibits retaliation against an employee or applicant for employment because she "opposed any practice made an unlawful employment practice by this subchapter." 42 U.S.C. § 2000e-3(a).³ To establish a prima facie case of retaliatory discrimination, Fawkes must show that she engaged in protected activity, that an adverse employment action was taken against her, and that there was a causal

³The retaliation provision of Title VII also contains a "participation clause" which makes it unlawful for employers to retaliate against an employee or applicant for employment because she "made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter." 42 U.S.C. § 2000e-3(a). Plaintiffs have not argued that defendant has violated this provision.

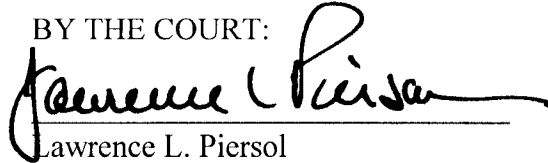
connection between the two. See, e.g., Montandon v. Farmland Indus., Inc., 116 F.3d 355, 359 (8th Cir. 1997). Cases from the Eighth and other circuit courts provide little guidance as to what activities fall within the meaning of "opposition" to sexual harassment. Some district courts have held that protected opposition activities include resisting and expressing opposition to sexual advances, Boyd v. James S. Hayes Living Health Care Agency, 671 F.Supp. 1155, 1167 (W.D. Tenn. 1987), registering internal complaints with management regarding sexual harassment, Hollis v. Fleetguard, Inc., 668 F.Supp. 631, 638 (M.D. Tenn. 1987), testifying on behalf of or supporting the claims of another employee, Jones v. Lyng, 669 F.Supp. 1108, 1121 (D.D.C. 1986), or notifying law enforcement authorities, Ross v. Double Diamond, Inc., 672 F.Supp. 261, 275 (N.D. Tex. 1987). For purposes of the pending motion, the question is whether the Court finds that Fawkes' statements to her co-worker and supervisor were undisputedly made in opposition to sexual harassment.

Viewing the evidence in the light most favorable to the defendant, the Court concludes that there is a genuine issue of material fact as to whether Fawkes engaged in protected activity on April 5, 1997. James Greenfield denies offering Fawkes time off in exchange for oral sex. If the jury believes him, then they could not find that Fawkes engaged in protected activity because she could not oppose sexual harassment that did not occur. Further, the jury might conclude that defendant's stated reason for Fawkes' termination was the real reason behind the termination. See, e.g., Kiel v. Select Artificials, Inc., 169 F.3d 1131, 1136 (8th Cir. 1999) ("Although contesting an unlawful employment practice is protected conduct, the anti-discrimination statutes do not insulate an employee from discipline for violating the employer's rules or disrupting the workplace.") Because the jury could find in favor of the defendant on these two elements of plaintiffs' retaliation claim (engaging in protected activity and a causal connection between the protected activity and the termination), the Court must deny summary judgment on the retaliation claim. Accordingly,

IT IS ORDERED that Plaintiffs' Motion for Partial Summary Judgment is denied. (Doc. 19)


Dated this 17th day of February, 2000.

BY THE COURT:



Lawrence L. Piersol
Chief Judge

ATTEST:
JOSEPH HAAS, CLERK

BY: 
(SEAL) DEPUTY