IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
EASTERN DIVISION

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,	)	
Plaintiff,	)	
and	)	No. 97-1112
JOE CARLTON,	)	
Intervenor,	)	
VS.	)	
HARBERT-YEARGIN, INC.,	)	
Defendant.	)	

ORDER DENYING MOTION FOR INJUNCTIVE RELIEF OF PLAINTIFF EEOC

The Equal Employment Opportunity Commission ("EEOC") has moved the court pursuant to 42 U.S.C. § 2000e-5(g)(1) to enjoin Defendant from sexually harassing employees in the workplace and from suborning perjury during federal investigations. Defendant has responded to the motion. For the reasons set forth below, the motion for injunctive relief is DENIED.

The EEOC filed this action pursuant to Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq., alleging that Defendant engaged in unlawful

employment practices, including subjecting male employees to offensive touching on the basis of sex and failing to take prompt remedial action to prevent further such conduct. Joe Carlton intervened, asserting similar claims on his individual behalf. The case was tried by a jury, and the jury returned a verdict in favor of Carlton and Cedric Woods on their sexual harassment claims. The jury found in favor of Defendant on all other claims. In a previous order, the court set aside the jury verdict as to Cedric Woods. See Order Partially Granting & Partially Denying Defendant's Motion for Judgment as a Matter of Law, 12/16 /99.

Title VII provides that the EEOC may recover injunctive relief upon a showing of intentional employment discrimination. 42 U.S.C. § 2000e-5(g)(1). However, injunctive relief is not mandatory even though an employer is found to have violated Title VII. Prentice v. American Standard, Inc., 1992 WL 172662 at *2 (6th Cir.) Instead, it is a matter for the discretion of the trial court. Id. After Title VII liability has been established, the defendant has the burden of going forward with evidence "tending to show that it has taken, and will continue to take, effective measures to prevent a recurrence of the actionable conduct." Id. The ultimate burden of proving that injunctive relief is necessary remains with the plaintiff, however. Id. To satisfy this burden, the plaintiff must show that there is "a cognizable danger that defendant [will] not take effective steps to prevent the conduct from recurring." Id. An injunction should not be issued unless there is some likelihood that the conduct of which plaintiff complains will recur. Janowski v. International Brotherhood of Teamsters Local No. 710 Pension Fund, 673 F.2d 931, 940 (7th Cir.), *cert. denied*, 459 U.S. 858 (1982).

In the present case, the EEOC has failed to show that the conduct complained of is

likely to reoccur. Louis Davis, the primary harasser, is no longer employed by Defendant. Additionally, Harold Scott, William Irvin, and Don Bomar are no longer employed by Defendant, and Joe Carlton has left Defendant's employment. See Spencer v. General Electric Co., 894 F.2d 651, 660 & n. 12 (4th Cir. 1990) (Sexual harassment is not likely to recur because the plaintiff was transferred to another job and the harasser left the company.); Swanson v. Elmhurst Chrysler Plymouth, 882 F.2d 1235, 1237 (7th Cir.1989) ("Since Swanson was no longer an employee, the court could not exercise its equitable powers to enjoin the employer from engaging in unlawful conduct, since injunctions are available only to restrain present or threatened unlawful conduct."), *cert. denied*, 493 U.S. 1036 (1990); McKinney v. State of Illinois, 720 F. Supp. 706, 708 (N.D. Ill. 1989) (The plaintiff is no longer employed by defendant and there are no allegations that she has any contact with the harasser; therefore, nothing suggests that the sexual harassment will recur.) Accord Walker v. Anderson Electrical Connectors, 742 F. Supp. 591, 595 (M.D. Ala. 1990), *aff'd*, 944 F.2d 841 (11th Cir. 1991)

An injunction would not be appropriate for the additional reason that Defendant no longer does business in Tennessee, see Lauerman Affidavit, Defendant's Exhibit 1, and there is no evidence that the sexual harassment occurred at any work site of Defendant other than the one at issue in the present case in Jackson, Tennessee. See Domingo v. New England Fish Co., 727 F.2d 1429, 1438, *modified on other grounds*, 742 F.2d (9th Cir. 1984) ("Because the Nefco canneries involved in this litigation are no longer in operation, injunctive relief is not available.")

Next, the conduct complained of occurred before the Supreme Court in Oncale v. Sundowner Offshore Servs., Inc.,118 S. Ct. 998 (1998), clarified the law on same sex harassment.[1] Defendant is now on notice that this type of conduct will not be tolerated. See Walker, 742 F. Supp. at 595 ("Title VII itself, bolstered by the jury finding in this case, provides an adequate warning to Anderson Electrical and a sufficient guarantee against future sexual harassment.") The court also notes that the monitoring of the nationwide injunction requested by the EEOC, in light of the above facts, "would be impossible at worst and unduly burdensome at best." Id.

Finally, Defendant already has a company-wide policy explicitly informing employees that sexual harassment violates Title VII and will not be tolerated. Lauerman Affidavit, Defendant's Exhibit 1.

Because the EEOC has failed to show that "there is some likelihood that the conduct of which plaintiff complains will recur," see Janowski v. International Brotherhood of Teamsters Local No. 710 Pension Fund, 673 F.2d 931, 940 (7th Cir.), *cert. denied*, 459 U.S. 858 (1982), the motion for injunctive relief is DENIED. The clerk is directed to enter judgment in accordance with this order, the order granting attorney's fees and costs, the order partially granting and partially denying Defendants' motion for judgment as a matter of law,

[1] There is no evidence that any of the complained of conduct occurred after the Oncale decision.

and the order on the jury verdict.

IT IS SO ORDERED.

James D. Todd

JAMES D. TODD
UNITED STATES DISTRICT JUDGE

12/16/99

DATE