IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

EQUAL EMPLOYMENT, OPPORTUNITY COMMISSION,	§	
Plaintiff,	§	
v.	§	
CAFÉ ACAPULCO, INC.	§	CIVIL ACTION NO. 3-98CV2302-P
Defendant.	§	

MEMORANDUM OPINION AND ORDER

Now before the Court for consideration are Defendant's Motion for Summary Judgment and Brief in Support, filed on January 31, 2000; Plaintiff's Response in Opposition to Defendant's Motion for Summary Judgment and Brief in Support, filed on February 22, 2000; and Defendant's Reply-Brief to Plaintiff's Response in Opposition to Defendant's Motion for Summary Judgment, filed on March 8, 2000. After reviewing the arguments along with the applicable law, the Court hereby DENIES Defendant's Motion for Summary Judgment.

FACTUAL BACKGROUND

From May 1995 to November 1996, Defendant Café Acapulco, Inc. ("Defendant") employed Anna Quinones ("Quinones") as a food server in its Arlington, Texas restaurant. In 1998, the Equal Employment Opportunity Commission ("Plaintiff") filed this lawsuit against Defendant seeking damages on behalf of Quinones. Plaintiff claims that Defendant violated Title VII of the Civil Rights Act by discriminating against Quinones because of her gender and by constructively discharging her from her employment with Café Acapulco.

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In response to Plaintiff's claims, Defendant moves for summary judgment on a number of grounds, each of which is described below.

DISCUSSION

I. SUMMARY JUDGMENT STANDARD

In general, summary judgment is proper when the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. See Fed. R. Civ. P. 56(c); Celotex Corp. v. Catrett, 477 U.S. 317, 323-25 (1986). A dispute about a material fact is "genuine" if the evidence is such that a reasonable jury could return a verdict for the nonmoving party. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). The moving party must identify the evidence on file in the case which establishes the absence of any genuine issue of material fact. See Celotex, 477 U.S. at 323.

Once the moving party has made an initial showing, the party opposing the motion must offer evidence sufficient to demonstrate the existence of the required elements of the party's case. See Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986). Mere assertions of a factual dispute unsupported by probative evidence will not prevent summary judgment; the party defending against a motion for summary judgment cannot defeat the motion unless it provides specific facts that show the case presents a genuine issue of material fact, such that a reasonable jury might return a verdict in its favor. See Anderson, 477 U.S. at 256-57. Conclusory assertions, unsupported by specific facts, presented in affidavits opposing the motion for summary judgment are likewise insufficient to defeat a proper motion for summary judgment. See Lujan v. National Wildlife Fed'n, 497 U.S. 871, 888 (1990).

All evidence and the inferences to be drawn therefrom "must be viewed in the light most favorable to the party opposing the motion." United States v. Diebold, Inc., 369 U.S. 654, 655 (1962); see also Marshall v. Victoria Transp. Co., 603 F.2d 1122, 1123 (5th Cir. 1979). However, if the nonmoving party fails to make a showing sufficient to establish the existence of an element essential to its case on which it will bear the burden of proof at trial, summary judgment must be granted. See Celotex, 477 U.S. at 322-23. Finally, in reviewing the summary judgment evidence, the Court has no duty to search the record for triable issues; rather, it need rely only on those portions of the submitted documents to which the nonmoving party directs its attention. See Guarino v. Brookfield Township Trustees, 980 F.2d 399, 403 (6th Cir. 1992).

In Defendant's Reply-Brief to Plaintiff's Response in Opposition to Defendant's Motion for Summary Judgment, Defendant objects to the Brief in Support of Plaintiff's Response in Opposition to Defendant's Motion for Summary Judgment on the grounds that its length exceeds the maximum page limit allowed by LR 7.2(c). While agreeing that the length of Plaintiff's brief clearly violates established local rules, the Court declines to grant Defendant's motion to strike Plaintiff's brief from the record in its entirety.[1] The Court does, however, encourage Plaintiff to conform future filings in this case to the requirements of this Court's Local Rules.

II. TITLE VII CLAIMS

Plaintiff claims that Defendant discriminated against Quinones in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e et seq., on the basis of her gender and then constructively discharged her from her employment with Café Acapulco. Title VII makes it "an

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[1] Half of Plaintiff's brief—twenty-two of its forty-two pages—is a statement of facts which merely restates material in the brief's appendix.

unlawful employment practice for an employer . . . to discriminate against any individual with respect to [her] compensation, terms, conditions, or privileges of employment because of such individual's sex." 42 U.S.C. § 2000e-2(a)(1).

A Title VII violation may be established by proving that discrimination based upon gender has created a hostile or abusive working environment. See Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 66 (1986). As discussed more fully below, Plaintiff bases its hostile work environment claim upon numerous incidents whereby other employees of Defendant made offensive and humiliating comments and gestures of a sexual nature. Under Fifth Circuit law, Plaintiff must establish five elements to set forth a hostile environment claim: (1) that she belongs to a protected class, female; (2) that she was subject to unwelcome harassment of a sexual nature; (3) that the harassment was based on sex; (4) that the harassment affected a "term, condition or privilege" of employment; and (5) that Defendant Café Acapulco, Inc., Quinones's employer, knew or should have known of the harassment and failed to take prompt remedial action. See Shepherd v. Comptroller of Public Accounts, 168 F.3d 871, 873 (5th Cir. 1999), cert. denied, 120 S. Ct. 395 (1999).

Defendant asserts that it is entitled to summary judgment on the Title VII claims because (A) Plaintiff has failed to demonstrate a hostile work environment; (B) Defendant had no actual or constructive notice of any sexually harassing conduct; and (C) Defendant took prompt remedial action to investigate and correct any objectionable behavior committed by its employees. Defendant also argues that Plaintiff has failed to show any evidence that Quinones was constructively discharged. The Court considers each argument in turn.

A. Hostile Work Environment

For sexual harassment to be actionable, it must be "sufficiently severe or pervasive to alter the conditions of [the victim's] employment and create an abusive working environment." Meritor, 477 U.S. at 67. A recurring point in Supreme Court opinions is that neither "simple teasing," offhand comments, nor isolated incidents (unless extremely serious) will amount to such discrimination. See, e.g., Faragher v. City of Boca Raton, 524 U.S. 775, 788 (1998). Whether an environment is hostile or abusive is determined by looking at all the circumstances, including 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. See Harris v. Forklift Sys., Inc., 510 U.S. 17, 23 (1993). Finally, the conduct must be both objectively offensive, meaning that a reasonable person would find it hostile and abusive, and subjectively offensive, meaning that the victim perceived it to be so. See id. at 21-22; see also Shepherd, 168 F.3d at 874.

In support of its summary judgment motion, Defendant first argues that, even accepting Plaintiff's sexual harassment allegations as true, such conduct is not sufficiently severe or pervasive to create a hostile work environment as a matter of law. Defendant contends that because Quinones names only ten specific incidents which she considered to be sexual harassment during her one and one-half year employment at Café Acapulco, the conduct was not sufficiently pervasive to establish a Title VII violation. Defendant also asserts that while the conduct "could certainly be viewed as unprofessional or boorish," it was not sufficiently severe to create a hostile work environment as a matter of law. See Def's Brief in Support of Def's Mot. at 6.

Finding that Plaintiff has pled facts sufficient to support a finding of a hostile work

environment, the Court disagrees. Testimony of Quinones and various witnesses, all former female employees of Café Acapulco, allege that several male employees engaged in repeated and egregious misconduct and that their pleas to supervisors went wholly ignored. The female employees recount several offensive and degrading comments[2] and behavior[3] and allege that Defendant's managers, in essence, stood by and watched (as is addressed below).

Taken as a whole, this conduct cannot be dismissed as mere boorishness, offhand comments, or isolated incidents. See Faragher, 524 U.S. at 787. Rather, given the pervasive and offensive nature of the allegations, a reasonable jury could find that the environment was hostile or abusive. See Harris v. Forklift Sys., Inc., 510 U.S. at 23. In other words, Plaintiff's allegations are serious and pervasive enough that summary judgment on this basis would be inappropriate.

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[2] Café Acapulco's kitchen staff allegedly subjected the female employees to offensive comments on a daily basis, including (i) asking Quinones, "Do you want me to fuck you? I'll fuck you, and give you some ninos," "When are we going to go out?" and "I would like to fuck you," and refusing to provide her with her food order until she answered (Quinones Dep. at 75-78); and (ii) subjecting hostesses to catcalls and comments in English and in Spanish which the female employees understood to mean "look at the way they shake their hips when they walk," "would they be good in bed," and "oh, bend over" while making thrusting motions with their hips (Gray Dep. at 80-81; Minard Dep. at 8, 21). Defendant objects to portions of this evidence, claiming it is hearsay because some comments were made in Spanish and then supposedly translated in English to the female employees by someone else. However, the gestures which accompanied the comments could be viewed as offensive in any language, and the total effect contributed to the female employees' claimed hostile work environment. As such, Defendant's objection to this evidence is overruled.

Employee Mo Adibi also allegedly made offensive comments to female employees, including (i) asking questions about their sex lives (Quinones Dep. at 86; Suarez Dep. at 10-12); (ii) telling Quinones on a weekly basis, "I think what you need is a good fuck" (Quinones Dep. at 87); and (iii) telling Quinones that he wanted to flip his dick out and hit her with it and sling her across the restaurant (*Id.* at 68).

[3] Among the allegedly offensive behavior by the kitchen staff are the following incidents: (i) a busboy grabbed the pocket of Quinones's blue jeans and said, "Oh, I like your jeans. They look good on you" (Quinones Dep. at 79); (ii) a cook named Alejandro stood with his legs spread over a puddle of blood on the floor and said, "Look, Anna. I'm on my period" (*Id.* at 83); (iii) Alejandro stuck a large carrot in his groin, made gestures with the carrot, and said, "Anna, look at this. Look at this" (*Id.* at 108); (iv) a cook named Pancho insisted several times that Quinones sit on his lap (*Id.* at 185).

B. Defendant's Lack of Notice of Any Sexually Harassing Conduct

A plaintiff bringing a claim of hostile work environment sexual harassment under Title VII must show that the employer knew or should have known of the harassment and failed to take prompt remedial action. See Jones v. Flagship Int'l, 793 F.2d 714, 720 (5th Cir. 1986). Notice of the harassment may be actual or constructive, and a showing of pervasive harassment can result in a finding of constructive notice. See Williamson v. City of Houston, Texas, 148 F.3d 462, 464-65 (5th Cir. 1998). Plaintiff and Defendant dispute whether the harassment at Café Acapulco was so ongoing and apparent that Defendant's managers should have known that the harassment was taking place.

Whether or not Defendant is deemed to have had constructive notice of any sexual harassment, Plaintiff has produced sufficient evidence to support a finding that Defendant had actual notice of the allegations of a hostile work environment at Café Acapulco. An employer receives actual notice of sexual harassment when an employee brings a complaint to management's attention or management actually witnesses harassment taking place. See EEOC v. Horizons Hotel Corp., 831 F. Supp. 10, 14-15 (D. P.R. 1993).

Defendant argues that Quinones never provided it with actual notice of any sexually harassing conduct, pointing out that Quinones never reported many incidents of what she alleges was sexual harassment to any manager. When Quinones did complain to management, moreover, she reported conflicts but did not state that she considered them instances of sexual harassment. See Def's Mot. at 6-8; Def's Brief in Support of Def's Mot. at 3. However, Plaintiff maintains that Defendant's management actually observed incidents of sexual harassment. Several female employees allege that Hamid Adibi, Defendant's assistant manager, was present in the kitchen on

some occasions during which he witnessed the kitchen staff's verbal harassment of the female employees. See Quinones Dep. at 85; Gray Dep. at 16, 18-19.

Quinones contends that she did inform management in the spring of 1996 that she was experiencing sexual harassment at the hands of the kitchen staff and Mo Adibi when she complained to Ali Adibi, Defendant's manager, of unfair disciplinary treatment in the restaurant. See Quinones Dep. at 42, 108-11. Furthermore, when Quinones complained to Officer Miguel Montalvo of the Arlington Police Department on September 28, 1996, that she was experiencing sexual harassment on the job, he immediately relayed the complaint to Café Acapulco Assistant Manager Hamid Adibi. See Montalvo Decl., Pl's Resp.[4] At least one other employee, Kytari Chapman, complained to management of sexual harassment; her complaint came in the summer of 1997, about six months after Defendant received notice of the Charge of Discrimination filed by Quinones. See Chapman Decl., Pl's Resp. In sum, Plaintiff has shown sufficient evidence relating to the issue of Defendant's notice of the alleged sexual harassment that summary judgment on these grounds would be improper.

C. Defendant's Investigation and Remediation of Objectionable Conduct

Where an employer takes prompt action upon learning of alleged sexual harassment by a non-supervisory employee, the employer is not liable under Title VII. See Carmon v. Lubrizol Corp., 17 F.3d 791, 793 (5th Cir. 1994). Here, Defendant argues that it acted promptly to remedy all problems brought to its attention.[5] However, Quinones testified that management

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[4] Defendant objects to Montalvo's testimony as "unbelievable." Because issues of credibility are to be resolved by a jury, this objection is overruled.

[5] Specifically, Defendant claims that it investigated the conflict between Quinones and Mo Adibi; instructed the kitchen staff to give Quinones her food orders when Quinones complained the staff was refusing to

refused to address her complaints about the harassment by the kitchen staff and Mo Adibi because management claimed that Quinones was the only one having problems with other employees. See Quinones Dep. at 87, 111. Quinones also testified that when she asked manager Ali Adibi how she was to respond to harassment from fellow employees, Adibi told her to ignore it. See id. at 80-81. Adibi's response to complaints of harassment by Kytari Chapman was that the problem was her fault and she wasn't doing her job properly. Chapman claims that when she raised the issue of sexual harassment in an employee meeting, Adibi told her to shut up and that he didn't want to hear about it.[6]

Although female employees allege that Hamid Adibi personally witnessed the kitchen staff's sexually harassing comments and behavior, Hamid has never warned, disciplined, or terminated any employee for sexual harassment. See Hamid Adibi Dep. at 47. Additionally, there was no written policy on sexual harassment for employees or managers of Café Acapulco before September 1998. See Ali Adibi Dep. at 16, 111. Because a reasonable jury could find that this evidence shows that Defendant made no effort to remedy the complaints of sexual harassment at Café Acapulco, summary judgment on this basis would be inappropriate.

D. Constructive Discharge

To establish constructive discharge, a plaintiff must show that the employer made its employee's working environment so intolerable that a reasonable employee would feel forced to resign. See Barrow v. New Orleans S.S. Ass'n, 10 F.3d 292, 297 (5th Cir. 1994). Defendant

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do so; and investigated and remedied another employee's complaint of sexual harassment. See Def's Brief in Support of Def's Mot. at 8-9.

[6] Defendant objects to this evidence as not credible or probative because it is vague and overly general. Because issues of credibility are to be resolved by a jury, this objection is overruled.

contends that it told Quinones she did not have to quit working at Café Acapulco. Additionally, Quinones's letter of resignation does not mention sexual harassment as her reason for leaving but rather "constant rude remarks made to me by a few co-workers." Quinones Dep. at 146-47. Therefore, Defendant argues that in fact Quinones's inability to get along with her fellow employees was the root of her dissatisfaction with her employment at Café Acapulco. However, Quinones claims that when she told Ali Adibi that she could not ignore the harassment by the kitchen staff and Mo Adibi, Ali replied, "Well, if you don't like it, there's three doors. You can get out." See Quinones Dep. at 80-81.

Furthermore, Kytari Chapman claims that Ali Adibi's repeated refusals to address her complaints compelled her to leave Café Acapulco. When Chapman raised the issue of sexual harassment in an employee meeting, Adibi allegedly told her to shut up and that he didn't want to hear about it. Chapman walked out of the meeting and quit. See Chapman Decl., Pl's Response.[7] Given these circumstances, the Court finds there is a fact issue with respect to the nature of the circumstances surrounding Quinones's resignation and whether a reasonable employee would feel compelled to resign in such a situation. Summary judgment on this basis would be improper given such a record.

For the reasons set forth above, the Court DENIES Defendant's Motion for Summary Judgment.

So ORDERED, this 23rd day of March, 2000.

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[7] Defendant objects to this evidence as not credible or probative because it is vague and overly general. Because issues of credibility are to be resolved by a jury, this objection is overruled.

JORGE A. SOLIS
UNITED STATES DISTRICT JUDGE