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United States District Court, N.D. Texas, Dallas Division.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Plaintiff,
v.
FENYVES & NERENBERG, M.D.P.A., formerly d/b/a MULTICARE FAMILY CLINIC, et al., Defendants.

No. CIV.A. 3:97–CV–2322–D. | March 9, 1999.

Opinion

MEMORANDUM OPINION AND ORDER

FITZWATER, District J.

***1** The court revisits this action under Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. § 2000e *et seq.,* to address motions for partial summary judgment filed by defendant Fenyves & Nerenberg, M.D.P.A. ("F & N") and plaintiff Equal Employment Opportunity Commission ("EEOC"), and a motion for attorney's fees by dismissed-defendants Texas Healthcare Network, Inc. ("THN") and Columbia/HCA Healthcare Corporation ("Columbia").[1] For the reasons that follow, the court grants in part and denies in part F & N's motion, grants in part and denies in part the EEOC's motion, and denies THN and Columbia's motion.

[1] F & N has also filed objections to and a motion to strike the EEOC's summary judgment evidence. Except to the extent the court explicitly sustains the objections and motion in this memorandum opinion, the court denies the motion as moot because it the court has not otherwise relied on inadmissible evidence in reaching its decision.

F & N also objects to the EEOC's failure to comply with N.D.Tex. Civ. R. 56.5(c). This Rule took effect on April 15, 1998. Except in specific pre–1998 cases in which the court has expressly notified the parties that the 1998 summary judgment rule amendments will apply, the court does not apply these amendments to such cases.

I

The EEOC sued defendants F & N, THN, and Columbia, contending they were liable pursuant to Title VII for acts of sexual harassment and retaliation committed by Steven Fenyves, M.D. ("Dr.Fenyves") against Regina Moore ("Moore"), Mildred Sewell ("Sewell"), Cynthia Aguirre ("Aguirre"), and Mary Ramon ("Ramon"). On July 6, 1998 the court filed a memorandum opinion and order in which it dismissed the EEOC's actions against THN and Columbia on the ground that they could not be held liable as successors to F & N.

On November 25, 1998 the EEOC filed a motion for partial "nonsuit" concerning the claims of Sewell and Ramon. The EEOC's motion was partially opposed on the material ground whether the parties should bear their own fees and costs. The motion was not accompanied by a brief, as required by N.D. Tex. Civ. R. 7.1(d). That same day, the court filed an order that provided that it would treat the motion as a Fed.R.Civ.P. 41(a)(2) motion to dismiss,[2] which it would consider according to the factors addressed in *Radiant Technology Corp. v. Electrovert USA Corp.,* 122 F.R.D. 201 (N.D.Tex.1988) (Fitzwater, J.). The court directed that the EEOC file a brief that conformed to the requirements of Rule 7.2, and stated that defendant's response to the motion would not be due until 20 days after the EEOC's supporting brief was filed. Although the EEOC has not yet complied with the court's November 25, 1998 order, the summary judgment motions are briefed only as to Moore and Aguirre[3] and the parties apparently no longer consider the claims of Sewell and Ramon to be part of the suit. Only the EEOC's claims on behalf of Moore and Aguirre remain against F & N, the sole defendant.[4]

[2] This is so because the term "nonsuit" is found in Tex.R. Civ. P. 162 and is not used in federal procedure.

[3] F & N states in its motion:

> The EEOC has agreed to voluntarily dismiss (and is in the process of filing the necessary papers to do so) all claims against Defendant that it was pursuing on behalf of two other individuals: Mary Ramon Verdin and Mildred Sewell. Therefore, the EEOC's original claims on behalf of Ramon Verdin and Sewell are not addressed in this Motion for Partial Summary Judgment.

D. Mot. for PSJ at 1 n. 1.

[4] In view of the briefing, the court grants the EEOC's November 25, 1998 motion for partial "nonsuit" and dismisses with prejudice, at each party's respective costs, the claims it brought on behalf of Sewell and Ramon. This relief—dismissal without taxing defendant's costs against the plaintiff, provided that the

dismissal is with prejudice—is consistent with that which the court would usually award under the *Radiant Technology* factors.

At the time of the events in question, F & N was a Texas professional association that consisted of Dr. Fenyves and Dr. David Nerenberg ("Dr.Nerenberg"). F & N operated the Multicare Family Clinic ("Clinic") and employed Moore and Aguirre. A separate entity, of which Drs. Fenyves and Nerenberg were the sole members, owned F & N's assets. The assets were sold on December 16, 1996 when West 9th Street Healthcare, Inc. ("West 9th Street"), a nonprofit organization, purchased the business. THN later merged with West 9th Street. At that time, the employment of all employees of F & N ceased. Some former employees became employees of Columbia, the new management company at the Clinic, and Drs. Fenyves and Nerenberg became employees of the entity that ultimately held the Clinic's assets. Although F & N continues as a viable entity, the result of these transactions is that it no longer has any employees or owns or operates any business that has employees or would have reason to have employees.

***2** The EEOC maintains that F & N employed Moore in its Clinic as a medical assistant from approximately May 1996 until October 7, 1996, when F & N discharged her. Aguirre worked at the Clinic for approximately three months, concluding on October 15, 1996 when she was terminated. Both Aguirre and Moore allege they were subjected to unwelcome sexual conduct and comments by Dr. Fenyves. Specifically, Aguirre and Moore assert that Dr. Fenyves touched them on the head, face, arm, breasts, hips, and shoulders; stared and leered at them in a sexual manner; through his clothes, rubbed his genitals against them; and commented about Aguirre's beauty. Both Aguirre and Moore contend that they notified Dr. Fenyves that his comments and conduct were neither welcomed nor appreciated. Both maintain that they objected and resisted Dr. Fenyves' advances within weeks before their respective discharges.

F & N contends that in late September 1996 Tammy Harpster ("Harpster") was selected to be the new manager of the Clinic. From October 1996 through December 1996 Judy Lisenby ("Lisenby") assisted Harpster with personnel and administrative matters. Both Harpster and Lisenby had full authority to make staffing changes or adjustments to ensure an efficient medical practice and quality care for patients. Lisenby learned that Moore intended to call Dr. Fenyves' wife to tell her that Dr. Fenyves and Lisenby were involved in sexual conduct. After F & N temporarily suspended Moore, Harpster and Lisenby ultimately decided to terminate Moore for her improper conduct. F & N contends that they did not consult Dr. Fenyves before Moore's termination.

Shortly after Harpster began her employment, she assessed Aguirre's position and concluded that her job responsibilities were nominal and not even being performed. Based on Aguirre's lack of responsibilities and apparent contribution to the Clinic, Harpster concluded that F & N should eliminate her position. Harpster did not consult Dr. Fenyves before terminating Aguirre's employment. At the time of Moore's and Aguirre's terminations, no Clinic employee had ever complained to Harpster or Lisenby about sexual harassment or inappropriate conduct or comments of a sexual nature by Dr. Fenyves.

F & N now moves for summary judgment on the EEOC's retaliation and *quid pro quo* sexual harassment claims.[5] F & N argues that Dr. Fenyves, the alleged sexual harasser, did not make any adverse employment decisions as to Aguirre and Moore and did not have any input into the decisions to suspend and terminate their employment. F & N contends that the decisionmakers were not aware of any alleged sexual harassment of Moore or Aguirre or of their complaints regarding such conduct. Further, F & N maintains that it terminated Moore and Aguirre for legitimate, nondiscriminatory reasons. Alternatively, F & N seeks summary judgment on the EEOC's claim for lost damages on behalf of Aguirre and Moore for their lack of diligence in pursuing subsequent employment and/or failing to make reasonable and good faith efforts to maintain the substantially equivalent employment that they did obtain. Finally, F & N seeks summary judgment on the EEOC's claim for nonmonetary, injunctive relief, contending that because F & N no longer has any employees, the EEOC cannot practically obtain the requested relief against F & N.

[5] In light of the Supreme Court's recent decisions in *Burlington Industries, Inc. v. Ellerth,* 524 U.S. 742, 118 S.Ct. 2257 (1998), and *Faragher v. City of Boca Raton,* 524 U.S. 775, 118 S.Ct. 2275 (1998), the court will not use the term *quid pro quo* in referring to this claim. The Supreme Court held that "[t]he terms *quid pro quo* and hostile work environment are helpful, perhaps, in making a rough demarcation between cases in which threats are carried out and those where they are not or are absent altogether, but beyond this are of limited utility." *Burlington,* 524 U.S. at ___, 118 S.Ct. at 2264. Instead, the court will refer to this cause of action as the EEOC's claim that Moore and Aguirre suffered an adverse tangible employment action resulting for refusing to submit to Dr. Fenyves' sexual advances.

***3** The EEOC seeks partial summary judgment on four of F & N's affirmative defenses.

II

The court first considers the EEOC's retaliation claim. The EEOC argues that F & N retaliated against Moore by suspending and then terminating her employment, and against Aguirre by discharging her, after each objected and refused to cooperate with and participate in Dr. Fenyves' unwelcome sexual conduct and comments. F & N maintains that the EEOC cannot establish a prima facie case of retaliation and, even if it can, F & N has produced evidence of legitimate, nondiscriminatory reasons for suspending and terminating the employment of Moore and Aguirre and the EEOC cannot show that these are pretexts for retaliation.

A

The *McDonnell Douglas*[6] method of proof applies to retaliation claims. *See Long v. Eastfield College,* 88 F.3d 300, 304 (5th Cir.1996). To establish a prima facie case of unlawful retaliation, the EEOC must demonstrate that (1) Moore and Aguirre engaged in activity protected by Title VII; (2) an adverse employment action occurred; and (3) a causal link existed between the protected activity and the adverse employment action. *Id.*

6 *McDonnell Douglas Corp. v. Green,* 411 U.S. 792 (1973).

F & N does not dispute for summary judgment purposes that the EEOC has met the first two elements. *See* D. Rep. Br. at 3. Only the causation element is at issue.[7] This element is "much less stringent" at the prima facie stage than at the ultimate issue stage. *Id.* at 305 n. 4. "[A] plaintiff need not prove that her protected activity was the sole factor motivating the employer's challenged decision in order to establish the 'causal link' element of a prima facie case." *Id.* (citing *De Anda v. St. Joseph Hosp.,* 671 F.2d 850, 857 n. 12 (5th Cir.1982)). The court holds that the EEOC has produced sufficient evidence to satisfy its burden of establishing a prima facie case.

7 In contending that the EEOC cannot establish a prima facie case of retaliation, F & N asserts that the EEOC cannot satisfy the causation element because Dr. Fenyves, the alleged harasser, did not make, or have any input in, the decisions to suspend and terminate Moore and to discharge Aguirre. D. Br. Support of Mot. PSJ at 2. The EEOC responded to this argument, P. Br. at 14–16, and F & N discussed it extensively in its reply brief, D. Rep. Br. Support of Mot. PSJ at 3–6. Because F & N advances this argument in the context of the EEOC's prima facie case, and in view of the "much less stringent" standard that applies at this stage, the court holds that the argument is inadequate to support the legal conclusion that the EEOC has failed to carry its prima facie burden.

B

Because the EEOC has established a prima facie case, the burden of production has shifted to F & N to produce evidence of a legitimate, non-retaliatory reason for the employment decisions in question. *Id.* at 305.

F & N has introduced summary judgment evidence that it suspended and then terminated Moore based on improper workplace conduct. Lisenby testified that she sent Moore home, and that she and Harpster later terminated Moore's employment, because, instead of focusing on her job duties, Moore began spreading rumors about an alleged affair that involved Dr. Fenyves. Lisenby considered such behavior "highly disruptive and destructive to the work environment ." D.App. at 160. Moore admitted that she engaged in this conduct. Discharging an employee for disruptive and improper conduct is a legitimate, non-retaliatory business decision. *See Jackson v. Delta Special Sch. Dist. No. 2,* 86 F.3d 1489, 1494–95 (8th Cir.1996).

F & N has also adduced proof that it terminated Aguirre as part of a legitimate restructuring of the Clinic staff and because Aguirre was not performing the tasks assigned to her. When Harpster commenced employment as F & N's manager, she was given authority to review all job positions and eliminate unnecessary ones. After reviewing Aguirre's position, Harpster concluded that she had negligible job responsibilities, was not performing the duties she had been assigned, and made no other apparent contributions. Harpster concluded that Aguirre should be discharged in order to increase the efficiency of the Clinic's operations and to improve patient care. Harpster had never heard that Aguirre allegedly had been sexually harassed and could not have based her decision on Aguirre's response to Dr. Fenyves' conduct. These are legitimate, non-retaliatory reasons for the adverse employment actions in question.

C

***4** Because F & N has met its burden of production "the focus shifts to the ultimate question of whether the defendant unlawfully retaliated against the plaintiff." *Id.* at 305.

> The ultimate determination in an unlawful retaliation case is whether the conduct protected by Title VII was a "but for" cause of the adverse employment decision. In other words, even if a plaintiff's protected conduct is a substantial element in a defendant's decision to terminate an employee, no liability for unlawful retaliation arises if the employee would have been terminated even in the absence of the protected conduct.

Id. at 305 n. 4 (citations omitted). The EEOC is now obligated to introduce evidence that would permit a reasonable trier of fact to find a reasonable inference of intentional retaliation.

1

The EEOC points first to the proximity in time, *i.e.,* several weeks, between Moore's and Aguirre's respective opposition to Dr. Fenyves' sexual advances and their terminations, contending it is sufficient to create a genuine issue of material fact. The court disagrees that this connection is alone adequate to avoid summary judgment. The Eighth Circuit held in *Stevens v. St. Louis University Medical Center,* 97 F.3d 268, 272 (8th Cir.1996), that "[e]ven assuming that a mere temporal connection between the filing of an EEOC charge and firing could alone establish a *prima facie* case of discrimination, we do not believe that the inference to be drawn from the temporal connection is alone enough to prove pretext and satisfy the third stage of the *McDonnell* test." *See Armstrong v. City of Dallas,* 997 F.2d 62, 67 (5th Cir.1993) (stating that pretext could not be established in face of employer's legitimate reasons despite temporal proximity of plaintiff's discrimination complaint and adverse consequences); *Underwood v. East Texas State Univ.,* 1998 WL 204624, *6 (N.D.Tex. Apr. 15, 1998) (Fish, J.) ("Although the court may consider proximity in time as a factor supporting causation, proximity alone is a slender reed on which to avoid summary judgment."). The court holds that the temporal connection alone, or in combination with other evidence on which the EEOC relies, is insufficient to create a genuine issue of material fact.

2

The EEOC maintains that there is evidence that creates a genuine issue of material fact whether F & N's proffered reasons for terminating Aguirre are pretexts for intentional retaliation. It points to evidence that during her three months of employment, Aguirre worked on referrals with Diana Ramon ("D.Ramon"), a busy assignment that involved approximately 15 referrals per day; that D. Ramon requested another employee to assist her with referrals after F & N discharged Aguirre; and that the Clinic hired someone to replace Aguirre concerning her referral work. The EEOC posits that "[i]t is simply not credible that this busy, hectic clinic had no work for Cynthia Aguirre who had spent the three previous months cashiering, verifying insurance and doing referrals." P. Br. Opposition to Mot. PSJ at 17; *see* P.App. at 201.

***5** The EEOC has not presented sufficient evidence to create a genuine issue of material fact. It first cites page 60 of Aguirre's deposition. P. Br. Opposition to Mot. PSJ at 16. This page is not included any either party's appendix. *See* P.App. at 178–79 (skipping from page 1 to page 96 of Aguirre's deposition); D.App. at 17–18 (skipping from page 57 to page 66 of Aguirre's deposition). The court is not required to comb the record to find this page of Aguirre's deposition or to find the correct page in the record in which the cited facts can be found.[8]

[8] In general, Fed.R.Civ.P. 56 obligates a party to designate the specific facts in the record that create genuine issues precluding summary judgment. "Rule 56 does not impose a duty on the district court to sift through the record in search of evidence to support a party's opposition to summary judgment." *Doddy v. Oxy USA, Inc.,* 101 F.3d 448, 463 (5th Cir.1996) (citing *Jones v. Sheehan, Young & Culp, P.C.,* 82 F.3d 1334, 1338 (5th Cir.1996)); *accord Stults v. Conoco, Inc.,* 76 F.3d 651, 657 (5th Cir.1996). The court has no obligation to consider evidence that the nonmovant does not bring forth in opposition to the summary judgment motion. *Doddy,* 101 F.3d at 463 (citing *Copsey v. Swearingen,* 36 F.3d 1336, 1347 n. 9 (5th Cir.1994)). To satisfy her burden, a nonmovant is required to identify specific evidence in the record, and to articulate the precise manner in which that evidence supports her claims. *Forsyth v. Barr,* 19 F.3d 1527, 1537 (5th Cir.1994) (citing *Topalian v. Ehrman,* 954 F.2d 1125, 1131 (5th Cir.1992)). When a party fails to refer to items in the record, the evidence is not properly before the court in deciding whether to grant the motion. *Skotak v. Tenneco Resins, Inc.,* 953 F.2d 909, 915 (5th Cir.1992); *Nissho–Iwai Am. Corp. v. Kline,* 845 F.2d 1300, 1307 (5th Cir.1988) (on rehearing) (denying rehearing after plaintiff asserted that deposition was of record when district court granted partial summary judgment, and holding that because plaintiff failed to designate, or in any way refer to, deposition as source of factual support for response to motion, deposition was never made part of competent summary judgment record before district court).

The EEOC next cites page 54 of D. Ramon's deposition. P. Br. Opposition to Mot. PSJ at 16. D. Ramon testified, however, as follows:

> Q. Did you go and protest to anybody that you had so much work to do that you really needed Cynthia Aguirre there to help you?
>
> A. No. I asked Tammy if she could get me some help, but I didn't actually mention Cynthia's name.

P.App. at 779. This snippet, in which D. Ramon stated that she asked for help, is insufficient to permit a reasonable jury to find that F & N management's view that Aguirre's job was expendable and that she was not performing her assigned duties was a pretext for intentional retaliation. Indeed, D. Ramon also testified that "[Aguirre] was a floater and I don't know who put her or if she took it upon herself to start helping me do the referrals." *Id.* at 778. This is hardly the job description of an essential employee.

The EEOC finally cites Aguirre's deposition testimony at page 225 to support the assertion that F & N hired someone to replace her doing referrals work. P. Br. Opposition to Mot. PSJ at 16. F & N properly objected to this testimony based on hearsay and lack of personal knowledge. *See* D. Objs. & Mot. Strike at 6, ¶ 6. The court sustains the objection and grants the motion to strike in this respect. This evidence is not properly before the court and the EEOC cannot rely on it to oppose summary judgment.[9]

[9] There is, moreover, testimony from Harpster that F & N never filled Aguirre's position.

Even assuming the EEOC has presented evidence that would permit a finding of pretext, it has failed to introduce evidence that would permit a reasonable inference that F & N terminated Aguirre's employment in retaliation for her participation in protected activities. *See Walton v. Bisco,* 119 F.3d 368, 370 (5th Cir.1997) ("[T]he evidence taken as a whole must create (1) a fact issue regarding whether each of the employer's stated reasons was what actually motivated it and (2) a reasonable inference that [retaliation] was a determinative factor in the actions of which plaintiff complains.").

Aguirre's retaliation claim is dismissed with prejudice.

3

In an attempt to show pretext and intentional retaliation regarding Moore's suspension and termination, the EEOC has introduced proof that Moore was not the only employee who spread the rumor involving Dr. Fenyves and Lisenby; others who did so were not terminated. F & N points out, however, that Moore was the only employee at the Clinic who, by her own admission, revealed her intention to call Dr. Fenyves' wife to tell her that Dr. Fenyves and Lisenby were sexually involved. Lisenby made a judgment call that Moore's conduct was highly disruptive and destructive to the work environment. Harpster concurred in her assessment.

***6** The EEOC also maintains that F & N has produced no other evidence of poor work performance by Moore. This argument has no bearing on F & N's decision to terminate her because F & N's proof shows that it discharged her for precipitating work place disharmony, not for unsatisfactory job performance.

The court concludes that a reasonable jury could not find intentional retaliation. A reasonable trier of fact could only find that F & N would have fired Moore for instigating and attempting to perpetuate the rumor despite her refusal of Dr. Fenyves' alleged sexual advances. *See Long,* 88 F.3d at 305 n. 4.

Moore's retaliation claim is dismissed with prejudice.

III

The court now addresses the EEOC's claims that Moore and Aguirre suffered an adverse tangible employment action for refusing Dr. Fenyves' sexual advances.

Under *Burlington Indus., Inc. v. Ellerth,* 524 U.S. 742, 118 S .Ct. 2257 (1998), and *Faragher v. City of Boca Raton,* 524 U.S. 775, 118 S.Ct. 2275 (1998), "[w]hen a plaintiff proves that a tangible employment action resulted from a refusal to submit to a supervisor's sexual demands, he or she establishes that the employment decision itself constitutes a change in the terms and conditions of employment that is actionable under Title VII." *Burlington,* 524 U.S. at ___, 118 S.Ct. at 2265. The employer is strictly liable in such cases. *See id.* at ___, 118 S.Ct. at 2269. A tangible employment action consists of significant changes in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits. *Id.* at ___, 118 S.Ct. at 2268.

The court holds that the EEOC has failed to present a genuine issue of material fact concerning this claim. The EEOC argues that Dr. Fenyves' alleged statement that female employees should "close [their] eyes and open

widely" to get a pay raise constitutes discrimination. The EEOC has not adduced evidence, however, that Moore or Aguirre were ever denied a requested pay raise or denied a raise to which they were entitled. Moreover, Moore's and Aguirre's testimony refutes any suggestion that a job benefit was conditioned on their participation in unwanted sexual behavior or that Dr. Fenyves threatened them with the loss of a tangible job benefit if they refused to participate in such behavior. For example, Aguirre testified that Dr. Fenyves neither promised her a promotion or raise if she went along with his alleged sexual advances nor threatened to fire her or take other adverse action against her if she refused to go along with the sexual advances. Moore did not testify about any such comments. Rather, she asserted that Dr. Fenyves stared, smiled, or laughed or touched her hand when he engaged in the allegedly sexually harassing conduct toward her.

The EEOC must introduce evidence that would permit a reasonable trier of fact to find that a tangible employment action resulted from a refusal to submit to a supervisor's demands. *Burlington,* 524 U.S. at ___, 118 S.Ct. at 2265. The EEOC has failed to produce such evidence. It has not adduced proof that would support a reasonable finding that Moore's and Aguirre's terminations resulted from, or were caused by, their refusal to submit to alleged sexual advances of Dr. Fenyves. It has not produced evidence that Dr. Fenyves made acceptance of unwelcome sexual advances a condition to receipt of a job benefit by Moore and Aguirre. Further, the EEOC has not offered evidence that would permit a reasonable finding that an adverse employment action taken against Moore or Aguirre was the result of any refusal to submit to Dr. Fenyves' behavior.

***7** The court grants summary judgment dismissing this component of the EEOC's sex discrimination claim.

IV

Because the court is granting summary judgment on the two EEOC claims at issue in this opinion, and because F & N only seeks summary judgment on the EEOC's claim for lost damages for Moore and Aguirre as an alternative remedy, the court declines to reach the mitigation of damages issue.[10]

[10] A plaintiff is not entitled to back pay where she has not established that her discharge was based on discrimination. *See* 42 U.S.C.2000e–5(g)(2)(A):

> No order of the court shall require ... the payment to [an employee] of any back pay, if such individual was ... suspended or discharged for any reason other than discrimination on account of ... sex ... or in violation of section 2000e–3(a) of this title.

See also Cuesta v. Texas Dept. of Criminal Justice, 805 F.Supp. 451, 461–62 (W.D.Tex.1991) (stating that parole case worker who resigned her position due to sexual harassment was not entitled to award of back pay where harassment was not direct cause of resignation).

V

F & N moves for summary judgment on the EEOC's claim for nonmonetary, injunctive relief. It contends that because F & N no longer has any employees, the EEOC cannot practically obtain the requested relief against F & N.[11] F & N argues that when the assets of its Clinic were sold, the employment of all of its employees ceased. F & N continues to be a viable entity but has no employees and no longer owns or operates any business that has employees or would have reason to have employees. Drs. Fenyves and Nerenberg have no ownership interest in the entity that ultimately held the assets of the Clinic or in the new management company that took over their Clinic.

[11] The EEOC seeks the following nonmonetary, injunctive relief against F & N: (1) a permanent injunction enjoining F & N and others from engaging in any employment practice that discriminates on the basis of sex; (2) a permanent injunction enjoining F & N and others not named in this suit from subjecting its employees to retaliatory treatment; and (3) an order that F & N institute and carry out policies, procedures, and programs that provide equal employment opportunities for employees. Compl. at 4.

The EEOC points out, however, that because F & N is still a viable entity, Drs. Fenyves and Nerenberg can hire new nurses and clerical workers and reactivate their medical practice again. The EEOC asserts that without an established sexual harassment policy in place, the record lacks evidence that the prior illegal practices will not recur. Title VII provides a court with express authority to order injunctive relief. "[O]nce discrimination has been established in a Title VII action, the issuance of an injunction rests in the sound discretion of the district court[.]" *Taylor v. Teletype Corp.,* 648 F.2d 1129, 1135 (8th Cir.1981). Absent clear and convincing proof of no reasonable probability of further noncompliance with the law, a grant of injunctive relief is mandatory. *James v. Stockham Valves & Fittings Co.,* 559 F.2d 310, 354 (5th Cir.1977). The court concludes that a genuine issue of material fact exists with respect to the EEOC's claim for nonmonetary, injunctive relief because of the evidence that a prior practice could recur. Therefore, the court

denies F & N's motion in this respect.

VI

The EEOC moves for partial summary judgment as to F & N's seventh, eighth, eleventh, and fourteenth affirmative defenses.

A

F & N has indicated that it does not intend to pursue the eleventh and fourteenth defenses, *see* D. Br. Opposition to P. Mot. for PSJ at 2 n. 1, and has failed to carry its burden of identifying a genuine issue of material fact as to these two defenses. The court grants summary judgment for the EEOC as to the eleventh and fourteenth defenses. F & N has failed to demonstrate a genuine issue of material fact regarding the eighth affirmative defense. Accordingly, the court grants summary judgment barring that defense.

B

F & N asserts as its seventh affirmative defense that the EEOC has not "properly carried out its responsibilities precedent to bringing such an action." 2d Am. Ans. at 3. The conditions precedent to a suit by the EEOC under § 706(f)(1) of Title VII, 42 U .S.C. § 2000e–5(f)(1), are: (1) filing with the EEOC of a timely charge of discrimination at least 30 days before suit is filed; (2) notice of the charge served on the respondent; (3) an investigation of the charge; (4) a determination by the EEOC that reasonable cause exists to believe that the charge is true; (5) an attempt by the EEOC to eliminate the unlawful employment practices by informal methods of conference, conciliation, and persuasion; and (6) inability of the EEOC to secure from the respondent an acceptable conciliation agreement. *See, e.g., EEOC v. Shell Oil Co.,* 466 U.S. 54, 63–64 (1984).

***8** By asserting that it "attempted to conciliate the charges of discrimination by contacting the Defendant's representatives and sending them letters identifying the types of relief sought by EEOC,"[12] the EEOC suggests that these letters constituted satisfaction of its obligation to conciliate. F & N argues that the EEOC is required to do more than merely go through the conciliation motions; instead, F & N argues, the EEOC is required to engage in "good faith" efforts to achieve voluntary compliance. *See Usery v. Sun Oil Co. (Del.),* 423 F.Supp. 125, 130 (N.D.Tex.1976) (Taylor, C.J.). To satisfy its responsibility to conciliate a Title VII claim in good faith, the EEOC must, at a minimum, (1) present the employer with the reasonable cause for the EEOC's belief that a Title VII violation has occurred, (2) offer the employer an opportunity to achieve voluntary compliance, and (3) respond to the employer's participation in the process in a reasonable and flexible manner. *EEOC v. Klingler Elec. Corp.,* 636 F.2d 104, 107 (5th Cir. Unit A Feb. 1981).

[12] The conciliation letters to which the EEOC refers merely give notice of Aguirre's and Moore's claims and relief sought on May 7, 1997. The letters concluded by stating that the EEOC would contact F & N "to discuss possible conciliation the week of May 26, 1997." *See* P.App. to P. Mot. for PSJ Ex. 8, 9.

F & N argues that the EEOC's offering F & N an opportunity for voluntary compliance by telling F & N that it could resolve the charges by paying full backpay as the EEOC computed it, paying the full amount of punitive and compensatory damages the EEOC calculated, and reinstating some or all of the charging parties, was neither a reasonable nor a remotely flexible approach to the conciliation process. F & N contends that the EEOC completely failed to present F & N with reasonable cause for its belief that a Title VII violation had occurred. F & N also maintains that the EEOC failed to respond reasonably to F & N's attempts to reach an acceptable settlement through mediation.

F & N has adduced evidence that the EEOC did not use good faith by failing reasonably and flexibly to respond to F & N's responses to conciliation efforts. On May 7, 1997 the EEOC sent F & N notices outlining the backpay allegedly owed to Moore and Aguirre and articulating some of the other relief it intended to pursue. On June 10 and 20, 1997 F & N offered to mediate the EEOC's charge. After concluding that "efforts to conciliate may be useless," the EEOC rejected F & N's offer to mediate and indicated it was already prepared to deem conciliation a failure. The court concludes that a genuine issue of material fact exists with respect to the EEOC's compliance with its statutory obligation to conciliate. *See EEOC v. One Bratenahl Place Condominium Ass'n,* 644 F.Supp. 218, 219–220 (N.D.Ohio 1986) (finding no good faith conciliation where EEOC refused to accede to defendant's request for conciliation meeting when defendant would not commit to agreeing to full relief requested by EEOC). The EEOC's motion for summary judgment is therefore denied with respect to F & N's seventh affirmative defense.

VII

Following the court's dismissal of the claims against them, THN and Columbia applied for attorneys' fees pursuant to 42 U.S.C. § 12205, Fed.R.Civ.P. 26(g), and the court's inherent authority. Application at 1. They have failed to brief the court on the second and third grounds and the court therefore denies the application as far as it is based on these grounds.

***9** The court rejects the first ground of defendants' application because they moved for fees under an inapplicable statute. Section 12205 provides that the court, in its discretion, may allow the prevailing party reasonable attorneys' fees in an action or administrative proceeding commenced pursuant to the Americans with Disabilities Act. It does not apply to Title VII actions.[13]

[13] THN and Columbia refer to Title VII in their application, *see* Application at 2, but they base their request for relief on § 12205.

The October 16, 1998 application of THN and Columbia for recovery of attorney's fees is therefore denied.

The court grants F & N's motion in part and denies it in part, grants the EEOC's motion in part and denies in part, and denies THN and Columbia's motion.

SO ORDERED.