IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
DEL RIO DIVISION

Equal Employment Opportunity Commission, Plaintiff,	§	
	§	**CAUSE NO:**
	§	**DR-99-CA-011-OLG**
v.	§	
San Antonio Shoe, Inc., Defendant.	§	

UNITED STATES MAGISTRATE JUDGE'S
REPORT AND RECOMMENDATION

Pending is a motion for partial summary judgment filed by Defendant San Antonio Shoe, Inc. (SAS), and a response filed by Plaintiff Equal Employment Opportunity Commission (EEOC). After reviewing this motion and the response filed by the plaintiff, this Magistrate Judge recommends that the defendant's motion for partial summary judgment be denied.

Background and Procedural History

On April 21, 1998, Gloria Franco filed a Charge of Discrimination against Defendant San Antonio Shoe in the EEOC's San Antonio office. Mr. E. Thomas Price was assigned as the Equal Employment Opportunity Commission (EEOC) investigator for the case. On July 20, 1998, the EEOC issued a Determination signed by San Antonio District Director, Pedro Esquivel, which found SAS violated Gloria Franco's rights under Title VII of the Civil Rights Act of 1964 because of her sex, female. When efforts to settle the case failed, the EEOC filed suit against SAS on March 5, 1999. On February 4, 2000 and March 29, 2000, the court

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entered orders resolving several discovery motions and cross-motions for sanctions.

Discussion

Summary Judgment Standard

Rule 56(c) of the Federal Rules of Civil Procedure allows summary judgment only when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. FED. R. CIV. P. 56(c). All reasonable doubts and inferences must be decided in the light most favorable to the party opposing the motion, *Thornbrough v. Columbus & Greenville R.R. Co.*, 760 F.2d 633, 640 (5th Cir. 1985), and as long as there appears to be some evidentiary support for the disputed allegations, the motion must be denied. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); *Coke v. General Adjustment Bureau, Inc.*, 640 F.2d 584, 595 (5th Cir. 1981) (en banc).

The party moving for summary judgment bears the initial burden of identifying those portions of the pleadings, depositions, answers to interrogatories, and admissions on file, along with affidavits, if any, which it believes demonstrate the absence of genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Where the nonmovant bears the burden of proof on a claim upon which summary judgment is sought, the movant may discharge its summary judgment burden by showing that there is an absence of evidence to support the nonmovant's case. *Id.* at 325. Once the movant satisfies this burden, the nonmovant must then oppose the motion by going beyond the pleadings and by its own affidavits or by depositions, answers to interrogatories, and admissions on file designating specific facts showing a genuine issue for trial. *Id.* at 324. *See also Anderson v. Liberty Lobby, Inc.*, 477 U.S. at 256-57. Summary judgment will be granted 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." *Id.* at 322.

SAS's Arguments

SAS's motion for summary judgment makes essentially two arguments: (1) instances of misconduct occurring in and prior to the year 1996 should be barred by limitations and should form no part of the plaintiff's case against SAS; and (2) the alleged rape of Gloria Franco by Manuel Cuevas occurred away from the workplace and without the knowledge of SAS and, therefore, cannot form the basis for the plaintiff's claim.

Statute of Limitations

SAS's first argument requires the court to decide whether Gloria Franco filed her discrimination complaint with the EEOC in a timely manner. Gloria Franco's charge of discrimination was brought on April 21, 1998. In its motion for partial summary judgment, SAS argues that the sexual harassment suffered by Franco prior to 1996 cannot be used to support her charge of discrimination because it occurred more than 300 days before she filed her discrimination complaint. SAS cites the Fifth Circuit's decision in *Webb v. Cardiothoracic Surgery Assocs. of N. Tex., P.A.*, 139 F.3d 532, 537 (5th Cir. 1998).

In Texas, to maintain a Title VII claim, a plaintiff must file a charge of discrimination with the EEOC within 300 days of the alleged unlawful employment practice. *See Huckabay v. Moore*, 142 F.3d 233, 238 (5th Cir. 1998); *Webb*, 139 F.3d at 537; *Griffin v. City of Dallas*, 26 F.3d 610, 612-13 (5th Cir. 1994); *Anson v. University of Tex. Health Science Ctr.*, 962 F.2d 539, 540 (5th Cir. 1992); *see also* 42 U.S.C. § 2000e-5(e)(1). Generally, the limitations period begins on the date the discriminatory act occurred, and a plaintiff cannot

sustain her claims based on incidents that occurred more than 300 days before the filing of a charge of discrimination. *See Webb*, 139 F.3d at 537; *Messer v. Meno*, 130 F.3d 130, 134 (5th Cir. 1997); *Waltman v. International Paper Co.*, 875 F.2d 468, 474 (5th Cir. 1989). "Congress intended the limitations period contained in § 2000e-5(e)(1) to act as a statute of limitations." *Webb,* 139 F.3d at 537.

Equitable Tolling and Equitable Estoppel

The EEOC attempts to salvage Franco's pre-1996 claims by urging the application of essentially two equitable doctrines: the equitable tolling doctrine and the so-called "continuing violation" theory. The EEOC first argues that Franco's claims should be equitably tolled because SAS never provided information to its employees regarding their rights under federal anti-discrimination laws. The EEOC maintains that SAS perpetuated a work environment where its employees were "kept ignorant of their rights under federal laws," and that a genuine issue of material fact exists as to whether Franco should have known to file a charge of discrimination prior to April 1998.

It is not entirely clear from this argument whether the EEOC is urging the court to apply the doctrine of equitable estoppel, equitable tolling, or some combination of the two. The Fifth Circuit recognizes a distinction between equitable tolling and equitable estoppel:

> The Fourth Circuit recently explained the difference between equitable tolling and equitable estoppel: 'Equitable tolling focuses on the plaintiff's excusable ignorance of the employer's discriminatory act. Equitable estoppel, in contrast, examines the defendant's conduct and the extent to which the plaintiff has been induced to refrain from exercising his rights.' A case of equitable tolling would arise, for example, if the employer had failed to post information about employees' rights under federal anti-discrimination laws, or if the employee 'could not by the exercise of reasonable diligence have discovered essential information bearing on his claim.' Equitable tolling focuses on the employee's ignorance, not on any possible misconduct by the employer.
>
> Under equitable estoppel, an employer is estopped from asserting the filing period if the employer misrepresented or concealed 'facts necessary to

> support a discrimination charge.' If the defendant did conceal facts or misled the plaintiff and thereby caused the plaintiff not to assert his rights within the limitations period, the defendant is estopped from asserting the EEOC filing time as a defense.

Rhodes v. Guiberson Oil Tools Div., 927 F.2d 876, 878-879 (5th Cir. 1991) (citations omitted) (because of company's misleading statements regarding the reasons for plaintiff's discharge, plaintiff was without sufficient facts to be aware of possible age discrimination claim and therefore equitable estoppel applied); *see also Christopher v. Mobil Oil Corp.*, 950 F.2d 1209, 1215 (5th Cir. 1992) (equitable tolling and equitable estoppel "doctrines provide for tolling of the statute of limitations when a plaintiff's unawareness of his ability to bring a claim – either unawareness of the facts necessary to support a discrimination charge or unawareness of his legal rights – is due to defendant's misconduct.").

Although the present case potentially raises both issues, the court finds the summary judgment evidence focuses more on equitable tolling rather than equitable estoppel. Unlike the *Webb* case cited by SAS, for example, there is no evidence here that SAS instituted a specific sexual harassment policy or that Franco received an employee handbook clearly explaining the anti-harassment policy and her rights under federal law. *See Webb*, 139 F.3d at 535. The *Rhodes* court noted that a case of equitable tolling would potentially arise where the employer fails to post information about employees' rights under federal anti-discrimination laws. *See Rhodes*, 927 F.2d at 878. The federal anti-discrimination poster cited by SAS as proof that it informed its employees of their rights under Title VII does not specifically mention the words "sexual harassment" and only refers to Title VII's prohibition of "discrimination in hiring, promotion, discharge, pay, fringe benefits, job training, classification, referral, and other aspects of employment on the basis of color, religion, sex or national origin." Furthermore, there is summary judgment evidence suggesting that the management of SAS never explained

the meaning of this poster to its supervisors or employees; that SAS's human resources representative in the Del Rio plant where Franco worked did not know and could not articulate that Title VII's prohibition of "discrimination based on sex" includes a prohibition against sexual harassment; and that the defendant's corporate representative, Lew Hayden, when questioned about the poster, was unaware of its contents and could not remember the last time he had reviewed it. After carefully reviewing this summary judgment evidence in the light most favorable to the plaintiff, the non-moving party, *River Production Co., Inc. v. Baker Hughes Production Tools, Inc.*, 98 F.3d 857, 859 (5th Cir. 1996) (citing Fed. R. Civ. P. 56(c)), the court finds an issue of material fact as to whether Franco "knew or should have known" to file a charge of discrimination with the EEOC. *See Hederson v. AT & T Corp.*, 933 F.Supp. 1326, 1336 (S. D. Tex. 1996) (treating applicability of equitable tolling doctrine as question of fact).

Continuing Violation

The EEOC's second argument asserts that the defendant's conduct in and prior to 1996 should be considered even though it occurred more than 300 days before her charge of discrimination was filed with the Texas Employment Commission because this conduct was part of a "continuing violation." Courts recognize an exception to the statute of limitations "where the unlawful employment practice manifests itself over time, rather than as a series of discrete acts." *Webb*, 139 F.3d at 537. In a nutshell, "[t]he continuing violation theory provides that where the last act alleged is part of an ongoing pattern of discrimination and occurs within the filing period, allegations concerning earlier acts are not time-barred." *McGregor v. Louisiana University Board of Supervisors*, 3 F.3d 850, 866 (5th Cir. 1993) (quoting *Curry v. United States Postal Serv.*, 583 F.Supp. 334, 342 (S. D. Ohio 1984)); *Hendrix v. Yazoo City*, 911 F.2d 1102, 1103 (5th Cir. 1990). In order to extend the statute of

limitations under this exception, however, the plaintiff must show a series of related acts, one or more of which falls within the 300-day limitations period. *See Webb*, 139 F.3d at 537; *Messer*, 130 F.3d at 134-35; *see also Delaware State College v. Ricks*, 449 U.S. 250, 258 (1980). As the Fifth Circuit explained in *Messer*:

> The continuing violation theory relieves a plaintiff of establishing that all of the complained-of conduct occurred within the actionable period if the plaintiff can show a series of related acts, one or more of which falls within the limitations period. . . . The core idea of the continuing violations theory, however, is that equitable considerations may very well require that the filing periods not begin to run until facts supportive of a Title VII charge or civil rights action are or should be apparent to a reasonably prudent person similarly situated. The focus is on what event, in fairness and logic, should have alerted the average lay person to act to protect his rights. At the same time, the mere perpetuation of the effects of time-barred discrimination does not constitute a violation of Title VII in the absence of independent actionable conduct occurring within the statutory period. Thus, a plaintiff can avoid a limitations bar for an event that fails to fall within the statutory period where there is a persisting and continuing system of discriminatory practices in promotion or transfer that produces effects that may not manifest themselves as individually discriminatory except in cumulation over a period of time.

130 F.3d at 134-35 (citations, quotation marks, and brackets omitted).

Although there is no definitive standard for what constitutes a continuing violation, the plaintiff must demonstrate more than a series of discriminatory acts. *See Huckabay*, 142 F.3d at 238. The plaintiff must show an organized scheme leading to and including a present violation, *Berry v. Board of Supervisors of L.S.U.*, 715 F.2d 971, 981 (5th Cir. 1983), such that it is the cumulative effect of the discriminatory practice, rather than any discrete occurrence, that gives rise to the cause of action. *See Huckabay*, 142 F.3d at 238; *Messer*, 130 F.3d at 135; *Glass v. Petro-Tex Chemical Corp.*, 757 F.2d 1554, 1561 (5th Cir. 1985). This inquiry usually involves several factors:

> The first is subject matter. Do the alleged acts involve the same type of discrimination, tending to connect them in a continuing violation? The second is frequency. Are the alleged acts recurring . . . or more in the nature of an isolated work assignment or employment decision? The third factor, perhaps of

> most importance, is degree of permanence. Does the act have the degree of permanence which should trigger an employee's awareness of and duty to assert his or her rights, or which should indicate to the employee that the continued existence of the adverse consequences of the act is to be expected without being dependent on a continuing intent to discriminate?

Berry, 715 F.2d at 981. Importantly, however, the particular context of individual employment situations requires a fact-specific inquiry that cannot easily be reduced to a formula. *Id.*

In the instant case, although Franco filed her complaint with the Texas Employment Commission more than 300 days after 1996, the EEOC argues that Franco's pre-1996 claims are not time-barred because the facts underlying her claims fall squarely within the "continuing violation" exception. After reviewing the summary judgment record, the court agrees with the EEOC that all of the *Berry* factors are met in this case. First, all of the incidents alleged by Franco involved the same subject matter, sexual harassment. Second, the frequency is established because Franco claims she was harassed by Manuel Cuevas on an almost daily basis for nearly six years. As for the permanence factor, the court agrees with the EEOC that the sexual harassment allegedly suffered by Franco prior to 1996 was not the kind of violation that would have put a worker on notice that her rights were violated. Although Franco was no doubt aware that Cuevas' acts were sexual in nature and offensive to her, the evidence suggests that she asserted her rights in the only way she knew how - she made repeated complaints to her San Antonio Shoe supervisors. And as mentioned previously, there is no summary judgment evidence that SAS instituted a specific sexual harassment policy or that Franco received an employee handbook or any other written information clearly explaining her rights under federal law concerning sexual harassment. *See Webb*, 139 F.3d at 535. The court again finds, unlike the *Webb* case cited by SAS, that there is a genuine issue of material fact here regarding Franco's "knowledge and understanding of [Cuevas'] conduct." *Id.* at 538.

The Rape Allegation

SAS also argues it should not be held liable for Cuevas' alleged rape of Franco in October or November 1997 because (1) the rape occurred away from the workplace, and (2) Cuevas was not the company's "agent" at the time of the rape because he had no authority to hire or fire employees, or any kind of authority over Franco at the time of the alleged rape.

Beginning with the defendant's assertion that it is not liable for an alleged rape that occurred away from the workplace, the court notes that this argument is not supported by the case law. In *Pfau v. Reed*, for example, the Fifth Circuit specifically held that "the 'gauntlet of sexual abuse' that an employee is required to run need not be confined to working hours in order to affect a 'term, condition, or privilege of employment within the meaning of Title VII.' " *Pfau v. Reed*, 125 F.3d 927, 933 (5th Cir. 1997), *cert. granted, judgment vacated*, 525 U.S. 801 (1998), *judgment reinstated*, 167 F.3d 228, 229 (5th Cir. 1999), *cert. denied*, 120 S.Ct. 49 (1999). The Fifth Circuit also cited the Supreme Court's decision in *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 66-67 (1986), which held that a plaintiff who suffered sexual harassment both during and after office hours had stated a claim under Title VII. *See* 125 F.3d at 933 ("The fact that the Court discussed at length the plaintiff's allegations of sexual harassment outside the office setting indicates that those allegations formed part of the basis for the plaintiff's Title VII claim."). The defendant's argument is overruled.

As for the defendant's assertion that it is not liable for the acts of a supervisor with no direct authority over Franco, or any authority to hire and fire, the court also rejects this argument. Whether Cuevas was Franco's immediate supervisor or had the authority to hire or fire her is not the issue. The Fifth Circuit holds that even if the harasser is a co-worker,[1] the

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[1]Where the alleged harasser is a supervisor, the employer may be held vicariously liable. *Faragher v. City of Boca Raton*, 524 U.S. 775, 118 S.Ct. at 2292-93; *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 118 S.Ct. 2257, 2270, 141 L.Ed.2d 633 (1998). However, where the employee suffered no "tangible employment

employer can be held liable for his conduct where the employer knew or should have known of the harassing conduct yet failed to take prompt remedial action. *See Williamson v. City of Houston*, 148 F.3d 462, 464 (5th Cir. 1998); *Galloway v. Matagorda County*, 35 F.Supp.2d 952, 955 (S.D. Tex. 1999). The applicable standard of care in such cases is negligence. *Williamson*, 148 F.3d at 464-65. Liability may result from either actual or constructive notice, the latter of which "can result from 'showing the pervasiveness of the harassment.' " *Id.* at 465 (quoting *Waltman v. International Paper*, 875 F.2d 468, 478 (5th Cir. 1989)).

> Determining whether a supervisor was in a position to accept notice of harassment for purposes of liability under Title VII entails a different inquiry than that involved in determining an employer's liability for harassment by supervisors. As a number of courts have pointed out, employer liability for harassment by co-workers is direct liability for negligently allowing harassment, not vicarious liability for the harassing actions of employees.

Id. See also Pierce v. Commonwealth Life Ins. Co., 40 F.3d 796, 804 n. 11 (6th Cir. 1994) ("The term 'respondeat superior' - which connotes derivative liability - is an incorrect label for co-worker harassment cases, where the employer is directly liable for its own negligence.") (citation omitted). The court agrees with the EEOC that the issue here is whether the defendant was negligent in allowing the harassment to occur. *Williamson*, 148 F.3d at 465.

Gloria Franco's declaration alleges that she was told by SAS supervisors, and had always understood, that complaints or questions of any kind should first be taken to her back-up supervisors. She claims she was never given any different instructions. She also stated that as an employee of SAS, she was told by her supervisors that the back-up supervisors could

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action," *i.e.*, discharge, demotion, undesirable reassignment, or the like, an employer may raise an affirmative defense to liability or damages. *Id.* To establish this affirmative defense, the employer must show by a preponderance of the evidence that it "exercised reasonable care to prevent and correct promptly any sexually harassing behavior" and that "the plaintiff employee unreasonably failed to take advantage of any preventative or corrective opportunities provided by the employer or to avoid harm otherwise." *Id.* This affirmative defense is not available where the supervisor's harassment culminates in a tangible employment action. *Id.* In the present case, however, there is no indication Manuel Cuevas exercised any direct supervisory authority over Gloria Franco

"write her up" or even fire her. There is also summary judgment evidence that from 1991 until February of 1998, Franco made numerous complaints to supervisors and back-up supervisors Rosie Bowels, Juanita Duran, Mary Esther Mendoza, Lupe Fuentes, John Villareal, and Bertha Sobrevilla regarding sexual advances and obscenities directed towards her by Manuel Cuevas. Supervisor John Villareal recalled relaying Franco's complaints to his supervisor, Mike Dozier, on more than one occasion. He was not aware whether Dozier took any action. Janice Thompson, SAS's in-house counsel, admitted during her deposition that if any of the individuals to whom Franco allegedly brought complaints failed to take action, their failure to act would have been in contravention of their duties as supervisors. In January of 1998, Terry Balderas, the personnel representative for SAS, claims that she investigated a complaint made by Franco for approximately two days and spoke to Mike Dozier, one of Cuevas's supervisors, and to Elisa Alvarez, a witness identified by Franco. When questioned by the plaintiff's counsel, neither person could remember being interviewed by Balderas during the January 1998 investigation. Even so, as a result of the investigation, Cuevas was apparently told Franco's claims could not be substantiated but that he should stay away from her. Franco, however, claims Cuevas continued to harass her even after he was warned to stay away from her, and that shortly before she resigned from SAS on February 13, 1998, she brought the continued harassment to the attention of her supervisors, but they did nothing about it.

As a general rule, an employer takes prompt remedial action if it "took the allegation seriously, it conducted prompt and thorough investigations, and it immediately implemented remedial and disciplinary measures based on the results of such investigations." *Waymire v. Harris County*, 86 F.3d 424, 428 (5th Cir. 1996) (quoting *Carmon v. Lubrizol Corp.*, 17 F.3d 791, 795 (5th Cir. 1994)). "What is appropriate remedial action will necessarily depend on the

particular facts of the case - the severity and persistence of the harassment, and the effectiveness of any initial remedial steps." *Waltman v. International Paper Co.*, 875 F.2d at 468, 479 (5th Cir. 1989). "[T]he employer may be liable despite having taken remedial steps if the plaintiff can establish that the employer's response was not 'reasonably calculated' to halt the harassment." *Id.*

In the present case, the summary judgment evidence suggests that the defendant failed to take any action, much less prompt remedial action, after receiving numerous complaints from Franco before January of 1998; that even after SAS responded in some manner to Franco's January 1998 complaint and warned Cuevas to stay away from her, the response was ineffective because Cuevas continued to harass Franco after he was specifically warned to stay away from her; and that Franco's complaints about the continued harassment were ignored by the management of SAS. After carefully reviewing the summary judgment evidence, the court therefore concludes there are genuine issues of material fact as to whether SAS had actual or constructive notice of the alleged harassment and whether SAS took prompt remedial action to "eradicate the hostile environment" complained of by Gloria Franco. *See Waltman*, 875 F.2d at 479.

Recommendation

SAS's motion for partial summary judgment (docket number 30), filed on January 14, 2000, should be denied.

SIGNED on this 10th day of May, 2000.

DURWOOD EDWARDS
U.S. MAGISTRATE JUDGE

Certificate of Service and Notice of Right to Appeal and/or Object

The United States District Clerk shall serve a copy of this Report and Recommendation on all parties either (1) by certified mail, return receipt requested, or (2) by facsimile if authorization to do so is on file with the Clerk. Pursuant to Title 28 U.S.C. Section 636(b)(1) and Rule 72(b) of the Federal Rules of Civil Procedure, any party who desires to object to this Report and Recommendation must serve and file written objections to the Report and Recommendation within ten (10) days after being served with a copy unless this time period is modified by the District Court. A party filing objections must specifically identify those filings, conclusions or recommendations to which objections are being made and the basis for such objections; the District Court need not consider frivolous, conclusive or general objections. SUCH PARTY SHALL FILE THE OBJECTIONS WITH THE CLERK OF THE COURT, AND SERVE THE OBJECTIONS ON ALL OTHER PARTIES AND THE MAGISTRATE JUDGE. A party's failure to file written objections to the proposed findings, conclusions and recommendations contained in this Report and Recommendation shall bar a de novo determination by the District Court. *See Thomas v. Arn*, 474 U.S. 140, 150, 106 S.Ct. 466, 472, 88 L.Ed.2d 435 (1985). Additionally, any failure to file written objections to the proposed findings, conclusions and recommendations contained in this Report and Recommendation within ten (10) days after being served with a copy shall bar the aggrieved party, except upon grounds of plain error, from attacking on appeal the unobjected-to proposed findings and legal conclusions accepted by the District Court. *Douglass v. United Services Automobile Ass'n*, 79 F.3d 1415, 1430 (5th Cir. 1996) (en banc).

SIGNED on this 10th day of May, 2000.

DURWOOD EDWARDS
U.S. MAGISTRATE JUDGE