UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF RHODE ISLAND

CATHY WILSON

v. C.A. No. 01-365T

BURLINGTON COAT FACTORY
WAREHOUSE OF WOONSOCKET, INC.;
ANDREW RICARD; ROLANDE LEFEBVRE

MEMORANDUM & ORDER

ERNEST C. TORRES, Chief United States District Judge.

Cathy Wilson, a former employee of Burlington Coat Factory Warehouse of Woonsocket, Inc., ("Burlington"), brought this action against Burlington and two supervisory employees alleging violations of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq., which prohibits discrimination in employment on account of race.[1]

The defendants appeal from that portion of a magistrate judge's Report recommending denial of their motion for summary judgment with respect to Burlington's liability on Wilson's hostile environment claim.[2]

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[1]By stipulation claims against several co-workers have been dismissed.

[2]There has been no objection to that portion of the Report recommending that summary judgment be granted with respect to the plaintiff's constructive discharge claim.

This Court finds that the motion for summary judgment with respect to that issue should be denied but for different reasons than those expressed by the magistrate judge.

Background

Cathy Wilson is an African-American woman who began working at Burlington in October 1998 as a sales associate. Defendant Andy Ricard ("Ricard") was Burlington's district manager and Rolande Lefebvre ("Lefebvre") was its assistant operations manager and Wilson's direct supervisor.

The facts set forth in the parties' affidavits are as follows. In December 1998, Marcin Orybkiewicz, one of Wilson's co-workers, told Wilson that she (Wilson) "slept with monkeys" and "should go back to Africa." Lefebvre learned of that incident but the parties disagree as to whether Wilson reported it to Lefebvre or Lefebvre heard about it from another employee. In any event, no disciplinary action was taken against Orybkiewicz at that time but Burlington claims that it began "monitoring" the interactions between Orybkiewicz and Wilson.

In December of 1998 or January of 1999, Wilson observed Matthew Deroy, another co-worker, setting up a display of stuffed animals. When Wilson asked why monkeys were included in the display, Deroy allegedly replied that he was trying to make another African-American employee named Otis "feel comfortable." Wilson reported that incident to Ricard but not until February of 1999.

Deroy was fired five days later, apparently, for other reasons.

In January of 1999, Orybkiewicz asked Wilson if she "ordered something from the nigger network." It appears that Wilson did not immediately report that incident but that a store manager heard about it from another employee. Orybkiewicz was fired that same day but, like Deroy, the reason for his termination is not clear.

Wilson also cites three other incidents that occurred in January and February of 1999. On one of those occasions, Wilson was training a new employee when a supervisor told the new employee not to listen to Wilson because she "didn't know what she was doing" and "did everything wrong." On another occasion a co-worker, Heidi Marchand, told Wilson that she overheard two other employees planning to "write up" Wilson. On the third occasion, Wilson complained to a co-worker about not feeling well and the co-worker told Wilson to "get over it." Wilson reported the second incident to Ricard but did not report the other two incidents.

In March 1999, Wilson took medical leave and later resigned her position.

The defendants contend that these incidents do not rise to a level that would support a hostile environment claim and that, even if they did, a hostile environment did not exist until the racial slur made by Deroy and/or the second racial slur made by Orybkiewicz and that corrective action was promptly taken in both instances.

Standard of Review

A magistrate judge's recommendation with respect to dispositive pretrial motions is reviewed by the district court, *de novo*. 28 U.S.C. § 636(b)(1); CVS Corp. v. Taubman Ctrs., 225 F. Supp. 2d 120, 123 (D.R.I. 2002). The test applied with respect to a motion for summary judgment is whether "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the 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." Fed. R. Civ. P. 56(c). The Court must review the evidence in the light most favorable to the non-moving party and draw all reasonable inferences in the non-moving party's favor. Cadle Co. v. Hayes, 116 F.3d 957, 959 (1st Cir. 1997).

Analysis

When an employee brings a hostile environment claim against an employer based on the conduct of fellow employees, the complaining employee must prove, among other things, that the conduct was sufficiently severe or pervasive to create a hostile work environment; that the employer knew or should have known of that conduct; and that the employer failed to take prompt and appropriate corrective action. Crowley v. L.L. Bean, Inc., 303 F.3d 387, 395, 401 (1st Cir. 2002); White v. New Hampshire Dept. of Corr., 221 F.3d 254, 259, 261 (1st Cir. 2000).

I. Existence of Hostile Environment

Proof of offensive conduct is not always sufficient to establish that a hostile environment exists. Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 80 (1998); Harris v. Forklift Sys., Inc., 510 U.S. 17, 21 (1993). An employer cannot be held liable on a hostile environment claim unless the conduct of its employees was so "severe" or "pervasive" that "a reasonable person would have felt that it affected the conditions of [] employment." Marrero v. Goya of Puerto Rico, Inc., 304 F.3d 7, 18-19 (1st Cir. 2002); see Alfano v. Costello, 294 F.3d 365, 374 (2d Cir. 2002) (racial incidents must be sufficiently continuous to constitute a hostile work environment, not merely episodic); Sweezer v. Michigan Dept. of Corr., No. 99-1644, 2000 WL 1175644 at **5 (6th Cir. August 11, 2000) (brief and isolated incidents of racial comments were not indicative of a hostile work environment); Schwapp v. Town of Avon, 118 F.3d 106, 110 (2d Cir. 1997) (for racist comments to constitute a hostile work environment there must be more than a few isolated incidents of racial enmity); Daso v. The Grafton Sch., Inc., 181 F. Supp. 2d 485, 493 (D. Md. 2002) (use of racial epithet by a supervisor insufficient to create a hostile working environment unless used on a repeated, continuing basis); but see Richardson v. N.Y. State Dept. of Corr., 180 F.3d 426, 437 (2d Cir. 1999) (a single severe episode of harassment, like a sexual assault, can establish a hostile work environment); Tutman v. WBBM-

TV/CBS Inc., 54 F. Supp. 2d 817, 825 (N.D. Ill. 1999) (single comment sufficient to create a hostile work environment where comment involved a racial epithet and a threat of physical violence).

As the magistrate judge noted, there is no "mathematically precise test" for determining when conduct moves beyond what is "merely offensive" and becomes so "severe or pervasive" that it creates a hostile environment. Harris, 510 U.S. at 21-22, 23. Making that determination requires an examination of "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." Id. at 23.

In this case, Wilson has proffered evidence that would permit a jury to find that a hostile environment existed. Even if the three incidents having no apparent racial overtones (two of which were not reported) are disregarded, the racial epithets uttered by Orybkiewicz and Deroy could be viewed as satisfying the "severe or pervasive" requirement. The overtly racial and extremely odious nature of those statements makes them much more than "merely offensive." Nor can they be passed off as isolated statements since they were made on three different occasions during a period of two months.

II. Employer Liability

The defendants argue that they were "not legally obligated to take action" with respect to Orybkiewicz's initial statement because that statement, alone, was insufficient to create a hostile environment. See Defendants' Suppl. Brief in Supp. of Limited Obj. to Report and Recommendation, at 4. The defendants also argue that, even if the subsequent statements by Deroy and Orybkiewicz created a hostile environment they cannot be held liable because they took corrective action by promptly firing both individuals.

The defendants' arguments rest on the erroneous premise that an employer is not required to take action to protect employees from racial harassment until the harassment rises to a hostile environment level. It is true that an employer is not liable for workplace harassment unless it rises to the level of a hostile environment. However, that does not necessarily mean that, where complaints of racial harassment are made before a hostile environment level has been reached, an employer is insulated from liability for failing to act on those complaints when a hostile environment later develops.

Although the cases describing an employer's obligation to address harassment by non-supervisory employees generally refer to circumstances in which a hostile environment already exists, they do not limit the employer's obligation only to these circumstances. Rather, they focus on the reasonableness of the employer's

response. Crowley, 303 F.3d at 401 ("To establish employer liability for a non supervisory co-employee, a plaintiff must demonstrate that the employer 'knew or should have known of the charged sexual harassment and failed to implement prompt and appropriate action.'")(citations omitted); White, 221 F.3d at 261 ("[T]he employer is liable if it 'knew or should have known of the charged sexual harassment and failed to implement prompt and appropriate corrective action.'") (quoting Blankenship v. Parke Care Ctr., Inc., 123 F.3d 868, 872 (6th Cir. 1997); Knabe v. Boury Corp., 114 F.3d 407, 412 (3d Cir. 1997) (The employer's actions should be "reasonably calculated to end the harassment.").

Indeed, limiting an employer's obligation to respond to complaints of racial harassment only to those complaints made after a hostile environment develops would be both illogical and contrary to the purpose of Title VII, which seeks to eliminate invidious racial discrimination in the workplace. Harris, 510 U.S. at 21; Crowley, 303 F.3d at 394-95 (citations omitted). That objective cannot be achieved unless an employer's obligation is read to include a duty to take reasonable steps to prevent a hostile environment from developing as well as a duty to take corrective action after the fact. See Hollins v. Delta Airlines, 238 F.3d 1255, 1258 (10th Cir. 2001) (under negligence theory of liability, an employer is liable for harassment by co-employee where employer fails to intervene); Knabe, 114 F.3d at 412 (under negligence

theory of liability, employer's response to a complaint of harassment must be reasonably calculated to prevent future harassment); Tutman, 54 F. Supp. 2d at 826-27 (an employer acts unreasonably when its actions are not reasonably likely to prevent harassing conduct from recurring).

Of course, that does not mean that an employer must guarantee that every employee will be free from harassment by co-employees. Oncale, 523 U.S. at 80 (Title VII does not prohibit all harassment in the workplace but is directed at discrimination in the terms and conditions of employment). It does mean that the employer must make a reasonable effort to see that its employees are not subjected to prohibited forms of discrimination that may create a hostile work environment. DeGrace v. Rumsfeld, 614 F.2d 796, 805 (1st Cir. 1980) (an employer who takes reasonable steps to correct and/or prevent racial harassment by non-supervisory employees is not liable under Title VII); Rutledge v. Macy's East, Inc., No. 01-12-P-H, 2001 WL 1117108 at * 11 (D.Me. September 17, 2001) ("An employer need only exercise reasonable care in preventing and correcting harassing conduct."). If such efforts are made, the employer is not rendered liable merely because they were unsuccessful. See Blankenship, 123 F.3d at 874 (an employer is not liable when its response after the first complaint of harassment was appropriate, but failed to prevent further harassment); Knabe, 114 F.3d at 415 (fact that hostile work environment continued after

employer's remedial action is not dispositive of the issue of whether the employer's response was reasonable); Rutledge, 2001 WL 1117108 at *9 (an employer need not prove success in preventing harassing behavior in order to demonstrate that it exercised reasonable care).

Accordingly, the duty to take reasonable steps to prevent a hostile environment from developing does not require an employer to respond to every complaint of harassment, real or perceived. In cases where a complaint of harassment is petty or appears to lack any factual basis, it may be perfectly reasonable for an employer not to take any action. Nor is an employer required to be clairvoyant and to anticipate when conduct that is "merely offensive" will evolve into harassment so severe or pervasive that it creates a hostile environment. What is required is that, in cases where it is foreseeable that reported incidents of harassment are likely to develop into a hostile environment, the employer must take reasonable steps to prevent that from happening.

In this case, a jury could find that Orybkiewicz's initial statements to Wilson were so odious and demonstrated such extreme hostility and racial prejudice that it was reasonably foreseeable that a hostile environment was likely to develop unless corrective action was taken. A jury also could find that Burlington's unspecified "monitoring" of the contacts between Orybkiewicz and Wilson was not reasonably calculated to prevent that from

happening. Therefore, even if the firing of Orybkiewicz and Deroy was an adequate response once a hostile environment developed, a jury could find Burlington liable for allowing that environment to be created.

Conclusion

For all of the foregoing reasons, and for the additional reasons stated in the unobjected-to portion of the magistrate judge's Report, the defendants' motion for summary judgment is granted to with respect to the constructive discharge claim and denied with respect to the hostile environment claim.

IT IS SO ORDERED,

Ernest C. Torres, Chief Judge
Date: December 19, 2003