IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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DEREK A. SYKES,

Plaintiff,

v.

FRANCISCAN SKEMP HEALTHCARE,

Defendant.

OPINION AND ORDER

99-C-734-C

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This is a civil action for monetary relief in which plaintiff Derek A. Sykes contends that defendant Franciscan Skemp Healthcare violated his rights under Title VII of the Civil Rights Act of 1964, as amended by the Civil Rights Act of 1991, 42 U.S.C. §§ 2000e - 2000e-17, by subjecting him to a racially hostile working environment. Plaintiff seeks to recover compensatory and punitive damages. Defendant contends that plaintiff was not subjected to a hostile environment and even if he was, defendant responded appropriately to the incidents of which plaintiff complained. If its motion for summary judgment is denied, defendant seeks partial summary judgment, barring plaintiff from recovering back pay and punitive damages at trial. Subject matter jurisdiction is present. See 28 U.S.C. § 1331.

In construing all facts in the light most favorable to the non-moving party, see Bombard v. Fort Wayne Newspapers, Inc., 92 F.3d 560, 562 (7th Cir.1996), I find that there are disputed issues of material fact. See Fed. R. Civ. P. 56(c); see also Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). Specifically, it is disputed whether plaintiff told his supervisor Donald Kotek about racist writings on the elevator wall and the calendar in the linen sorting area and feces in plaintiff's work gloves in 1996 or whether plaintiff first complained to Kotek about racially harassing incidents in a letter dated December 3, 1997. According to plaintiff, he had told Kotek in 1996 about racist writings on the elevator walls, such as "nigger"; "nigger go home"; "Mongoloid"; and drawings of swastikas. Because of this disputed issue of material fact, I will deny defendant's motion for summary judgment. (The parties submitted extensive proposed findings of fact relating to the events following plaintiff's letter of December 3, 1997; however, I will not include those facts in this opinion because the most egregious incident is in dispute.) I will also deny defendant's motion for partial summary judgment on the issue of damages.

OPINION

A. Standard of Review

To succeed on a motion for summary judgment, the moving party must show that there

is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); Celotex v. Catrett, 477 U.S. 317, 324 (1986). All evidence and inferences must be viewed in the light most favorable to the non-moving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 (1986). The Seventh Circuit has recognized that courts must apply the summary judgment standard with rigor in employment discrimination cases because "motive, intent and credibility are crucial issues." Crim v. Board of Education of Cairo School Dist. No. 1, 147 F.3d 535, 540 (7th Cir. 1998).

B. Title VII

1. Statute of limitations

Before suing in federal court, a plaintiff alleging a Title VII violation must file a claim with the Equal Employment Opportunities Commission. See 42 U.S.C. § 2000e-5. Generally, parties must file their claims within 180 days of the allegedly unlawful employment practice, but where an aggrieved employee files first with a state or local agency possessing the authority to address the discrimination, the limitations period is extended to 300 days. See 42 U.S.C. § 2000e-5(e); Russell v. Delco Remy Division of General Motors Corp., 51 F.3d 746, 750 (7th Cir. 1995). Wisconsin is one of many states that have entered into work sharing agreements with the EEOC under which both agencies treat a complaint filed with one agency as cross-filed with the other and the state agency waives its right to exclusive jurisdiction over the initial

processing of a complaint. Therefore, in Wisconsin, a charge of discrimination actionable under federal law is timely if it is filed with the state Equal Rights Division within 300 days of the alleged discriminatory act. See Wisconsin Employment Law, §§ 14.182, 14.247 (1998). Generally, conduct that occurred outside the limitations period may not be challenged under Title VII. See Galloway v. General Motors Service Parts Operations, 78 F.3d 1164, 1167 (7th Cir. 1996). In this case, plaintiff seeks redress for incidents beginning in 1996 and continuing until March 1998. The limitations period began 300 days before plaintiff filed a complaint with the Equal Rights Division. However, because defendant failed to argue that the statute of limitations bars plaintiff's claim for conduct that occurred outside the 300-day limitations period, this argument is waived. See, e.g., Hentosh v. Herman M. Finch University of Health Sciences, 167 F.3d 1170, 1174 (7th Cir. 1999) (noting that statute of limitations is "subject to waiver, estoppel, and equitable tolling under the appropriate circumstances").

2. Hostile work environment

Title VII prohibits discrimination based on race, gender, religion or national origin that creates a hostile or abusive work environment. See Oncale v. Sundowner Offshore Services, Inc., 118 S. Ct. 998, 1001 (1998); Harris v. Forklift Systems, Inc., 510 U.S. 17, 22 (1993); Meritor Savings Bank, FSB v. Vinson, 477 U.S. 57, 66 (1986). The Supreme Court has

articulated a standard with objective and subjective components for determining whether conduct rises to the level of a Title VII violation. See Harris, 510 U.S. at 21-22. Ultimately, the conduct must be such that a reasonable person would consider the work environment hostile and abusive and the subject of the treatment must have perceived it as such. See id.; see also Ngeunjuntr v. Metropolitan Life Ins. Co., 146 F.3d 464, 467 (7th Cir. 1998).

Harassment is actionable if it is severe or pervasive enough to alter an employee's terms and conditions of employment. See Oncale, 118 S. Ct. at 1001. Although courts in Title VII cases have had an easier time describing this concept than applying it, one accepted guideline is that actionable harassment has two inversely related parts: severity and pervasiveness. The more pervasive the conduct, the lower the required level of severity. See Ellison v. Brady, 924 F.2d 872, 878 (9th Cir. 1991) (citing King v. Board of Regents of Univ. of Wis. System, 898 F.2d 533, 537 (7th Cir. 1990)); see also Drake v. Minnesota Mining & Manufacturing Co., 134 F.3d 878, 885 (7th Cir. 1998) ("'isolated and innocuous incidents will not support a hostile environment claim'") (quoting McKenzie v. Illinois Dept. of Transportation, 92 F.3d 473, 480 (7th Cir. 1996)).

An employer's liability for hostile environment sexual harassment depends upon the status of the harasser. See Faragher v. City of Boca Raton, 118 S. Ct. 2275, 2292-93 (1998). If the harasser is a supervisor the employer is strictly liable, although the employer may raise

an affirmative defense if it can show both that it exercised reasonable care to prevent and promptly correct the behavior and that the employee failed unreasonably to take advantage of any preventive or corrective opportunities provided by the employer. See Burlington Industries, Inc. v. Ellerth, 118 S. Ct. 2257, 2270 (1998); Shaw v. Autozone, Inc., 180 F.3d 806, 810-11 (7th Cir. 1999); Parkins v. Civil Constructors of Illinois, Inc., 163 F.3d 1027, 1032 (7th Cir. 1998). An employer is liable for a co-employee's harassment only when it has been negligent either in discovering or remedying the harassment. See Parkins, 163 F.3d at 1032. Plaintiff does not contend that he was harassed by a supervisor. Therefore, the standard

> 'is a negligence standard that closely resembles the 'fellow servant' rule . . . . Under that rule, as under Title VII, the employer, provided it has used due care in hiring the offending employee in the first place, is liable for that employee's torts against a coworker only if, knowing or having reason to know of the misconduct, the employer unreasonably fails to take appropriate corrective action. The employer acts unreasonably either if it delays unduly or if the action it does take, however promptly, is not reasonably likely to prevent the misconduct from recurring.'

Saxton v. American Telephone & Telegraph Co., 10 F.3d 526, 535 (7th Cir. 1993) (quoting Guess v. Bethlehem Steel Corp., 913 F.2d 463, 465 (7th Cir. 1990)); see also Baskerville v. Culligan International Co., 50 F.3d 428, 432 (7th Cir. 1995) (stating that "the criterion for when an employer is liable for sexual harassment is negligence"). The Court of Appeals for the Seventh Circuit has held that "the employer can avoid liability for its employees' harassment

if it takes prompt and appropriate corrective action reasonably likely to prevent the harassment from recurring." Tutman v. WBBM-TC, Inc., 209 F.3d 1044, 1048 (7th Cir. 2000).

Although it is not clear whether some of the incidents of which plaintiff complained constitute racial harassment, see Heuer v. Weil-McLain, 203 F.3d 1021, 1024 (7th Cir. 2000) ("Title VII does not impose liability on an employer for creating or condoning a hostile working environment unless the hostility is motivated by race, gender, or some other status that the statute protects."); Baskerville, 50 F.3d at 432 (stating "nothing was required, if . . . [plaintiff's co-worker's] behavior did not even reach the threshold at which it could reasonably be thought to create a hostile working environment for the plaintiff"), it is unquestionably the case that writings such as "nigger" and "nigger go home" in plaintiff's work area constitute actionable harassment. It is disputed whether defendant knew about the racist writings as early as 1996 or was negligent in failing to discover the harassment. In his letter of December 3, 1997, plaintiff points out that he told Kotek the previous year about racially offensive writings in the elevator and on the communications board. Even if plaintiff did not tell Kotek about the writings in 1996 as defendant maintains, the writings were in common areas, such as the elevator. See Wilson v. Chrysler Corp., 172 F.3d 500, 509 (7th Cir. 1999) (holding that defendant "should have known about the alleged harassment" when "much of the alleged misconduct was public"). Furthermore, defendant proposed as a fact that "the graffiti was

washed off the walls." See Def's. Resp. to Plt.'s Proposed Findings of Fact #11. In support of this statement, defendant cites to plaintiff's affidavit in which he states, "The only action that I am aware the employer took was to wash the walls." If defendant washed the racist graffiti off the walls, it is clear that it knew the graffiti was in plaintiff's work area. Lastly, defendant had notice about the graffiti when plaintiff's co-workers told Kotek about racist writings on the calendar in the linen sorting room and showed him the calendar.

It will be the jury's role to determine whether the incidents of which plaintiff complained constitute actionable racial harassment under Title VII and whether defendant took "prompt and appropriate corrective action reasonably likely to prevent the harassment from recurring" by doing such things as conducting investigations, reprimanding and warning the appropriate employees, installing a surveillance camera, conducting sensitivity training and offering to transfer plaintiff. Tutman, 209 F.3d at 1048. "Since the record supports an inference that [defendant] failed in its legal duty to respond to the harassment, . . . [plaintiff] has raised a genuine issue as to [defendant's] liability." Wilson, 172 F.3d at 509-10.

C. Damages

Defendant has moved for partial summary judgment on the issue of damages. First, defendant contends that plaintiff is not entitled to recover punitive damages under Title VII

because defendant did not act with malice or reckless indifference to plaintiff's rights. 42 U.S.C. § 1981a(b) provides that "[a] complaining party may recover punitive damages under this section against a respondent . . . if the complaining party demonstrates that the respondent engaged in a discriminatory practice or discriminatory practices with malice or reckless indifference to the federally protected rights of an aggrieved individual." In light of the disputed issue of material fact as to whether defendant responded appropriately to racist writing in plaintiff's work area, I cannot say at this stage of the case that plaintiff is not entitled to punitive damages under § 1981a.

Second, defendant contends that plaintiff is not entitled to recover back pay. Plaintiff responds that he is entitled to back pay for two reasons: (1) he lost overtime opportunities when he was transferred to the environmental services department; and (2) he was forced to take paid time off as a result of harassment incidents. Title VII of the Civil Rights Act of 1964, § 706(g), as amended, 42 U.S.C. § 2000e-5(g), authorizes relief for victims of unlawful employment practices, including back pay, as follows:

> If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may . . . order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay . . . .

District courts have "broad equitable discretion to fashion back pay awards to make the Title

VII victim whole." Equal Employment Opportunity Commission v. Ilona of Hungary, Inc., 97 F.3d 204, 213 (7th Cir. 1996). Although there is some support for the idea that "Title VII [only] allows back pay awards when an employee does not leave [his] employment voluntarily," Durham Life Insurance Co. v. Evans, 166 F.3d 139 (3d Cir. 1999), defendant has failed to present this argument. "Arguments that are not developed in any meaningful way are waived." Central States, Southeast and Southwest Areas Pension Fund v. Midwest Motor Express, Inc., 181 F.3d 799, 808 (7th Cir. 1999); see also Finance Investment Co. (Bermuda) Ltd. v. Geberit AG, 165 F.3d 526, 528 (7th Cir. 1998). I will determine at trial whether plaintiff is entitled to back pay.

ORDER

IT IS ORDERED that defendant Franciscan Skemp Healthcare's motion for summary judgment is DENIED. FURTHER IT IS ORDERED that defendant's motion for partial summary judgment is DENIED.

Entered this 21st day of August, 2000.

BY THE COURT:

BARBARA B. CRABB
District Judge