IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

ANTHONY A. CARDENAS,

Plaintiff,

OPINION AND ORDER

v.

01-C-647-C

FRITO-LAY, INC.,

Defendant.

Plaintiff Anthony A. Cardenas has commenced this civil rights lawsuit under Title VII of the Civil Rights Act of 1964 against defendant Frito Lay, Inc., contending that defendant subjected him to a hostile work environment because of his national origin and then retaliated against him. Plaintiff also raises several common law tort claims based on the same conduct. Defendant has moved for summary judgment.

I am granting defendant's motion in its entirety. First, even if all of the alleged harassment occurred, defendant's prompt and thorough corrective actions relieved it of any statutory liability for the hostile work environment claim. Second, plaintiff has not proposed any facts that would support his retaliation claim. Finally, plaintiff has failed entirely to support his "common law" claims with facts or law or even as identification of the federal or state laws under which they might arise.

Before setting out the undisputed facts, I note that many of plaintiff's proposals failed to comply with this court's directives for proposing facts. Plaintiff included legal propositions, omitted adequate citations to the record and often lumped a number of propositions into one proposal. Oddly enough, for the most part, plaintiff's proposed facts support defendant's position that it has no liability for any harassment that plaintiff experienced.

From the facts proposed by the parties, I find the following material undisputed.

UNDISPUTED FACTS

Defendant Frito-Lay, Inc. is a corporation that does business in several states, including Texas and Wisconsin. Defendant operates a plant and a traffic center in Beloit Wisconsin. Plaintiff began working for defendant in Texas in December 1998 and later became an over-the road truck driver at defendant's Beloit traffic center in July 1999. At the time, plaintiff was the only Mexican or Mexican-American driver employed at the traffic center.

At all relevant times, defendant had written equal opportunity and "zero tolerance" anti-harassment policies that it put into its Over-The-Road Drivers Handbook and that it posted at the traffic center in the hallway outside the over-the-road drivers' room. The handbook provided a procedure for complaining about harassment. Each driver at the traffic

center, including plaintiff, signed an acknowledgment that he or she had received the handbook containing defendant's anti-harassment policy.

At all relevant times defendant had an additional anti-harassment policy it called "Speak-Up," which was posted at the traffic center. The Speak-Up policy directed employees who were subjected to harassment to tell the offending person to stop his or her conduct immediately and then to report the incident to a supervisor or to the Human Resource Manager right away. The Speak-Up policy provided a toll-free, 24-hour a day, seven days a week telephone number for reporting incidents of abuse, including harassment. Employees could make anonymous reports over the Speak-Up line if they wished. The policy provided that, for the protection of all employees, no action would be taken against an employee solely on the basis of a Speak-Up Line report (that is, without further investigation), and that an employee who used the Speak-Up Line would not be retaliated against in any way.

While working in Beloit, plaintiff neither experienced nor witnessed any national origin discrimination at the Traffic Center prior to June 29, 2001. On Monday, July 2, 2001, plaintiff called the Speak-Up Line to report that he had overheard two other Frito Lay drivers talking about him on citizens' band radio on Friday, June 29, 2001, using derogatory racial or ethnic slurs, including "wetback" and "fucking Mexican." Also, plaintiff reported the alleged incident to defendant's Network Manager, Tim Kinsinger, who took him to speak with defendant's Distribution Manager, Stephen Ruh. Ruh had already received the Speak-

Up Line's report about plaintiff's call and was reading it when plaintiff and Kinsinger arrived at his office. Ruh told plaintiff that defendant would investigate his allegations, and that if they were true, defendant would not tolerate such behavior.

Defendant began its investigation of plaintiff's complaint immediately. The daily logs and dispatch sheets revealed that over-the-road drivers James Babcock and Norbert Weston had been on runs on June 29, 2001. Defendant reviewed the drivers' personnel files to determine whether either had been involved in any similar incidents. Weston's file showed a prior discipline for sexual harassment and a note regarding an incident of inappropriate feedback to shipping personnel, but no prior incidents involving racial, ethnic or national origin discrimination. Babcock's file revealed no similar incidents.

Both Weston and Babcock were on vacation during the week of July 2, so defendant waited until they returned to work the next week to interview them. Both denied having directed any racial slurs at plaintiff. Defendant's managers told both Weston and Babcock that the language alleged to have been used was inappropriate and contrary to defendant's policy. Defendant's Human Resource Manager for the traffic center, Jody Kalma, further informed Weston and Babcock that retaliation against plaintiff was prohibited. Defendant suspended Babcock and Weston without pay pending investigation of plaintiff's allegations.

Defendant's investigation yielded no evidence corroborating plaintiff's allegations. It concluded that the matter boiled down to a swearing contest between plaintiff and Babcock and Weston and that it could not sufficiently corroborate plaintiff's allegations to

mete out discipline. On July 10, 2001, defendant's Senior Human Resources Manager, Julie Grant, put a note in plaintiff's mailbox asking to meet with him to discuss the conclusion of defendant's investigation. Plaintiff refused to meet with anyone unless his lawyer was present. On July 13, 2001, Grant placed another note in plaintiff's mailbox, informing him that defendant had completed its internal investigation and that if plaintiff wanted to talk about the outcome, he should contact Grant.

On July 12, 2001, in the drivers' room at the Traffic Center, Babcock started complaining to whoever was within earshot about how defendant had handled plaintiff's allegations. About six to eight employees listened to Babcock vent for about twenty minutes. Plaintiff was not present. Babcock was angry because he did not believe defendant was justified in suspending him for the events of June 29. He warned the other drivers to be careful what they said on their radios because of what defendant might do if someone were to make an accusation against them, as had happened to him.

After learning of Babcock's speech, Ruh told Babcock that although other over-the-road drivers should be warned not to use inappropriate language on their CB radios, Babcock should not have complained in the break room about how defendant had handled the investigation. Ruh directed Babcock to bring his complaints to the attention of defendant's management staff rather than airing them publicly.

In July 2001, plaintiff, by counsel, filed a charge of discrimination with the United States Equal Opportunity Commission. On July 20, 2001, Kalma informed Babcock and

Weston of the complaint and reminded them that retaliation of any kind against plaintiff was prohibited.

On July 21, 2001, plaintiff found an anonymous letter in his driver mailbox at the Traffic Center. Although it did not address plaintiff by name, the letter contained an offensive reference to plaintiff's national origin, as well as general vulgarity and warned that plaintiff to "watch you're [*sic*] back." Plaintiff contacted the Beloit Police Department. Defendant's Traffic Manager, Juliane Guenther, came to the traffic center to speak with the police. She cooperated in their investigation, showing officers Frito Lay's office equipment so that they could determine whether any company equipment had been used to create the document. The police were unable to identify the letter's author even though they collected fingerprints and interviewed Babcock, Weston and others. The police concluded their investigation upon determining that the letter was too vague to constitute a threat.

In response to plaintiff's receipt of the anonymous letter, defendant put him on paid administrative leave for one week to distance him from the situation. Plaintiff did not consider requesting a transfer, although defendant did have a transfer policy with which plaintiff was familiar.

Both before and after plaintiff's July 2, 2001 complaint, Ruh made a point of checking the driver mailboxes. On July 23, 2001, while plaintiff was on administrative leave, one of defendant's managers (either Ruh or a Mr. Lovegren) found a second document in plaintiff's mailbox. This document contained plaintiff's name, a picture of an open mouth,

and the letters "WA-A-A-A-H." (At some point this became known as the "agonizing mouth" document). Defendant reported this second document to the police but did not inform plaintiff that it had found a second document because plaintiff would not talk to defendant's managers without his lawyer. Plaintiff learned of this letter from the police.

While plaintiff was on administrative leave, defendant consulted with plaintiff and his attorney about a proposed memorandum it later circulated to its traffic center employees. In the memorandum dated July 24, 2001, Ruh informed employees that a driver had received an inappropriate and unacceptable letter, that the filing of charges with the EEOC is every individual's right and that defendant was investigating the matter and intended to take disciplinary action against the author of the letter. Ruh asked anyone with information to contact a manager immediately. Finally, Ruh emphasized that defendant would not tolerate conduct of the type alleged by plaintiff and that retaliation is against the law.

In further response to the situation, defendant instituted mandatory anti-harassment training, including one-on-one training. The training took place on July 25 - July 27, 2001. After this training took place, plaintiff reported no more incidents of harassment.

Following plaintiff's paid administrative leave, Ruh offered to inspect plaintiff's truck before every run to ensure plaintiff's safety. Ruh actually followed through by reporting to the traffic center very early one morning to make such an inspection. Plaintiff thought such action was "extraordinary," but informed Ruh that his help was no longer needed or wanted.

At around the same time, during the summer of 2001, both plaintiff and another employee, Jerry Straw, suffered deaths in their families requiring them to take off work to attend the funerals. Although the traffic center's policy at that time did not require documentation for an employee to receive funeral pay, defendant's plant did require documentation. Guenther, who previously had worked at the plant for nine years mistakenly directed both Straw and plaintiff to document their requests. Straw provided the documentation, plaintiff did not. As a result, plaintiff did not receive his funeral pay immediately. However, defendant rectified its error and paid plaintiff for the day.

On or about February 1, 2002, plaintiff delivered a resignation letter to defendant, listing as his reasons the incidents that began on June 29, 1999, and his perception of the situation that followed.

OPINION

A. Plaintiff's hostile work environment claim

Pinning down plaintiff's claims is not always easy. It is clear plaintiff is contending that defendant subjected him to a hostile work environment because of the June 29, 2001 CB radio conversation he believes was directed against him and the letter that followed. It is less clear whether plaintiff considers the second, "agonizing mouth" letter to have been part of a hostile work environment, but its presence or absence from the analysis does not change the result. Defendant denies that it ever subjected plaintiff to a hostile work

environment, but that even if plaintiff did suffer some harassment, defendant cannot be held liable because it had in place and implemented an appropriate anti-harassment plan that was reasonably likely to prevent recurrences.

In Harris v. Forklift Systems, 510 U.S. 17, 21 (1993), the Supreme Court defined a hostile work environment as a workplace that is "permeated with discriminatory intimidation, ridicule, and insult . . . that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment." Id. To determine whether that standard is met, a court must consider the totality of the circumstances, including the frequency and severity of the discriminatory conduct; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employees work performance. Id. at 23.

Even if a hostile work environment is found to exist, however, an employer is liable for harassment carried out by a plaintiff's co-employee only where the employer knew or should have known of the harassment and did not take prompt and corrective action reasonably likely to prevent recurrence. Tutman v. WBBM-TV, Inc./CBS, Inc., 209 F.3d 1044, 1048 (7th Cir. 2000).

In Tutman, plaintiff complained to his supervisor and to his company's outside consultant on workplace concerns that a co-worker had engaged in racially motivated harassment earlier that same day. Plaintiff's supervisors met immediately, and reported the complaint to their boss, who spoke immediately to the alleged harasser and a witness about

the incident. The defendant company allowed plaintiff to work from home while it undertook further investigation. Within a week, the defendant determined that the plaintiff had been harassed and punished the harassing co-worker with a letter of reprimand and warning, mandatory participation in a three-day interpersonal skills workshop, and a required apology to the plaintiff. The defendant also recirculated its anti-discrimination and fair employment policies to all its employees. The harassing employee responded tepidly to the punishment, believing that his words and acts had been misinterpreted; the defendant allowed slight compromises in the implementation of its sanctions. Meanwhile, the plaintiff stayed home, asserting it was unsafe for him to return to work. The defendant agreed to several additional accommodations, but insisted that the plaintiff report to work. The plaintiff did not, so defendant put him on paid medical leave. When the six months of leave to which the plaintiff was entitled expired and he did not return to work, the defendant decided that he had "voluntarily resigned." Id. at 1046-48.

Thereafter, the plaintiff filed a Title VII lawsuit, alleging that the defendant had subjected him to a racially hostile work environment, retaliated against him and constructively discharged him. The district court and the court of appeals concluded otherwise and granted summary judgment to the defendant. Accepting for the purposes of summary judgment that the plaintiff had been exposed to a racially hostile work environment, the courts found that the defendant had taken prompt and effective remedial action, which excused it from liability. Although the plaintiff argued that the defendant's

response to his complaint failed to punish the harasser appropriately, the court found this legally irrelevant because Title VII does not require an employer to punish a harassing employee commensurately to his conduct; what it requires is prompt remedial action reasonably calculated to end the harassment. Id. at 1049.

It is doubtful that the few incidents plaintiff experienced would constitute a hostile environment, but it is not necessary to decide this point. Defendant had implemented and published an anti-harassment policy and a separate but related "Speak Up" policy prior to the incidents of harassment against plaintiff that began on June 29, 2001. Plaintiff admits he suffered no harassment of any sort prior to June 29, 2001, the date of the CB radio incident involving Babcock and Weston. He reported the incident on July 2, 2001. At that time, Ruh promised plaintiff that defendant would investigate the charges and Ruh kept his word. Defendant began investigating immediately by checking on the two drivers implicated in the incident. That investigation included a review of the two men's personnel records to determine whether they had previously been involved in any similar incidents.

Defendant's managers interviewed Babcock and Weston within the week, delaying several days only because both men had been gone on vacation when defendant began the investigation. Defendant advised both men that defendant would not tolerate conduct such as that alleged by plaintiff and warned them that retaliation against plaintiff was prohibited.

At that point the investigation essentially hit a dead end because Babcock and Weston denied plaintiff's accusations. Defendant was confronted with a swearing contest

devoid of any evidence corroborating either side's version of events. Even in hindsight, it is difficult to imagine what else defendant reasonably could have done at the time. Defendant had responded promptly to plaintiff's complaint, it had investigated it as thoroughly as circumstances permitted and it provided the only remedy commensurate to the equivocal information available to it: re-emphasizing to the alleged harassers its commitment to a harassment free workplace and warning them to steer clear of plaintiff. At his deposition, plaintiff could not think of any additional actions defendant could have taken, and he has not proposed any additional actions in his opposition brief.

The July 21 "watch you're back" letter appeared in plaintiff's work mailbox the day after the other truckers learned he had filed an EEOC complaint. Did Babcock or Weston write the letter? Defendant tried to find out and cooperated with the police investigation: Guenther came to the traffic center to speak with police and showed officers company office equipment in an effort to help them determine whether that equipment had been used to create the letter. Defendant also put plaintiff on paid administrative leave to distance him from the turmoil.

Two days later, while plaintiff was on paid leave, defendant discovered the "agonizing mouth" document in plaintiff's mailbox at the traffic center. Again, defendant promptly notified the police in an effort to aid their investigation, but even police interviews and forensic work did not reveal the perpetrators. Neither the police nor defendant ever established who was responsible for the two harassing letters. This made it impossible for

defendant to mete out punishment in an effort to effect either specific or general deterrence against those intent upon harassing plaintiff.

Instead defendant ordered mandatory anti-harassment training for *all* its drivers in Beloit, starting on July 25, 2001, and continuing for three days. Training included both group training and individual sessions with members of defendant's management staff, during which each employee was provided with a copy of the company's anti-harassment policy. Additionally, defendant's management staff asked plaintiff to report any further incidents of harassment, and Ruh helped plaintiff inspect his truck before starting a run. Thereafter, plaintiff suffered no further incidents of harassment. He also informed Ruh that he no longer wanted or needed Ruh's assistance with inspecting the truck.

Only 23 days passed between plaintiff's first report of harassment and defendant's initiation of anti-harassment training, after which plaintiff reported no further incidents of harassment. Those 23 days were filled with meetings, investigation, and communications designed to ferret out the harassers and to prevent future harassment.

During this same three-week period, someone generated two additional harassing letters directed against plaintiff. This does not mean that defendant's actions during this period were not reasonably likely to prevent recurrence of the harassing behaviors. As just noted, both letters were anonymous and no one ever identified their authors, despite prompt, diligent investigation. In response to this faceless harassment, defendant promptly cast an anti-harassment dragnet designed to educate all the truckers and eliminate the

problem. Defendant achieved its goals within a week after plaintiff received the first letter. On these facts, it cannot be said that defendant's actions were inadequate or slow.

Title VII requires no more of defendant than the actions it took. Plaintiff might disagree with how certain aspects of the investigation and response were handled, but as the court noted in Tutman, this is legally irrelevant. Defendant's legal obligation was to provide prompt remedial action reasonably calculated to end the harassment. Tutman, 209 F.3d at 1049. Defendant met this obligation. Therefore, it is entitled to summary judgment on plaintiff's claim of racially hostile work environment.

B. Plaintiff's Claims of Retaliation

In his complaint, plaintiff contends that defendant retaliated against him when it demanded that he document his request for funeral leave and delayed giving him his funeral leave pay. Although it is not clear, it may be that plaintiff has alleged other incidents of retaliation in paragraph 13 of count I of the complaint, which incorporates several other documents by reference. Defendant treated plaintiff's complaint as if it alleges four incidents of retaliation, but plaintiff did not address defendant's arguments in his response brief or otherwise clarify his theory of liability. Plaintiff's failure to support his own claims against a summary judgment motion constitutes acquiescence in defendant's arguments, which operates as a waiver. Cincinnati Ins. Co. v. Eastern Atlantic Ins. Co., 260 F.3d 742, 747 (7th Cir. 2001).

Under the circumstances, defendant is entitled to judgment on the retaliation claim without further analysis. For the sake of completeness, however, I will also consider three other claims of retaliation that plaintiff might be raising: (1) Babcock presented an impromptu speech in the drivers' lounge that led another driver to tell plaintiff to "watch out;" (2) plaintiff received the "watch you're back" letter on July 21, 2001; and (3) defendant found the "agonizing mouth" document in his mailbox while plaintiff was on administrative leave. The elements of a retaliation claim require a plaintiff to establish that: 1) he engaged in statutorily protected expression; 2) he suffered an adverse employment action or decision; and 3) a causal link exists between the two. Logan v. Kautex Textron North America, 259 F.3d 635, 640 (7th Cir. 2001). In this case, plaintiff engaged in statutorily protected expression by filing complaints with the EEOC in July 2001, so there is factual support for the first element.

Plaintiff's second, third and fourth claims fail at the second element because they cannot be considered adverse employment action under even the most generous definition of that term. Retaliatory harassment by co-workers can constitute an actionable adverse employment action if it rises to the level of a significant change in employment status. Stutler v. Illinois Dept. of Corrections, 263 F.3d 698, 703 (7th Cir. 2001). Making a fellow employee's life hell can qualify where the employer fails to correct the campaign of harassment. Id. at 703-04. Even so, not everything that makes an employee unhappy is an actionable adverse action. Id. In this case, plaintiff received one hostile letter, learned about

another and learned that there had been a gathering in the trucker's lounge, with the three incidents occurring between on July 12, 21 and 23, 2001. Of the three, only the "watch you're back" letter could be viewed as strongly harassing and directed against plaintiff. Babcock's speech was directed against management, not plaintiff, and plaintiff only heard about it second hand. The "agonizing mouth" document could not be characterized as harassing, but on a "tepid and petty" level that cannot be viewed as a material change in plaintiff's terms of employment. See Stutler, 263 F.3d at 704. Plaintiff never saw this document; he only heard about it while he was home on paid leave during defendant's investigation and remediation.

No matter how one characterizes these three incidents, the key is that defendant did not commit them, encourage them or acquiesce in them. To the contrary, defendant promptly investigated and remedied all three incidents to the best of its ability. It defended to its workers plaintiff's right to seek relief from the EEOC, then imposed mandatory training on every employee in the center. Regardless whether the actual harassers became sensitive to their misdeeds by virtue of their training or afraid of being disciplined if they persisted, they stopped their harassment. Plaintiff returned to work and suffered no more incidents. In short, defendant did not subject plaintiff to an adverse employment action directly or indirectly as a result of his complaints to the EEOC.

This leaves plaintiff's complaint regarding funeral pay. It is questionable whether a mistaken request for documentation of a leave request even constitutes a cognizable adverse

employment action. Plaintiff was paid eventually, despite never providing the documentation. At most, he experienced a delay in receiving one day's pay as a result of on employee's misinterpretation of a policy.

Even assuming, however, that the request for documentation and payment delay constitute an adverse employment action or decision, plaintiff cannot establish the third element of a retaliation claim, that is, that there was a causal connection between plaintiff's report of harassment and defendant's request for documentation and delay in paying plaintiff for his leave. Indeed, as with his other claims, plaintiff has provided no evidence whatsoever to support his bare assertion of retaliation.

By contrast, defendant has submitted an affidavit attesting to the fact that the request for documentation and subsequent delay were caused by Guenther's misunderstanding of the Traffic Center's policy regarding funeral leave. In addition, the same error affected another Traffic Center employee, Jerry Straw. Plaintiff cannot even show that Guenther's request and delay targeted plaintiff specifically, much less that it was intended as retaliation for his complaints. Plaintiff has not raised a genuine issue of material fact with regard to the third element of his retaliation claim. Defendant is entitled to summary judgment on this claim as well.

C. Plaintiff's Miscellaneous Common Law Claims

Plaintiff's complaint includes what I can only term "miscellaneous" common law tort claims, including reckless disregard for plaintiff's safety, gross negligence and breach of

defendant's duty of reasonableness toward its employee. The parties' Rule 26(f) report clarified plaintiff's legal theory of these claims: (1) common law workplace fraud by omission; and (2) deceptive business practice or tortious negligent concealment in reckless disregard of plaintiff's safety. These claims appear to be based upon defendant's failure to notify plaintiff about the discovery of the "agonizing mouth" document while plaintiff was on administrative leave. Defendant has moved for summary judgment on these claims.

Notwithstanding the indefinite nature of these claims, defendant attempted to address them in its brief, noting that they failed to state a claim and were not supported by any evidence. As with his retaliation claims, plaintiff neither responded to defendant's arguments or set forth any facts in support of its claims. Again, plaintiff's failure to support his own claims against a summary judgment motion constitutes acquiescence in defendant's arguments, which operates as a waiver. Cincinnati Ins. Co., 260 F.3d at 747.

This is all the more true with these common law claims because they are incomprehensible; absent any guidance from plaintiff, it is impossible to follow the thinking that led to these purported claims. This lack of clarity is the theme of plaintiff's pursuit of this case. Starting with his complaint and continuing with virtually every submission thereafter, plaintiff has provided substandard work that defies easy characterization or analysis. For instance, in his brief in opposition to plaintiff's motion, the vast majority of the case citations lack a reporter name or number. It is almost as if a hostile find-and-replace virus searched plaintiff's brief for citations and gutted them. Then, on page 9, without explanation, plaintiff drops in a section on cost-shifting under Fed. R. Civ. P. 37, abruptly

returning on page 11 to a quasi-response to defendant's brief. Searching past the distracting nature of plaintiff's patchwork quilt approach to briefing reveals a factual and legal vacuum. At no point does plaintiff address any of the facts material to the suit or focus on the legal standard for deciding the case he brought. Instead, he discusses a pastiche of pregnancy age and disability discrimination law and the burden-shifting requirements of McDonnell Douglas v. Green, 411 U.S. 792 (1973), which have no bearing on his case. He has alleged direct discrimination, not disparate treatment. Defendant is entitled to summary judgment motion on all the common law claims.

ORDER

IT IS ORDERED that Frito-Lay, Inc.'s motion for summary judgment is GRANTED. The clerk of court is directed to enter judgment in favor of defendant and close this case.

Entered this 30th day of September, 2002.

BY THE COURT:

BARBARA B. CRABB
District Judge