IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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ROSETTA R. JORENBY,

Plaintiff,

v.

DATEX-OHMEDA, INC.,

Defendant.

OPINION AND ORDER

01-C-0699-C

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This is a civil action for monetary, declaratory and injunctive relief in which plaintiff is suing defendant for failing to prevent and stop gender-based harassment by her co-workers, pursuant to Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e. On July 16, 2002, I denied defendant's motion for summary judgment as to plaintiff's hostile work environment claim because I concluded that it is a question of fact whether being called a "dizzy bitch" is gender-based harassment. In that same order, I granted defendant's motion for summary judgment as to plaintiff's constructive discharge claim.

Presently before the court is defendant's "second" motion for summary judgment. According to the preliminary pretrial conference report, the parties were given two summary

judgment deadlines, one for procedural matters (April 12, 2002) and another for factual matters (August 29, 2002). See Prelim. Pretrial Conf. Order, dkt. #7, at 2-3. Specifically, the procedural issues were to encompass the following: (1) "[w]hich, if any, of the complaint's allegations are within the scope of the plaintiff's EEOC charge"; and (2) "[w]as the plaintiff's EEOC charge timely." See Joint Discovery Plan, dkt. #6, at 4. However, in defendant's second motion for summary judgment, it is re-arguing some factual matters that were decided previously in response to its first motion for summary judgment. (Aside from a few minor exceptions, defendant's proposed findings of fact in support of its second motion for summary judgment motion are nearly identical to those submitted in support of its first motion for summary judgment. Therefore, it is unnecessary to repeat the undisputed facts in this order.)

In deciding defendant's first motion for summary judgment, I concluded that it was for the factfinder to decide whether defendant's employee (Bob Bristol) called plaintiff a "dizzy bitch" because of plaintiff's gender or merely because he disliked her. In fact, I noted that this determination is for the factfinder because "[e]valuating Bristol's alleged behavior requires 'one to weigh the tone and nuances of his words and deeds and a host of other intangibles that the page of a deposition or an affidavit simply do not reveal.'" See Order dated July 16, 2002, dkt. #19, at 16 (quoting Shepard v. Slater Steels Corp., 168 F.3d 998, 1010 (7th Cir. 1999)).

Along with its second motion for summary judgment, defendant has submitted Bristol's affidavit, in which he avers that he called plaintiff a "dizzy bitch" because he disliked her and not because of her sex. Although defendant now adds this affidavit to the factual mix, it is nevertheless attempting to have another bite at the summary judgment apple, which is impermissible. See Dft.'s Br. in Supp. of its First Summ. J., dkt. #9, at 6 n.4, 11 (defendant argued previously that "the 'dizzy bitch' incident, is nondiscriminatory as a matter of law" and that such a "comment is not sex-based"). Notwithstanding what effect, if any, Bristol's self-serving affidavit would have had on my earlier decision, it is clear that the time for submitting it passed with defendant's first motion for summary judgment. See Schacht v. Wisconsin Dept. of Corrections, 175 F.3d 497, 504 (7th Cir.1999) (indicating that summary judgment "is the 'put up or shut up' moment in a lawsuit, when a party must show what evidence it has that would convince a trier of fact to accept its version of events").

Despite the court's earlier ruling to the contrary, defendant argues that the "dizzy bitch" issue remains undecided because (1) the legal landscape has changed as a result of the Supreme Court's ruling in National Railroad Passenger Corp. v. Morgan, 122 S. Ct. 2061 (2002); and (2) I noted that for the purpose of deciding defendant's first summary judgment motion that I would assume without deciding that the alleged acts constitute gender-based harassment. Defendant is incorrect on both counts. First, I incorporated the holding in National Railroad into my earlier order addressing defendant's first motion. Thus, there has

been no concomitant change in the legal landscape that has not been accounted for by the court. Second, the fact that I assumed that the "dizzy bitch" incident constituted gender-based harassment is standard summary judgment protocol. All evidence and inferences must be viewed in the light most favorable to the non-moving party. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 (1986). I will not be deciding whether the "dizzy bitch" incident constitutes gender-based harassment in this order either because, as I stated in my previous order, this is a question of fact for the factfinder. The ruling regarding the "dizzy bitch" incident has become the law of the case. See Arizona v. California, 460 U.S. 605, 618 (1983) ("when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages of the same case").

Defendant argues next that the "dizzy bitch" incident, standing alone, cannot support a hostile work environment claim. Again, I decided that issue in defendant's first summary judgment round. As I stated in my previous order, "the pre- and post-limitations period conduct alleged by plaintiff involve the same type of ongoing harassment by co-workers." See Order, dkt. #19, at 15; see also National Railroad, 122 S. Ct. at 2076 ("A court's task is to determine whether the acts about which an employee complains are part of the same actionable hostile work environment practice, and if so, whether any act falls within the statutory time period."). Because I determined that the "dizzy bitch" incident involved the same type of ongoing harassment by co-workers as the earlier incidents (which fell outside

the limitations period), this ruling has become the law of the case.

Finally, defendant contends that plaintiff failed to trigger defendant's duty to address the "dizzy bitch" incident as sexual harassment because she never reported the incident to defendant. Specifically, defendant argues that (1) although Bristol reported the "dizzy bitch" incident to defendant, plaintiff did not; (2) plaintiff never provided her version of events regarding the incident; and (3) plaintiff failed to advise defendant that she considered the incident to be *sexual* harassment. Because this argument has not been addressed previously, I will turn to the substance of it.

"An employer is negligent with respect to sexual harassment if it knew or should have known about the conduct and failed to stop it." Burlington Industries v. Ellerth, 524 U.S. 742, 759 (1998); see also Wilson v. Chrysler Corp., 172 F.3d 500, 509 (7th Cir. 1999) ("notice may be presumed where the work environment is permeated with pervasive harassment"). "Liability for co-worker harassment requires a showing of negligence on the part of the employer." See Wilson, 172 F.3d at 508 (citing Baskerville v. Culligan Int'l Co., 50 F.3d 428, 431-32 (7th Cir.1995)). "Thus, a plaintiff must show that her employer failed to take reasonable steps to discover and remedy the harassment." See id. (citing Perry v. Harris Chernin, Inc., 126 F.3d 1010, 1013 (7th Cir.1997)).

Because Bristol reported the "dizzy bitch" incident to defendant, defendant had actual knowledge of it. Although defendant faults plaintiff for not providing her version of

events, this is irrelevant because it is undisputed that Bristol's version of the events (other than his rationale for calling plaintiff a "dizzy bitch") coincides with plaintiff's. Although defendant concedes that plaintiff filed a union grievance a month after the "dizzy bitch" incident, it argues that she alleged only a "hostile work environment" in the grievance. In other words, defendant contends that it had no duty to address the "dizzy bitch" incident as sexual harassment because plaintiff never alleged a "sexually" hostile work environment in her grievance. This position is somewhat confusing in light of the fact that defendant never alleges exactly what type of harassment it thought plaintiff was alleging. Moreover, the Court of Appeals for the Seventh Circuit has held that "there is no legal mandate that an employee use the specific term 'sexual harassment' in order to inform his or her employer about a harasser in the workplace." Gentry v. Export Packaging Co., 238 F.3d 842, 849 (7th Cir. 2001). Although defendant relies heavily on the fact that plaintiff's grievance failed to mention either Bristol or the "dizzy bitch" incident, this is not dispositive. The grievance did not mention *any* specific incident; it spoke in very general terms. Therefore, the fact that plaintiff omitted the word "sexually" in her hostile work environment grievance or failed to mention Bristol or the "dizzy bitch" incident does not relieve defendant of its duty to take reasonable steps to discover and remedy the harassment. None of defendant's proposed facts address what, if any, reasonable steps it took to clarify what plaintiff meant by her general allegation of a hostile work environment. See id. ("The *Ellerth/Faragher* affirmative

defense places the burden on the employer . . . [to establish] it took both preventive and corrective steps to address sexual harassment."). Defendant's posture is especially questionable in light of plaintiff's other undisputed complaints of harassment (albeit made outside the limitations period).

Defendant argues that, in any event, it instituted two days of "sensitivity training" in response to plaintiff's hostile work environment grievance. (It is undisputed that this training dealt solely with respectful and courteous behavior toward co-workers, not sexual harassment or discrimination.) Defendant argues that because the "dizzy bitch" incident is plaintiff's last allegation of sexual harassment, the sensitivity training was successful and, thus, it has fulfilled its duty under Title VII. However, defendant ignores the impact of the Supreme Court's ruling in National Railroad on the facts in this case. See National Railroad, 122 S. Ct. at 2075 ("the statute in no way bars a plaintiff from recovering damages for that portion of the hostile environment that falls outside the period for filing a timely charge"). Accordingly, if the factfinder concludes that the "dizzy bitch" incident (which occurred within the filing period) constitutes gender-based harassment, then the factfinder can consider any acts of harassment that occurred outside the filing period that it considers related in determining whether plaintiff had been subjected to a hostile work environment. In such an scenario, the factfinder will determine whether the employer took preventive or corrective steps to address the alleged sexual harassment in light of plaintiff's earlier and

undisputed reports of harassment.

Finally, defendant argues that "[p]laintiff's sexual harassment claim amounts to a series of isolated incidents that do not support a finding of a hostile work environment." Dft.'s Br. in Supp., dkt. #23, at 15. However, I am not persuaded that no reasonable jury could conclude that these alleged incidents were not serious enough to affect plaintiff's work environment when viewed cumulatively. See Hostetler v. Quality Dining, Inc., 218 F.3d 798, 808-09 (7th Cir. 2000) ("Holding such acts not to be severe as a matter of law is another way of saying that no reasonable person could think them serious enough to alter the plaintiff's work environment."). It is for the factfinder to determine whether the alleged acts created a hostile work environment. Accordingly, defendant's second motion for summary judgment will be denied.

ORDER

IT IS ORDERED that defendant Datex-Ohmeda, Inc.'s second motion for summary judgment is DENIED.

Entered this 22nd day of October, 2002.

BY THE COURT:

BARBARA B. CRABB
District Judge