IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

CEVIN F. KOLDEN,

Plaintiff,

v. MEMORANDUM AND ORDER

WAL-MART STORES, INC., 04-C-968-S

Defendant.

Plaintiff Cevin F. Kolden commenced this civil action under Title VII claiming that defendant Wal-Mart Stores, Inc. subjected him to sexual harassment.

On April 15, 2005 defendant filed a motion for summary judgment pursuant to Rule 56, Federal Rules of Civil Procedure, submitting proposed findings of facts, conclusions of law, affidavits and a brief in support thereof. This motion has been fully briefed and is ready for decision.

On a motion for summary judgment the question is whether any genuine issue of material fact remains following the submission by both parties of affidavits and other supporting materials and, if not, whether the moving party is entitled to judgment as a matter of law. Rule 56, Federal Rules of Civil Procedure.

Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. An adverse party may not rest upon the mere allegations or denials of the pleading, but the response must set forth specific facts showing there is a genuine issue for trial. Celotex Corp. v. Catrett, 477 U.S. 317 (1986).

There is no issue for trial unless there is sufficient evidence favoring the non-moving party that a jury could return a verdict for that party. If the evidence is merely colorable or is not significantly probative, summary judgment may be granted. Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986).

FACTS

For purposes of deciding defendant's motion for summary judgment the Court finds that there is no genuine dispute as to any of the following material facts.

Plaintiff Cevin F. Kolden is an adult resident of Rockton, Illinois. Defendant Wal-Mart Stores, Inc. is a corporation doing business in Beloit, Wisconsin.

Plaintiff commenced work at the Beloit Wal-Mart on February 21, 2002 as a sales associate in the Garden Center. Gary Cole was the garden center department manager and plaintiff's supervisor.

Plaintiff received an employee handbook when he began his employment. A portion of the handbook dealt with "harassment/ inappropriate conduct" by customers. The handbook encouraged employees to report such conduct to any salaried member of management and advised that an employee could also contact your Regional Personnel Manager, the People Group or the Ethics Hotline. Defendant also had separate "Harassment/Inappropriate Conduct" and "Open Door" policies. The "Harassment/Inappropriate Conduct" policy directed employees to notify a salaried member of management if they believed they had been subjected to or witnessed harassment or inappropriate conduct by a customer.

From May 2002 until February 21, 2003 George Fields came into the Beloit Wal-Mart store two to three times a week. Fields was in the garden Center more than a normal customer and stared at plaintiff. Plaintiff complained to Cole who told him to remove himself from the situation if Fields was in the store. Coworkers warned plaintiff many times that they had seen Fields or that Fields had asked for him. One of the places plaintiff hid from Fields was behind an outdoor shed at Wal-Mart.

In May 2002 Fields sexually propositioned plaintiff and rubbed the back of his hand on the outside of plaintiff's leg for about three seconds. Plaintiff told Fields not to do it again and to leave him alone. Plaintiff reported to Cole who told him to tell

a salaried member of management. Plaintiff then told co-manager Jeff Clark that there was a man propositioning him.

In June 2002 Fields propositioned plaintiff and rubbed plaintiff's thigh with the back of his hand and his palm. Plaintiff told Fields to leave him alone and not to touch him. Plaintiff told co-manager Stacy Maynard about it. Maynard said he could not talk to Fields because he had not seen it happen.

In July 2002 Fields asked plaintiff whether he would change his mind and rubbed the outside of his leg with the back of his hand. Fields asked plaintiff if he would set him up with Justin Thompson, a cashier. Plaintiff said he would and then went and told Thompson. Thompson said he had also experienced problems with Fields. Plaintiff told Stacy Maynard that Fields had propositioned him and Thompson. Maynard said he could not do anything unless he saw it.

Thompson talked to Jeff Clark about George Fields' attention toward him. Jeff Clark talked to Fields and told him to stay away from Thompson which he did.

Cole told Assistant Manager Michael Marchese, a salaried member of management, three or four times that Fields looked at plaintiff and seemed to follow him around. Cole told Marchese that he advised plaintiff to remove himself from the situation. The last time Cole reported to Marchese about plaintiff's situation with Fields was probably late in July 2002. No one from management

ever followed-up concerning the reports about Fields' behavior towards plaintiff.

Between July 2002 and February 2003 Fields continued to come into the store. Plaintiff saw Fields in the store roughly once a month from July 2002 through December 2002. Between July 2002 and February 21, 2003 plaintiff did not report Fields to a salaried member of management.

Plaintiff went on a medical leave of absence from early January to mid-February for hernia surgery. When he returned from his surgery plaintiff worked at Wal-Mart as a cashier.

On February 21, 2003 Fields sexually assaulted plaintiff in a men's bathroom at the Wal-Mart store. Plaintiff talked with James Wilson and Melinda Wold of loss prevention who walked around the store for Fields. Within about an hour Fields was arrested and banned from the store. Plaintiff did not see Fields in the Wal-Mart store again.

On April 30, 2003 plaintiff quit his job at Wal-Mart.

MEMORANDUM

Plaintiff claims that he was subjected to a hostile work environment. Title VII prohibits sexual harassment in the work place which is defined as unwelcome sexual advances, requests for sexual favors and other verbal or physical conduct of a sexual nature. 29 C.F.R. §1604.11(a)(1985). To violate Title VII sexual

harassment must be so severe or persuasive to alter the conditions of the victim's employment and create an abusive work environment. Meritor Savings Bank FSB v. Vinson, 477 U.S. 57, 67 (1986). The conduct does not need to be both severe and pervasive. Hostetler v. Quality Driving, Inc., 218 F.3d 798, 808 (7th Cir. 2000).

The harassment must be both objectively and subjectively offensive. The victim must have perceived the environment to be sexually offensive, and the environment must also be one that a reasonable person would find offensive. Harris v. Forklift Systems, Inc., 510 U.S. 17, 21 (1993).

Whether sexual harassment is sufficiently severe or pervasive from an objective standpoint depends on 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. Harris v. Forklift Systems, Inc., 510 U.S. at 23.

The United States Court of Appeals for the Seventh Circuit discussed the conduct that establishes an objective hostile work environment in Baskerville v. Culligan International Company, 50 F.3d 428, 430 (7th Cir. 1995) as follows:

> Drawing the line is not easy. On one side lie sexual assaults; other physical contact, whether amorous or hostile, for which there is no consent express or implied; uninvited sexual solicitations; intimidating words or acts; obscene language or gestures, pornographic pictures.(Citations omitted). On the other side lies the occasional vulgar

> banter, tinged with sexual innuendo, of coarse or boorish workers. (Citations omitted).

Defendant argues that the actions of Fields prior to February 21, 2003 were not sufficiently severe or pervasive as to alter his conditions of employment. The following facts are undisputed. From May 2002 until February 21, 2003 George Fields came into the Beloit Wal-Mart store two to three times a week. Fields was in the garden Center more than a normal customer and stared at plaintiff. Plaintiff complained to Cole who told him to remove himself from the situation if Cole was in the store. Co-workers warned plaintiff many times that they had seen Fields or that Fields had asked for him. One of the places plaintiff hid from Fields was behind an outdoor shed at Wal-Mart.

In May 2002 Fields sexually propositioned him and rubbed on the outside of his leg with the back of his hand for about three seconds. In June 2002 Fields propositioned plaintiff and rubbed plaintiff's thigh with the back of his hand and his palm. In July 2002 Fields asked plaintiff whether he would change his mind and rubbed the outside his leg with the back of his hand.

In a period of three months Fields touched plaintiff inappropriately and sexually solicited him three times. Fields also stared at plaintiff and asked for him in the garden center. Plaintiff tried to avoid him and hid from him.

From May to July 2002 plaintiff perceived his environment to be sexually offensive since he hid from Fields and complained about

the conduct. It remains disputed whether plaintiff's environment from May to July 2002 was sufficiently severe or pervasive from an objective viewpoint to constitute sexual harassment in violation of Title VII. The fact that no incidents occurred from July to February 2003 is not relevant to whether the conduct from May to July 2002 constituted sexual harassment.

The sexual assault that occurred on February 21, 2003 was severe enough to constitute actionable sexual harassment. Smith v. Sheahan, 189 F.3d 529, 533-34 (7th Cir. 1999).

An employer may be held responsible for sexual harassment of an employee by a customer only if the employer knew or should have known about the acts of harassment and fails to take remedial action. Berry v. Delta Airlines, Inc., 260 F. 3d 803, 811-812 (7th Cir. 2001). After the February 21, 2003 incident when Fields sexually assaulted plaintiff, defendant took remedial action to prevent it from happening again by banning Fields from the store and having him arrested.

The question is whether defendant knew of acts of harrasment prior to February 21, 2003 and failed to take remedial action to prevent further harassment. It is undisputed that Maynard, Clark and Cole knew of the incidents in May, June and July 2002. It is disputed whether defendant failed to take appropriate remedial measures prior to February 21, 2003.

Defendant argues that the February 21, 2003 assault was not foreseeable or predictable. It may not have happened, however, if prior remedial measures had been taken. Had Fields been banned from the store or warned about his prior behavior toward plaintiff the February 21, 2003 incident might have not occurred.

A genuine dispute of fact remains as to whether plaintiff was subjected to sexual harassment of which the defendant had knowledge and failed to prevent from happening again. Defendant's motion for summary judgment will be denied.

ORDER

IT IS ORDERED that defendant's motion for summary judgment is DENIED.

Entered this 31st day of May, 2005.

BY THE COURT:

/s/

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JOHN C. SHABAZ
District Judge