

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE DEPARTMENT OF HUMAN RIGHTS

State of Minnesota, by
David Beaulieu, Commissioner,
Department of Human Rights,

Complainant,

v.

Spee Dee Delivery Service, Inc.
and Christopher J. Dahlin,

Respondents.

**ORDER ON MOTION
TO DISMISS**

The above-entitled matter is before the undersigned Administrative Law Judge on Respondents' motions to dismiss. Respondents filed their motions on April 15, 1996. Complainant filed a memorandum in opposition to Respondents' motions on April 25, 1996. The record closed on April 25, 1996.

Erica Jacobson, Assistant Attorney General, 1200 NCL Tower, 445 Minnesota Street, St. Paul, MN, 55101, represented the Complainant.

Frank Kundrat, Esq., 1010 West St. Germain, Suite 600, St. Cloud, MN, 56301, represented the Respondent Spee Dee Delivery Service, Inc.

David Ukenholz, Esq., 407 North Broadway, P.O. Box 605, Crookston, MN, 56716-0605, represented the Respondent Christopher Dahlin.

Based upon the Memoranda filed by the parties, all the filings in this case, and for the reasons set out in the Memorandum which follows:

IT IS HEREBY ORDERED:

1. That Respondents' motions to dismiss the complaint on the grounds that it fails to state a claim upon which relief can be granted is DENIED.
2. That Respondents' motions to dismiss Complainant's quid pro sexual harassment claim is GRANTED.

3. That Respondents' motions to dismiss Complainant's hostile environment sexual harassment claim is DENIED.

Dated this ____ day of May, 1996

STEVE M. MIHALCHICK

Administrative Law Judge

MEMORANDUM

This case involves a same gender sexual harassment claim under the Minnesota Human Rights Act. According to the complaint, Lance Henrickson, a former employee of Respondent Spee Dee Delivery Service, Inc., ("Spee Dee"), quit his employment due to a hostile work environment caused by the offensive and unwelcome sexual comments and advances of his supervisor Christopher Dahlin. Affidavit of Lance Henrickson, Ex. C. Both Henrickson and Dahlin are men and identify themselves as heterosexual. However, Henrickson considered Dahlin's communications to be homosexual sexual advances and requests for sexual favors. In addition to his allegations of a hostile working environment, Henrickson alleges quid pro quo harassment by Dahlin. Specifically, Henrickson maintains that when he rejected Dahlin's request for a sexual favor Dahlin responded by stating: "You know all day shifts go through me. You could be on nights a long time." Affidavit of Henrickson, Ex. C at p.5.

Respondents have brought motions to dismiss the complaint on the grounds that it fails to state a claim upon which relief can be granted.

Same Gender Sexual Harassment Claim

The Minnesota Human Rights Act makes it an unfair employment practice for an employer, because of sex, "to discriminate against a person with respect to hiring, tenure, compensation, terms, upgrading, conditions, facilities, or privileges of employment." Minn. Stat. § 363.03, subd. 1(2)(c). Respondents argue that there is no cause of action under the Minnesota Human Rights Act for same gender sexual harassment. Because this appears to be an issue of first impression, Respondents have looked to Title VII cases for guidance. Principles developed by federal courts in Title VII cases are instructive and may be applied when interpreting the Minnesota Human Rights Act. Fore v. Health Dimensions, Inc., 509 N.W.2d 557, 560 (Minn. App. 1993); Continental Can Co., v. State, 297 N.W.2d 241, 246 (Minn. 1980). Title VII of the Civil Rights Act of 1994 provides that it is an unlawful employment practice for an employer to discriminate against any individual because of the individual's sex. 42 U.S.C. § 2000e-2(a)(1). Respondents cite to a number of recent Title VII cases which have held that sexual harassment claims do not lie where both the alleged harasser and

the victim are of the same sex because such conduct does not constitute gender discrimination. That is, the perpetrator is not harassing the victim “because of” the victim’s sex. E.g., Quick v. Donaldson Co., Inc., 895 F.Supp. 1288 (S.D. Iowa 1995); Garcia v. Elf Atochem North America, 28 F.3d 446 (5th Cir. 1994).

The majority of the cases which have held that Title VII does not protect against same gender sex discrimination have relied in whole or in part on the decision of Goluszek v. H.P. Smith, 697 F.Supp 1452 (N.D. Ill. 1988). In Goluszek, the court dismissed for failure to state a claim under Title VII a male employee’s complaint alleging sexual harassment by male supervisors. Without citation to any legislative history or case law, the court stated that same gender discrimination was not the type of conduct Congress was concerned about when it enacted Title VII. Id. at 1456. Rather, according to the court, Congress was concerned about discrimination which results from an imbalance of power in the workplace. For this proposition, the court relied on a student note written in a law review. Id., (citing Note, *Sexual Harassment Claims of Abusive Work Environment Under Title VII*, 97 Harv.L.Rev. 1449, 1451-52 (1984)). Based on this note, the court reasoned that because Goluszek was a male in a male-dominated environment, he could not have worked in an environment that treated males as inferior. Id.

Several recent cases have rejected the reasoning of Goluszek and its progeny and have held that Title VII does protect employees against sexual harassment by members of the same gender. In Sardinia v. Dellwood Foods, 69 FEP Cases 705 (S.D. NY 1995), the court noted the division of opinion among federal courts as to the viability of same gender sexual harassment claims but determined that the dominant trend appears to be to include such claims among Title VII’s prohibitions. Id. at 708. The court pointed out that there is nothing in the language of Title VII to support a finding that same sex harassment is not prohibited. On the contrary, the language of the statute is non-exclusive creating a “broad rule of workplace equality.” Id. at 709, *citing*, Harris v. Forklift Systems, 114 S.Ct. at 3471 (1993). Moreover, guidelines issued by the Equal Employment Opportunity Commission (EEOC) recognize same gender sexual harassment claims. The EEOC Compliance Manual specifically states that the victim does not have to be of the opposite sex of the harasser. Rather, the crucial inquiry is whether the harasser treats a member of one sex differently from members of the other sex. EEOC Compliance Manual § 615.2(b)(3). Though not binding on the courts, EEOC guidelines are a source of informed and persuasive interpretation by the enforcing administrative agency to which courts and litigants may properly resort for guidance. See, Gen. Electric Co., v. Gilbert, 429 U.S. 125, 141-42 (1976).

In a recent ruling denying a motion for summary judgment, U.S. Magistrate Judge Jonathan Lebedoff held that same gender sexual harassment claims are actionable under Title VII. Waag v. Thomas Pontiac, Civil File No. 3-95-538 (D.Minn., April 15, 1996) (unpublished opinion). Judge Lebedoff’s case involves an allegedly homosexual perpetrator and a heterosexual victim. Both perpetrator and victim are men. Citing EEOC guidelines, Judge Lebedoff held that the crucial inquiry is whether the harasser treats a member of one sex differently from members of the other sex. Id. at 12; EEOC Compliance Manual § 615.2(b)(3). Judge Lebedoff concluded that there was no logic in requiring that the perpetrator and victim in a sexual harassment suit

under Title VII be of the opposite sex. Id. In fact, imposing such a requirement would allow a homosexual supervisor to legally engage in conduct that a heterosexual supervisor would otherwise be prohibited from engaging in. Id. at 13. Because Minnesota courts have not yet considered whether the Minnesota Human Rights Act's proscription of discrimination on the basis of sex protects against same gender sexual harassment, Judge Lebedoff construed the Act as offering protection analogous to Title VII.

As with Judge Lebedoff's case, most of the recent decisions which have found same gender sexual harassment claims to be actionable appear to presume that the harasser is homosexual. Given this, Respondents urge the court to follow McWilliams v. Fairfax County Board of Supervisors, 72 F.3d 1191 (4th Cir. 1996) which specifically rejected a claim of heterosexual-male on heterosexual-male harassment. In McWilliams, a group of presumably heterosexual mechanics tormented a heterosexual co-worker who was learning disabled and developmentally delayed. All of the parties involved were male. The evidence indicated that on several occasions the co-workers requested McWilliams to perform sexual acts on them, and restrained and physically touched McWilliams in a sexual manner. This behavior continued for approximately three years. The court dismissed McWilliams's claim on the grounds that the harassment was not "because of" his gender as required by Title VII. Id. at 1196. However, the dissent in McWilliams persuasively argued that the majority was mistaken in focusing on the orientation of the harassers. Rather, the dissent maintained that Title VII is implicated whenever a person harasses a co-worker for sexual satisfaction, interest or desire, and the harassment is sufficiently pervasive to create a hostile working environment. Id. at 1198. While the sexual orientation of the harasser may be relevant, the dissent argued that its proof should not be required in order for a harassment claim to survive. Instead, according to the dissent, a claim of same gender sexual harassment can be established by an account of what the harasser did or said to the victim. Id.

Complainant argues that Respondents' reliance on Title VII cases which have found no cause of action in same gender sexual harassment claims is misguided. According to Complainant, differences in statutory language require that sex discrimination claims brought under the Minnesota Human Rights Act be analyzed differently than claims brought under Title VII. See, Minnesota Mining & Manufacturing Co., v. State, 289 N.W.2d 396 (Minn. 1979), 44 U.S. 1041, (where court held that the sex discrimination provision under the Minnesota Human Rights Act provided broader protection than interpretation given to sex discrimination provision in Title VII by the U.S. Supreme Court in General Electric Co. V. Gilbert, 429 U.S. 125 (1976)).

Complainant asserts that unlike Title VII, the Minnesota Human Rights Act has distinct provisions, beyond the simple prohibition against sex discrimination in Minn. Stat. § 363.03, subd. 1(2)(c), which provide a basis for same gender claims. First, the Minnesota Human Rights Act defines actionable sex discrimination to include sexual harassment. Minn. Stat. § 363.01, subd. 14. Such a provision does not exist in Title VII. Second, the Act specifically defines sexual harassment in gender-neutral terms. Minn. Stat. § 363.01, subd. 41. Nowhere in the definition does it state that the harasser and the victim must be of different genders. Thus, in order to have an actionable claim

for sex discrimination under the Act, Complainant argues that it need only establish the elements of sexual harassment as set forth in the definition, and need not prove that the harassment was “because of” the victim’s sex (gender).

Complainant also asserts that a requirement that the victim prove the discrimination was “because of” the victim’s gender, improperly shifts the focus of the case away from the actual harassment and to an elusive pursuit of the “true” sexual orientation of the harasser. Complainant argues that the crucial factual inquiry should be to determine what the alleged harasser said or did to the charging party. In addition, Complainant insists that it is the perspective of the victim and whether the harassment was unwelcome that is the appropriate focus of the case. See, Meritor Savings Bank v. Vinson, 477 U.S. 57, 64, 68 (1986) (citing EEOC Guidelines). Finally, Complainant points out that the Minnesota Supreme Court has held that the Minnesota Human Rights Act prohibits same race discrimination. Lamb v. Village of Bagley, 310 N.W.2d 508 (Minn. 1981). Likewise, the Act should be interpreted as prohibiting same sex discrimination.

After careful consideration of the memoranda filed by the parties and the relevant case law, the ALJ concludes that same gender sexual harassment claims are actionable under the Minnesota Human Rights Act. The Act defines actionable sex discrimination to include sexual harassment, and sexual harassment is defined in gender neutral terms. Minn. Stat. § 363.01, subds. 14 and 41. There is no requirement in the Act that the harasser and the victim in a sexual harassment suit be of the opposite sex. To impose such a requirement, would improperly insulate some harassers from the reach of the Act. Therefore, Respondents’ motions to dismiss the complaint for failure to state a claim are denied. Furthermore, the ALJ agrees with Complainant that Complainant need only establish the elements set forth in the definition of sexual harassment in Minn. Stat. § 363.01, subd. 41, in order to have an actionable claim of sex discrimination. That is, Complainant is not required to prove that the harassment was “because of” the victim’s gender, i.e., that Mr. Dahlin is homosexual and would not have made sexual advances and requests to Mr. Henrickson had Mr. Henrickson been a woman. It is the harasser’s alleged conduct, not the harasser’s individual characteristics, that is the crucial factual inquiry in a sexual harassment case.

Sexual Harassment Claims Under the Minnesota Human Rights Act

Pursuant to Minn. Stat. § 363.01, subd. 41, “sexual harassment” is defined as:

... unwelcome sexual advances, requests for sexual favors, sexually motivated physical contact or communication of a sexual nature when:

(1) submission to the conduct or communication is made a term or condition, either explicitly or implicitly, of obtaining employment...;

(2) submission to or rejection of that conduct or communication by an individual is used as a factor in decisions affecting that individual’s employment...; or

(3) that conduct or communication has the purpose or effect of substantially interfering with an individual’s employment...; and the employer

knows or should know of the existence of the harassment and fails to take timely and appropriate action.

Respondents argue that, even if the off-color comments and gestures took place as alleged by Complainant, such behavior does not rise to the level of actionable sexual harassment. Respondents rely on Continental Can Company v. State, 297 N.W.2d 241, 249 (Minn. 1980), for the proposition that an employer has no duty to maintain a pristine work environment. Likewise, in Klink v. Ramsey County, 397 N.W.2d 894, 901 (Minn. App. 1986), the Minnesota Court of Appeals held that “[f]oul language and vulgar behavior in the workplace does not automatically trigger an actionable claim of sex discrimination by a worker who finds such language offensive and repulsive.” In addition, Respondents assert that there is no basis in the Complaint to support a quid pro quo cause of action. According to Respondents, there is no evidence that Henrickson was given less favorable workplace treatment, or was passed over for a promotion, or in any way had his terms and conditions of employment affected by Dahlin.

Complainant argues that the allegations in this case do support claims for both hostile workplace environment and quid pro quo sexual harassment. Complainant asserts that Dahlin’s sexual talk was offensive and unwelcome to Henrickson and interfered with Henrickson’s employment enough to cause him to quit his job. Affidavit of Henrickson, Ex. C at pp. 1-2. In his affidavit, Henrickson has listed several examples of sexual comments and requests allegedly directed at him by Dahlin. Affidavit of Henrickson, Ex. C. Furthermore, Complainant maintains that Dahlin’s warning that Henrickson could be on nights a long time implied that a rejection of Dahlin’s sexual request by Henrickson would be a factor in determining the terms and conditions of Henrickson’s employment. Affidavit of Henrickson, Ex. C at p. 5.

The test for determining whether the workplace had become a hostile environment is an objective one based on the totality of the circumstances. Harris v. Forklift Systems, Inc., 114 S.Ct. 367, 371 (1993). According to the Court, factors to be considered in determining whether a reasonable person would find an environment hostile or abusive include “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. In addition, the victim must have “subjectively” perceived the environment to be hostile or abusive in order to prevail. Id. at 370.

In order to establish an actionable claim of quid pro quo sexual harassment, Complainant must show that Henrickson’s submission to Dahlin’s unwelcome sexual advances was an express or implied condition for receiving job benefits or that his refusal to submit resulted in a tangible job detriment. Minn. Stat. § 363.01, subd. 41(2); Cram v. Lamson & Sessions Co., 49 F.3d 466, 473 (8th Cir. 1995). The gravamen of a quid pro quo claim is that a tangible job benefit is conditioned on an employee’s submission to sexual blackmail and that adverse consequences flow from the employee’s refusal. Carrero v. New York City Housing Authority, 890 F.2d 569, 579 (2d Cir. 1989). The withholding of a favorable employment action, such as a denial of a promotion or training opportunities has been held to constitute quid pro quo harassment. See, e.g., Sowers v. Kemira, Inc., 701 F. Supp. 809 (S.D. Ga. 1988);

Henson v. City of Dundee, 682 F.2d 897 (11th Cir. 1982). However, mere threats of adverse consequences, without more, are insufficient to establish quid pro quo liability. See, e.g., Watts v. New York City Police Dept., 724 F.Supp. 99 (S.D.N.Y. 1989).

The ALJ finds that Complainant has set forth specific issues of fact with respect to its allegations of hostile workplace sexual harassment to survive Respondents' motions to dismiss. According to Henrickson's affidavit, Dahlin's sexual statements were frequent and unwelcome, and created an intimidating and offensive work environment which substantially interfered with Henrickson's ability to perform his job. However, the ALJ agrees with Respondent Spee Dee that Complainant has failed to set forth sufficient facts to support a quid pro quo sexual harassment cause of action. Complainant has put forth no evidence to show how Henrickson's refusal to acquiesce to Dahlin's sexual advances affected the terms or conditions of Henrickson's employment by actually depriving Henrickson of a job benefit or resulting in a tangible job detriment. While Dahlin may have threatened to keep Henrickson on night shifts until Henrickson acquiesced, there is nothing to suggest that the conditions of Henrickson's employment actually changed as a result of his refusal to do so. For example, there is no evidence that a request by Henrickson to be switched to the day shift was denied. Likewise, there is no allegation by Complainant that Dahlin's offensive sexual comments became more frequent or severe after Henrickson rebuffed Dahlin's advances. Rather, the record indicates that Dahlin's alleged offensive behavior remained fairly consistent throughout Henrickson's short employ. Therefore, without evidence that Henrickson suffered tangible employment consequences for refusing Dahlin's requests for sexual favors, Respondent's motion to dismiss Complainant's quid pro quo allegation is granted.

Employer Liability

Respondent Spee Dee maintains that even if Dahlin's conduct is actionable, it cannot be held liable under the Act because it did not know about the harassment. More specifically, Spee Dee argues that Henrickson's failure to follow Spee Dee's written procedures regarding reporting offensive and discriminatory behavior absolves Spee Dee of any liability. Spee Dee had a written policy against discrimination and offensive behavior in place at the time that Henrickson was employed. Respondent Spee Dee Ex. A. Henrickson was issued a copy of the employee policy manual which contained the policy against discrimination and offensive behavior. The policy gave procedures on how to report offensive or discriminatory behavior. The policy states in relevant part:

Any person who feels he or she is being subjected to offensive or discriminatory behavior of any kind should feel free to object to the behavior and should report the behavior to the immediate group leader or manager. Any group leader or manager who receives an offensive behavior complaint or who has reason to believe offensive behavior is occurring shall report these concerns to the Human Resources Department. If any reason exists why an employee cannot follow the normal procedure for complaints or reporting, that employee should report to the Vice President or President of the Company.

According to Spee Dee, Henrickson never stated to any co-employee or his supervisor any objection to any statements or conduct of a sexual nature. In addition, Spee Dee argues that Henrickson never reported to company management any objection to Dahlin's conduct until after he voluntarily resigned his position. Spee Dee argues that Henrickson cannot impute Dahlin's knowledge of his own harassing conduct to Spee Dee when Henrickson failed to report any perceived sexual harassment until after his resignation. In addition, Spee Dee maintains that once it was made aware of Henrickson's sexual harassment allegations, it promptly investigated his complaint.

Complainant maintains that Henrickson did comply with Spee Dee's anti-harassment policy. Dahlin is the manager of Spee Dee's Thief River Falls terminal where Henrickson worked. Henrickson objected to Dahlin's behavior and he communicated his objections to his immediate manager (Dahlin). Henrickson maintains that he told Dahlin that he "didn't like hearing" Dahlin's sexual comments. According to Henrickson, Dahlin responded by saying "get used to it". Affidavit of Henrickson, Ex. C, p. 2. In addition, Henrickson maintains that before he quit Spee Dee, he complained to assistant manager Blair Lund about Dahlin's offensive comments, but the comments continued. Affidavit of Henrickson, ¶ 3. On January 9, 1995, a few days after he resigned, Henrickson complained about Dahlin's behavior to Spee Dee's regional manager, Dennis Mohs. Affidavit of Henrickson, ¶ 4. On January 30, 1995, after not hearing back from Mr. Mohs, Henrickson wrote to Don Weeres, the president of Spee Dee, and complained of the alleged harassment. Affidavit of Henrickson, Ex. D. Complainant argues that Dahlin's failure to report Henrickson's complaint to Human Resources, in compliance with Spee Dee's policy, does not absolve Spee Dee of liability.

In order to establish a prima facie case of sexual harassment against an employer under the Minnesota Human Rights Act, the Complainant must establish that the employer knew or should have known of the harassment and failed to take appropriate action. Minn. Stat. § 363.03, subd. 41(3); Fore v. Health Dimensions Inc., 509 N.W.2d 557, 560 (Minn. App. 1993); Tretter v. Liquipak Int'l, Inc., 356 N.W.2d 713, 715 (Minn. App. 1984). Minnesota courts have held that where a manager commits sexual harassment, the manager's knowledge may be imputed to the employer. Heaser v. Lerch, Bates & Associates, 467 N.W.2d 833, 835 (Minn. App. 1991). However, employers are not strictly liable for the acts of harassment perpetuated by supervisors. Fore, 509 N.W.2d at 560. Rather, imputation of knowledge of sexual harassment to the employer is determined on a case-by-case basis. Id. The existence of a grievance procedure and a policy against sexual harassment is relevant to determining whether an employer is liable for acts of sexual harassment. Meritor, 477 U.S. at 72. Yet, even if a policy is in place, employers have a continuing duty to assure that its managers take appropriate action once a report of harassment is received. Weaver v. Minnesota Valley Labs., 470 N.W.2d 131, 135 (Minn. App. 1991).

The ALJ finds that Complainant has put forth sufficient evidence to support its claim that Henrickson did comply with the procedures of Spee Dee's written anti-harassment policy by reporting his complaints directly to Dahlin. The fact that Dahlin failed to report Henrickson's complaint to Spee Dee's Human Resources Department does not insulate Spee Dee from liability. Therefore, Complainant has raised genuine

issues of fact regarding Spee Dee's knowledge of the sexual harassment. Respondent Spee Dee's motion to dismiss based on Complainant's failure to follow Spee Dee's anti-harassment policy and lack of Respondents' knowledge of the harassment is denied.

Spee Dee's Remedial Action

Finally, Respondent Spee Dee argues that once it was made aware of Henrickson's complaint, it took prompt and appropriate steps to investigate the alleged sexual harassment. As part of its investigation, Spee Dee's regional manager and president interviewed Christopher Dahlin and other employees to determine if its policy against discrimination and offensive behavior had been violated. In a letter dated February 20, 1995, Spee Dee's counsel informed Henrickson that the company was investigating his complaint and that Spee Dee would inform him of the conclusions of the investigation. Complainant's Ex. E.

Complainant maintains that Spee Dee failed to take timely and appropriate action once it was notified of Henrickson's complaint. A few days after resigning, Henrickson contacted Spee Dee's regional manager Dennis Mohs and told him that he was quitting his job because of Dahlin's sexual harassment. According to Henrickson, Mohs responded by stating that "he would look in to the problem and maybe they could work something out." Affidavit of Henrickson, ¶ 4. According to Complainant, Mohs gave Henrickson reason to believe that an investigation would take place promptly. However, Henrickson was not contacted by Mohs again. After waiting three weeks, Henrickson wrote to the President of Spee Dee and expressed a desire to return to work if he would no longer be harassed by Dahlin. Affidavit of Henrickson, Ex. D. Approximately three weeks later, Spee Dee's attorney wrote to Henrickson and informed him that an investigation had begun and that he would be informed of its conclusions. Henrickson never received any further contact from Spee Dee. On March 20, 1995, Henrickson filed charges of discrimination with the Department of Human Rights. Affidavit of Henrickson, Exs. A and B.

Minnesota courts have held employers liable for supervisors' acts of harassment where the employer knew or should have known of the harassment, but failed to take timely and appropriate action. McNabb v. Cub Foods, 352 N.W.2d 378, 383 (Minn. 1984); Heaser v. Lerch, Bates & Associates, 467 N.W.2d 833 (Minn. App. 1991). Consequently, an employer may avoid liability for harassment committed by its employees by taking such actions as enacting an anti-harassment policy, promptly investigating complaints, and taking or threatening appropriate disciplinary action. Fore v. Health Dimensions, Inc., 509 N.W.2d 557, 561 (Minn. App. 1993); Tretter v. Liquipak Intern, Inc. 356 N.W.2d 713, 716 (Minn. App. 1984). In the instant case, Complainant has put forth sufficient evidence to raise an issue of fact regarding the timeliness and appropriateness of Spee Dee's remedial action. Therefore, Respondent Spee Dee's motion to dismiss Complainant's sexual harassment claim based on Spee Dee's response to Henrickson's complaint is denied.

S.M.M.