IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
DAVENPORT DIVISION

COREY STOGLIN,	)	
	)	
Plaintiff,	)	Civil No. 3-98-cv-30089
	)	
v.	)	FINDINGS OF FACT, CONCLUSIONS
	)	OF LAW AND ORDER FOR JUDGMENT
WAL-MART STORES, INC.,	)	
	)	
Defendant.	)	

This matter is before the Court following bench trial on April 14, 2000, and subsequent post-trial briefs. Attorney Walter Braud appeared for plaintiff. Attorney Linda Whittaker appeared for defendant. This is an action under 42 U.S.C. § 1981[1] and the Iowa Civil Rights Act, Iowa Code Ch. 216, based on an alleged racially hostile work environment. The Court has jurisdiction pursuant to 28 U.S.C. §§ 1331, 1343(a)(4) and 1367.

The parties consented to proceed before a United States

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[1] Plaintiff's pro se complaint and accompanying motion for leave to proceed in forma pauperis were received by the Clerk on June 18, 1998, 91 days after the date of plaintiff's right-to-sue letter from the EEOC. Following order granting leave to proceed in forma pauperis, the complaint was filed June 22, 1998. Defendant Wal-Mark claimed the complaint was not timely filed as a Title VII action. See 42 U.S.C. § 2000e-5(f)(1). To avoid a limitations issue, plaintiff asked the Court to consider his action as one for race discrimination under 42 U.S.C. § 1981, and the Court has done so. See Plaintiff's March 10, 2000 Trial Brief. However, it bears noting that if a reasonable time for mail delivery is assumed and the time of receipt of the pro se complaint by the Clerk's office tolls the running of the 90-day limitations period, see Janneh v. Regency Hotel, 879 F. Supp. 5, 6 (N.D.N.Y. 1995), the complaint may have been timely submitted to proceed as a Title VII action.

Magistrate Judge and the case was referred to the undersigned for all further proceedings on April 10, 2000. See 28 U.S.C. § 636(c). The Court has carefully considered the record evidence, the arguments and statements of counsel and now finds and concludes as follows.

FINDINGS OF FACT

Plaintiff, Corey Stoglin, age 24, is currently a college student at the University of Iowa. Stoglin is an African American. Needing some additional money, in April 1996 he applied for a job at a Wal-Mart store in Davenport, Iowa and was hired as a floor associate. He worked until January 1997, when he was terminated after failing to report for work.

Stoglin was first placed in the greenhouse where he worked for about three months until toward the end of the summer season. He had no complaints about his treatment in the greenhouse. He was next transferred to the toy department. His supervisor there was assistant manager Jim Wright. Stoglin has no complaint about his treatment at the hands of Mr. Wright. Stoglin worked the evening shift from about 5:00 to 5:30 p.m. to about 11:30 p.m., three or four days a week, totaling about 20 hours a week.

Stoglin's hostile work environment claim stems from his interactions with two Wal-Mart employees, Roy Mayday and Nancy Sparks, both white. Mayday was an assistant manager who once or twice a week

when Stoglin worked was in charge of the store in the evening in the absence of the store manager, Tony Ciabattoni. Nancy Sparks was a customer service manager who, when on duty, was in charge of the cashiers and from time to time would assign work to Stoglin as described below.[2]

Stoglin testified that his problems with Mayday began in mid to late October of 1996 and lasted until the time he left employment. According to Stoglin, when he was there Mayday often hounded him by monitoring his breaks, checking and complaining about his work (though there is no evidence Mayday complained to anyone other than Stoglin about his work), and rushing him to get his work done. Stoglin also complains that once or twice a week Mayday would send him to work in other departments. Stoglin came to believe that Mayday's attitude toward him was racially motivated. He based this on his perception that Mayday appeared more open and friendly with whites, whereas with him Mayday was blunt and strictly business, and his belief he was sent to work outside of his department more frequently than other employees.

Stoglin left work never to return after an incident involving Mayday on January 25, 1997. That day Stoglin was working in the health and beauty area "facing" shelf items (pulling them forward on the shelf) when a member of his former national guard unit, Andrew Souza

[2] Stoglin's testimony varied some with respect to the frequency with which he worked with Mayday and Sparks.

(who is white), stopped by to talk to him. Stoglin continued to work while talking with Souza. He noticed Mayday observing them. After a few minutes, Mayday came up and, addressing Souza in a rude and abrupt fashion, told him he would have to talk to Stoglin on his own time. Stoglin testified he had seen Mayday in the vicinity when other white employees talked to their friends, but not intervening as he did when Stoglin and Souza were speaking.

Stoglin was embarrassed by the episode and did not come to work again. The January 25 incident was the "straw that broke the camel's back." Stoglin did not complain about the episode to the store manager or others in Wal-Mart management, nor did he ever complain that Mayday was treating him differently because of his race.

James Holmes was the stockman assigned to Stoglin's shift. Holmes is an African American. Among the stockman's job responsibilities were cleaning the bathrooms and collecting carts from the parking lot. As customer service manager, Nancy Sparks was responsible for seeing that these jobs got done. Stoglin complains that when Holmes was on break or otherwise not available, Sparks would typically assign him and/or Ernest Stokes (also an African American) to fill in. Stoglin testified white employees were assigned less frequently by Sparks to clean the bathrooms and collect carts. As with Mayday, Sparks was on duty about half the time when Stoglin worked. Stoglin had contact with Sparks three to four times each week in a

manner he found unsatisfactory.

Stoglin testified that on four or five occasions Sparks addressed him and other minority employees as "boy" (or "girl" in the case of women) when giving instructions. Twice Stoglin heard Sparks use racial slurs. Once Stoglin heard Sparks talking about some kids standing near the McDonald's in the store, saying she wished those "niggers" would just leave. In November 1996 after some type of incident between an African American individual and a security guard, Stoglin overheard Sparks say something like "you have to watch those niggers." Stoglin did not bring Sparks' racist comments to the attention of the store manager or any other person in Wal-Mart management.

Stoglin was not the only person to have overheard Sparks using racial slurs. Former cashier Frances Lewis testified she overheard Sparks say to two small African American boys looking at baseball cards, "I wish you little nigger boys would go home." Lewis is African American. She testified to an episode where a customer gave her a $100 bill. Lewis asked Sparks for change, giving Sparks the bill. Later, apparently on Sparks' instructions, Lewis' register was turned off and her drawer was counted with her present and to her embarrassment. Lewis was told Sparks had said she could not find the $100 bill. The cash drawer balanced whereupon Sparks pulled the $100 bill out of her pocket, stating she had just found it. As described by

Lewis, the incident was one of race-based harassment by Sparks of an employee under her supervision. Lewis was a credible witness.

After he left Wal-Mart, Stoglin continued his other part-time employment at a grocery store but did not seek any other employment.

Wal-Mart has an appropriate policy against unlawful discrimination. (Exs. P & Q). The store in question used computer-based learning modules to train employees on its EEO policies and procedures. A complaint of discrimination can be taken to any level of the company. Store manager Ciabattoni testified that company policy required him to personally investigate a complaint of discrimination within twenty-four hours and to report the matter to his supervisors. He received no complaints about Mayday or Sparks. There is no evidence Ciabattoni harbored any animosity toward African American employees.

DISCUSSION INCLUDING ADDITIONAL FACTUAL FINDINGS

Stoglin claims Wal-Mart discriminated against him on the basis of his race by creating a hostile work environment in violation of 42 U.S.C. § 1981 and the Iowa Civil Rights Act which led to his constructive discharge. The analysis applied to cases arising under § 1981 is the same as applied in Title VII cases. Roxas v. Presentation College, 90 F.3d 310, 315 (8th Cir. 1996). Similarly, Iowa courts follow the same analysis as federal courts in considering discrimination cases. Reiss v. ICI Seeds, Inc., 548 N.W.2d 170, 174 (Iowa 1996).

To establish a hostile work environment claim a plaintiff must prove (1) he "is a member of a protected group; (2) unwelcome harassment occurred; (3) a causal nexus existed between the harassment and [the] protected-group status; (4) the harassment affected a term, condition, or privilege of employment; and (5) [his] employer knew or should have known of the harassment and failed to take prompt and effective remedial action." Austin v. Minnesota Mining & Mfg. Co., 193 F.3d 992, 994 (8th Cir. 1999); see Mems v. City of St. Paul, __ F.3d __, __, 2000 WL 1060446 (8th Cir. Aug. 3, 2000); Carter v. Chrysler Corp., 173 F.3d 693, 700 (8th Cir. 1999). In the case of a hostile work environment created by a supervisor, the plaintiff need not prove the last element (though it is sufficient to establish liability if he does) as the employer is vicariously liable for the supervisor's conduct, unless (where no tangible employment action has been taken, which is the case here) the employer establishes (1) it "exercised reasonable care to prevent and correct promptly" the racially hostile behavior and (2) the employee "unreasonably failed to take advantage of any preventative or corrective opportunities provided by the employer or to avoid harm otherwise." Faragher v. City of Boca Raton, 524 U.S. 775, 807 (1998); see Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 765 (1998).[3]

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[3] The dissent in Ellerth opined that as a result of the holdings in that case and Faragher employer liability would be (continued...)

[3](...continued)
judged "by different standards depending on whether a sexually or racially hostile work environment is alleged." 524 U.S. at 767 (Thomas, J., dissenting). The dissenters noted that (except where tangible employment action is taken) prior racially hostile work environment cases had suggested that the employer is liable for a hostile work environment created by a supervisor only if the employer knew, or in the exercise of reasonable care, should have known about the hostile work environment and failed to take remedial action, essentially a negligence standard. Id. at 768-69. They appeared to assume that the modified vicarious liability rule announced in Faragher and Ellerth would apply only in sexually hostile work environment cases and argued that the two types of cases should receive "parallel treatment." Id. at 774. Pointing to the dissent in Ellerth, Wal-Mart argues that this Court should decline to apply the modified vicarious liability rule to racially hostile work environment cases.

While it is true that Faragher and Ellerth were sex harassment cases and their holdings expressly apply only to such claims under Title VII, there is no principled reason to distinguish between types of discriminatory harassment in determining the liability of an employer for a supervisor's conduct. The Faragher/Ellerth majority signaled as much when, in Faragher, it observed that "[i]n . . . holding that environmental claims are covered by [Title VII], we drew upon earlier cases recognizing liability for discriminatory harassment based on race and national origin." 524 U.S. at 786. In a footnote, the Court continued that while racial and sexual harassment may take different forms and "may not be entirely interchangeable, we think there is good sense in seeking generally to harmonize the standards of what amounts to actionable harassment." Id. at 787 n.1. The Eighth Circuit subsequently cited this language in support of the proposition that "[t]he same standards are generally used to evaluate claims of hostile work environment based upon sexual harassment and racial harassment." Gipson v. KAS Snacktime Co., 171 F.3d 574, 578 (8th Cir. 1999). See Wright-Simmons v. City of Oklahoma City, 155 F.3d 1264, 1270 (10th Cir. 1998). In light of these pronouncements, it is likely the Supreme Court and our circuit court would harmonize the standards governing racial and sexual harassment claims by applying the modified vicarious liability
(continued...)

To prevail on a hostile work environment claim, plaintiff must show both that the offensive conduct created an objectively hostile work environment and that he subjectively perceived the working environment as abusive. Hathaway v. Runyon, 132 F.3d 1214, 1221 (8th Cir. 1997)(citing Harris v. Fork Lift Sys., Inc., 510 U.S. 17, 21-22 (1993)). To satisfy the requirement that the work environment be objectively hostile or abusive, plaintiff must show that the complained of conduct was "severe or pervasive." Klein v. McGowan, 198 F.3d 705, 709 (8th Cir. 1999)(citing Harris, 510 U.S. at 21); Delph v. Dr. Pepper Bottling Co., 130 F.3d 349, 354 (8th Cir, 1997). "A court evaluating a Title VII claim must evaluate the totality of the circumstances, including 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." Klein, 198 F.3d at 709. "Simple teasing, offhand comments, and isolated incidents generally cannot amount to severe or pervasive harassment." Id. The "conduct must be extreme to amount to a change in the terms and conditions of employment." Faragher, 524

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[3](...continued)
rule articulated in Ellerth and Faragher to both. It is not necessary, however, to address vicarious liability, or the defense to it, in this case because plaintiff has not established other elements of his racial harassment claim.

U.S. at 788 (citing among other authorities, Moylan v. Maries County, 792 F.2d 746, 749-50 (8th Cir. 1986)). Harassing conduct may constitute discrimination where members of a protected group "are exposed to disadvantageous terms or conditions of employment" that other workers are not. Schoffstall v. Henderson, ___ F.3d ____, ___, 2000 WL 1166318, *7 (8th Cir. Aug. 18, 2000).

For reasons set forth below, the Court finds Stoglin has not established that the alleged harassing conduct of Mayday was motivated by or causally connected to Stoglin's race or, in the case of Sparks' conduct, that the alleged harassment was severe or pervasive to the extent that it affected a term, condition or privilege of Stoglin's employment.

The only evidence Mayday's treatment of Stoglin was racially motivated is Stoglin's perception that Mayday was friendlier to whites than he was to him, and his belief Mayday treated him harsher and sent him to work in other departments more frequently than he did whites. His testimony on these points is general, subjective and unsupported by other evidence. Even if Mayday was not as friendly to Stoglin as he was with others, that does not necessarily imply that the reason was Stoglin's race.

There are many neutral reasons why a supervisor may dislike or distrust a subordinate.

If Mayday felt animosity toward African Americans and let it influence his working relationship with Stoglin, it should have shown itself in his dealings with the other African Americans on Stoglin's shift, James Holmes and Ernest Stokes, been perceived by others in the workplace, or reflected itself in Mayday's assessment of Stoglin's job performance. Mayday was Holmes' direct supervisor. Holmes did not offer any testimony tending to support Stoglin's perception of Mayday's attitude toward African Americans nor did he testify to unfair treatment at Mayday's hands. Ernest Stokes testified that he did not observe Mayday being more friendly with whites than nonwhites. Stokes also testified he did not experience any inappropriate treatment from Mayday or observe Mayday treating Stoglin differently than other employees. There is no evidence that Mayday ever complained to others in management, or made an adverse report, about Stoglin's work performance.[4]

For the same reasons the evidence is also short of establishing disparate treatment by Mayday in assigning Stoglin to work outside the toy department from time to time. Wal-Mart

[4] When Stoglin was terminated for absenteeism the Wal-Mart termination form noted that he was eligible to be re-hired. (Ex. H).

operates large retail stores in which all employees are expected to help wherever they are needed. When one department was shorthanded because an employee failed to show for work or for some other reason, or was busier than another, it was expected that employees would be moved from another department to assist. Stoglin may have felt picked on, but it is doubtful he was in a position to know whether, on a store-wide basis, he was assigned by Mayday to work outside his department disproportionally than other, white employees. If Stoglin was asked to help out in other departments more than other employees, such assignments are not an adverse employment action nor sufficiently disadvantageous to support an inference of racial motivation.

There is direct evidence that Sparks held an animus toward African Americans. The $100 bill episode with Frances Lewis shows that Sparks was fully capable of racial harassment. She had only limited authority over Stoglin, however. She could summon him to the front to collect shopping carts from the parking lot or to clean the bathroom when the regular stockman, Holmes, was absent or on break. Beyond this she did not supervise Stoglin or have much to do with him. The two racial slurs overheard by Stoglin in a six-month period of time, which were not personally directed at him, and Sparks' occasional use of the words "boy" and "girl" when addressing African American workers, while

certainly offensive and intolerable in the workplace,[5] do not establish a pervasive environment of racial animosity which interfered with Stoglin's employment. Faragher, 524 U.S. at 788; Klein, 198 F.3d at 709.

In considering the totality of circumstances, Sparks' racial comments must be viewed in conjunction with Stoglin's complaint that he and Stokes were called forward by Sparks more frequently than white employees to clean bathrooms and collect shopping carts. In view of Sparks' attitude toward African Americans it is a distinct possibility that race motivated some of her instructions to Stoglin to clean bathrooms or collect carts, see Carter, 173 F.3d at 701 (racial epithets may create "an inference that racial animus motivated other conduct as well"), but Stoglin would have done much of the same work regardless of Sparks' attitudes.

Sparks was present one or two nights a week when Stoglin worked. Stoglin estimated she called him and Stokes to clean bathrooms once or twice in a two-week period, and apparently more frequently to collect carts. As indicated previously, all employees were expected to work where needed. Even store manager Ciabattoni cleaned bathrooms and collected carts on occasion. As a matter of practice, women were not asked to clean the men's bathroom. The frequency with which Stoglin was

[5] Store manager Ciabattoni testified Sparks' racial epithets would have warranted investigation and possible dismissal of Sparks.

called also had to do with the department in which he worked. Sales associates in areas where security was a concern - automotive, fitting rooms, jewelry, and shoes as examples - typically were not sent elsewhere if it could be avoided. Ciabattoni testified associates in the apparel, health and beauty, housewares and toy departments were called forward more frequently because they were considered more available.[6] It is therefore very difficult to determine the extent to which Sparks' racial animus may have influenced Stoglin's occasional assignments to clean bathrooms or collect shopping carts. It is unlikely, however, that Sparks' attitudes affected a significant part of Stoglin's overall work experience.

"Title VII is not a general civility code," nor was it "designed to create a federal remedy for all offensive language and conduct in the workplace." Scusa v. Nestle USA Co., 181 F.3d 958, 966-67 (8th Cir. 1999). The cause of action for hostile work environment is "limited to extreme work conditions." Gipson, 171 F.3d at 580. The racial comments attributed to Sparks and her periodic work assignments to Stoglin do not rise to the level the case law reflects is necessary to find harassing conduct which affects a term, condition or privilege of employment. See, e.g., Carter, 173 F.3d at 696 (female African American subjected to personally directed racial and sexual epithets by

[6] The Associate Handbook notes that "[f]lexibility is important in our business. Occasionally, you will be asked to work in areas other than your original assignment." (Ex. P at 10).

co-worker, as well as other abusive conduct, nearly every other day over two years); Gipson, 171 F.3d at 577-79 (explicit racial comments, suspension and statement by supervisor that company did not need black employee's "kind" permitted inference of racial animus but incidents in question did not create hostile work environment); Delph, 130 F.3d at 356 (evidence of racially offensive comments by supervisors on many occasions made not only in plaintiff's presence but also directed at him was sufficient to demonstrate severity and pervasiveness); Ways v. City of Lincoln, 871 F.2d 750, 755 (8th Cir. 1989)(nearly fifty examples of racial harassment in evidence); Johnson v. Bunny Bread Co., 646 F.2d 1250, 1257 (8th Cir. 1981)(prima facie case not established in absence of "steady, barrage of opprobrious racial comment"); Smith v. DataCard Corp., 9 F. Supp. 2d 1067, 1079 (D. Minn. 1998)(contention that co-workers used racial slur "regularly" or "frequently" insufficient for purposes of summary judgment); Moss v. Advance Circuits, Inc., 981 F. Supp. 1239, 1247 (D. Minn. 1997)(five incidents, only three of which had racial overtones, insufficient).

As plaintiff has not established the required elements of his hostile work environment claim, the Court does not reach the question of the supervisory status of Mayday and Sparks or the merits of the Faragher/Ellerth defense addressed in the parties' briefs.

The Court wishes to express its appreciation to plaintiff's counsel, Mr. Walter Braud, who accepted appointment to represent Mr.

Stoglin, for his able prosecution of plaintiff's case which greatly assisted in a full presentation of the evidence.

CONCLUSIONS OF LAW

1. Plaintiff has failed to establish that he was subjected to a hostile work environment based on his race in violation of 42 U.S.C. § 1981 or the Iowa Civil Rights Act.

2. Judgment should be entered in favor of defendant and against plaintiff dismissing the complaint.

IT IS SO ORDERED.

Dated this _____ day of September, 2000.

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ROSS A. WALTERS
CHIEF UNITED STATES MAGISTRATE JUDGE