IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF IOWA
WESTERN DIVISION

ROBYN E. PERRIGO,	*	CIVIL NO. 1-99-CV-10003
	*	
Plaintiff,	*	
	*	
vs.	*	ORDER
	*	
HARVEYS IOWA MANAGEMENT * COMPANY, INC., a Nevada corporation, d/b/a HARVEYS CASINO HOTEL; and VERNE WELCH,	*	
	*	
Defendants,	*	

The Court has before it a motion for summary judgment, filed December 1, 1999 by defendants Verne Welch and Harveys Iowa Management Company, Inc. d/b/a Harveys Casino Hotel ("Harveys"). Plaintiff Robyn Perrigo resisted the motion on December 29, 1999, and the Court held a telephonic hearing on March 9, 2000. The motion is now considered fully submitted.

I. BACKGROUND

The following facts either are not in dispute or are viewed in a light most favorable to plaintiff. Robyn Perrigo is an individual currently residing in the State of Nebraska. Verne Welch is an Iowa resident employed as senior vice president and general manager of Harveys in Council Bluffs, Iowa, and has been so employed at all times relevant to this lawsuit. Welch's position as general manager makes him the highest ranking employee in the Council Bluffs complex.

Plaintiff began working as a cocktail server for Harveys' Council Bluffs, Iowa casino on

October 31, 1996. As part of her orientation, Harveys gave plaintiff a copy of its Employee Handbook, which contains a written Sexual Harassment policy. Harveys also gave plaintiff a brochure and two separate informational letters describing the Employee Assistance Program (EAP). All three EAP documents listed a toll-free number for employees experiencing "personal or work related problems," as well as the local telephone number for Jennie Edmundson Hospital in Council Bluffs, Iowa.

Plaintiff's performance record with Harveys was mixed. On January 3, 1997, at the conclusion of plaintiff's orientation performance review as a cocktail server, Harveys placed plaintiff on a sixty-day extended orientation review schedule and advised her she needed to show improvement in her work. On July 23, 1997, plaintiff received a warning from Harveys for an attendance problem. Subsequently, on August 9, 1997, Harveys issued a written warning to plaintiff for engaging in malicious gossip regarding another employee's schedule change.

In the interim, however, on July 19, 1997, Robyn was commended for providing outstanding service after being observed by a surveillance team.

On September 2, 1997, plaintiff was off-duty and went with a female friend to Mr. G's Lounge ("Mr. G's"), a cocktail lounge located within Harveys Casino Hotel. Plaintiff and her friend sat with a group of other Harveys employees. At some point, plaintiff began talking with defendant Welch, who invited her to sit at his table. Plaintiff agreed, and sat down across from Welch. According to plaintiff, Welch told her several times that she had "very sexy legs." Plaintiff did not respond, but moved her legs a little closer to the table.

One of the women in plaintiff's group then suggested they all go to a local dance club called

Lipstix. Welch offered plaintiff a ride to the club, and she accepted. When plaintiff and Welch arrived at Lipstix, they located the group from Harveys, and sat down at the same table. Welch repeatedly put his hands on plaintiff's legs, and told plaintiff again that she had nice legs. Plaintiff contends she pushed his hands away several times, and said, "don't." She did not leave the table, however, because she wanted to stay with the group. Welch also allegedly told plaintiff that he would like to date her. When plaintiff told him that their schedules clashed because she worked nights, Welch allegedly told plaintiff he could change her schedule to a day shift. Welch also mentioned that he was going on a trip to the Bahamas, and allegedly implied he might take plaintiff with him.

Plaintiff states they had been at Lipstix approximately forty-five minutes when Welch said he was leaving and offered to give plaintiff a ride home. Plaintiff agreed. Before long, plaintiff realized Welch was not driving to her house. Plaintiff asked where they were going, and Welch told her he wanted to give her a tour of his house, which was not very far from plaintiff's house. Plaintiff replied that she had to get home to her children, and Welch assured her the tour would not take very long. After a brief "tour," plaintiff told Welch she was ready to leave. Welch allegedly responded that they could just sit on the sofa and talk for a minute. Plaintiff contends Welch led her to believe that he would take her to the Bahamas and change her work schedule to the day shift if she engaged in sexual activity with him.[1] Because of his position as general manager, plaintiff also believed that Welch would fire her if she did *not* succumb to his advances. She therefore agreed to "sit and talk."

Plaintiff alleges Welch then attempted to have intercourse with her. Plaintiff contends she put

[1] It is not clear from the record at what point Welch allegedly made these statements. Plaintiff contends, however, that his statements and implications caused her to continue to go along with his advances.

her hands on his chest and said no, that she did not want to do that. According to plaintiff, the two nevertheless engaged in sexual intercourse against her wishes. Welch disputes that intercourse took place, and claims all of his advances were welcomed by plaintiff. Welch took plaintiff home shortly thereafter.

At some point between September 2, and September 12, 1997, plaintiff ran into Welch at Mr. G's, and asked him about the trip to the Bahamas. He told her that the trip had been cancelled. Plaintiff had no other encounters with Welch during the remainder of her tenure at Harveys.

Plaintiff acknowledges she was aware of Harveys' sexual harassment policy, yet chose not to report the alleged incident to anyone in a management position at Harveys. Plaintiff contends that reporting the incident would have been futile in light of Welch's senior position at the Council Bluffs complex. Plaintiff states she was also concerned about the policy language providing that false reports of sexual harassment would be punished as harshly as acts of discrimination or harassment.

On November 15, 1997, plaintiff received a written warning for leaving alcoholic beverage containers around her workstation. Subsequently, on November 28, 1997, plaintiff was suspended for leaving beer bottles at her work station after Harveys could legally sell alcoholic beverages. Plaintiff acknowledges she was told early in her employment that Harveys could lose its liquor license if beer bottles and liquor glasses were on the floor after 2:00 a.m.

On February 9, 1998, plaintiff's immediate supervisor, Joe Clark, again allegedly observed plaintiff allow an excessive number of alcoholic beverage containers to accumulate at and around her work station. When she reported for her next shift on February 11, 1998, Clark informed plaintiff he and another supervisor, Marie Burnham, had made the decision to terminate plaintiff due to the

February 9, 1998 incident. Clark further asserts that although he also discussed plaintiff's proposed termination with *his* supervisor, Tim Nelson, there was no discussion with or attempt to influence the decision by anyone else in management above Nelson.

Furthermore, Harveys' human resources director, Cyndy Canada, stated in affidavit that numerous other cocktail servers were terminated for similar violations. She also asserted that plaintiff did not report her September 2, 1997 encounter with Welch to anyone in Harveys' management until after her termination, nearly five and one half months after the encounter.

Plaintiff filed the present action on December 21, 1998 in the Iowa District Court in and for Pottawatamie County. Count I alleges that defendant Harveys discriminated against plaintiff on the basis of her sex, and sexually harassed plaintiff, in violation of Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. §§ 2000e *et seq*. Count II sets forth parallel claims of sexual discrimination and harassment in violation of the Iowa Civil Rights Act, ("ICRA"), Iowa Code §§ 216 *et seq*. Counts III and IV allege that defendant Welch's conduct on September 2, 1997 amounted to assault and battery, respectively. Count V alleges both defendants' conduct toward her constituted intentional infliction of emotional distress. Count VI alleges alternatively that defendants' conduct constituted *negligent* infliction of emotional distress. Count VII alleges defendant Harveys was negligent in failing to properly supervise and control defendant Welch, and in retaining him in its employ. Count VIII alleges defendant Harveys is liable under the doctrine of respondeat superior for torts committed by defendant Welch in the scope of his employment.

Defendants removed the action to this Court on January 7, 1999. They now move for summary judgment on counts I and II and on counts V through VIII.

II. APPLICABLE LAW AND DISCUSSION

A. Summary Judgment Standard

Summary judgment is properly granted when the record, viewed in the light most favorable to the nonmoving party, shows that there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *Walsh v. United States*, 31 F.3d 696, 698 (8th Cir. 1994). When ruling on a motion for summary judgment, we consider the evidence and draw all justifiable inferences in favor of the nonmoving party. *See Miners v. Cargill Communications, Inc.*, 113 F.3d 820, 823 (8th Cir. 1997).

"Summary judgment should seldom be granted in the context of employment actions, as such actions are inherently fact based." *Hindman v. Transkrit Corp.*, 145 F.3d 986, 990 (8th Cir. 1998). Summary judgment should be granted only on the rare occasion where no dispute of fact exists and there is only one conclusion. *Crawford v. Runyon*, 37 F.3d 1338, 1341 (8th Cir. 1994) (citations omitted). The court should not grant a summary judgment motion "unless the evidence could not support any reasonable inference for the nonmovant." *Id.* (citations omitted); *see also Benson v. Northwest Airlines, Inc.*, 62 F.3d 1108, 1111 (8th Cir. 1995) (citation omitted).

B. Timeliness of Administrative Filing

1. State Discrimination Claim

The Court will first consider defendants' timeliness argument. Defendants contend the September 2, 1997 incident occurred outside the statute of limitations period, thus barring all of counts I and II of plaintiff's petition. To be considered timely under the Iowa Civil Rights Act, a complainant must file her charge with the Iowa Civil Rights Commission ("ICRC") within 180 days of the alleged

occurrence. *See* Iowa Code § 216.15(12). *See also Ritz v. Wapello County Bd. of Supervisors*, 595 N.W.2d 786, 792 (Iowa 1999); *Iowa Civil Rights Comm'n v. Deere & Co.*, 482 N.W.2d 386, 388 (Iowa 1992).[2] The record shows plaintiff filed her administrative charge with the ICRC on June 24, 1998–295 days after her September 2, 1997 encounter with Welch. *See* Exhibit M to Defendants' Motion for Summary Judgment.

Plaintiff attempts to save her state claim by arguing the September 2, 1997 incident was the first act in a "continuing violation," or pattern and practice of discrimination. In *Annear v. State*, 419 N.W.2d 377, 379 (Iowa 1988), the Iowa Supreme Court first recognized that an alleged discriminatory act occurring outside the limitations period may be considered in support of a charge of discrimination if the act is of a "continuing nature." It is important to note, however, that an act will not be held to be part of a "continuing violation" if it is "'merely the consequence of a now time-barred event.'" *Hy-Vee Food Stores, Inc. v. Iowa Civil Rights Comm'n*, 453 N.W.2d 512, 527 (quoting 45A Am.Jur.2d Job Discrimination § 1231 at 1024 (1986)). Furthermore, to establish that an act is part of a continuing violation, a claimant must show, among other things, a connection between a present act of discrimination and the time-barred event. *Id.* at 528. This plaintiff has failed to do.

In her brief in resistance to the present motion, plaintiff theorizes that after she confronted Welch about the Bahamas trip, he decided he wanted plaintiff terminated, and somehow influenced

[2] The Court acknowledges that the ICRC conducted a preliminary screening on plaintiff's case pursuant to Iowa Code § 216.16(6) and Iowa Administrative Code regulation 161.3.12, before administratively closing the case on October 21, 1998. *See* Defendants' Exhibit B. The fact the ICRC initially assumed jurisdiction over and conducted a preliminary screening of plaintiff's charge does not preclude this Court from determining whether the administrative complaint was timely filed. *Ritz*, 595 N.W.2d at 792 n.5.

plaintiff's floor supervisors to issue the two November write-ups, as well as the February 1998 write-up which ultimately led to her termination. Plaintiff has failed to produce any admissible evidence to support these allegations, however, or to challenge the statements made by Joe Clark, one of the beverage supervisors who made the decision to terminate plaintiff. According to Clark, "[t]here was no discussion with or attempt by anyone else in the management above Tim Nelson to influence our decision to terminate Ms. Perrigo's employment." Defendant's Exhibit H at 2. The Court therefore finds plaintiff has failed to establish a connection between plaintiff's February 1998 termination and the otherwise time-barred encounter in September 1997. Absent evidence of an incident of allegedly discriminatory conduct based on sex that occurred within 180 days of the date she filed her administrative complaint, the Court finds plaintiff's claims under the ICRA in count II are DISMISSED.

2. Federal Discrimination Claim

Timely filing of an administrative complaint with the federal civil rights agency, the Equal Employment Opportunity Commission ("EEOC"), also is a prerequisite to maintaining a federal claim of discrimination under Title VII. *See, e.g., Owens v. Ramsey Corp.*, 656 F.2d 340, 342 (8th Cir. 1981). Although the time period for filing with the EEOC ordinarily is 180 days, Congress extended the deadline to 300 days in instances where the individual has "initially instituted proceedings with a state or local agency with authority to grant or seek relief" from the alleged violation. 42 U.S.C. § 2000e-5(e). States that maintain these agencies are known as "deferral states." *See. e.g., Worthington v. Union Pacific R.R.*, 948 F.2d 477 n.3 (8th Cir. 1991).

A somewhat confusing situation occurs when a complainant files her administrative complaint with the state agency between 240 and 300 days after the alleged incident, as in the present case.

Regardless of whether a plaintiff cross-filed her complaint with the ICRC and EEOC on the same date, the filing is statutorily effective *only as to the state commission.* *See* 42 U.S.C. § 2000e-5(c) (no charge may be filed with the EEOC "before the expiration of sixty days after proceedings have been commenced under the State or local law, unless such proceedings have been earlier terminated."); *Owens v. Ramsey Corp.*, 656 F.2d 340, 341 (8th Cir. 1981) (administrative complaint held in "suspended animation for 60 days or until an earlier termination of state proceedings"). Accordingly, if a plaintiff filed a complaint in a deferral state on the 241st day following an alleged incident of harassment, if the state agency did not terminate its proceedings early, the EEOC would not begin processing the claimant's case until day 301, in which case it would be untimely. *Owens*, 656 F.2d at 342; *see also Shepherd v. Kansas City Call*, 905 F.2d 1152, 1153 (8th Cir. 1990) ("a charge received by the EEOC after 240 days and before 300 days can be timely filed if the state agency terminates its proceedings before the 300-day period expires.").[3]

To avoid this dilemma, states such as Iowa have included provisions in their work-share agreements with the EEOC whereby the states waive their 60-day periods of exclusive jurisdiction "for the purpose of allowing the EEOC to proceed immediately with the processing of such charges before the 61st day." *See* Worksharing Agreement Between ICRC and EEOC for Fiscal Year 1998 ("Worksharing Agreement"), Division III.[4] The Eighth Circuit has interpreted a Nebraska work-share

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[3]As indicated in note 2, above, the ICRC did not terminate its proceedings before expiration of the 60-day period.

[4] The Agreement goes on to provide that: "The EEOC will initially process the following charges: –All Title VII, ADA and concurrent Title VII/ADA charges jurisdictional with the [ICRC] and received by the [ICRC] 240 days or more after the date of violation." Worksharing Agreement, Division III.

agreement with waiver language substantially similar to that in the Iowa agreement as being self-executing. *Worthington v. Union Pacific R.R.*, 948 F.2d 477, 481-82 (8th Cir. 1991). As explained by the *Worthington* court: "The automatic waiver had the effect of immediately terminating state proceedings on the same day that Worthington filed her charge with the [Nebraska agency]." *Id.* at 482. Assuming the Eighth Circuit would interpret the Iowa language in the same manner, the Court finds that because the ICRC's waiver of exclusive jurisdiction was effective on the date plaintiff filed her administrative complaint, the EEOC constructively received the complaint on the same date. *Id.* Plaintiff's federal discrimination charge, filed 295 days following the alleged incident of sexual harassment, is thus timely-filed.

B. Plaintiff's Quid Pro Quo Claims

The Court will now consider whether plaintiff has established a submissible case of sexual harassment under federal law. Count I of plaintiff's petition alleges in relevant part that: "Defendant Harveys discriminated against Plaintiff with respect to conditions of employment, subjected her to sexual harassment, and discharged Plaintiff, all in violation of 42 U.S.C. § 2000e. Petition ¶ 32. Although the heading includes the term "sex discrimination" as well as "sexual harassment," plaintiff's brief in resistance to the present motion addresses only two claims: quid pro quo and hostile work environment sexual harassment. The Court therefore will focus its analysis on these claims.[5]

[5] Counsel for plaintiff confirmed during the hearing that she is now asserting claims only for quid pro quo and hostile work environment sexual harassment under counts I and II of her petition. Even assuming plaintiff desired to make a claim of gender discrimination, however, she has failed to establish pretext: i.e. "that she was treated differently than male employees who were similarly situated in all relevant respects." *Newton v. Cadwell Labs.*, 156 F.3d 880, 882 (8th Cir. 1998). Pretext is a necessary component in the analytical framework for gender discrimination claims. *Id.*

To establish a prima facie claim of quid pro quo harassment, plaintiff must show:

> she was a member of a protected class, was subjected to unwelcome sexual harassment in the form of sexual advances or requests for sexual favors, the harassment was based on sex, and [plaintiff's] submission to the unwelcome advances was an express or implied condition for receiving job benefits or her refusal to submit resulted in a tangible job detriment.

Newton v. Cadwell Labs., 156 F.3d 880, 882 (8th Cir. 1998) (citing *Cram v. Lamson & Sessions Co.*, 49 F.3d 466, 473 (8th Cir. 1995)). In the present case, plaintiff claims she submitted to Welch's sexual advances based on his express or implied promise to change her schedule to daytime hours,[6] and because she believed she might suffer an adverse working condition if she refused him. Deposition of Robyn Perrigo ("Perrigo Deposition") at 80, 120. Although Welch alleges the evening was purely consensual, this issue is for a jury to resolve. The Court therefore finds plaintiff has established a prima facie case of quid pro quo harassment.

C. Plaintiff's Hostile Environment Claim

Count I also alleges plaintiff was subjected to a sexually hostile work environment. In order to be actionable, the sexual harassment to which a plaintiff was subjected must be "so severe or pervasive as to alter the conditions of [the victim's] employment and create an abusive working environment." *Faragher v. City of Boca Raton*, 524 U.S.770, 786 (internal citation omitted). Counsel for plaintiff conceded during the hearing that the only alleged incident of harassment based on plaintiff's sex was the September 1997 encounter with Welch. Although a single, less serious incident

[6] The Court notes Welch also allegedly promised to take plaintiff on a trip to the Bahamas. The Court fails to see how this trip could reasonably be viewed as a "tangible job benefit," however, and is thus irrelevant to the analysis.

undoubtedly would not establish an abusive working environment, the Eighth Circuit has held that whether a single incident of *sexual assault* is sufficient to establish a hostile working environment is a question of fact. *Todd v. Ortho Biotech, Inc.*, 175 F.3d 595, 598 (8th Cir. 1999). *Cf., Tomka v. Seiler Corp.*, 66 F.3d 1295, 1305 (2d Cir. 1995) ("even a single incident of sexual assault sufficiently alters the conditions of the victim's employment and clearly creates an abusive work environment for purposes of Title VII liability"); *Guess v. Bethlehem Steel Corp.*, 913 F.2d 463, 464 (7th Cir. 1990) (court found single incident where supervisor forced plaintiff's face against his crotch sufficient to create hostile environment); *Fall v. Indiana Univ. Bd. of Trustees*, 12 F. Supp. 2d 870, 879 (N.D. Ind. 1998) (single instance where individual groped intimate areas may support hostile working environment).

Defendant Harveys contends that even if plaintiff established that Welch's conduct effectively subjected her to an abusive working environment, Harveys should not be held liable for such harassment because plaintiff failed to take advantage of Harveys' policies and procedures on sexual harassment. As recently acknowledged by the Eighth Circuit, the Supreme Court's decisions in *Faragher* and *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998), "articulated a new standard for determining when a supervisor's sexual harassment subjects the employer to hostile work environment liability under Title VII." *Todd v. Ortho Biotech, Inc.*, 175 F.3d 595, 597 (8th Cir. 1999). The Supreme Court clarified in *Ellerth* that:

> [a]n employer is subject to vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over the employee. When no tangible employment action is taken, a defending employer may raise an affirmative defense to liability or damages, subject to proof by a preponderance of the evidence, see Fed. Rule Civ. Proc. 8(c). The defense

> comprises of two necessary elements: (a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, *and* (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.

Ellerth, 524 U.S. at 765 (emphasis added). Although Harveys did in fact maintain a written sexual harassment policy, the Court finds a question of fact exists as to whether plaintiff acted unreasonably in failing to take steps under the policy to report Welch's alleged harassment. As argued by plaintiff, the policy directs employees who believe they have been harassed to contact their immediate supervisors or the Employee Relations Manager. Defendants' Exhibit D at 21. A jury could find that plaintiff was not unreasonable in believing it would be futile to report the September 1997 incident to individuals who ultimately reported to the alleged harasser. Furthermore, Harveys' supplemental brochure on sexual harassment indicates that "false accusations will result in equivalent disciplinary action applicable to one who is found guilty of sexual harassment." *Stopping Sexual Harassment*, Defendants' Exhibit D. Plaintiff contends that because of Welch's position as general manager, she believed that any supervisor to whom she would have attempted to report the alleged incident could have deemed her account a "false accusation" under the policy. A jury must determine whether plaintiff's belief was warranted.[7]

Because the Court finds a fact issue exists on the second element of the *Ellerth* defense, it need not address whether Harveys used reasonable care to correct and prevent incidents of harassment. Defendants' motion for summary judgment is DENIED with regard to plaintiff's federal quid pro quo

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[7] Harveys also contends it participated in an employee assistance program sponsored by a local hospital, and offered employees a toll-free number for assistance with a variety of issues, including emotional and job stresses. Defendants' Exhibit F. Again, the Court cannot find as a matter of law it was unreasonable for plaintiff not to place a call to this local health care provider.

and hostile work environment claims under count I of her petition.

D. Counts V Through VIII

Defendants further contend the common law torts pled in counts V through VIII of plaintiff's petition are preempted by the Iowa Civil Rights Act, based on the fact plaintiff has failed to allege a separate basis for the torts. Defendants also claim plaintiff's claims are legally insufficient as a matter of law. The Court will consider each tort individually.

1. Intentional Infliction of Severe Emotional Distress.

Count V of plaintiff's petition alleges defendants' conduct toward plaintiff amounted to intentional infliction of severe emotional distress. Petition ¶¶ 54-57. As argued by defendants, the ICRA provides the exclusive remedy for claims arising out of discriminatory acts. Specifically, the Iowa Supreme Court has held: "Preemption [of a common law tort claim by a statute] occurs unless the claims are separate and independent, and therefore incidental, causes of action. The claims are not separate and independent when, under the facts of the case, success in the nonchapter 601A claims . . . requires proof of discrimination." *Greenland v. Fairtron Corp*., 500 N.W.2d 36, 38 (Iowa 1993) (citations omitted). A common law tort claim is not preempted by a civil statute "when the rights asserted in the tort claim are different from the rights protected by the statute, especially when the tort claim requires proof of facts beyond those necessary to state a claim under the statute." *Van Baale v. City of Des Moines*, 550 N.W.2d 153, 156 (Iowa 1996) (citations omitted).

To establish a *prima facie* case of tortious infliction of emotional distress, a plaintiff must demonstrate the following: "(1) outrageous conduct by the defendant; (2) the defendant's intentional causing, or reckless disregard of the probability of emotional distress; (3) the plaintiff has suffered

severe or extreme emotional distress; and (4) actual proximate causation of the emotional distress by the defendant's outrageous conduct." *Taggart v. Drake University*, 549 N.W.2d 796, 802 (Iowa 1996) (citation omitted). In the present case, the outrageous conduct plaintiff cited to support her tort claim is "Welch's conduct in taking Ms. Perrigo to his home and forcing himself on her." Plaintiff's Brief in Opposition to Defendants' Motion for Summary Judgment ("Plaintiff's Brief") at 18. In *Greenland*, the Iowa Supreme Court held that where a plaintiff specifically alleged discrimination through sexual harassment as the outrageous conduct upon which her tortious infliction of emotional distress claim was based, the tort claim was preempted by the ICRA. *See Greenland*, 500 N.W.2d at 38; s*ee also Westin v. Mercy Med. Servs., Inc.*, 994 F. Supp. 1050, 1058 (N.D. Iowa 1998) (common law tort claim for intentional infliction of emotional distress preempted because it was based entirely on same conduct alleged to be discriminatory under disability provisions of ICRA). Similarly, defendant Harveys could not be found responsible for the alleged outrageous conduct absent its relationship as Welch's employer, and accordingly, a finding that some form of sexual discrimination had occurred. Plaintiff's intentional infliction of emotional distress is therefore preempted with regard to defendant Harveys.

The Court finds plaintiff's claim is *not* preempted with regard to defendant Welch. Welch's conduct in allegedly assaulting plaintiff could support a claim for intentional infliction of emotional distress independent of a separate finding of discrimination. Because plaintiff has failed to allege facts showing she suffered *severe* emotional distress, however, the Court finds she is unable to establish the necessary elements as a matter of law. *See Lawrence v. Grinde*, 534 N.W.2d 414, 421 (Iowa 1995) ("In assessing the level of stress necessary to support a claim we have adopted the following test from

the Restatement (Second) of Torts: 'whether the distress inflicted is so severe that no reasonable man could be expected to ensure it.'") (quoting *Bethards v. Shivvers, Inc.*, 355 N.W.2d 39, 44-45 (Iowa 1984)).

Plaintiff has alleged without proof only that she "suffered from stress and nightmares and medical problems that *could* have been caused by Mr. Welch's actions." Plaintiff's Statement of Disputed Material Fact ¶ 34. Such allegations are insufficient to establish plaintiff has suffered from "severe" emotional distress–especially in light of evidence plaintiff returned to Harveys and worked her customary shifts for more than five months following the September 1997 incident. *See, e.g., Tappe v. Iowa Methodist Med.* Ctr., 477 N.W.2d 386, 404 (Iowa 1991) (evidence that confrontation was "worst thing that ever happened" to plaintiff, resulting in plaintiff's feeling upset and confused, insufficient to establish severe emotional distress); *Vaughn v. Ag Processing, Inc.*, 459 N.W.2d 627, 636 (Iowa 1990) (plaintiff "must prove more than the fact that he or she felt bad for a period of time."); *Bethards*, 355 N.W.2d at 44-45 (no severe distress where plaintiffs "were angry and lost sleep and 'quivered' when the subject came up"). Summary judgment is therefore appropriate on count V with regard to both defendants.

2. Negligent Infliction of Emotional Distress

Count VI of plaintiff's petition alleges defendants "negligently inflicted upon Plaintiff severe emotional distress and suffering." Petition ¶ 59. The Iowa Supreme Court repeatedly has refused to recognize such a cause of action. *Doe v. Cherwitz*, 518 N.W.2d 362, 365 (Iowa 1994); *Cutler v. Klass, Whicher & Mishne*, 473 N.W.2d 178, 182-83 (Iowa 1991). Accordingly, summary judgment is appropriate on count VI.

3. Negligence

Count VII of plaintiff's petition alleges defendant Harveys was negligent in "failing to properly supervise and control" defendant Welch, and in retaining him as an employee. Petition ¶¶ 63-64. As noted by defendants, to succeed on a claim of negligence, a claimant must first establish the defendant owed her a legal duty. *Godar v. Edwards*, 588 N.W.2d 701, 707 (Iowa 1999) (citing *Burton v. Metroplitan Transit Auth.*, 530 N.W.2d 696, 699 (Iowa 1995)). In *Goddard*, the Iowa Supreme Court formally recognized a claim for negligent hiring, retention and supervision when the employer has reason to believe that, because of his or her employment, an individual "may pose a threat of injury to members of the public." *Id.* at 709.

In the present case, however, the record is devoid of evidence defendant knew or had reason to know Welch might commit sexual assault prior to hiring him. Thus, plaintiff has failed to create a jury issue on her claim of negligent hiring. *See id*. Plaintiff has likewise presented no evidence defendant was negligent in its supervision of Welch, such that Harveys should have been able to prevent the alleged assault. *Id.* In fact, defendant has produced evidence it took affirmative steps to counteract sexual harassment on the part of its management staff by maintaining a formal sexual harassment policy, and by sending Welch to training programs on the topic. *See* November 29, 1999 Affidavit of Verne Welch at ¶ 15. There is no evidence it was foreseeable to Harveys that Welch would fail to abide by Harveys' sexual harassment policy and/or the training programs. *Godar*, 588 N.W.2d at 708 (employer liable only for foreseeable risks).

Lastly, plaintiff has also failed to produce evidence to support her claim for negligent retention. As noted by defendants, plaintiff admitted in deposition she never reported the incident involving Welch

to any Harveys manager or supervisor during the remainder of her tenure with defendant. Deposition of Robyn Perrigo at 76, 136, 139. Summary judgment is therefore, GRANTED, with regard to count VII.

4. Respondeat Superior

Count VIII of plaintiff's petition alleges Harveys is liable for Welch's conduct toward plaintiff under the doctrine of respondeat superior. Petition ¶ 67. Under Iowa law, in order to succeed on her claim, plaintiff must establish the challenged acts were committed within the scope of the actor's employment. *Godar*, 588 N.W.2d at 707, *Doe v. Hartz*, 52 F. Supp. 2d 1027, 1075 (N.D. Iowa 1999). Furthermore, although whether an act is committed in the scope of employment generally is a fact issue, "'the question as to whether the act which departs markedly from the employer's business is still within the scope of employment may well be for the court.'" *Godar*, 588 N.W.2d at 706 (quoting *Sandman v. Hagan*, 154 N.W.2d 113, 118 Iowa 1967)). In *Godar*, the Iowa Supreme Court had no trouble finding as a matter of law that sexual abuse of a student by a teacher was "conduct so far removed from [the teacher's] authorized duties" that the issue as to whether the abuse was committed in the scope of employment was appropriately determined by the district court. *Id.* at 707.

Similarly, in the present case the evidence shows the alleged sexual assault occurred off Harveys' premises, while both plaintiff and Welch were off-duty. Furthermore, even assuming abuse occurred while plaintiff, Welch or both had been working for Harveys, the alleged misconduct was in no way "foreseeable, expected" or conducted in furtherance of Welch's duties as general manager. *Id.* Accordingly, the Court finds as a matter of law any alleged sexual assault was performed outside the scope of Welch's employment with Harveys. Summary judgment is appropriate with regard to count

VIII of plaintiff's petition.

III. CONCLUSION

For the foregoing reasons, defendant's motion for summary judgment is DENIED with respect to count I of plaintiff's petition. Defendant's motion is GRANTED with respect to count II of the petition, as well as the common law claims set forth in counts V through VIII.

IT IS SO ORDERED.

Dated this ____ day of March, 2000.

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RONALD E. LONGSTAFF, JUDGE
UNITED STATES DISTRICT COURT