IN THE UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF NORTH CAROLINA

Action No. 11-9321

Nick Ellison,	)	
	)	
Plaintiff	)	**Defendant Gibson Technology, Inc.'s**
	)	**Memorandum of Law in Support of**
vs.	)	**Motion for Summary Judgment**
	)	
Gibson Technology, Inc.	)	
	)	
Defendant	)	

Defendant Gibson Technology, Inc. for its Memorandum of Law in Support of Motion for Summary Judgment states as follows:

STATEMENT OF FACTS

Gibson Technology, Inc. was recently sued by Plaintiff Nick Ellison for sexual harassment.

Plaintiff Ellison was employed by Gibson Technology for almost two years. Once employed, Ellison was assigned to work with a group of ten men, whom he immediately informed that he was a homosexual. There were no remarks or comments made by any of the men once this was announced by Ellison.

There were at least five known occasions in which all of the men engaged in jokes and banter, some of a sexual nature, and at least once including homosexuality. At no time did Plaintiff Ellison or any of the other men involved state that there was an issue with the nature of the jokes.

In January, 2009, there was an email sent by Tom Barnes, Plaintiff Ellison's supervisor, entitled "Ten Reasons a Beer is Better than a Homosexual." At no time did Plaintiff Ellison or any of the other men respond or make reference to the email.

In March, 2009, there was a meeting held. Plaintiff Ellison walked into the room and was met by Tom Barnes, who stated that Ellison was wearing a cute outfit. It is unknown if anyone other than Ellison heard the comment. Ellison did not say anything to anyone about the comment.

In April, 2009, Plaintiff Ellison filed a complaint with the Human Resources Department at Gibson Technology, following the sexual harassment policy. Gibson Technology investigated the claim immediately. A statement was issued to Ellison informing him that Barnes would not be terminated as there were no previous charges against him regarding sexual harassment. Barnes did apologize for any discomfort he may have unknowingly caused Ellison. Gibson Technology sent Barnes to a workplace sensitivity seminar and placed a warning in his personnel file.

On April 23, Plaintiff Ellison resigned from Gibson Technology by way of a letter to the Human Resources Department and to the company's president, M.M. Gibson. Ellison states his reasons

for resigning were that he had demanded Barnes be terminated in his original complaint, and was appalled that Gibson Technology had not honored that request. Ellison claimed that he could not work for a company that disrespected the rights and feelings of homosexuals.

ARGUMENT

I.

DEFENDANT'S CONDUCT WAS NOT SEXUAL HARASSMENT BECAUSE IT WAS NOT "SEVERE AND PERVASIVE"

Plaintiff's claims of sexual harassment do not meet the requirements under Title VII of the Civil Rights Act. The conduct Plaintiff complained of was uncomfortable, not severe and pervasive. The court in *Hopkins v. Baltimore Gas and Elec. Co.*, 77 F. 3d 745 (D. Md. 1996), set out the elements that must be proven for the Plaintiff in a "hostile environment" sexual discrimination case to prevail. These elements are the totality of the circumstances, the frequency of discriminatory conduct, the severity of the conduct, and whether the conduct is physically threatening, and humiliating. The conduct must also interfere unreasonably with the employee's work performance.

The essence of Plaintiff's complaint is that the Defendant made Plaintiff feel singled out, awkward, and like everyone was laughing at him behind his back. It is clear that such conduct is not, in and of itself, sufficient to sustain a claim of sexual harassment under the Civil Rights Act because it was not "severe and pervasive."

Plaintiff points to several incidents involving the telling of jokes of a sexual nature as creating an environment that he, as a homosexual male, felt uncomfortable in. In addition, he specifically points to the distribution of an email containing a joke making derogatory remarks about the homosexual lifestyle. These incidents occurred in group settings and only the Plaintiff felt that they were being directed towards him. The former fifth circuit has held that "terms, conditions, or privileges of employment include the state of psychological well-being at the workplace," *Henson v. City of Dundee*, 682 F. 2d 897, 904 (C.A. Fla. 1982). During the course of his employment with Gibson Technology, Ellison's psychological state was never one of someone in distress or of one being harassed, this being based on his work performance and actions throughout his term of employment.

These claims do not sustain the elements of severe and pervasive behavior as they did not occur in a frequent nature, they were not physically threatening, nor humiliating, and the conduct did not interfere with the employee's work performance. Plaintiff was never asked about his sexual preference. He made the decision himself to inform his coworkers of his sexuality. Plaintiff did not complain about the conduct more than once, therefore it was not known until a complaint was filed that the conduct was making Plaintiff uncomfortable. Plaintiff continued to go to work on a daily basis. Plaintiff never complained about the jokes when they were made, nor did he complain about the email when it was sent out. The workplace was not permeated with discriminatory conduct or intimidation. Plaintiff never let Defendant know that his comments were humiliating or unwelcome at any time. In *Hopkins v. Baltimore Gas and Elec. Co.,* 77 F. 3d 745, 754 (Md. 1996) the U.S. Court of Appeals held that "Title VII was not designed to create a federal remedy for all offensive language and conduct in the workplace."

II

DEFENDANT'S CONDUCT WAS NOT SEXUAL HARASSMENT BECAUSE IT DID NOT ALTER THE TERMS OR CONDITIONS OF PLAINTIFF'S EMPLOYMENT

Plaintiff's claims fail to meet the requirements of a legitimate sexual harassment claim because the conduct did not alter the terms or conditions of his employment. The U.S. Supreme Court held that "not all workplace conduct that may be described as 'harassment' affects a 'term, condition, or privilege' of employment within the meaning of Title VII." *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 2405 (U.S. Dist. Col. 1986).

Plaintiff worked for Gibson Technology for nearly two years. During the period of his employment, Plaintiff received exemplary performance ratings, and received bonuses, as well as steady increases in pay. During the period of employment, Plaintiff never complained, let his discomfort be known, or asked to be transferred. Plaintiff failed to establish a continuing violation. Having only asserted one complaint against the Defendant, the Plaintiff cannot firmly assert that there was a continuance in the violations being complained of. The Plaintiff did not establish a degree of permanence that would cause one being harassed to assert their known rights.

Plaintiff made no indication that he felt he was being treated any differently than the rest of the men he worked with during most of his time at Gibson Technology. Plaintiff never made any comments relating to the feeling of being uncomfortable due to the nature of the jokes being

made. Plaintiff never missed work, nor did he complain that he was being singled out due to his homosexuality.

In *Tepperwien v. Entergy Nuclear Operations, Inc.*, 606 F. Supp. 2d 427 (S.D.N.Y. 2009) the Court held that "a male victim of same-sex sexual harassment must show that he was harassed because he was male." In his complaint, Plaintiff did not state that he felt that he was terminating his employment because he felt he was being singled out and harassed due to the fact that he was a male, or a homosexual. He states he was ending his employment due to the fact that Gibson Technology failed to terminate Barnes as he so asked them to do.

Plaintiff's claims of a hostile work environment are not warranted. Plaintiff had reasonable knowledge of the avenues to take if he was feeling harassed or uncomfortable during his employment at Gibson Technology. Plaintiff did not take the measures necessary to eliminate any conduct he felt was unwarranted, instead, often going along with the jokes and banter as they occurred. Plaintiff did not terminate his employment due to sexual harassment. Plaintiff terminated his employment due to Gibson Technology not terminating Barnes as Plaintiff so asked in his complaint. The Plaintiff in no uncertain terms continued his employment with Gibson Technology for nearly two years with no indication that there was an issue. Plaintiff Ellison has failed to establish a prima facie case, as he has provided no evidence that the terms of his employment were affected by the supposed actions of the Defendant.

III.

DEFENDANT'S CONDUCT WAS NOT SEXUAL HARASSMENT BECAUSE DEFENDANT TOOK PROMPT MEASURES TO

REMEDY THE CONDUCT THAT WAS COMPLAINED OF BY PLAINTIFF

Defendant's conduct was not that of sexual harassment because Defendant took prompt measures to rectify the conduct that was complained of.

Two necessary elements that an employer may raise as a defense to this claim are that the employer exercised reasonable care in preventing and promptly correcting any behavior deemed sexually harassing and that the employee failed to take advantage of any preventative measures provided by the employer to avoid harm.

Concerning the exercising of reasonable care by employers, the Court of Appeals states that:

> ...Whereas here, the plaintiff seeks to hold the employer responsible for the hostile environment created by the Plaintiff's supervisor or coworker, (s)he must show that the employer knew or should have known of the harassment in question and failed to take prompt remedial action.

Henson v. City of Dundee, 682 F.2d 897, 905 (C.A. Fla. 1982).

The Defendant took immediate action to respond to the complaint by the Plaintiff, as well as prompt action to correct the situation. A statement concerning the situation and the actions to be taken was issued to Ellison immediately following the original complaint.

Plaintiff failed to take immediate action, or to use any complaint procedure provided by Gibson Technology during the course of the supposed harassment, only filing a single complaint days before resigning. Due to the lack of any prior complaints or the usage of the provided avenues at Gibson Technology concerning this matter by the Plaintiff, or any other employee,

there is no reason to believe that Gibson Technology could have, or should have, known of any of the accused behaviors by Barnes.

The EEOC states that:

> when a sexual harassment claim rests exclusively on a "hostile environment" theory, however, the usual basis for a finding of agency will often disappear. In that case, the EEOC believes, agency principles lead to a rule that asks whether a victim of sexual harassment had reasonably available an avenue of complaint regarding such harassment, and, if available and utilized, whether that procedure was reasonably responsive to the employee's complaint. If the employer has an expressed policy against sexual harassment and has implemented a procedure specifically designed to resolve sexual harassment claims, and if the victim does not take advantage of that procedure, the employer should be shielded from liability absent actual knowledge of the sexually hostile environment (obtained, *e.g.,* by the filing of a charge with the EEOC or a comparable state agency). In all other cases, the employer will be liable if it has actual knowledge of the harassment or if, considering all the facts of the case, the victim in question had no reasonably available avenue for making his or her complaint known to appropriate management officials. Brief for United States and EEOC as *Amici Curiae* 26.

Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 2407 (U.S. Dist. Col. 1986)

Gibson Technology did hold Barnes responsible for his actions, in the scope they felt necessary. Being that there were no prior complaints against Barnes, a warning and a workplace sensitivity seminar were deemed appropriate for Barnes, but not by the Plaintiff, who demanded Barnes be discharged. Defendant had no prior knowledge of any wrongdoing by the accused, and therefore acted as quickly and appropriately as possible so as to correct the situation at hand. The Plaintiff did not take any immediate action, nor did the Plaintiff use available resources to attempt to notify anyone of the conduct complained of. The Defendant did take prompt measures to rectify the situation as deemed necessary by the Human Resources Department and the sexual

harassment policy provided by Gibson Technology, and therefore, Defendant's conduct is not that of sexual harassment.

CONCLUSION

For the reasons stated above, Defendant Gibson Technology, Inc. states that summary judgment should be granted in its favor.

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Attorney for Defendant
Gibson Technology, Inc.

CERTIFICATE OF SERVICE

I, Andriana Dewey, do hereby certify that a true and accurate copy of the foregoing Defendant Gibson Technologies, Inc. Memorandum of Law in Support of Motion for Summary Judgment was this day mailed to Denny W. Crain, 2473 Shark Street, Charlotte, NC 28343.

This the _____day of_____, 2010.

_____

Andriana Dewey