**UNITED STATES COURT OF APPEALS**
**FOR THE FIFTH CIRCUIT**

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**No. 93-2908**
**Summary Calendar**

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**VEDA SCHNEIDER,**

**Plaintiff-Appellant,**

**versus**

**WHATABURGER, INC.,**

**Defendant-Appellee.**

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**Appeal from the United States District Court**
**for the Southern District of Texas**
**(CA-H-92-3835)**

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(September 29, 1994)

Before DAVIS, JONES, and DUHÉ, Circuit Judges.

EDITH H. JONES, Circuit Judge:[*]

Veda Schneider filed suit alleging that she was sexually harassed and wrongfully discharged from her job. The court below granted summary judgment in favor of the defendant, Whataburger, Inc., and dismissed with prejudice plaintiff's claims of sexual harassment, retaliatory discharge, and intentional infliction of emotional distress. We affirm.

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[*] Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

## BACKGROUND

Schneider was hired by Whataburger, a retail fast food chain, as an Assistant Manager of a Whataburger restaurant in Houston in October of 1988. In March of 1989, Schneider was promoted to the position of Store Manager and transferred to another location. Schneider's Area Supervisor at that time was Pat Bangert. In May of 1990, Schneider attended a managers' meeting at the Whataburger regional corporate office. While at the corporate office, Schneider entered a walk-in closet to pick up some forms. Marlin Birdwell, another Area Supervisor, followed Schneider into the closest. Birdwell then shut the door, turned off the light, and touched Schneider in an offensive manner. Schneider immediately walked out of the closet.

Plaintiff's husband, also a Whataburger Store Manager, informed the District Manager, David Porter, that Birdwell had "made a pass" at the plaintiff. Porter promptly met with Birdwell and questioned him about Schneider's allegations. After his meeting with Birdwell, Porter was satisfied that Birdwell was only intending to play a practical joke which had admittedly backfired. Porter reminded Birdwell about Whataburger's policy on sexual harassment and instructed Birdwell not to act in any manner which could be considered offensive to Schneider. Porter assured plaintiff's husband that he would monitor the situation and asked to be informed of any further complaints.

In September of 1990, Porter transferred Schneider's Area Supervisor, Bangert, to another area. Effective October 1, 1990,

Birdwell was assigned to supervise the restaurant Schneider managed. Schneider protested the management change and requested a transfer to another location. During the period from October 1, 1990 to December 31, 1990 when Birdwell was Schneider's supervisor, Schneider alleges Birdwell made sexual advances and comments toward her. On December 31, 1990, Schneider was transferred to another location maintaining her same title and base salary. Her Area Supervisor was again Pat Bangert.

Whataburger conducted a routine audit of Schneider's restaurant in October of 1991 and discovered several instances of mismanagement on the part of Schneider. Bangert sternly reprimanded Schneider in a letter shortly after the audit. Bangert informed Schneider that her conduct was "reprehensible" and notified her that she would be terminated for any future mismanagement. During the 1991 holiday season, Whataburger ran a gift book promotional campaign. Each manager was sent multiple memoranda instructing them to treat the gift books like cash. Schneider reviewed and understood the memoranda. Nevertheless, Schneider lost one hundred and twenty-two books valued at $3,050.00.

Schneider was terminated by Whataburger on January 15, 1992. Whataburger also terminated two male managers for losing substantially fewer gift books. On February 28, 1992, Schneider filed a charge of discrimination with the Equal Employment Opportunity Commission (EEOC) alleging that she had been sexually harassed and discharged from her position because of her sex.

Schneider was issued a Notice of Right to Sue by the EEOC on September 17, 1992. Schneider filed a lawsuit on December 16, 1992 alleging sexual harassment and retaliatory discharge under Title VII, and intentional infliction of emotional distress.

Whataburger's motion for summary judgment on all causes of action was granted on November 18, 1993. Schneider now appeals from the entry of final judgment disposing of her claims.

**DISCUSSION**

**Standard of Review**

The court of appeals reviews an award of summary judgment de novo, Topalian v. Ehrman, 954 F.2d 1125, 1131 (5th Cir. 1992), *cert. denied*, 113 S.Ct. 82, (1992), and applies the same standard as the district court. Waltman v. Int'l Paper Co., 875 F.2d 468, 474 (5th Cir. 1989). Rule 56(c) of the Federal Rules of Civil Procedure provides that summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c) (1994). The defendant is entitled to a summary judgment if no reasonable juror could find by a preponderance of the evidence that the plaintiff could prevail on her case based on the record evidence. Anderson v. Liberty Lobby Inc., 477 U.S. 242, 251 (1986). A party opposing a summary judgment motion may not rely on merely the allegations in her pleadings, but must produce by summary judgment evidence specific facts showing the existence of

a genuine issue for trial. Id. at 256. Further, "[w]e may affirm a summary judgment on grounds other than those relied upon by the district court when we find in the record an adequate and independent basis for that result." Brown v. Southwestern Bell Tel. Co., 901 F.2d 1250, 1255 (5th Cir. 1990) (citations omitted).

**Plaintiff's Alleged Points of Error**

In her appellate brief, Schneider alleges several points of error by the trial court. We address these points below.

**1) Standard Applied by the District Court**

Schneider first argues that the district court improperly applied the summary judgment standard in its ruling. While it is true that summary judgment should be used cautiously in Title VII cases, see, e.g., Waltman, 875 F.2d at 482, it is nevertheless proper when no issues of material fact remain. Waggoner v. City of Garland, 987 F.2d 1160, 1164 (5th Cir. 1993).

Schneider claims that because the magistrate initially assigned to examine the motion recommended that summary judgment be denied, this somehow establishes the existence of a question of fact. Such a rule would foreclose a district court from ever granting summary judgment when a magistrate recommends otherwise. Such an argument is unpersuasive.

**2) Sexual Harassment**

Schneider next argues that the district court applied the wrong limitations period to the Title VII action. The general rule is that in order to sustain an action under Title VII, a plaintiff must first file a charge of discrimination with the EEOC within 180

days of the alleged unlawful employment practice. 42 U.S.C. § 2000e-5(e) (1994). An exception to the general rule, applicable in Texas, allows 300 days in certain circumstances.[1] Id. In any event, the timely filing of a charge with the EEOC is a necessary condition precedent to a private suit under Title VII. Price v. Southwestern Bell Tel. Co., 687 F.2d 74, 77 (5th Cir. 1982). Because the record shows that the alleged harassment occurred more than 300 days prior to EEOC charge, the trial court's error in computing the limitations period was harmless.

Plaintiff's encounter with Birdwell occurred in May of 1990. Schneider's EEOC charge states that she "was a victim of continuous harassment [by Birdwell] from September 1990 through December 1990," which consisted of comments, innuendos, and touching. Taking as true these allegations, as we are bound to do, Schneider's claim is still time-barred because she filed her charge with the EEOC on February 26, 1992 -- over 400 days after the

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[1] Section 2000e-5(e)(1) provides:

> A charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred . . ., except that in a case of an unlawful employment practice with respect to which the person aggrieved has initially instituted proceedings with a State or local agency with authority to grant or seek relief from such practice, or to institute criminal proceedings with respect thereto upon receiving notice thereof, such charge shall be filed by or on behalf of the person aggrieved within three hundred days after the alleged unlawful employment practice occurred, . . ..

Texas is a deferral state allowing claimants the full 300 days. See, Mennor v. Fort Hood Nat'l Bank, 829 F.2d 553, 556 (5th Cir. 1987). Therefore, the district court technically erred in applying the 180 day limitations period.

alleged harassment.[2] Therefore, unless the limitations period is tolled, Schneider's Title VII harassment claim is barred.

Schneider argues that her claim is tolled by the continuous violations exception. In Waltman, we recognized an equitable exception to the limitations period which applies when the unlawful employment practice manifests itself over time, rather than as a series of discrete acts. Waltman, 875 F.2d at 474. However, "[i]n order to sustain a claim under this exception, . . . , the plaintiff must show that at least one incident of harassment occurred with the [limitation] period." Id. at 475. As set forth above, Schneider has failed even to make an allegation that would qualify under this exception, let alone create an issue of fact as to its application. Therefore, Schneider's sexual harassment claim is time-barred and summary judgment on this cause of action was proper.

**3) Retaliatory Discharge**

Schneider next contends that the district court erred in granting summary judgment on the retaliatory discharge claim. In order to prove a cause of action for retaliatory discharge under Title VII, a plaintiff must prove 1) that she was engaged in an activity protected by Title VII, 2) an adverse employment action occurred, and 3) there was a causal connection between the

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[2] In her opposition to Whataburger's motion for summary judgment, Schneider claims that she was periodically harassed after her transfer on December 31, 1990 until she was fired in January of 1992. However, this contradicts her EEOC charge that she was harassed from September 1990 through December 1990. The only evidence that she offers to support this allegation is that she was forced to be in Birdwell's presence periodically. There is no evidence or even an allegation of any conduct that could be construed as sexual harassment occurring at any time after December 31, 1990.

participation in the protected activity and the adverse employment action. McDaniel v. Temple Indep. Sch. Dist., 770 F.2d 1340, 1346 (5th Cir. 1985). If the plaintiff proves a prima facie case, then the burden of production shifts to the employer to articulate a legitimate, nondiscriminatory reason for its action. Upon such a showing, the plaintiff is required to prove by a preponderance of the evidence that the employer's stated reason is merely a pretext and that the employer unlawfully discriminated against her. Id. Absent evidence of pretext, the trier of fact must accept the employer's explanation as the real reason for the adverse action. Guthrie v. Tifco Indus., 941 F.2d 374, 378 (5th Cir. 1991), *cert. denied*, 112 S.Ct. 1267 (1992).

Schneider has not produced prima facie evidence sufficient to allow a trier of fact to conclude that she was retaliatorily discharged. First, Schneider has produced only scant evidence that she was engaged in a protected activity at the time of her discharge. It is undisputed that Schneider complained of harassment in 1990, however, this was *thirteen months* before her discharge.[3] It is also undisputed that David Porter, the District Manager, was notified of this harassment complaint. Schneider produced an affidavit signed by Pat Bangert, her supervisor from December 31, 1990 to January 15, 1992, stating that Schneider told him that she thought the harassment was continuing during that

[3] Because we find no causal connection between any protected activity and Schneider's termination, we express no opinion as to whether complaining of sexual harassment thirteen months prior to discharge qualifies as engaging in protected activity.

period of time.[4] We will assume for the sake of argument that Schneider has created a factual issue regarding her involvement in protected activity.

Schneider was fired on January 15, 1992. Termination certainly qualifies as adverse employment action. Therefore, the dispositive question is whether plaintiff has produced sufficient evidence of a causal connection to entitle her to proceed to trial.

The causal connection required is causation-in-fact or "but for" causation. Jack v. Texaco Research Ctr., 743 F.2d 1129, 1131 (5th Cir. 1984). Schneider has not produced evidence that "but for" her complaints, she would not have been terminated from her job. Bangert's affidavit declares that at no time did he recommend termination of Schneider; that decision was made by the District Manager, David Porter.

Moreover, the protected activity engaged in by Schneider thirteen months before her termination bears no causal relation to the termination.[5] Cf. Jackson v. RXO Bottlers of Toledo, 783 F.2d 50, 54 (6th Cir. 1986), *cert denied*, 478 U.S. 1006 (1986) (holding that one-year lapse between protected activity and adverse employment action "militates against a finding" of causal connection between the two). Plaintiff points to no evidence to

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[4] It is particularly telling that in his affidavit, Bangert identifies Schneider's complaints of continuing harassment as her merely being forced occasionally to work with Birdwell. There is no evidence or even an allegation that Birdwell harassed Schneider or did anything inappropriate during this time.

[5] We do not hold that there can *never* be a causal connection between protected activity and adverse employment action occurring thirteen months apart. It is conceivable under other facts that such could be the case. We merely find that the plaintiff in this case has not made an evidentiary showing sufficient to raise a factual issue.

link her complaint in 1990 with the termination in 1992. To the contrary, Whataburger submitted the only evidence as to why Schneider was fired.

It is undisputed that Schneider was reprimanded in October of 1991 by Pat Bangert for "reprehensible" mismanagement. It is also undisputed that Schneider was advised in writing that any further instances of mismanagement would result in her termination. It is undisputed that Schneider was unable to account for one hundred and twenty-two gift books. It is further undisputed that two male managers were fired for losing fewer than one-third the amount of gift books lost by Schneider. Therefore, even if Schneider had produced prima facie evidence of Title VII retaliation, which she has not, Whataburger has established a legitimate, nondiscriminatory purpose for her termination. Schneider has failed to produce any evidence of pretext. Therefore, summary judgment on the retaliatory discharge cause of action was appropriate.

**4) Intentional Infliction of Emotional Distress**

Finally, Schneider asserts that the district court erred in granting summary judgment on the intentional infliction of emotional distress cause of action. To prevail on a claim of intentional infliction of emotional distress, Texas law requires a plaintiff to prove 1) defendant acted intentionally or recklessly, 2) defendant's conduct was extreme and outrageous, 3) the actions of defendant caused plaintiff emotional distress, and 4) the emotional distress suffered was severe. Wornick Co. v. Casas, 856

S.W.2d 732, 734 (Tex. 1993).

Plaintiff has alleged essentially five events that could possibly form the basis for this cause of action:

1. The closet incident in May of 1990;

2. Harassment by Birdwell from September 1990 through December 31, 1990;

3. The transfer at her request to another restaurant on December 31, 1990;

4. Occasional work with Birdwell from December 31, 1990 through January of 1992; and

5. Termination on January 15, 1992.

None of these events is sufficient to overcome summary judgment.

Plaintiff filed her state court complaint on December 16, 1992. The statute of limitations in Texas for a cause of action for intentional infliction of emotional distress is two years. Tex. Civ. Prac. & Rem. § 16.003(a) (1986). See also Brady v. Blue Cross and Blue Shield, 767 F.Supp. 131, 133 (N.D.Tex. 1991); Stevenson v. Koutzarov, 795 S.W.2d 313, 318-19 (Tex.Ct.App. 1990). Schneider's cause of action based on the closet incident in May of 1990 is time-barred. Likewise, any harassment by Birdwell that occurred before December 16, 1990 is also time-barred.

"Conduct is considered to be 'outrageous' if it surpasses 'all bounds of decency' such that it is 'utterly intolerable in a civilized community.'" Ugalde v. W.A. McKenzie Asphalt Co., 990 F.2d 239, 243 (5th Cir. 1993) (citations omitted). Because Schneider gave no details of Birdwell's harassment from December 16-31, 1990, it is impossible to evaluate his conduct against the onerous standard or to determine how the employer could

have ratified it and become liable for it. Further, as a matter of law, Schneider's lateral transfer to remove her from the alleged harasser is not extreme or outrageous conduct. Finally, the fact that Schneider was later assigned to work occasionally with Birdwell on a special project is not under the circumstances of this case extreme or outrageous conduct.

The only remaining event upon which an intentional infliction of emotional distress cause of action could lie is Schneider's termination. The fact of discharge alone, unless accompanied by outrageous behavior, cannot as a matter of law support a cause of action for intentional infliction of emotional distress. See Wornick Co. v. Casas, 856 S.W.2d 732, 735 (Tex. 1993). As explained above, Schneider has produced no evidence that could lead a reasonable trier of fact to conclude that she was terminated for any reason other than for mismanagement or that Whataburger's conduct was in any way extreme or outrageous. In sum, summary judgment on this cause of action was appropriate.

**CONCLUSION**

For the foregoing reasons, the judgment of the district court is **AFFIRMED**.