IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 94-10799
(Summary Calendar)

SHERI L. BARRINGTON,

Plaintiff-Appellant,

versus

MINYARD FOOD STORES, INC.,

Defendant-Appellee.

Appeal from United States District Court
for the Northern District of Texas
(4:93-CV-548-A)

March 30, 1995

Before DUHÉ, WIENER and STEWART, Circuit Judges.

PER CURIAM:[*]

Plaintiff, Sheri L. Barrington filed suit against her employer, Minyard Food Stores, Inc., alleging sexual harassment by one of her supervisors, as well as retaliation in the form of a transfer to another location.[1] Minyard's motion for summary judgment was granted, and Barrington appeals. Because we find

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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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

[1] We note that there were other issues decided by the district court which were not appealed and which are therefore not addressed herein.

genuine issues of material fact as to the sexual harassment claim, we reverse the judgment and do not address the retaliation claim.

FACTS

Sheri L. Barrington was employed by Minyard Food Stores, Inc. as a meat wrapper from April 1, 1987 until March 10, 1993. Minyard had stores at several locations. During February or March 1992, she worked at Minyard's Coppell, Texas store. Steve Vaughn, a co-worker, began making statements to her, to the effect that Barrington excited him sexually in a way that his own wife did not. The remarks were made to her on a daily basis. Barrington reported this to Wayne Ford, the meat manager who was her supervisor, but it appeared to her that nothing was done in response to her complaint. Finally, on June 15, 1992, Barrington notified Ford that she could not take it anymore. Ford said that he would call the meat market supervisor, Bob Self. Self went to the store that day to talk to Barrington and, as a result, transferred Vaughn to another store that day. This transfer took care of Barrington's problems with Vaughn, and she had no problems with other employees in terms of sexual harassment at the Coppell store. In August 1992, Barrington was transferred to another store in Carrollton, Texas with no loss of pay or benefits. She had no problems with the management or other employees at the Carrollton store and, other than its longer distance from her home, she liked the environment of the Carrollton store better.

Barrington filed suit in federal district court against her employer, alleging that Steve Vaughn had sexually harassed her during February through June 1992. She also alleged that Minyard's decision to transfer her to the Carrollton store was retaliation against her for her complaint against Vaughn. The district court granted Minyard's motion for summary judgment, and Barrington appeals.

STANDARD OF REVIEW

This Court reviews a grant of summary judgment de novo, and we examine the evidence in the light most favorable to the nonmoving party. Abbott v. Equity Group, Inc., 2 F.3d 613, 618 (5th Cir. 1993), cert. denied sub nom. Turnbull v. Home Insurance Co., 114 S.Ct. 1219, 127 L.Ed.2d 565 (1994); Salas v. Carpenter, 980 F.2d 299, 304 (5th Cir. 1992). Summary judgment is proper if the moving party establishes that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. Campbell v. Sonat Offshore Drilling, Inc., 979 F.2d 1115, 1119 (5th Cir. 1992); Fed.R.Civ.P. 56(c). The party opposing a motion for summary judgment must set forth specific facts showing the existence of a genuine issue for trial. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 256-57, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). A dispute about a material fact is "genuine" if the evidence is such that a reasonable jury could return a verdict for the nonmoving party. Bodenheimer v. PPG Industries, Inc., 5 F.3d 955, 956 (5th Cir. 1993), citing Anderson v. Liberty

Lobby, Inc., 477 U.S. 242, 248, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986).

DISCUSSION

Hostile or Offensive Working Environment

The district court granted summary judgment for Minyard Food Stores on the grounds that Barrington did not produce sufficient evidence of (1) the existence of a hostile environment and (2) Minyard's knowledge of the harassment and failure to adequately remedy the situation.

The employee need not state a prima facie case to succeed in this appeal; rather, she must provide evidence that raises a genuine issue of material fact concerning each element of her prima facie case. Waltman, id., citing Thornbrough v. Columbus & Greenville R.R. Co., 760 F.2d 633, 640-41 (5th Cir. 1985).

Title VII of the Civil Rights Act of 1964 prohibits discrimination against any individual with respect to her compensation, terms, conditions, or privileges of employment, because of such individual's sex. 42 U.S.C. § 2000(3)-2((a)(1). In order to state a prima facie case of sexual harassment, an employee must prove the following five elements: (1) the employee belongs to a protected group; (2) the employee was subject to unwelcome sexual harassment, such as sexual advances, requests for sexual favors, and other verbal and physical conduct of a sexual nature which is unsolicited or unincited and is undesirable or

offensive to the employee; (3) the harassment complained of was based upon sex; (4) the harassment complained of was sufficiently severe as to alter the conditions of employment and create an abusive working environment; and (5) the employer knew or should have known of the harassment in question and failed to take prompt remedial action. Waltman v. International Paper Co., 875 F.2d 468, 477 (5th Cir. 1989) (citations omitted).

The first three elements are not disputed issues on appeal. Thus, the only question presented is whether Barrington has sufficiently shown genuine issues of material fact regarding the severity of the harassment and Minyard's notice thereof. As we observed in Nash v. Electrospace System, Inc., 9 F.3d 401, 403-404 (5th Cir. 1993),

> The Supreme Court recently affirmed that sexually discriminatory verbal intimidation, ridicule and insults may be sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment that violates Title VII. Harris v. Forklift Systems, Inc., __ U.S.__, 114 S.Ct. 367, 370-71, 126 L.Ed.2d 295 (1993) (citing Meritor Savings Bank v. Vinson, 477 U.S. 57, 65, 67, 106 S.Ct. 2399, 2405, 91 L.Ed.2d 299 (1986)).

Barrington alleges that, from February 1992 until June 15, 1992, Vaughn made sexually discriminatory comments to her on a daily basis. Whether these comments constituted intimidation, ridicule and insults which were severe enough or pervasive enough to satisfy the fourth element "can be determined only by looking at all the circumstances . . ., such as 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." Nash, id. (citation and internal quotation marks omitted). Daily comments by Vaughn of the nature described in the record and for this length of time (four months), under some circumstances, can be pervasive enough to satisfy this element. Minyard does not challenge the existence of these daily comments. Instead, Minyard contends that it had no notice of the alleged harassment until it was reported to Bob Self and that, once notified, Minyard took immediate and responsive action. We find that Barrington has shown a genuine issue of material fact as to element four.

As to element five, Barrington supplemented her own deposition testimony with that of Bobby Joe "Bob" Self, who stated that Minyard's policy was that the employee was to report any sexual harassment to his or her immediate boss. In Barrington's case, this would be the market manager or the store manager. Minyard's sexual harassment policy states that the employee may complain to the employee's manager, supervisor, or directly to the Personnel Director. Barrington presented her deposition testimony that she complained daily to her market manager, Wayne Ford. Barrington contended that, long before June 15, 1992, she had complied with Minyard's policy by reporting to Ford and that, therefore, Minyard was on notice of the alleged harassment but did nothing until that date. Minyard, on the other hand, contended that prior to her report to Self which resulted in immediate action, Barrington only reported these allegations against Vaughn

to lower level employees and not to upper level management; therefore, Minyard neither knew nor should have known about the alleged harassment. On this record, a material fact--whether Minyard "knew or should have known" of Barrington's complaints, long before June 15, 1992--is at issue.

Because there are genuine issues of material fact regarding the two elements presented for our review, we reverse the district court judgment on the issue of whether there was a hostile or offensive working environment. Accordingly, we do not address Barrington's claim of retaliation.

CONCLUSION

For the foregoing reasons, the district court judgment is REVERSED.