IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 94-20927

DIANA BRIONES,

Plaintiff-Appellant,

versus

CALEB BRETT USA, INC. and
BOBBY NICHOLLS,

Defendants-Appellees.

Appeal from the United States District Court for the
Southern District of Texas
(CA H 93 2629)

(October 3, 1995)

Before REAVLEY, JOLLY, and WIENER, Circuit Judges.

PER CURIAM:[*]

Appellant Diana Briones ("Briones"), a Caleb Brett, U.S.A. ("Caleb Brett") employee under the direct supervision of Robert Nicholls ("Nicholls"), brought claims of sexual harassment under Title VII of the Civil Rights Act of 1964, as amended, against Nicholls and Caleb Brett. In addition to quid pro quo and hostile work environment claims, she brought an intentional infliction of

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 Pursuant to that Rule, the court has determined that this opinion should not be published.

emotional distress claim under Texas law. The district court granted summary judgment in favor of Nicholls and Caleb Brett, dismissing all claims. Briones appeals, arguing that the district court erred in finding that the defendants had taken prompt, remedial measures so as to avoid liability. She also challenges the district court's summary dismissal of her supplemental State law claim. We affirm the district court's dismissal of the Title VII claims, and affirm, although on different grounds from the district court, the dismissal of the intentional infliction of emotional distress claim.

I

Briones was employed by Caleb Brett beginning in 1986, and in early 1992 began serving as administrative assistant to Robert Nicholls, Caleb Brett's Human Resources Manager. On October 12, 1992, Nicholls reprimanded Briones in his office for a breach of confidentiality by Briones concerning termination of another Caleb Brett employee. It was at that meeting that the key events giving rise to her discrimination allegations occurred.[1] Briones claims Nicholls hugged and kissed her twice, then later that afternoon "discussed the need to keep sexual activities secret, told Mrs.

[1]Briones also claims that Nicholls gave her a bear hug and pushed her pelvis into his on October 9, 1992. She did not complain of this alleged harassment during her employment, and in fact never mentioned this alleged incident until she was deposed in August 1994, nearly two years after the events giving rise to this lawsuit.

Briones that he loved her and forced an `I love you' from Mrs. Briones." Appellant's Br. at 7.

The next day, Briones complained to Nicholls about his conduct the day before. He advised her to report her concerns to his superiors pursuant to the company's sexual harassment policy. According to notes made by Nicholls' superior, Brian Pitzer ("Pitzer"), memorializing her complaint, Briones stated that Nicholls had made improper advances toward her and that she wanted to transfer to another facility because she no longer wanted to work with Nicholls. As to the improper advances, Pitzer wrote:

> The situation as she described it was that she had told some other employees that she knew about Jackson Cole's termination ahead of time. This got back to Bobby who reprimanded her. She said she was very sorry and was wrong in doing that at which time Bobby hugged her and kissed her and stated that they were a team together against the rest and confidentiality between them was very important. She then stated that later in the day he again as[ked] her if she had told any other employees about knowing that Jackson was to be terminated. At that meeting he said confidentiality was of utmost importance and that if he was running around the desk naked it should stay in the room or if she was running around the room naked it should stay in the room that's how important the confidentiality issue was.

Pitzer reported Briones' allegations to the president of Caleb Brett, Richard Kaminski ("Kaminski"). Kaminski met with Briones and she repeated what she had told Pitzer.

Following this meeting, Kaminski and Pitzer met with Nicholls, who admitted hugging Briones in an attempt to console her after "chewing her out." He also admitted kissing Briones on the cheek, and using the example of running naked around his desk to "explain

the importance of the confidentiality question." He denied that his actions were sexually suggestive.

Within ten days after this meeting, Caleb Brett granted Briones' request for a transfer, without a loss in pay or benefits, and issued a written reprimand to Nicholls, which read as follows:

> This is to inform you that we have reviewed the situation brought to our attention by your administrative assistant. It has been agreed that you used poor judgment in your actions that day regardless of your intentions. Any further situations involving actions like or even similar to these types of action will result in immediate suspension and probable termination.

Briones did not accept the transfer, claiming that, on the advice of doctors, she needed to take sick leave because she was suffering from "post traumatic stress syndrome." She did not report to work for more than one month, and eventually quit her job.[2] Shortly thereafter, Briones filed a charge with the Equal Employment Opportunity Commission ("EEOC"), to which Caleb Brett responded, providing, inter alia, a copy of the Nicholls reprimand. In August 1993, Briones filed this complaint, alleging violations of Title VII, and intentional infliction of emotional distress.

In granting appellees' summary judgment motion, the district court held that Nicholls could have no individual liability under Title VII, since only "employers" and their agents are liable under

[2]Because Briones was unsatisfied with what she knew of Caleb Brett's handling of her complaint, she states that she felt compelled to resign, and was therefore constructively discharged.

Title VII.[3] The district court also held that Briones failed to demonstrate that Caleb Brett did not take prompt remedial action in response to the sexual harassment charges, and that Caleb Brett therefore was insulated from liability. Finally, the district court concluded that Briones' claim for intentional infliction of emotional distress was merely a remedy, and did not constitute a separate, cognizable cause of action.

On appeal, Briones contends that whether Caleb Brett's response was "prompt and remedial" was a factual dispute appropriate for resolution by a jury, and that summary judgment on the "hostile work environment" sexual harassment claim was therefore inappropriate. She also reasserts her quid pro quo claim.[4] Finally, she argues that the district court wrongly dismissed her State law claim as but a remedial component of her Title VII claim.

II

Because this is a case on appeal from the grant of a motion for summary judgment, we review the record de novo. Calpetco 1981 v. Marshall Exploration, Inc., 989 F.2d 1408, 1412 (5th Cir. 1993).

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[3]On appeal, Briones does not challenge the holding of the district court absolving Nicholls of individual liability under Title VII; therefore we need not address that issue.

[4]The district court did not specifically address the quid pro quo claim in its Memorandum Opinion. However, its conclusion as to the legal sufficiency of Caleb Brett's response to Briones' allegation of "hostile work environment" sexual harassment (discussed infra), applies to bar both the hostile work environment claim and the quid pro quo claim.

Under Rule 56(c) of the Federal Rules of Civil Procedure, we examine evidence presented to determine 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). Once a properly supported motion for summary judgment is presented, the burden shifts to the non-moving party to set forth specific facts showing that there is a genuine issue for trial. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249, 106 S.Ct. 2505, 2511, 91 L.Ed.2d 202 (1986); Brothers v. Klevenhagen, 28 F.3d 452, 455 (5th Cir.), cert. denied, 115 S.Ct. 639 (1994). We must review "the facts drawing all inferences most favorable to the party opposing the motion." Matagorda County v. Russell Law, 19 F.3d 215, 217 (5th Cir. 1994).

III

A

To establish a Title VII discrimination claim against Caleb Brett for a hostile working environment, Briones must show that she belongs to a protected group, that she was subject to unwelcome sexual harassment, that the harassment complained of was based upon sex, that the harassment complained of affected a "term, condition or privilege of employment," and that her employer knew or should have known of the harassment in question and failed to take prompt, remedial action (the respondeat superior component). See Jones v. Flagship Int'l, 793 F.2d 714, 719-720 (5th Cir. 1986) cert. denied, 479 U.S. 1065 (1987).

In this case, the parties dispute whether Nicholls' actions could be construed by reasonable jurors as affecting a "term, condition or privilege of employment." The record is clear, however, that within a day of Briones' complaint to Nicholls' supervisors, Caleb Brett investigated the complaint, offered Briones a transfer out of Nicholls' office, and issued a written reprimand to Nicholls. Because the undisputed evidence shows that Caleb Brett took prompt and appropriate remedial action in response to Briones' allegations, her claim of sexual harassment fails. See Nash v. Electrospace System, Inc., 9 F.3d 401, 402, 404 (5th Cir. 1993) ("When a company, once informed of allegations of sexual harassment, takes prompt remedial action to protect the claimant, the company may avoid Title VII liability."); see also Carmon v. Lubrizol Corp., 17 F.3d 791, 794-95 (5th Cir. 1994) (holding that plaintiff must show, in sexual harassment case, that defendant failed to take prompt and appropriate remedial action). The district court's dismissal of Briones' Title VII "hostile work environment" claim was therefore appropriate.

B

If an employer requires sexual favors from an employee as a quid pro quo for bestowing job benefits upon that employee, it violates Title VII. Jones, 793 F.2d at 721. To establish a quid pro quo violation, Briones must prove the following elements: (1) that she belongs to a protected group, (2) that she was subject to unwelcome sexual harassment, (3) that the harassment complained of

was based on sex, (4) that her reaction to the harassment affected tangible aspects of her compensation, terms, conditions, or privileges of employment, and (5) respondeat superior, i.e., that the employer knew or should have known of the harassment in question and failed to take prompt remedial action. Ellert v. University of Texas, at Dallas, 52 F.3d 543, 545 (5th Cir. 1995); Jones, 793 F.2d at 721-22.

Although the district court appeared to base its dismissal of Briones' quid quo pro claim on her failure to show that Caleb Brett knew or should have known of the harassment and failed to take prompt remedial action, it could as easily have relied on the complete absence of evidence in the record to show that the alleged harassment affected tangible aspects of her compensation, terms, conditions or privileges of employment. Briones has not alleged that Nicholls promised her any benefit or threatened to negatively affect a term or condition of her employment if she did not succumb to his alleged advances. See Jones, 793 F.2d at 722 (holding that acceptance or rejection of the harassment by plaintiff employee must be express or implied condition to receipt of job benefit or cause of tangible job detriment to create Title VII liability). In any case, as we noted above, the district court correctly found that Caleb Brett took prompt and appropriate remedial action in response to Briones' complaint. The decision of the district court to dismiss Briones' quid pro quo sexual harassment claim was therefore proper.

C

Turning to Briones' tort claim, we decline the defendants' invitation to rule that an intentional infliction of emotional distress claim brought pursuant to state law can never coexist with Title VII sexual harassment claims. However, summary judgment by the district court on the intentional infliction of emotional distress claim was proper in this case, as Briones' evidence in response to the summary judgment motion did not support such a claim. See Schuster v. Martin, 861 F.2d 1369, 1371 (5th Cir. 1988) (holding that summary judgment may be upheld on different grounds than those relied on by the district court).

To prevail on a claim of intentional infliction of emotional distress under Texas law, the plaintiff must establish the following four elements: (1) that the defendant acted intentionally or recklessly; (2) that the conduct was `extreme and outrageous'; (3) that the actions of the defendant caused the plaintiff emotional distress; and (4) that the emotional distress suffered by the plaintiff was severe. Dean v. Ford Motor Credit Co., 885 F.2d 300, 306 (quoting Tidelands Auto. Club v. Walters, 699 S.W.2d 939 (Tex.App.--Beaumont 1985, writ ref'd n.r.e.)).

> Liability [for outrageous conduct] has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community . . . . Generally, the case is one in which a recitation of the facts to an average member of the community would lead him to exclaim, "Outrageous."

Dean, 885 F.2d at 306 (citing Restatement (Second) Torts § 46, Comment d (1965)). In Wilson v. Monarch Paper Co., 939 F.2d 1138, 1143 (5th Cir. 1991), we observed that "although [an employer's] conduct often rises to the level of illegality, except in the most unusual cases it is not the sort of conduct, as deplorable as it may sometimes be, that constitutes `extreme and outrageous' conduct." "In other words, even though conduct may violate Title VII as sexual harassment, it does not necessarily become intentional infliction of emotional distress under Texas law. Only in the most unusual cases does the conduct move out of the `realm of an ordinary employment dispute.'" Prunty v. Arkansas Freightways, Inc., 16 F.3d 649, 654 (5th Cir. 1994) (citing Dean, 885 F.2d at 307).

Briones' proffered evidence--that she received a bear hug, another hug and two kisses, and was somehow forced to say, "I love you" in the context of a very emotional encounter with her supervisor, and that Caleb Brett did not respond to her complaints as she desired--simply could not be construed by reasonable jurors as proof of conduct that is "beyond all possible bounds of decency, . . . atrocious, and utterly intolerable in a civilized community . . . ." We find that summary judgment on Briones' intentional infliction of emotional distress claim was therefore entirely appropriate.[5]

[5]Although Briones argues that Nicholls' conduct was sufficient to constitute intentional infliction of emotional distress (an

IV

Because we hold that Caleb Brett took prompt and appropriate remedial action in response to the alleged events of October 13, 1992, and because we hold that Briones' claim of intentional infliction of emotional distress is legally insufficient, we AFFIRM the district court's dismissal of Briones' Title VII claims, and AFFIRM, although on different grounds from the district court, the district court's dismissal of Briones' intentional infliction of emotional distress claim.

A F F I R M E D.

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argument we reject), she concludes her argument on the state law claim by asserting that Caleb Brett is liable for Nicholls' actions. Even if we had found that Nicholls' conduct was sufficient to support Briones' tort claim, Caleb Brett could be liable for that same conduct only if it ratified or approved it. Prunty, 16 F.3d at 652. Ratification occurs only when the employer confirms, adopts, or fails to repudiate the acts of its employees. Id. at 653. In the light of this court's finding that Caleb Brett took prompt, remedial action in response to Nicholls' alleged conduct, Caleb Brett could not be held liable for intentional infliction of emotional distress.