United States District Court, E.D. Louisiana.
Joseph ONCALE
v.
SUNDOWNER OFFSHORE SERVICES, INC., John Lyons, Danny Pippen, and Brandon Johnson.

Civ. A. No. 94–1483.
March 24, 1995.

MINUTE ENTRY
PORTEOUS, District Judge.

***1** Before the Court is Defendants' Motion for Summary Judgment. Plaintiff, Joseph Oncale, has filed opposition. This motion came before the Court for hearing on March 8, 1995.

Background

Plaintiff was employed as a roustabout by Sundowner Offshore Services, Inc. ("Sundowner") for several weeks in November of 1991. Plaintiff filed this suit for damages against Sundowner and three male individuals employed by Sundowner, John Lyons ("Lyons"), Danny Pippen ("Pippen") and Brandon Johnson ("Johnson"), alleging violations of the Civil Rights Act, Section 703(a)(1) of Title VII, and 42 U.S.C. § 2000(e)–2(a)(1). Specifically, plaintiff seeks reinstatement to his former position or to a similar position, or in the alternative, damages resulting from the alleged sexual discrimination and harassment he experienced while employed by Sundowner.

Standard for Summary Judgment

Under Fed.R.Civ.P. 56(c), summary judgment is proper if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986). The Fifth Circuit has explained that "[t]he Supreme Court has defined material facts as those that will affect the outcome of the lawsuit under governing law." *Meyers v. M/V Eugenio C.*, 919 F.2d 1070, 1072 (5th Cir.1990), *citing Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986).

Plaintiff's Complaint Does Not Give Rise to a Title VII Violation

Plaintiff's complaint alleges specific physical acts and verbal assaults perpetrated against plaintiff by Lyons, Pippen and Johnson. These acts and assaults, if proven, would constitute outrageous conduct by the defendants which would be actionable under Louisiana law.[FN1] However, plaintiff's complaint in this matter only alleges violations of Title VII, and the Fifth Circuit has clearly articulated its position that same sex harassment does not state a claim under Title VII. *See Garcia v. Elf Atochem North America*, 28 F.3d 446 (5th Cir.1994).

The issue presented to the Fifth Circuit in *Garcia* was whether the district court erred in granting summary judgment in favor of the defendants[FN2], dismissing Garcia's claim that he had been sexually harassed by a male co-worker during his employment, in violation of Title VII. Affirming the grant of summary judgment, the Fifth Circuit explained that Garcia was limited to seeking equitable relief because the provisions of the Civil Rights Act of 1991 providing for damages were not retroactively effective as to his claim.[FN3] However, the Court continued its analysis, ruling that:

> Garcia's Title VII claim was also properly dismissed because he did not establish a prima facie case against any of the defendants.

Id. at 450. The Court explained that "Title VII prohibits an 'employer' from discriminating 'against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's ... sex.' " *Id.* Section 2000e(b) defines an employer as "a person engaged in an industry affecting commerce ... and any agent of such a person.... In this Circuit, we have accorded the phrase 'any agent' a liberal construction....". *Id.* at 451. The "liberal construction"

has been extended to include immediate supervisors who participate in the decision-making process that forms the basis of the discrimination. However, "[t]here can be no liability under Title VII ... 'for the actions of mere co-workers.' " *Id.* (citation omitted).

***2** Although the *Garcia* court found an independent basis to affirm the grant of summary judgment as to each defendant, it concluded as follows:

> II. Sexual Harassment
>
> Finally, we held in *Giddens v. Shell Oil Co.*, No. 92–8533 (5th Cir. Dec. 6, 1993) (unpublished), that "[h]arassment by a male supervisor against a male subordinate does not state a claim under Title VII even though the harassment has sexual overtones. Title VII addresses gender discrimination." *Accord Goluszek v. Smith*, 697 F.Supp. 1452, 1456 (N.D.Ill.1988). Thus, what Locke did to Garcia could not in any event constitute sexual harassment within the purview of Title VII, and hence summary judgment in favor of all defendants was proper on this basis also.

Id. at 451–52. Plaintiff argues that the above quoted language is dicta, however the Court disagrees. Although the *Garcia* court articulated other grounds to support its affirmance of summary judgment, it included the above quoted language and explicitly stated that summary judgment "was proper on this basis also." Following the clear directive of the Fifth Circuit in *Garcia*, this Court is compelled to find that Mr. Oncale, a male, has no cause of action under Title VII for harassment by male co-workers.

In addition, the Court finds that defendants Pippen and Johnson cannot be considered plaintiff's employer under Title VII, further supporting the Court's ruling granting summary judgment. *See* Affidavit of Edward M. DuBroc, attached to defendant's motion for summary judgment.[FN4]

Accordingly, finding that there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law, defendant's motion for summary judgment is hereby *granted.*

FN1. The Court is suggesting that plaintiff could have timely brought a state action.

FN2. Named as defendants in the *Garcia* suit were the parent company of Garcia's employer, the plant manager, and the plant foreman.

FN3. Because no further incidents of harassment occurred after Garcia complained to his supervisors, and because Garcia continued in his employment with Seagraves Oazark, equitable relief was inappropriate, and damages were unavailable.

FN4. Mr. DuBroc, the personnel director for Sundowner Services, Inc., states in his affidavit that plaintiff's direct supervisor on the rig would have been Lyons. Pippen, a driller, was the direct supervisor of derrick hands and floor hands, not of roustabouts. Johnson was a floor hand, and his supervisor was Pippen.

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Not Reported in F.Supp., 1995 WL 133349 (E.D.La.), 67 Fair Empl.Prac.Cas. (BNA) 769

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