MICHAEL D. BATES 09-20-02

AWARD OF ARBITRATOR

I, THE UNDERSIGNED ARBITRATOR, having been designated in accordance with the personnel manual or employment agreement entered into by the above-named parties, and having been duly sworn and having duly heard the proofs and allegations of the parties, AWARD as follows:

Claimant was employed by Respondent as an administrative assistant to the supervisor of Plant Operations on July 7, 1999. She claims that from the beginning of her employment until she resigned her employment on April 5, 2000 (nine months later) she was subjected to hostile environment sexual harassment that caused her to resign her employment.

She seeks $25,000 in compensatory damages for emotional distress, loss of enjoyment of life and damage to her marriage, $150,000 in punitive damages and $25,000 in attorney fees.

This case is brought pursuant to Title VII of the Civil Rights Act of 1964 (42USC 2000E,et seq) and the state Civil Rights Act RSMO 213.010et seq.

At the outset there was some question whether Claimant's supervisor could be held individually liable under Title VI I. It is clear that in the 8th Circuit United States Court of Appeals that a supervisor cannot be held individually liable for a Title VII violation. *Roark v.City of Hazan, Arkansas,* 189F3d 258,761(8th Cir,1999).

Counsel for Claimant did not argue this point in hearing or brief. Therefore, the arbitrator rules that Claimant's supervisor is dismissed from individual liability.

A. Facts

1- Claimant began her employment July 7, 1999.

2- Thereafter, from the first week of employment, Claimant's supervisor made sexually explicit comments to Claimant.

3- A reasonable person would find those sexually specific comments to be offensive.

4- Claimant's supervisor never engaged in any behavior that involved any inappropriate sexual touching or solicited Claimant for sexual favors.

5- In November of 1999, the company Comptroller found out that Claimant was offended by the sexual statements of her supervisor.

6- Claimant told the Comptroller that she did not want her supervisor to know she was complaining about his comments.

7- The Comptroller informed the company CEO of Claimant's complaints.

8- Neither the Comptroller nor the CEO notified the Director of Human Resources at this time of the complaints.

9- The CEO tried to informally talk about the alleged sexual harassment with Claimant's supervisor in very general terms without revealing Claimant's name.

10- Claimant's supervisor continued to make sexual comments.

11- Claimant again went back to the Comptroller with a written list of her supervisor's comments.

12- The Comptroller referred Claimant to Human Resources regarding her sexual harassment complaints.

13- Claimant met with the Director of Human Resources and told her she wanted the comments to stop, but did not want her name revealed to her supervisor.

14- The Director of Human Resources met with the supervisor and advised him that in general terms because he supervised women he needed to be careful about sexual comments. She did not reveal that Claimant is the complainant.

15- At this point Claimant's supervisor thought the complainant was someone else and told Claimant that this other woman was "a bitch."

16- Claimant's supervisor continued to make sexually explicit statements.

17- In late February Claimant informed the Administrative Assistant to the Director of Human Resources that the supervisor had continued to make sexually explicit statements.

18- Claimant made a list of the sexually explicit comments and put a star by those comments made by the supervisor since the Director of Human Resources met with him.

19- At this time the Director of Human Resources told Claimant that she

would have to reveal to the supervisor who was making the complaints.

20- On or about March 9, 2000 the Director of Human Resources met with Claimant's supervisor and revealed to him the complaints were coming from Claimant. She also discussed whether Claimant's desk could be moved putting her out of earshot of the supervisor.

21- On March 14, 2000 Claimant resigned her position with Respondent.

22- Her resignation became effective April 5, 2000.

B. Hostile Work Environment

The Supreme Court of the United States in the Case of *Harris v. Forklift Sys. Inc.* 510 U.S. 17 stated that a hostile or abusive environment exists when a reasonable person would find that the atmosphere is sexually severe and pervasive.

To prevail the complainant must show that she was subjected to unwelcome sexual harassment that affected a term, condition or privilege of her employment, *Beard v Flying J. Inc.* 266 F3d 792,797-98 (8th Cir. 2001).

As in *Harris*, 51 U.S. 21-22, the issue here is whether the conduct was severe or pervasive enough considering the frequency of the conduct, its severity, whether it was humiliating, whether it unreasonably interfered with an employee's work performance or was mere offensive utterances that were a sporadic use of sexually abusive language, *Farragher v City of Boca Raton,* 524 U.S. 275,788 1998.

The Arbitrator concludes that, given all the circumstances, a reasonable person would conclude that the supervisor's statements were a form of hostile environment sexual harassment that unreasonably interfered with Claimant's work performance.

As Claimant's direct supervisor he should not have engaged in many of the sexually specific conversations he had with Claimant. A direct supervisor is in a unique position to control the environment of his employee. Regardless, whether the supervisor's motive was not sexual harassment or whether he became infatuated with Claimant and engaged in sexually explicit conversations as form of machismo, he should not have engaged in this sexually explicit behavior.

The Arbitrator distinguishes the present case from the recent 8th Circuit opinion of *Duncan v. General Motors Corp.,*F3d (8th Circuit August 22, 2002), as follows:

1- The frequency of the sexually explicit statements within a nine-month period compared with sporadic behavior made in the *Duncan* case over three years.

2- The supervisor's sexually specific statements were more than boorish, chauvinistic, and immature. A reasonable person would conclude that the atmosphere was sexually hostile and Claimant testified that she subjectively found the atmosphere intimidating and hostile.

3- These were not mere isolated statements, but a pattern of behavior over the entire nine months.

As stated earlier in this opinion, the supervisor's motive is unclear, but as her direct supervisor he should not have engaged in sexually specific conversations with Claimant whether direct or implied.

C. Ellerth Defense

The U.S. Supreme Court in *Burlington Industries v. Ellerth,* 524 U.S. 742 allows an employer if there is no tangible employment action to assert an affirmative defense to an otherwise actionable sexual harassment complaint. The employer must show that it exercised reasonable care to prevent and correct promptly any sexually harassing behavior and that the complainant failed to take advantage of any preventive or corrective opportunities.

It is clear to the Arbitrator that the Respondent had sufficient procedures in place to prevent sexual harassment, the first element of the *Ellerth* Defense.

It is the second element, "to correct promptly any sexually harassing behavior" that prevents the Respondent from exercising the full benefit of the defense.

The Respondent learned of Claimant's complaint as early as November 1999 when the Comptroller became aware that Claimant's husband was vocal about the alleged sexual harassment. The Comptroller met with Claimant at this time to verify that Claimant was offended by her supervisor's sexually explicit statements.

In an attempt to address Claimant's concerns for anonymity, the Comptroller put into motion an attempt to informally get the supervisor to stop making sexually specific statements by having the CEO informally talk with the supervisor.

When this failed the Director of Human Resources tried this same approach.

Whether the Respondent was motivated by simply discounting Claimant's complaint or they were trying to reach an informal resolution and not reveal Claimant's name, the result was the same. The Respondent failed to promptly correct the sexually harassing behavior.

This Arbitrator has conducted a significant number of training sessions for employers to prevent sexual harassment. Prior to the *Ellerth* decision I would instruct employers that if an employee came to them with an allegation of sexual harassment but wanted to remain anonymous to put it in writing and have the employee sign it to prevent the employee from later claiming the employer failed in its duty to prevent sexual harassment.

Post-*Ellerth* I Inform employers that once they know or should know of an allegation of sexual harassment that they must promptly investigate the matter and that the complainant cannot remain anonymous. The investigation will be completed as soon as possible and that any persons who need to know will know of the investigation.

When the Comptroller and subsequently the Director of Human Resources knew of the allegations they should have immediately begun an investigation and informed Claimant she could not remain anonymous. The Arbitrator believes had that action been taken given the nature of this type of sexual harassment, it would have ended. The Respondent can not pass its responsibility to Claimant, who wanted to remain anonymous.

Therefore, the Respondent is liable for the hostile environment created by its Supervisor. ***Burlington Industries Inc. v. Ellerth.***

D. Compensatory Damages

The complainant having proven the conduct of her supervisor is a form of hostile environment sexual harassment and the Respondent cannot justify an affirmative defense under the *Ellerth* doctrine, Claimant is entitled to compensatory damages.

Claimant has asked for compensatory damages in the amount of $25,000. Compensatory damages as was pointed out by the *Harris* Court are appropriate where there is emotional distress and the "conduct need not seriously affect an employee's psychological well being or lead the employee to suffer injury."

The Claimant testified that the stress of the work environment caused her marital problems and caused her to become extremely nervous and jittery. These statements are sufficient to establish an actual remedy. There is no

precise mathematical method for determining compensatory damages.

Without additional evidence of medical care the Arbitrator believes the amount of $25,000 is too high. Especially in light of the fact that Claimant suffered no direct requests for sexual favors or tangible employment injury.

Therefore, the Arbitrator awards an amount of $10,000 in compensatory damages to the complainant for the hostile environment.

E. Punitive Damages - No Constructive Discharge

Punitive damages are recoverable on a showing that the Respondent acted with malice or reckless indifference. The Arbitrator does not find the Respondent acted with malice or reckless indifference. In light of *Ellerth* the Respondent acted inappropriately.

The Respondent attempted to informally resolve Claimant's complaints. Respondent tried in good faith, but it was the wrong response to the problem. The Arbitrator finds no malice or reckless indifference.

F. Attorney Fees

The Claimant has prevailed on the issue of hostile environment sexual harassment and is therefore entitled to attorney fees. Claimant's attorney has requested $25,000. Given the nature of the case and its complexity that amount seems reasonable.

The Respondent at hearing or in brief did not contest this amount.

Therefore, the Arbitrator awards $25,000 in attorney fees to the prevailing party.

Conclusion

The Arbitrator finds that the Respondent's supervisor engaged in hostile environment sexual harassment. The Respondent attempted to informally resolve Claimant's complaints but it was not sufficient to create an affirmative defense under the principles articulated by the United States Supreme Court in *Burlington Industries, Inc. v. Ellerth* 524 U.S. 742 (1998).

Therefore, the Arbitrator rules in favor of the Claimant and awards $10,000 in compensatory damages and $25,000 in attorneys fees.

The administrative fees and expenses of the American Arbitration

Association and the compensation and expenses of the arbitrator shall be borne in accordance with the provisions of the personnel manual or employment agreement.

This Award is in full settlement of all claims submitted to this Arbitration. All claims not expressly granted herein are, hereby, denied.