

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF ILLINOIS

EQUAL EMPLOYMENT OPPORTUNITY	)	
COMMISSION,	)	
	)	
Plaintiff,	)	04-2209
	)	
v.	)	
	)	
FEDERAL EXPRESS CORPORATION,	)	
	)	
Defendant.	)	

ORDER

The plaintiff, Equal Employment Opportunity Commission (“EEOC”) has filed this complaint against defendant Federal Express Corporation (“FedEx”). EEOC alleges that FedEx unlawfully discriminated against employees David Marcotte (“Marcotte”) and Bob Kerouac (“Kerouac”) and a class of similarly situated individuals. Specifically, EEOC alleges that the FedEx employees were sexually harassed and/or retaliated against for lodging complaints of harassment.

FedEx has filed a motion for summary judgment. For the following reasons, the motion [#37] is denied.

BACKGROUND

FedEx operates a facility in Kankakee, Illinois. At all relevant times, FedEx employed approximately 35 people at the Kankakee facility.

During most of the relevant time period, Pamela O’Sullivan (“O’Sullivan”) was the highest ranking manager at the Kankakee facility; she reported to a supervisor located at a different FedEx facility. O’Sullivan hired Marcotte in late 1999. Shortly thereafter, Marcotte met Daren McGill (“McGill”). McGill and Marcotte would often work at the conveyor belt at the same time, although for much of that time they were not in close proximity to each other. A significant part of their workday was spent away from the facility and each other, doing package pick-up and/or delivery.

Marcotte alleges that beginning almost immediately after he started with FedEx, he was sexually harassed by McGill. Marcotte asserts he repeatedly complained to his supervisor, O’Sullivan, and when Marcotte finally made a written report, he was retaliated against and then terminated. Kerouac also claims he was sexually harassed by McGill. Although Kerouac reported it to O’Sullivan, he did not make a written complaint. McGill, who was terminated in November 2003, admits only that (1) he had a habit of rubbing and/or touching his male and

female coworkers' shoulders and upper torso, including Marcotte's; and (2) he once brought in a deck of playing cards depicting pictures of naked men. O'Sullivan denies that Marcotte repeatedly complained to her about McGill's sexual harassment. She states that in February 2003, she, McGill and Marcotte had a meeting at which they discussed "acceptable conduct." She states that Marcotte complained about McGill's "looks or comments" but O'Sullivan didn't take it to mean that the looks or comments were sexual in nature.

### ANALYSIS

Summary judgment is granted "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 a judgment as a matter of law." Fed. R. Civ. P. 56(c). Summary judgment is proper when "a party . . . fails to make a showing sufficient to establish the existence of an element essential to that party's case[.]" *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). The court must consider the evidence in the light most favorable to the party opposing summary judgment. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 158-59 (1970).

The burden of establishing that no genuine issue of material fact exists rests with the movant. *Jakubiec v. Cities Serv. Co.*, 844 F.2d 470, 473 (7th Cir. 1988). Once the movant has done so, the party opposing the motion bears the burden to respond. *Celotex*, 477 U.S. at 322-323. The opponent must provide specific facts to show the existence of a genuine issue for trial. See *Matsushita Elec. Ind. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

#### I.

On this motion for summary judgment, the court must first determine whether there are any facts to support a claim of a sexually discriminatory hostile work environment. A prima facie case is established by showing (1) the victim was subjected to unwelcome sexual harassment; (2) the harassment was based on the victim's sex; (3) the harassment unreasonably interfered with the victim's work performance by creating an intimidating, hostile or offensive working environment that seriously affected his psychological well-being; and (4) there is a basis for employer liability. *Moser v. Indiana Dep't of Corr.*, 406 F.3d 895, 902 (7th Cir. 2005). Same-sex sexual harassment is cognizable under Title VII. *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 79 (1998).

As to the first three elements of the prima facie case, McGill's story contrasts sharply with Marcotte and Kerouac's description of the events.<sup>1</sup> According to Marcotte, the harassment started almost immediately after he was hired. McGill rubbed Marcotte's shoulders; rubbed, grabbed, and slapped Marcotte's buttocks; pressed his groin against Marcotte's buttocks;

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<sup>1</sup> Other FedEx employees witnessed some of the incidents and corroborate Marcotte's allegations.

reached out and rubbed Marcotte's leg; and "goosed" Marcotte with a finger or clipboard. In addition to physical contact, McGill talked to Marcotte and tried to engage him in conversations about masturbation. McGill repeatedly told Marcotte to bend over so he could "drill him in the ass and said he wanted to surprise Marcotte with "something big and hard." McGill admits only that he often touched or rubbed his coworkers' backs and shoulders; he states he did not engage in any sexually explicit conversation or conduct (other than showing the sexually explicit playing cards to his coworkers).<sup>2</sup>

In addition, the parties dispute the facts supporting the fourth element of the prima facie case. Marcotte and Kerouac allege that they repeatedly reported McGill's conduct to O'Sullivan, but their complaints fell on deaf ears. O'Sullivan says the first formal complaint she received from Marcotte was in January 2003.<sup>3</sup> In February 2003, she met with Marcotte and McGill to discuss "acceptable conduct." On March 13, 2003, Marcotte submitted a written sexual harassment complaint to FedEx. He listed numerous incidents of McGill's harassment and O'Sullivan's failure to take action. FedEx argues that once Marcotte filed the written report, the company took swift action against McGill and O'Sullivan. FedEx also argues that even if O'Sullivan failed to act on the men's verbal complaints, FedEx policy allowed the men to take their complaints to members of their management team *or* FedEx's Human Resources professionals. That the men *could* have complained to someone else does not absolve the company of liability when the men followed company policy by complaining to O'Sullivan.<sup>4</sup>

## II.

EEOC alleges that FedEx retaliated against Marcotte for complaining about the sexual harassment. To prove a Title VII retaliation charge under the indirect method, the plaintiff must show he lodged a complaint of discrimination, his job performance was satisfactory, he suffered an adverse employment action, and similarly situated individuals who did not complain were

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<sup>2</sup> Marcotte, Kerouac and other FedEx employees believe McGill is homosexual; McGill denies it.

<sup>3</sup> O'Sullivan knew that upon receiving a complaint, FedEx policy required her to give the complainant a form to complete, and she was to submit the completed form to a Human Resources officer within 48 hours. She did not do so. In fact, when she received Marcotte's January 2003 complaint, she did not even look up FedEx's sexual harassment policy.

<sup>4</sup> FedEx argues that "a reasonable person, realizing that [his] complaints were ineffective, would . . . seek a remedy elsewhere," quoting *Parkins v. Civil Constructors of Ill., Inc.* 163 F.3d 1027, 1038 (7th Cir. 1998). *Parkins* is factually inapposite. In that case, the plaintiff saw and spoke to the company's owner every day, yet did not report the harassment directly to him. *Parkins*, 163 F.3d at 1038. In this case, Marcotte did not have regular contact with O'Sullivan's supervisors. Also, FedEx employee Calimas Hill told of several events suggesting that O'Sullivan could be vindictive and unprofessional. A jury could conclude that complaining to someone other than O'Sullivan would have been at the complainants' peril.

treated more favorably. *Luckie v. Ameritech Corp.*, 389 F.3d 708, 714 (7th Cir. 2004). The employer may defeat the claim if it can show a legitimate purpose for the action taken, and the employee is unable to rebut that evidence by showing the stated purpose is pretextual. *Stone v. City of Indianapolis*, 281 F.3d 640, 644 (7th Cir. 2002).

Marcotte claims that FedEx retaliated against him by (1) cutting his hours; (2) allowing McGill to retaliate against him; and (3) eventually terminating him.<sup>5</sup> FedEx states it cut Marcotte's hours because others with more seniority asked to work additional hours. Marcotte claims that the additional hours were given to individuals with less seniority who had not complained of sexual harassment. Marcotte also claims that McGill began to leave trash in Marcotte's truck, poured water on his seat, and threw packages at him. O'Sullivan did nothing to stop McGill because she considered Marcotte as culpable as McGill, labeling the conduct "pranks." McGill was eventually terminated after he threw a metal device at Marcotte, hitting him on the head. Finally, Marcotte was terminated. Fed Ex claims that Marcotte violated company policy by driving with his driver's door open and his seatbelt unfastened. Marcotte claims that others had done the same thing and were not issued a disciplinary warning for doing so.<sup>6</sup> These issues must be resolved by a jury.

#### CONCLUSION

The court concludes, on the basis of the evidence discussed herein, that the defendant's motion for summary judgment [#37] must be denied. The parties' voluminous supporting documents contain additional factual disputes, each of which has been reviewed and considered. The facts and arguments not addressed in this order do not change the conclusion that this case must be decided by a trier of fact.

The final pretrial conference is scheduled for January 8, 2007 at 2:00 p.m. by personal appearance. Jury selection and jury trial are scheduled to begin on January 22, 2007 at 9:00 a.m.

Entered this 5<sup>th</sup> day of December, 2006.

**s\Harold A. Baker**

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HAROLD A. BAKER  
UNITED STATES DISTRICT JUDGE

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<sup>5</sup> FedEx later offered to reinstate Marcotte, but he declined. He argues he was constructively discharged because management had become openly hostile to him, and continued employment at FedEx would be intolerable.

<sup>6</sup> FedEx's policy is to terminate an employee who receives three disciplinary warnings within twelve months. The warning for the driving violation was Marcotte's third warning.