

EEOC v. Management Hospitality of Racine 666 F.3d 422 (7th Cir. 2012)

OPINION BY DISTRICT JUDGE YOUNG:

The Equal Employment Opportunity Commission (“EEOC”) brought this action on behalf of two servers, Katrina Shisler and Michelle Powell, who were employed at an *International House of Pancakes* franchise in Racine, Wisconsin (the “Racine IHOP”), alleging that the servers were sexually harassed in violation of Title VII of the Civil Rights Act of 1964. A jury found in favor of Shisler and Powell on the hostile work environment claim. . . . * * *

[Salauddin] Janmohammed was the principal owner and franchisee of twenty-one IHOPs, including the Racine IHOP. He operated the Racine IHOP under the franchise name of MHR and was its president and sole share-holder. MHR contracted with Flipmeastack, a company solely owned by Janmohammed’s wife, Victoria Janmohammed, to provide management consulting services for his IHOPs. These services included accounting and payroll, corporate IHOP franchise reporting and compliance, and human resources assistance. In addition, Flipmeastack hired the district managers, who, in turn, hired the general managers of each restaurant in the district, and oversaw the day-to-day operations of those particular restaurants. In 2005, Steve Smith was the district manager of the Racine IHOP, Michelle Dahl was the general manager, and Nadia Del Rio and Rosalio “Junior” Gutierrez were the assistant managers. The employees of each restaurant, including the general manager, assistant managers, and servers, were employees of MHR. * * *

1. Sexual Harassment Claims

A sexually hostile or abusive work environment is a form of sex discrimination under Title VII of the Civil Rights Act of 1964. For sexual harassment to be actionable, a plaintiff must prove conduct that is so severe or pervasive as “to alter the conditions of [her] employment and create an abusive working environment.” * * *

We find that a rational jury could have found that Shisler was subjected to harassment that was both severe and pervasive. . . . Shisler testified that Gutierrez engaged in sexually harassing conduct during every shift that Gutierrez was her assistant manager. His comments to Shisler were highly offensive and easily surpassed what could reasonably be described as vulgar

banter, tinged with sexual innuendo. He told her he wanted to “f**k her,” propositioned her for three-way sex with his girlfriend, told her she was “kinky” and liked “rough” sex, and stared at the intimate parts of her body “like a piece of meat.” Gutierrez engaged in physical touching by “slap groping” her buttocks. Shisler testified that she felt “bullied” by him and that his comments made her feel “dirty.” Given the age difference between Shisler and Gutierrez and Gutierrez’s position of authority over her, a rational jury could have concluded that Gutierrez’s verbal and physical harassment directed at Shisler created an objectively hostile and abusive work environment.

The Defendants attack Shisler’s credibility by arguing that on cross-examination, she could only identify three specific instances of sexually harassing comments and conduct by Gutierrez over the four-week period that she worked at the Racine IHOP. As noted, however, Shisler testified to more than three specific instances of conduct, and she testified that some form of verbal harassment occurred on every shift that she worked with Gutierrez. Although Shisler could not remember the exact dates that specific instances of sexual harassment occurred, the jury was entitled to believe Shisler’s version of events. In any event, to prevail, Shisler need not show that the conduct complained of was both severe and pervasive; “even one act of harassment will suffice if it is egregious.” A jury could infer that the three instances that Shisler did testify to—telling her that he thought she was “kinky” and liked it “rough,” propositioning her for sex on the pancake batter, and “slap groping” her buttocks—were sufficiently severe to support a jury verdict.

The Defendants also suggest that Shisler was not subjectively offended by Gutierrez’s crude comments because her MySpace page contained a sexually graphic video of young males masturbating in the presence of young females, and contains the comment, “funny as hell.” The jury was entitled to disregard this video as evidence that Shisler did not find Gutierrez’s comments to be offensive. As the district court observed, “sharing jokes with friends in an online community is vastly different than being propositioned for sex by a supervisor at work.” Further, there is sufficient evidence in the record showing that Shisler was subjectively offended by Gutierrez’s comments and conduct because she repeatedly informed Gutierrez that

his conduct was unwelcome and complained to IHOP managers Del Rio and Dahl. Accordingly, there is sufficient evidence in the record from which a rational jury could find that Shisler was the victim of sexual harassment while an employee at the Racine IHOP, in violation of Title VII.

We also find a rational jury could have found that Powell was subjected to a sexually hostile work environment. Powell testified that Gutierrez made inappropriate comments to her like “your ass looks good in them pants,” pulled her ponytail and told her she “would like it rough” and “would get freaky with sex.” He propositioned her for oral sex, told her he would like to “do her from behind” as he pressed his pelvis into her body, told the cooks he wanted to “f*k” her, and left a voicemail message on her phone asking her to “hook up” with him. Gutierrez touched her breasts and buttocks whenever he could by brushing up against her as he walked past her. Powell testified Gutierrez’s comments made her feel “dirty,” and that she felt worried if she had to work on the same shift as Gutierrez. Powell also testified that when she objected to Gutierrez’s treatment of her, he gave her harder work assignments or “yelled at her more,” “[s]o she learned just not to say anything.” Like Shisler, Powell was a teenager at the time. The age disparity between Powell and Gutierrez, coupled with Gutierrez’s position of authority over her, could have led a rational jury to conclude that Gutierrez’s verbal and physical harassment directed at Powell created an objectively hostile and abusive work environment, and that Powell reasonably perceived it as such.

2. The Faragher/Affirmative Defense

An employer can be held vicariously liable for a supervisor’s sexual harassment of a subordinate. Generally, an employer may avoid liability if it can prove the two elements of the Faragher/Ellerth affirmative defense: “(a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.”

a. Defendants’ Preventative Measures

The Defendants contend that they took sexual harassment seriously, and instituted an effective sexual harassment policy to prevent and promptly correct any instances of sexual harassment occurring in the

workplace. Victoria Janmohammed testified that the policy was a “zero tolerance” policy, meaning “we do not tolerate any sexual harassment, any discrimination. We don’t even tolerate somebody not investigating.” To this end, the Defendants required all of their new employees, including Shisler and Powell, to watch a video educating them on sexual harassment in the workplace, and to read and sign their sexual harassment policy. The Sexual Harassment and Diversity Policy that Shisler and Powell signed stated the following:

*I have watched the Sexual Harassment and Diversity videos. I am fully aware of our companies [sic] policies regarding both—zero tolerance for any type of unlawful discrimination and/or harassment. Our company is committed to providing a work environment that is free of unlawful behavior in any form. I will lead by example. * * * Any form of unlawful harassment of co-workers or members of the public is absolutely forbidden, regardless of whether it is verbal, physical, or visual harassment. You must be sensitive to the feelings of others and must not act in a way that might be considered offensive to someone else. I will report any instances of improper behavior to my manager or company representative. The company will take immediate and appropriate steps to investigate all reports of improper behavior. I also understand the severity of knowingly making false accusations of discrimination or harassment. Sexual Harassment and/or Discrimination are a serious charge and should be taken seriously.*

In addition, the Defendants also note the presence of the Crisis Management Guidelines Poster in the employee break room that displayed, in part, Smith’s cell phone number. Lastly, Defendants point out that as soon as Del Rio informed Smith that a private investigator was asking questions about sexual harassment at the Racine IHOP, he immediately conducted an investigation, took witness statements, determined that the policy had been violated, and took corrective action by firing Dahl for her failure to investigate the servers’ allegations.

* * * Although the presence of a sexual harassment policy is encouraged by Title VII, “the mere creation of a sexual harassment policy will not shield a company from its responsibility to actively prevent sexual harassment in the workplace.” The policy

must provide “a meaningful process whereby an employee can express his or her concerns regarding an individual within a working environment.” * * * Moreover, the policy must not only be reasonably effective on paper, but also reasonably effective in practice.

Despite the fact that the Defendants had a sexual harassment policy in place, a rational jury could have found that the policy and complaint mechanism were not reasonably effective in practice. At trial, the jury heard evidence indicating that all managerial employees at the Racine IHOP failed to carry out their duties under the policy. For example, Gutierrez violated the policy by engaging in sexual harassment. The other assistant manager of the Racine IHOP, Del Rio, and the general manager of the Racine IHOP, Dahl, both failed to report Gutierrez’s harassment after Shisler and Powell complained to them. Moreover, the jury heard evidence that Smith failed to investigate Shisler’s prior complaint of harassment of another female server by the former general manager of the Racine IHOP, Hecker. * * * A rational jury . . . could have found that none of the managers of the Racine IHOP took action under the policy that could be termed “corrective” or “effective.”

Second, although management was required to take sexual harassment training, the evidence at trial suggested that the training was inadequate. Del Rio testified that she did not receive sexual harassment training when she became an assistant manager, even though she, as the assistant manager, was responsible for the orientation and training of new employees. Moreover, even though the policy stated that “any form of unlawful harassment of co-workers or members of the public is absolutely forbidden,” Del Rio “blew off” Shisler’s and Powell’s complaints. Del Rio knew that she had an absolute duty to report sexual harassment allegations to upper management, yet she did not report Powell’s complaints because, in her opinion, Powell did not seem to be “afraid” of Gutierrez. Similarly, Dahl knew that she had an absolute duty to report such allegations to upper management. Yet, in the face of Powell’s allegations that Gutierrez was “sexually and physically abusing [her] and other female servers,” she failed to report Powell’s complaints. On these facts, a rational jury could have concluded that, not only was the policy and the

management training ineffective, but the protections offered by them were illusory.

Third, [o]ur cases recognize prompt investigation of the alleged misconduct as a hallmark of reasonable corrective action. Here, a rational jury could have concluded that Smith’s investigation of Gutierrez’s sexual harassment was not “prompt.” Shisler complained to management of Gutierrez’s harassment twice in March 2005, and Powell complained to management three times in April 2005. Smith did not commence his investigation until May 23, 2005. This is not the type of response “reasonably likely to prevent the harassment from recurring.” In addition, a rational jury could have believed that an investigation ensued only because Shisler’s private investigator started making inquiries of other female servers at the Racine IHOP.

Further, a rational jury could have concluded that the policy was not reasonably effective on paper. As the district court observed, an employer’s complaint mechanism must provide a clear path for reporting harassment, particularly where, as here, a number of the servers were teenagers. Flipmeastack’s sexual harassment policy did not provide a point person to air complaints to. In fact, it provided no names or contact information at all. To the extent the Crisis Management Guidelines Poster was meant to supplement the sexual harassment policy in this regard, a rational jury could have concluded that it did not fulfill this role. First, neither Shisler nor Powell could recall whether the poster was actually displayed in the employee break room during the time that they were harassed. Second, the poster contains instructions on how to deal with natural disasters, fires, and other events such as food-borne illness. It also contains the phone numbers of local authorities, and Flipmeastack’s corporate numbers, including Smith’s cell phone number. The word “discrimination” is contained on the poster under the heading “other emergencies”; however, the poster does not inform an employee which company number to call in the event he or she believes that the sexual harassment policy has been violated. In addition, the poster did not describe employees’ rights under Title VII or provide phone numbers for the EEOC or a local civil

rights office, and thus, did not provide a means for the employee to make an external complaint of discrimination. These facts, and the inferences reasonably drawn from them, could have led a rational jury to conclude that the complaint mechanism provided by Flipmeastack's sexual harassment policy did not provide a clear path for reporting harassment. For all of these reasons, we find that the jury's determination that the Defendants did not discharge their duty to effectively prevent and correct promptly sexual harassment in the workplace, was not unreasonable.

b. Shisler's and Powell's Preventative or Corrective Action

We now turn to the second element of the Faragher/Ellerth affirmative defense—i.e., whether Shisler and Powell unreasonably failed to take advantage of preventative or corrective measures. The Defendants' primary argument on appeal is that neither Shisler nor Powell ever complained to Smith, and there is "no doubt" that had they done so, "[Smith] would have taken prompt action to correct sexual harassment." The Defendants' argument ignores the terms of the sexual harassment policy itself, which provided that an employee was to "report any instances of improper behavior to [the employee's] manager or company representative." * * * Shisler and Powell utilized the complaint mechanism by first asking Gutierrez, an assistant manager, to stop his harassing behavior. When Gutierrez refused to stop his harassment, both Shisler and Powell reported Gutierrez's harassment to Del Rio and Dahl—each of whom were managers or company representatives within the meaning of the policy.

During the month that Shisler worked at the Racine IHOP (March 2005), she first reported Gutierrez's harassment to Del Rio on March 18, 2005. After Del Rio failed to take action, Shisler reported the harassment to Dahl on March 27, 2005. On cross-examination, Shisler testified that, after she last complained to Dahl, and Dahl "blew her off," she could have complained to Smith; however, Smith did not work that day, and would not be at the restaurant "until the very next Sunday, possibly." Shisler was terminated on April 3, 2005. Given this evidence, a rational jury could have believed that Shisler did not

act unreasonably by failing to report Gutierrez's conduct directly to Smith.

In addition, a rational jury could have believed that Shisler did not feel comfortable reporting Gutierrez's harassment to Smith. Shisler testified that Smith failed to respond to her prior complaint of harassment by Hecker [the manager during Shisler's previous stint of employment at IHOP] toward another server in 2004. Shisler also testified that after she complained to Smith, Hecker began to treat her more harshly. In light of this prior experience, a rational jury could have concluded that her decision not to contact Smith in 2005 was therefore justified.

Powell first complained to Dahl of Gutierrez's harassment during the first week of April 2005. Dahl responded that she "would take care of it." The following week, Del Rio asked Powell if Gutierrez had been treating her inappropriately, and Powell responded in the affirmative. Still, no action was taken. Powell last aired a complaint to Dahl during the last week of April, but Dahl told her that she "didn't need to hear it." While it is true, as the district court observed, that Powell *might* have complained to Smith after it became evident that neither Dahl nor Del Rio had corrected the problem, only about three to four weeks elapsed between the time that Powell last complained to Dahl and the date that Gutierrez resigned. A rational jury could have concluded that Powell did not act unreasonably in failing to contact Smith during this time period. * * *

CASE QUESTIONS

1. What were the legal issues in this case? What did the appeals court decide?
2. Why does the court agree that the employer failed to exercise reasonable care to *prevent* harassment? Why was its harassment policy not sufficient?
3. Why does the court agree that the employer failed to exercise reasonable care to *correct* harassment? That the employees did not unreasonably fail to take advantage of the employer's preventive and corrective measures?
4. The restaurant industry seems to produce more than its share of sexual harassment cases. What things about this industry might be conducive to problems with sexual harassment?
5. What should this employer have done differently?