UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
OCALA DIVISION

TINA LAWLER,

Plaintiff,

-vs- CASE NO. 99-65-Civ-Oc-10C

SUMPTER ELECTRIC COOPERATIVE, INC.,

Defendant.
_____/

ORDER

This case is before the Court on the Defendant, Sumpter Electrical Cooperative Inc.'s, Motion to Partially Dismiss and alternatively, for Partial Summary Judgment (Doc. 3). The Plaintiff has filed a response (Doc. 7), and the Defendant has been given an opportunity to reply (Doc. 11). The motion is due to be Granted.

FACTS AND PROCEDURAL HISTORY

The Plaintiff, Tina Lawler, has been employed by the Defendant, Sumpter Electric cooperative Inc. ("Sumpter Electric") since January 9, 1984. Plaintiff has brought suit against Sumpter Electric pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e, *et seq.* ("Title VII") and the Florida Civil Rights Act, §760.01 *et seq.* ("FCRA") for hostile work environment sexual harassment and retaliatory conduct. In her complaint, Plaintiff alleges that she was subjected to hostile work environment sexual harassment when her supervisor, John Perry "touched her against her will", forced her to sit on his lap, and forced her to "model dresses" in front of him. See Complaint (Doc. 1, ¶11). Plaintiff also claims that she was "subjected to continued retaliation and

harassment"for testifying on behalf of Eddie Swistack, another employee, "who protecting his rights under Title III and Chapter 760." See id. Plaintiff states tha alleged retaliatory conduct was also directly related to Perry's harassment.

The Defendant has now filed a motion to dismiss or alternatively for sum judgment on (Doc. 3) the Plaintiff's hostile work environment claim. As grounds Defendant contends that the Plaintiff has failed to meet the administrative prerequ prior to filing suit because Plaintiff's charge of sexual harassment was not timely with the EEOC or the Florida Commission on Human Relations. The Defendant's m has placed the Plaintiff on notice that it might be treated as one made pursua FED.R.CIV.P. 56.

SUMMARY JUDGMENT STANDARD

The entry of summary judgment is appropriate only when the Court is satisfie "there is no genuine issue as to any material fact and that the moving party is e to judgment as a matter of law." Fed.R.Civ.P. 56(c). In applying this standard, th must examine the pleadings, depositions, answers to interrogatories, and admiss file, together with any affidavits and other evidence in the record "in the lig favorable to the non-moving party." Samples on Behalf of Samples v. Atlanta, 1328, 1330 (11th Cir. 1988). The moving party bears the initial burden of es the nonexistence of a triable fact issue. Celotex Corp. V. Catrett, 477 U.S. S. Ct. 2458, 91 L.Ed.2d 265 (1986). If the movant is successful on this burden of production shifts to the non-moving party who must then come f "sufficient evidence of every element that he or she must prove." Rollins v 833 F.2d 1525, 1528 (11th Cir. 1987). The non-moving party may not s

the pleadings, but must use affidavits, depositions, answers to interrogatories, or admissible evidence to demonstrate that a material fact issue remains to be Celotex, 477 U.S. at 324, 106 S. Ct. at 2553.

DISCUSSION

In Florida, when a Plaintiff's charge of discrimination is initially filed wit Florida Commission on Human Relations, 42 U.S.C. §2000e-5(e)(1) mandates t charge of discrimination must be filed with the EEOC "within 300 days after the al unlawful employment practice occurred . . . ." Additionally, "the filing of a chai discrimination with the EEOC within the time limits prescribed by 42 U.S.C. §2(5(e)(1) is a prerequisite to the maintenance of a Title VII action." King v. Auto. T Industrial Parats and Supply, 21 F. Supp.2d 1370 (N.D. Fla. 1998)(citing Gonza Firestone Tire & Rubber Co., 610 F.2d 241,249 (5th Cir. 1980)). Similarly, with r to filing suit under the Florida Civil Rights Act, Florida Statute §760.11(1) provid "[a]ny person aggrieved by a violation of ss. 760.01-760.10 may file a complai the commission withing 365 days of the alleged violation."

The Defendant states, in its motion, that the alleged sexual harassment ended when his employment was terminated by Defendant in December of 1 Defendant thus contends that the Plaintiff's charge of discrimination, filed witl on September 16, 1996 was untimely because it was not filed within 300 last act of sexual harassment. In support of its motion, the Defendant has s Plaintiff's charge of discrimination dated September of 1996 (Exh. B) a affidavit by Tina Wallace, the Director of Human Resources and Corporat Sumpter Electric (Exh. A). Wallace attests that Perry was transferred i

1992 and that after his transfer, he no longer worked with the Plaintiff. See Exh. B, ¶3 to Defendant's motion for Summary Judgment (Doc. 3). Wallace further attests that Perry was discharged on August 2, 1993 due to allegations that he had "acted inappropriately toward Tina Lawler in 1992." See id. at ¶4. Finally, the affidavit states that Perry died on May 6, 1995. See id. at ¶5.

The Plaintiff acknowledges that "harassment by John Perry directed toward Plaintiff standing alone, is time barred." See Plaintiff's Response (Doc. 7, ¶3). Nevertheless, Plaintiff argues that "the behavior of Jon Perry is part of a continuing violation" under Title VII. In particular, Plaintiff alleges that the harassment continued because of her willingness to testify "on behalf of Eddie Swistack" who Plaintiff contends had sued the Defendant "for a violation of his rights under Title VII . . . ." See id. at ¶4.

The Defendant contends, in reply, that it does not seek the dismissal of Plaintiff's retaliation claim (Doc. 11, pg. 1). Rather, Defendant argues that the hostile work environment claim should be dismissed because no further incidents of harassment occurred subsequent to December of 1992.

In determining whether a "continuing violation" has occurred under Title VII, the Court must distinguish between "a present consequence of a one-time violation" and "the continuation of a violation into the present." See Beavers v. American Case Iron Pipe Company, 975 F.2d 792, 796 (11th Cir. 1992)(citing Webb v. Indiana National Bank, 931 F.2d 34, 438 (7th Cir. 1991)). See also Calloway v. Partners National Health Plans, 986 F.2d 446, 448 (11th Cir. 1993).

In this case, the Plaintiff does not contend that any alleged acts of sexual harassment occurred subsequent to December of 1992. Furthermore, the Plaintiff has not provided any specific facts to support the existence of a "continuing violation" or to support her claim of retaliation. In fact, though the Plaintiff alleges generally that she was subjected to retaliatory conduct for her decision to testify on behalf of another employee, she does not point to any specific acts or individuals involved in the retaliation. For this reason, the Plaintiff does not, and cannot, present any evidence that her claim of retaliation is a *continuation* of hostile work environment sexual harassment. The Eleventh Circuit has noted that revive the otherwise time-barred claim under the doctrine, however, it must be part of a pattern or continuing practice out of which the timely-filed incident arose." Roberts v. Gadsden Memorial Hospital, 835 F.2d 793 (11th Cir. 1988)(citations omitted). However, Plaintiff does not state: (1) when she testified, (2) what sorts of acts of retaliation followed; or (3) when any acts of retaliation occurred. The Plaintiff has therefore failed to establish a "continuing violation."

Nevertheless, even if the Plaintiff could point to a retaliatory act or acts that would fall within the time limit, her claim would still be time barred for the simple reason that she has alleged two separate violations of Title VII, and the Plaintiff may not boot strap the retaliation claim onto her sexual harassment claim in order to circumvent Title VII's filing requirements.[1] The Court is aware that the "determination of whether a discriminatory act constitutes a continuing violation of Title VII or simply a past violation with present effect is a finding of fact." King, 21 F. Supp.2d. at 1377 (citing Calloway

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1 Thus, dismissing the claim without prejudice and allowing the Plaintiff to re-plead would not cure this fatal deficiency.

v. Partners Nat'l Health Plains, 986 F.2d 446, 448 (11th cir. 1993). Such evidence is at least sufficient under Rule 56 to shift the burden of production to the Plaintiff to establish the existence of a material fact issue. In this case, however, the facts as presented by the Defendants remain uncontested by the Plaintiff. The Defendant's affidavit states that Perry was discharged in 1993 and subsequently died in 1995. Even assuming that Perry harassed the Plaintiff until his death in 1995, the Plaintiff's charge of discrimination, filed on September 16, 1996, was untimely. The Court thus concludes that in the light of this evidence, it is impossible for any continuing violation, in the form of sexual harassment by Perry, to have occurred at a time when the Plaintiff's filing of her charge with the EEOC would have been timely.

Accordingly, upon due consideration,

(1) the Defendant's Motion to Partially Dismiss or for Partial Summary Judgment (Doc. 3) is GRANTED, and the Clerk is directed to enter judgment for the Defendant and against the Plaintiff on Counts I and II insofar as Counts I & II state a claim for hostile work environment sexual harassment.

(2) Pursuant to Fed.R.Civ.P. 54(b), the Clerk is directed to withhold the entry of judgment pending resolution of the case as a whole.

IT IS SO ORDERED.

DONE and ORDERED in Ocala, Florida, this 16th day of July, 1999.

William Terrell Hodges

UNITED STATES DISTRICT JUDGE

Copy to counsel of record