UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Plaintiff,

-v-

KONOS, INC.
Defendant.

No. 1:20-cv-973

Honorable Paul L. Maloney

OPINION AND ORDER DENYING MOTION TO DISMISS

The matter is before the Court on Defendant Konos's motion to dismiss (ECF No. 11) Plaintiff Equal Employment Opportunity Commission's ("EEOC") complaint (ECF No. 1) for failure to state a claim. For the reasons to be explained, the motion will be denied, as Plaintiff's complaint includes sufficient facts to provide Defendant with fair notice of what the claim is and the grounds upon which it rests.

I.

Plaintiff EEOC sets forth the following facts in support of its claims. Because this case is before the Court on a motion to dismiss, the Court accepts these facts as true. *Hill v. Blue Cross & Blue Shield,* 409 F.3d 710 (6th Cir., 2005). Jane Doe started working for Defendant Employer on or about April 12, 2017 as an egg inspector at its facility in Martin, Michigan. Shortly thereafter, a supervisor, Selvin Castillo-Vasquez, began sexually harassing Doe. Castillo-Vasquez's harassment included text messages soliciting an intimate relationship, which Doe rejected. Additionally, he sexually assaulted Doe on three separate occasions, including forced kissing, groping, and vaginal penetration. Doe reported

Castillo-Vasquez's assault to Defendant Employer and police and obtained a personal protection order against him. Castilo-Vasquez was prosecuted and pled no contest to 4th degree criminal sexual conduct. In retaliation for Doe's complaints about sexual harassment, Defendant Employer sent Doe home, and she never returned to work.

On October 9, 2020, Plaintiff EEOC filed this lawsuit against Defendant Employer Konos. Plaintiff alleges two claims: First, that Konos violated Title VII of the Civil rights Act of 1964 by subjecting Doe to a hostile work environment and second, that Konos violated Title VII by retaliating against Doe for objecting to and complaining about a sexually hostile work environment.

II.

Defendant moves to dismiss both claims under Rule 12(b)(6) of the Federal Rules of Civil Procedure, which provides that a party may file a motion for relief for failure to state a claim upon which relief can be granted.

Under the notice pleading requirement, a complaint must contain a short and plain statement of the claim showing how the pleader is entitled to relief. Fed. R. Civ. P. 8(a)(2). The complaint need not contain detailed factual allegations, but it must include more than labels, conclusions, and formulaic recitations of the elements of a cause of action. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). A defendant bringing a motion to dismiss for failure to state a claim under Rule 12(b)(6) tests whether a cognizable claim has been pled in the complaint. *Scheid v. Fanny Farmer Candy Shops, Inc.*, 859 F.2d 434, 436 (6th Cir. 1988).

To survive a motion to dismiss under Rule 12(b)(6), the plaintiff must provide sufficient factual allegations that, if accepted as true, are sufficient to raise a right to relief

above the speculative level, *Twombly*, 550 U.S. at 555, and the "claim to relief must be plausible on its face." *Id.* at 570. "A claim is plausible on its face if the 'plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.'" *Ctr. For Bio-Ethical Reform, Inc. v. Napolitano*, 648 F.3d 365, 369 (6th Cir. 2011) (quoting *Twombly*, 550 U.S. at 556). "The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citations omitted). If plaintiffs do not "nudge[] their claims across the line from conceivable to plausible, their complaint must be dismissed." *Twombly*, 550 U.S. at 570.

When considering a motion to dismiss, a court must accept as true all factual allegations, but need not accept any legal conclusions. *Ctr. For Bio-Ethical Reform*, 648 F.3d at 369. The Sixth Circuit has noted that courts "may no longer accept conclusory legal allegations that do not include specific facts necessary to establish the cause of action." *New Albany Tractor, Inc. v. Louisville Tractor, Inc.*, 650 F.3d 1046, 1050 (6th Cir. 2011). However, "a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations"; rather, "it must assert sufficient facts to provide the defendant with 'fair notice of what the . . . claim is and the grounds upon which it rests.'" *Rhodes v. R&L Carriers, Inc.*, 491 F. App'x 579, 582 (6th Cir. 2012) (quoting *Twombly*, 550 U.S. at 555).

III.

A. Plaintiff's Hostile Work Environment Claim

Defendant argues that Plaintiff has failed to allege specific facts demonstrating a hostile work environment based on sexual harassment. To succeed on a hostile work environment claim, a plaintiff must show that (1) he or she was a member of a protected class; (2) he or she was subjected to unwelcome sexual harassment; (3) the harassment complained of was based on sex; (4) the charged sexual harassment created a hostile work environment; and (5) the employer is liable. *Smith v. Rock-Tenn Servs., Inc.*, 813 F.3d 298, 307 (6th Cir. 2016). Defendant does not make any arguments contesting the first three elements.

The fourth element of a hostile work environment claim requires that the charged sexual harassment created a hostile work environment. A hostile work environment occurs "when the workplace is permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment." *Harris v. Forklift Sys. Inc.*, 510 U.S. 17, 21 (1993). Such a finding must be made both objectively and subjectively. A reasonable person must objectively find the environment to be hostile or abusive and the victim must subjectively regard the work environment as hostile or abusive. *Id.* The Sixth Circuit has held that the "totality-of-circumstances examination should be viewed as the most basic tenet of the hostile-work-environment cause of action." *Williams v. Gen. Motors Corp.*, 187 F.3d 553, 563 (6th Cir. 1999). Employing such an examination, even if individual instances of sexual harassment do not independently create a hostile work environment, "the accumulated effect of such incidents may result in a Title VII violation." *Id.* When determining whether conduct is severe or pervasive enough to constitute a hostile work

environment, the Court may consider "the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." *Id.* at 23.

Defendant alleges that Plaintiff failed to plead sufficient facts that establish a hostile work environment existed. However, Plaintiff alleges Doe was subjected to text messages, forced kissing, groping, and vaginal penetration by a supervisor. While these instances of sexual harassment vary in severity, when viewed in totality, they are sufficient to state a claim for relief under Title VII.

The fifth element required to establish a hostile work environment claim is employer liability. Defendant is correct that in order to establish this fifth element, Plaintiff must prove either a supervisor's participation in the harassment that created the hostile work environment or the Employer's negligence in discovering or remedying the harassment by Doe's co-workers. *Vance v. Ball State Univ.*, 570 U.S. 421, 424 (2013). The definition of a supervisor for purposes of vicarious liability under Title VII is an employee who "is empowered by the employer to take tangible employment actions against the victim." *Id.*

While Plaintiff does not specify in their complaint whether Castillo-Vasquez was Doe's supervisor under this definition, employer liability may still be established if the employer knew or should have known of a non-supervisor's charged sexual harassment "and failed to implement prompt and appropriate corrective action." *Hafford v. Seidner*, 183 F.3d 506, 513 (6th Cir. 1999). An employer is only liable for a hostile work environment created by the harassment of a co-worker when "its response manifests

indifference or unreasonableness in light of the facts." *Hawkins v. Anheuser-Busch, Inc.*, 517 F.3d 321, 338 (6th Cir. 2008) (quoting *Blankenship v. Parke Care Ctrs., Inc.*, 123 F.3d 868, 873 (6th Cir. 1997)).

According to the facts alleged by Plaintiff, Doe complained to Defendant Employer about Castillo-Vasquez's harassment and was sent home. This employer response, taken as true, manifests indifference in light of the alleged harassment, thus satisfying the fifth element required for a hostile work environment claim, regardless of whether Castillo-Vasquez was Doe's supervisor.

B. Plaintiff's Retaliation Claim

Defendant next argues that Plaintiff's complaint fails to allege specific facts to establish a claim for retaliation under Title VII. To establish a claim for retaliation under Title VII, a plaintiff must establish (1) an individual has engaged in protected activity; (2) the individual suffered a materially adverse employment action; and (3) a causal link between the protected activity and the adverse employment action. *Laster v. City of Kalamazoo*, 746 F.3d 714, 730 (6th Cir. 2014). Defendant alleges that Plaintiff failed to establish any of these elements.

With respect to the first element, a protected activity includes "complaining to anyone (management, unions, other employees, or newspapers) about allegedly unlawful practices. *Johnson v. Univ. of Cincinnati*, 215 F.3d 561, 578 (6th Cir. 2000). The Sixth Circuit has held that complaining about alleged harassment "to company management is classic opposition activity," protected by Title VII. *Wasek v. Aarow Energy Services, Inc.*, 682 F.3d 463, 469 (6th Cir. 2012). The complaint alleges that Doe reported Castillo-

Vasquez's sexual harassment to Defendant Employer. This factual allegation is sufficient to establish the first required element.

The second requirement for a retaliation claim under Title VII is that the individual suffered a materially adverse employment action. The Sixth Circuit has recognized that a "loss of pay or benefits" can constitute a tangible job detriment for purposes of establishing an adverse employment action. *Thornton v. Fed. Express Corp.*, 530 F.3d 451, 454-55 (6th Cir. 2008). Plaintiff's allegation that Doe was sent home after engaging in a protected activity, taken as true, can reasonably lead to the conclusion that Doe was sent home and suffered a loss of pay. Such a loss of pay is sufficient to establish that Doe suffered an adverse employment action.

Finally, the third element requires that plaintiff establish a causal link between the protected activity and the adverse employment action. In making the determination of whether a causal link exists, "courts may consider whether the employer treated the plaintiff differently from similarly situated individuals and whether there is a temporal connection between the protected activity and the retaliatory action." *Barret v. Whirlpool Corp.*, 556 F.3d 502, 516 (6th Cir. 2009). Plaintiff alleges Doe was sent home after complaining to Defendant Employer. This temporal connection could reasonably lead to the conclusion that there was a causal link between the protected activity and the adverse employment action, thus, the third element is satisfied.

IV.

For the foregoing reasons,

IT IS HEREBY ORDERED that Defendant's motion to dismiss the complaint (ECF No. 11) is **DENIED.**

IT IS SO ORDERED.

Date: June 3, 2021

/s/ Paul L. Maloney
Paul L. Maloney
United States District Judge