

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF TENNESSEE  
WESTERN DIVISION

---

NICOLE HOWELL and	)	
JOSEPH HOWELL,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	No. 03-2098 M1/V
	)	
FEDERAL EXPRESS CORPORATION,	)	
et al.,	)	
	)	
Defendants.	)	

---

**ORDER DENYING DEFENDANT ADECCO'S MOTION TO DISMISS  
OR FOR SUMMARY JUDGMENT  
AND  
ORDER GRANTING IN PART AND DENYING IN PART DEFENDANT FEDERAL  
EXPRESS CORPORATION'S MOTION TO DISMISS**

---

This case is before the Court on Adecco's Motion to Dismiss or in the Alternative Motion for Summary Judgment, filed February 21, 2003, and Defendant Federal Express Corporation's Motion to Dismiss<sup>1</sup>, filed February 21, 2003. Plaintiffs responded to Defendant Adecco's motion on April 25, 2003. Adecco requested leave to file a reply, which the Court granted, but no reply has been filed with the Court. Plaintiffs did not respond to the motion of Defendant Federal Express. As these motions assert similar grounds for dismissing this case, the Court will address

---

<sup>1</sup> Pursuant to Fed. R. Civ. P. 12(b), the Court construes this motion as one for summary judgment under Fed. R. Civ. P. 56 because FedEx filed two affidavits in support of its motion.

the motions together.

## **I. Background**

Plaintiff Nicole Howell brought this lawsuit against Frank Civera, Federal Express Corporation ("FedEx"), and Adecco-TAD Technical Services ("Adecco"). Plaintiff<sup>2</sup> claims that while employed at FedEx<sup>3</sup> from early 1999 through January 2, 2002, she was subjected to severe and pervasive harassment by Mr. Civera. Mr. Civera's actions allegedly included inappropriate comments, cornering Plaintiff in different areas of the FedEx facility, slapping her on her bottom, and grabbing her breasts.

Plaintiff asserts claims of sexual harassment and retaliatory discharge under Title VII of the Civil Rights Act ("Title VII"), 42 U.S.C. § 2000e, *et seq.*, and the Tennessee Human Rights Act (the "THRA"), Tenn. Code Ann. § 4-21-101, *et seq.*, negligent infliction of emotional distress, and failure to provide a safe workplace against both FedEx and Adecco. She asserts an additional claim of negligent hiring and retention against FedEx. She also asserts claims for assault, battery, malicious harassment, and outrageous conduct against Mr. Civera. Plaintiff's husband, Joseph Howell, brings a claim for loss of

---

<sup>2</sup> Any references to Plaintiff shall refer to Nicole Howell.

<sup>3</sup> Adecco is a temp agency that provides employees to its client FedEx. Plaintiff was assigned through Adecco to work at FedEx.

consortium against all three defendants.

## **II. Summary Judgment Standard**

Under Federal Rule of Civil Procedure 56(c), summary judgment is proper "if . . . there is no genuine issue as to any material fact and . . . the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c); see also Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). The Supreme Court has explained that the standard for determining whether summary judgment is appropriate is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 251-252 (1989).

So long as the movant has met its initial burden of "demonstrat[ing] the absence of a genuine issue of material fact," Celotex, 477 U.S. at 323, and the nonmoving party is unable to make such a showing, summary judgment is appropriate. Emmons v. McLaughlin, 874 F.2d 351, 353 (6th Cir. 1989). In considering a motion for summary judgment, "the evidence as well as all inferences drawn therefrom must be read in a light most favorable to the party opposing the motion." Kochins v. Linden-Alimak, Inc., 799 F.2d 1128, 1133 (6th Cir. 1986); see also Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986).

### **III. Analysis**

Adecco and FedEx have moved for summary judgment as to all of Plaintiff's claims.

#### **A. Exhaustion of Title VII Claims**

Both FedEx and Adecco moved to dismiss Plaintiff's Title VII claims because she failed to exhaust her administrative remedies. Plaintiff subsequently filed her Amended Complaint indicating that she filed an EEOC charge on September 17, 2002 and that the EEOC issued a right to sue letter on March 7, 2003. However, Plaintiff's EEOC charge names only Adecco as her employer. Plaintiff has failed to exhaust her administrative remedies as to FedEx and the Court DISMISSES the Title VII claims against FedEx. Plaintiff's Title VII claims against Adecco are timely.

#### **B. Title VII/THRA Retaliation Claims Against Adecco**

In order to establish a *prima facie* case of retaliation, Plaintiff must show: (1) that she engaged in protected activity; (2) that the exercise of her civil rights was known by the defendant; (3) that defendant thereafter took adverse employment action; and (4) that a causal connection exists between the protected activity and the adverse employment action. Walborn v. Erie County Care Facility, 150 F.3d 584, 588-89 (6th Cir. 1998).<sup>4</sup>

Adecco asserts that Plaintiff can not establish a claim for

---

<sup>4</sup> Plaintiff's THRA claims "are governed by the same burden-shifting standards as the claims under Title VII." Wade v. Knoxville Utils. Bd., 259 F.3d 452, 464 (6th Cir. 2001).

retaliation under Title VII and the THRA because Adecco has not terminated her employment. The Court can not determine based on the present facts whether Adecco terminated Plaintiff's employment. Although Adecco maintains that Plaintiff remains eligible for employment with Adecco, (Lute Aff. ¶ 9), Plaintiff alleges that Adecco terminated their employment relationship on January 2, 2002, (Howell Aff. ¶ 24). It appears that Plaintiff has not been employed through Adecco since January 2, 2002. At the present time, Plaintiff's affidavit stating that she has been terminated and her subsequent failure to work with Adecco since January 2, 2002 is sufficient to create a genuine issue of material fact on the question of whether Adecco terminated her employment.

Adecco also moves for summary judgment on the grounds that Plaintiff can not show a causal connection between the protected activity and the allegedly adverse employment action. "[T]o establish the element of causal link a plaintiff is required to proffer evidence sufficient to raise the inference that her protected activity was the likely reason for the adverse action." EEOC v. Avery Denison Corp., 104 F.3d 858, 861 (6th Cir. 1997) (internal quotation marks omitted). "A causal link can be shown by . . . knowledge [of the protected activity] coupled with a closeness in time that creates an inference of causation." Nguyen v. City of Cleveland, 229 F.3d 559, 566 (6th Cir. 2000)

(quoting Parnell v. West, 1997 U.S. App. Lexis 12023 (6th Cir. 1997)). However, "temporal proximity in the absence of other evidence of causation is not sufficient to raise an inference of a causal link." Nguyen, 229 F.3d at 566.

Plaintiff alleges that she complained of harassment to Cathy Lute at Adecco during the period after December 1, 2000 while she worked in the Quality Assurance Department at FedEx. (Howell Aff. ¶18.) Adecco disputes whether Plaintiff made any complaints of sexual harassment after November 30, 2000. (Lute Aff. ¶ 6.) Plaintiff further alleges that she complained of sexual harassment to the FedEx Human Resources Department on December 31, 2001 and that she was subsequently terminated from both FedEx and Adecco on January 2, 2002. (Howell Aff. ¶¶ 21, 24.) Plaintiff's almost immediate termination after her complaint of harassment combined with her previous complaints to Ms. Lute would raise a strong inference that the two events are related. Although at the present time there is no evidence that Adecco was aware of the December 31, 2001 complaint to the FedEx Human Resources Department, this information would appear to be entirely within the possession of FedEx and Adecco and Plaintiff has not yet had an opportunity to undertake discovery in this case. Therefore, the Court uses its discretion under Fed. R. Civ. P. 56(f) to deny summary judgment on the issue of causation at this time. Federal Express Corp. v. USPS, 75 F. Supp.2d 807,

815 n.10 (W.D. Tenn. 1999) (“[T]he court may still deny the motion for summary judgment where there is an inadequate factual basis or record to support the ruling.”) (citing 10A Wright, Miller & Kane, Federal Practice & Procedure, Civil 3d § 2728 (West 1990)).

The Court DENIES Adecco’s motion for summary judgment as to the Title VII and THRA retaliation claims.

**C. THRA Sexual Harassment Claims Against Adecco and FedEx**

A plaintiff must bring an action for violation of the Tennessee Human Rights Act “within one year after the alleged discriminatory practice ceases.” Tenn. Code Ann. § 4-21-311. Even under the continuing violation doctrine, in order for a complaint to be considered timely at least one discriminatory act of sexual harassment must have occurred within the relevant one-year limitations period (i.e. on or after January 2, 2002). Reed v. Cracker Barrel Old Country Store, Inc., 133 F. Supp.2d 1055, 1074-75 (M.D. Tenn. 2000); Spicer v. Beaman Bottling Co., 937 S.W.2d 884, 890 (Tenn. 1996).

Adecco and FedEx assert that Plaintiff’s sexual harassment claims are barred by the statute of limitations because Mr. Civera could not have harassed Plaintiff in the workplace after December 23, 2001 and she did not file her Complaint until January 2, 2002, more than one year later. According to Adecco and FedEx, Plaintiff’s last actual day of work at FedEx occurred

during the week ending December 23, 2001. (Lute Aff. ¶ 8.) She allegedly complained of sexual harassment on December 31, 2001. (Am. Compl. ¶ 30.) She did not work on January 1, 2002 because it was a holiday, (Ford Aff. ¶ 7), or January 2, 2002 because she failed to report to work, (Lute Aff. ¶ 8). Plaintiff does not contest these dates in her response or her affidavit. Therefore, it is true that Mr. Civera's last possible act of sexual harassment in the workplace could have occurred no later than December 23, 2001.<sup>5</sup>

However, as her employers both FedEx and Adecco had a duty to investigate and take prompt and appropriate corrective action in response to Plaintiff's complaints of sexual harassment. Fenton v. HiSan, Inc., 174 F.3d 827, 830 (6th Cir. 1999). This duty did not cease on December 23, 2001, but rather continued through the date of her termination because the problem had not been abated. Moreover, Plaintiff alleges that her termination from employment with both FedEx and Adecco on January 2, 2002 is related to her claims of sexual harassment because her supervisor told her that she was fired because of her complaints about Mr.

---

<sup>5</sup> Plaintiff alleges in her affidavit that Mr. Civera drove past her home on both January 1, 2002 and January 2, 2002. (Howell Aff. ¶¶ 22-23.) Even if the Court could construe these alleged acts as incidents of sexual harassment, which is doubtful, they did not occur in the workplace and there is no evidence that Plaintiff's employer was aware of these acts or could have acted to prevent them. These alleged acts can not bring Plaintiff's sexual harassment claim within the limitations period.



Civera's behavior. (Howell Aff. ¶ 24.) Essentially, Plaintiff alleges that her termination was simply the last act of discrimination attributable to FedEx's and Adecco's failure to remedy the sexual harassment she suffered in the workplace.<sup>6</sup> Plaintiff has set forth a hostile work environment claim, to which a continuing violation theory is applicable. "It does not matter . . . that some of the component acts of the hostile work environment fall outside the statutory time period. Provided that an act contributing to the claim occurs within the filing period, the entire time period of the hostile environment may be considered by a court for the purposes of determining liability." Amtrak v. Morgan, 536 U.S. 101, 117 (2002) (discussing continuing violation in Title VII hostile work environment case).

The last alleged act of discrimination, i.e. Plaintiff's termination, occurred on January 2, 2002. Plaintiff timely filed her Complaint precisely one year later. Accordingly, the Court DENIES Adecco's and FedEx's motions for summary judgment as to

---

<sup>6</sup> In Spicer, the Tennessee Supreme Court held that the plaintiff could not bring a sexual harassment claim because the last act of harassment occurred outside the limitations period despite the fact that the plaintiff filed her complaint within one year of her termination. Spicer, 937 S.W.2d at 890-91. Spicer is distinguishable from the present cause because the plaintiff in Spicer admitted that the sexual harassment had ceased over a month before her termination and "there [was] no evidence in th[e] record that the violations which precipitated plaintiff's termination resulted from discriminatory behavior on the part of her employer." Id. at 891. The opposite is true here, where Plaintiff alleges that FedEx and Adecco terminated her employment based on her complaints of sexual harassment.

Plaintiff's THRA claims of sexual harassment.

**D. THRA Retaliation Claim Against FedEx**

For the reasons stated above, Plaintiff's also timely filed her THRA retaliation claim against FedEx. However, FedEx also asserts that Plaintiff can not establish a causal connection between her complaints of sexual harassment by Frank Civera and her termination. FedEx maintains that it asked Adecco to remove Plaintiff from her assignment due to her poor performance and attendance problems. (Ford Aff. ¶¶ 8-9.) In response, Plaintiff states in her affidavit that her supervisor, Frank Basile, told her that she was being fired because of her complaints and excuses. (Howell Aff. ¶ 24.) This allegation constitutes direct evidence of retaliation. Furthermore, as discussed above, Plaintiff's affidavit shows temporal proximity between her complaint and her termination that is sufficient at present to create a genuine issue of material fact on the issue of causation. Accordingly, the Court DENIES FedEx's motion for summary judgment as to the THRA claim of retaliation.

**E. Remaining State Law Claims Against Adecco and FedEx**

Plaintiff's state law claims of negligent infliction of emotional distress, failure to provide a safe workplace, and negligent hiring and retention are subject to a one-year statute of limitations. Tenn. Code Ann. § 28-3-104. As discussed above, Defendants' obligation to Plaintiff continued through January 2,

2002. Accordingly, the Court DENIES the motion for summary judgment as to the state law claims based on the statute of limitations.

#### **IV. Conclusion**

For the foregoing reasons, the Court DISMISSES the Title VII claims against FedEx, but otherwise DENIES FedEx's motion to dismiss. The Court DENIES Adecco's motion to dismiss or for summary judgment.

SO ORDERED this \_\_\_\_ day of September, 2003.

---

JON P. McCALLA  
UNITED STATES DISTRICT JUDGE