

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
TERRE HAUTE DIVISION

TRISHA ANDERSON, JENNIFER)
BAUMGARTNER, NICOLE FULK,)
AMANDA HARDEN, and HEATHER SHAW,)
Plaintiffs,)
)
vs.)
)
DARYL ANDREWS and CLAY CITY PLAZA)
A&W,)
Defendants.)
)

2:03-cv-0074-RLY-WGH

ENTRY ON DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

This matter is before the court on Defendants', Daryl Andrews ("Andrews") and Clay City Plaza A&W ("A&W") (collectively "Defendants"), Motion for Summary Judgment. For the following reasons, Defendants' motion is **denied in part** and **granted in part**.

I. Background

Plaintiffs', Trisha Anderson ("Anderson"), Jennifer Baumgartner (née Coley) ("Baumgartner"), Nicole Fulk ("Fulk"), Amanda Harden ("Harden"), and Heather Shaw ("Shaw") (collectively, "Plaintiffs"), lawsuit against the Defendants alleges, *inter alia*, that Andrews sexually harassed the Plaintiffs in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* ("Title VII"). Plaintiffs are former employees of A&W, and Andrews is the owner and manager of A&W. (*See generally* Complaint).

Anderson's employment with A&W ended in 2001. (Affidavit of Daryl Andrews at ¶¶ 7, 10, 11 and Ex. 2). Thereafter, Anderson filed a charge of discrimination with the Equal Opportunity Employment Commission ("EEOC"), on June 27, 2002. (Andrews Affidavit ¶ 12

and Ex. 3). Baumgartner, Fulk, Harden, and Shaw worked at A&W until 2002. Plaintiffs filed their Complaint on March 24, 2003 and their Amended Complaint on May 8, 2003.

The Amended Complaint asserts claims of Title VII hostile work environment sexual harassment as well as state law claims of battery, defamation, intentional infliction of emotional harm, and invasion of privacy. Plaintiffs have since withdrawn their complaints for invasion of privacy and defamation. (*See* Plaintiffs' Brief in Opposition to Defendants' Motion for Summary Judgment at 35).

Defendants filed a Motion for Partial Summary Judgment on the grounds that A&W is not an "employer" within the meaning of Title VII and on the grounds that Anderson's claim was time-barred. The court denied that Motion. Defendants now move for Summary Judgment, pursuant to Federal Rule of Civil Procedure 56, against all Plaintiffs on all claims.

II. Summary Judgment Standard

A party is entitled to summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). A fact is material if it is outcome determinative. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). An issue is genuine "only when a reasonable jury could find for the party opposing the motion based on the record as a whole." *Pipitone v. United States*, 180 F.3d 859, 861 (7th Cir. 1999).

In determining whether a genuine issue of material fact exists, the court must view the record and all reasonable inferences in the light most favorable to the non-moving party. *National Soffit & Escutcheons, Inc. v. Superior Systems, Inc.*, 98 F.3d 262, 265 (7th Cir. 1996). The moving party bears the burden of demonstrating the "absence of evidence on an essential

element of the non-moving party's case.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986).

The non-moving party may not, however, simply rest on the pleadings, but must demonstrate by specific factual allegations that a genuine issue of material fact exists for trial. *National Soffit & Escutcheons, Inc.*, 98 F.3d at 265.

III. Facts

The facts, as alleged by Plaintiffs, are that Andrews inappropriately touched Plaintiffs, danced vulgarly while at work, and made inappropriate sexual comments to Plaintiffs. (*See generally* Amended Complaint). In their Brief in Opposition to Defendants' Motion for Summary Judgment, Plaintiffs outline four categories of misconduct that Andrews allegedly engaged in: (1) nonverbal misconduct involving touching; (2) nonverbal misconduct not involving touching; (3) verbal misconduct involving inappropriate comments; and (4) verbal misconduct involving inappropriate inquiries into private and primarily sexual matters. (Plaintiffs' Brief in Opposition to Defendants' Motion for Summary Judgment at 3-4). The facts as alleged by each individual Plaintiff are outlined below.

A. Trisha Anderson

1. Anderson worked at Clay City Plaza A&W from December 2000 through September 2001, under the supervision of Mr. Andrews. (Amended Complaint ¶ 13).
2. On a regular basis,¹ Andrews would ask Anderson questions about her personal life, such as “Who are you dating?”; “Who are you sleeping with?”; and “Are you pregnant?” (*Id.*

¹ There has been much debate in the parties' briefs about the frequency of these alleged activities. Plaintiffs described many of the alleged activities as occurring on a “daily basis” in their Amended Complaint. Since then, Plaintiffs have clarified that the alleged activities did not take place on each and every day that they worked; rather, they allege that the activities took place frequently. (Plaintiffs' Brief in Opposition to Defendants' Motion for Summary Judgment at 24-25).

at ¶ 14).

3. On one occasion in December 2001, Andrews asked Anderson: “Hey, you want to do it in the storage room?” (*Id.*)
4. On numerous occasions, Andrews rubbed his crotch on Anderson’s backside while she was working on the food assembly line or in the drive-through area. (*Id.* at ¶ 15).
5. On a regular basis, Andrews flicked his tongue at Anderson in a sexual manner. (*Id.* at ¶ 16).
6. On a regular basis, Andrews danced vulgarly in front of Anderson. (*Id.* at ¶ 17).
7. Andrews made false statements about Anderson, including that she lived with him and that he was paying her bills. (*Id.* at ¶ 18).

B. Jennifer Baumgartner

8. Baumgartner worked at Clay City Plaza A&W from April 2001 through April 14, 2002, under the supervision of Andrews. (Amended Complaint at ¶ 19).
9. On a regular basis, Andrews touched Baumgartner in a sexual manner, most often by rubbing against her and brushing his hand across her breasts, buttocks, and front side. (*Id.* at ¶ 20).
10. Andrews repeatedly made personal remarks to and about Baumgartner. For example:
 - a. Baumgartner arrived at work with an upset stomach. Andrews asked Baumgartner what was wrong, and she told him that she wasn’t feeling well. He replied “well, you’re probably pregnant.” Several of the restaurant’s patrons heard this comment. (*Id.* at ¶ 21).
 - b. The following day, Andrews said “I know what your problem is. You wouldn’t even know who the father of your baby would be.” Several of the restaurant’s

patrons heard this comment, and Baumgartner was embarrassed as a result. (*Id.*)

11. Andrews repeatedly made sexual comments regarding Baumgartner's boyfriend and her relationship with him. On one occasion he asked, "You guys are sexually active, aren't you?" On another occasion he asked, "What's wrong? Late night with your boyfriend?" (*Id.* at ¶ 22).
12. From time to time, Baumgartner had to work alone with Andrews, which would frighten her because she found him verbally abusive and intimidating. (*Id.* at ¶ 23).
13. On a regular basis, Andrews danced vulgarly in front of Baumgartner. (*Id.* at ¶ 24).
14. On a regular basis, Baumgartner heard Andrews make sexual comments about and to other employees, and she saw Andrews touch other female employees in a sexual manner. (*Id.*).

C. Amanda Harden

15. Harden worked at Clay City Plaza A&W from March 2001 through April 14, 2002, under the supervision of Andrews. (Amended Complaint at ¶ 25).
16. Shortly after she began working at the restaurant, Andrews started telling the restaurant's patrons, several times a day, that Harden was his "new girlfriend." (*Id.* at ¶ 26).
17. Several times a day, Andrews would come up behind Harden and rub his crotch on her and brush his hand on her breasts or buttocks. (*Id.* at ¶ 27).
18. Andrews repeatedly asked Harden if he "could bend her over the table." If an attractive female customer would come into the restaurant, Andrews would ask Harden "do you think she would let me bend her over the table?" (*Id.* at ¶ 28).
19. In early 2002, Andrews remarked to Harden, in the presence of other employees, "Damn, Amanda! You look so good I can taste it!" (*Id.* at ¶ 29).

20. Harden was active in the Future Farmers of America (F.F.A.) organization through her high school. When she would ask for time off for F.F.A. events, Andrews would refer to the organization as the “Future Fags of America.” (*Id.* at ¶ 30).
21. Andrews repeatedly involved himself in Harden’s personal life:
- a. In April 2001, while Harden was still a minor, Andrews withdrew Harden from school on two occasions without first obtaining permission from her father.
 - b. On another occasion, Andrews requested and received Harden’s high school records from her school without the knowledge or permission of Harden or her parents.
 - c. Andrews offered Harden money to buy cars or other expensive personal items. (*Id.* at ¶ 31).
22. Andrews repeatedly called Harden a “ho” in the presence of restaurant patrons and other employees. (*Id.* at ¶ 32).
23. Andrews often danced vulgarly in front of Harden. The dancing Harden observed consisted of Andrews clasp his hand in front of him while he moved his crotch around. (*Id.* at ¶ 33).
24. On a regular basis, Harden saw and/or heard Andrews make sexual and demeaning comments and gestures toward and make physical contact with other female employees. (*Id.* at ¶ 34).
- D. Nicole Fulk**
25. Fulk worked at Clay City Plaza A&W from April 16, 2002 to July 25, 2002, under the supervision of Andrews. (Amended Complaint at ¶ 35).
26. Andrews repeatedly asked Fulk about her personal life and past relationships. (*Id.* at ¶

- 36).
27. On several occasions, Andrews rubbed his clothed erect penis on Fulk's leg while she worked in the drive-thru service station. (*Id.* at ¶ 37).
 28. On several occasions, Andrews came up behind Fulk and rubbed the front of his body against the back of her body. (*Id.* at ¶ 38).
 29. Andrews repeatedly made demeaning remarks to Fulk, such as "You are the most attractive employee, but not smart;" and "You would be the perfect employee with your body and Jackie's [another female employee] brain." (*Id.* at ¶ 39).
 30. Andrews offered Fulk money to buy a car. (*Id.* at ¶ 40).
 31. Andrews offensively touched Fulk:
 - a. Andrews repeatedly roughly moved Fulk around the workplace by grabbing her shoulders and pushing or pulling her to his desired location.
 - b. Once, when Andrews became upset with Fulk while she was working in the drive-through, he pushed the headset that she was wearing into her neck.
 - c. Andrews often threw objects in an intimidating manner. (*Id.* at ¶ 41).
 32. Around July 25, 2002, Fulk attended a meeting held by Andrews' attorney. During that meeting, Fulk told Andrews' attorney about the alleged sexual harassment that she has experienced.
 - a. Andrews became enraged when he learned what Fulk told his attorney. While they were at work, and in the presence of Fulk's mother, Andrews began yelling at Fulk about the incident, addressing her with profanities, pounding his fist on a table, and threatening her; Andrews told Fulk that if she didn't quit, he would "make her life a living hell." (*Id.* at ¶ 42).

b. As a result of this incident, Fulk feared for her safety, so she left the restaurant and quit her job. (*Id.* at ¶ 43).

E. Heather Shaw

33. Shaw worked at Clay City Plaza A&W from May 2002 to August 2001 and from May 2002 to December 2002, under the supervision of Andrews. (Amended Complaint at ¶ 44).

34. Once, Shaw walked into the restaurant and saw Andrews and a male employee, Matt Tresh, laughing. Shaw asked why they were laughing, and Tresh told Shaw that Andrews had just said “that he would like to bend Heather [Shaw] over the counter.” (*Id.* at ¶ 45).

35. Andrews routinely made unwarranted physical contact with Shaw:

a. On one occasion, Andrews brushed up against Shaw while she was working, even though there was ample room to walk around her.

b. On another occasion, Andrews grabbed Shaw’s arm and breast, then said “sorry, don’t press charges.” (*Id.* at ¶ 46).

36. When Shaw told Andrews that she was unable to lift weights over five pounds, he responded, “Why? Are you pregnant?” (*Id.* at ¶ 47).

37. Andrews danced vulgarly in front of Shaw. The dancing Shaw observed consisted of Andrews clasping his hand in front of him while he gyrated his hips. (*Id.* at ¶ 48).

38. After Shaw told Andrews that she knew of Fulk’s E.E.O.C. complaint in this matter, Andrews demonstrated the behavior referred to in the complaint by rubbing up against Shaw. In reference to the claims about his erect penis, Andrews told Shaw that Fulk must have felt his cell phone in his pocket. (*Id.* at ¶ 49).

39. Shaw has exhausted all of her administrative remedies and was issued a right to sue letter from the E.E.O.C. on April 28, 2003. (*Id.* at ¶ 50).

F. Additional Fact

40. On a number of occasions, Andrews called female employees, including Anderson, Baumgartner, and Harden, “lesbians.” (Amended Complaint at ¶ 51).

IV. The Motion for Summary Judgment

In Defendants’ Answer to the Amended Complaint, Andrews absolutely denied that he said or did anything inappropriate to any of the Plaintiffs. Subsequently, Defendants filed their Motion for Summary Judgment. In their motion, Defendants acknowledge that “there exists an obvious dispute of facts between the parties concerning plaintiffs’ allegations against Andrews.” (Defendants’ Brief in Support of Motion for Summary Judgment at 19). However, Defendants contend that, even if all of the Plaintiffs’ allegations were true, the alleged conduct falls short of the applicable standards for their hostile work environment, battery, and intentional infliction of emotional distress claims. (*Id.* at 20).

A. Hostile Work Environment

Plaintiffs claim that they were the victims of sexual harassment. To establish a hostile work environment sexual harassment claim, Plaintiffs must show that: “(1) [they were] subjected to unwelcome sexual advances, requests for sexual favors, or other verbal or physical conduct of a sexual nature; (2) the conduct was severe or pervasive enough to create a hostile work environment; (3) the conduct was directed at [them] because of [their] sex; and (4) there is a basis for employer liability.”² *Quantock v. Shared Marketing Serv. Inc.*, 312 F.3d 899, 903 (7th

² In this case, the employer liability element is subsumed into the other three elements, because Andrews is the owner and manager of A&W. *See* Defendants’ Brief in Support of

Cir. 2002). In order to establish the hostile work environment element, Plaintiffs must submit evidence showing that they were subjected to conduct so severe or pervasive as to “alter the conditions of employment and create an abusive working environment.” *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 67 (1986) (quoting *Henson v. Dundee*, 682 F.2d 897, 902 (11th Cir. 1982)).

Defendants argue that Plaintiffs cannot meet the second element outlined above; that is, they cannot establish that the alleged sexual conduct was severe or pervasive enough to create a hostile work environment. (*E.g.*, Defendants’ Brief in Support of Motion for Summary Judgment at 17-21). In support of this argument, Defendants claim that Plaintiffs were not, in their depositions, able to give specific enough information regarding the incidents of harassment they allege. (*Id.* at 23). Plaintiffs counter that the alleged harassment occurred with such frequency that it was indistinguishable by date. (*See, e.g.*, Plaintiffs’ Response to Defendants’ Statement of Material Facts not in Dispute Concerning Amanda Harden at 3).

The specificity or lack thereof of Plaintiffs’ deposition testimony goes to the weight of the evidence in the case before the court. At the summary judgment stage, the court must not engage in weighing the evidence. As explained above, the record must be considered in the light most favorable to the Plaintiffs. *National Soffit & Escutcheons, Inc. v. Superior Systems, Inc.*, 98 F. 3d 262, 264-65 (7th Cir. 1996). Accordingly, the court presumes that the alleged harassment took place with such frequency that the specifics of individual instances were not memorable to the Plaintiffs.

Defendants next argue that Plaintiffs’ continuing to work at the restaurant undermines

Motion for Summary Judgment at 1; Andrews Deposition at 25-26.

their claim that the harassment was severe or pervasive. (*See* Defendants’ Brief in Support of Summary Judgment at 20 (“None [of the Plaintiffs] has claimed that the work environment became so hostile, intimidating, or oppressive that any of them had to quit because of Andrews’ alleged conduct.”)). But Plaintiffs need not allege constructive discharge in order to make out their hostile work environment claim. Rather, “whether an environment is sufficiently hostile or abusive must be judged by looking at all the circumstances, including 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.” *Clark County School Dist. v. Breeden*, 532 U.S. 268 (2001). Additionally, Plaintiffs must show that their environment was both subjectively and objectively hostile. *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 21-22 (1993). There is not, however, any requirement that the work environment in question be so terribly hostile that no employee could continue to work in it.³ The fact that the Plaintiffs continued working at the restaurant may impact the credibility or weight of their testimony, but it is not a determinative fact for the purposes of summary judgment of their hostile work environment claim.

³ The standard for constructive discharge is higher than that for hostile work environment. *See E.E.O.C. v. University of Chicago Hospitals*, 276 F.3d 326, 331-32 (7th Cir. 2002) (“to demonstrate constructive discharge, the plaintiff must show that she was forced to resign because her working conditions, from the standpoint of the reasonable employee, had become unbearable. We are ordinarily faced with a situation in which the employee only alleges that she resigned because of discriminatory harassment, and in such cases, we require the plaintiff to demonstrate a discriminatory work environment *even more egregious* than the high standard for hostile work environment.” (internal citations omitted, emphasis added)); *see also Harris*, 510 U.S. at 22 (“[s]o long as the environment would reasonably be perceived, and is perceived, as hostile or abusive, there is no need for it also to be psychologically injurious”) (internal citations omitted).

Finally, Defendants argue that Andrews' alleged vulgar dancing cannot be used to substantiate the hostile work environment claim, asserting that there is no evidence that the dancing was directed at the Plaintiffs because of their sex. (Defendants' Brief in Support of Motion for Summary Judgment at 22-23). The record supports the fact that the dancing was performed in front of both men and women. (*See, e.g.*, Anderson Deposition at 60, Baumgartner Deposition at 68). However, the fact that there are male witnesses to an act does not negate the possibility that the act was motivated by the sex of female witnesses. (*See* Plaintiffs' Brief in Opposition to Defendants' Motion for Summary Judgment at 22).

Andrews' alleged dancing could have contributed to a hostile environment in the workplace. Furthermore, based on the totality of the circumstances, a reasonable jury could find that there was a hostile work environment even in the absence of the dancing episodes. Taking the facts alleged in the light most favorable to Plaintiffs, the court finds that Plaintiffs have made sufficient allegations, both subjectively and objectively, to survive summary judgment of their hostile work environment claim.

B. Battery

In Indiana, the intentional tort of battery consists of “the knowing or intentional touching of a person against [her] will in a rude, insolent, or angry manner.” *Wallace v. Rosen*, 765 N.E.2d 192, 196 (Ind. Ct. App. 2002) (quoting 2 Indiana Pattern Jury Instructions (Civil) 31.03 (2d ed. Revised 2001)). Alternatively, battery has been defined as “a harmful or offensive contact with a person, resulting from an act intended to cause the plaintiff or a third person to suffer such a contact, or apprehension that such a contact is imminent.” *Fields v. Cummins Employees Fed. Credit Union*, 540 N.E. 2d 631, 640 (Ind. Ct. App. 1989).

Plaintiffs allege that they were battered by Andrews when he touched them on their

breasts and buttocks. (Plaintiffs' Brief in Opposition to Defendants' Motion for Summary Judgment at 32-34). Defendants argue that summary judgment of the battery claim is appropriate because Plaintiffs have not provided any evidence or testimony to show that Andrews' contact with them was intentional and not accidental. (Defendants' Brief in Support of Motion for Summary Judgment at 26-27). However, Plaintiffs have alleged that, for at least some of the instances of contact, Andrews had room to walk around Plaintiffs. (*See, e.g.*, Anderson Deposition at 41; Fulk Deposition at 48). The fact that Andrews could have avoided contact with the Plaintiffs' breasts and buttocks, but did not, can give rise to a legitimate inference that he intended to touch them. *See Wallace*, 765 N.E.2d at 196-97.⁴ Consequently, summary judgment is inappropriate.

Defendants also argue that summary judgment of the battery claim is suitable because of Plaintiffs' inability to articulate, during depositions, exactly which parts of Andrews' conduct constituted battery. (Defendants' Brief in Support of Motion for Summary Judgment at 27). However, Plaintiffs are not responsible for knowing the legal definition of battery during their

⁴The court in *Wallace* explained:

[I]t is correct to tell the jury that, relying on circumstantial evidence, they may infer that the actor's state of mind was the same as a reasonable person's state of mind would have been. Thus, . . . the defendant on a bicycle who rides down a person in full view on a sidewalk where there is ample room to pass may learn that the factfinder (judge or jury) is unwilling to credit the statement, 'I didn't mean to do it.'

Id. (quoting W. Page Keeton et al., PROSSER AND KEETON ON THE LAW OF TORTS, § 8, at 33, 36-37 (5th ed. 1984)). The case at bar is sufficiently analogous to that of the bicyclist described in *Wallace* for this reasoning to be applicable. In both scenarios, the alleged wrongdoer had space to go around the person he touched.

depositions; filing under the proper cause of action is a matter for Plaintiffs' counsel, not for Plaintiffs themselves. Accordingly, Defendants' Motion for Summary Judgment is denied as to the battery claim.

C. Intentional Infliction of Emotional Distress

Plaintiffs have not alleged conduct that meets the "outrageousness" threshold for intentional infliction of emotional distress. Liability for the intentional infliction of emotional distress arises in cases where the defendant's conduct "has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." *Gable v. Curtis*, 673 N.E.2d 805, 810 (Ind. App. 1996). Defendants' conduct, as alleged, was neither so outrageous nor so extreme as to meet this standard. Accordingly, Defendants' Motion for Summary Judgment is granted as to Plaintiffs' intentional infliction of emotional distress claim.

V. Conclusion

Taking the facts as Plaintiffs have alleged them, a reasonable jury could find that Andrews' actions gave rise to a hostile work environment and/or to a battery claim, but not to a viable intentional infliction of emotional distress claim. For the foregoing reasons and based on the record before this court, Defendants' Motion for Summary Judgment is hereby **denied** as to the hostile work environment and battery claims and **granted** as to the intentional infliction of emotional distress claim.

It is **so ordered** on this 24th day of February 2005.

RICHARD L. YOUNG, JUDGE United
States District Court
Southern District of Indiana

Electronic copies to:

David Robert Brimm
WAPLES & HANGER
dbrimm@wapleshanger.com

Robert Peter Kondras, Jr.
HUNT HASSLER & LORENZ LLP
kondras@huntlawfirm.net

Richard A. Waples
WAPLES & HANGER
richwaples@aol.com