

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

EQUAL EMPLOYMENT OPPORTUNITY
COMMISSION,

Plaintiff,

and

DENISE J. POOLE,

Plaintiff-
Intervenor,

vs.

NEA-ALASKA, INC., THOMAS
HARVEY, and NATIONAL EDUCATION
ASSOCIATION,

Defendants.

Case No. 3:07-cv-0197-RRB

**ORDER DENYING MOTION
FOR PARTIAL SUMMARY JUDGMENT**

I. MOTION PRESENTED

Defendant NEA-Alaska, Inc., at Docket 57, has moved for partial summary judgment pursuant to Rule 56(c), arguing that Plaintiff-Intervenor Denise Poole has no claim for "hostile work environment" under Title VII, section 703(a) against NEA-Alaska. Plaintiff EEOC and Plaintiff-Intervenor Poole oppose the motion at

Docket 69, and NEA-Alaska has replied at Docket 78. This matter, being fully briefed, the Court now enters the following order.

II. BACKGROUND

A. The Parties

NEA-Alaska, Inc., is a union that represents teachers and other public school employees in Alaska. It is a local affiliate of the National Education Association ("NEA"), which is a national labor organization comprised of more than 3.2 million members. According to the NEA, the State affiliates are not subsidiaries of NEA; rather, each State affiliate is an independent and autonomous organization.¹ Docket 63 at 2.

Defendant Tom Harvey served as NEA-Alaska's "interim" Assistant Executive Director ("AED") for 17 months before his hire as "regular" AED beginning on August 30, 1999. Harvey assumed the position of Executive Director beginning January 1, 2002, and served until August 31, 2006.

Tom Harvey hired Denise Poole to fill a UniServ Director's position with NEA-Alaska to start on April 19, 2004, in Fairbanks. She served in Fairbanks in all times relevant to this case. Although Poole worked out of the NEA-Alaska office in

¹ The relationship between NEA-Alaska and the NEA will be examined in more detail in the Order regarding NEA's Motion for Summary Judgment at Docket 54.

Fairbanks, and Harvey had his office in Anchorage, Poole and Harvey interacted regularly, both in Anchorage and Fairbanks, as well as in phone conferences.

B. Procedural History

This case concerns events beginning April 19, 2004, during Denise Poole's employment with NEA-Alaska. Poole filed her complaint to EEOC charging NEA-Alaska with employment discrimination because of her sex. EEOC, in turn, commenced this action on behalf of Poole against defendant NEA-Alaska. By its Complaint, EEOC avers NEA-Alaska violated §§ 703(a) and 704(a) of Title VII of the Civil Rights Act of 1964 [42 U.S.C. §§ 2000e-2(a) and 2000e-3(a)]. These sections of Title VII prohibit an "unlawful employment practice:" inter alia, "to . . . discriminate against any individual with respect to his . . . terms, conditions, or privileges of employment, because of such individual's . . . sex . . ." and ". . . to discriminate against any individual . . . because he has opposed any practice made an unlawful employment practice by this title. . . ."

Poole intervened in the EEOC District Court action. Through her Complaint in Intervention, she personally advanced § 703(a) and § 704(a) claims made by EEOC described above. She added a state statutory claim and a claim for intentional

infliction of emotional distress. She also added Thomas Harvey and the National Education Association as Defendants.

III. STANDARD OF REVIEW

Rule 56 of the Federal Rules of Civil Procedure provides that summary judgment should be granted if there is no genuine dispute as to material facts and if the moving party is entitled to judgment as a matter of law. The moving party has the burden of showing that there is no genuine dispute as to material fact.² The moving party need not present evidence; it need only point out the lack of any genuine dispute as to material fact.³ Once the moving party has met this burden, the nonmoving party must set forth evidence of specific facts showing the existence of a genuine issue for trial.⁴ All evidence presented by the non-movant must be believed for purposes of summary judgment, and all justifiable inferences must be drawn in favor of the non-movant.⁵ However, the nonmoving party may not rest upon mere allegations or denials, but must show that there is sufficient evidence supporting the claimed

² Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986).

³ Id. at 323-325.

⁴ Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248-49 (1986).

⁵ Id. at 255.

factual dispute to require a fact-finder to resolve the parties' differing versions of the truth at trial.⁶

IV. DISCUSSION

NEA-Alaska seeks partial summary judgment arguing that the EEOC and Poole cannot prevail on the claims filed under Title VII, section 703(a) claiming "hostile work environment."

NEA argues that in a "hostile work environment" case, a workplace violates Title VII only if it is infused with discriminatory mistreatment that is sufficiently severe or pervasive to alter conditions of the victim's employment and create an abusive working environment.⁷ Title VII forbids only conduct that is objectively so severe or pervasive as to alter the terms of a victim's employment.⁸ This objective determination of severity or pervasiveness is made from the viewpoint of a reasonable person with the same fundamental characteristics as the complaining party.⁹ NEA-Alaska argues that Poole's case lacks either the severity or the pervasiveness required by Title VII.

⁶ Id. at 248-49.

⁷ See *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 21 (1993).

⁸ See *Oncale v Sundowner Offshore Services, Inc.*, 523 U.S. 75, 81 (1998).

⁹ *Fuller v. City of Oakland*, 47 F.3d 1522, 1527 (9th Cir. 1995).

This case is unique in that the Ninth Circuit has previously held that the *same type of alleged conduct* by the *same supervisor* (Thomas Harvey) on behalf of the *same employer* (NEA-Alaska) created an actionable hostile work environment for female employees, in violation of Title VII, sufficient to survive summary judgment.¹⁰ The Ninth Circuit held that the record in *Christopher* revealed "numerous episodes of Harvey shouting in a loud and hostile manner at female employees. The shouting was frequent, profane, and often public. The record show[ed] little or no provocation for these episodes."¹¹ The Ninth Circuit noted: "Where the conduct in question was allegedly a 'daily thing' there can be little question that a reasonable juror might infer that Harvey's pattern of verbal and physical intimidation, as confirmed by a wide range of employees, was sufficiently severe to satisfy the statute."¹² The matter ultimately settled with no admission of fault.

In this case, NEA-Alaska outlines the alleged instances of abusive conduct, and concludes that the abuse alleged by Poole

¹⁰ See *EEOC and Christopher v. National Education Association, Alaska*, 422 F.3d 840 (9th Cir. 2005) (hereinafter "*Christopher*").

¹¹ *Id.* at 843.

¹² *Id.* at 847.

at the hands of Harvey, even if true, was not "a daily thing."¹³ NEA-Alaska relies on Poole's deposition, a report conducted by an independent professional investigator ("The Russell Report"), the EEOC interview report, and a memorandum to Harvey from Poole dated October 6, 2005. According to NEA-Alaska, Poole's complaint boils down to ten separate events over a period of almost two years. NEA-Alaska argues that even assuming the truth of these ten separate events, they are not sufficiently severe or pervasive to satisfy Title VII. NEA-Alaska argues that Poole has offered only "sporadic," "episodic," not "concerted," and not "extreme" tokens of discriminatory conduct. Even if these events caused Poole anxiety,¹⁴ NEA-Alaska argues they did not create a workplace such that a reasonable person "with the same fundamental characteristics" as Poole would claim altered her conditions of employment and created an abusive working environment, and do not pass the summary judgment standard.

¹³ Docket 67 at 4-14.

¹⁴ The record reflects that as a result of her encounters with Harvey, Poole sought psychological treatment and counseling from Linda King, a certified marriage and family therapist. At intake, King diagnosed Poole with Post-Traumatic Stress Disorder, attributable to King's interactions with Harvey. According to King, Poole experienced "intense fear" as a result of Harvey's conduct towards her.

NEA-Alaska argues that if *Christopher* were given the broadest possible reading, a court would quickly come up against the Supreme Court's instruction in *Oncale* not to make of Title VII a civility code for the workplace.¹⁵ What NEA-Alaska fails to acknowledge, however, is that Poole argues that her case concerns a continuation of the **same** abusive behavior already addressed by the Ninth Circuit in *Christopher*, noting that the abusive conduct at issue in this case occurred during the pendency of the first action brought by the EEOC in the *Christopher* case. Poole argues that there is more than sufficient evidence in the record of this case to support the contention that she was exposed to an abusive workplace environment sufficiently severe to be actionable under Title VII.

Furthermore, Poole disputes NEA-Alaska's characterization of the facts as breaking down into ten discrete episodes. Taking the evidence in the light most favorable to Poole, threatening and accusatory phone calls to Poole from Harvey continued throughout 2005 and into 2006. In 2006, Poole had "numerous" interactions with Harvey in which he was "yelling, accusatory, angry." According to Poole, personal encounters - whether in person or by telephone - between she and Harvey were often marked by yelling,

¹⁵ *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. at 81.

and other threatening and intimidating conduct. In any event, "offensive comments do not all need to be made directly to an employee for a work environment to be considered hostile."¹⁶ The *Davis* court found that it was obvious from the employee's distraught journal entries that the alleged incidents upset her and made it more difficult for her to work. The court found that whether those incidents would be considered abusive by an "objective" reasonable woman was a closer question, but that the question was not "a mathematically precise test."¹⁷ "[W]here the severity of frequent abuse is questionable, it is more appropriate to leave the assessment to the fact-finder than for the court to decide the case on summary judgment."¹⁸ Although Poole's claims may or may not ultimately persuade the trier of fact, when viewing the facts in the light most favorable to Poole, the non-moving party, the Court finds that she has alleged sufficient facts to state a prima facie case for a violation of Title VII.¹⁹

¹⁶ *Davis v. Team Electric Co.*, 520 F.3d 1080, 1095 (9th Cir. 2008).

¹⁷ *Id.* at 1096.

¹⁸ *Id.*

¹⁹ See *Craig v. M&O Agencies, Inc.* 496 F.3d 1047, 1057 (9th Cir. 2007).

V. CONCLUSION

In light of the foregoing, NEA-Alaska's Motion for Partial Summary Judgment at **Docket 57** is **DENIED**.

IT IS SO ORDERED.

ENTERED this 7th day of April, 2009.

S/RALPH R. BEISTLINE
UNITED STATES DISTRICT JUDGE