IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION

DAWN SEWELL	)	
	)	
Plaintiff,	)	Civil Action No.: 7:04CV00268
	)	
v.	)	**MEMORANDUM OPINION**
	)	By: Hon. Glen E. Conrad
MACADO'S, INC., et al.	)	United States District Judge
	)	
Defendants.	)	

Dawn Sewell brings this action against Macado's, Inc. (Macado's), alleging that she was subjected to sexual harassment and retaliation in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e et seq., and the common law of Virginia.[1] Mrs. Sewell also asserts state claims for assault and battery against the company and her former coworker, Derek Demler. The case is currently before the court on the defendants' motions to dismiss. For the reasons that follow, the plaintiff's claim for wrongful discharge in violation of Virginia public policy will be dismissed. The defendants' motions will be denied with respect to the remaining claims.

BACKGROUND

The following facts, which are taken from the plaintiff's complaint, are accepted as true for purposes of the defendants' motions. See Estate Constr. Co. v. Miller & Smith Holding Co., 14 F.3d 213, 217-218 (4th Cir. 1994). Mrs. Sewell began working for Macado's in August 1999 and subsequently worked for the company on three separate occasions. Mrs. Sewell's employment was terminated in September 2003.

Mrs. Sewell alleges that while she was employed by Macado's, the company's agents and employees sexually harassed her and created a hostile work environment. For instance, Mrs.

[1] Specifically, Mrs. Sewell asserts hostile work environment and retaliation claims under Title VII, as well as a state claim for wrongful discharge in violation of Virginia public policy.

Sewell alleges that the company's director of operations made offensive remarks about her body and the bodies of other female employees in the fall or winter of 2000 and 2001. Mrs. Sewell also alleges that the same employee referred to her as a "whore" and as a "bitch" in 2002, and that other managers for the company made offensive comments concerning women. Mrs. Sewell further alleges that an area supervisor propositioned her in January 2003. In the summer of 2003, Mrs. Sewell received an order compelling her to attend a hearing in California regarding child custody and visitation matters. While she was in California, the director of operations told Mrs. Sewell's husband that she was flashing her breasts for money.

Derek Demler worked as an assistant manager for Macado's from the winter of 2002 until August 2003. Mrs. Sewell contends that Mr. Demler sexually harassed her and other female employees while he was employed by the company. Mrs. Sewell alleges that Mr. Demler grabbed her and tickled her on several occasions. Mrs. Sewell also alleges that Mr. Demler approached her from behind, forced each of her hands against the bar, and pushed his groin area against her buttocks. On another occasion, Mr. Demler grabbed Mrs. Sewell and startled her. Mrs. Sewell alleges that she hurt her knee when she tried to move away from him.

Mrs. Sewell complained to her area supervisor and the company's general manager about Mr. Demler's offensive conduct. In response, the plaintiff's area supervisor threatened to reduce her hours and take away her weekend shifts. Macado's ultimately terminated the plaintiff's employment on September 28, 2003. Mrs. Sewell alleges that she was terminated in retaliation for complaining about sexual harassment, as well as for traveling to California to attend the hearing.

Mrs. Sewell filed a complaint with the Equal Employment Opportunity Commission (EEOC) on November 21, 2003. On February 25, 2004, Mrs. Sewell received a right-to-sue notice from the EEOC. Mrs. Sewell filed the present action on May 21, 2004.

DISCUSSION

Macado's has moved to dismiss the plaintiff's hostile work environment claim, as well as her state claims, pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure.[2] Mr. Demler has moved to dismiss the plaintiff's assault and battery claims for lack of subject matter jurisdiction under Rule 12(b)(1).

When deciding a motion to dismiss under Rule 12(b)(6), the court must determine "whether the complaint, under the facts alleged and under any facts that could be proved in support of the complaint, is legally sufficient." Eastern Shore Market, Inc. v .J.D. Associates Ltd. Partnership, 213 F.3d 175, 180 (4th Cir. 2000). The court must accept the allegations in the complaint as true, and draw all reasonable factual inferences in favor of the plaintiff. The court should not dismiss a complaint for failure to state a claim, unless it appears beyond a doubt that the plaintiff can prove no set of facts in support of her claim that would entitle her to relief. Conley v. Gibson, 355 U.S. 41, 45-46 (1957).

When subject matter jurisdiction is challenged under Rule 12(b)(1) of the Federal Rules of Civil Procedure, the plaintiff bears the burden of proving that subject matter jurisdiction exists in federal court. Adams v. Bain, 697 F.2d 1213, 1219 (4th Cir. 1982). The court should not grant a Rule 12(b)(1) motion to dismiss unless "the material jurisdictional facts are not in dispute and the moving party is entitled to prevail as a matter of law." Richmond, Fredericksburg & Potomac R.R. Co. v. United States, 945 F.2d 765, 768 (4th Cir. 1991).

[2] During a motions hearing held on September 16, 2004, Macado's clarified that the company has not moved to dismiss the plaintiff's Title VII retaliation claim.

1. **Plaintiff's Hostile Work Environment Claim**

Title VII of the Civil Rights Act of 1964 prohibits an employer from discriminating against an employee with respect to the terms, conditions, or privileges of employment, based on the employee's sex. 42 U.S.C. § 2000e-2(a). "Since an employee's work environment is a term or condition of employment, Title VII creates a hostile working environment cause of action." Glover v. Oppleman, 178 F. Supp. 2d 622, 636 (W.D. Va. 2001). In order to succeed on a hostile work environment claim, the plaintiff must prove the following elements: (1) the existence of unwelcome conduct; (2) that is based on the plaintiff's sex; (3) which is sufficiently severe or pervasive to alter the plaintiff's conditions of employment and to create an abusive work environment; and (4) which is imputable to the employer. Conner v. Schrader-Bridgeport Internation, Inc., 227 F.3d 179, 192 (4th 2000).

In support of its motion to dismiss, Macado's argues that certain allegations in the plaintiff's complaint are time-barred and therefore cannot be considered for the purpose of her hostile work environment claim. Macado's emphasizes that a complainant must file a discrimination claim with the EEOC within 300 days of the allegedly discriminatory action, and that matters not timely raised before the EEOC cannot be the subject of a later lawsuit. Since Mrs. Sewell filed her charge of discrimination with the EEOC on November 21, 2003, Macado's argues that any allegations of harassment arising from events that occurred prior to January 25, 2003 are untimely. In response, the plaintiff contends that she can recover for offensive acts that occurred beyond the relevant limitations period, as long as a portion of the hostile work environment occurred within the limitations period. See White v. BFI Waste Services, LLC, 375 F.3d 288, 292-293 (4th Cir. 2004) (citing to AMTRAK v. Morgan, 536 U.S. 101, 122 (2002). The court recognizes that some of the alleged incidents of harassment may be separated by

distinct breaks in the plaintiff's employment. However, without further factual development, the court cannot conclude that the plaintiff's allegations are not part of the same hostile work environment claim.

Macado's also argues that the alleged conduct was not severe or pervasive enough to create a hostile or abusive work environment. The "severe or pervasive" element is determined from both an objective and subjective standpoint. Harris v. Forklift Sys., Inc., 510 U.S. 17, 21-22 (1993). Macado's does not argue that the alleged conduct was not severe or pervasive to the plaintiff personally. Instead, Macado's contends that the allegations do not establish a hostile work environment from an objective standpoint. To determine whether a work environment is hostile or abusive, the court must consider all of the circumstances, including the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; whether the conduct unreasonably interfered with the plaintiff's work performance; and what psychological harm, if any, resulted. Id. at 23.

After reviewing the facts alleged in the complaint, in conjunction with relevant case law, the court concludes that the plaintiff's hostile environment claim is legally sufficient. In contrast to the plaintiff's complaint in Bass v. Dupont, 324 F.3d 761 (4th Cir. 2003), a case cited by Macado's in support of its motion, Mrs. Sewell's complaint is not merely "full of problems she experienced with her coworkers and supervisors" that "do not seem to have anything to do with gender … harassment." Bass, 324 F.3d at 765. Instead, the complaint specifically alleges that the director of operations for Macado's made offensive remarks about the plaintiff's body and referred to the plaintiff as a "whore" and as a "bitch." The complaint further alleges that the plaintiff was propositioned for sex, tickled, and touched from behind.

The court agrees with the plaintiff that the case of Ocheltree v. Scollon Productions, Inc., 335 F.3d 325 (4th Cir. 2003) (en banc) is instructive. In Ocheltree, the United States Court of Appeals for the Fourth Circuit held that a reasonable jury could find that the coworkers' sexual simulations involving mannequins, vulgar songs and pictures, and graphic descriptions of sexual activity were sufficiently severe or pervasive to alter the conditions of the plaintiff's employment. Id. at 333. As the plaintiff points out, the conduct at issue in this case could be considered even more egregious than the conduct alleged in Ocheltree. Rather than simulating sexual acts on a mannequin, Mr. Demler allegedly grabbed Mrs. Sewell from behind, forced each of her hands against the bar, and pushed his groin area against her buttocks. Certainly, such allegations describe the type of severe or pervasive activity required to state a hostile work environment claim.

2. **Plaintiff's Assault and Battery Claims**

In Count II of her complaint, Mrs. Sewell claims that Mr. Demler's inappropriate and unwanted touching constitutes assault and battery in violation of state law. Mrs. Sewell further alleges that Macado's is liable as a result of the assault and battery.

Mr. Demler argues that the court lacks subject matter jurisdiction over plaintiff's claims for assault and battery, because such claims are based on state law. However, as the plaintiff correctly points out, the court may exercise supplemental jurisdiction over these claims pursuant to 28 U.S.C. § 1367(a), since the claims are so related to the plaintiff's Title VII claims that they form part of the same case or controversy.[3] For this reason, the court will deny Mr. Demler's motion to dismiss for lack of subject matter jurisdiction.

[3] Section 1367(a) states that "district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution." The statute further provides that "[s]uch supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties."

Macado's argues that the allegations in the complaint fail to state a claim for assault or battery under Virginia law. The court notes that the Virginia Supreme Court recently identified the elements of these "independent torts" in Koffman v. Garnett, 265 Va. 12, 16, 574 S.E.2d 258, 261 (2003). The court explained that the "tort of assault consists of an act intended to cause either harmful or offensive contact with another person or apprehension of such contact, and that creates in that other person's mind a reasonable apprehension of an imminent battery." Id. The court further explained that the "tort of battery is an unwanted touching which is neither consented to, excused, nor justified." Id. After reviewing the allegations in the complaint, the court concludes that the allegations are sufficient to state claims for assault and battery.

3. **Plaintiff's Wrongful Discharge in Violation of Public Policy Claim**

As a final claim, Mrs. Sewell alleges that Macado's wrongfully discharged her in violation of the public policy expressed in Virginia Code § 18.2-465.1.[4] The Virginia Supreme Court first recognized a claim for wrongful discharge based on an employer's violation of public policy in Bowman v. State Bank of Keysville, 229 Va. 534, 331 S.E.2d 797 (1985). Since that decision, the court has emphasized that the public policy exception to the employment-at-will doctrine is a "narrow" exception. City of Virginia Beach v. Harris, 259 Va. 220, 232, 523 S.E.2d 239, 245 (2000). Although many statutes express a public policy of some sort, the Virginia Supreme Court has limited claims for wrongful discharge to three circumstances. Rowan v. Tractor Supply Co., 263 Va. 209, 559 S.E.2d 709 (2002). These circumstances are as follows: (1) where "an employer violated a policy enabling the exercise of an employee's statutorily

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[4] This statute provides that "[a]ny person … who is summoned or subpoenaed to appear in any court of law or equity when a case is to be heard … shall neither be discharged from employment nor have any adverse personnel action taken against him … as a result of his absence from employment due to such … court appearance, upon giving reasonable notice to his employer of such court appearance or summons. Any employer violating the provisions of this section shall be guilty of a Class 3 misdemeanor."

created right";[5] (2) where "the public policy violated by the employer was explicitly expressed in the statute and the employee was clearly a member of that class of persons directly entitled to the protection enunciated by the public policy";[6] and (3) where "the discharge was based on the employee's refusal to engage in a criminal act." Id. at 213-14, 559 S.E.2d at 711.

In this case, the plaintiff contends that the public policy of Virginia is violated when an employer discharges an employee for appearing in court. However, the plaintiff's wrongful discharge claim is not based on a public policy expressly set out by statute. Likewise, the plaintiff's claim is not based on an explicit statutory right. Instead, the plaintiff relies on a criminal statute. Virginia Code § 18.2-465.1 provides a criminal penalty for those who violate it. See Rowan, 263 Va. at 215 (holding that Virginia Code § 18.2-460 did not allow a common law action for wrongful discharge, since the criminal statute did not create any specific statutory right or set forth any specific public policy). The court also notes that the plaintiff acknowledged during the motions hearing that the Virginia Supreme Court has not addressed whether § 18.2-465.1 provides a cause of action for wrongful discharge. The court would potentially expand the state's public policy exception to the employment-at-will doctrine, if the court was to recognize the plaintiff's wrongful discharge claim. As this court has stated previously, "a federal court exercising diversity jurisdiction only is permitted to 'rule upon the state law as it currently exists and not to surmise or suggest its expansion.'" Swain v. Adventa Hospice, Inc., 2003 U.S. Dist.

[5] For instance, in Bowman, several employees were terminated because they refused to vote shares of stock in the manner directed by their employer. 229 Va. at 540, 331 S.E.2d at 801. Former Virginia Code § 13.1-32 (currently codified in § 13.1-662) gave shareholders the right to vote for their shares. The Virginia Supreme Court concluded that the employer's act of terminating the employees violated the public policy that shareholders are entitled to vote without duress or intimidation. Id.

[6] In Lockhart v. Commonwealth Education Systems Corporation, 247 Va. 98, 439 S.E.2d 328 (1994), the court permitted a claim for wrongful discharge on the basis of the public policy expressed in former Virginia Code § 2.1-715 (currently codified in § 2.2-3900), where the statute provided that it is "the policy of the Commonwealth" to "safeguard all individuals within this Commonwealth" against unlawful discrimination in employment based on gender.

LEXIS 22753 *7 (W.D. Va. Dec. 12, 2003) (citing Tritle v. Crown Airways, Inc., 928 F.2d 81, 84 (4th Cir. 1990). For these reasons, the court concludes that the plaintiff's wrongful discharge claim must be dismissed.

CONCLUSION

For the reasons stated, the court will dismiss the plaintiff's claim for wrongful discharge in violation of Virginia public policy. The defendants' motions will be denied with respect to the remaining claims.

The Clerk is directed to send certified copies of this Memorandum Opinion and the accompanying Order to all counsel of record.

ENTER: This 4th day of October, 2004.

/S/ GLEN E. CONRAD
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
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DAWN SEWELL	)	
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Plaintiff,	)	Civil Action No.: 7:04CV00268
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v.	)	**ORDER**
	)	By: Hon. Glen E. Conrad
MACADO'S, INC., et al.	)	United States District Judge
	)	
Defendants.	)	

This case is before the court on the defendants' motions to dismiss. For the reasons stated in a Memorandum Opinion filed this day, it is hereby

ORDERED

as follows:

1. The plaintiff's wrongful discharge claim is **DISMISSED**.

2. Macado's Inc.'s motion to dismiss is **DENIED** with respect to the remaining claims.

3. Derek Demler's motion to dismiss for lack of subject matter jurisdiction is **DENIED**.

The Clerk is directed to send a certified copy of this Order and the attached Memorandum Opinion to all counsel of record.

ENTER: This 4th day of October, 2004.

/S/ GLEN E. CONRAD
United States District Judge