

Equal Employment Opportunity Commission

Investigator Name

Address

Re: Employee X v.
EEOC No. 150200600000

Dear Investigator:

I am writing on behalf of the Respondent, EMPLOYER Corporation (“EMPLOYER”) in response to the Charge of Discrimination filed by Employee X (“Ms. X” or “Charging Party”) in the above-referenced matter.

I. BACKGROUND

EMPLOYER is an equal opportunity employer and makes all employment decisions without regard to race, color, sex, religion, national origin, age, handicap or disability, marital status, veteran status or citizenship status. In addition, EMPLOYER does not tolerate sexual harassment or sex discrimination and has a well-disseminated Harassment Policy that is distributed to each newly hired employee during a mandatory orientation. Each employee is required to review EMPLOYER’s Harassment Policy and sign an acknowledgment that they read and understand the policy. Further, EMPLOYER provides its Employees, through the EMPLOYER handbook, with several avenues to address complaints of inappropriate conduct, sexual harassment and discrimination.

After conducting an internal investigation of this matter, EMPLOYER has concluded that there is no factual basis or legal merit to Charging Party’s allegations of sexual harassment, discrimination or retaliation. EMPLOYER made all employment decisions with respect to Ms. X’s employment for legitimate non-discriminatory, non-retaliatory business reasons completely unrelated to her gender or claim of inappropriate conduct by a co-worker. After a review of this position statement and supporting documentation, EMPLOYER is confident that the EEOC will reach the same conclusion.

II. THE CHARGE

Ms. X alleges that she was discriminated against on the basis of her gender (female) and was retaliated against for complaining of alleged sexual harassment by a co-worker in violation of Title VII of the Civil Rights Act of 1964, as amended.

EMPLOYER denies that Ms. X was subjected to any discrimination or retaliation. To the contrary, Ms. X was treated fairly and any employment decisions made by EMPLOYER with respect to Ms. X’s employment were for legitimate non-

discriminatory, non-retaliatory reasons unrelated to her gender or complaint of inappropriate conduct by a co-worker. Each of Ms. X's allegations shall be discussed separately below.

III. EMPLOYER'S RESPONSE

A. Charging Party's Hire by Respondent.

Ms. X was hired on January 1, 2005 as an hourly employee in the EMPLOYER store location #0000 on Tree Lined Drive in Anywhere, U.S.A. Ms. X was assigned to work on the receiving team. The receiving team usually consists of approximately five to ten employees who work various shifts each week.

Receiving is responsible for unloading new merchandise from the delivery truck, checking the merchandise in and, in part, transporting the merchandise to the appropriate department for stocking or display. The receiving Employees report to a Receiving Department Manager who works many shifts with the receiving team. In addition, there is always an Assistant Manager or Manager in the location.

Ms. X participated in an EMPLOYER Orientation on or about January 1, 2005 during which she received an EMPLOYER handbook. (Exhibit 1). Ms. X signed an Orientation Completion Form on January 1, 2005 in which she acknowledged that she had learned EMPLOYER's policies and procedures, had read the EMPLOYER handbook and that she understood EMPLOYER's Harassment Policy and Equal Employment Opportunity Policy. (Exhibit 2). In addition, Ms. X acknowledged that she understood EMPLOYER's communication policy, which includes an Open Door Policy that encourages employees to go to the next level of supervision with any questions or difficulties until they "find someone who can help." Also, EMPLOYER's Harassment Policy contains explicit instruction on how to make a complaint of harassment and includes a toll free number for employees to report any problems in the workplace. (Exhibit 1).

During a typical receiving shift, the Employees are required to quickly and efficiently unload the merchandise from the delivery truck. During this process, Employees work in close proximity to one another. There are, at times, several Employees on each side of the receiving line assisting with the unloading process. The Employees do stand next to one another and it may be necessary, during the course of unloading the truck, to reach in front of another Employee or to assist another Employee in lifting the heavier objects.

B. Ms. X's Complaint of Inappropriate Conduct.

On approximately June 1, 2004, Ms. X approached the Receiving Department Manager, Mr. Y regarding another Employee, Mr. Z. Ms. X informed Mr. Y that Mr. Z sometimes "stared" at her, bumped into her in the receiving area and would stand in her way and not move while unloading the truck. Ms. X told Mr. Y that she did not want to see Mr. Z get in trouble but that she would like Mr. Z to be more conscious of his actions. Further, Ms. X told Mr. Y that she and Mr. Z were

on friendly terms and that she felt comfortable talking to him about the situation. Mr. Y, aware that the two Employees were on friendly terms, informed Ms. X that he would check into her concerns and get back to her. Mr. Y then approached the Assistant Manager, Mr. S, and informed him of Ms. X's concerns. Mr. S spoke to Ms. X and she explained that Mr. Z would "stare" at her and sometimes would touch her on the shoulder or back while they were unloading the truck.

Mr. S spoke with Mr. Y and both decided to closely monitor Mr. Z's behavior in response to Ms. X's concerns and for security purposes because they considered the "staring" behavior odd. Mr. Y personally interviewed other receiving team members, Mr. A and Mr. B, both of whom observed no inappropriate conduct by Mr. Z toward Ms. X. Further, Mr. S told Ms. X that there was a security camera set up in receiving and that Mr. Z would be closely monitoring during the shifts in which Mr. Z and Ms. X worked together. Ms. X expressed to Mr. S that the presence of the security camera was reassuring.

In addition, Mr. Y again spoke to Ms. X and asked her if she would like him to set up a meeting including Ms. M, Manager, Mr. Z, Mr. Y and Ms. X in which they would discuss Ms. X's concerns. Ms. X declined the suggested meeting and instead decided to speak with Mr. Z herself about his behavior. Also, Mr. Y and Ms. X decided that she would work only on the opposite side of the receiving line from Mr. Z so that any potential physical contact between the two Employees would be minimal or eliminated. Ms. X agreed with Mr. Y, stated that she would speak with Mr. Z about his conduct and proceeded to work on the opposite side of the receiving line from Mr. Z.

A few days later, Ms. X approached Mr. Y again and told him she had spoken to Mr. Z, told Mr. Z that there was a "line that he could not cross," that the conversation went well and that there had been no further incidents with Mr. Z after she spoke with him. Mr. Y specifically asked Ms. X to let him know if she had any additional concerns regarding Mr. Z's conduct.

Ms. X never approached Mr. Y again with any additional complaint about Mr. Z. According to Mr. Y, the situation had been effectively resolved. Under the circumstances, Mr. Y's conclusion was certainly reasonable. It should be noted that Mr. Z is a tall, imposing individual. He is otherwise quiet, unassuming and has been working for EMPLOYER for almost ten years. During Mr. Z's ten years of employment with EMPLOYER no other employee has ever complained about inappropriate conduct by Mr. Z. Further, Mr. Z was interviewed and denied that he had "stared at" or "touched" Ms. X inappropriately or intentionally. He explained that he may have inadvertently bumped her while working on the receiving line but did not recall any specific incidents.

In addition, in July 2005, Human Resources Director, Ms. P spoke with Ms. X and asked her about the situation with Mr. Z. Ms. X told Ms. P that the situation was better and that she had no further problems with Mr. Z. At no time during the conversation with Ms. P did Ms. X express that she felt she had been or was being

“sexually harassed” by Mr. Z or that any inappropriate conduct was taking place whatsoever.

Despite the many avenues available to Ms. X to complain of any additional perceived inappropriate conduct by Mr. Z, she failed to do so. In fact, EMPLOYER was not aware of any ongoing issue with Mr. Z until receipt of the Charge of Discrimination dated December 25, 2005, several months after Ms. X informed EMPLOYER that the purported problem with Mr. Z had been successfully resolved.

Contrary to the assertions in the Charge of Discrimination, EMPLOYER has no record of any call by Ms. X to the EMPLOYER hotline number included in EMPLOYER’s Harassment Policy. Further, Ms. X never contacted EMPLOYER’s Human Resources department regarding her complaint.

C. Ms. X’s Retaliation Claim.

Ms. X also claims in her charge that EMPLOYER retaliated against her by threatening to terminate her employment for requesting FMLA leave. This claim is completely without merit. As provided above, Ms. X received an EMPLOYER handbook and acknowledged that she understood EMPLOYER’s Attendance policy. (See Exhibits 1 & 2). EMPLOYER’s Attendance policy provides that Team Members could be subject to discipline or could lose their job if they are frequently late or absent without prior approval or excuse. (Exhibit 1, Page 10). Further, the policy provides that if an Employee is absent three consecutive days in a row without calling their supervisor or manager, they could lose their job. (Exhibit 1). At all times during her employment with EMPLOYER, Ms. X was aware of this policy.

In early January 2006, Ms. X was absent from work several times due to health related issues. Those absences were excused, without documentation, and not questioned by EMPLOYER. On or about January 17, 2006, Ms. X requested an unpaid medical leave of absence. EMPLOYER granted Ms. X’s request for leave of absence and confirmed her anticipated date of return to work as February 1, 2006. (Exhibit 3). During her leave of absence, Ms. P, Human Resources Manager for EMPLOYER location #000, contacted Ms. X at home on two occasions to see how she was doing, to determine whether she needed any assistance, and to obtain a status with regard to her anticipated return to work.

During the second week of March 2006, Ms. X informed EMPLOYER that her physician had released her to return to work as of March 15, 2006. Following Ms. X’s return to work she began calling in sick more frequently and missing her scheduled shifts. During the same time period, other members of the receiving team were frequently absent from their scheduled shifts creating an ongoing and serious productivity problem in receiving. As such, the Receiving Department Manager, Mr. Y, began counseling employees with frequent absences.

In March 2006, Ms. X was absent from her scheduled shift on March 20th, 21st, 22nd, 23rd and 24th. On March 25, Ms. X was counseled by Mr. Y regarding her absences. (Exhibit 4). The counseling also notes that Ms. X was reporting to her scheduled shifts late, taking excessively long breaks and leaving work early without authorization. (Exhibit 4). The counseling was issued in an effort to correct an ongoing problem and had absolutely nothing to do with Ms. X's prior complaint regarding the conduct of Mr. Z, almost eight months earlier. Further, at the time of the counseling, Ms. X never mentioned any continuing inappropriate conduct by Mr. Z or that she thought the counseling had anything to do with her prior complaint.

Despite all of the methods available to Ms. X to complain about the counseling and its purported relation to her earlier complaint, she failed to do so. On March 24, 2006 Ms. X notified EMPLOYER of some work-related physical restrictions imposed by her physician. Ms. X was immediately assigned to light duty tasks during her scheduled shifts. Notwithstanding the counseling Ms. X received on March 25, 2006, her absences continued through March, April and early May 2006.

In a letter dated April 15, 2006, Ms. M, Store Manager at store #0000, confirmed Ms. X's physical restrictions and accommodation of those restrictions with the light duty assignment. (Exhibit 5). Also in the letter, Ms. M provided, "Of your past 11 scheduled shifts, you have missed 9." The letter also sets forth Ms. X's scheduled shifts from April 15, 2006 through April 30, 2006. The letter states, "As we have accommodated the restrictions set forth by your doctor, you are expected to work these shifts in full. If you continue to call out and/or No Call No Show for your scheduled shifts, we will be forced to take corrective action, based on EMPLOYER's Policy and Procedure." (Exhibit 5). Despite Ms. X's continued absences and her failure to call and show up for her scheduled shifts on several occasions, EMPLOYER continued to work with Ms. X to continue her employment with EMPLOYER.

Based on the above, EMPLOYER in no way retaliated against Ms. X based on her prior complaint regarding the conduct of co-worker Mr. Z. To the contrary, EMPLOYER demonstrated extraordinary tolerance of Ms. X's attendance problems under the circumstances. Accordingly, Ms. X's charge of discrimination lacks merit and should be dismissed in its entirety.

IV. CONCLUSION

For the reasons discussed above in this position statement, Ms. X was not discriminated against on the basis of her gender or retaliated against at any time during her employment with EMPLOYER.

The conduct of Mr. Z, as alleged by Ms. X, that purportedly occurred in June 2005, does not rise to the level of actionable harassment. Conduct such as the "staring" and unintentional touching alleged are not sufficiently severe or

pervasive to rise to the level of sexual harassment. In addition, EMPLOYER's response to Ms. X's complaint regarding Mr. Z was certainly reasonable under the circumstances and no further inappropriate conduct was ever reported by Ms. X.

Ms. X's claim of retaliation is completely without merit. EMPLOYER made every effort to work with Ms. X during and after her medical leave of absence. It was not until March 2006, when Ms. X began consistently missing her scheduled shifts without a valid medical excuse, that EMPLOYER took appropriate disciplinary action that had nothing to do with her prior complaint about Mr. Z.

Accordingly, EMPLOYER respectfully requests that the agency dismiss this charge as expeditiously as possible.

Submitted,

Respectfully

EMPLOYER