

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN MARIANA ISLANDS

U.S. EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION,

Plaintiff,

v.

ASIA PACIFIC HOTELS, INC., *d/b/a*
SAIPAN GRAND HOTEL; TAN
HOLDINGS, INC., *d/b/a* TAN
HOLDINGS COMPANY; and DOES 1-
10, *inclusive*,

Defendants.

Civil Case No. 10-00002

MEMORANDUM OPINION AND
ORDER RE: DEFENDANTS'
MOTION FOR SUMMARY
JUDGMENT

1 Before me is Defendants' motion for summary judgment ("the MSJ") in this Title VII
2 sexual harassment case. *See* Docket Nos. 13, 14. Plaintiff brought this case on behalf of a
3 female singer in a Filipino rock band called "Switch Groove," and has alleged that one of
4 Defendants' employees tried to switch his groove on by jumping into bed with her while she
5 was asleep. Not surprisingly, the parties are singing different tunes about the applicability
6 of the "*Ellerth/Faragher*" affirmative defense ("the EFD").¹ *See generally* Docket No. 14.
7 I heard oral argument on the MSJ on August 18, 2011. *See* Docket No. 28.

8 **(I) BACKGROUND FACTS**

9 **(A) The Parties**

10 Plaintiff EQUAL EMPLOYMENT OPPORTUNITY COMMISSION ("EEOC") is
11 the agency of the United States charged with the administration, interpretation, and
12 enforcement of Title VII of the Civil Rights Act of 1964, and is expressly authorized to bring
13 actions like this one. *See* 42 U.S.C. § 2000e-5(f)(1), -(3).

¹ The name comes from two companion Supreme Court cases: *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998) and *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998).

1 Defendant ASIA PACIFIC HOTELS, INC., owns and operates THE SAIPAN
2 GRAND HOTEL (“the Hotel”) in the village of Susupe, on the island of Saipan in the
3 Commonwealth of the Northern Mariana Islands (“CNMI”). *Compare* Docket No. 1 (“the
4 Complaint”) at ¶5 *with* Docket No. 3 (“the Answer”) at ¶2.

5 Defendant TAN HOLDINGS, INC., doing business as TAN HOLDINGS
6 COMPANY (“Tan Holdings”), is a holdings company doing business on the island of Saipan
7 in the CNMI. *Compare* Complaint at ¶7 *with* Answer at ¶3.

8 **(B) The Underlying Dispute**

9 Michelle A. Bunoan, a citizen of the Republic of the Philippines, was a member of
10 a musical act called “Switch Groove” (“the Band”). *See* MSJ at 1:19-20. While performing
11 with the Band in the CNMI pursuant to a ninety-day contract with the Hotel, Bunoan stayed
12 in a room at the Hotel. *See id.* at 1:21-6; *see also* Docket No. 14-6 at 1-8.

13 Early on January 2, 2008, Bunoan was in her bed in her room at the Hotel. *See*
14 Complaint at ¶13(a); MSJ at 2:11-20. EEOC alleges that Bunoan awoke to find that she had
15 been joined in bed by Roberto Alegre, the Hotel’s Food and Beverage Manager. *See*
16 Complaint at ¶13(a), -(b); MSJ at 2:7-8. EEOC alleges that Alegre had undone Bunoan’s
17 bra, unsnapped her skirt, and lowered her panties, and was touching her without her consent
18 in an unwelcome sexual manner. *See* Complaint at ¶13(a), -(b). Bunoan became upset, and
19 began to scream and cry and to claim that she had been sexually assaulted. *See id.*; MSJ at
20 2:15-16. Police took Alegre into custody. *See* Complaint at ¶13(b); MSJ at 2:16-17.

21 EEOC alleges that Defendants failed to take reasonable steps to prevent and correct
22 the events at issue by, among other things, failing to provide Bunoan or Alegre with their
23 anti-harassment policy, and by failing to require Alegre to attend their equal employment
24 opportunity training regarding those policies. *See* Complaint at ¶13(d); *see also* Docket No.
25 16 (“the Opposition”) at 2:17-7:9.

26 Defendants contend that they did provide Bunoan and Alegre with their written
27 EEOC policy, that Alegre did attend various EEOC training seminars, and that the Hotel
28 generally conducted regular EEOC training prior to January 2, 2008. *See* MSJ at 2:3-10.

1 After the alleged assault, the Hotel investigated the incident, concluded that Alegre
2 had violated its policies, and let him to resign under threat of impending termination. *See*
3 MSJ at 2:18-3:4; *see also* Docket No. 14-7 at 1-2; Opposition at 10:7-11:8.

4 **(II) PROCEDURAL HISTORY**

5 This case began on January 12, 2010. *See generally* Complaint. All conditions
6 precedent to litigation have been met. *Compare* Complaint at ¶12 *with* Answer at ¶7.

7 The sole cause of action is unlawful employment practices in violation of Section 703
8 of Title VII. *See* Complaint at ¶13 (citing 42 U.S.C. § 2000e-2). The specific theory
9 contemplated is hostile work environment. *See id.*; *cf. Craig v. M & O Agencies, Inc.*, 496
10 F.3d 1047, 1055 (9th Cir. 2007). Plaintiff seeks injunctive relief as well as general, special,
11 and punitive damages. *See* Complaint at pp. 6-7.

12 Defendants filed the MSJ on July 21, 2011. *See* Docket Nos. 13, 14. Plaintiff
13 opposed the MSJ on August 4, 2011. *See* Docket Nos. 15, 16. Defendants replied in support
14 of the MSJ on August 11, 2011. *See* Docket No. 18 (“the Reply”); *see also* Docket Nos. 19-
15 26. Finally, I heard oral argument on the MSJ on August 18, 2011. *See* Docket No. 28.

16 **(III) JURISDICTION AND VENUE**

17 Jurisdiction is proper because this is an action to enforce Title VII of the Civil Rights
18 Act of 1964. *See* 42 U.S.C. § 2000e-5(f)(1), -(3). Venue is proper in this District, the
19 District of the Northern Mariana Islands, because this is the judicial district in which the
20 unlawful employment practice is alleged to have been committed. *See id.* § 2000e-5(f)(3).

21 **(IV) APPLICABLE STANDARDS**

22 Summary judgment is proper if the pleadings, the discovery and disclosure materials
23 on file, and any affidavits “show[] that there is no genuine dispute as to any material fact and
24 the movant is entitled to judgment as a matter of law.” FED. R. CIV. P. 56(a).

25 A fact is “material” if it might affect the outcome of the suit under the governing
26 substantive law. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A factual
27 dispute is “genuine” where “the evidence is such that a reasonable jury could return a verdict
28 for the nonmoving party.” *Id.* “The mere existence of a scintilla of evidence . . . will be

1 insufficient; there must be evidence on which the jury could reasonably find for [the
2 opposing party].” *Id.* at 252. All evidence must be viewed in the light most favorable to the
3 non-moving party, and I must not make credibility findings. *See id.* at 255.

4 The movant bears the initial burden of proving that there is no genuine dispute of
5 material fact. *See* FED. R. CIV. P. 56(c). The movant must also satisfy any burden of proof
6 it would bear at trial. *See Propstra v. United States*, 680 F.2d 1248, 1251 (9th Cir. 1982).
7 A such, when the moving party seeks summary judgment on its own affirmative defense, that
8 party must show that there is no genuine dispute as to any fact material to that defense. *See*,
9 *e.g., El v. Southeastern Pennsylvania Transp. Authority (SEPTA)*, 479 F.3d 232, 237 (3d Cir.
10 2007); *Johnson v. Riddle*, 443 F.3d 723, 725-26 (10th Cir. 2006).

11 “When the moving party has carried its burden . . . , its opponent must do more than
12 simply show that there is some metaphysical doubt as to the material facts.” *Matsushita*
13 *Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). “Where the record taken
14 as a whole could not lead a rational trier of fact to find for the non-moving party, there is no
15 ‘genuine issue for trial.’” *Id.* at 587.

16 Finally, the standard for granting summary judgment in employment discrimination
17 cases—like this one—is especially high, because of their fact-intensive nature. *See, e.g.,*
18 *Metoyer v. Chassman*, 504 F.3d 919, 930 (9th Cir. 2007) (“We require very little evidence
19 to survive summary judgment in a discrimination case, because the ultimate question is one
20 that can only be resolved through a ‘searching inquiry’—one that is most appropriately
21 conducted by the factfinder, upon a full record.”) (quoting *Lam v. University of Hawaii*, 40
22 F.3d 1551, 1564 (9th Cir. 1994)).

23 **(V) DISCUSSION**

24 Plaintiff’s overall claim is that Defendants subjected Bunoan to a sexually hostile
25 work environment. *See generally* Complaint. In the instant motion, Defendants seek
26 summary judgment in their favor on all claims, on the basis of the EFD. *See generally* MSJ.

1 **(A) Law**

2 **(1) The elements of a *prima facie* case**

3 “To make a *prima facie* case of a hostile work environment, a person must show
4 ‘that: (1) she was subjected to verbal or physical conduct of a sexual nature, (2) this conduct
5 was unwelcome, and (3) the conduct was sufficiently severe or pervasive to alter the
6 conditions of the victim’s employment and create an abusive working environment.’” *Craig*,
7 496 F.3d at 1055 (quoting *Fuller v. City of Oakland*, 47 F.3d 1522, 1527 (9th Cir. 1995)).

8 If the plaintiff makes out the elements of a *prima facie* case and the harassing conduct
9 comes from a supervisor, then the plaintiff’s case runs against the employer. *See, e.g.*,
10 *Swinton v. Potomac Corp.*, 270 F.3d at 803 (“[E]mployer liability depends on the identity
11 of the actual harasser, specifically whether he is a supervisor of the employee, or merely a
12 co-worker.”).

13 Indeed, under these circumstances it appears that the employer is strictly or
14 automatically liable, unless it establishes the EFD. *See, e.g.*, *Nichols v. Azteca Restaurant*
15 *Enterprises, Inc.*, 256 F.3d 864, 875 (9th Cir. 2001) (“When harassment by a supervisor is
16 at issue, an employer is vicariously liable, subject to a potential affirmative defense [*i.e.*, the
17 EFD.]”); *cf. Kohler v. Inter-Tel Technologies*, 244 F.3d 1167, 1178 (9th Cir. 2001) (“[I]n
18 construing an employer’s liability under Title VII, the United States Supreme Court treats
19 the terms ‘vicarious liability’ and ‘strict liability’ as synonymous.”).

20 **(2) The *Ellerth/Faragher* affirmative defense**

21 The EFD is composed of a threshold showing and two prongs. The threshold
22 showing is that no “tangible employment action” was taken against the plaintiff. *See, e.g.*,
23 *Craig v. M & O Agencies, Inc.*, 496 F.3d 1047, 1055 (9th Cir. 2007) (EFD available only
24 “[w]hen no ‘tangible employment action’ (such as firing or demotion) is taken”).

25 Then come the two prongs. First—“Prong One”—the employer must show “that [it]
26 exercised reasonable care to prevent and correct promptly any sexually harassing behavior.”
27 *Craig*, 496 F.3d at 1055 (quotation marks omitted). Second—“Prong Two”—the employer
28 must show “that the plaintiff employee unreasonably failed to take advantage of any

1 preventive or corrective opportunities provided by the employer or to avoid harm otherwise.”
2 *Id.* (quotation marks omitted).

3 The standard of proof is “by the preponderance of the evidence.” *Craig*, 496 F.3d at
4 1055.

5 **(B) Analysis**

6 **(1) Plaintiff’s prima facie case**

7 Defendants have not challenged Plaintiff’s *prima facie* case. “By not raising the issue
8 on summary judgment,” Plaintiff argues, “Defendant[s] acknowledge[] that the evidence
9 establishes at least a triable issue of a sexually hostile work environment.” Opposition at
10 13:6-7.

11 I agree. For purposes of the instant motion, then, Defendants have admitted that the
12 evidence establishes a hostile work environment case sufficient to go to a jury.

13 **(2) Defendant’s asserted *Ellerth/Faragher* affirmative defense**

14 **(i) Threshold showing: No tangible employment action**

15 Defendants argue that Bunoan suffered no tangible employment action, because the
16 Hotel “fully honored the terms and conditions of [the temporary work contract she was hired
17 under].” MSJ at 5:1-3. Plaintiff does not seriously contest this; rather, it simply suggests in
18 a footnote that Defendants “[a]rguably” took a tangible employment action against Bunoan
19 by moving her to another hotel room after the complained-of incident. Opposition at 15 n.5.

20 I hold that Defendants took no tangible employment action against Bunoan. A
21 “tangible employment action” is “a significant change in employment status, such as hiring,
22 firing, failing to promote, reassignment with significantly different responsibilities, or a
23 decision causing a significant change in benefits.” *Ellerth*, 524 U.S. at 761. No reasonable
24 jury could find that moving Bunoan to another hotel room is an event of this order.
25 Plaintiff’s feeble argument effectively concedes the point. Accordingly, Defendants are
26 entitled to raise the EFD.

1 Normally, I would now consider the two prongs of the EFD in order. Here, I will
2 skip right to Prong Two.²

3 **(ii) Prong Two: Employee’s unreasonable conduct**

4 To carry its burden on Prong Two, the employer must show, by the preponderance
5 of the evidence, “that the plaintiff employee unreasonably failed to take advantage of any
6 preventive or corrective opportunities provided by the employer or to avoid harm otherwise.”
7 *Craig*, 496 F.3d at 1055 (quotation marks omitted). The EFD fails altogether if this showing
8 is not made. *See id.* at 1057-58. In the summary judgment context, the employer must show
9 that no reasonable jury could find for the employee on Prong Two.

10 Defendants’ argument on Prong Two may be quoted in full:

11 With reasonable policies and procedures in place and
12 available to Bunoan, the Hotel cannot be held liable for the
13 alleged conduct of Roberto Alegre *if* Bunoan failed to take
14 advantage of available measures to end the alleged
15 harassment. Numerous courts have held that an employee
16 who fails to complain of sexual harassment has unreasonably
17 failed to avail herself of the employer’s corrective
18 opportunities.

19 MSJ at 5:15-20 (emphasis added; citations omitted). There is a footnote, which reads: “Until
20 the incident on January 2, 2008, Bunoan did not complain to the Hotel about any EEOC
21 problems involving Roberto Alegre or any other manager. She did report the incident on
22 January 2, 2008, and the Hotel took immediate and reasonable action[.]” *Id.* at 5 n.3.

23 This argument is insufficient. It does not indicate that Bunoan failed to do something
24 she should have done, or did something that she should not have done. Moreover, it does
25 not point to record materials showing that there is no issue of fact as to whether Plaintiff
26 “unreasonably failed to take advantage of any preventive or corrective opportunities provided
27 by the employer or to avoid harm otherwise.” As such, Defendants fail to carry Prong Two,
28 and therefore fail to establish the EFD altogether. *See Craig*, 496 F.3d at 1057-58.

² I note in passing that Plaintiff has probably adduced sufficient evidence to create triable issues of fact on whether (1) Bunoan and the other band members were informed of the Hotel’s policies and procedures on sexual harassment and (2) Alegre had received adequate anti-harassment training. *See Opposition* at 16:24-20:15.

1 I must say, though, that I find Defendants’ lack of showing on Prong Two
2 understandable. Prong Two just does not seem to make sense in single-severe-incident
3 hostile work environment cases. If an employer has satisfied Prong One—by, for instance,
4 having an adequate harassment policy and complaint mechanisms in place, and by taking
5 prompt action on any complaints (*see Craig*, 496 F.3d at 1057)—it seems neither fair to that
6 diligent employer nor consistent with the underlying policy of Title VII to have that
7 employer’s Title VII liability turn on the alacrity of the complaining employee. So while I
8 do not claim that Defendants deliberately soft-pedaled Prong Two, I am not surprised if they
9 could not quite see how it meaningfully related to their case, because I cannot see this either.

10 In this way, I broadly agree with the concerns raised in *Alalade v. AWS Assistance*
11 *Corporation*, ___ F. Supp. 2d ___, No. 3:09-CV-338-PPS, 2011 WL 2473617 (N.D. Ind.
12 June 22, 2011). In *Alalade*, Chief Judge Simon noted a circuit split about Prong Two of the
13 EFD, with the Fifth and Eighth Circuits opting to jettison Prong Two of the EFD in single-
14 incident (or “incipient hostile environment”) cases, and the Tenth Circuit expressly declining
15 to do so. *See id.* at *4-7 (discussing, *inter alia*, *McCurdy v. Ark. State Police*, 375 F.3d 762
16 (8th Cir. 2004); *Harrison v. Eddy Potash, Inc.*, 248 F.3d 1014 (10th Cir. 2001); and *Indest*
17 *v. Freeman Decorating, Inc.*, 164 F.3d 258 (5th Cir. 1999)).

18 Chief Judge Simon carefully explained the thinking of the Fifth and Eighth Circuits,
19 which, in a nutshell, is that “[t]o reach a conclusion that the affirmative defense is
20 unavailable in single incident cases in which the employee takes advantage of preventative
21 or corrective opportunities provided by the employer and the employer thereafter takes swift
22 and effective action to avoid further offensive conduct stands the underlying policy behind
23 the affirmative defense on its head.” *Alalade*, 2011 WL 2473617 at *4 (quoting *McCurdy*,
24 375 F.3d at 772).

25 Ultimately, though, Chief Judge Simon went with the rationale of the Tenth Circuit,
26 which reduces to two basic points: (1) fairness issues aside, the text of the relevant cases is
27 such that there is no reason to doubt that the basic two-prong EFD framework controls *all*
28 cases in which an employee seeks to hold his or her employer vicariously liable for a

1 supervisor's sexual harassment, and (2) even if there were reason to have such doubts, the
2 only court institutionally capable of doing anything about them is the Supreme Court. *See*
3 *Alalade*, 2011 WL 2473617, at *7-10.

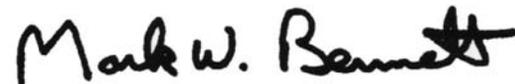
4 If anything, I think *Alalade* is too reticent. As the opinion notes, *Ellerth* and
5 *Faragher* were pervasive sexual harassment cases. *See Ellerth*, 524 U.S. at 747-48;
6 *Faragher*, 524 U.S. at 780-82. As such, I do not think they control single-severe-incident
7 cases—and the circuit split highlighted in *Alalade* endorses this position. I therefore disagree
8 with Chief Judge Simon that it is only for the Supreme Court to modify the EFD for single-
9 severe-incident cases; I have no institutional qualms about jettisoning Prong Two in cases
10 like this one.

11 Here, though, I am reluctant to toss Prong Two on to the judicial scrap-heap because
12 the issue was not briefed, and because I am not the judge who will try this case—that will
13 be this court's new Chief Judge, Ramona V. Manglona. Perhaps, upon proper briefing and
14 argument, Chief Judge Manglona would be open to considering the issues I have discussed
15 here, because it is she who must decide whether to submit Prong Two to the jury in the
16 distinct circumstances of this single-severe-incident sexual harassment case.

17 **(VI) CONCLUSION**

18 I hereby **DENY** the MSJ because Defendants have not carried their burden on the
19 second of the two prongs of their affirmative defense.

DATED this 26th day of August, 2011.



MARK W. BENNETT
U. S. DISTRICT COURT JUDGE,
NORTHERN DISTRICT OF IOWA,
SITTING BY DESIGNATION