

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MARGARET E. FALA,	:	
	:	CIVIL ACTION
Plaintiff,	:	
	:	
v.	:	NO. 99-CV-3319
	:	
THE PERRIER GROUP OF AMERICA	:	
and MICHAEL SIMON,	:	
	:	
Defendants.	:	

MEMORANDUM

R.F. KELLY, J.

MAY 25, 2000

Before this Court are the Motions for Summary Judgment filed by Defendants the Perrier Group of America ("Perrier"), the former employer of Plaintiff Margaret E. Fala ("Ms. Fala"), and Michael Simon ("Mr. Simon"), Ms. Fala's former supervisor at Perrier. Ms. Fala brought this lawsuit alleging various instances of sexual harassment and discrimination in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. section 2000e-1 et seq., ("Title VII"), and the Pennsylvania Human Relations Act, 43 P.S. section 951 et seq., ("PHRA"), as well as state law claims for assault and battery, intentional infliction of emotional distress, and punitive damages.¹ For the reasons that follow, the motions of Defendants are granted in part and

¹ Ms. Fala's Complaint also contained a claim for negligent supervision of employees. However, she has withdrawn that claim. (Pl.'s Resp. Opp'n Perrier Mot. Summ. J. at 52.)

denied in part.

BACKGROUND

The facts relevant to Ms. Fala's personal experience as an employee at Perrier are as follows.² Perrier is a Delaware corporation with its principal place of business in Philadelphia, Pennsylvania. (Pl.'s Resp. Opp'n Perrier Mot. Summ. J. at 1.) Perrier is in the business of selling bottled water and coffee to commercial and residential consumers. Id. Ms. Fala began working for Perrier in July of 1994 as an Area Sales Representative in Philadelphia, an entry level position. Id. Although Ms. Fala admits that Perrier has a sexual harassment and discrimination policy which is explained in an employee handbook, she claims that it was not distributed to Philadelphia Perrier employees. Id. at 6.

Ms. Fala's first supervisor at Perrier was Kevin Walker, whose position was District Sales Manager. Id. at 2. Under Mr. Walker's management, Ms. Fala alleges, only women were hired into entry level positions and none of these women were promoted. Id. For the first eight months of her employment at Perrier, under Mr. Walker's supervision, Ms. Fala claims that she was subjected to hostile working conditions caused by Mr. Walker,

² Ms. Fala's briefs in opposition to these summary judgment motions contain some allegations of incidents which occurred to other people, of which Ms. Fala had no personal knowledge whatsoever. As these incidents are irrelevant to Ms. Fala's claims, this Court will not detail them.

who would call women, including Ms. Fala, into his office and make inappropriate sexual comments. Id. Mr. Walker also allegedly expressed his desires to date Ms. Fala to other co-workers. After another co-worker, Miriam Toro, complained to a Route Sales Manager about Mr. Walker's behavior, an investigation ensued, culminating in Mr. Walker's termination from Perrier in April of 1995.³ Id. at 3.

After Mr. Walker's discharge, Ms. Fala temporarily reported to branch manager Michael Hudacheck ("Mr. Hudacheck"). Id. at 5. During this period, Mr. Hudacheck asked Ms. Fala if he could take her son, who he did not know, to a baseball game and suggested that Ms. Fala come along. Id. Ms. Fala interpreted this as an invitation for a date. Id. Ms. Fala hoped that if she avoided Mr. Hudacheck he would not repeat the invitation, but Mr. Hudacheck allegedly did so by telephone several times over the next few days. Id. Ms. Fala claims she felt pressured to go to the game but did not want to. Id. Ms. Fala finally refused the invitation. Id. at 6.

Mr. Walker's position as District Sales Manager was eventually filled by Diane Box-Worman ("Ms. Box-Worman") in August or September of 1995. Id. Mr. Hudacheck allegedly told Ms. Fala that the only reason Ms. Box-Worman was hired for the

³ Because Ms. Fala is not complaining of Mr. Walker's behavior in this case, we describe these events merely for background purposes.

position is because she was a "pretty blonde." Id. Ms. Fala allegedly informed Ms. Box-Worman that Mr. Hudacheck had asked her for a date, and Ms. Box-Worman reported this information to her supervisor, Bob LaRose ("Mr. LaRose"), but Mr. LaRose responded that Ms. Fala was overreacting to the situation and that Ms. Box-Worman should quietly speak with Mr. Hudacheck. Id. at 9. Ms. Fala admits that after Ms. Box-Worman spoke with Mr. Hudacheck, Mr. Hudacheck apologized to Ms. Fala. Id.

In August of 1995, Ms. Fala attended a Perrier company convention in Stowe, Vermont. Id. During this convention, at which alcoholic drinks were served, a co-worker, Michael Hoynes, allegedly made "a sexual pass" at Ms. Fala. Id. Ms. Fala claims she asked a male Perrier manager who was also present to help her discourage the behavior, but this request was refused. Id. Mr. Hoynes allegedly followed Ms. Fala to her hotel room, forcibly kissed her and tried to force his way into her hotel room. Id. at 10. Ms. Fala reported this incident to Ms. Box-Worman, who claims she did not report it to anyone else because she believed the incident would not be taken seriously, as had happened in the past. Id. Ms. Fala also claims she later reported it to Defendant Mr. Simon, who was her branch manager, but that he did not take any action. Id. Ms. Box-Worman thereafter discovered that at another convention, two male Perrier employees allegedly climbed onto a hotel roof to look into the hotel room occupied by

Ms. Fala and a female roommate, and that they watched the women disrobe. Id. Ms. Fala did not find out about this incident until six months later, when she purportedly heard male co-workers laughing about it at a company-sponsored dinner. Id.

Ms. Box-Worman promoted Ms. Fala to the position of Territory Manager in September or October of 1995.⁴ Id. In July of 1996, Ms. Box-Worman resigned from Perrier.⁵ Id. at 11. Prior to her resignation, Ms. Box-Worman recommended to Rob Hoynes, Market Manager for the East Coast, that Ms. Fala be promoted. Subsequent to Ms. Box-Worman's resignation, Ms. Fala was temporarily supervised by Mr. Simon.⁶ Id. at 11.

In August of 1996, Ms. Fala attended a Perrier convention in Cape Cod, Massachusetts, with several other Philadelphia Perrier co-workers, including Mr. Simon. Id. Ms.

⁴ Ms. Fala claims that although this promotion was not made official until September or October of 1995, she had been performing the duties of Territory Manager since May or June of 1995, when she was asked to assume the duties of a Territory Manager who was transferred to another location. However, she claims that she was not compensated as a Territory Manager until the promotion was made official.

⁵ Although Ms. Fala believed that Ms. Box-Worman resigned because of "the environment of the workplace," (Fala Dep., 1/17/2000 at p. 229), Ms. Box-Worman testified that she resigned because she wanted to move to Texas to be near her father, who was ill. (Box-Worman Dep. at pp. 30-31.)

⁶ Ms. Fala also claims that she had to assume some of Ms. Box-Worman's duties at this time, without receiving a promotion or pay increase. (Pl.'s Resp. Opp'n Perrier Mot. Summ. J. at 24).

Fala claims that the ratio of men to women at this convention was approximately ten-to-one. Id. Ms. Fala engaged in a conversation with Mr. Simon, who had allegedly been drinking, in which she told Mr. Simon about the incident with Michael Hoynes at the 1995 convention. Id. Later in the conversation, Mr. Simon told Ms. Fala that he thought the two of them would have a better working relationship than he had with Ms. Box-Worman. Id. Ms. Fala also alleges that Mr. Simon told her that she would be doing a lot of the work Ms. Box-Worman had performed, which Ms. Fala claims led her to believe that she would be assuming Ms. Box-Worman's position as District Sales Manager. Id. at 11-12. Ms. Fala believed that Mr. Simon had the authority to promote her to this position. Id. at 12. Ms. Fala's support for this assumption is her belief that Mr. Simon had a close relationship with Rob Hoynes. (Fala Dep., 1/17/00, at p. 20).

As the conversation continued, Mr. Simon allegedly told Ms. Fala that he had an affair with a former co-worker while he was engaged to his wife, and they had been able to "help each other out" at work. (Pl.'s Resp. Opp'n Perrier Mot. Summ. J. at 12.) Ms. Fala also claims he talked about a brief "encounter" he had with one of his wife's friends. Id. Mr. Simon then allegedly asked Ms. Fala about men she had dated, the number of sexual partners she had had, and her sexual preferences. Id. Ms. Fala claims she responded to his questions in "general terms"

during the conversation and eventually left. Id. She never told Mr. Simon during this approximately forty-five minute conversation that she felt uncomfortable. (Fala Dep., 1/17/00 at p. 92-93, 95). The next day during the flight back to Philadelphia, Mr. Simon, who had not been drinking at that time, did not act inappropriately toward Ms. Fala, and showed her some profit and loss documents that he said she would be working with shortly. (Pl.'s Resp. Opp'n Perrier Mot. Summ. J. at 12). Id. Ms. Fala worked under Mr. Simon's supervision for the next month without incident. Id.

In September of 1996, Rob Hoynes hired John Higgins ("Mr. Higgins") as the Business Development Manager, the position Ms. Fala claims Ms. Box-Worman recommended to Mr. Hoynes that she fill. Id. at 25-26. Mr. Hoynes never considered Ms. Fala for this position. Id. Ms. Fala alleges that Mr. Higgins was hired for this position in violation of Perrier's policy of posting positions. Id. at 26.

Also in September of 1996, Ms. Fala attended another company convention in Greenwich, Connecticut, at which alcoholic beverages were served. Id. at 13. Ms. Fala claims that during the convention Mr. Simon again attempted to engage her in sexual conversation. Id. Mr. Simon allegedly followed Ms. Fala around while she attempted to interact with other co-workers. Id. Ms. Fala asserts she eventually sat down with two other co-workers,

Maria Rizzo and John Till, and Mr. Simon followed suit. Id. Ms. Fala admits that the group began discussing the "weirdest place" each of them had ever had sex, and that she participated in the discussion. Id. Mr. Simon relayed a story about having sex on a golf course. Id. Ms. Fala admits she probably replied that she had sex on a golf course as well. (Fala Dep., 1/17/00 at p. 143.) Ms. Fala admits the group was laughing and drinking. Id. at 109. After about ten minutes of this conversation, Ms. Fala got up to sing along with a Karaoke machine. (Pl.'s Resp. Opp'n Perrier Mot. Summ. J. at 13.) Ms. Fala claims that at some point in the evening, Mr. Simon repeatedly placed his hand on her leg, and that she kept pushing it away. Id. She claims that Mr. Simon, who was very intoxicated, continued to follow her throughout the evening, including up to her hotel room, where he remained until Ms. Fala asked him to leave, which he did. Id. Ms. Fala did not report these incidents to anyone until after she left Perrier, as Mr. Simon was her manager and she claims she feared repercussions. Id. at 13-14.

At a December 1996 meeting in Teaneck, New Jersey, Mr. Simon acknowledged that his behavior toward Ms. Fala had been inappropriate. Id. at 14. He told Ms. Fala that he was not going to drink because he wanted to stay out of trouble. Id.

Ms. Fala did not report to Mr. Simon for approximately the next ten months, from September of 1996 until July of 1997.

Id. During this time, Ms. Fala admits that she experienced no alleged incidents of harassment by Mr. Simon. (Fala Dep., 1/17/00 at p. 134.) She admits she saw Mr. Simon regularly during this period, and claims that they had a "good working relationship." Id. at 134-135. She admits she felt free to ask him about career advice, and that she did so. Id. at 135-137. She admits that they had lunch together several times, sometimes at her suggestion. Id. at 135. She further admits that between September of 1996 and July of 1997, she did not try to avoid Mr. Simon, but considered him a friend and felt comfortable working with him. Id. at 136-137. She does not claim to have been harassed by anyone else at Perrier during this period. Id. at 137.

Sometime in 1996, Ms. Fala began taking classes in the evening in pursuit of an MBA at Villanova University. (Fala Dep., 12/7/99, at p. 35.) She claims she felt that a degree in business would assist her in her work at Perrier. Id. Part or all of her tuition was reimbursed by Perrier. Id.

In approximately February or March of 1997, Mr. Higgins became a Unit Leader. (Pl.'s Resp. Opp'n Perrier Mot. Summ. J. at 26.) Mr. Higgins changed Ms. Fala's position from Territory Manager to Residential Sales Manager. Id. at 27. During her first month in this position, Mr. Higgins asked Ms. Fala to make a proposal for her bonus structure because none yet existed for

this position as it was a new position. Id. Mr. Higgins never finalized the structure with Ms. Fala, and at the end of the month, paid her \$1,000.00 out of a possible \$1,300.00. Id. Ms. Fala later came across a document which revealed that two male coworkers received higher bonuses that month. Id. Another female coworker allegedly felt that she had been shorted in her bonus as well. Id. Ms. Fala reported this discrepancy to Mr. Higgins, and to her Human Resources Representative, Alice Hines. Id. Ms. Fala suggested to Ms. Hines that she believed that she was shorted in her bonus because she was a woman. Id. at 28. Ms. Hines allegedly told Ms. Fala that reporting the deficiency as being due to her gender could be dangerous to her career. Id. Ms. Fala promptly received her full bonus and an apology from Mr. Higgins. (Perrier Mot. Summ. J. at 8). After this incident, Ms. Fala alleges that Mr. Higgins reportedly referred to her as a slut. (Pl.'s Resp. Opp'n Perrier Mot. Summ. J. at 28.)

In July of 1997, Ms. Fala had lunch with Mr. Simon to discuss the possibilities of her being promoted. Id. at 14. At the end of the lunch, Mr. Simon remarked on how he had not yet "gotten himself in trouble." Id. In the car on the way back from lunch, Mr. Simon allegedly commented that he and Ms. Fala could really "rip up a tee" on a golf course, a reference, Ms. Fala believes, to his prior remark about having had sex on a golf course. Id. Ms. Fala did not indicate that the comment was

unwelcome, but rather began talking about a man she was dating, explaining how the man criticized Ms. Fala's breasts for being too small and her arms for being too big. Id. Mr. Simon responded that he would have to see for himself. Id. at 14-15. Ms. Fala did not report this conversation to anyone until after she ceased working at Perrier. However, she claimed that this incident upset her because she had felt that Mr. Simon's inappropriate behavior was no longer a problem, since it had not occurred in such a long time. (Fala Dep., 1/17/00, at p. 141.)

Subsequently, Ms. Fala claims she decided to "go over [Mr. Simon's head]" in terms of seeking career advancement. (Pl.'s Resp. Opp'n. Perrier Mot. Summ. J. at 15.) She allegedly approached Rob Hoynes, who was Mr. Simon's supervisor, who suggested that Ms. Fala could get additional training needed to advance in the company by organizing the Route Sales force in Allentown, Pennsylvania. Id. Ms. Fala admits that the Allentown project was to be short-term, and that she would not receive a new title or pay increase. (Fala Dep., 1/17/00 at pp. 45-46.)

The Allentown project required that Ms. Fala work with Mr. Simon. (Pl.'s Resp. Opp'n Perrier Mot. Summ. J. at 15). Ms. Fala claims that due to the July, 1997 incident, she wanted to make it clear to Mr. Simon that she was "perfectly willing" to work with him, but would not tolerate being harassed by him. Id. She claims she expressed her displeasure to Mr. Simon that Mr.

Walker, who had allegedly harassed her and who had been fired from Perrier, had been given a senior management position at another beverage company. Id. She also told Mr. Simon that she would have to report sexual harassment in the workplace if it ever happened again. Id. at 16. Ms. Fala claims that Mr. Simon appeared shaken by the conversation, and later in the day admitted that he had been "out of line" in the past and that he did not want Ms. Fala to consider him as on the same level as Mr. Walker. Id. Ms. Fala told Mr. Simon that she thought they could work together and that they should put the past behind them and concentrate on work. Id. However, Ms. Fala claims that Mr. Simon appeared concerned that Ms. Fala may have already reported his past inappropriate behavior to Mr. Hoynes. Id.

Approximately a week after this conversation, Ms. Fala was informed by Nicholas Stein ("Mr. Stein"), a new supervisor in Philadelphia, that she would not be proceeding with the Allentown project, which Ms. Fala took to mean that she would not be getting the training she needed to be promoted. Id. When she informed Mr. Simon, he allegedly promised her that he would attempt to talk to Mr. Stein. Id. However, Ms. Fala claims Mr. Simon merely inquired of Mr. Stein about getting a severance package for Ms. Fala so she could leave the company. Id. A few days later, Ms. Fala claims that Mr. Simon told her that she had no future with Perrier and encouraged her to go back to school on

a full-time basis using the money from the severance package. Id. Part of the severance package was a release of liability for Perrier from any lawsuit arising out of Ms. Fala's employment, including sexual harassment or discrimination, a fact of which Mr. Simon admits he was aware. Id. at 17.

Mr. Simon did arrange for Ms. Fala to get a six-month severance, and he then met with Ms. Fala for lunch at a Friday's restaurant to discuss the terms of the severance. Id. During the Friday's lunch, Mr. Simon allegedly informed Ms. Fala that he believed that she intentionally wore tight clothing on days when her compensation was evaluated, and he informed her that there was a rumor circulating around the office that Ms. Fala had performed oral sex on a male Perrier manager in the office. Id. He also remarked about his sexual boredom with his wife, and told Ms. Fala that he had become "turned on" by a woman who had cut his hair and massaged his head. Id. After the meeting concluded, Ms. Fala got into her car and allegedly observed Mr. Simon running toward her vehicle in her rear view mirror. Id. Mr. Simon approached the driver's side of the car and while Ms. Fala was still wearing her seatbelt, allegedly kissed Ms. Fala, placing his tongue in her mouth. Id. While he was kissing her, Mr. Simon allegedly had his hand over Ms. Fala's chest and she claims she feared he was going to touch her breast. Id. at 17-18. After a few seconds, Mr. Simon stood up and ran away. Id.

at 18. Mr. Simon, on the other hand, claims that he merely gave Ms. Fala a friendly hug and a kiss on the cheek, since he believed he would not see her again as she was leaving Perrier. (Simon Dep. at p. 129).

Ms. Fala claims that due to the above described events, she has had at least one nightmare, as well as "day-to day anxiety," which she claims she discussed with a psychiatrist whom she had been seeing since before she began working for Perrier. (Fala Dep., 12/7/99 at 261-262). She took a week's vacation after this incident. (Pl.'s Resp. Opp'n Perrier Mot. Summ. J. at 18). When she returned, she allegedly learned that Mr. Simon had represented to a clerical worker, Nicole Clough, that he would make sure she was promoted to Territory Sales Manager within a year. Id. Ms. Fala did not believe that Ms. Clough was a candidate for this position because she lacked a four-year college degree, which Ms. Fala believed was usually a prerequisite for this position. Id. Ms. Fala claims that at this point "for the first time, [she] suspected that Mr. Simon's sexual advances toward her were not an accidental behavior, but were a calculated effort to pressure a sexual relationship with his subordinates." Id. She allegedly warned Ms. Clough about Mr. Simon. Id. She also claims she attempted to contact Alice Hines, her Human Resources Representative, but that Ms. Hines was away on maternity leave. Id. at 18-19.

Some time later Ms. Fala met with Mr. Simon to review the severance agreement. Id. at 19. Ms. Fala noticed at this time that the severance agreement contained a provision releasing Perrier from all legal claims Ms. Fala may have concerning her employment with Perrier. Id. She claims she asked Mr. Simon why the agreement contained the provision, but Mr. Simon did not give a direct response. Id. She also claims Mr. Simon pressured her into signing the agreement at this meeting by informing her he would not be able to accept the agreement later in the week. Id. Ms. Fala signed the agreement. Id. She then confronted Mr. Simon about his alleged offer to assist Ms. Clough obtain a sales position, and Mr. Simon denied that he had made the offer but allegedly turned very red in the face. Id.

Subsequently, Ms. Fala called Roy Park ("Mr. Park"), the Human Resources Manager, and asked Mr. Park whether Perrier provided an exit interview. (Fala Dep., 1/17/00 at p. 202). Mr. Park offered to hold the interview immediately over the phone. Id. During the interview, Ms. Fala told Mr. Park that the reason she was leaving Perrier was to go back to school full-time. Id. at 202-203. Mr. Park claims, and Ms. Fala does not dispute, that Ms. Fala said that Mr. Simon had been helpful to her career. (Pl.'s Resp. Opp'n Simon Mot. Summ. J. at 12.) She explained that her only concern was that Mr. Simon might act inappropriately toward Ms. Clough, based on the rumor about Mr.

Simon offering to help Ms. Clough professionally. (Fala Dep., 1/17/00 at p. 203). Ms. Fala described the conversations that took place in Cape Cod and Greenwich, and the two lunches that occurred in 1997. Id. at 205-207. All of Ms. Fala's complaints to Mr. Park related to sexual harassment only, and Ms. Fala never mentioned that she felt she was not promoted because she was a woman. (Pl.'s Resp. Opp'n Perrier Mot. Summ. J. at 20). Mr. Park took notes during the interview and had those notes transcribed. Id.

Mr. Park then interviewed Rob Hoynes about an application Ms. Fala had submitted for the position of Business Development Manager, to which she was not appointed. (Pl.'s Resp. Opp'n Simon Mot. Summ. J. at 12). Mr. Hoynes claimed that Ms. Fala was not a viable candidate for the position because she lacked interaction skills with route salesmen.⁷ Id. He also explained that the two candidates being considered for the position were women. Id. Mr. Park interviewed Brian McCracken, a Unit Leader, who described Ms. Fala's performance favorably. Id. Mr. Park also interviewed Mr. Simon, but allegedly asked him

⁷ Ms. Fala claims she had difficulty obtaining route sales experience since she, like other female Perrier employees, was physically unable to lift the 50 pound water bottles to be delivered. She claims that in an attempt to get route sales experience, which she believed was necessary for career advancement, she had voluntarily ridden along with the delivery drivers on their routes. (Pl.'s Resp. Opp'n Perrier Mot. Summ. J. at 1, 21.)

about only one of the four alleged instances of sexual harassment. Id. at 13. Mr. Park did not interview John Till, who Ms. Fala claims saw Mr. Simon touch her leg at the Cape Cod convention. Id. The result of Mr. Park's investigation was his resolution to have a talk with Mr. Simon and warn him, documenting such warning in his file, that further inappropriate behavior would result in his termination. Id. No written warning was issued to Mr. Simon.⁸ Id.

Within seven days of accepting the severance agreement, Ms. Fala withdrew her acceptance, allegedly because she did not want to forego her present discrimination and harassment claims. (Pl.'s Resp. Perrier Mot. Summ. J. at 29.) Thereafter, on September 25, 1997, Ms. Fala filed for unemployment compensation claiming that she was forced to leave her job because she was subject to pervasive sexual harassment. Id. at 22. Perrier's response, which was signed and verified by Mr. Park as being true and correct, stated that Ms. Fala voluntarily quit in order to pursue an MBA full-time, and that she never complained about sexual harassment. Id. The finding that the reasons Ms. Fala gave for quitting were necessitous and compelling was not

⁸ Mr. Park testified that Ms. Fala, from the onset of the interview, encouraged him not to do anything about Mr. Simon, and consistently stated that she and Mr. Simon were friends and that Mr. Simon may have "crossed a line at times." (Park Dep. at p. 93.) Mr. Park did not think that Mr. Simon's behavior, while inappropriate, amounted to sexual harassment, since it did not amount to conduct that was unwelcome or unwanted. Id.

appealed by Perrier. Id.

Ms. Fala then filed an administrative charge of discrimination with the Pennsylvania Human Relations Commission on February 11, 1998, and, after receiving her right to sue letter, instituted this lawsuit on June 29, 1999. The Complaint alleges sexual discrimination; disparate treatment; intentional infliction of emotional distress; assault and battery; retaliation; and seeks punitive damages for the Defendants' alleged gross, willful and wanton misconduct.

STANDARD OF REVIEW

"Summary judgment is appropriate when, after considering the evidence in the light most favorable to the nonmoving party, no genuine issue of material fact remains in dispute and 'the moving party is entitled to judgment as a matter of law.'" Hines v. Consolidated Rail Corp., 926 F.2d 262, 267 (3d Cir. 1991) (citations omitted). "The inquiry is whether the evidence presents a sufficient disagreement to require submission to the jury or whether it is so one sided that one party must, as a matter of law, prevail over the other." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986). The moving party carries the initial burden of demonstrating the absence of any genuine issues of material fact.⁹ Big Apple BMW, Inc. v. BMW of North

⁹ "A fact is material if it could affect the outcome of the suit after applying the substantive law. Further, a dispute over a material fact must be 'genuine,' i.e., the evidence must be

America, Inc., 974 F.2d 1358, 1362 (3d Cir. 1992), cert. denied, 507 U.S. 912 (1993). Once the moving party has produced evidence in support of summary judgment, the nonmovant must go beyond the allegations set forth in its pleadings and counter with evidence that demonstrates there is a genuine issue of fact for trial. Id. at 1362-63. Summary judgment must be granted "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986).

DISCUSSION

I. Timeliness of Title VII and PHRA Claims.¹⁰

Title VII allows a plaintiff to bring suit within 180 days of the alleged act of discrimination. Oshiver v. Levin, Fishbein, Sedran & Berman, 38 F.3d 1380, 1385 (3d Cir. 1994) (citing 42 U.S.C. § 2000e-5(e)). However, if the plaintiff files a complaint with a state or local agency authorized to adjudicate

such 'that a reasonable jury could return a verdict in favor of the non-moving party.'" Compton v. Nat'l League of Professional Baseball Clubs, 995 F. Supp. 554, 561 n.14 (E.D.Pa.) (citations omitted), aff'd, 172 F.3d 40 (3d Cir. 1998).

¹⁰ Ms. Fala does not contest Mr. Simon's assertion that there is no individual liability under Title VII. See Dici v. Commonwealth of Pennsylvania, 91 F.3d 542, 552 (3d Cir. 1996). Therefore, Ms. Fala's Title VII claims are applicable only to Perrier, and the only harassment or discrimination claims Plaintiff can assert against Mr. Simon individually are under section 955(e) of the PHRA.

the claim, the plaintiff is allotted 300 days from the date of the alleged discrimination to file a charge of employment discrimination. Id. Under the PHRA, a charge of discrimination must be filed within 180 days of the act of discrimination complained of. 43 P.S. § 959(h). In the instant case, Ms. Fala filed her administrative charge on February 11, 1998. Therefore, Defendants allege that any incidents occurring before April 17, 1997 are untimely under Title VII, and any events occurring before August 15, 1997 are untimely under the PHRA.¹¹ Accordingly, Defendants argue that the only timely incidents of alleged harassment or discrimination are Ms. Fala's removal from the Allentown project, and Mr. Simon's alleged sexual banter during the August, 1997 lunch at the Friday's restaurant, culminating in a kiss.¹²

Ms. Fala sets forth two theories to support her

¹¹ Defendant Perrier argues erroneously that the only timely acts under the PHRA are those occurring before August 14, 1997. However, the correct deadline is August 15, 1997, 180 days before the filing of the charge.

¹² Ms. Fala claims the Friday's lunch incident took place on August 27, 1997, while Defendants claim it took place on August 22, 1997. However, the incident would be timely under both Title VII and the PHRA on either date. None of the parties provides a precise date on which Ms. Fala's removal from the Allentown project occurred. Ms. Fala claims that this incident is timely (Pl.'s Resp. Opp'n Perrier Mot. Summ. J. at 34); Mr. Simon summarily argues that it is not. (Simon Mot. Summ. J. at 14). Perrier admits that the incident occurred in August of 1997. (Perrier Mot. Summ. J. at 11-14). Therefore, considering the evidence in the light most favorable to Ms. Fala, the date of this incident, and therefore its timeliness, is a disputed fact.

assertion that the events which occurred prior to the filing period are not time-barred: equitable tolling and continuing violation. We will address the applicability of each of these theories individually.

A. Equitable tolling.

The time limits set forth in Title VII are not jurisdictional. Oshiver, 38 F.3d at 1387. Rather, they are analogous to a statute of limitations and are, therefore, subject to equitable tolling. Id. The doctrine of equitable tolling may also be applied to claims brought under the PHRA. Altopiedi v. Memorex Telex Corp., 834 F. Supp. 800, 806 (E.D.Pa. 1993).

"Equitable tolling functions to stop the statute of limitations from running where the claim's accrual date has already passed." Oshiver, 38 F.3d at 1387. There are three principal situations in which equitable tolling may be applied: (1) where the defendant has actively misled the plaintiff respecting the plaintiff's cause of action; (2) where the plaintiff in some extraordinary way has been prevented from asserting his or her rights; or (3) where the plaintiff has timely asserted his or her rights mistakenly in the wrong forum. Id. (citations omitted).

In the instant case, Ms. Fala argues that the first provision, active deception by the defendant, applies to her claims. With regard to Perrier, Ms. Fala alleges that

the timeliness of plaintiff's charge was tolled by the misleading words and actions of the defendant. With

respect to the promotions, it is uncontested that after Dianne Box-Worman resigned, that Perrier told Ms. Fala that due to the reorganization of the entry level management position that the requirements for eligibility for the position had changed. No one at Perrier told Ms. Fala that they were not considering her for a promotion. In fact, at all times relevant hereto the management at Perrier encouraged her to do extra projects and route sales rides to prepare herself for promotion. At all times relevant, Perrier lead (sic) Ms. Fala to believe that she was on a management track although this apparently was not true. Perrier can not now benefit from its own misrepresentations by claiming that Plaintiff's complaint is untimely. In addition, the discrimination in this case is not overt. To the contrary, the gender bias in this case was insidious. The plaintiff in this case was young, inexperienced in business, and a member of a very small minority of female workers. She trusted what she was told, tried not to make waves and to fit in with the men with whom she worked. She cannot now be penalized because she trusted her employer. The defendant actively mislead (sic) the plaintiff as to their requirements to be promoted and as to her chances of being promoted within the company and denying her the right to complain at this point would have the effect of forcing all minority workers to file a complaint each time they were denied a promotion, for fear they would be waiving their right to complain later on the one occasion she did express her concerns to human resources, that her bonus and the bonus of a female coworker were less than her male coworkers and she was concerned that it was because she was a woman, human resources assured her that was not the case and told her it would be dangerous to her career with the company to raise the issue of sexual discrimination. Clearly, Perrier is estopped for (sic) now claiming that the plaintiff should have raised this issue sooner.

(Pl.'s Resp. Opp'n. Perrier Mot. Summ. J. at 33).

With regard to Mr. Simon, Ms. Fala claims that he "actively misled [her] regarding his sexual harassment" because after each alleged instance of sexual harassment, he recognized

that he had acted inappropriately, apologized and promised it would never happen again. (Pl.'s Resp. Opp'n Simon Mot. Summ. J. at 20). Further, Ms. Fala claims that Mr. Simon led her to believe he was going to promote her, causing her to refrain from filing an administrative charge since she believed he "had taken an appropriate remedial action and that he was truly going to change." Id.

In Koschoff v. Runyon, No.Civ.A. 98-2736, 1999 WL 907546 (E.D.Pa. Oct. 7, 1999), the United States District Court for the Eastern District of Pennsylvania was presented with the question of whether to apply the doctrine of equitable tolling to untimely Title VII claims under facts very similar to the instant case.¹³ In that case, the plaintiff, a postal worker, claimed she had been harassed by her supervisors, and discriminated against when they failed to recommend her for the position of Postmaster because she was a woman. Id. at *8. She filed a pre-complaint with the EEOC, but never filed a formal one at that

¹³ We have noted both parties' reliance upon Oshiver v. Levin, Fishbein, Sedran & Berman, 38 F.3d 1380 (3d Cir. 1994), in support of their respective arguments regarding equitable tolling. However, Oshiver deals with employer deception with regard to the reasons for the plaintiff's discharge and of the employer's failure to rehire, rather than failure to promote. Accordingly, although the general legal principles in Oshiver are helpful, Koschoff is more factually on point. Moreover, the Oshiver court merely found that the plaintiff in that case had sufficiently pled the applicability of the equitable tolling doctrine to allow her claims against the defendant to survive a motion to dismiss, without commenting on whether the plaintiff would ultimately derive benefit from the doctrine.

time, because she claimed her supervisor told her it would be beneficial for her to drop the complaint, and because her supervisors ceased harassing her. Id. The court refused to apply equitable tolling to her untimely Title VII sexual harassment claims, finding no evidence that the plaintiff's supervisors actively misled her concerning her pre-complaint claims. Id. The court held that even if the plaintiff's supervisor had told her that it would be beneficial to drop her complaint, that action alone was insufficient to justify the application of equitable tolling, as such a remark did not constitute a direct threat, and could not be characterized as a deceptive act which would have caused the plaintiff's failure to comply with Title VII's filing requirements. Id. The court also aptly noted that "if we made a practice of tolling filing requirement based on scant innuendo, it would very quickly obviate the need for timely filing of all complaints." Id. Moreover, the court found significant the fact that the plaintiff admitted she dropped her complaint because her supervisors stopped harassing her.

In the instant case, as in Koschoff, Ms. Fala's arguments are insufficient to justify the application of equitable tolling due to employer deception. Ms. Fala's argument in support of equitable tolling is based upon her assertion that Mr. Simon and other Perrier employees actively misled her into

thinking she was going to be promoted but was not.¹⁴

With regard to Mr. Simon, Ms. Fala's allegations that Mr. Simon's apologies and promises to curtail future behavior constituted active deception which prevented her from filing a timely charge are without merit. "To justify tolling, a plaintiff must show that because of the defendants' deception, [s]he could not have discovered, by reasonable diligence, the essential factual information bearing on [her] claim. . . .The burden is on the plaintiff to demonstrate facts that support tolling the limitations period." Weber v. Henderson, No.Civ.A. 99-2574, 2000 WL 217676, at *1 (E.D.Pa. Feb. 10, 2000)(citing Byers v. Follmer Trucking Co., 763 F.2d 599, 600-601 (3d Cir. 1985)). Here, Ms. Fala does not argue that Mr. Simon's apologies and promises prevented her from discovering the basis for her discrimination or harassment claims, only that she chose not to pursue them.

Moreover, with regard to other Perrier supervisors, Ms. Fala's general assertion that no one at Perrier told her she was not going to be promoted, if true, was not deceptive, as Ms. Fala has not established that anyone at Perrier ever actually did tell her she was in line for further promotion. Rob Hoynes' suggestion that Ms. Fala participate in the Allentown project did

¹⁴ We note that, importantly, Ms. Fala did receive at least one promotion while she worked for Perrier in 1995.

not, according to Ms. Fala, include a promise that such participation would lead to a promotion. (See, e.g., Pl.'s Resp. Perrier Mot. Summ. J. at 15). Ms. Fala does not assert that anyone else ever promised her a promotion, only that certain actions or statements of others led her to believe she was to be promoted. However, Ms. Fala's mistaken beliefs, which were allegedly due to her youth and inexperience in the business world, do not provide a basis for the application of equitable tolling.

Finally, Ms. Fala's assertion that human resources told her it would be dangerous to raise the issue of her bonus being lower than male coworkers, even if true, cannot invoke equitable tolling, as this advice does not constitute a direct threat, or a deceptive act which would have caused Ms. Fala to fail to comply with the filing requirements. See Koschoff, 1999 WL 907546, at *8. Accordingly, Ms. Fala has failed to establish active deception by Perrier or Mr. Simon which would justify equitable tolling.¹⁵

B. Continuing violation.

Ms. Fala also claims that the alleged incidents are not time-barred under a continuing violation theory. Under this

¹⁵ Moreover, even if Ms. Fala had established that she had been misled into believing she would be further promoted, she has provided no evidence that she was not further promoted because she is a woman.

theory, a Title VII Plaintiff may pursue her claim for discriminatory conduct that occurred outside the filing period if she can demonstrate that the act is a part of an ongoing practice or pattern of discrimination of the defendant. West v. PECO, 45 F.3d 744, 754 (3d Cir. 1995). Courts have also applied the continuing violation theory in the PHRA context. Cortes v. R.I. Enters., No. Civ.A. 3:99-CV-1339, 2000 WL 575918, at *7 (M.D.Pa. Apr. 18, 2000). In order to establish a claim that falls within the continuing violations theory, a plaintiff must prove: (1) that at least one act of discrimination occurred within the filing period, and (2) that the harassment is "more than the occurrence of isolated or sporadic acts of intentional discrimination." West, 45 F.3d at 754 (quoting Jewett v. International Tel. and Tel. Corp., 653 F.2d 89, 91 (3d Cir.), cert. denied, 454 U.S. 969 (1981)). "The relevant distinction is between the occurrence of isolated, intermittent acts of discrimination and a persistent, on-going pattern." West, 45 F.3d at 755. A plaintiff satisfying these requirements may recover for the entire continuing violation; the 300-day filing period will not act as a bar. Id.; Rush v. Scott Specialty Gases, Inc., 113 F.3d 476, 481 (3d Cir. 1997).

Ms. Fala has satisfied the first prong, by establishing that at least one act of alleged discrimination, the Friday's lunch, occurred within the filing period. Therefore, we now

consider whether Ms. Fala has established a pattern of ongoing discrimination. In West, the United States Court of Appeals for the Third Circuit (the "Third Circuit") established the following factors to be considered in determining whether an ongoing pattern of discrimination exists: (1) subject matter, or whether the violations constitute the same type of discrimination; (2) frequency; and (3) permanence, or whether the nature of the violations should trigger the employee's awareness of the need to assert her rights and whether the consequences of the act would continue even in the absence of a continuing intent to discriminate. West, 45 F.3d at 755 n.9 (citing Martin v. Nannie and Newborns, Inc., 3 F.3d 1410 (10th Cir. 1993)).

In support of her continuing violation theory, Ms. Fala argues that

the plaintiff can satisfy both requirements required by West for her failure to promote claim and her claim for sexual harassment. First, within 300 days of filing her complaint with the EEOC, she was removed from the project in Allentown which would have given her the training defendant claimed was necessary to get an entry level management position and she was sexually harassed and retaliated against by Mr. Simon. With respect to the second requirement in this case, the plaintiff's inability to get a promotion is directly related to her failure to submit to the sexual advances of Mr. Simon, who was the gatekeeper for promotional opportunities in the Philadelphia market.

(Pl's Resp. Opp'n Perrier Mot. Summ. J. at 34.)

However, courts in this circuit have refused to apply a continuing violation theory in both Title VII and PHRA cases

involving prolonged periods during which no harassment occurred. For example, in Konstantopoulos v. Westvaco Corp., 112 F.3d 710 (3d Cir.) cert. denied, 522 U.S. 1128 (1998), the Third Circuit considered whether a Title VII plaintiff who had suffered sexual harassment from April 1989 to August 1989, left her employment for eight months, and returned in April 1990 to face more sexual harassment could establish a hostile working environment. In affirming the district court's ruling that she could not, the Third Circuit reasoned that

the effects of the harassment that occurred from April through August 1989 had dissipated by the time that Konstantopoulos returned to work in April 1990 therefore, without any new incidents there would be no basis for concluding that the working environment in April 1990 was hostile or abusive . . . the few incidents that occurred when Konstantopoulos returned were not sufficiently numerous or severe to warrant the conclusion that the working environment remained hostile or abusive.

Id. In addition to noting that the passage of nearly seven months between the end of the plaintiff's first period of harassment and the beginning of the second was a significant hiatus, which allowed "the lingering effects of the prior incidents to dissipate," the court further noted that after leaving her employment in 1989, the plaintiff repeatedly stated that she was "ready, willing and able to return to work," assertions which suggested that, in the plaintiff's mind, the effects of the prior incidents had faded before she actually returned to work. Id. at 715-716. Finally, the court found that

the nature of the incidents when she returned to work, which consisted of mute gestures made by male co-workers' squinting their eyes and shaking their fists at her, were not particularly severe. Id.

Similarly, in Cortes, the Title VII sexual harassment plaintiff, who also brought claims under the PHRA, argued that she was forced to leave her job in August, 1995 because she could no longer tolerate the hostile working environment created by the defendant and its employees. Cortes, 2000 WL 575918, at *7. She returned to work approximately one year later, at which time some of her harassers had left, but she discontinued working again when she learned one of her harassers was returning to work. Id. at *2. The plaintiff filed an administrative charge with the EEOC on March 26, 1999, and filed suit in July of 1999. Id. at *1.

Defendants moved to dismiss arguing that the plaintiff had failed to exhaust her administrative remedies, having filed her charge two and a half years after the date of the last alleged incident of harassment. Id. at *3. The United States District Court for the Middle District held that "the plaintiff's decision to terminate her employment and her subsequent return to work a year later under improved circumstances evidence[d] a lack of continuity." Id. at *8. Accordingly, the court dismissed the plaintiff's Title VII and PHRA claims. Id.

Similarly, in Bishop v. National R.R. Passenger Corp., 66 F.Supp.2d 650 (E.D.Pa. 1999), the plaintiff, an employee for the defendant Amtrak, attempted to establish a continuing violation for otherwise untimely incidents which supported her Title VII sexual harassment claims. The plaintiff suffered harassment between 1989 and 1991, then went on disability leave until 1995, during which time she had no contact with her alleged harasser. Id. at 660. The harassment allegedly resumed when the plaintiff returned to work in 1995. Id. Citing Konstantopoulos, the United States District Court for the Eastern District of Pennsylvania rejected the plaintiff's continuing violation theory, holding that even if the alleged incidents of harassment were all similar to one another, the lengthy interruption in the harassment "destroyed the pattern" of harassment.¹⁶ Id.

Furthermore, in Koschoff, the plaintiff alleged that she was sexually harassed by defendants from 1989 to 1992. Koschoff, 1999 WL 907546, at *2. She filed a pre-EEOC complaint

¹⁶ The court also pointed out that this analysis is not limited to the Third Circuit, but is "typical of the law of limitations periods in discrimination cases." Bishop v. National R.R. Passenger Corp., 66 F.Supp.2d 650, 660 (E.D.Pa. 1999) ("For various acts of sexual harassment to be joined together into a single claim . . . the acts must be reasonably close to each other, in time and circumstances, because [a]cts . . . so discrete . . . that they do not reinforce each other cannot reasonably be linked together into a single claim, a single course of conduct, to defeat the statute of limitations")(quoting Koelsch v. Beltone Elec. Corp., 46 F.3d 705, 707 (7th Cir. 1995)).

in 1991, but did not file a formal one at that time. Id. In 1992, the plaintiff was transferred to a different work site. Id. at *3. During this time, the plaintiff filed numerous grievances alleging discriminatory acts which took place between June of 1995 and November of 1996, when she left her employment. Id. She filed a formal complaint with the EEOC in 1996. Id. at *9. She then brought a lawsuit against the defendants, attempting to include all of the alleged incidents of harassment, including those complained of in her 1991 pre-complaint. Id. Upon the defendants' timeliness objection, the court rejected the plaintiff's attempt to tack the events described in the pre-complaint, relating to incidents alleged to have occurred prior to 1991, to the events alleged in the 1996 filing, covering activity going back only as far as June of 1995. Id. at *10. Rather, the court held that "we find that the time gap between the events allowed the effects of the earlier . . . incidents to dissipate, and we reject the notion that those events are connected to the alleged discrimination that took place . . . in 1995 through 1996." Id.

In the instant case, Ms. Fala alleges an initial period of harassment and discrimination from August of 1995 through September of 1996. She admits that from September of 1996 until July of 1997, no harassment occurred on the part of Mr. Simon or anyone else at Perrier. We find that this hiatus alone is

sufficient to destroy the continuity Ms. Fala attempts to establish under West. She cannot establish the requisite frequency of the acts, since they were separated by such a prolonged period. Compare West, 45 F.3d at 755 (holding continuing violation theory did apply to Title VII claims where acts occurred "consistently" over the four years and increased in frequency toward the end of that period). Moreover, Ms. Fala's continuing violation theory lacks the requisite permanence under West, in that the nature of the alleged violations should have triggered her awareness of the need to assert her rights. She does not claim she was ignorant that her rights might have been violated from the outset of the behavior; instead, she merely claims she did not assert those rights due to Mr. Simon's apologies. Finally, Ms. Fala cannot establish the remaining requirement under West, that the acts complained of constitute the same type of discrimination, in that the events which form the basis for Ms. Fala's continuing violation theory are a mishmash of failure to promote claims and sexual harassment claims. See Rush, 113 F.3d at 484 (holding that timely discrimination and harassment occurrences could not be joined with untimely instances of failure to promote under continuing violations theory and stating that "we have no intention of shredding the 300-day limitations period by automatically allowing an employee who alleges actionable conduct occurring

within that period to make claims with respect to any adverse actions that occurred during his employment.”)

Furthermore, even more persuasive is Ms. Fala’s own description of how she felt during the ten-month hiatus. She testified that during this period, she saw Mr. Simon regularly, and said they had a “good working relationship.” (Fala Dep., 1/17/00 at p. 134-135). She admits she felt free to ask him for career advice, and that she did so. Id. at 135-137. They had lunch together, often at her suggestion. Id. at 135. She considered Mr. Simon a friend and felt comfortable working with him. Id. at 136-137. Moreover, when Mr. Simon made the July 1997 comment about he and Ms. Fala “ripping up a tee,” Ms. Fala thought the comment was really “odd” and that she was “set back” because “it just hadn’t existed for such a period of time, [she] really thought it wasn’t a problem.” Id. at. 141. Ms. Fala’s own testimony establishes that by July of 1997, the effects of the earlier acts of alleged harassment had dissipated in her own mind, and as such, the continuity necessary to save her untimely claims under a continuing violation theory is lacking.

Therefore, the only alleged acts of harassment or discrimination under Title VII Ms. Fala has alleged which are timely are: (1) her removal from the Allentown project in the summer of 1997, and (2) the August 1997 Friday’s lunch involving Mr. Simon’s alleged sexual banter, leading up to the kiss in the

parking lot. Further, Ms. Fala's claims against Perrier under the PHRA are likewise limited to these incidents.¹⁷ See Jones v. WDAS FM/AM Radio Stations, 74 F.Supp.2d 455, 462 (E.D.Pa. 1999)("Since the Court concludes that two of the plaintiff's [Title VII] retaliation claims are barred by the 300-day statute of limitations, any similar claims brought pursuant to the PHRA are also barred by the PHRA's shorter limitations period."); Cortes, 2000 WL 575918, at *8 (rejecting plaintiff's Title VII continuing violation theory, and holding that an identical outcome with respect to plaintiff's PHRA claims was appropriate.

II. Assault and Battery.

Under Pennsylvania law, the statute of limitations for

¹⁷ Ms. Fala's PHRA claim against Mr. Simon, however, is limited to only the Friday's lunch incident. The PHRA prohibits "any person, employer, employment agency, labor organization or employee to aid, abet, incite, compel or coerce the doing of any act declared by this section to be an unlawful discriminatory practice." 43 P.S. §955(e). Courts in this district have held supervisors liable under section 955(e) for aiding and abetting employer discrimination even when it is the supervisors own conduct at issue. Smith v. Pathmark Stores, Inc., No.Civ.A. 97-1561, 1998 WL 309916, at *1 (E.D.Pa. June 11, 1998); Kohn v. Lemon Co., No.Civ.A. 97-3675, 1998 WL 67540, at *8 (E.D.Pa. Feb. 19, 1998); Frye v. Robinson, No.Civ.A. 97-0603, 1998 WL 57519, at *4 (E.D.Pa. Feb. 11, 1998). Therefore, Mr. Simon is not entitled to judgment as a matter of law with regard to the Friday's lunch incident.

However, as explained later in Section III, Ms. Fala has failed to establish that Mr. Simon was in any way responsible for her removal from the Allentown project. She has failed to rebut the Defendants' evidence that Mr. Stein made that decision. Ms. Fala's only support for her theory that Mr. Simon was responsible is her own belief that Mr. Simon had influence within Perrier. However, this is insufficient to survive summary judgment with regard to this incident.

both assault and battery is two years. Osgood v. Borough of Shamokin Dam, 420 A.2d 613, 614 (Pa.Super. 1980). Therefore, the only incident which could give rise to these claims which is not time-barred is the 1997 kiss in the parking lot after the Friday's lunch meeting, accompanied by Mr. Simon's alleged hovering hand.

A. Perrier

With regard to Perrier, under Pennsylvania law, an employer generally cannot be held liable for the intentional torts of its employees. Costa v. Roxborough Mem. Hosp. 708 A.2d 490, 493 (Pa.Super. 1998). In order for the employer to be held liable for its employee's intentional torts, the employee's act must have been committed within the course and scope of his or her employment. Id. An act is within the scope of employment if: (1) it is of a kind and nature that the employee is employed to perform; (2) it occurs substantially within the authorized time and space limits; (3) it is actuated, at least in part, by a purpose to serve the employer; and (4) if force is intentionally used by the employee against another, the use of force is not unexpected by the employer. Id. (citations omitted). While the question of whether an employee was acting within the course and scope of his or her employment is generally one for the jury, the Costa court explained that, "our courts have held that an assault committed by an employee upon another for personal reasons or in

an outrageous manner is not actuated by an intent to perform the business of the employer and, as such, is not within the scope of employment." Id. (citing Potter Title & Trust Co. v. Knox, 113 A.2d 549, 551 (Pa. 1955)).

In the instant case, we find that in the event that an assault on Ms. Fala occurred as Mr. Simon allegedly approached her to kiss her, it was not done for the purpose of serving Perrier, but rather was done for Mr. Simon's personal reasons. Indeed, it is inconceivable how such an act could further the business of Perrier. Moreover, Perrier was not likely to expect Mr. Simon to engage in such behavior as part of his job. Therefore, under Costa, Mr. Simon was not acting within the course and scope of his employment during the alleged assault. Moreover, we find that logic dictates that this reasoning apply equally to the tort of battery. As such, summary judgment on the assault and battery claims is granted in favor of Perrier.

B. Mr. Simon

With regard to Mr. Simon, because we find that factual issues for the jury exist as to the merits of the assault and battery claims, summary judgment is denied as to these claims.

III. Intentional Infliction of Emotional Distress.

Under Pennsylvania law, the statute of limitations for the tort of intentional infliction of emotional distress is two years. Bartanus v. Lis, 480 A.2d 1178, 1186 (Pa.Super. 1984).

Therefore, Ms. Fala may not base this claim upon incidents which occurred before June 29, 1999, the date she filed her Complaint. The conduct which occurred during this period consisted of Ms. Fala's removal from the Allentown project, Mr. Simon's sexual banter, and the kiss after the Friday's lunch.

Under Pennsylvania law, to state a claim for the tort of intentional infliction of emotional distress, a plaintiff must allege conduct "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 society." Decesare v. National R.R. Passenger Corp., No.CNA 98-3851, 1999 WL 33025, at *6 (E.D.Pa. May 24, 1999) (quoting Cox v. Keystone Carbon Co., 861 F.2d 390, 395 (3d Cir. 1988)). Additionally, a plaintiff must allege "physical injury, harm, or illness caused by the alleged outrageous conduct." Corbett v. Morgenstern, 934 F. Supp. 680, 684 (E.D. Pa. 1996). As the Supreme Court of Pennsylvania has stated, "[c]ases which have found a sufficient basis for a cause of action of intentional infliction of emotional distress have presented only the most egregious conduct." Hoy v. Angelone, 720 A.2d 745, 754 (Pa. 1998); Papieves v. Lawrence, 437 Pa. 373, 263 A.2d 118 (1970)(defendant, after striking and killing plaintiff's son with automobile, and after failing to notify authorities or seek medical assistance, buried body in a field where discovered two

months later and returned to parents).

Further, intentional infliction of emotional distress cases in the employment context are rare, and the alleged conduct is not usually found to be extreme enough to rise to the level of outrageousness necessary to provide a basis for recovery for the tort. Hoy, 720 A.2d at 754; Cox v. Keystone Carbon, 861 F.2d 390, 395 (3d. Cir. 1988). Also, the Third Circuit has stated that "sexual harassment alone does not rise to the level of outrageousness necessary to make out a cause of action for the intentional infliction of emotional distress." Andrews v. City of Philadelphia, et al., 895 F.2d 1469, 1487 (3d Cir. 1990). However, when the harassment is coupled with retaliation for turning down sexual propositions, the Third Circuit acknowledges a higher likelihood of recovery. Id.

However, in the instant case, Ms. Fala's allegations of sexual banter and a kiss do not rise to the requisite level of atrocity. Moreover, although Ms. Fala alleges the requisite retaliation, even if this Court found that Mr. Simon harassed her, we cannot reach the conclusion that her removal from the Allentown project was an act of retaliation against her for refusing Mr. Simon's sexual advances, since Ms. Fala has not provided any evidence to refute Defendants' evidence that it was Mr. Stein who made that determination. The only support for this retaliation theory is that Ms. Fala believed Mr. Simon had

influence within Perrier, which could have, ostensibly, encouraged Mr. Stein's decision. However, "[w]hen opposing a summary judgment motion, the non-moving party 'cannot rely on unsupported assertions, conclusory allegations, or mere suspicions.'" American Int'l Surplus Ins. Co., v. IES Lead Paint Div., Inc., et al., No. 94-4627, 1996 WL 135334, at *6 (E.D.Pa. Mar. 18, 1996)(quoting Chemical Bank v. Dippolito, 897 F. Supp. 221, 223 (E.D.Pa. 1995)). Moreover, "[u]nsubstantiated and subjective beliefs and opinions are not competent summary judgment evidence." Forsyth v. Barr, 19 F.3d 1533 (5th Cir.), cert. denied, 513 U.S. 871 (1994). As such, summary judgment is granted in favor of both defendants on this claim.

An appropriate Order follows.