

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

MARY BETH OCASIO,	:	
	:	
Plaintiff,	:	CIVIL ACTION
	:	
v.	:	
	:	
LEHIGH VALLEY FAMILY	:	
HEALTH CENTER,	:	99-CV-4091
	:	
Defendant.	:	

**MEMORANDUM**

BUCKWALTER, J.

November 3, 2000

Presently before the Court is defendant Lehigh Valley Family Health Center's ("Defendant" or "Lehigh Valley") Motion to Dismiss and plaintiff Mary Beth Ocasio's ("Plaintiff") Response thereto. For the reasons set forth below, Defendant's motion is Granted in part and Denied in part.

**I. BACKGROUND**

Plaintiff, a Hispanic-American, began her employment with Defendant, a private company, in January, 1999. Plaintiff continues to work for Defendant despite being the target of alleged racial discrimination and harassment carried out by white co-workers and white supervisory staff. Plaintiff asserts this alleged discrimination has manifested in two ways. First, white co-workers have made racially derogatory comments to and about Plaintiff, other Hispanic staff and Hispanic patients. Second, supervisory staff members have instructed Hispanic employees to refrain from speaking Spanish with each other and Hispanic patients. In addition to

these assertions of discriminatory behavior, Plaintiff also claims she has been the victim of unjustifiable discipline as a result of her complaining about the alleged inappropriate behavior and alleged mistreatment of Hispanic patients.

The environment created by the harassment and discrimination, Plaintiff claims, has forced her to seek counseling and to adjust her work schedule to avoid contact with the most offensive white employees. Plaintiff does not assert she was discharged outright or constructively, nor has she voluntarily left Lehigh Valley. Plaintiff continues to work at Lehigh Valley as a medical assistant.

## **II. LEGAL STANDARD**

Rule 12(b)(6) of the Federal Rules of Civil Procedure provides that, in response to a pleading, a defense of "failure to state a claim upon which relief can be granted" may be raised by motion. Fed. R. Civ. P. 12(b)(6). In considering a motion to dismiss under Rule 12(b)(6), a court must take all well pleaded facts in the complaint as true and view them in the light most favorable to the plaintiff. See Jenkins v. McKeithen, 395 U.S. 411, 421 (1969). The court must only consider those facts alleged in the complaint in considering such a motion. See ALA v. CCAIR, Inc., 29 F.3d 855, 859 (3d Cir. 1994). The pleader must provide sufficient information to outline the elements of the claim, or to permit inferences to be drawn that these elements exist. Kost v. Kozakiewicz, 1 F.3d 176, 183 (3d. Cir. 1993). A complaint should be dismissed if "it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." Hishon v. King & Spalding, 467 U.S. 69, 73 (1984).

### **III. DISCUSSION**

In her Complaint, Plaintiff makes civil rights claims under the First Amendment, the Fourteenth Amendment, 42 U.S.C. §§ 1981, 1982, 1985(1) and (3), 1986, and 1988. Plaintiff also makes supplemental state law claims for intentional infliction of emotional distress and negligent supervision. Defendant has motioned the Court to dismiss all but Plaintiff's claims under § 1981 and negligent supervision. The claims Defendant seeks to dismiss are treated below in turn.

#### **A. Plaintiff's First Amendment and Fourteenth Amendment Claims**

Plaintiff brings discrimination claims directly under the First and Fourteenth Amendments to the United States Constitution. In bringing such claims, Plaintiff must assert facts that would indicate the alleged discrimination involved state action. See New York Times Co. v. Sullivan, 376 U.S. 254, 265 (1964) (recognizing that state action is required to trigger the First Amendment); Lugar v. Edmondson Oil Co., 457 U.S. 922, 929 (1982) (recognizing that state action is required to trigger the Fourteenth Amendment). Plaintiff has made no showing of state action and therefore the Court will dismiss both of these constitutional claims.

#### **B. Plaintiff's § 1982 Claim**

Plaintiff fails to allege a property interest protected under § 1982. Section 1982 provides:

All citizens of the United States shall have the same right, in every state and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell hold and convey real and personal property.

To state a claim under § 1982, a party must allege impairment of a property interest of the type protected by the statutory language. City of Memphis v. Greene, 451 U.S. 100, 123-124 (1981).

Although the Third Circuit has not addressed § 1982 and its application to employment claims, several courts in this district have expressly held that employment claims do not fall under the protection of § 1982 because the interest implicated in such cases is neither real nor personal property. See Altieri v. Pennsylvania State Police, No. 98-5495, 2000 U.S. Dist. LEXIS 5041, at \*44-45 (E.D. Pa. Apr. 19, 2000) (plaintiffs' failure to allege an impairment of one of the named property interests in § 1982 was fatal to their § 1982 claim); Schirmer v. Eastman Kodak, No. 86-3533, 1987 U.S. Dist. LEXIS 2800, \*12-13 (E.D. Pa. Apr. 9, 1987) (plaintiff showed no support for the assertion that contract rights are "property" for purposes of § 1982); This Court agrees. Plaintiff's § 1982 claim, therefore, will be dismissed.

### **C. Plaintiff's § 1985(1) Claim**

To make a claim under § 1985(1), Plaintiff would have to allege she is a federal officer and that Defendant interfered with her official federal duties. Robison v. Canterbury Village, Inc., 848 F.2d 424, 430 n.5 (3d Cir. 1988) (Section 1985(1) "governs interference with the duties of federal officials only . . . ."); Industrial Design Serv. Co. v. Upper Gwynedd Township, No. 91-7621, 1993 U.S. Dist. LEXIS 742, \*12 (E.D. Pa. Jan. 27, 1993) ("Section 1985(1) prohibits interference with federal officials in the performance of their duties . . . . Since plaintiffs have not alleged any facts involving . . . a federal officer . . . they fail to state a cause of action under [this] provision[.]"); Trimback v. Philadelphia, No. 87-8392, 1988 U.S. Dist. LEXIS 10507, \*8 (E.D. Pa. Sept. 20, 1988) ("Section 1985(1) governs interference with the duties of federal officials only and therefore has no relevance to the instant litigation."). Here, plaintiff makes no allegations of that sort and therefore the Court will dismiss her § 1985(1) claim.

#### **D. Plaintiff's § 1985(3) Claim**

Section 1985(3) provides no substantive rights itself. Great American Federal Savings & Loan Assn. v. Novotny, 442 U.S. 366, 372 (1979). Rather, it protects any person or group of persons from a conspiracy to deprive them of “[t]he rights, privileges, and immunities” found in other areas of federal law such as Amendments to the Constitution. Carpenters v. Scott, 463 U.S. 825, 836 (1983). When the underlying rights claimed to have been violated are only protected from state action, a plaintiff must show the state was somehow involved in the conspiracy. See id; see also Bray v. Alexandria Women’s Health Clinic, 506 U.S. 263, 278 (1993) (explaining that § 1985(3) does not apply to private conspiracies that are aimed at a right that is by definition a right only against state interference). Here, Plaintiff appears to base her § 1985(3) claim on rights protected by the First and Fourteenth Amendments. As explained *supra*, these Amendments require state action and Plaintiff makes no allegation of state action in her Complaint. Because those claims will be dismissed for lack of state action, so must Plaintiff’s § 1985(3) claim.

#### **E. Plaintiff's § 1986 Claim**

Claims under § 1986 can only be maintained if a cause of action has been established under § 1985. See Rogin v. Bensalem Township, 616 F.2d 680, 696 (3d Cir. 1980) (“Because transgressions of § 1986 by definition depend on a preexisting violation of § 1985, if the claimant does not set forth a cause of action under the latter, its claim under the former necessarily must fail also.”); see also Trimback v. Philadelphia, No. 87-8392, 1988 U.S. Dist. LEXIS 10507, \*9 (E.D. Pa. Sept. 20, 1988) (“Because no claim can be maintained under section 1986 unless a cause of action has been established under section 1985, I will dismiss both the

section 1985 and 1986 claims against defendants.”) (citation omitted). Here, both Plaintiff’s § 1985(1) and (3) claims will be dismissed and therefore the Court also will dismiss Plaintiff’s § 1986 claim.

**F. Plaintiff’s § 1988 Claim**

Although Plaintiff’s Complaint is unclear, the Court does not read it as attempting to state a claim under § 1988. If Plaintiff intended to state a claim under § 1988, she did so misguidedly because § 1988 does not grant an independent cause of action. See Moor v. County of Alameda, 411 U.S. 693, 702 (1973) (Section 1988 does not create an independent federal cause of action; it is merely intended to complement the various acts which do create federal causes of action for the violation of federal civil rights). Rather, it provides that “[i]n any action or proceeding to enforce a provision of sections 1981, 1981a, 1982, 1983, 1985, and 1986 . . . the court, in its discretion, may allow the prevailing party . . . a reasonable attorney’s fee as part of the costs.” At this time, § 1988 is irrelevant, and to the extent Plaintiff believed she was stating a claim under § 1988, the claim will be dismissed.

**G. Plaintiff’s Intentional Infliction of Emotional Distress Claim**

Finally, Lehigh Valley has motioned to dismiss Plaintiff’s common law claim of intentional infliction of emotional distress (IIED). The Court believes Plaintiff has sufficiently pled this cause of action for this stage of the case.

There is little Pennsylvania law or federal case law from the Third Circuit or this district addressing this type of claim. See Hoy v. Angelone, 720 A.2d 745, 753 (Pa. 1998). The Pennsylvania and federal courts that have dealt with IIED claims have relied upon the Restatement (Second) of Torts § 46(1) (1965) to outline necessary elements of the cause of

action. See Chuy v. Philadelphia Eagles Football Club, 595 F.2d 1265, 1273-1274 (3d Cir. 1979). The four elements are: 1) The conduct must be extreme and outrageous; 2) the conduct must be intentional or reckless; 3) the conduct must cause emotional distress; and 4) the distress must be severe. See id. The issue presented to this Court by the Defendant is whether Defendant's conduct was extreme and outrageous.

To meet this element, Plaintiff must show conduct that is "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." Buczek v. First National Bank of Mifflintown, 531 A.2d 1122, 1125 (Pa. Super. 1987). Racial discrimination alone, despite its repulsive nature, has not been sufficient to meet this standard. See EEOC v. Chestnut Hill Hospital, 874 F. Supp. 92, 96 (E.D. Pa. 1995). Discrimination combined with retaliation, however, has been held sufficiently outrageous and extreme to sustain an IIED claim. See Lane v. Cole, 88 F. Supp. 2d 402, 406-407 (E.D. Pa. 2000); cf. Andrews v. City of Philadelphia, 895 F.2d 1469, 1487 (3d Cir. 1990) (explaining that courts applying Pennsylvania law have found conduct outrageous in the employment context where an employer engaged in both sexual harassment and other retaliatory behavior).

Here, Plaintiff asserts she suffered from not only racial discrimination but also retaliation for reporting the discrimination. The Court agrees that a combination of discrimination and retaliation may be sufficient to meet the standards of an IIED claim and therefore believes a decision on the survival of this claim is better suited for summary judgment. Defendant's motion to dismiss as to Plaintiff's IIED claim will be denied.

#### **IV. CONCLUSION**

For the reasons set forth above, Defendant's Motion to Dismiss will be Granted in part and Denied in part.

An appropriate order follows.

A cautionary note: Plaintiff's counsel has (1) cited cases for propositions the cases do not make; (2) cited cases that do not exist; (3) failed to proofread and find obvious errors; and (4) made frivolous claims despite having had the same claims dismissed in a prior case that was factually similar to this case. Counsel must know that such conduct is not only inappropriate, but also suggests a disregard for his professional responsibilities to this court. Counsel would be well advised to pay heed to this note.

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Plaintiff,	:	CIVIL ACTION
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vi.	:	
	:	
LEHIGH VALLEY FAMILY	:	
HEALTH CENTER,	:	99-CV-4091
	:	
Defendant.	:	

**ORDER**

AND NOW, this 3<sup>rd</sup> day of November, 2000, upon consideration of defendant Lehigh Valley Family Health Center’s Motion to Dismiss (Docket No. 4) and plaintiff Mary Beth Ocasio’s Response thereto (Docket No. 6), it is **ORDERED** that Lehigh Valley Family Health Center’s motion is **GRANTED** in part and **DENIED** in part.

More specifically, it is **ORDERED**:

1. Defendant’s Motion to Dismiss as to Plaintiff’s 42 U.S.C. § 1982 claim is **GRANTED**.
2. Defendant’s Motion to Dismiss as to Plaintiff’s 42 U.S.C. § 1985(1) claim is **GRANTED**.
3. Defendant’s Motion to Dismiss as to Plaintiff’s 42 U.S.C. § 1985(3) claim is **GRANTED**.
4. Defendant’s Motion to Dismiss as to Plaintiff’s 42 U.S.C. § 1986 claim is **GRANTED**.

5. Defendant's Motion to Dismiss as to Plaintiff's 42 U.S.C. § 1988 claim is **GRANTED**.
6. Defendant's Motion to Dismiss as to Plaintiff's First Amendment claim is **GRANTED**.
7. Defendant's Motion to Dismiss as to Plaintiff's Fourteenth Amendment claim is **GRANTED**.
8. Defendant's Motion to Dismiss as to Plaintiff's Intentional Infliction of Emotional Distress claim is **DENIED**.

BY THE COURT:

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RONALD L. BUCKWALTER, J.