

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

STANLEY BACONE and : CIVIL ACTION
JUDY BACONE, h/w , : No. 01-CV-419
 :
v. :
 :
PHILADELPHIA HOUSING :
AUTHORITY, TONY MILLER, and :
ANGELA ALLEN :

O'Neill, J.

June 27, 2001

MEMORANDUM

Stanley Bacone (“Bacone” or “plaintiff”), a PHA Police Officer, and his wife Judy Bacone have sued the Philadelphia Housing Authority (“PHA”), Angela Allen, a former PHA Police Officer, and Tony Miller, a former PHA Police Sergeant. Plaintiffs allege that Bacone was subjected to hostile work environment discrimination and retaliation while employed by the PHA Police Department. Count I of the complaint alleges that PHA violated Title VII of the Civil Rights Act of 1964, 42 U.S.C.A. § 2000e et. seq. (West 1994 & Supp. 2000). Count II alleges that PHA discriminated against plaintiff in violation of Section 955(e) of the Pennsylvania Human Relations Act (“PHRA”), 43 Pa. Cons. Stat. Ann. § § 951 et seq. (West 1991 & Supp. 2000). Count III alleges that Allen and Miller violated section 955(e) of the PHRA. Count IV alleges that PHA and Miller aided and abetted the harassment practices of Allen in violation of the PHRA. Count V alleges intentional infliction of emotional distress under Pennsylvania law against Allen and Miller. Count VI alleges loss of consortium under Pennsylvania Law against PHA, Miller, and Allen. Defendants PHA and Allen now move to dismiss Count III of the complaint against Allen, Count IV against PHA, and Counts V and VI in their entirety.

Officer Allen is alleged to have committed several acts of sexual harassment against Officer Bacone, including exposing her breasts to him in public, making uninvited physical contact with his person and making repeated and suggestive requests that Bacone “go home” with her. In addition to direct incidents of harassment, Bacone also alleges that unwelcome sexual comments made by Allen to other department police officers contributed to a hostile work environment at the PHA. The first alleged act of sexual harassment took place in a radio patrol car while Bacone and Allen were on duty on March 5, 1998. The alleged acts of harassment continued until March 19 of that year.

On three occasions Bacone reported Allen’s alleged acts of harassment to Miller, who had supervisory authority over Bacone and Allen. It is alleged that Miller did not take action to eradicate the hostile work environment purportedly created by Allen. Only after Bacone filed a written report of Allen’s behavior with PHA officials superior to Miller did the PHA begin an investigation of the matter. The investigation was conducted by then-Captain Rosenstein of the PHA police. Plaintiffs claim the investigation was a sham because the PHA should have known Rosenstein was a perjurer and therefore of questionable integrity. No action was taken against Allen following the investigation, and Bacone claims that following the investigation he was transferred to a dead-end job and harassed with unfounded disciplinary charges.

Bacone made a joint filing of his charges against Allen, Miller, and the PHA with the Pennsylvania Human Relations Commission (“PHRC”) and the EEOC on July 28, 1998. The PHRC returned a finding of cause letter to Bacone on or about April 19, 1999, confirming there was probable cause to credit his allegations of unlawful discrimination based on his sex by Miller and the PHA.¹ Following receipt of the letter, Bacone attempted to obtain a public hearing on his charges through the administrative procedures of the PHRC. The hearing was

canceled when Bacone refused to accept a remedy proposed by the PHA that the PHRC deemed appropriate. Bacone then filed his complaint in this Court.

STANDARD OF REVIEW

In examining a motion to dismiss for failure to state a claim upon which relief can be granted pursuant to Fed. R. Civ. P. 12(b)(6), the question is whether the plaintiff is entitled to introduce evidence in support of his claims, not whether he will ultimately succeed in presenting them. Scheuer v. Rhodes, 416 U.S. 232, 236 (1974); see also Redden v. ContiMortgage Corp., et al., No. 99-4535, 1999 WL 1257280 at *2 (E.D. Pa. Dec. 22, 1999). The Court must accept as true all well pleaded factual allegations in the complaint and all reasonable inferences that can be drawn from them and must view them in the light most favorable to the non-moving party. Scheuer 416 U.S. at 236, see also Rocks v. City of Philadelphia, 868 F.2d 644,645 (3d Cir. 1989). “Yet our courts have an obligation in matters before them to view the complaint as a whole and to base rulings not upon the presence of mere words but, rather, upon the presence of a factual situation which is or is not justiciable. We do draw on the allegations of the complaint, but in a realistic, rather than a slavish, manner.” City of Pittsburgh v. West Penn. Power Comp., 147 F.3d 256, 263 (3d Cir. 1998). Since granting a motion to dismiss results in a determination on the merits early in the case, dismissal is limited to instances where “it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations.” H.J. Inc. v. Northwestern Bell Tel. Co. 492 U.S. 229, 249-250, see also Demuro v. Philadelphia Housing Authority, No. 98-3137, 1998 WL 962103, at *2 (E.D. Pa. Dec. 22, 1998).

I. Motion to Dismiss Count III of Plaintiff’s Complaint

Allen argues that Count III should be dismissed as to her because she cannot be

individually liable to Bacone under section 955(e) of the PHRA. Section 955(e) forbids: any person, employer, employment agency, labor organization or employe [sic], to aid, abet, incite, compel or coerce the doing of any act declared by this section to be an unlawful discriminatory practice, or to obstruct or prevent any person from complying with the provisions of this act or any order issued thereunder, or to attempt, directly or indirectly, to commit any act declared by this section to be an unlawful discriminatory practice.”

“The plain language of the PHRA . . . expressly proclaims that ‘any person’ can be liable.”

Wein v. Sun Co., Inc., 936 F. Supp. 282, 284 (E.D. Pa. 1996). Plaintiffs argue that, under Wein, section 955(e) claims are not limited to supervisory employees. However, subsequent cases have held otherwise, and support defendants’ argument that only supervisory employees can be held individually liable under section 955(e). “Courts have distinguished between nonsupervisory and supervisory employees and imposed liability only on the latter, on the theory that supervisory employees can share the discriminatory intent and purpose of the employer.”

Destefano v. Henry Mitchell, No. 990CV-5501, 2000 WL 433993, at *2 (E.D. Pa. Apr. 13, 2000), citing Dici v. Pennsylvania, 91 F.3d 542 at 553 (3d Cir. 1996), Frye v. Robinson Alarm Co., No. 97-0603, 1998 WL 57519, at *4 (E.D. Pa. Feb. 11, 1998).

Although Allen was an employee of the PHA, she was Bacone’s co-worker, not a supervisory employee. Her direct acts of discrimination do not trigger section 955(e). In Dici, the Court of Appeals for the Third Circuit held that allegations of direct incidents of harassment were “not covered by the terms of §955(e).” Dici, 91 F.3d at 553. Without proof of “intent to aid” the PHA or her supervisor in their discriminatory practices, Allen cannot be held individually liable under section 955(e). Destefano, 2000 WL 433993, at *2; see also Dici, 91 F.3d at 552-553. Also in support of defendants’ position, courts have generally construed the PHRA to be in conformity with Title VII. See e.g. Bonora v. UGI Utilities, Inc., No.

99-5539,2000 WL 1539077 at *1 n.1 (E.D. Pa. Oct. 18, 2000). Title VII has been held to preclude individual liability. See Dici, 91 F.3d at 553. For the foregoing reasons, I will dismiss Count III as to Allen.

II. Motion to Dismiss Count IV of Plaintiff's Complaint

PHA argues that it cannot be held liable because it “cannot aid or abet its own alleged PHRA violation.” (Defs.’ Mot. at 9) This is contrary to the court’s finding in Dici, 91 F.3d at 552-553, where summary judgment was granted in favor of the alleged harassing co-employee because he was not a proper defendant under section 955(e) but summary judgment was not granted for the supervisory employee because he could still have been liable for aiding and abetting discriminatory practices. Here, if the facts as pled by Bacone are true liability may be imposed against the PHA for violations of the PHRA even though the 955(e) claim against Allen is being dismissed.

As Allen’s employer, PHA is a proper defendant under section 955(e). PHA’s liability for Allen’s conduct under the PHRA follows Title VII’s employer liability standards. See Knabe v. Boury Corp., 114 F.3d 407, 410 n.5 (3d Cir. 1997). Following the Supreme Court’s decisions in Faragher v. City of Boca Raton, 524 U.S. 775 (1998) and Burlington Indus. Inc. v. Ellerth, 524 U.S. 742 (1998), and the Court of Appeals’ decision in Durham Life Ins. Co. v. Evans, No. 97-1683, 1999 WL 16779 (3d Cir Jan. 15, 1999) employer liability under Title VII “depends upon whether the harasser is the victim’s supervisor or merely a co-employee.” Glickstein v. Neshaminy School District, No. CIV. A. 96-6236, 1999 WL 58578 at *10, (E.D.Pa. Jan. 26, 1999). Under Faragher and Ellerth, if a supervisor’s sexual harassment falls within the scope of employment, an employer is automatically liable for his conduct. Id. Although, as Bacone alleges in the complaint, Allen “acted . . . in [her] official capacity[] as officer[], agent[],

representative[], employee[], and/or servant[] of the Authority” during the alleged harassment, she is not a supervisor so PHA is not automatically liable for her actions. Compl. ¶6. However, “where the harasser is a co-employee . . . the appropriate standard remains as previously defined prior to Faragher and Ellerth by the Third Circuit in Bouton: whether the employer took ‘prompt and effective remedial action.’” Glickstein, 1999 WL 58578 at *12, quoting Bouton v. BMW of North America, Inc., 29 F.3d 103, 107 (3d Cir. 1994).

Plaintiff has pled sufficient facts to raise questions about the effectiveness of PHA’s corrective actions and thus to survive a motion to dismiss. For example, Bacone alleges that, “during the purported investigation of Officer Bacone’s charges . . . then-Captain Rosenstein and other agents, servants, employees, and/or representatives of the Authority attempted to improperly manipulate witnesses to discredit Officer Bacone’s charges. . . .” See Complaint at ¶ 27(j). If Bacone can prove “that management level employees had actual or constructive knowledge about the existence of a sexually hostile environment, and failed to take prompt and adequate remedial action, the employer will be liable.” Andrews v. City of Philadelphia, 895 F.2d 1469, 1486 (3d Cir. 1990). Because this is a motion to dismiss I must accept as true the well-pleaded facts alleged in the complaint and therefore that PHA’s investigation and subsequent decision not to take remedial action were inadequate. It is not clear that no appropriate relief could be granted under Bacone’s allegations.

III. Motion to Dismiss Count V of Plaintiff’s Complaint

I will dismiss Count V of plaintiff’s complaint against Allen as time barred. Under Pennsylvania law the statute of limitations for the tort of intentional infliction of emotional distress is two years. 42 Pa. Cons. Stat. Ann. §5524 (West 1981 & Supp. 2000); see also Sicalides v. Pathmark Stores, No. 99-CV-3465, 2000 WL 760439 at *11 (E.D. Pa. June 12,

2000). Defendants argue that plaintiff's claim should be dismissed because the limitation period had expired when this complaint was filed on January 29, 2001. They claim the limitation period began with Allen's alleged infliction of emotional distress in March of 1998. Plaintiffs argue the limitation period began on April 19, 1999 when the PHRC issued its finding of cause letter. Defendants' argument is persuasive for reasons that follow.

In Johnson v. Railway Express Agency, 421 U.S. 454, 465 (1975), the Supreme Court held that the statute of limitations for a §1981 claim was not tolled by the processing of a Title VII claim before the EEOC. This holding is consistent with the requirement that a plaintiff initiate suit within the statutory time period although an administrative proceeding is ongoing. Similarly, in Mincin v. Shaw Packing Co., 989 F. Supp. 710, 719 (W.D. Pa. 1997), the court held that "the Pennsylvania Supreme Court would not toll the statute of limitations for related state tort claims because of the pendency of a discrimination charge before the PHRC/EEOC." The Court of Appeals recognizes three main scenarios where equitable tolling may apply: "(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." Oshiver v. Levin, Fishbein, Sedran & Berman, 38 F.3d 1380, 1387 (3d Cir. 1994) citing School District of City of Allentown v. Marshall, 657 F.2d 16, 19-20 (3d. Cir. 1981).

Although plaintiffs argue that the statute of limitations for their federal court filing was tolled by their timely joint filing with the PHRC and EEOC, none of the equitable tolling situations apply in this case. There are no allegations that defendants misled Bacone regarding his cause of action. Bacone did not assert the emotional distress claim until the complaint was filed in this court, so this is not a case of mistaken filing in the wrong forum. Plaintiffs argue

they were foreclosed from bringing suit within the limitations period unless they abandoned a possible administrative remedy. They claim the PHRC would have closed its investigation if plaintiffs had filed a state law claim of emotional distress in state court within two years of the last alleged act of discrimination by Allen. This is not the case. Bacone's claim of infliction of emotional distress is independent from his discrimination, hostile work environment and harassment claims. Even if the statute of limitations were tolled for the latter by filing with the PHRC and EEOC, the two-year statute of limitations for the emotional distress claim was not. See Vaughan v. Pathmark Stores, Inc., No. 99-18,2000 WL 39067 at *3-*4 (E.D. Pa. Jan. 19, 2000) (employee's pursuance of workmen's compensation benefits was a separate claim from a discrimination charge filed with EEOC and did not toll the statute of limitations for her Title VII, ADA, and PHRA claims).

Plaintiffs argue this case is comparable to Holmes v. Strawbridge and Clothier, Inc., No. 94-1999, 1994 WL 649156 at *1 (E.D. Pa. Nov. 16, 1994), where I denied a similar defense motion to dismiss a complaint as time barred. However, in Holmes, the plaintiffs filed a claim in state court prior to expiration of the statute of limitations. Id. I explained, "[h]ad this complaint been plaintiff's first filing of the state law claims, they would have been dismissed as time-barred by the applicable statute of limitations." Id. Here, the complaint is plaintiff's first filing of the state law claims, and when Bacone filed the federal complaint the statute of limitations on his state law claims against Allen had already expired. This case more closely resembles Bougher v. University of Pittsburgh, 882 F.2d 80, 75 (3d Cir. 1989), where the court affirmed the dismissal of plaintiff's emotional distress claim even though she had made a timely filing of a PHRC discrimination charge because she failed to allege any unlawful acts during the two-year period prior to filing her complaint in federal court.

Plaintiffs also argue that allowing the claim would serve the policy goals of the two year statute of limitations: “to expedite litigation, and thus discourage and delay the presentation of stale claims which may greatly prejudice the defense of such claims.” Holmes 1994 WL 649156 at *1. While these are indeed goals of the statute of limitations, I conclude that failure to dismiss the claim would defeat the goals of the statute by allowing plaintiffs to pursue a claim for which the statute of limitations has expired. Plaintiff had the opportunity to preserve his claim by filing it within the allotted limitation period. Because he did not, it will be dismissed.

Defendants argue that in addition to being time-barred Count V of the complaint should be dismissed because Allen is immune from liability under the Political Subdivision Torts Claim Act, 42 Pa. Cons. Stat. Ann. §§ 8521-8528 (West 1998), and because plaintiff has not alleged conduct sufficiently outrageous to state a claim. I agree with both arguments.

Under the Political Subdivision Torts Claim Act, employees “acting within the scope of their duties” are immune from suit except where the legislature has specifically waived immunity. See LaFrankie v. Miklich, 618 A.2d 1145, 1149 (Pa. Commw. 1992). Allen does not fall under any of the waiver provisions, and, as Bacone alleges in the complaint, she was acting within the scope of her employment when the alleged incidents of harassment took place. See Compl. ¶ 6. Accepting plaintiff’s allegations as true, the motion to dismiss the emotional distress claim will also be denied for this reason.

In the employment context, emotional distress claims rarely succeed because the alleged conduct does not usually rise to the necessary level of outrageousness. See Sicalides v. Pathmark Stores, No. 99-CV-3465, 2000 WL 760439 at *11 (E.D. Pa. June 12, 2000). The Pennsylvania Supreme Court has held that “sexual propositions, physical contact with the back of Appellant’s knee, the telling of off-color jokes and the use of profanity on a regular basis, as well as the

posting of a sexually suggestive picture” is not outrageous enough to allow for recovery. See Hoy v. Angelone, 720 A.2d 745, 754 (Pa. 1998). Case law in this district further indicates that the alleged sexually explicit touching, comments, and gestures in this case would not be sufficiently outrageous to support a claim. See Redden v. Conti Mortgage Corp., et al., No. 99-4535, 1999 WL 1257280 at *2 (E.D. Pa. Dec. 22, 1999); Wasserman v. Potamkin Toyota, Inc., No. 98-0792, 1998 WL 744090 (E.D. Pa. Oct. 23, 1998).

The docket shows a return of service for Miller. No appearance has been entered for him and he has not responded to the complaint. Although Miller has not moved to dismiss Count V of the complaint, and presumably has waived the statute of limitations defense, dismissal of the Count as to him is appropriate because of the defenses of failure to allege conduct sufficiently outrageous to state a claim and immunity from liability under the Political Subdivision Torts Claim Act, 42 Pa. Cons. Stat. Ann. §§ 8521-8528 (West 1998).

IV. Motion to Dismiss Count VI of Plaintiff’s Complaint

The “loss of services, society, and conjugal affection of one's spouse” may result in a loss of consortium claim. Nowosad v. Villanova University, No. 97-5881, 1999 WL 744017 at *3 (E.D. Pa. Sept. 23, 1999). Loss of consortium is a “derivative claim[] governed by the statute[] of limitations of the source claim[].” Patterson v. American Bosch Corp., 914 F.2d 384, 386 n. 4 (3d Cir. 1990). Because plaintiff’s emotional distress claim is dismissed as time barred and because he has failed to plead conduct sufficiently outrageous to state that claim, the loss of consortium claim must be derived from plaintiff’s PHRA or Title VII claims. However, under Pennsylvania law, recovery for loss of consortium is limited to occasions where the other spouse may recover in tort. See, e.g., Szydowski v. City of Philadelphia, 134 F. Supp.2d 636, 639

(E.D. Pa.2001); Danas v. Chapman Ford Sales, Inc., 120 F. Supp.2d 478, 489 (E.D. Pa.2000); Washkul v. City of Philadelphia, 998 F. Supp. 585 (E.D. Pa. 1998); Quitmeyer v. Southeastern Pennsylvania Transportation Authority, 740 F. Supp. 363, 370 (E.D. Pa.1990). “A spouse's right to recover under a civil rights statute such as the PHRA . . . does not support a loss of consortium claim.” Stauffer v. City of Easton, 1999 WL 554602, No. 99-CV-492 at *1 (E.D. Pa. July 20, 1999). Although plaintiff’s Title VII and PHRA claims may succeed at trial, Judy Bacone will not have a viable claim of loss of consortium against PHA, Allen or Miller. The motion to dismiss Count VI of plaintiff’s complaint will be granted.

An appropriate Order follows.

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FOR THE EASTERN DISTRICT OF PENNSYLVANIA

STANLEY BACONE and	:	CIVIL ACTION
JUDY BACONE, h/w ,	:	No. 01-CV-419
	:	
v.	:	
	:	
PHILADELPHIA HOUSING	:	
AUTHORITY, TONEY MILLER, and	:	
ANGELA ALLEN	:	

ORDER

AND NOW, this day of June, 2001, upon consideration of defendants Philadelphia Housing Authority's and Angela Allen's Motion to Dismiss pursuant to Fed.R.Civ.P. 12(b)(6) and plaintiff's response thereto, and for the reasons contained in the accompanying memorandum, it is hereby ORDERED that:

- 1) Count III is dismissed with prejudice as to Allen only;
- 2) Count V is dismissed with prejudice as to all defendants;
- 3) Count VI is dismissed with prejudice as to all defendants and
- 4) for all other respects the motion is DENIED.

THOMAS N. O'NEILL, JR.

¹ The PHRC found that Allen's actions were not sufficient to constitute a violation of Section 5 of the PHRA as she was Bacone's non-supervisory co-worker. However, her conduct was deemed sufficient to support a finding of probable cause against Miller and the PHA. See Pls.' Compl. Ex. A.