

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

BRIAN S. KOONTZ and	:	
STANLEY ZUCZEK,	:	
	:	CIVIL ACTION
Plaintiffs,	:	
	:	
v.	:	No. 99-3191
	:	
USX CORPORATION and	:	
U.S. STEEL GROUP,	:	
	:	
Defendants.	:	

**MEMORANDUM**

**GREEN, S.J.**

**July 2, 2001**

Presently before the court is Defendants’ Motion for Summary Judgment and the responses thereto. For the reasons set forth below, Defendants’ Motion for Summary Judgment will be granted in part and denied in part.

**I. FACTUAL AND PROCEDURAL BACKGROUND**

Plaintiffs Brian Koontz (“Plaintiff Koontz”) and Stanley Zuczek (“Plaintiff Zuczek”) (collectively “Plaintiffs”) filed a complaint against Defendants USX Corporation (“Defendant USX”) and U.S. Steel Group (“Defendant U.S. Steel”) (collectively “Defendants”)<sup>1</sup> for allegedly “subjecting them to discrimination and retaliation on the basis of their opposition to discrimination and the assistance they provided to female employees of Defendants who were the subject of sexual harassment by Defendants and their agents.” (Compl. ¶ 1.)

Defendant USX hired Plaintiff Koontz on February 5, 1968 and Plaintiff Zuczek on April 23, 1968. (See Compl. ¶ 14.) Plaintiffs worked in the Accounting Department. During their tenure, Plaintiffs became involved with the grievance committee for Local 5092 of the

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<sup>1</sup>Defendant U.S. Steel Group is alleged to be a “wholly owned subsidiary of Defendant USX Corporation.” (Compl. ¶ 9.)

United Steelworkers of America, AFL-CIO (“the Union”) and bore the responsibility for processing employee grievances. (See Koontz’ Aff. at 2; Zuczek’s Aff. at 1-2.) In the Spring of 1996, Judy Petro-Roberts (“Petro-Roberts”) and Carol Williams (“Williams”), female employees in Defendant USX’s accounting department, complained to Plaintiff Koontz of sexual harassment by Anthony Schmidt (“Schmidt”), a male manager. (See Petro-Roberts’ Dep. at 31-32; Koontz’ Aff. at 2.) Specifically, Schmidt served as Department Manager for General Accounting.

Plaintiffs reported the complaints of sexual harassment to Robert Kennedy (“Kennedy”), Defendant USX’s Employee Relations Manager, and demanded that the harassment stop. (See Koontz’ Aff. at 2; Zuczek’s Aff. at 2.) Kennedy allegedly assured Plaintiffs that a record of the complaints would be placed in Schmidt’s file, and Schmidt would be transferred to another office. (See Koontz’ Aff. at 2-3; Zuczek’s Aff. at 2-3.) In or about June of 1996, Schmidt allegedly told Plaintiff Zuczek that he would “fire” both Plaintiffs “for what [they had] done to him.” (See Zuczek’s Dep. at 334-335; Zuczek’s Aff. at 3.) Soon thereafter, Schmidt allegedly began entering his former office and contacting Petro-Roberts and Williams by telephone and in person. (See Petro-Roberts’ Dep. at 33-35; Koontz’ Aff. at 3.) Along with Plaintiff Koontz, Petro-Roberts complained to her direct supervisor Cyril William Winslade (“Winslade”) to stop Schmidt’s conduct. (See Petro-Roberts’ Dep. at 33-34; Koontz’ Aff. at 4.) Winslade allegedly stated that he was powerless to stop Schmidt’s conduct. (See Petro-Roberts’ Dep. at 33-34; Koontz’ Aff. at 4.)

Also in August of 1996, Richard Walck (“Walck”), Schmidt’s replacement as Department Manager for General Accounting, issued Plaintiff Zuczek a set of “work instructions” on how to perform his job. (See Zuczek’s Aff. at 3; Walck’s Dep. at 21.) Plaintiff Koontz filed a

grievance relating to the “work instructions” as a “violation of the job description section of [Plaintiff Zuczek’s] contract.” (See Koontz’ Aff. at 3.) On October 25, 1996, Walck allegedly informed Plaintiff Zuczek, in the presence of Plaintiff Koontz, that he was not performing his job in accordance with the “work instructions.” (See Zuczek’s Aff. at 4, Koontz’ Aff. at 4.) Plaintiff Koontz claims that Walck failed to produce any reasons or documentation to support his position. (See Koontz’ Aff. at 5.) Plaintiff Zuczek was reassigned from an accounts payable control clerk to “a temporary job in the blue print room” on November 1, 1996. (See Zuczek’s Aff. at 4.) Plaintiff Zuczek filed a grievance with the Union and a complaint with the Equal Employment Opportunity Commission (EEOC) against Defendants regarding his removal from the accounting office. (See Zuczek’s Aff. at 5.)

In or around November or December of 1996, Schmidt allegedly began entering his former office with more frequency. (See Koontz’ Aff. at 7.) At the request of Petro-Roberts and Williams, Plaintiff Koontz filed several grievances to complain about Schmidt’s conduct. (See Def.s’ Ex.s 7, 8; Koontz’ Aff. at 7.) On January 3, 1997, a meeting was held with Plaintiff Koontz, Petro-Roberts, and two of Defendant USX’s managers. (See Koontz’ Aff. at 7.) During the meeting, Petro-Roberts explained how Schmidt sexually harassed her. (See Petro-Roberts Dep. at 59.) On January 14, 1997, another meeting was held with Defendants’ managers. (See Koontz’ Aff. at 8.) At said meeting, William McBunch (“McBunch”), Defendant USX’s Labor Relations Manager, allegedly stated that Defendant USX never agreed to prevent Schmidt from entering his former office, and the Union could not restrict Schmidt’s whereabouts. (See Koontz’ Aff. at 8.) The following day, Kennedy met with Plaintiffs and allegedly stated that there was a perception that Plaintiff Koontz was inciting Petro-Roberts and Williams to initiate sexual

harassment claims to satisfy Plaintiff Koontz' personal vendetta against Schmidt. (See Koontz' Aff. at 9.) Plaintiff Koontz filed a grievance regarding Kennedy's alleged statement. (See Def.s' Ex. 12.)

On January 16, 1997, Plaintiff Koontz informed Winslade that Plaintiff Zuczek, Petro-Roberts, Williams, and himself "would be off of work on union business on January 17, 1997." (See Koontz' Aff. at 9.) Kennedy allegedly requested a meeting with Plaintiffs. (See Koontz' Aff. at 9.) At said meeting, Plaintiffs allegedly informed Kennedy that they intended to file charges with the EEOC against Defendants concerning Schmidt's conduct. (See Koontz' Aff. 9, 10.) Kennedy allegedly proposed a joint investigation with the Union regarding the sexual harassment allegations against Schmidt. (See Koontz' Aff. at 10.) Between January 20 and January 24, 1997, Defendant USX conducted an investigation of Schmidt's alleged conduct and concluded that no sexual harassment involving Schmidt had occurred. (See Lauritzen Dep. at 44.) In or around February of 1997, Williams was removed from the accounting office. (See Koontz' Aff. at 12.) Approximately three months later, on April 7, 1997, Plaintiff Zuczek, in an oral agreement with Kennedy, consented to withdraw his grievances and EEOC charge against Defendant USX protesting his removal from the accounting office provided that Defendant USX returned Williams to the accounting office. (See Zuczek's Aff. at 8.)

On May 30, 1997, in preparation for Defendant USX's annual inventory, Plaintiffs met with Winslade and Walck to discuss the allocation of inventory work. (See Zuczek's Aff. at 8.) Plaintiffs allegedly questioned Winslade about the scheduling of non-union employees to conduct a portion of the inventory. (See Zuczek's Aff. at 8.) Later that day, Plaintiffs met with John Pentin ("Pentin"), the newly assigned Department Manager for General Accounting, to

discuss the matter. (See Zuczek's Aff. at 9.) During the meeting, Pentin allegedly threatened Plaintiff Zuczek and physically assaulted Plaintiff Koontz.<sup>2</sup> (See Koontz' Aff. at 15-16; Zuczek's Aff. at 9.) The following day, May 31, 1997, Plaintiff Zuczek alleges that Pentin told him that he would "fire" Plaintiffs if they "put any black mark on [Pentin's] record." (See Zuczek's Aff. at 10.)

On October 4, 1997, Pentin announced that a mandatory Safety and Communications meeting would be held on October 16, 1997 for employees in the accounting office. (See Def.s' Ex. 19.) On October 15, 1997, Plaintiffs informed Walck, via voice mail messages, that they would be absent from the meeting due to official union business. (See Koontz' Aff. at 17; Zuczek's Aff. at 10-11.) On October 20, 1997, Defendant USX suspended Plaintiffs for five (5) days for being "absent from work without permission." (See Def.s' Ex. 21.) Plaintiffs filed grievances regarding their suspensions. (See Def.s' Ex. 22.) On October 31, 1997, Plaintiffs' attended a "due process" hearing before Walck and Pentin regarding Plaintiffs' suspensions. (See Zuczek's Aff. at 12; Koontz' Aff. at 18.) During the hearing, Plaintiff Zuczek used "profane and abusive language" toward Pentin for which he received another five (5) day suspension on November 11, 1997. (See Def.s' Ex. 27.) On July 7, 1998, the Arbitration Board reviewed Plaintiffs' October 20, 1997 suspensions and sustained the grievance on the ground that the five (5) day suspensions were too severe. (See Def.s' Ex. 23.) The Arbitration Board did not review Plaintiff Zuczek's November 11, 1997 suspension.

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<sup>2</sup>Plaintiff Koontz filed a criminal complaint relating to Pentin's alleged physical and verbal assault against Plaintiff Koontz on May 30, 1997. (See Pl.s' Ex. E.)

On November 12, 1997, Plaintiffs left voice mail messages for Walck stating that they were “call[ing] in sick” so that they could attend an appointment with a psychiatrist for a mental health evaluation. (See Koontz’ Aff. at 19; Zuczek’s Aff. at 13.) Plaintiffs submitted notes from Dr. Victor Nemerof (“Dr. Nemerof”) stating that neither Plaintiff should return to work until further notice. (See Def.s’ Ex. 31.) On November 25, 1997, McBunch, Defendant USX’s Labor Relations Manager, wrote to Plaintiffs requesting detailed medical information regarding their diagnosis, prognosis and treatment plans. (See Def.s’ Ex. 32.) Plaintiffs submitted letters from Dr. Robert H. Brick (“Dr. Brick”), dated December 2 and December 6, 1997, describing Plaintiffs’ diagnoses, prognoses and treatment plans. (See Def.s’ Ex. 33.) The letters also state that Plaintiffs were not presently prepared to return to work. (See Def.s’ Ex. 33.)

Defendant USX’s Medical Director, Dr. Cornell Percy (“Dr. Percy”), contacted Dr. Brick to discuss Plaintiffs conditions, but Dr. Brick stated that, at the direction of Plaintiffs, he was not at liberty to discuss those matters. (See Brick’s Dep. at 72-73.) On December 10, 1997, Defendant USX allegedly ceased paying Plaintiff Zuczek’s salary and discontinued his benefits. (See Zuczek’s Aff. at 13.) On December 18, 1997, Pentin, Defendant USX’s Accounting Manager, wrote to Plaintiffs ordering Plaintiffs to report to work by December 22, 1997. (See Def.s’ Ex. 35.) On December 22, 1997, Plaintiffs were suspended for “[r]efusal to report to work as directed.” (See Def.s’ Ex. 36.) On January 5, 1998, Defendant USX terminated Plaintiffs’ employment for failure to return to work on December 22, 1997.

On May 5, 1998, an arbitration hearing was held regarding Plaintiffs' October 20, 1997 suspensions for "being absent from work without permission."<sup>3</sup> (See Def.s' Ex. 23.) The arbitration panel ruled that Plaintiffs' October 20, 1997 suspensions for "being absent without permission lacked proper cause." (See Def.s' Ex. 23.) On or about June 17, 1998, an arbitration hearing was held regarding Plaintiffs' January 5, 1998 discharges for failure to return to work. (See Pl.s' Ex. 8.) The arbitration panel ruled that Defendant USX lacked proper cause to discharge Plaintiffs, and Plaintiffs were to be reinstated and granted full pay and benefits. (See Pl.s' Ex. 8.) Defendant USX rescinded Plaintiff Koontz' suspension and discharge on or about October 27, 1998. However, Plaintiff Koontz was suspended on October 31, 1998 and then discharged on November 5, 1998 for "misrepresenting" his "ability to work."<sup>4</sup> (See Def.s' Ex.s 51, 52.) Defendant USX did not rescind Plaintiff Zuczek's suspension or discharge on the ground that Plaintiff Zuczek failed to timely file his grievance of the January 5, 1998 discharge.

Plaintiffs filed a five (5) count complaint on or about June 23, 1999 bringing claims against Defendants for violations of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, et seq. ("Title VII"), 42 U.S.C. §1981a, the Pennsylvania Human Relations Act, 43 Pa.C.S.A. § 959 et seq. ("PHRA"), the Family and Medical Leave Act, 29 U.S.C. § 2601 et seq. ("FMLA"), and Pennsylvania common law. Defendants filed three (3) motions which are discussed below.

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<sup>3</sup>While awaiting the decision of that hearing, Plaintiffs were suspended for failing to return company pagers. (See Def.s' Ex. 40.) On June 4, 1998, Plaintiffs' suspensions for failing to return company pagers were converted into discharges.

<sup>4</sup>Defendants contend that Plaintiff Koontz misrepresented his ability to work when, at an arbitration hearing, he represented that he was disabled and unable to work in February of 1998. (See Def.s' Ex. 44.) On September 2, 1998, Plaintiff Koontz testified at an unemployment compensation hearing that he "probably could've returned to work had [he] not been fired." (See Def.s' Ex 47 at 12.)

## II. DISCUSSION

Summary judgment shall be awarded “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(c). A dispute regarding a material fact is genuine “if the evidence is such that a reasonable jury could return a verdict for the nonmoving party.” Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). Once the moving party has carried the initial burden of showing that no genuine issue of material fact exists, the non-moving party cannot rely on conclusory allegations in its pleadings or in memoranda and briefs to establish a genuine issue of material fact. See Pastore v. Bell Telephone Co. of Pa., 24 F.3d 508, 511 (3d Cir. 1994). The nonmoving party, instead, must establish the existence of every element essential to his case, based on the affidavits or by the depositions and admissions on file. See id. (citing Harter v. GAF Corp., 967 F.2d 846, 852 (3d Cir. 1992)); see also Fed. R. Civ. P. 56(e). The evidence presented must be viewed in the light most favorable to the non-moving party. See Lang v. New York Life Ins. Co., 721 F.2d 118, 119 (3d Cir. 1983). In the present matter, Defendant moves for summary judgment against each of Plaintiffs’ claims, Counts I through V, as well as Plaintiffs’ Request for Punitive Damages.

### A. Count I (“Retaliation under Title VII”)

Section 704(a) of Title VII forbids an employer from discriminating against an employee “because [the employee] has opposed any practice made an unlawful employment practice by this subchapter, or because [the employee] has made a charge, testified, assisted, or participated in any manner in an investigation . . . under this subchapter.” 42 U.S.C. 2000e-3(a).

Claims of retaliation brought pursuant to Title VII are analyzed under a burden-shifting framework, the particulars of which vary depending on whether the suit is characterized as a “pretext” suit or a “mixed motives” suit.<sup>5</sup> Since Plaintiffs do not purport to assert a “mixed motives” suit,<sup>6</sup> Plaintiffs’ retaliation claim will be analyzed using the burden-shifting framework for “pretext” suits set forth in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) and Texas Dep’t of Community Affairs v. Burdine, 450 U.S. 248 (1981) and their progeny, Keller v. Orix Credit Alliance, Inc., 130 F. 3d 1101, 1108 (3d Cir. 1997).

Under a “pretext” theory, a plaintiff must first establish a prima facie case for retaliation under Title VII. A plaintiff advances a prima facie case by showing that: (1) he engaged in a protected activity; (2) the employer took an adverse employment action against him; and (3) there was a causal connection between his participation in the protected activity and the adverse employment action. See Robinson v. City of Pittsburgh, 120 F.3d 1286, 1299 (3d Cir. 1997). Temporal proximity between the protected activity and the termination may be sufficient to establish a causal link. See Jalil v. Avdel Corp., 873 F.2d 701, 708 (3d Cir. 1989). In addition, a plaintiff can substantiate a causal connection between protected conduct and adverse employment action through timing and ongoing antagonism, as well as other types of

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<sup>5</sup>“Mixed motive” cases involve evidence of direct intent to discriminate in the employment decision while “pretext” cases involve circumstantial evidence that the employment decision was made on improper grounds, and that defendant’s proffered reasons for the decisions are pretexts. Starceski v. Westinghouse Elec. Corp., 54 F.3d 1089, 1095-96 n.4 (3d Cir. 1995).

<sup>6</sup>In their motion for summary judgment, Defendants challenged Plaintiffs’ retaliation claims using both the “pretext” and the “mixed motives” theories. In response, Plaintiffs analyzed their retaliation claim under the “pretext” theory only. Therefore, it appears that Plaintiffs are not advancing the “mixed motives” theory, and Defendants do not contend that mixed motives were involved in the sanctions imposed on Plaintiffs.

circumstantial evidence that support the inference. See Farrell v. Planters Lifesavers Co., 206 F.3d 271, 280-81 (3d Cir. 2000).

Once the plaintiff satisfies a prima facie case, the burden of production shifts to the defendant to articulate a legitimate, non-discriminatory reason for its actions. See Burdine, 450 U.S. at 254. If the defendant points to evidence of a non-discrimination reason for its actions, the burden of production then shifts back to the plaintiff to point to some evidence that the defendant's proffered reasons were a pretext for retaliation. See St. Mary's Honor Center v. Hicks, 509 U.S. 502, 511 (1993). The burden of proof remains on the plaintiff. To defeat summary judgment, the plaintiff must come forward with evidence from which a factfinder could reasonably either (1) disbelieve the employer's articulated legitimate reasons; or (2) believe that an invidious discriminatory reason was more likely than not a determinative cause of the employer's action. See Fuentes v. Perskie, 32 F.3d 759, 764 (3d Cir. 1994). In order to make the requisite showing of pretext,

the plaintiff cannot simply show that the employer's decision was wrong or mistaken, since the factual dispute at issue is whether the discriminatory animus motivated the employer, not whether the employer is wise, shrewd, prudent or competent. (citations omitted). Rather, the non-moving plaintiff must demonstrate such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its actions that a reasonable factfinder *could* rationally find them 'unworthy of credence,' . . . and hence infer 'that the employer did not act for non-discriminatory reasons.'

Id. at 765 (quoting Ezold v. Wolf, Block, Schorr & Solis-Cohen, 983 F.2d 509, 531 (3d Cir. 1991)) (emphasis in original).

In the matter at bar, Defendants argue that they are entitled to summary judgment as to Count I, Plaintiffs’ retaliation claim under Title VII, because Plaintiffs cannot establish a prima facie case of retaliation. Specifically, Defendants contend that Plaintiffs cannot establish a causal link between their complaints made on behalf of female employees, Petro-Roberts and Williams, and their disciplines or discharges. Even if a prima facie case is established, Defendants argue that Plaintiffs are unable present evidence sufficient to infer that Defendants’ legitimate non-discriminatory reasons were a pretext to cover up discrimination. Defendants assert that the adverse employment action taken against Plaintiffs were legitimate and non-discriminatory.

In response, Plaintiffs contend that they have offered sufficient evidence to establish a causal link between their complaints on behalf of Petro-Roberts and Williams and their disciplines and discharges. Plaintiffs point to several factors in support of a causal link: (1) temporal proximity—Plaintiffs were often disciplined during or immediately following their “advocacy and representation” of Petro-Roberts and Williams; (2) ongoing antagonism—Plaintiffs were disciplined over a period of ten months; (3) severity of discipline—allegedly no other employee was ever subjected to similar discipline; and (4) direct threats—two of Defendant USX’s managers, Schmidt and Pentin, allegedly threatened to “fire” Plaintiffs because of work related activity. Plaintiffs assert that Defendants’ reasons for its actions were not legitimate but, rather, pretextual in that the discipline and discharges lacked foundation.<sup>7</sup>

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<sup>7</sup>Plaintiffs attacked several of Defendants’ employment actions as pretextual including, but not limited to: (1) Plaintiff Zuczek’s removal from his position in the accounting department for allegedly failing to do his job properly without any prior warnings regarding his performance; (2) Plaintiffs’ suspensions for failing to attend a mandatory meeting despite notices  
(continued...)

Upon review of the evidence, I conclude that Plaintiffs have presented sufficient evidence to show a causal nexus between their participation in a protected activity and an adverse employment action to withstand a motion for summary judgment. The parties agree that Plaintiffs engaged in protected activity when they, as members of the Union's grievance committee, represented female employees who complained of sexual harassment. The parties also agree that Defendants took adverse employment action against Plaintiffs including, but not limited to, discipline and discharges.<sup>8</sup> Although Defendants contend that Plaintiffs' discipline and discharges were not a result of Plaintiffs' complaints, Plaintiffs have presented sufficient evidence to support the contrary. The temporal proximity between Plaintiffs' complaints and their discipline and discharges support the existence of a causal link between the events.<sup>9</sup> The causal nexus is further supported by evidence of alleged direct threats by Schmidt and Pentin against Plaintiffs, and Defendants' ongoing antagonism against Plaintiffs. Plaintiffs also presented evidence that

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<sup>7</sup>(...continued)

of their absences prior to the meeting; (3) Plaintiffs' suspensions for failing to return to work although they provided medical documentation stating that they were unable to return to work; and (4) Plaintiff Zuczek's suspension for using "abusive" language, the same language allegedly used by managers without the imposition of sanctions.

<sup>8</sup>The record discloses that Defendant took the following adverse employment actions against Plaintiffs: (1) the removal of Plaintiff Zuczek from his position in the accounting department in November of 1996; (2) the October 20, 1997 suspensions of Plaintiffs for missing the Safety and Communications meeting; (3) the November 11, 1997 suspension of Plaintiff Zuczek for using profane language; (4) the December 22, 1997 suspensions and January 5, 1998 terminations of Plaintiffs for failing to return to work; (5) the May 29, 1998 suspensions and ultimate terminations of Plaintiffs for failing to return company pagers; and (6) the October 31, 1998 suspension and November 5, 1998 termination of Plaintiff Koontz for misrepresenting his ability to work.

<sup>9</sup>A review of the facts illustrates that Plaintiffs often suffered adverse employment actions soon after filing grievances or complaints regarding the conduct of Defendants' managers.

discredits Defendants' assertion that its employment actions were legitimate. Using such evidence, a fact finder could infer that Defendants did not act for the proffered non-discriminatory reasons. On summary judgment, viewing the evidence in a light most favorable to Plaintiffs, a reasonable jury could conclude that Plaintiffs were retaliatorily discharged. Thus, Defendant's Motion for Summary Judgment on Count I will be denied.

**B. Count III ("PHRA")**

Defendants move for summary judgment as to Count III, Plaintiffs' retaliation claim under the Pennsylvania Human Relations Act ("PHRA"), on the ground that Plaintiffs cannot establish a prima facie case of retaliation under the PHRA. Plaintiffs argue the converse. As the analytical framework of an action under the PHRA is similar to a claim under Title VII, the discussion of Plaintiffs' retaliation claim under Title VII applies equally to Plaintiffs' retaliation claim under the PHRA. Accordingly, Count III survives Defendants' Motion for Summary Judgment.

**C. Count II ("Section 1981a")**

Section 1981a addresses "damages in cases of intentional discrimination in employment." 42 U.S.C. § 1981a. The statute allows a complaining party to recover compensatory and punitive damages for claims brought under "section 706 or 707 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-5)." See 42 U.S.C. § 1981a(a)(1); Pollard v. E.I. du Pont de Nemours & Co., 121 S. Ct. 1946, 1949 (2001).

Defendants move for summary judgment as to Count II on the ground that Section 1981a does not provide a separate cause of action.<sup>10</sup> Plaintiffs argue the contrary. Upon reviewing the statute, I conclude that Section 1981a does not provide a separate cause of action. The statute merely provides parties with damages for claims brought under the Civil Rights Act. See Pollard, 121 S. Ct. at 1949. To the extent that the allegations in Count II assert a separate cause of action under Section 1981a, Count II must be dismissed. However, to the extent that the allegations in Count II assert additional claims for relief under Count I, those allegations are cognizable.<sup>11</sup> Accordingly, Defendants’ Motion for Summary Judgment as to Count II will be granted to the extent that Count II asserts a separate cause of action under Section 1981a.

**D. Count IV (“FMLA”)**

Under the Family and Medical Leave Act (“FMLA”), eligible employees are entitled to twelve (12) weeks leave for certain family and medical reasons with the right to reinstatement to their former position upon the completion of the leave. See 29 U.S.C. § 2601 et seq. An eligible employee under the FMLA is defined as an individual who has been employed

(i) for at least 12 months by the employer with respect to whom leave is requested . . . ; and

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<sup>10</sup>Defendants also move to dismiss Count II on the ground that Plaintiffs had not alleged facts to support their claim of sex or sexual orientation discrimination. In response, Plaintiffs withdrew their allegations of sex discrimination and sexual orientation discrimination and limited Count II to allegations of retaliation.

<sup>11</sup>Remedies authorized under Section 1981a are “in addition to the relief authorized by § 706(g)” of the Civil Rights Act of 1964. See Pollard, 121 S. Ct. at 1951. Section 1981a(a)(1) provides that, in intentional discrimination cases brought under Title VII, “the complaining party may recover compensatory and punitive damages . . . , in addition to any relief authorized by section 706(g) of the Civil Rights Act of 1946, from the respondent.” 42 U.S.C.1981a(a)(1).

(ii) for at least 1,250 hours of service with such employer during the previous 12-month period.

29 U.S.C. § 2611(2)(A).

In order to determine whether the plaintiff satisfies the hours of service requirement, the FMLA uses the same principles as those used in the Fair Labor Standards Act (“FLSA”) codified at 29 U.S.C. § 207. The FLSA provides that “payments made for occasional period when no work is performed due to vacation, holiday, illness . . . and other similar causes” are not considered compensation for “hours of employment.” 29 U.S.C. § 207(e)(2). The FLSA also states that:

Time spent in adjusting grievances between an employer and employees during the time the employees are required to be on premises is hours worked, but in the event a bona fide union is involved the counting of such time will, as a matter of enforcement policy, be left to the process of collective bargaining or to the custom or practice under the collective bargaining agreement.

29 C.F.R. § 785.42. Applying those standards to the FMLA, paid vacation and sick time are not considered “hours of service.” In addition, determining whether or not time spent adjusting grievances by union employees is compensable under the FLSA is left up to the collective bargaining process or the custom or practice under the resulting agreement.

Before taking FMLA leave, an employee must provide at least thirty (30) day advance notice to the employer before leave commences, if the leave is foreseeable. See 29 C.F.R. § 825.302(a).<sup>12</sup> “When the need for leave . . . is not foreseeable, an employee should give

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<sup>12</sup>If providing thirty (30) day notice is not possible, notice must be given “as soon as practicable.” See 29 C.F.R. § 825.302(a). “‘As soon as practicable’ means as soon as both possible and practicable, taking into account all of the facts and circumstances of the individual  
(continued...) ”

notice to the employer of the need for FMLA leave as soon as practicable under the facts and circumstances of the particular case.” 29 C.F.R. § 825.303(a) (1993). The employee “need not expressly assert rights under the FMLA, but may only state that leave is needed.” Id.

Defendants aver they are entitled to summary judgment as to Count IV, Plaintiffs’ FMLA claim, for three reasons. First, Defendants argue that Plaintiff Zuczek was not an “eligible employee” under the FMLA. Defendants offer time sheets and an affidavit of Kennedy, Defendant USX’s Employee Relations Manager, to show that during the twelve (12) month periods of November 13, 1996 to November 12, 1997 and December 7, 1996 to December 6, 1997, Plaintiff Zuczek worked less than 1,250 hours.<sup>13</sup> (See Def.s’ Ex. 57 with attached Ex.s A,B,C.) Specifically, Defendants state that Plaintiff Zuczek worked 1,242.9 hours between November 13, 1996 to November 12, 1997 and 1,186.6 hours between December 7, 1996 to December 6, 1997. (See Def.s’ Ex.s 57, I.) Defendants do not consider the hours Plaintiff Zuczek spent on union business as “hours worked,” because those hours are tracked separately and compensated by the Union. (See Def.s’ Ex. HH, Koontz’ Dep. at 278; Zuczek’s Dep. at 95-96.)

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<sup>12</sup>(...continued)

case.” 29 C.F.R. § 825.302(b). This would ordinarily mean “at least verbal notification to the employer within one or two business days of when the need for leave becomes known to the employee.” Id.

<sup>13</sup>Defendants maintain that Plaintiff Zuczek’s FMLA leave commenced, at the earliest, on December 6, 1997 when Defendants received a letter from Dr. Brick outlining Plaintiff Zuczek’s medical condition. (See Def.s’ Ex.33.) Therefore, the twelve (12) month period would begin on December 7, 1996. However, in arguendo, Defendants consider that Plaintiff Zuczek’s FMLA leave may have commenced on November 12, 1997 when Defendants received a note from Dr. Nemerof regarding Plaintiff Zuczek’s medical condition. (See Def.s’ Ex. 31.) Under those circumstances, the twelve (12) month period would begin on November 13, 1996. Regardless of which date is applied, Defendants contend that Plaintiff Zuczek’s hours of service fail to amount to 1,250.

Second, Defendants contend that Plaintiffs failed to provide Defendants with timely and adequate notice of their need for FMLA leave. Finally, Defendants assert that Plaintiffs were terminated for independent, legitimate and nondiscriminatory business reasons.

Plaintiffs contend that Plaintiff Zuczek was an “eligible employee” for FMLA purposes, because he worked the requisite 1,250 hours between November 13, 1996 and November 12, 1997. Plaintiffs state that Defendants’ calculation is faulty, because it fails to include Plaintiff Zuczek’s “union business hours,” which allegedly accounted for 33% of his time. (See Walck’s Dep. At 24.) Furthermore, due to the unforeseeability of their leave, Plaintiffs argue that they were not required to provide advance notice, but, rather, notice as soon as practicable. Finally, Plaintiffs reject Defendants’ proffered non-discriminatory reasons for their terminations.

The evidence before the court does not support the contention that Plaintiff Zuczek worked 1,250 hours, using either November 12, 1997, or December 6, 1997 as the commencement of Plaintiff Zuczek’s FMLA leave. Furthermore, the hours Plaintiff Zuczek spent conducting “union business” do not constitute “hours worked” for purposes of the FMLA. The evidence shows that Defendants neither tracked nor compensated the hours employees spent performing union business. (See Def.s’ Ex. 57; Koontz’ Dep. at 278; Zuczek’s Dep. at 44-45.) Instead, the Union compensated Plaintiff Zuczek as an employee. (See Def.s’ Ex. HH.) On a motion for summary judgment, the non-moving party cannot rely on mere allegations, but must come forward with some evidence to support his claims. See Pastore, 24 F.3d at 511. Because Plaintiff Zuczek failed to present any evidence, either factual or legal, to support his claims that he worked the required 1,250 hours of service as defined under the FMLA, Plaintiff Zuczek is not considered an “eligible employee” under the FMLA. Accordingly, Plaintiff Zuczek’s FMLA

claim will be will be dismissed without prejudice to Plaintiff Zuczek submitting evidence to support his claim at the Final Pre-Trial Conference.

Plaintiff Koontz' FMLA claim, however, survives Defendants' motion. Plaintiff Koontz submitted a doctor's note the day of his absence from work. (See Def.s' Ex. 31.) Plaintiff Koontz also submitted letters from Dr. Brick outlining his medical condition within twelve days of the date of Defendants' request. (See Def.s' Ex.33.) Plaintiff Koontz' notices, viewed in a light most favorable to him, were submitted "as soon as practicable" under the circumstances. Furthermore, for reasons already stated, Plaintiff Koontz provided sufficient evidence to counter Defendants' proffered reason for terminating his employment. Thus, Defendants' Motion for Summary Judgment on Count IV will be denied as to Plaintiff Koontz' FMLA claim, but granted as to Plaintiff Zuczek's FMLA claim, and said claim will be dismissed without prejudice to Plaintiff Zuczek submitting evidence to support his claim at the Final Pre-Trial Conference.

**E. Count V ("Intentional Infliction of Emotional Distress")**

Under Pennsylvania law, the Worker's Compensation Act provides the exclusive remedy for work-related injuries. See 77 P.S. § 481(a). The exclusivity provision bars all claims for work-related injuries, including those based on intentional torts. See Matczak v. Frankford Candy & Chocolate Co., 136 F.3d 933, 940 (3d Cir. 1997); Poyser v. Newman & Co., 522 A.2d 548, 550 (Pa. 1987). However, the Act creates a "personal animus" exception for injuries caused "by an act of a third person intended to injure the employee because of reasons personal to him, and not directed against him as an employee or because of his employment." 77 P.S. 411(1).

Defendants argue that Count V, Plaintiffs' Intentional Infliction of Emotional Distress claim, is barred by the Pennsylvania Workers' Compensation Act. Defendants contend

that the “personal animus” exception is inapplicable to this claim, because the alleged retaliation is based on Plaintiffs’ work-related representation of employees. Moreover, Defendants maintain that Count V is prima facially flawed, in that Plaintiffs cannot produce any evidence that Defendants engaged in “extreme or outrageous” conduct, nor have Plaintiffs provided expert testimony that they have suffered “severe” emotional distress.

In response, Plaintiffs argue that Count V falls under the “personal animus” exception, because Defendants’ managers engaged in “an unrelenting and ruthless pattern of personally-driven misconduct” which were not related to the managers’ employment. (See Pl.s’ Resp. at 55.) Furthermore, Plaintiffs assert that Defendants’ alleged retaliatory conduct was “extreme or outrageous” by its nature. Plaintiffs also allege that they suffered “severe” psychological distress, as evidenced by the deposition testimony of Drs. Nemerof and Brick. (See generally Nemerof’s Dep; Brick’s Dep.)

The evidence does not support Plaintiffs’ contention that Defendants’ managers engaged in misconduct for reasons unrelated to work. Plaintiffs neither pled nor presented any evidence to show that Defendants’ managers engaged in the alleged retaliatory conduct for personal reasons, rather than work related reasons. Plaintiffs’ Complaint, affidavits and depositions allege that Defendants’ managers retaliated against Plaintiffs, because Plaintiffs represented female employees. (See Compl. at §1; Koontz’ Aff. and Dep.; Zuczek’s Aff. and Dep.) The “personal animus” exception to the Worker’s Compensation Act is therefore inapplicable to Count V. On a motion for summary judgment, the non-moving party cannot rely on conclusory allegations in its pleadings or in memoranda and briefs to establish a genuine issue

of material fact. See Pastore, 24 F.3d at 511. Accordingly, Defendants' Motion for Summary Judgment on Count V will be granted and Count V will be dismissed.

**F. Punitive Damages**

Punitive damages are not available under the PHRA or the FMLA. See 43 Pa.C.S.A. 959 et seq.; 29 U.S.C. 2617. By contrast, punitive damages are available under Title VII and 1981a, if the employee demonstrates that the employer engaged "in a discriminatory practice or discriminatory practices with malice or reckless indifference to the federally protected right of an aggrieved individual." 42 U.S.C. 1981a(b)(1).

Defendants move for summary judgment on Plaintiffs' Request for Punitive Damages for Counts I through IV. Defendants assert that punitive damages are not available under the PHRA and the FMLA and therefore, not available under Counts III and IV. Moreover, Defendants contend that Plaintiffs are not entitled to punitive damages under either Counts I and II, Plaintiffs' Title VII and Section 1981a claims. Plaintiffs concede that punitive damages are not available for either the PHRA or the FMLA claims. However, Plaintiffs challenge Defendants' contention that they are not entitled to punitive damages for their retaliation claim under Title VII and their 1981a claim. Plaintiffs argue that the evidence shows that Defendants discriminated against Plaintiffs with malice and/or reckless indifference.

Since Plaintiffs concede that punitive damages are not available under the PHRA and the FMLA, Defendants' motion will be granted as to Counts III and IV. Also, to the extent that Count II alleges a separate cause of action under Section 1981a, Defendants' motion will be granted as to Count II. However, Defendants' motion will be denied as to Count I, Plaintiffs' retaliation claim under Title VII. Viewing the evidence in a light most favorable to Plaintiffs,

there is a genuine issue of material fact regarding whether Defendants' managers retaliated against Plaintiffs with malice and/or reckless indifference. Thus, Defendants' Motion for Summary Judgment on Plaintiffs' Request for Punitive Damages will be granted as to Counts III and IV, granted as to Count II, to the extent Count II alleges a separate cause of action under Section 1981a, and denied as to Count I, which is read as requesting the additional remedies set out in Section 1981a.

An appropriate Order follows.

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

BRIAN S. KOONTZ and	:	
STANLEY ZUCZEK,	:	
	:	CIVIL ACTION
Plaintiffs,	:	
	:	
v.	:	No. 99-3191
	:	
USX CORPORATION and	:	
U.S. STEEL GROUP,	:	
Defendants.	:	

**ORDER**

**AND NOW**, this 2<sup>nd</sup> day of July, 2001, **IT IS HEREBY ORDERED** that Defendants' Motion for Summary Judgment is:

1. **GRANTED** as to Count II, Count V and Plaintiffs' Request for Punitive Damages for Counts II, III and IV, and judgment on said claims will hereafter be entered in favor of Defendants;
2. **GRANTED** as to Plaintiff Zuczek's FMLA claims in Count IV, and judgment will hereafter be entered, unless Plaintiff Zuczek presents evidence to support his claim at the Final Pre-Trial Conference; and
3. **DENIED** in all other respects.

BY THE COURT:

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CLIFFORD SCOTT GREEN, S.J.