

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

JANICE TUPPER) CIVIL ACTION
)
 v.)
)
 HAYMOND & LUNDY, ET AL.) No. 00-3550

MEMORANDUM

Padova, J. August , 2001

The instant matter arises on Defendant Haymond & Lundy's Motion for Summary Judgment and Defendants Robert Hochberg, John Haymond, and Law Office of John Haymond's Motion for Summary Judgment. For the reasons that follow, the Court grants in part and denies in part the Motions. Specifically, the Court grants judgment in favor of all Defendants on the intentional infliction of emotional distress claim. The Court also dismisses the punitive damages claim on the state causes of action. The Court denies Defendants' motions in all other respects.

I. Background

Plaintiff Janice Tupper ("Tupper") brings this suit involving claims of retaliatory discharge pursuant to Title VII of the Civil Rights Act of 1964 and the Pennsylvania Human Relations Act ("PHRA"). Tupper claims that she was terminated from her position with the law firm Haymond & Lundy in retaliation for filing sexual harassment claims with the Equal Employment Opportunity Commission ("EEOC") and the Pennsylvania Human Relations Commission ("PHRC").

Tupper also brings related claims for intentional infliction of emotional distress and intentional or negligent damage to property.

Plaintiff originally worked in the Law Office of John Haymond in Connecticut. She alleges that between August 1995 and November 1998, partner John Haymond ("Haymond") harassed and abused her after the breakup of their brief consensual sexual relationship. In November 1998, Robert Hochberg ("Hochberg"), Haymond's partner, offered to transfer Plaintiff to Philadelphia in the office of a newly formed entity, Haymond & Lundy. Plaintiff agreed to the move, but in April 1999 filed complaints with the EEOC and PHRC when the harassment continued. Tupper was terminated on July 1, 1999. Plaintiff lived in an apartment leased by the Defendants, and on July 26, 1999, Defendants entered the apartment and removed the contents. Plaintiff's damage to property claims arise from alleged damage to the property seized from the apartment.

The Defendants named in the Complaint are Haymond & Lundy, the Law Office of John Haymond, John Haymond, and Robert Hochberg.¹ Haymond & Lundy and the Law Office of John Haymond are named as defendants on the federal retaliation claim, while all four defendants are named on all the other claims. All of the named Defendants seek summary judgment on the claims in which they are named.

¹The claims against John Haymond and Robert Hochberg are brought against them individually and in their capacity trading as Haymond & Lundy and/or Law Office of John Haymond.

II. Legal Standard

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with 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). An issue is "genuine" if the evidence is such that a reasonable jury could return a verdict for the non-moving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). A factual dispute is "material" if it might affect the outcome of the case under governing law. Id.

A party seeking summary judgment always bears the initial responsibility for informing the district court of the basis for its motion and identifying those portions of the record that it believes demonstrate the absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). Where the non-moving party bears the burden of proof on a particular issue at trial, the movant's initial Celotex burden can be met simply by "pointing out to the district court that there is an absence of evidence to support the non-moving party's case." Id. at 325. After the moving party has met its initial burden, "the adverse party's response, by affidavits or otherwise as provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e). That is, summary

judgment is appropriate if the non-moving party fails to rebut by making a factual 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, 477 U.S. at 322. Under Rule 56, the Court must view the evidence presented on the motion in the light most favorable to the opposing party. Anderson, 477 U.S. at 255. "[I]f the opponent [of summary judgment] has exceeded the 'mere scintilla' [of evidence] threshold and has offered a genuine issue of material fact, then the court cannot credit the movant's version of events against the opponent, even if the quantity of the movant's evidence far outweighs that of its opponent. Big Apple BMW, Inc. v. BMW of North America, Inc., 974 F.2d 1358, 1363 (3d Cir. 1992).

III. Discussion

A. Retaliatory Discharge pursuant to Title VII and PHRA²

Courts have uniformly interpreted the PHRA and Title VII; thus, any conclusions under Title VII analysis will be equally applicable to her PHRA claim. Gautney v. Americas Propane, Inc., 107 F. Supp. 2d 634, 640 (E.D. Pa. 2000). To establish a prima facie case of discriminatory retaliation under Title VII, a plaintiff must demonstrate that: (1) she was engaged in a protected activity under Title VII; (2) that the employer took an adverse

²Plaintiff brings the Title VII claim against Haymond & Lundy and the Law Offices of John Haymond. She brings the PHRA claim against all the defendants.

employment action against her; and (3) there is a causal connection between the protected activity and the adverse employment action. Barber v. CSX Distribution Svcs., 68 F.3d 694, 701 (3d Cir. 1995); Charlton v. Paramus Bd. of Educ., 25 F.3d 194, 201 (3d Cir.), cert. denied, 513 U.S. 1022 (1994). If the plaintiff succeeds in presenting a prima facie case of retaliation, the burden shifts to the defendants to articulate a legitimate, nondiscriminatory reason for its action. Shaner v. Synthes, 204 F.3d 494, 500 (3d Cir. 2000). The burden then shifts back to the plaintiff to demonstrate by a preponderance of the evidence that the articulated reasons are only a pretext for retaliation. Id. The articulated reasons are pretextual if plaintiff demonstrates "that retaliatory intent had a 'determination effect' on the employer's decision." Id. at 501 n.8.

Plaintiff brings the federal retaliation claim against the two law firms, and the state retaliation claim against the two law firms and individuals Hochberg and Haymond. For the reasons that follow, the Court concludes that Plaintiff has established that there are genuine issues of material fact that warrant denial of Defendants' Motion for Summary Judgment.

1. Prima facie case under Title VII

Plaintiff has set forth evidence with respect to all three elements of a prima facie case under Title VII that is sufficient to defeat Defendants' Motion for Summary Judgment. With respect to

the first requirement, the parties do not dispute that Plaintiff engaged in conduct that is protected under Title VII and the PHRA. Plaintiff filed formal complaints and made numerous other complaints and protests. Pl. Ex. A ("Tupper Dep. 2/19/01") at 46; Def. Ex. O ("PHRC/EEOC complaint"). All of these are acceptable indicia of protected conduct. See Barber, 68 F.3d at 702 (noting that protected conduct includes informal protests of discriminatory employment practices, including informal protests to management). Thus, Plaintiff has set forth this first element of a prima facie case.

The second requirement of Plaintiff's prima facie case of retaliation is to show an adverse employment action taken by the employer. Barber, 68 F.3d at 701. An adverse employment action requires serious tangible harm which alters plaintiff's compensation, terms, conditions or privileges of employment. See Robinson v. City of Pittsburgh, 120 F.3d 1286, 1300 (3d Cir. 1997). Plaintiff alleges three specific "tangible adverse employment" actions: (1) employers required her to undergo mandatory counseling; (2) employers discharged her from employment; and (3) employers removed her belongings from the apartment and damaged them. Examining each of the three alleged adverse actions, the Court concludes that Plaintiff has set forth sufficient evidence to demonstrate a genuine issue of material fact with respect to the discharge from employment only.

Plaintiff's first alleged adverse action - the mandatory counseling session - fails because Plaintiff has not put forth any evidence to show that the session resulted in a material change in the terms or conditions of her employment so as to constitute an adverse action under Title VII. A tangible, adverse employment action is a "significant change in employment status, such as hiring, firing, failing to promote, reassignment, or a decision causing a significant change in benefits." Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 749 (1998). Though direct economic harm is not necessarily required to establish a tangible adverse employment action, Durham Life Ins. Co. v. Evans, 166 F.3d 139, 153 (3d Cir. 1999) (holding that removal of files which prevented employee from doing his job could constitute adverse employment action), the action must cause more than a trivial or minor change in the working condition. Crane v. Vision Quest Nat'l, Civil Action No.98-4797, 2000 U.S. Dist. LEXIS 12357, at *10 (E.D. Pa. Aug. 23, 2000); see also Robinson, 120 F.3d at 1300 (holding that minor or trivial actions that merely make an employee unhappy are not sufficient to qualify as retaliation under Title VII). Plaintiff has failed to provide any evidence demonstrating that she suffered more than a trivial or minor change in the working condition as a result of the counseling. The only result of the counseling session was Plaintiff's agreement to meet eight specific conditions, Tupper Dep. 2/19/01 at 83-84, 86; Henri Dep. at 34, 38,

but even these conditions did not create a significant change in her work schedule or her job duties. Plaintiff's contention that the session was aimed at retaliating against her, particularly because the alleged "deficiencies" were untrue, is irrelevant if the action involved is not an adverse employment action under federal and state law.³ The Court concludes that the mandatory counseling session cannot constitute an adverse action under Title VII.

With respect to Plaintiff's second alleged adverse action - job termination - the Court concludes that there are genuine issues of material fact as to whether Plaintiff was terminated or she voluntarily left her position. Plaintiff testified in deposition that she was still actively engaged in the business of the firm at the time that she was terminated, and in fact continued working after the date that the firm considered her terminated. Tupper Dep. 2/19/01 at 147. She testified that she did not receive the July 1 letter from Haymond & Lundy regarding her alleged resignation until August.⁴ Id. at 147-48. Plaintiff further

³Defendants contend that the purpose of the session was to address deficiencies in Plaintiff's work performance. Def. Ex. D. ("Henri Dep. 4/2/01") at 34.

⁴In the letter, counsel for Haymond & Lundy informed counsel for Plaintiff that, "It has come to the firm's attention that your client has relocated her place of residence to Connecticut as of this date. Inasmuch as her residing in Connecticut is inconsistent with her duties on behalf of the firm in the Delaware Valley, Haymond & Lundy will accept your client's resignation from her position as of today. Please advise me

presents evidence that she received a job offer from a firm in Connecticut, but that she did not accept the offer, receive any compensation, or perform any work for that firm. Pl. Ex. Q ("Affidavit of Pamela Maher"). Plaintiff's showing is sufficient to demonstrate a genuine issue of material fact with respect to whether she was terminated, and therefore there is a genuine issue of material fact with respect to the existence of the alleged adverse employment action.

With respect to the third of Plaintiff's allegations of adverse action - the removal of Plaintiff's belongings from the apartment - the Court concludes that Plaintiff has failed to provide evidence to establish that this is an adverse employment action. Plaintiff in this case has failed to show any evidence that the preservation of her belongings was a benefit of her employment. See Robinson, 120 F.3d at 1300 ("Retaliatory conduct other than discharge or refusal to rehire is . . . proscribed by Title VII only if it alters the employee's compensation, terms, conditions of employment, deprives him or her of employment opportunities, or adversely affects his or her status as an employee.") While it is true that a former employee may sue for retaliation relating to actions taken after the work relationship

immediately if the firm's information is in error." Def. Ex. X ("Letter from Sidney Steinberg to David Deratzian, 7/1/99").

has ended, Charlton, 25 F.3d at 200, those actions must still meet the definition of a tangible adverse employment action.

Finally, Plaintiff must show a causal link between the protected activity and the adverse employment action. Jalil v. Avdel Corp., 873 F.2d 701, 708 (3d Cir. 1989). The usual method of showing a causal link has been to focus on the temporal proximity between the protected activity and the adverse employment action sufficient to support an inference that the protected activity was the likely reason for the adverse employment action. Kachmar v. SunGard Data Sys., Inc., 109 F.3d 173, 177 (3d Cir. 1997). However, in addition to, or in lieu of temporal proximity, circumstantial evidence of a pattern of antagonism following the protected conduct as well as looking at the proffered evidence as a whole can also give rise to the inference of a causal link. Id.; see also Farrell v. Planters Lifesavers Co., 206 F.3d 271, 281 (3d Cir. 2000) (recognizing two main factors in finding causal link necessary for retaliation to be timing and evidence of ongoing antagonism); Abramson v. William Paterson Coll. of New Jersey, No.00-5026, 2001 U.S. App. LEXIS 17614, at *63-65 (3d Cir. Aug. 3, 2001).

The Court concludes that the evidence set forth by Plaintiff is sufficient to establish that there is at least a genuine issue of material fact as to the existence of a causal link between Plaintiff's complaints regarding sexual harassment and her

termination. Plaintiff's attorney sent a letter to Hochberg alleging violations of Title VII on April 13, 1999. Pl. Ex. J. Plaintiff was deemed to no longer work for the firm approximately two and a half months later. Def. Ex. X. Plaintiff testified that she complained directly to Hochberg on many occasions, Tupper Dep. 2/19/01 at 33, 119, including in April 1999. Id. at 46. Plaintiff also testified regarding poor treatment by Hochberg. Tupper Dep. 2/19/01 at 142. Plaintiff's submissions demonstrate a close proximity between her formal and informal complaints to Hochberg and her eventual termination, and are sufficient to establish the causation element, and to demonstrate a genuine issue of material fact with respect to the causal link. Thus, Plaintiff's showing is sufficient to establish a prima facie case of discrimination, consisting of temporal proximity as well as other circumstantial evidence of a causal link.

2. Pretext

Defendants assert that Plaintiff abandoned her position with the firm, that she stopped coming into the office, and that she began working with another Connecticut firm. Plaintiff has provided sufficient evidence, however, to establish that there is a genuine issue of material fact with respect to the circumstances of her supposed abandonment of her job. As detailed above, Plaintiff testified that she continued to work for the firm up to the time of her termination, and that she did not take the position

offered to her by the Connecticut firm. Plaintiff also presents evidence supporting the suggested connection between the action taken and retaliatory motive. Thus, Plaintiff's showing is sufficient to demonstrate that on the issue of pretext, there are genuine issues of material fact that warrant denial of Defendants' motion for summary judgment.

B. Intentional Infliction of Emotional Distress Claim

Defendants next move for summary judgment on the intentional infliction of emotional distress claim. Because the Court concludes that Plaintiff has failed to present evidence of physical injury, the Court grants Defendants' Motion and enters judgment on the claim in favor of Defendants.

Defendants first assert that Plaintiff's claim is barred by the Pennsylvania Workmen's Compensation Act ("WCA"). The WCA is designed as a substitute method of accident insurance in place of common law rights and liabilities for employees covered by its provisions. Murray v. Gencorp, Inc., 979 F. Supp. 1045, 1049 (E.D. Pa. 1997). The WCA is generally the exclusive remedy for workers to claim benefits for injuries sustained in the workplace or in work related activity. 77 Pa. Cons. Stat. Ann. § 411 (West 1992). A narrow exception provides that an injury caused by a third person whose intentions in causing the injury are purely personal are not covered by WCA. Cleland Simpson Co. v. Workmen's Compensation Appeal Board, 332 A.2d 862, 865 (Pa. Commw. 1975) ("[W]hen an

employee accepts the coverage of the Act, he or she does so for all accidental injuries which occur in the course of employment except those arising from attack by a third person or fellow employee for personal reasons"). Where the injury falls under this exception to the WCA, the employee is permitted to maintain a common law action against his employer. Kryeski v. Schott Glass Techs., 626 A.2d 595, 599 (Pa. Super. Ct. 1993). Sexual harassment has been found to fall under this narrow exception. Dunn v. Warhol, 778 F. Supp. 242, 243 (E.D. Pa. 1991); Gruver v. Ezon Products, Inc., 763 F. Supp. 772, 776 (M.D. Pa. 1991). Because Plaintiff's claim of intentional infliction of emotional distress is at least in part based on sexual harassment, the claim falls within the exception and is not foreclosed by the WCA.

Nevertheless, the Court concludes that Plaintiff's claim fails because Plaintiff has failed to provide evidence establishing key elements of her claim. In order to sustain the claim, the plaintiff must show: (1) conduct was extreme and outrageous; (2) conduct was intentional or reckless; (3) conduct caused emotional distress; and (4) the distress was severe. Chuy v. Philadelphia Eagles Football Club, 595 F.2d 1265, 1273-74 (3d Cir. 1979); Ocasio V. Lehigh Valley Family Health Center, Civ.Act.No.00-CV-3555, 2000 U.S. Dist. Lexis 16014, at *10 (E.D. Pa. Nov. 6, 2000).

Here Plaintiff's claimed injury is severe emotional distress intentionally inflicted by the Defendants. Plaintiff admits that

she did not suffer any physical injury. Tupper Dep. 2/19/01 at 240. Generally, however, physical injury is required in order to recover for emotional distress. Zieber v. Bogert, 773 A.2d 758, 762 (Pa. 2001); Simmons v. Pacor, Inc., 674 A.2d 232, 238 (Pa. 1996) ("It is the general rule of this Commonwealth that there can be no recovery for damages for injuries resulting from fright or nervous shock or mental or emotional disturbances or distress mental or emotional distress unless they are accompanied by physical injury or physical impact."); Brown v. Lanckenau Hospital, Civ.Act.No.95-7829, 1996 U.S. Dist. LEXIS 6507, at *21 (E.D. Pa. 1996).

Plaintiff asserts that her case falls under an exception to the general rule requiring physical injury, citing Sinn v. Burd, 404 A.2d 672 (Pa. 1979). In Sinn, the court articulated a narrow exception allowing bystander recovery where the plaintiff did not suffer the physical impact of the accident, but where he was also outside of the zone of danger. Discussing such recovery, Justice Eagen observed that recovery should be permitted in where three requirements are met: (1) the plaintiff is closely related to the injured party; (2) the plaintiff is near the scene and views the accident; and (3) "the plaintiff suffers serious mental distress as a result of viewing the accident and physical injury or suffers serious mental distress and there is a severe physical manifestation of this mental distress." Sinn, 404 A.2d at 687

(Eagen, J., concurring) (emphasis added). Plaintiff misreads Sinn, which clearly requires either physical injury or physical manifestation of the mental distress. Furthermore, Sinn involved bystander recovery and is completely inapplicable to this case.

Moreover, even if emotional distress without any physical manifestation were sufficient to support recovery, Plaintiff's claim fails because she does not provide any medical evidence to demonstrate that she suffered severe emotional distress. See Kazatsky v. King David Memorial Park, Inc., 527 A.2d 988, 995 (Pa. 1987) (requiring evidence of medical treatment or medical confirmation). A plaintiff must either show that she obtained medical treatment for the distress, or provide expert medical testimony of the existence and severity of the alleged emotional distress. Tuman v. Genesis Assocs., 935 F. Supp. 1375, 1393 (E.D. Pa. 1996) ("Once defendant establishes that the plaintiff has no expert medical confirmation of the alleged injuries, plaintiff is burdened to produce such evidence to defeat summary judgment."). Plaintiff has provided no such medical evidence, and admitted in her deposition that she did not receive medical treatment for her alleged distress. Tupper Dep. 2/19/01 at 238-40. Without evidence of physical injury, medical treatment, or expert medical testimony to substantiate the claim, plaintiff cannot defeat the motion for summary judgment. See Tuman, 935 F. Supp. at 1393.

C. Intentional or negligent damage to property

Defendants next seek judgment on Plaintiff's claims of damage to property. Defendants first contend that Plaintiff's claims of intentional or negligent damage to property are barred by the release executed by Plaintiff in exchange for receipt of her belongings from storage. The Court disagrees. While Plaintiff did agree to release tort and criminal liability, the agreement signed by Plaintiff also contained the following explicit exclusion:

The only exceptions to Ms. Tupper's release of liability with respect to the incidents set forth herein are: (a) Ms. Tupper is not releasing Haymond & Lundy from liability for any actual damage to her property which may have occurred during the move from the apartment in question to the truck in which the property has been stored since July 26, 1999.

Def. Mot. Ex. GG. The plain language of the release contradicts Defendants' claim that Plaintiff's claim for actual damages is barred.

Defendants next contend that Plaintiff cannot establish any actual damage to her belongings. The Court disagrees. With respect to the condition of the property, Plaintiff has submitted an itemized list of damages to Defendants, Pl. Ex. P; Def. Ex. HH (damage report), and testified in her deposition as to the extent of damage. Tupper Dep. 2/19/01 at 184-195. Plaintiff, who had first-hand knowledge of the condition of her belongings, would be competent to testify as to the condition of (and therefore the damage to) her property. Plaintiff's evidentiary submissions

establish that there is a genuine issue of material fact with respect to whether there was damage to her property.

Finally, Defendants argue that Plaintiff cannot establish either intent or negligence with respect to the firm's actions. With respect to intent, however, the record reflects multiple genuine issues of material fact, relating largely to the chain of events and actions also relevant to the retaliation claim. The evidence that Defendants retaliated against Plaintiff, for example, would certainly have a bearing on whether there was also intent to damage or destroy Plaintiff's property. Thus, the Court concludes that the record supports a denial of Defendants' Motion with respect to intentional damage to property.

The Court further concludes that there are genuine issues of material fact with respect to a claim for negligence. The record contains evidence supporting Plaintiff's claim that Defendants removed the property and that the result was damage to that property. There is conflicting evidence regarding the circumstances surrounding Plaintiff's leaving of the property and its subsequent removal. For these reasons, Defendants' motion for summary judgment on the damage to property claims is denied.

D. Punitive Damages

Plaintiff seeks punitive damages on the state and federal claims. The Court dismisses the punitive damages claim under the state causes of action only. Punitive damages are not available

under the PHRA. Hoy v. Angelone, 720 A.2d 745, 751 (Pa. 1998). Although punitive damages are available under state common law for willful and wanton acts, Plaintiff is not seeking punitive damages on the only remaining common law claim for damage to property.⁵ Accordingly, the Court dismisses the punitive damages claim with respect to the state law claims.

Punitive damages may be available under Title VII, however. In order to be awarded punitive damages under Title VII, a plaintiff must demonstrate "that the [employer] engages in a discriminatory practice . . . with malice or reckless indifference to the federally protected rights of an aggrieved individual." 42 U.S.C. § 1981a(b). A plaintiff's eligibility for punitive damages is characterized by defendant's motive or intent, not by the alleged character of its act. Kolstad v. American Dental Assoc., 527 U.S. 526, 538 (1999). A finding of intentional discrimination or retaliation may be insufficient in itself to satisfy this required showing. Id. at 536-37. In this case, the Court concludes that there are genuine issues of material fact as to whether punitive damages are warranted. There are numerous facts in dispute regarding what Defendants said and did to Plaintiff. Accordingly, the Court denies the request to dismiss the punitive damages claim with respect to the federal retaliation claim.

⁵In any case, any claims for punitive damages for property damage would be barred by the release, which specifically allows her to file suit only for "actual damages." Def. Ex. GG.

E. Claims Against Law Office of John Haymond

Defendant Law Office of John Haymond argues that it is entitled to judgment on the retaliation claim because Plaintiff has not put forth any evidence that it had any part in the retaliation. Plaintiff claims, however, that the Law Office of John Haymond and Haymond & Lundy are joint employers, and therefore both entities are liable. The focus of the joint employer theory is whether the entities in question share or co-determine those matters governing essential terms and conditions of employment, such as the hiring and firing of employees and the day to day supervision of employees. NLRB v. Browning-Ferris Indus. of Pa., Inc., 691 F.2d 1117, 1122-23 (3d Cir. 1982). The Court examines three factors to make this determination: (1) authority to hire and fire employees, promulgate work rules and assignments, and set conditions of employment, including compensation, benefits, and hours; (2) day-to-day supervision of employees, including employee discipline; and (3) control of employee records, including payroll, insurance, taxes and the like. Podsobinski v. Roizman, Civ.Act.No.97-4976, 1998 U.S. Dist. LEXIS 1743, at *9 (E.D. Pa. Feb. 13, 1998) (citing Zarnoski v. Hearst Bus. Comm., Inc., No.CIV.A.95-3854, 1996 WL 11301, at *8 (E.D. Pa. Jan. 11, 1996)). Examining the evidence provided by Plaintiff in light of these factors, the Court concludes that, at minimum, there are genuine issues of material fact as to whether the Law Office of John Haymond was a joint

employer. Plaintiff presents evidence that the Law Office of John Haymond (Connecticut) and Haymond & Lundy (Philadelphia) offices were jointly managed, and that Robert Hochberg was the managing attorney for both. Pl. Ex. B ("John Haymond Dep. 4/5/01") at 42. The firms were not separately designated on letterhead or business cards. Haymond Dep. 4/5/01 at 30-31. After the formation of Haymond & Lundy, the Law Office of John Haymond traded as Haymond & Lundy. Haymond Dep. at 44-45. After Plaintiff moved to Philadelphia, she continued to have to report to Haymond, who routinely visited the Philadelphia office and who was in charge of advertising for both offices. Tupper Dep. 2/19/01 at 41, 62, 99-100.

Similarly, the Court also concludes that Defendant Law Office of John Haymond is not entitled to summary judgment on the damage to property claim. There are at a minimum genuine issues of material fact as to whether the Law Office of John Haymond was a joint employer, and thus whether it can be held liable for the damage to property. These are facts for the jury to determine at trial.

F. Claims Against the Individual Defendants

Plaintiff brings the state retaliation and damage to property claims against Defendants Haymond and Hochberg in their capacities "individually and trading as Law Office of John Haymond and/or Haymond & Lundy." A party's capacity to be sued other than in a

representative capacity is determined by the law of the state in which the district court is located. Fed. R. Civ. P. 17(b). In Pennsylvania, "an action against a partnership may be prosecuted against one or more partners as individuals trading as the partnership . . . , or against the partnership in its firm name." Pa. R. Civ. P. 2128. Under the rule, a plaintiff may bring suit against a partnership entity, the individual partners, or both. Powell v. Sutliff, 189 A.2d 864, 865 n.1 (Pa. 1963) (involving suit originally filed against partners "individually and as partners"); see also Svetik v. Svetik, 547 A.2d 794, 797 (Pa. Super. Ct. 1988) ("Generally speaking, a partnership is not a legal entity separate from its partners.") These general rules apply to claims brought under Title VII and the PHRA. Birk v. Dobin, Civ.Act.No.95-5958, 1996 U.S. Dist. LEXIS 7286, at *3-4 (E.D. Pa. May 23, 1996). Partner tort liability arises from torts committed by a co-partner acting in the scope of the firm business. Baxter v. Wunder, 89 Pa. Super. 585, 589 (1927) ("Each member of a partnership is personally liable for a tort committed by a copartner acting in the scope of the firm business. . . . Being liable as joint tortfeasors the party aggrieved has his election to sue the firm or to sue one or more of its members, and may even single out for suit a partner who personally was in no wise involved in the commission of the tort.")

In this case, the parties do not dispute that both Robert Hochberg and John Haymond were partners in the firm entities.⁶ The Court concludes that the claims therefore may continue against the individual Defendants.

IV. Conclusion

For the reasons stated above, the Court grants judgment in favor of all Defendants on the intentional infliction of emotional distress claim. The Court also dismisses the punitive damages claim on the state causes of action. The Court denies Defendants' motions in all other respects. An appropriate Order follows.

⁶The Court notes that the parties have not established definitively the exact legal relationship between the individual Defendants and the partnership entities. However, the record at this time reflects sufficient proof that the individual Defendants are members of the partnerships for purposes of denying the motion for summary judgment.

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

JANICE TUPPER) CIVIL ACTION
)
 v.)
)
 HAYMOND & LUNDY, ET AL.) No. 00-3550

ORDER

AND NOW, this day of August, 2001, upon consideration of Defendant Haymond & Lundy's Motion for Summary Judgment (Doc. No. 27), Defendants Robert Hochberg, John Haymond, and Law Office of John Haymond's Motion for Summary Judgment (Doc. No. 28), and all attendant briefing and exhibits, **IT IS HEREBY ORDERED** that said Motions are **GRANTED** in part and **DENIED** in part. In furtherance thereof, it is specifically **ORDERED** as follows:

1. With respect to the Intentional Infliction of Emotional Distress Claim, judgment is **ENTERED** in favor of Defendants Haymond & Lundy, Law Office of John Haymond, Robert Hochberg, and John Haymond.
2. The punitive damages claim with respect to all state causes of action is **DISMISSED**.
3. Defendants' Motions for Summary Judgment are **DENIED** in all other respects. The federal retaliation, state retaliation, and damage to property claims shall go forward against the Defendants named in each Count in

the Complaint. The punitive damages claim pursuant to the federal retaliation claim shall also go forward.

BY THE COURT:

John R. Padova, J.