

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

ROBIN L. FERRELL;	:	
MARCUS B. MURRAY and	:	
MARK A. STEWART,	:	
Plaintiffs	:	Civil Action No. 00-2707
	:	
v.	:	
	:	
HARVARD INDUSTRIES, INC. and	:	
POTTSTOWN PRECISION CASTING, INC.,	:	
formerly DOEHLER JARVIS POTTSTOWN,	:	
Defendants.	:	

OPINION and ORDER

Van Antwerpen, J.

October 23, 2001

Plaintiffs Robin L. Ferrell, Marcus B. Murray and Mark A. Stewart (“Plaintiffs”) sued their former employer, Pottstown Precision Casting, Inc., formerly Doehler Jarvis Pottstown (“PPC”) and its parent company, Harvard Industries, Inc. (“Harvard”) (collectively, “Defendants”) under Title VII of the Civil Rights Act, 42 U.S.C. §2000e (“Title VII”), each plaintiff alleging several theories of discrimination as well as retaliation.¹ All three allege that they were retaliated against for their involvement with Ferrell’s original sexual harassment complaints. Plaintiff Stewart also alleges tortious retaliatory discharge at common law, stemming

¹Plaintiffs Ferrell and Murray alleged parallel complaints under the Pennsylvania Human Relations Act, 43 P.S. §955(d) (“PHRA”). A fourth plaintiff, Barbara G. Chism, accepted an offer of judgment under Fed.R.Civ.Pro. 68. Defendants’ motions for summary judgment and our discussion and order here are inapplicable as to Chism’s already-resolved case. Moreover, Plaintiffs Ferrell, Murray and Stewart elected not to contest Defendants’ summary judgment motions with respect to their “negligent hiring and supervision” claims as well as Ferrell’s disability discrimination and Stewart’s racial discrimination claims. Memorandum For Plaintiffs in Opposition to Motion for Summary Judgment of Defendant Harvard Industries, Inc. at 1. Accordingly, we resolve these issues in Defendants’ favor without further discussion.

from a complaint he filed against PPC with the Occupational Safety and Health Administration (OSHA) in June 1998.

We have before us Defendants' motions for summary judgment on all of Plaintiffs' claims and a separate summary judgment motion by Defendant Harvard contending that liability cannot be properly extended to it as PPC's parent company. We now find that triable issues of fact exist as to Plaintiff Ferrell's discrimination complaint and Ferrell's and Murray's retaliation complaints. On the other hand, Plaintiff Stewart's common law tortious wrongful discharge claim fails because he benefitted from a collective bargaining agreement, and because he was not discharged, but placed on temporary layoff and later recalled. Moreover, even if Plaintiff Stewart establishes a prima facie retaliation claim for associating with those who engaged in Title VII protected activity, we find that he has failed to raise any genuine issues of material fact regarding Defendant's legitimate, non-discriminatory explanations for the actions taken. Accordingly, we deny summary judgment as to Defendant's motions on Ferrell's and Murray's contested issues, but grant summary judgment as to Stewart's claims.

Finally, we deny summary judgment as to Harvard's motion to exclude itself from parental liability. As a matter of law, Harvard may be liable for any retaliation by its subsidiary, PPC, given Harvard's role in the allegedly faulty implementation of PPC's anti-discrimination policies. Whether or not Harvard is actually liable is a question for the trier of fact.

To avoid redundancy, rather than setting forth a separate discussion of the facts, we will discuss the relevant details of each Plaintiff's case below in connection with our legal determinations.

I. INTRODUCTION

Our decision takes into account Plaintiffs' Complaint and Demand for Jury Trial, filed on May 26, 2000 and amended on April 12, 2001, Motion by Defendant Harvard Industries for Summary Judgment and Memorandum, filed on July 13, 2001 ("Harvard SJ Mot."), Answer by Plaintiff Mark A. Stewart, Plaintiff Marcus B. Murray, Plaintiff Robin L. Ferrell, Plaintiff Barbara G. Chism to Defendant Harvard Industries, Inc. Motion for Summary Judgment, filed on July 27, 2001 ("Answer to Harvard SJ Mot."), Motion by Defendant Pottstown Precision, Defendant Harvard Industries for Summary Judgment on All Plaintiffs' Claims and Memorandum, filed on August 1, 2001 ("Def. SJ Mot."), Reply Brief by Defendant Harvard Industries to Plaintiff's Answer to Harvard's Motion for Summary Judgment, filed on August 16, 2001 ("Harvard SJ Mot. II"), Answer by Plaintiff Mark A. Stewart, Plaintiff Marcus B. Murray, Plaintiff Robin L. Ferrell to Defendant Harvard Industries, Inc. Motion for Summary Judgment, filed on October 1, 2001 ("Answer to Def. SJ Mot."), and Letter by Defendants to Judge Franklin Van Antwerpen dated August 21, 2001, filed on October 15, 2001 ("Def. Letter").

II. DISCUSSION

A. Statement of Jurisdiction

We have original, subject matter jurisdiction over Title VII claims under 28 USC §1331. We consider Stewart's Pennsylvania common law tortious retaliation claim stemming from his OSHA complaint and Murray's and Ferrell's retaliation complaints under the Pennsylvania Human Relations Act, 43 P.S. §955(d) ("PHRA"), as well as Ferrell's sex discrimination complaint under PHRA, by exercising our supplemental jurisdiction under 28 USC §1367(a).

B. Summary Judgment Standard

The court shall render summary judgment "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 a judgment as a matter of law." Fed.R.Civ.P. 56(c). An issue is "genuine" only if there is a sufficient evidentiary basis on which a reasonable jury could find for the non-moving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). A factual dispute is "material" only if it might affect the outcome of the suit under governing law. Id. at 248, 477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed.2d 202. All inferences must be drawn, and all doubts resolved, in favor of the non-moving party – in this case, Plaintiff. United States v. Diebold, Inc., 369 U.S. 654, 655, 82 S.Ct. 993, 8 L.Ed.2d 176 (1962); Gans v. Mundy, 762 F.2d 338, 341 (3d Cir.1985), cert. denied, 474 U.S. 1010, 106 S.Ct. 537, 88 L.Ed.2d 467 (1985). On motion for summary judgment, the moving party bears the initial burden of identifying those portions of the record that it believes demonstrate the absence of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). To defeat summary judgment, the non-moving party must respond with facts of record that contradict the facts identified by the movant and may not rest on mere denials. Id. at 321 n. 3, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (quoting Fed.R.Civ.P. 56(e)); see First Nat'l Bank of Pennsylvania v. Lincoln Nat'l Life Ins. Co., 824 F.2d 277, 282 (3d Cir.1987). The non-moving party must demonstrate the existence of evidence that would support a jury finding in its favor. See Anderson, 477 U.S. at 248-49, 106 S.Ct. at 2505.

In discrimination and retaliation cases, proof at summary judgment follows a well-

established “burden-shifting” approach first set forth in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S.Ct. 1817 (1973). Once a plaintiff has established a prima facie case of discrimination or retaliation, the defendant must rebut an inference of wrongdoing with evidence of a legitimate, non-discriminatory, non-retaliatory reason for the action taken. Delli Santi v. CNA Ins. Co., 88 F.3d 192, 199 (3rd Cir. 1996); Weston v. Commonwealth of Pennsylvania, 251 F.3d 420, 432 (3rd Cir. 2001).² If a defendant successfully meets its burden in a discrimination or retaliation case, then in order to avoid summary judgment, Plaintiff must present evidence of pretext, or cover-up, or show that discrimination played a role in the employer’s decision-making and had a determinative effect on the outcome. Fuentes v. Perskie, 32 F.3d 759, 764 (3rd Cir. 1994); Weston, 251 F.3d at 432.

Notwithstanding the non-moving party’s burden, the Third Circuit urges special caution about granting summary judgment to an employer when its intent is at issue, particularly in discrimination and retaliation cases. Goosby v. Johnson & Johnson Medical, Inc., 228 F.3d 313, 321 (3rd Cir. 2000).

C. Ferrell’s Claims³

Plaintiff Ferrell alleges quid pro quo sexual harassment, retaliation for her rejection of sexual advances by her supervisor and for her complaints of sexual harassment, and hostile work

²In harassment cases where no tangible, detrimental employment action ensued, after the plaintiff establishes a prima facie case, the defendant may assert the affirmative defense that it exercised reasonable care to prevent and correct promptly the offending behavior but the plaintiff unreasonably failed to take advantage of the opportunities provided. Anderson v. Deluxe Homes of PA, Inc., 131 F.Supp.2d 637, 648 (M.D.Pa. 2001).

³We will not separately address Ferrell’s retaliation and discrimination and Murray’s retaliation claims under the PHRA, inasmuch as the analysis under the state statute is identical to that under Title VII and §1981. See Goosby, 228 F.3d at 317 FN3 (“The analysis required for adjudicating Goosby’s claim under PHRA is identical to a Title VII inquiry and we therefore do not need to separately address her claim under the PHRA.”), citing Jones v. School District of Philadelphia, 198 F.3d 403, 410-11 (3^d Cir.1999).

environment sexual harassment. Complaint at Paragraphs 22-24, 32-40.

1. Quid Pro Quo Sexual Harassment and Retaliation

The Third Circuit requires that in order to prove quid pro quo sexual harassment, a plaintiff must show that her response to unwelcome advances was subsequently used as a basis for a decision about compensation, terms, conditions, or privileges or employment. Farrell v. Planters Lifesavers Company, 206 F.3d 271, 281-282 (3rd Cir. 2000), citing Robinson v. City of Pittsburgh, 120 F.3d 1286, 1296-1297 (3d Cir.1997). A quid pro quo sexual harassment claim may also allege that the defendant implicitly or explicitly threatened the plaintiff with retaliation when making the advance, but proving a prior threat is not necessary to establish a prima facie case of quid pro quo harassment. Id. Rather, the employer's actions subsequent to the advance are dispositive. Id. Moreover, the Third Circuit explained in Farrell, "While evidence of hostility or repeated demands for sexual favors would strengthen any plaintiff's case, the lack of such evidence does not render it fatally flawed." Id.

Plaintiff Ferrell's burden and the scope of evidence she may present are similar to those required for establishing a retaliation claim.⁴ Id. The Third Circuit explained, "The court can consider circumstantial evidence and draw inferences in favor of the non-moving party in reaching this determination on summary judgment." Id. Thus, we treat Ferrell's quid pro quo harassment and retaliation claims together, drawing all inferences in her favor based on her version of the facts.

Ferrell testified in her deposition that her shift supervisor, Michael Conrad, made sexual

⁴A prima facie case of retaliation in violation of Title VII requires that Plaintiff engaged in protected activity and suffered an adverse employment action, and that there was a causal link between the former and the latter. Goosby, 228 F.3d at 323.

advances and insinuated that having a sexual relationship with him would be advantageous to her. Answer to Def. SJ Mot., Exhibit 1, “Deposition of Robin L. Ferrell,” December 20, 2000 (“Ferrell Depo.”), pp. 66:8-68:23, 586:1-5. Though Plaintiff Ferrell rejected Conrad, he remained persistent in his sexual advances and said he would “find a way to change [her] mind.” Id. at 72:6-12, 73:2-10. After Ferrell refused Conrad’s final invitation to “spend time with him” in about March 1997, he called her at home to say that Ferrell was making a mistake, in that she did not know what she was missing sexually. Id. at 127:16-129:19.

After her initial refusals, Ferrell’s job assignments began to change for the worse, such that she repeatedly had to bring the assignments to Conrad’s attention, resulting in confrontations. Id. at 51:2-7, 211:10-23, 276:3-277:24. When Ferrell tried to do an assigned job beyond her physical limitations (she had suffered a work injury), Conrad grabbed and shook Ferrell, yelling at her and accusing of deliberately trying to reinjure herself. Id. at 54:11-24. After Ferrell began to cry, Conrad told her she was fired, though he did not make good on this threat. Id. at 56:19-22, 89:10-91:5. Suddenly, Ferrell was disciplined for absenteeism when she went to doctors’ appointments, which she had attended previously without incident. Id. 94:11-14, 98:22-101:7.

Shortly thereafter, in May 1997, Michael Baer, a subordinate supervisor reporting to Conrad (Conrad’s “puppet,” according to Ferrell) fired Ferrell for insubordination. Id. at 195:19-196:24, 275:15-20. One witness testified that he heard Conrad and Baer speak about Ferrell as a “sexual distraction,” and heard Baer remark that an “example” had to be made of Ferrell. Answer to Def. SJ Mot., Exhibit 30, “Declaration of Michael W. Huffmaster”(“Huffmaster Declaration.”). After a union grievance, the discharge became a 10 1/2 day suspension. Answer

to Def. SJ Mot., Exhibit 6, Human Resources Letter Regarding Disciplinary Suspension.

Upon Ferrell's return to work, Conrad screamed at her, telling her he would "take her down with him," causing Plaintiff Ferrell to cry. Ferrell Depo. at 224:1-9, 227:6-14. A union official separated Conrad from Ferrell and urged Ferrell to switch to the Third Shift from Conrad's Second Shift – though the former was a less-desirable position, she switched to escape Conrad's constant retaliation for her refusal of his sexual advances. Id. at 166:13-21, 227:19-228:1.

Meanwhile, Plaintiff Ferrell had complained numerous times about Conrad's treatment to Phil Ryan, the Plant Manager, and the parent company official named on company fliers as the contact for discrimination complaints, Dean Konnick. Id. at 57:10-24, 135:3-11, 186:3-187:22, 189:721, 192:17-193:5. Ferrell's union, meanwhile, reported Ferrell's complaint to Becki McDermott, the appropriate Human Resources official. Id. at 221:15-21.

When Ferrell had to return to Conrad's shift for personal reasons, on October 20, 1997, she was told that was unqualified for work assignments and, only two days later, she was forced onto worker's compensation leave. Id. at 120:5-9, 165:23-166:27, 168:19-24, 190:17-191:3. She was never allowed to return to work again before she was laid off in February 1999. Answer to Harvard SJ Mot., Exhibit 21, Layoff Letter. In fact, Plaintiff Ferrell testifies that while she was on worker's compensation, there were many available jobs for which she was qualified on Conrad's shift. Ferrell Depo. at 150:9-151:9, 164:11-165:1. Conrad admits he made the decision that no positions were available for Ferrell on his shift. Answer to Def. SJ Mot., Exhibit 26, Deposition of Michael Conrad ("Conrad Depo."), pp. 74:13-75:24.

Based on the foregoing, Plaintiff Ferrell has alleged prima facie cases of quid pro quo

sexual harassment and retaliation because she was repeatedly treated adversely by supervisor Michael Conrad and his staff after she rejected Conrad's advances and complained of discrimination to company authorities.

Defendants contend that only the October 1997 action, in which Defendants notified Plaintiff she was unfit for available jobs, falls within the statutory time limits required under EEOC guidelines. Def. SJ Mot. at 37-38, 45. Under Title VII, the ordinary time for filing a charge of employment discrimination with the EEOC is 300 days after the alleged discrimination. 42 U.S.C. § 2000e-5(e)(1). Plaintiff Ferrell filed her EEOC charge on April 22, 1998 – counting back 300 days, the statutory period extended to late June 1997. Even assuming arguendo that only the October 1997 action occurred after June of that year, Defendants' arguments fail to take into account the continuing violation doctrine. This principle, embraced by the Third Circuit, holds that discriminatory or retaliatory incidents which occurred outside the statutory period may be actionable if they form part of an ongoing pattern of discrimination which enters into the statutory period. See generally Rush v. Scott Specialty Gases, Inc., 113 F.3d 476 (3rd Cir. 1997). Taking Plaintiff Ferrell's statements as true, Defendants' quid pro quo harassment and retaliation culminated in October 1997, but were, in fact, ongoing since she first rejected Conrad's advances in March 1997. Thus, we find that the continuing violation doctrine applies to her claims of quid pro quo harassment and retaliation, and deny summary judgment as to these claims.

Following the McDonnell-Douglas burden-shifting approach discussed above, Defendants must present a legitimate, non-discriminatory reason for the October 1997 notice that Plaintiff was unqualified for the existing jobs. Defendants contend that Plaintiff's significant

physical restrictions prevented her from being able to perform the essential functions of any of the jobs in the plant. Def. SJ Mot. at 47-29. Thus, the burden shifts to Plaintiff to produce evidence that Defendant's stated reason was not the actual reason she was placed indefinitely on worker's compensation.

Plaintiff testifies that she was qualified and capable to work on the "Tri-Way," which was functioning at the time. Ferrell Depo. at 151:23-152:4. Indeed, she states that her physical limitations only prevented her from working on four of twenty or thirty machines in the plant, and that she had no more restrictions in October 1997 than previously. Answer to Def. SJ Mot., Exhibit 32, Affidavit of Robin L. Ferrell. Moreover, she had been working without difficulty on the Third Shift, and should have been able to do likewise on Conrad's shift. Id. Rick Loughain, a similarly-situated, male employee with greater physical limitations was allowed to continue working on Conrad's shift. Ferrell Depo. at 173:17-23; Answer to Def. SJ Mot., Exhibit 31, Michael Huffmaster Statement.

Defendant provides no evidence conclusively disproving any of Plaintiff's testimony. Thus, we find that Plaintiff's representations are sufficient to create a triable issue of fact as to whether the October 1997 notice, within the statutory period, was retaliatory or part of quid pro quo sexual harassment.

2. Hostile Working Environment Sexual Harassment

Defendants contend that all of the alleged acts which might constitute hostile working environment sexual harassment occurred outside the statutory period, i.e. before the end of June 1997. Def. SJ Mot. at 39-41. However, based on the continuing violation doctrine, if any incidents of hostile working environment sexual harassment occurred after June 1997, we may

consider all earlier events forming part of the same discriminatory pattern or practice. Bronze Shields, Inc. v. New Jersey Dep't of Civil Service, 667 F.2d 1074, 1080-84 (3d Cir.1981), cert. denied, 458 U.S. 1122, 102 S.Ct. 3510, 73 L.Ed.2d 1384 (1982); Stair v. Lehigh Valley Carpenters Local Union No. 600 of United Broth. of Carpenters and Joiners of America, 813 F.Supp. 1112, 1115 (E.D.Pa.,1993).

Plaintiff Ferrell testifies that after June 1997 (i.e., during the statutory period), she saw pornographic material displayed in the workplace which included comments, possibly by Mike Conrad, that “we [Ferrell and Conrad] would look good in this [sexual] position.” Ferrell Depo. at 229:5-16. Other alleged acts of hostile working environment harassment which occurred before the statutory period, included, for example: the ongoing display of pornographic material in the workplace (id at 232:10-238:25, 246:16-249:17, inter alia; Answer to Def. SJ Mot., Exhibit 2, Deposition of Marcus Murray, pp. 135:1-138:12); a pornographic drawing done on “a very large piece of cardboard” labeled with her name (Ferrell Depo. at 233:10-13); sexually-suggestive comments by Conrad (e.g., that if Ferrell let Conrad massage her breasts, they would grow larger, id. at 68:14-15); propositions by Conrad (e.g., to have sexual relations with him, id. at 68:17-18, to come to his home when his wife was away, id. at 71:19-21); and another supervisor grabbing Plaintiff Ferrell’s crotch. Id. at 269:6-9 On summary judgment, we assume Plaintiff Ferrell’s version of all these events. We find the incidents of alleged sexual harassment occurring prior to the statutory period reasonably related to those after June 1997. Both before and during the statutory period, Ferrell was subjected to pornography, suggestive remarks and propositions, especially from supervisor Mike Conrad. Thus, we will not bar from Plaintiff’s claim of hostile working environment sexual harassment any of the incidents which occurred

prior to the statutory period.

The Third Circuit has announced a five-part test for determining whether a sexually hostile work environment exists. A plaintiff must prove that: (1) the plaintiff suffered intentional discrimination because of her sex; (2) the discrimination was pervasive and regular; (3) the discrimination detrimentally affected the plaintiff; (4) the discrimination would detrimentally affect a reasonable person of the same sex in that position; and (5) the existence of respondeat superior liability. Kunin v. Sears Roebuck and Co., 175 F.3d 289, 293 (3d Cir.1999), cert. denied, 528 U.S. 964, 120 S.Ct. 398, 145 L.Ed.2d 310 (1999); Anderson v. Deluxe Homes of PA, 131 F.Supp.2d at 644 . In determining whether a hostile working environment exists, we examine the totality of the circumstances. Andrews v. City of Philadelphia, 895 F.2d 1469, 1486 (3d Cir.1990). See also Konstantopoulos v. Westvaco Corp., 112 F.3d 710, 715 (3d Cir.1997), citing West v. Philadelphia Elec. Co., 45 F.3d 744, 756 (3d Cir.1995) (stating that the Third Circuit has "precluded an individualized incident-by-incident approach" to determining whether a working environment is sexually hostile).

a) Intentional Discrimination Because of Sex

The propositions, suggestive comments about her body, suggestive comments about pornography and crotch-grabbing all constitute intentional discrimination which Ferrell suffered because she is a woman. See Harris v. Forklift Systems, Inc., 510 U.S. 17, 114 S.Ct. 367, 126 L.Ed.2d 295 (1993) (sexual innuendoes, jokes and requests that female employee put her hand in supervisor's pocket satisfy intentional, sex-based discrimination element).

b) Pervasive and Regular

It is well-established that "Title VII affords employees the right to work in an

environment free from discriminatory intimidation, ridicule and insult." Meritor Sav. Bank v. Vinson, 477 U.S. 57, 65, 106 S.Ct. 2399, 91 L.Ed.2d 49 (1986). The Third Circuit explains, "To constitute impermissible discrimination, the offensive conduct is not necessarily required to include sexual overtones in every instance or that each incident be sufficiently severe to detrimentally affect a female employee." Andrews, 895 F.2d at 1485. We certainly consider the frequent posting of pornographic pictures which Ferrell alleges to be evidence of a sexually hostile working environment. Id. Ferrell also alleges that harassment, including sexual comments, continued during meetings in Mike Conrad's office every day for approximately six months in the first half of 1997. Ferrell Depo. at 211:8-212:213:3. It may be that the latter were not individually severe enough to constitute actionable sexual harassment. Yet, considering their frequency and the context in which they occurred – accompanied by workplace pornography, sexual advances, acts and innuendos by supervisors – we find that Ferrell's hostile working environment sexual harassment claims were amply pervasive and regular.

c) Subjectively Offensive

Plaintiff found the environment "quite offensive" (id. at 232:8-233:8, 237:4-19) and regularly complained to management and the unions about sexual harassment. Id. at 57:10-24, 135:3-11, 186:3-187:22, 189:721, 192:17-193:5, 221:15-21. She does not recall laughing along with Mike Conrad's sexual innuendos (id. at 68:14-70:21) and did not encourage him in their conversations. Id. at 68:14-73:12. The record gives some indication that a boyfriend of Plaintiff's drew pornographic pictures which were displayed at the plant. Id. at 244:8-245:18. Defendants suggest that because Plaintiff dated someone who drew pornographic pictures, she was not offended by such material. Def. SJ Mot. at 45. This is possible but not self-evident; it is a

question for the trier of fact. On summary judgment, we believe Plaintiff's testimony sufficiently indicates that she was subjectively disturbed by the sexually-tainted workplace environment.

d) Objectively Offensive

We imagine whether a reasonable woman would have been offended by the environment at PPC. The Third Circuit advises, "Obscene language and pornography quite possibly could be regarded as highly offensive to a woman who seeks to deal with her fellow employees and clients with professional dignity and without the barrier of sexual differentiation and abuse." Andrews, 895 F.2d at 1485-1486 (Internal citations omitted.). The Andrews court continued:

Although defendants' counsel vigorously argues that a police station need not be run like a day care center, it should not, however, have the ambience of a nineteenth century military barracks. We realize that it is unrealistic to hold an employer accountable for every isolated incident of sexism, however, we do not consider it an unfair burden of an employer of both genders to take measures to prevent an atmosphere of sexism to pervade the workplace. Id. at 1486.

The Andrews court's comments regarding the defendant police station in that case apply with equal force to the plant where Plaintiff worked. We have already found that the sexually-tainted conduct was pervasive and regular, and therefore, applying Andrews, find that it may have been offensive to any reasonable woman.

e) Respondeat Superior or Vicarious Liability

There can be no dispute that Defendant PPC would be liable for the actions of Mike Conrad, the shift supervisor of its plant, who is the prime subject of Plaintiff's complaints. Moreover, Plaintiff's many discrimination complaints suggest that she made every effort to avail herself of Defendant's procedures, without success. Thus, Defendant has not asserted and could not assert the affirmative defense created in Faragher v. City of Boca Raton, 524 U.S. 775,

807, 118 S.Ct. 2275, 141 L.Ed.2d 662 (1998), for defendants who immediately root out complained-of discrimination. Defendant PPC will be liable for sexual harassment at its plant if Plaintiff proves at trial that this harassment occurred – we discuss Defendant Harvard’s potential liability below.

In light of the foregoing, we deny Defendants’ summary judgment motions as to Plaintiff Ferrell’s claims.⁵

D. Stewart’s Claims

In Plaintiffs’ original Complaint on May 26, 2000, Plaintiff Stewart alleged tortious wrongful discharge in violation of public policy in the fall of 1998, following on the heels of his 1998 OSHA complaint. Complaint at Paragraphs 45-50. On April 12, 2001, Plaintiffs filed a Supplemental Complaint, amending the original, in which Plaintiff Stewart definitively complained of race discrimination and retaliation under Title VII, stemming from his May 2000 complaint. Complaint at Paragraphs 78-94. Plaintiffs’ response to summary judgment does not contest Defendants’ call for dismissal of Plaintiff Stewart’s race discrimination claims. Answer to Def. SJ Mot. at 1. Accordingly, we treat only his common law and Title VII retaliation claims.

1. Tortious Wrongful Discharge

We apply Pennsylvania State law to Plaintiff Stewart’s common law tort claim, before us through an exercise of our supplemental jurisdiction. Wisconsin Dept. of Corrections v. Schacht, 524 U.S. 381, 118 S.Ct. 2047, 2051-2052, 141 L.Ed.2d 364 (1998). In so doing, we apply the law

⁵Recall Footnote 1, *infra*, in which we granted summary judgment regarding Plaintiff Ferrell’s disability discrimination and common law claims because she did not contest Defendants’ motion as to these.

as announced by the Pennsylvania Supreme Court. See, e.g., Aceto v. Zurich Ins. Co., 440 F.2d 1320, 1321 (3rd Cir. 1971); Fidelity Union Trust Co. v. Field, 311 U.S. 169, 177-178, 61 S.Ct. 176, 85 L.Ed. 109 (1940).

Defendant argues, relying on a lower Pennsylvania court decision, that Plaintiff Stewart may not bring a common law wrongful discharge claim because his employment was governed by a collective bargaining agreement. Def. SJ Mot. at 12, citing Phillips v. Babcock & Wilcox, 349 Pa.Super. 351, 503 A.2d 36 (1986), appeal denied by 514 Pa. 618, 521 A.2d 933 (1987). The law is clear that in the “absence of more convincing evidence of what the state law is, [a lower state court decision] should be followed by a federal court in deciding a state question.” Com. of Pa. v. Brown, 373 F.2d 771, 777 (3rd Cir. 1967), citing Fidelity Union Trust Co., 311 U.S. at 177-178.

Because the Pennsylvania Supreme Court has not ruled on whether a collective bargaining agreement precludes a wrongful discharge claim, we look to Phillips. The Phillips court reaffirmed Pennsylvania’s at-will employment doctrine, stating that “absent a statutory or contractual provision to the contrary, either party [can] terminate an employment relationship for any or no reason.” Phillips, 349 Pa.Super. at 353. The Pennsylvania Supreme Court carved out an exception for wrongful discharge in violation of public policy to protect “corporate personnel in the areas of employment not covered by labor agreements,” providing a remedy to those with no other recourse. Id. at 354, citing Geary v. US Steel Corp., 456 Pa. 171, 181, 319 A.2d 174 (1974). The Phillips court therefore held that “an action for the tort of wrongful discharge is available only when the employment relationship is at-will,” i.e. without a collective bargaining

agreement. Phillips, 349 Pa.Super. at 355.⁶ In our case, Plaintiff Stewart benefitted from a collective bargaining agreement, and thus falls squarely within the Phillips holding.

Plaintiff Stewart's arguments to the contrary fall short. He highlights our responsibility to predict how the Pennsylvania Supreme Court would rule in such a situation, urging us not to rely excessively on lower Pennsylvania court decisions or those of other federal courts. Answer to Def. SJ at 32-33; Scranton Dunlop, Inc. v. St. Paul Fire & Marine Ins. Co., 2000 WL 1100779, at *1 (E.D.Pa. Aug.4, 2000) ("Since this is a matter of state law that has not been decided by the Pennsylvania Supreme Court, a prediction must be made as to how that court would rule if confronted with the same facts."). However, Plaintiff fails to elucidate a source superior to Phillips. Plaintiff recommends to our attention the case of Ziccardi v. Commonwealth, 500 Pa. 326, 331, 456 A.2d 979 (1983), in which the Pennsylvania Supreme Court held that an employee under a union agreement has no right to sue his employer for wrongful discharge where his union wrongly refused to proceed to arbitration. Answer to Def. SJ at 32-33. The Ziccardi court specifically chose not to decide the rule in a hypothetical situation involving an employer that conspires with the union to deny an employee the protection of his collective bargaining agreement. Ziccardi, 500 Pa. at 331. The Plaintiff urges, "[B]y implication, the Pennsylvania Supreme Court has acknowledged that a wrongful discharge action may be brought by a union

⁶The Phillips court noted that the Third Circuit had already construed Pennsylvania law to disallow wrongful discharge claims in instances where a collective bargaining agreement was in place. Id. at 355 FN2, citing Polsky v. Radio Shack, 666 F.2d 824 (3rd Cir. 1981); Perks v. Firestone Tire and Rubber Co., 611 F.2d 1363 (3rd Cir. 1979). Since Phillips, many district courts within our circuit have held that Pennsylvania law does not permit an employee benefitting from a union agreement to pursue a tortious wrongful discharge action. See, e.g., Harper v. American Red Cross Blood Services, 153 F.Supp.2d 719, 721 (E.D.Pa. 2001); Cini v. National R.R. Passenger Corp., No. 99-2630, 1999 U.S. Dist. LEXIS 17836 (E.D.Pa. 1999); Ricciardi v. Consolidated R.R. Corp., C.A. No. 98-3420, 1999 U.S. Dist. LEXIS 1232, at *3 (E.D.Pa. 1999); Searcy v. Southeastern Pennsylvania Transportation Authority, No. 96-3854, 1997 U.S. Dist. LEXIS 3825 (E.D.Pa. 1997).

employee if the employer is the wrongdoer.” Answer to Def. SJ at 33.

Plaintiff’s attempt to extend the Ziccardi holding to our situation is deficient. While the much-followed Phillips case is directly on point, stating that collective bargaining agreements preclude wrongful discharge claims in Pennsylvania, Ziccardi holds that an employee cannot bring wrongful discharge claims against an employer based on a union’s refusal to secure arbitration. Therefore, Plaintiff’s extrapolation of a favorable wrongful discharge holding from Ziccardi is, at best, a stretch. The Phillips case persuades us that Plaintiff Stewart’s common law claims must fail.⁷

Finally, even if Plaintiff Stewart overcame Phillips, we would find as a matter of law that Plaintiff Stewart was not wrongfully discharged in September 1998, after filing his OSHA complaint, because he was not discharged at all – he was laid off and recalled in April 1999 without loss of seniority or change in his pay rate. Answer to Def. SJ Mot. at 15. Even if this layoff was wrongful, Plaintiff suggests no case, and we find none, allowing a wrongful discharge action without a permanent discharge – indeed, a lower Pennsylvania court specifically barred

⁷Even if Plaintiff Stewart could overcome Phillips on his wrongful discharge claim, we would have to decide whether his clever pleading, invoking the Pennsylvania Health and Safety Act, 43 P.S. §25-2(a) (Complaint at Paragraph 58), overcomes the Pennsylvania Supreme Court’s holding in McLaughlin v. Gastrointestinal Specialists, Inc., 561 Pa. 307, 750 A.2d 283 (1998). The McLaughlin court held that filing an OSHA complaint is not enough to trigger state common law tort protection from retaliation. Id. at 320. Plaintiff Stewart echoes Justice Nigro’s dissent in McLaughlin, which states:

I disagree with the majority position that no public policy of the Commonwealth is violated when an employee is discharged for lodging safety complaints to his or her employer. ... [T]he majority overlooks the existence of Pennsylvania law [citing the Pennsylvania Health and Safety Act, 43 P.S. §25-2(a)] which precisely prohibits the conduct that Appellee engaged in.” Id. at 321 (Nigro, J., dissenting).

Plaintiff Stewart fundamentally alleges retaliation stemming from his filing of an OSHA complaint. Because his tort claims are already excluded based on the reasoning in Phillips, we will not decide whether Plaintiff Stewart’s complaint mentioning the Pennsylvania Health and Safety Act section providing for workplace safety would be enough to allow him to claim a wrongful discharge in violation of Pennsylvania’s public policy.

wrongful discharge actions under such conditions. See Ross v. Montour Railroad Company, 357 Pa.Super. 376, 383, 516 A.2d 29 (1986), appeal denied by 515 Pa. 609, 529 A.2d 1082 (involuntary furlough was not a discharge and plaintiff could not claim wrongful discharge where he later continued employment with full union rights and seniority).⁸

Based on the foregoing, we grant Defendants' summary judgment motion as to Stewart's common law claims.

2. Title VII Retaliation

Plaintiffs' amended complaint of April 12, 2001 states, "On May 26, 2000, the Original Complaint in this case was filed with this Court wherein the Plaintiffs, including Mark Stewart, alleged violations of Title VII and 42 USC §1981, among other causes of action." Complaint at Paragraph 78. The wording is ingenious but disingenuous – in fact, Mark Stewart was one of the original Plaintiffs, but did not allege any Title VII or §1981 violations in the May 2000 Complaint. The portion of the original Complaint mentioning Stewart (Complaint at Paragraphs 45-50) alleges his OSHA complaint in June 1998 and a suspension and layoff beginning in September 1998. The final paragraph of the original Complaint discussing Stewart states, "The defendant's conduct, representing a pattern and practice of unlawful discrimination and retaliatory actions affecting numerous employees not limited to the plaintiffs was outrageous...."

⁸We note that unlike a common law wrongful discharge claim, a prima facie Title VII claim in the Third Circuit does not require such "ultimate employment action." See, e.g., Saylor v. Ridge, 989 F.Supp. 680, 689 (E.D.Pa.,1998) ("The Third Circuit has not required that an employer's adverse action must be an 'ultimate' one as defined by the [Fifth Circuit] courts" which have held that the "denial of a desk audit..., verbal threats of termination, criticism, reprimands, missed pay increases, receiving false information about aspects of employment and being placed on 'final warning' did not constitute the kind of ultimate adverse employment actions contemplated by Title VII.").

Complaint at Paragraph 50. Following several paragraphs about Stewart’s OSHA complaint and retaliation resulting from this complaint, we can only infer from Paragraph 50 that Stewart was alleging “unlawful discrimination” based upon his whistle-blowing – not based on Title VII-protected bases.

The succeeding paragraphs of the original Complaint bolster our conclusion. In Paragraphs 52-56 and 60-73, the Complaint sets forth various counts of discrimination and retaliation, under Title VII, §1981 and the PHRA (the state Title VII counterpart), respectively. In three counts, the Plaintiffs allege, “The defendant’s above described retaliatory actions against Chism [one of the original Plaintiffs, now out of the case], Ferrell and Murray were violations of’ Title VII, PHRA and §1981. Complaint at Paragraphs 52, 54, 56. Later, only Plaintiff Chism alleged race discrimination under Title VII, PHRA and §1981. Complaint at Paragraphs 69, 71, 73. Significantly, none of these charges refer to Plaintiff Stewart. Stewart only appears in “Count IV: Unlawful Retaliatory Discharge,” alleging tortious common law retaliation in violation of Pennsylvania public policy as set forth in its Health and Safety Act. Complaint at Paragraph 58.⁹

Plaintiff Stewart apparently realized this omission and filed the “Supplemental Complaint” in April 2001, setting forth Stewart’s complaints of retaliation and discrimination under Title VII and §1981 in Counts XIII-XVI. Complaint at Paragraphs 88-94. Plaintiffs filed the Supplemental Complaint after Stewart exhausted administrative remedies by filing an EEOC charge on January 3, 2001. Complaint at Paragraph 83. Plaintiff Stewart has not contested

⁹Plaintiff Stewart was neither specifically included or excluded from Count XII alleging common law claims of negligent hiring and supervision – claims which were dropped in Plaintiffs’ response to Defendants’ motions for summary judgment. Complaint at Paragraphs 75-76; Answer to Def. SJ Mot. at 1. These would not help establish protected activity under Title VII or §1981 in any event.

Defendants' summary judgment motion as to his race discrimination claims (Answer to Def. SJ Mot. at 1) so we consider only his retaliation claims.

For Stewart to establish a prima facie case of retaliation in violation of Title VII and §1981, necessary to overcome summary judgment, he must show that he engaged in protected activity and suffered an adverse employment action, and that there was a causal link between the former and the latter. Goosby, 228 F.3d at 323. Defendants contend that Stewart does not establish the first element of the prima facie retaliation case until at least January 3, 2001, when he filed with the EEOC and Pennsylvania Human Relations Commission – until that time, he had complained only of retaliation based on his OSHA complaint. Def. SJ Mot. at 24.

Plaintiffs' amended Complaint alleges that Stewart was disparately treated and retaliated against with suspensions and discipline in August 2000, October 2000, December 2000 and January 2001. Complaint at Paragraphs 80-81; Answer to Def. SJ Mot. at 15-17. Only the January 2001 suspension may have occurred after Stewart filed his EEOC charge. Plaintiff Stewart completed an EEOC questionnaire alleging discrimination after his August 2000 suspension. However, he does not recall notifying Defendants that he intended to bring discrimination charges, or otherwise complaining of discrimination, and Defendant did not receive his EEOC questionnaire at that time. Def. SJ Mot. at 25 FN 15; Mark Stewart Deposition, Def. SJ Mot., Exhibit B, Answer to Def. SJ Mot., Exhibit 3 (“Stewart Depo.”) at 447:7-448:10. Plaintiffs' brief states, “By October, 2000, the defendants had learned that Stewart had been to the EEOC to complain of retaliation in his own right” (Answer to Def. SJ Mot. at 30), but Plaintiffs provide no evidence to support this contention, and we find none.

Thus, Plaintiff Stewart has provided no evidence of having personally fulfilled the first

element of a prima facie case of retaliation – engaging in protected activity – before any of the pre-2001 adverse actions were taken. We could seemingly grant summary judgment without further discussion as to all but his January 2001 suspension.

However, Plaintiff Stewart contends that he may have been subjected to retaliation by being associated with the other Plaintiffs' discrimination complaints, though he himself did not complain of discrimination, because he was a party to their lawsuit. Plaintiffs' brief states, "He was a participant in a Title VII proceeding, acting in support of the other plaintiffs' Title VII claim, [sic] even though his own claims were limited to the common law at the time. He was engaged in protected activity." Answer to Def. SJ Mot. at 30. By this reasoning, any adverse actions against Plaintiff Stewart after he joined the May 2000 complaint with Plaintiffs' Ferrell, Murray and Chism arguably could have been retaliatory, though Plaintiff Stewart himself had not complained of discrimination under Title VII and §1981.

Title VII and §1981 protections extend to those who assist or participate in investigations, proceedings or hearings arising under the civil rights statutes. 42 USCA §2000e-3; Eichman v. Indiana State University Board of Trustees, 597 F.2d 1104, 1107 (7th Cir. 1979) (plaintiff who assisted fellow faculty member with Title VII complaint entitled to statutory protection); Johnson v. University of Cincinnati, 215 F.3d 561, 574 (6th Cir. 2000) (plaintiff affirmative action official allegedly discharged for advocating on behalf of women and minorities makes out prima facie case against University employer under §1981 and Title VII); Scott v. Marsh 1994 WL 797678, *2 FN3 (D.S.C. 1994) (white plaintiff alleging nonselection for promotion based on failure to cooperate with discriminatory scheme could bring Title VII and §1981 retaliation complaint). These federal statutes also extend protection to those who associate with protected parties. See,

e.g., Holiday v. Belle's Restaurant, 409 F.Supp. 909, 909 (W.D.Pa. 1976) (embracing EEOC policy allowing complaints by those associated with protected parties in case involving Caucasian wife allegedly discharged for associating with her black husband); Tetro v. Elliott Popham Pontiac, Oldsmobile, Buick, and GMC Trucks, Inc., 173 F.3d 988 (6th Cir. 1999) (employee entitled to Title VII protection when he was discharged because his child was biracial); Parr v. Woodmen of the World Life Ins. Co., 791 F.2d 888, 890 (11th Cir.1986) (white plaintiff involved in interracial marriage is associated with a protected individual under Title VII and §1981); DeMedina v. Reinhardt, 444 F.Supp. 573, 580 (D.D.C. 1978) (wife is protected from discrimination in retaliation for husband's protected activities); Craig v. Suburban Cablevision, Inc., 140 NJ 623, 630-632, 660 A.2d 505 (1995) (entire, "cohesive" department protected from retaliatory discharge after co-worker complained of discrimination, because of potential coercive effect on discrimination plaintiff).

Plaintiff Stewart provides no evidence that he assisted or participated in any manner in the discrimination suits being brought by his co-plaintiffs before January 2001, when he testified in deposition. Thus, Stewart cannot establish the first prong of a prima facie retaliation case on the traditional grounds of opposition to discrimination or participation in proceedings stemming from a discrimination complaint. Plaintiff Stewart may only state a prima facie case on these claims under Title VII and §1981 if we find he was retaliated against for his "association with" discrimination plaintiffs by virtue of his presence on the same Complaint.

We find no Third Circuit case directly illustrating the threshold necessary to claim discrimination against one associated with those engaged in protected activity under Title VII and §1981. In Rode v. Dellarciprete, 845 F.2d 1195 (3rd Cir. 1988), the Third Circuit considered a 42

USC §1983 civil rights action in which the plaintiff alleged discrimination based on association with one who associated with racial minorities (i.e., association once-removed). The Court held that the plaintiff had presented no evidence to support her §1983 action as a perceived or actual supporter of protected parties, explaining, “She relies only on evidence of harassment due to her association with someone perceived as such a supporter. We hold that this attenuated connection by a person not a member of and not perceived as a supporter of minorities is insufficient to accord a person protection from discriminatory treatment based on racial animus or prejudice.” Id. at 1205.

Thus, we must determine whether Plaintiff Stewart’s connection to Ferrell, Murray and Chism was too “attenuated” to permit his Title VII and §1981 retaliation claims. Though it is a close call in the instant case, we hold, as a matter of first impression, that a co-plaintiff in a suit involving discrimination complaints – even one who does not himself allege discrimination – may be entitled to protection from retaliation under Title VII and §1981. Our ruling furthers the underlying spirit of the civil rights statutes, that those suffering from discrimination should be encouraged to come forward with their complaints for the betterment of society as a whole, and should not be deterred by the possibility of retaliation against themselves or their close associates. Moreover, the Third Circuit has unambiguously urged caution about granting summary judgment in discrimination cases, where the primary consideration is an employer’s alleged unlawful intent – always difficult for plaintiffs to prove. Goodby, 228 F.3d at 321. On summary judgment, allowing every inference in the non-moving party’s favor (i.e. in Stewart’s favor), we may imagine that Defendants considered Plaintiff Stewart part of the same trouble-making group as Ferrell, Chism and Murray, since he was listed as a co-plaintiff in the same suit

in which they alleged discrimination.

We find helpful reasoning by the New Jersey Supreme Court in Craig, 140 NJ at 630-632. In Craig, the court held that co-employees of a federal discrimination plaintiff could proceed with retaliation actions under New Jersey's anti-discrimination statute, modeled on Title VII. Id. The court explained:

From the limited record, we gather that the door-to-door sales department [in which the original plaintiff worked] was small and cohesive. Plaintiffs constituted virtually the entire sales force. They claim that the pendency of Susan's [original] action and the department's cohesiveness caused Suburban [the defendant] to retaliate against the entire department. Further, they assert that they "clearly felt that [Susan] had been wronged by the company and [that they] supported her." Finally, they argue that Suburban fired them because it perceived plaintiffs as having supported Susan. Id. at 630.

The Craig court continued:

To deny standing to the co-workers would encourage employers to take reprisals against the friends, relatives, and colleagues of an employee who has asserted [a discrimination] claim. Through coercion, intimidation, threats, or interference with an employee's co-workers, an employer could discourage an employee from asserting such a claim. In this context, we doubt that the Legislature would want us to bar the aggrieved co-workers from the courthouse by denying them standing to sue. Id. at 630-631.

The court followed a case from the District Court of the District of Columbia, which held, "Since tolerance of third- party reprisals would, no less than the tolerance of direct reprisals, deter persons from exercising their protected rights under Title VII, the Court must conclude ... that section 2000e-3 proscribes the alleged retaliation of which plaintiff complains." Id. at 632, citing De Medina, 444 F.Supp. at 580.

Like in Craig, Plaintiff Stewart was part of a small, clearly-defined group – in this case, a

group of four plaintiffs – which included three discrimination plaintiffs. Given the Third Circuit’s sympathetic disposition toward discrimination plaintiffs generally upon summary judgment, we doubt that this Circuit would countenance the coercion of such discrimination plaintiffs through adverse actions against their co-plaintiffs (even those filing on grounds other than discrimination) after they have filed suit together. Thus, we find that Plaintiff Stewart’s association with his co-plaintiffs was not excessively attenuated as to prevent him from the civil rights statutes’ protection against retaliation. Based on the foregoing, Mr. Stewart meets the first prong of a prima facie retaliation case (association with protected activity) regarding the adverse actions taken against him after he joined Ferrell, Murray and Chism in the May 2000 Complaint.

The suspensions in August 2000, October 2000, December 2000 and January 2001 (Complaint at Paragraphs 80-81; Answer to Def. SJ Mot. at 15-17) constitute adverse actions fulfilling the second prong of the prima facie case of retaliation prohibited by Title VII and §1981. See supra Footnote 8. We assume arguendo that their timing – coming only several months after Stewart joined the lawsuit with Ferrell, Murray and Chism – is sufficiently proximate to enable an inference of causation, the third and final prong of a prima facie retaliation case. See Farrell, 206 F.3d at 279-284 (plaintiff alleging retaliation after a discrimination complaint may rely on a “broad array” of evidence to establish a causal link), comparing Jalil v. Avdel Corp., 873 F.2d 701 (3rd Cir. 1989) (time alone creates causal inference sufficient to establish a prima facie case of retaliation where plaintiff was discharged two days after receiving EEOC charge) and Krouse v. American Sterilizer Co., 126 F.3d 494, 503 (3rd Cir. 1997) (summary judgment for defendant appropriate because nineteen months between discrimination complaint and adverse action too attenuated to create a genuine issue of fact).

As we have discussed, our inquiry on summary judgment does not conclude even if Plaintiff Stewart establishes a prima facie case of retaliation – the burden of production merely shifts to Defendant to articulate a legitimate, non-retaliatory reason for each action taken. Delli Santi, 88 F.3d at 199, Weston, 251 F.3d at 432. Defendants provide non-discriminatory, non-retaliatory reasons for Plaintiff Stewart’s four suspensions after May 2000. In August 2000, Plaintiff Stewart was suspended after directing hostile, foul language toward his supervisor. In October 2000, Stewart was again suspended after he was caught sleeping on the job. In December 2000, he was suspended for insubordination. In January 2001, Plaintiff Stewart was suspended when he was discovered out of his designated work area for an extended period of time.

Since Defendant presents legitimate reasons for the suspensions, the burden of production returns to Plaintiff to show that retaliatory animus was, in fact, the underlying motivation in Defendant’s actions. Fuentes, 32 F.3d at 764; Weston, 251 F.3d at 432. Instead, Plaintiff admits that all of Defendants’ stated reasons were true.

As to the August 2000 suspension, Plaintiff acknowledges that he was frustrated with a supervisor’s decision-making, so he addressed the supervisor, saying, “Mike, where do you want me to put the f***ing dies [tools]?” Stewart Depo. at 134:9-13. Whereupon, the supervisor replied, “Go home,” and began the proceedings which led to Stewart’s three-day suspension. Id. at 134:24-135:4; 163:9-14.

Likewise, Plaintiff testifies as to his October 2000 27-day suspension that he was caught sleeping on the job and “Sleeping on the job is wrong. They could fire you for that.” Id. at 121:9-122:21.

Plaintiff relates the events leading to his December 2000 suspension, admitting to

insubordination:

Now I said now if I start taking this apart and doing it as he told me, they're going to write me up for unsafe work because I won't be able to finish it and I'm leaving a job hanging and halfway done. So I said the best thing for me to do is to do nothing and just, you know, go out there with my wrench and whatever but don't actually take anything apart or put – just leave it the way it is. If they want to change it on day shift, they can change it around. So that's what I did.

[T]he next day I come in, Mr.[Durand] says, "Come into the office." And then he says, "You are under suspension for not following directions and I told you to take that apart and do it the way I told you the first time." Id. at 218:10-219:7.

Finally, Plaintiff confirms that he was out of his work area in January 2001 and at the time offered his supervisor no explanation for his conduct, leading to his fourth suspension since May 2000. Stewart engaged in the following interchange at deposition:

Q: For how long a period of time in the casting room had you not been working when Mr. Durand [the supervisor] came in and told you you were out of your work area?

A: About 20 minutes. That's when my nose started bleeding.

Q: And during that 20 minute period why were you in the casting room as opposed to going someplace else?

A: That's where I was, that's where I started. I was in a casting machine, I stopped to say hello to [another Plaintiff,] Barbara [Chism], my nose started bleeding, and that's why I was in the casting room.

Q: When you were cited for being out of your work area, what did you say to Mr. Durand?

A: I didn't say shit to him. I walked around the other way.

Q: So when he wrote you up you didn't say anything to him?

A: Not at that time.

Q: You offered him no explanations as to why you were there?

A: No.

Id. at 305:4-306:5.

Thus, Plaintiff Stewart admits Defendants' legitimate, non-discriminatory and non-retaliatory reasons for all four of his suspensions. Plaintiff argues that his punishments were more severe than similarly-situated employees received under similar circumstances. Answer to Def. SJ Mot. at 15-17. He must substantiate this belief in order to defeat summary judgment. See, e.g., Fitchett v.

Stroehmann Bakeries, Inc., 1995 WL 560028, *3 (E.D.Pa.) (“Fitchett's conclusory claim that white employees received more favorable treatment, based solely on an incident where an unidentified white employee was not reprimanded in Fitchett's presence, does not raise a genuine issue of material fact.”).

As to Plaintiff Stewart's first suspension for swearing at a supervisor, Stewart received full backpay after the union grieved his three-day suspension. Stewart Depo. at 163:9-14. He provides no evidence that others suffered lesser consequences for belligerence toward their supervisors.

As to his suspension for sleeping on the job, Plaintiff admits he could have been discharged for the offense but instead received a 27-day suspension. Id. at 121:9-122:21. Plaintiff alleges that “Cookie” was only suspended three days for sleeping on the job, but presents no evidence that Cookie had a prior disciplinary record like Stewart's. Id. at 239:7-11. Likewise, Carl Watkins and George the pipe fitter were suspended for only one day for sleeping on the job, but Plaintiff does not allege they also had prior disciplinary history. Id. at 241:16-243:4. In fact, Stewart's August 2000 suspension notice indicated that his next infraction would result in his discharge. Answer to Def. SJ Mot. at Ex. 37.

In Miller v. Yellow Freight Systems, Inc., the Western District of Pennsylvania compared the minority plaintiff's 30-day suspension for failing to sign a particular form with a mere warning given to a similarly-situated, white employee who likewise failed to sign the form. Miller v. Yellow Freight Systems, Inc., 758 F.Supp.1074, 1078-79 (W.D.Pa. 1991), aff'd 941 F.2d 1202 (3rd Cir. 1991). The Miller plaintiff had a prior warning in his disciplinary file and presented no evidence that the white employee had any prior disciplinary record. Id. The court granted summary judgment for defendant, holding, “Different disciplinary measures taken in response to different acts of

insubordination by employees with different work records do not constitute disparate treatment for purposes of establishing a prima facie case.” Id. We believe the Miller holding applies here, and find no evidence that Plaintiff Stewart’s 27-day suspension was disproportionately severe based on retaliation for Stewart’s association with his co-Plaintiffs.

Because Plaintiff admits he was insubordinate in December 2000, leading to his third suspension, it is irrelevant whether he was right or wrong as to how the job should have been performed. As the Third Circuit explains, "To discredit the employer's proffered reason, plaintiff cannot simply show that the employer's decision was wrong or mistaken, since the factual dispute at issue is whether discriminatory animus motivated the employer, not whether the employer is wise, shrewd, prudent, or competent." Fuentes, 32 F.3d at 765; see also Agostinelli v. Christiana Health Care Systems, Inc., 2001 WL 987538, *11 (D.Del.) (“Agostinelli cannot merely argue that CHCS's decisions were wrong or erroneous, but rather, that it's decisions were motivated by retaliatory animus.”) Plaintiff was not entitled to substitute his judgment for the employer’s.

As to both Plaintiff’s December 2000 and January 2001 suspensions, Stewart vaguely alleges that others were insubordinate or out of their work areas without similar consequences but names no specific individuals he believes were similarly-situated but disparately treated. Stewart Depo. at 221:6-24. On the contrary, Stewart states that the supervisor involved, Durand, treated more harshly a similarly-situated, white employee – Bob Stout – who never complained of discrimination or associated with the discrimination plaintiffs. Stewart Depo., 466:15-467:14. Stewart also testifies that Durand’s hostility toward him originated prior to the May 2000 Complaint. Id. at 466:15-17. Thus, Stewart cannot prove Durand’s actions were causally-connected to Stewart’s protected association with his co-Plaintiffs or that Durand’s actions were a pretext for retaliation. Stewart’s

showing is again insufficient.

We note that the suspensions in question originated with four different supervisory employees. The swearing incident involved Michael Baer, the sleeping was discovered by supervisors Steve May and Dave Rickers, and Plaintiff's insubordination and absence from his work area were punished by supervisor Durand. Of these, only Michael Baer was involved in the discrimination complaints alleged by Stewart's co-Plaintiffs. The record suggests no reason why May, Rickers or Durand would have harbored retaliatory animus against Stewart. See Weston, 251 F.3d at 432-433 (“[T]he decisions to suspend Weston were not made by his immediate supervisor to whom he directed his sexual harassment complaints. Thus, retaliatory animus, whether for purposes of establishing causation or pretext, cannot be ascribed to the hearing officers who made the suspension determination.”).

Even if a reasonable fact-finder could find a hint of disparate treatment in any one of the incidents Plaintiff Stewart raises, no reasonable trier of fact could believe that Plaintiff Mark Stewart was retaliated against because of his association with co-Plaintiffs Ferrell, Murray and Chism. The Third Circuit has noted that a “play cannot be understood on the basis of some of its scenes but only on its entire performance, and similarly, a discrimination analysis must concentrate not on individual incidents, but on the overall scenario.” Andrews, 895 F.2d at 1484. Looking at Stewart's entire performance, his own admissions suggest that he was disciplined repeatedly because he was a problem employee. As Stewart himself said, “[M]an, I got more suspensions in there than you can shake a stick at.” Stewart Depo. at 481:16-17.

E. Murray's Claims¹⁰

Like Stewart, to make out a prima facie claim of retaliation, Plaintiff Murray must first establish that he engaged in protected activity. Goosby, 228 F.3d at 323.

Murray contends that Defendant's management official Mike Conrad was well aware of Murray's friendship with Plaintiff Ferrell, and had made many derogatory comments to Murray concerning this association. Murray Depo. at 115:4-22, 125:2-10. Conrad admits that he knew Murray and Ferrell were friends. Conrad Depo. at 86:4-87:6, 88:3-13. However, we need not determine whether Murray's association was sufficient to establish protected activity under Title VII or whether it was too attenuated, as we discussed regarding Stewart.

Murray actively participated in discrimination proceedings launched by Plaintiff Ferrell by giving helpful statements to her attorney. Murray Depo. at 128:12-129:17. Such participation is sufficient, as a matter of law, to establish the protected activity prong of a prima facie case of retaliation. Eichman, 597 F.2d at 1107. Under the circumstances, we find Defendant's reference to Barber v. CSX Distrib. Servs., 68 F.3d 694 (3rd Cir. 1995) inapposite. The Barber plaintiff's complaint was too vague to establish protected activity because his complaint merely stated, "I am quite puzzled as to why the position was awarded to a less qualified individual" – without alleging a basis of discrimination. Id. at 697, 702. Murray, on the other hand, assisted in Ferrell's active sexual harassment complaint. Murray Depo. at 128:12-129:17.

To complete his prima facie case, Murray must produce evidence that Defendants knew of his protected activity and that it led to adverse actions against him. Goosby, 228 F.3d at 323. He contends that on one occasion in about April 1998, after Conrad insulted Murray's girlfriend, Murray

¹⁰Recall Footnote 3, supra.

notified Conrad of his participation in Ferrell's suit, saying "[I]t was a shame I had to write the statement out for Robin [Ferrell's] lawyer about what you did." Murray Depo. at 131:17-132:13. Construing these facts in the light most favorable to Plaintiff Murray, considering the context in which Murray notified Conrad that he was assisting Ferrell, we infer that Conrad was aware of Murray's protected activity.

Murray testifies that Conrad refused to speak with him for weeks thereafter. Id. at 132:12-133:6, 143:11-19. More importantly, Conrad and Conrad's intermediary, Michael Baer, began assigning Murray the least desirable jobs in the plant. Murray Depo. at 144:22-145:24; Stewart Depo. at 439:21-444:24.

On one occasion in September 1998, Baer gave Murray an incorrect product to work with, which damaged the machine on which Murray was working and injured Murray in the process. Answer to Def. SJ Mot. at 11; Id. at Exhibit 10, Accident Report. Murray was injured again in November 1998 after he was assigned to a machine he did not know how to use. In this instance, Defendant received a 38-day suspension without pay for failure to follow correct procedures, resulting in his injury. Id. at Exhibit 37, Record of Reprimand and/or Discipline; Murray Depo. at 83-100. Plaintiff Murray contends that the suspension was also retaliatory, because a similarly-situated employee, Dave Rusinski, who had not engaged in protected activity, was not suspended under similar circumstances. Answer to Def. SJ Mot. at 12.

Thereafter, Defendant's supervisory employees, Baer and Conrad, again assigned Murray a job which he could not perform and addressed him with hostility. Murray Depo. at 53:23-59:22. On one occasion, Baer told Murray that if Murray did not work a particular machine he had not been trained to operate, Murray should "go the f*** home." Id. at 58:21-59:4. Murray filed an EEOC

charge of retaliation and was issued a Right to Sue in February 2000. Answer to Def. SJ Mot. at 12.

In April 2000, Murray was the only applicant for a vacant position for which he was qualified and which he found more desirable than his then-current assignment. Murray Depo. at 162:14-165:14; Answer to Def. SJ Mot., Exhibit 13, Notice of Job Vacancy. He was never allowed to assume this position, and the position remained unfilled. Murray Depo. at 166:8-168:24. Arguably, the last allegation fails to meet the McDonnell-Douglas prima facie case, because Plaintiff provides no information indicating that Defendant continued to seek applicants for the position he sought, or that anyone less-qualified ever filled the job. McDonnell Douglas, 411 U.S. at 802.

Nonetheless, because Murray testifies to receive a slough of poor treatment between 1998 and 2000 stemming from his friendship with and assistance provided to discrimination complainant Ferrell, we find that he has alleged a prima facie case of retaliation.

Defendants respond with legitimate, non-discriminatory reasons only regarding the November 1998 suspension – Defendants dismiss the other alleged acts of retaliation off-handedly, stating they do not rise to the level of “adverse actions” actionable under Title VII. Def. SJ Mot. at 34. Defendants are correct that alleged retaliatory acts may only be addressed under the statute if they are “sufficiently serious and tangible to constitute a change in [Murray’s] ‘terms, conditions, or privileges’ of employment.” Robinson, 120 F.3d at 1299, 1300, citing 42 USC §2000e-2(a)(1). Defendants are wrong, however, in their conclusion as to the lack of seriousness of Murray’s relegation to undesirable assignments and machines he could not operate, his being provided with improper supplies, and his subjugation to verbal harassment. These are not just “minor and even trivial actions that an irritable, chip-on-the-shoulder employee did not like,” as Defendant would have us find. Id. at 1300 (internal citations omitted); Def. SJ Mot. at 34. On the contrary,

discriminatory assignments, undermining of work conditions and harassment are exactly the kind of actions that Title VII was designed to prevent. See, e.g., Burlington Industries, Inc. v. Ellerth, 524 U.S. 742, 118 S.Ct. 2257, 2268, 141 L.Ed.2d 633 (1998) (A tangible employment action is "a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits." [Emphasis supplied]); Mondzelewski v. Pathmark Stores, Inc., 162 F.3d 778, 787 (3rd Cir. 1998) (meat factory worker's reassignment to a shift leaving him less free time and requiring him to work Saturday evenings was sufficient to raise a triable issue as to whether the terms, conditions and privileges of his job were altered in retaliation for discrimination complaint); Hampton v. Borough of Tinton Falls Police Dep't, 98 F.3d 107, 116 (3d Cir.1996) (under Title VII, appointment to undesirable police assignment sufficient to withstand summary judgment on retaliation claim); Collins v. Illinois, 830 F.2d 692, 703 (7th Cir.1987) (under Title VII, "adverse action" does not require loss of money or benefits but rather may consist of changes in location, duties, perks, or other basic aspects of the job). Defendants have not met their burden of production on these issues.

As to the November 1998 suspension, Defendants contend that Murray's accident was the result of his failure to follow workplace safety guidelines of which he was acutely aware (Def. SJ Mot. at 33, 34), that he had a prior record of poor workplace safety (id. at 33, 34), and that in any event, Murray sustained no harm because a Union settlement ensured that he lost no pay during his suspension. Id. at 31. Defendant further alleges that Conrad did not impose the suspension in question, and that there is no evidence that the responsible officials were aware of Murray's participation in Ferrell's suit. Id. Finally, Defendant contends that more than six months had passed since Conrad became aware of Murray's participation – too long a period to allow the inference that

Murray's protected participation caused him to be disciplined. Id. at 32.

Murray's response concerns a similarly-situated individual, Dave Rusinski, whom he alleges did not participate in discrimination investigations and who was better-treated. Answer to Def. SJ Mot. at 12. A Defendant agent testified that he believed Rusinski had followed proper safety regulations. Id. at Exhibit 29, Deposition of Harry Cirullo, p. 36:18-37:9. Thus, a factual dispute exists on this point. But Murray does not establish that Rusinski had a similarly-poor prior safety record. In other words, Defendant may have been justified in any event – even if Murray and Rusinski made exactly the same error – in treating them differently.

Conrad admits that Murray's friendship with Plaintiff Ferrell was common knowledge (Conrad Depo. at 88:3-13) and thus, may have inferrably extended to the decision-makers regarding Murray's suspension. But Plaintiffs give no evidence that the decision-makers were aware of Murray's actual participation in Ferrell's complaint. Without more, we might conclude that summary judgment was appropriate as to Plaintiff Murray's November 1998 suspension.

However, we must look at this suspension in the context of all the circumstances surrounding it. Hampton, 98 F.3d at 114 (jury question existed as to whether race appeared to be a motivating factor, based on the totality of the circumstances). We have already found that Murray overcomes summary judgment as to the retaliatory unfavorable assignments and work conditions he alleges. Recalling the Third Circuit's cautionary warning about hastily granting summary judgment for an employer where its intent is at issue (Goosby, 228 F.3d at 321), we will not grant summary judgment as to the November 1998 action. In the context of the negative treatment which Murray was receiving throughout this period, a reasonable fact finder might believe Murray's suspension was part of a retaliatory pattern.

In sum, we deny summary judgment as to all of Murray's claims.

F. Defendant Harvard's Liability as PPC's Parent Corporation

Plaintiffs worked at a plant originally owned by Doehler Jarvis, Inc., which was acquired by Defendant Harvard in 1995. Answer to Harvard SJ Mot., Exhibit 2, SEC Form 10-K ("SEC Form"), p. 7. Doehler Jarvis changed its name to PPC in December 1998. Answer to Harvard SJ Mot., Exhibit 4, Harvard CEO Letter Dec. 18, 1998 ("CEO Letter"). In a separate summary judgment motion, Harvard claims that it should not be held liable for PPC's actions because it was not Plaintiffs' "employer," as required under the anti-discrimination statutes. Harvard SJ Mot. at 2.

Harvard is correct that a parent corporation may not be held liable for its subsidiary's discrimination or retaliation simply because the parent wholly owns the subsidiary. Id. at 3; Pearson v. Component Technology Corp., 247 F.3d 471, 484(3rd Cir. 2001) cert. denied, 2001 WL 826833; Jean Anderson Hierarchy of Agents v. Allstate Life Ins. Co., 2 F.Supp.2d 688, 691 (E.D.Pa.,1998). However, Harvard misapplies the holdings of Pearson to erroneously conclude that it cannot be liable for PPC's actions in this case. We find as a matter of law that the opposite is true – that Harvard may be liable. Whether or not Harvard is actually liable remains ultimately a question for the trier of fact.

In Pearson, the Third Circuit embraced the Department of Labor's test, which closely resembles the four-factor "integrated enterprise" test for determining parent company liability in a labor or employment context. Pearson, 247 F.3d at 477, 489-490. Though the Pearson holding was specific to a secured corporate creditor's liability as an "employer" to its borrower's employees under the Worker Adjustment Retraining Notification Act (WARN), the opinion approvingly noted

decisions applying the integrated enterprise test under anti-discrimination statutes. Id., citing Frank v. U.S. West, Inc., 3 F.3d 1357 (10th Cir.1993) and EEOC v. Chemtech Int'l Corp., 890 F.Supp. 623 (S.D.Tex.1995).

Though the issue was not before the Court in Pearson, we believe the Pearson holding evinces the Third Circuit's intention to extend the underlying principles of the integrated enterprise test to determinations of parent companies' liability under all labor and employment statutes.¹¹ The Court ultimately held that the factors should be the same for determining creditors' and parent companies' liability – so that its holdings should not be limited to the creditor/debtor context. Pearson, 247 F.3d at 484. The Court observed, “The current trend toward applying more than one test for affiliated corporate liability is manifestly unworkable.” Id. at 489. The court cited approvingly an earlier Third Circuit case highlighting the need for “a uniform federal approach” to veil-piercing. Id. at 490, citing US v. Pisani, 646 F.2d 83, 87-88 (3rd Cir. 1981) (regarding doctor liability for contributions left unpaid by defunct corporations in a Medicare context). The core issue

¹¹The five factors under the Department of Labor (DOL) test for assessing a parent company's liability are (i) common ownership; (ii) common directors and/or officers; (iii) de facto exercise of control; (iv) unity of personnel policies emanating from a common source, and (v) the dependency of operations. Pearson, 247 F.3d at 483, citing 20 C.F.R. §639.3(a)(2). The Third Circuit held that the five DOL factors “are the best method for determining WARN Act liability because they were created with WARN Act policies in mind and, unlike traditional veil-piercing and some of the other theories, focus primarily on circumstances relevant to labor relations.” Id. at 490.

The Pearson court noted that factors were not an “attempt to create new law in this area,” but rather, attempted to summarize the law of parent company liability employed throughout the country under labor and employment statutes. Id., citing 54 Fed.Reg. 16,045 (Apr. 20, 1989). See also id. at 491 (The DOL's five factors “were adapted from other tests developed for intercorporate liability, most notably labor law's ‘integrated enterprise’ test.” The DOL “intended ... to encourage courts to make use of established precedent in interpreting and applying its factors.”). We will not repeat the discussion here of the minor differences between the four-factor “integrated enterprise” test and the DOL test specifically applicable to the Worker Adjustment Retraining Notification Act (WARN). For a thorough discussion, see id. at 489-491.

The relevant anti-discrimination statutes do not fall under the Department of Labor. The Equal Employment Opportunity Commission, with primarily responsibility for enforcing Title VII, is an independent agency within the Department of Justice. Thus, the DOL's standards do not create policy in the anti-discrimination arena. We thus rely upon the pre-existing integrated enterprise test, “quite similar” to the DOL factors endorsed by the Third Circuit, and “specifically intended to deal with labor relations.” Id.

is the same in all labor and employment matters: “the fairness of imposing liability for labor infractions where two nominally independent entities do not act under an arm's length relationship.” (Internal citations omitted.) Id. at 486.

The integrated enterprise test is a “labor-specific veil-piercing test, first developed by the National Labor Relations Board.” Id. at 485. The test “looks to four labor-related characteristics of affiliated corporations: interrelation of operations; common management; centralized control of labor relations; and common ownership or financial control.” Id. at 486. The approach is holistic, looking to “all the circumstances of the case” as opposed to any single, dispositive factor, as was the case under old analyses for piercing the corporate veil, which focused on, for example, “nonpayment of dividends.” Id. at 486, 490-491. The Court observed that the integrated enterprise test, “with its focus only on labor relations and its emphasis on economic realities as opposed to corporate formalities, is demonstrably easier on plaintiffs than traditional veil piercing.” Id. The Court recalled an early case on the subject, stating the well-recognized proposition that in cases brought under federal labor statutes, “a ‘wrongdoer’ should not escape liability merely because ‘corporate formalities’ were observed,” and thus the integrated enterprise-type analysis is appropriate. Id. at 488, citing Local 397, International Union of Electronic, Electrical Salaried Machine & Furniture Workers v. Midwest Fasteners, Inc., 779 F.Supp. 788 (D.N.J.1992).

Ultimately, the extent of Harvard’s involvement is a question of fact for the jury. The Pearson decision noted that the integrated enterprise test presents factual questions and found that the application of the DOL factors in its own case was similarly a factual inquiry. Id. at 496-497. On summary judgment, we must determine whether Plaintiffs have put forth enough evidence to create genuine issues of material fact as to whether Harvard is an “employer” under the anti-discrimination

statutes according to the principles of the integrated enterprise test. Id. at 497. We now consider the relevant facts:

1. Interrelation of Operations

When considering this factor, we consider, for example, the sharing of administrative or purchasing services, interchanges of employees or equipment and commingled finances. Id. at 500. Plaintiff may not succeed in showing the requisite level of interrelation simply by proving that PPC's chain of command ultimately reached to Harvard – day-to-day control must be evident. Id. at 501. Moreover, showing that Harvard voted in directors' meetings and set general policies would be insufficient to establish this prong.¹² Id.

Plaintiffs allege that Harvard treated PPC “little differently than a production facility under its direct control.” Answer to Harvard SJ Mot. at 9. The Harvard CEO's letter to Plaintiffs announcing the name change of their plant, from Doehler-Jarvis to PPC, states,

We make this change for two key reasons. First, some people associate the name Doehler-Jarvis with the Toledo facility that helped pull us into Chapter 11. Secondly, and most importantly, we all work for a strong, focused company that is rebuilding a reputation for manufacturing excellence....Take it from me – Pottstown [PPC] is an integral part of our vision for the future of Harvard Industries. We need Pottstown's people, capabilities and production to support our vision of the future. Pottstown ranked second in sales among all Harvard plants in fiscal year 1998. CEO Letter.

The letter, mentioning PPC among “all Harvard plants” and “We need Pottstown's people,” and certainly suggests the truth of Plaintiffs' argument that PPC was merely one of Harvard's directly-controlled factories. The CEO's statement that “[W]e all work...” for Harvard is a particularly sweeping admission.

¹²As to “general policies,” we treat Harvard's labor and employment policies below, under the third prong.

Likewise, Harvard's SEC Form 10-K refers to Harvard "conduct[ing] its operations" through PPC. SEC Form at 2. Nonetheless, these types of blanket admissions, without details of day-to-day interrelation of operations, would be insufficient for Plaintiffs to overcome summary judgment as to the first prong of the integrated enterprise test.

Plaintiffs meets the interrelation of operations prong on summary judgment with their evidence that PPC's budget required Harvard's approval (Answer to Harvard SJ Mot., Exhibit 1, Deposition of David White ("White Depo."), pp. 7:12-8:4, 10:1-8), that PPC's sales and marketing were handled by Harvard (White Depo. at 13:20-14:14), that the quantity PPC produced was dictated by Harvard's marketing and Harvard management (Answer to Harvard SJ Mot. at 9), and that Harvard was foremost or exclusively mentioned on PPC's paychecks (id. at Exhibits 8 and 9, Harvard-Labeled Paychecks and W-2 Forms), stationery (id. at Exhibits 4, 10, 13 and 21) and facility signs (id. at Exhibit 3, Photograph of "Harvard" Facility Sign). Plaintiffs' evidence supports its argument that that "PPC was a production facility for Harvard and nothing more." Id. at 9.

2. Common Management

The common management inquiry seeks whether Harvard and PPC:

(1) actually ha[d] the same people occupying officer or director positions with both companies; (2) repeatedly transfer[red] management-level personnel between the companies; or (3) ha[d] officers and directors of one company occupying some sort of formal management position with respect to the second company. Pearson, 247 F.3d at 498.

From 1998 to 2000, PPC and Harvard's officers have been identical. White Depo. at 22:22-

23:15. In 1997, they were “virtually identical.” Id. The first criterion is established.

As to the second question, Harvard’s predecessor, Doehler-Jarvis, transferred Becki McDermott, the Human Resources Manager involved in most of the personnel decisions relevant to the case, from its Toledo operation to PPC in 1995 – just prior to the Harvard takeover. Answer to Harvard SJ Mot., Exhibit 22, Deposition of Becki McDermott (“McDermott Depo.”), pp. 9:14-10:3. She unofficially reported to Harvard’s Human Resources Department at its corporate headquarters (id. at 13:10-14:5), was part of Harvard’s email system (id. at 12:9-13), and had her evaluations were co-signed by a Harvard supervisor. Id. at 19:7-20:6.

Plaintiffs provide no evidence meeting the third common management criterion – that officers or directors of one company served as managers in the other company – but the three inquiries are linked by “or,” not “and.” In other words, because Plaintiffs clearly meet the first two criteria, common management is established at the summary judgment phase.

3. Centralized Control of Labor Relations

The Third Circuit requires us to examine “whether the companies actually functioned as a single entity with regard to its relationship with employees.” Pearson, 247 F.3d at 499. In the Tenth Circuit’s Frank decision, cited often in Pearson, the Court went a step further, holding that the critical question is, which “entity made the final decisions regarding employment matters related to the person claiming discrimination?” Frank, 3 F.3d at 1363, citing Trevino v. Celanese Corp., 701 F.2d 397, 404 (5th Cir. 1983) (control of labor relations is most important factor). See also Richard v. Bell Atlantic Corp., 946 F.Supp. 54, 62 (D.D.C. 1996) (“No one of the ... factors is dispositive, although evidence tending to show ‘centralized control of labor relations’ ... should be the focus of

the Court's analysis.”).

We agree that fundamentally we should be investigating the parent company's actual role in the alleged discriminatory and retaliatory employment practices. If Plaintiffs suggest facts indicating that Harvard was entirely or partially involved in the alleged harassment and adverse employment actions, then Harvard can naturally be held liable for its actions, and Plaintiffs overcome summary judgment on this prong.

Harvard admits that it promulgated the corporate EEO and sexual harassment policies. Harvard SJ Mot. at 8; Answer to Harvard SJ Mot. at Exhibits 10-15, EEO and Sexual Harassment Policies and Statements (“Policies”). As Harvard contends, the mere promulgation of such policies is not in itself enough to overcome summary judgment as to the centralized control of labor relations prong. See Frank, 3 F.3d at 1363; Richard, 725 F.Supp. at 62-63.

However, a parent company's promulgation of EEO and anti-harassment policies is significant when it suggests that company's exertion of influence over or overarching direction of the subsidiary's compliance with anti-discrimination legislation. We now hold that when a plaintiff complains of retaliation and failure to address complaints of harassment and discrimination, and the relevant anti-discrimination policies are those of a parent company, then, as a matter of law, the parent company may be held liable for such retaliation and continued discrimination where the parent company has an active role in the allegedly faulty implementation of the relevant policies.

Here, Plaintiffs complained of discrimination, harassment and retaliation – in Ferrell's case, she complained repeatedly – but their complaints were not redressed, and their testimony suggests the harassment and retaliation continued. Indeed, Plaintiffs complain that the harmful conduct escalated after their complaints. If Plaintiffs are believed, as they must be on summary judgment,

then Defendants' EEO and anti-harassment policies were ineffective.

Thus, we must only establish that Defendant Harvard had an active role in the implementation of the policies. The plethora of policies, updates and interpretations Harvard set forth suggests that Harvard's promulgation of EEO and anti-harassment policies was not merely a cursory act performed as part of a general submission of "Corporate Policies," immediately filed away and thereafter ignored by the subsidiary. See Policies. Harvard's guidance did not become part of a dusty binder in a manager's office somewhere in PPC's plant. On the contrary, Harvard's policies were posted around the PPC facility and were sent to PPC's employees individually. Id.; Ferrell Depo. at 186:3-193:4. Most importantly, Harvard's Vice President of Human Resources, Dean Konnick, was listed as the person to contact to complain about discrimination. Id. Ferrell called Konnick twice to complain about sexual harassment and retaliation, but Konnick took no corrective action. Id. Becki McDermott, the Human Resources Manager whom all the Plaintiffs dealt with most, unofficially took her orders from Konnick. McDermott Depo. at 13:10-14:5.

Furthermore, Harvard admits that its employees directly trained PPCs employees – including the alleged harassing, discriminating and retaliating officials – regarding the relevant policies. Harvard SJ Mot. at 8 Harvard negotiated the collective bargaining agreement and controlled employee benefits. McDermott Depo. at 14:14-15:25.

Finally, McDermott notified Ferrell of her layoff and termination benefits as a Harvard official. Answer to Harvard SJ Mot., Exhibit 21, Layoff Notice. A Harvard officer responded to Plaintiffs' counsel. Id. at Exhibit 20, Harvard Letter to Wilson.

In short, Harvard seemingly controlled or exercised considerable influence over all aspects of employee relations – precisely the subject of dispute in this case.

4. Common Ownership or Financial Control

This prong is most easily established by Plaintiffs. Harvard's 1999 SEC Form 10-K states, "During the past year [Harvard] conducted its operations primarily through three wholly owned subsidiaries," one of which was PPC. SEC Form at 2. In 2000, Harvard decided to close the PPC plant. White Depo. at 22:11-13. Harvard owned and financially controlled PPC.

In sum, we determine that Plaintiffs have elucidated sufficient facts suggesting that Harvard acted as an employer as defined by the integrated enterprise test, such that a reasonable jury could hold Harvard liable as PPC's parent.

Harvard may also be liable directly. As the Pearson court explained, "[I]t has long been acknowledged that parents may be 'directly' liable for their subsidiaries' actions when the 'alleged wrong can seemingly be traced to the parent through the conduit of its own personnel and management,' and the parent has interfered with the subsidiary's operations in a way that surpasses the control exercised by a parent as an incident of ownership. Pearson, 247 F.3d at 487, citing US v. Bestfoods, 524 US 51, 64, 118 S.Ct. 1876, 141 L.Ed.2d 43 (1998). The Pearson court explained,

Although direct liability is rarely used independently to hold parents liable for their subsidiary's actions, it has often been used in conjunction with the "integrated enterprise" test for liability, particularly to satisfy the "control of labor" prong. For instance, the Ninth Circuit in UA Local 343 of the United Ass'n of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada v. Nor-Cal Plumbing, Inc., 48 F.3d 1465 (9th Cir.1994), held that the "control of labor" prong of the integrated enterprise test may be established either by a showing of day-to-day control of labor, or by a showing that the parent was specifically responsible for the labor practice at issue in the litigation. See *id.* at 1471. Other courts have explained that all four factors of the integrated enterprise test are to be employed solely with an eye to discerning which entity--the parent or the subsidiary--was the final decisionmaker for the challenged practice. See, e.g., Hukill v. Auto Care, Inc., 192 F.3d 437, 444 (4th Cir.1999); Lusk v. Foxmeyer Health Corp., 129 F.3d 773, 777 (5th Cir.1997). Thus, the "directness" of a parent's involvement in the employment decision under dispute

may be conceived as a sliding scale; if the parent has sufficiently overwhelmed its subsidiary in taking the challenged action, such a showing is sufficient to create liability; if the parent was involved to a lesser degree, there must be some demonstration of the presence of the other aspects of the integrated enterprise test. Pearson, 247 F.3d at 487.

Here, Plaintiffs allege retaliation for complaining about discrimination, and thus, effectively allege that Defendants' anti-discrimination policies are inadequate. The anti-discrimination policy concerned was Harvard's, the parent company's. That is, in Pearson's language, "the parent was specifically responsible for the labor practice at issue in the litigation." Id. As we discussed above, the official named on the policy as the receiver of complaints was a Harvard official. Plaintiff Ferrell followed this policy, contacting the Harvard official, Dean Konnick. Rather than remedying the situation, Defendants allegedly retaliated against her. When Plaintiff Ferrell was laid off, her notice came from Harvard. Thus, arguably, Harvard was directly responsible for the fact that Plaintiffs' complaints were not addressed, and responsible for the final, alleged retaliatory action against Ferrell.

Finding Harvard potentially liable as a parent under the integrated enterprise factors and directly liable, we deny Harvard's summary judgment motion.

III. CONCLUSION

We grant Defendants' summary judgment motions as to Plaintiff Stewart's claims and those claims which Plaintiffs Ferrell and Murray did not dispute, regarding race and disability discrimination and common law negligent hiring and supervision. We deny summary judgment as to all remaining claims and set Ferrell's and Murray's cases for trial. An appropriate order follows.

6. We recognize and approve of former Plaintiff Barbara G. Chism's acceptance of an offer of judgment under Fed.R.Civ.Pro. 68.
7. This matter will proceed to trial.

BY THE COURT:

Franklin S. Van Antwerpen, U.S.D.J.