

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

MARY BETH OCASIO,	:	
	:	
Plaintiff,	:	CIVIL ACTION
	:	
v.	:	
	:	
LEHIGH VALLEY FAMILY	:	
HEALTH CENTER,	:	NO. 00-3555
	:	
Defendant.	:	

MEMORANDUM

BUCKWALTER, J.

December 11, 2001

Defendant has filed a motion for summary judgment, to which the plaintiff has not responded.

I. FACTS

The facts developed from discovery in this case are as follows:

On December 18, 1998, Lehigh Valley offered Ocasio a position as a Medical Assistant. January 4, 1999 was Ocasio's start date. (Dec. 18, 1998 offer letter) (Ex. "A", ex. "8").

Effective July 26, 1999, Lehigh Valley gave Ocasio a .50¢ an hour raise as part of a "market adjustment," which increased Ocasio's hourly wage to \$10.25. (July 26, 1999 Personnel Action Form) (Ex. "C"). Soon thereafter, Lehigh Valley gave Ocasio a .25¢ an hour raise for "additional duties." This "additional duties" raise was effective August 2, 1999 and

increased Ocasio's hourly wage to \$10.50 an hour. (Aug. 2, 1999 Personnel Action Form) (Ex. "D"). A little over six months after starting at Lehigh Valley, Ocasio received, in total, a .75¢ an hour raise.

In August of 1999, Ocasio received her six-month performance review. (Aug. 1999 Performance Review) (Ex. "E", ex. "27"). In this review, Ocasio received an overall performance score of 3.1. On a "5" point scale, "3" indicates that the "performance standard is consistently met." This review identified a number of problems, such as "being absent from the floor when needed"; "gets flustered easily"; "needs to consistently document patient's response to testing."

Significantly, among Ocasio's "strengths", as recognized by Lehigh Valley, was Ocasio's role as a "strong patient advocate for the Hispanic population." Id. Ocasio, however, "totally disagreed" with the performance review but did acknowledge that she had "some conflict with certain individuals" at work. Id.

Ocasio's performance problems at Lehigh Valley continued. On February 21, 2000, Ocasio received a written warning for seven (7) occurrences of absenteeism within a 12-month period. (Feb. 21, 2000 Written Warning). (Id. at ex. "11"). Ocasio acknowledged the validity of this written warning. (Occasion Dep. II at 57-58) (ex. "E").

On March 1, 2000, Ocasio underwent a "verbal counseling session" with Sherry Roth, the Practice Manager. (Verbal Counseling Session Memo) (Id. at ex. "12"). During this session, Ms. Roth counseled Ocasio for sending, to a co-employee, an inappropriate, unprofessional and insensitive e-mail. (Id.); (Occasion Dep. II at 59-64) (Ex. "E"). While Ocasio "believed" that Roth counseled her in retaliation for Ocasio's "complaints" of alleged

patient mistreatment, Ocasio also testified that she did not know why Roth wrote the verbal counseling session memorandum. (Id. at 62-63). Ocasio also testified that Roth did not counsel her because Ocasio was Hispanic. (Id. at 62).

On April 6, 2000, Sherry Roth again met with Ocasio to counsel Ocasio about miscellaneous complaints concerning job performance. Roth counseled Ocasio about changing her work assignments without consulting designated supervisors and for “creating a hostile work environment” due to her attitude towards other employees as well as supervisors, managers and directors. (April 6, 2000 Personnel Report) (Id. at ex. “15”). Ocasio, at her deposition, conceded that other individuals could interpret her passionate and expressive communication style, as an Hispanic, as anger. (Ocasio Dep. II at 86-89) (Ex. “E”).

On April 28, 2000, Ocasio received a second written warning regarding eight (8) absences within the last 12-month period. (April 28, 2000 Personnel Report) (Id. at ex. “16”). At her deposition, Ocasio conceded that this disciplinary action was justified. (Ocasio Dep. II at 102).

On May 4, 2000, Ocasio received yet another written confirmation of counseling. (May 4, 2000 Personnel Report) (Id. at ex. “19”). Among other things, Ocasio was counseled for leaving the flexible sigmoid scope in disinfecting solution for more than five (5) hours when Lehigh Valley’s procedures required that the equipment remain in the disinfecting solution for at least 20 minutes, but for no more than 40 or 45 minutes. Ocasio was warned that failure, on her part, to improve her performance could result in further disciplinary action up to and including suspension or termination. (Id.).

Also on May 4, 2000, Ocasio received a Final Warning. (May 4, 2000 “Final Warning” Personnel Report) (Id. at ex. “20”). Ocasio received a Final Warning for breaking the chain of command when she e-mailed a physician to complain about her supervisors. (Ocasio Dep. II at 109-111) (ex. “E”).

Shortly after Ocasio received her Final Warning, she filed this lawsuit.

On October 19, 2000, performance-based merit raises went into effect. Ocasio, however, did not receive a merit raise. (Oct. 27, 2000 Roth Memo) (Ex. “F”, ex. “43”). Roth, in her managerial discretion, decided not to give performance-based merit raises to Lehigh Valley employees who, like Ocasio, had received a Final Warning during the past year – that is, from July 1, 1999 to July 1, 2000. (Id.). Ocasio testified, moreover, that she does not know of any Lehigh Valley employee, on “Final Warning” status, who ever received a performance-based merit raise. (Ocasio Dep. III at 117) (Ex. “F”).

Although she received a Final Warning, Ocasio remains a Lehigh Valley employee.

II. DISCUSSION

In Count II of her complaint, plaintiff brings a claim for intentional infliction of emotional distress. While the complaint itself faults defendant for failing to prevent “white employees’ racially hostile and aggressive behavior”, there is nothing on this record to support that accusation.

Count III contains a claim for negligent supervision. Again, aside from the allegations in the complaint, there is little support for this in the record. What did take place in

terms of the plaintiff's complained of injuries in this regard was at the workplace, and would be thus barred by the Pennsylvania Worker's Compensation Act.

As to plaintiff's § 1981 claims, the claim for discrimination based upon race fails for several reasons. There were two adverse employment actions: the failure to receive a merit raise, and receiving less of a market adjustment than her co-employees. Aside from the fact that the record does not support a finding of racial animus, defendant has stated a legitimate non-discriminatory reason against which plaintiff can show no evidence, direct or circumstantial, from which a reasonable jury could disbelieve defendant's reasons or believe that an invidious discriminatory reason was more likely than not a motivating or determinative factor.

Plaintiff has also claimed that there existed a race-based hostile work environment. This simply is not supported by plaintiff's own deposition. This is not to suggest that race-based slurs, for example, were non-existent.¹ But there is no support that discrimination

1. For example, at p. 189 of her August 28, 2001 deposition, the following appears:

A. She made a comment about us being the Spanish people of the office instead of calling us by name. Someone had asked her – let me clarify this. Someone had asked her – there was a patient that needed some translating, and if anybody was available. And she was like, no, all the Spanish people went to lunch. And I was offended by that comment.

Q. When did the comment occur?

A. I think that was like in August of 2000.

Q. And you heard the comment?

A. No, Mayra did.

Q. Mayra. And she told you?

A. Yes.

Q. And what exactly was the comment? What were the exact words used by Dorene?

A. The Spanish people went to lunch.

Q. And how do you know that she was referring to you when she said Spanish people. Aren't there other –

(continued...)

(...continued)

A. Me and Josie are the only Hispanic that do translating in the office.

Q. Okay. And you were offended by the term Spanish people?

A. Yes.

Q. Is that a derogatory term?

A. For me it is, yes. Spanish is the language that we speak. It's not who we are.

Q. Okay. So if she had said the Hispanic people went to lunch, that would have been okay?

A. Or calling us by our name.

Q. Well, was it that she didn't use your name or was it that she used the term Spanish people?

A. Both, using Spanish people and not calling us by our name.

Q. Okay. So if she had said, for example, the Hispanic people when to lunch, would you have been offended by that?

A. No.

Q. But it was when he said Spanish instead of Hispanic, you took that as a derogatory comment?

A. Correct.

And at page 197:

Q. Were there any other racially derogatory comments or slurs that were directed to you or that you heard that related to being Hispanic?

A. Directed towards me or directed towards our patients?

Q. Directed towards you?

A. Towards me?

Q. I'm now going from January of '99 until the present.

A. Ray Nino was talking to Dr. McClarin, who was a resident at the Practice, and was telling a joke about his next door neighbor who asked him if he was Puerto Rican. He told his neighbor, no, because he likes to work.

Q. And what is Ray's national origin?

A. He's Columbian.

Q. He's Columbian. And you're saying that his neighbor asked him if he was Puerto Rican?

A. Yes.

Q. And it was Mr. Nino that said?

(continued...)

of this nature was pervasive and regular.

(...continued)

A. No, because he likes to work. And they all started laughing at the nurse's station.

Q. And this was a story told by Ray Nino at the nurse's station?

A. While I was standing right there.

Q. And who else was standing right there?

A. Dr. McClarin, Ray Nino, Cher, and Jennifer Smetana.

Q. And you found that to be –

A. Very offensive.

Q. Now, what – what is your national origin?

A. I'm Puerto Rican.

Q. Were you born in Puerto Rico?

A. I was born in Jersey, but my parents are both from Puerto Rico.

Q. So, therefore, you found it particularly offensive being Puerto Rican?

A. Correct.

Q. Are there any – by the way, did you complain about that comment

A. Yes, I did.

Q. – about that joke? To whom?

A. To the team leaders.

Q. What did they say or do?

A. Nothing.

Q. Are there any other comments or statements that you considered to be offensive and directed toward you or other Hispanic employees?

A. Yes, Hailey Wolf and Cher Klein. Hailey Wolf and Cher Klein had made a comment to Margarita that we were in American and that we should speak English.

Q. Okay. When was that made?

A. I think that was in the winter of '99.

Q. When was the Ray Nino joke told?

A. That was shortly after I started there, maybe two months after I started there.

Finally, the retaliation claim cannot stand because as previously stated, the defendant had a legitimate non-discriminatory reason for that action.

An order follows.

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v.	:	
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LEHIGH VALLEY FAMILY	:	
HEALTH CENTER,	:	NO. 00-3555
	:	
Defendant.	:	

ORDER

AND NOW, this 11th day of December, upon consideration of defendant Lehigh Valley Family Health Center's Motion for Summary Judgment (Docket No. 19), to which no response has been filed, it is hereby **ORDERED** that said Motion is **GRANTED**. Judgment is entered in favor of defendant Lehigh Valley Family Health Center and against plaintiff Mary Beth Ocasio.

This case is **CLOSED**.

BY THE COURT:

RONALD L. BUCKWALTER, J.