

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

ELIZABETH BROOKS,	:	CIVIL ACTION
Plaintiff	:	
vs.	:	
	:	
CHRIS MENDOZA	:	
and	:	00-5045
DENNY'S, INC. d/b/a	:	
DENNY'S RESTAURANT,	:	
Defendants.	:	

ORDER AND MEMORANDUM

ORDER

AND NOW, this 25th day of March, 2002, upon consideration of the Motion for Reconsideration of Order Denying Christopher¹ Mendoza's Motion for Summary Judgment (Document No. 38, filed December 31, 2001), Defendant Denny's Inc.'s Motion for Reconsideration of Order Denying Motion for Summary Judgment (Document No. 40, filed January 3, 2002), and Plaintiff's Answer to Defendant, Christian Mendoza's Motion for Reconsideration of the Denial of Summary Judgment (Document No. 42, filed January 4, 2002), for the reasons set forth in the attached Memorandum, **IT IS ORDERED** that the Motion for Reconsideration of Order Denying Christopher Mendoza's Motion for Summary Judgment (Document No. 38), and Defendant Denny's Inc.'s Motion for Reconsideration of Order Denying Motion for Summary Judgment (Document No. 40), are **GRANTED IN PART AND DENIED IN PART**, as follows:

1. The Motions for Reconsideration are **GRANTED** with respect to plaintiff's claims of negligent infliction of emotional distress set forth in First Cause of Action, Count I, of the

¹ Defendant's name is Christian Mendoza, not Christopher Mendoza.

Complaint, and the Motions for Summary Judgment are **GRANTED** with respect to such claims; and,

2. In all other respects the Motion for Reconsideration for Order Denying Christopher Mendoza's Motion for Summary Judgment (Document No. 38), and Defendant Denny's Inc.'s Motion for Reconsideration of Order Denying Motion for Summary Judgment (Document No. 40) are **DENIED**, and plaintiff's claims of intentional infliction of emotional distress will be allowed to proceed.

MEMORANDUM

I. BACKGROUND

On November 1, 2001, this Court denied Defendant Chris Mendoza's Motion for Summary Judgment and the Motion for Summary Judgment Pursuant to Fed. R. Civ. P. 56 of Defendant Denny's, Inc. Defendants Chris Mendoza and Denny's, Inc. ("Denny's") now move for reconsideration of their Motions for Summary Judgment on the ground that the exclusivity provision of the Pennsylvania Workmen's Compensation Act preempts plaintiff's claims of intentional infliction of emotional distress and negligent infliction of emotional distress. Upon reconsideration, the Court agrees that the exclusivity provision of the Pennsylvania Workmen's Compensation Act preempts plaintiff's negligent infliction of emotional distress claims and accordingly, the Court grants defendants' Motions for Reconsideration and Motions for Summary Judgment with respect to these claims. The Court concludes that plaintiff's intentional infliction of emotional distress claims are not preempted by the Pennsylvania Workmen's Compensation Act because they fall within the personal animus exception to the Pennsylvania Workmen's Compensation Act. Therefore, plaintiff's intentional infliction of emotional distress

claims against defendants Mendoza and Denny's will be allowed to proceed.

Plaintiff's negligent infliction of emotional distress and intentional infliction of emotional distress claims arise out of an alleged incident that occurred on May 23, 1999 during plaintiff's shift as a hostess at Denny's Store 1269 in Allentown, Pennsylvania. According to plaintiff, she approached defendant Mendoza, General Manager of Store 1269, at the end of her shift to tell him that she was clocking out and leaving. At that time another employee asked Mendoza to show plaintiff the "toy." Pl.'s Dep., May 16, 2001, at 57. Mendoza then "buzzed [the toy] in his pocket." Id. Plaintiff testified that she "just looked at him and said you're really sick. I hope you are enjoying yourself at my expense." Id. at 57-58. Plaintiff then started to walk away, and Mendoza called her back and "pushed the vibrator in his pocket ... pushed it onto his genitals and started buzzing it on himself ... and he went like ooh, aah, ooh, aah." Id. at 58, 77. At this point, plaintiff began to cry and started to look for "Pat ... to clock her out." Id. at 58. Defendant followed plaintiff around the restaurant as she looked for Pat and continued to operate the vibrator. Id. In response, plaintiff told Mendoza, "you're sick, you're sick." Id. Mendoza then asked plaintiff if she was clocked out and plaintiff told him that she didn't "need [Mendoza], I'll get Pat to clock me out." Id. at 59. Mendoza responded, "Pat can't clock you out anymore." Id. According to plaintiff, "all this time he was buzzing this thing and singing to himself." Id. Plaintiff then left the restaurant, and contends that she suffered severe emotional distress as a result of Mendoza's acts.

Defendant Mendoza denies plaintiff's account of May 23, 1999. Instead, he testified that on the day at issue Pat Remaly, a server at Store 1269, handed him a portable back massager, which he put in his left front pants pocket. Mendoza Dep., May 3, 2001, at 29-32. Approximately an hour later, while he was clocking out employees, including plaintiff, Mendoza

testified that he “propped his leg on one of the shelves ... [a]nd when [he] did, the little massager that was in [his] pocket went off.” Id. at 35. This startled Mendoza and he jumped back. Id. Mendoza denies that the massager went off more than once in plaintiff’s presence or that he followed plaintiff around the restaurant operating it. Id. at 35-40.

On May 24, 1999, plaintiff reported the incident at issue to District Manager Robert Clemens, who then offered to transfer plaintiff to Store 1190. Pl.’s Dep., May 16, 2001, at 73-78. Plaintiff told Clemens that she did not want a transfer, she “should [not] have to quit because of what [Mendoza] did,” and that she would “rather not work for Denny’s at all if [she had] to work with [Mendoza].” Id. at 78. On May 25, 1999, plaintiff submitted a Memo of Record regarding the May 23, 1999 incident to Denny’s. Id. at 79. On June 18, 1999, Denny’s officially terminated plaintiff. See Brooks Termination Doc., June 18, 1999.

On October 5, 2000, plaintiff filed a Complaint against defendants Mendoza and Denny’s in which she asserts claims intentional infliction of emotional distress and negligent infliction of emotional distress arising out of these events against both defendants and a claim under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq. (2001), against defendant Denny’s on theories of sexual harassment and retaliation.

II. STANDARD OF REVIEW

“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[,]” summary judgment shall be granted. Fed. R. Civ. P. 56(c); see also Celotex Corp. v. Catrett, 477 U.S. 317, 322-24, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986). The Supreme Court has explained that Rule 56(c) requires “the

threshold inquiry of determining whether there is the need for a trial – whether, in other words, there are any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party.” Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). Therefore, “a motion for summary judgment must be granted unless the party opposing the motion can adduce evidence which, when considered in light of that party’s burden of proof at trial, could be the basis for a jury finding in that party’s favor.” J.E. Mamiye & Sons, Inc. v. Fidelity Bank, 813 F.2d 610, 618 (3d Cir. 1987) (citing Anderson and Celotex Corp.).

In considering a motion for summary judgment, the evidence must be considered in the light most favorable to the non-moving party. See Adickes v. S.H. Kress & Co., 398 U.S. 144, 159, 90 S. Ct. 1598, 26 L. Ed. 2d 142 (1970) (quoting United States v. Diebold, 369 U.S. 654, 655, 82 S. Ct. 993, 8 L. Ed. 2d 176 (1962)). However, the party opposing summary judgment “must do more than simply show that there is some metaphysical doubt as to the material facts.” Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986). Therefore, “[i]f the evidence [offered by the non-moving party] is merely colorable, or is not significantly probative, summary judgment may be granted.” Anderson, 477 U.S. at 249-50 (citations omitted). On the other hand, if reasonable minds can differ as to the import of the proffered evidence that speaks to an issue of material fact, summary judgment should not be granted.

III. DISCUSSION

A. Intentional Infliction of Emotional Distress

Defendants argue that plaintiff’s intentional infliction of emotional distress claims (First

Cause of Action, Count I) are preempted by the Pennsylvania Workmen’s Compensation Act, 77 Pa. Cons. Stat. § 1 et seq. The Pennsylvania Workmen’s Compensation Act² “provides the sole remedy ‘for injuries allegedly sustained during the course of employment.’” Matczak v. Frankford Candy & Chocolate Co., 136 F.3d 933, 940 (3d Cir. 1997) (quoting Dugan v. Bell Tel. of Pa., 876 F. Supp. 713, 723 (W.D. Pa. 1994)). “The exclusivity provision of that statute bars claims for ‘intentional and/or negligent infliction of emotional distress [arising] out of [an] employment relationship.’” Id. (quoting Dugan, 876 F. Supp. at 724).

The Pennsylvania Workmen’s Compensation Act provides one very narrow exception, the personal animus exception, for “employee injuries caused by the intentional conduct of third parties for reasons personal to the tortfeasor and not directed against him as an employee or because of his employment.” Durham Life Ins. Co. v. Evans, 166 F.3d 139, 160 (3d Cir. 1999). Plaintiff contends that her intentional infliction of emotional distress claims fit within this exception because they are based on the alleged sexual harassment by plaintiff’s manager, defendant Mendoza, in her workplace.

The Pennsylvania Supreme Court has not addressed the issue of whether intentional infliction of emotional distress claims arising from sexual harassment in the workplace fall within the personal animus exception. Lower courts are split on this question. See id. The Pennsylvania Superior Court and some courts in this district have allowed such claims on the basis that a supervisor’s sexual harassment of an employee is “personal in nature and not part of the proper employer/employee relationship.” Hoy v. Angelone, 691 A.2d 476, 482

² The Pennsylvania Workmen’s Compensation Act provides that “[t]he liability of an employer under this act shall be exclusive and in place of any other liability to such employes ... in any action at law or otherwise on account of any injury or death defined in [77 Pa. Const. Stat. § 411] or occupational disease in [77 Pa. Cons. Stat. § 27.1].” 77 Pa. Cons. Stat. § 481(a).

(Pa.Super.Ct.1997), aff'd on other grounds, 720 A.2d 745 (Pa. 1998); see also Wils v. Phillips, No. Civ. A. 98-5752, 1999 WL 200674, at *6 (E.D. Pa. Apr. 8, 1999) (Hutton, J.); Lang v. Seiko Instruments USA, Inc., Civ. A. No. 96-5398, 1997 WL 11301, at *3 (E.D. Pa. Jan. 14, 1997) (Padova, J.); Dunn v. Warhol, 778 F. Supp. 242, 243-44 (E.D. Pa. 1991) (Waldman, J.); Schweitzer v. Rockwell Int'l, 586 A.2d 383, 391 (Pa.Super.Ct 1990). Other courts in this district have held that intentional infliction of emotional distress claims based on sexual harassment in the workplace do not fit within the personal animosity exception and are thus preempted by the Pennsylvania Workmen's Compensation Act. See Iacono v. Toll Brothers, Inc., No. CIV. A. 01-4486, 2001 WL 1632138, at *2 (E.D. Pa. Dec. 19, 2001) (Kelly, J.).

When the Third Circuit was presented with the issue in Durham, it expressed skepticism whether such claims fit within the personal animosity exception. The Court explained that:

Sexual harassment is a well-recognized workplace problem, the kind of thing employers must be prepared to combat. Because it is like other workplace hazards, we suspect that Pennsylvania would find [intentional infliction of emotional distress] claims based on this kind of harassment to be preempted. But we cannot be sure, and we express no opinion as to whether an [intentional infliction of emotional distress] claim for harassment more disconnected from the work situation would be preempted, for example where a supervisor sexually assaulted an employee or stalked her outside of work.

Id. at 160 n.16. Ultimately, however, the Third Circuit did not rule on the issue, id. at 160-61, and “refused to comment on the case law which holds that the Pennsylvania Workmen’s Compensation Act does not preempt intentional infliction of emotional distress claims where the sexual harassment is personal in nature and not part of the proper employer-employee relationship.” Wils, 1999 WL 200674, at *6; see also Carter v. Philadelphia Stock Exchange, No. CIV. A. 99-2455, 1999 WL 715205, at *4 (E.D.Pa. Aug. 25, 1999) (Ludwig, J.).

In this case, plaintiff’s intentional infliction of emotional distress claims arise from the

alleged harassment—taunting plaintiff with a vibrating object in his pants, pursuing plaintiff around the restaurant despite her protests, and uttering obscene remarks to plaintiff—by plaintiff’s manager, defendant Mendoza. Although the alleged harassment occurred in plaintiff’s workplace, the Court concludes that Mendoza’s acts were personal in nature and sufficiently disconnected from the work situation for plaintiff’s claims to fit within the exception to the Pennsylvania Workmen’s Compensation Act. In making this determination, the Court relies on prior decisions of other courts in this district and the Pennsylvania Superior Court because neither the Third Circuit nor the Pennsylvania Supreme Court has decided the issue. Accordingly, plaintiff’s intentional infliction of emotional distress claims are not preempted by the Pennsylvania Workmen’s Compensation Act and the Motions for Reconsideration of the denial of the Motions for Summary Judgment on this issue are denied.

B. Negligent Infliction of Emotional Distress

Defendants also argue that the Pennsylvania Workmen’s Compensation Act preempts plaintiff’s negligent infliction of emotional distress claims (First Cause of Action, Count II). The Court agrees because, unlike plaintiff’s intentional infliction of emotional distress claims, the personal animus exception does not except negligent infliction of emotional distress claims from the bar of the Pennsylvania Workmen’s Compensation Act. See Pryor v. Mercy Catholic Med. Ctr., No. CIV. A. 99-0988, 1999 WL 956376, at *2 (E.D. Pa. Oct. 15, 1999) (Hutton, J.) (“While the personal animus exception to the Pennsylvania Workmen’s Compensation Act ... supports the possibility of a claim of intentional infliction of emotional distress, a negligent infliction claim by its very terms excluded.”). “Any claim for negligent infliction of emotional distress which arises out of an employment relationship is thus barred by the [Pennsylvania Workmen’s Compensation Act].” Hoover v. Nabisco, Inc., No. CIV. A. 99-1452, 1999 WL 1073622, at *2 (E.D. Pa. Nov.

10, 1999) (O'Neill, J.) (citing Vaughan v. Pathmark Stores, Inc., 1999 WL 299576, at *2 (E.D. Pa. May 10, 1999); Williams v. Claims Overload Sys. Inc., 1998 WL 104476, at *3 (E.D. Pa. Feb. 25, 1998)); see also Hettler v. Zany Brainy, Inc., No. Civ. A. 99-3879, 2000 WL 1468550, at *6 (E.D. Pa. Sept. 27, 2000) (Pollack, J.) (“Claims against employers for negligent infliction of emotional distress do not fall within the personal animus exception.”); Fieni v. Pocopson Home, Civ. A. No. 96-5343, at *6, 1997 WL 220280 (E.D. Pa. Apr. 29, 1997) (Hutton, J.) (dismissing a negligent infliction of emotional distress claim as preempted by the WCA). Accordingly, the Court grants the defendants’ Motions for Reconsideration as to these claims and now grants the Motions for Summary Judgment as to the claims of negligent infliction of emotional distress against defendants Mendoza and Denny’s.

IV. CONCLUSION

For the foregoing reasons, the Court grants defendants’ Motions for Reconsideration with respect to plaintiff’s negligent infliction of emotional distress claims against defendants Mendoza and Denny’s and grants the Motions for Summary Judgment as to these claims. The Court denies defendants’ Motions for Reconsideration with respect to the intentional infliction of emotional distress claims against defendants Mendoza and Denny’s, and these claims will be allowed to proceed.

BY THE COURT:

JAN E. DUBOIS, J.