

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

PEARL MARION,	:	
Plaintiff,	:	CIVIL ACTION
	:	
v.	:	
	:	No. 00-3553
CITY OF PHILADELPHIA, et al.,	:	
Defendants.	:	

**GREEN, S.J.**

**December 9, 2002**

**MEMORANDUM /ORDER**

Presently before the Court is the City of Philadelphia and individual defendants' Motion for Summary Judgment, *pro se* Plaintiff's Response, Defendants' Reply and *pro se* Plaintiff's Sur-Reply. Also before the Court is the Second Motion for Summary Judgment of Defendant Miles Landenheim, M.D., and *pro se* Plaintiff's Response.

**I. Factual and Procedural Background**

In 2000 *pro se* Plaintiff Pearl Marion ("Plaintiff" or "Marion"), brought an action alleging retaliation and discrimination by her employer, the City of Philadelphia Water Department (the "Department" or "City"), co-workers and individuals associated with the City (collectively the "Defendants").<sup>1</sup> Plaintiff's claims include: (1) religious and sexual harassment in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.*, ("Title VII") and the Pennsylvania Human Relations Act ("PHRA"); (2) violation of 42 U.S.C. §§ 1981, 1983 and 1985; (3) retaliation under Title VII and the PHRA; (3) violation of the Age Discrimination in

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<sup>1</sup> Defendants include the City of Philadelphia Water Department, George Hayes, M.D., Brenda Shields, Richard Roy, Drew Mihicko, Lorin Fields, Raymond Staniec, Lauren Boles, Abdul Latif, Joseph Galante, Raymond Defelice, Michael Hogan, Daniel Plaasky and Miles Ladenheim, M.D. With the exception of Dr. Landenheim, all Defendants are employees of the City of Philadelphia. Dr. Ladenheim incorporates the arguments of the City of Philadelphia in support of its Motion for Summary Judgment. In addition, he has filed a separate motion for summary judgement, consolidated herein, that addresses Plaintiff's medical negligence and §1983 claims against Dr. Landenheim.

Employment Act, 29 U.S.C. §621, *et seq* (“ADEA”); (4) violation of the Equal Pay Act of 1963, 29 U.S.C. § 206(d)(1), (“Equal Pay Act”); and (5) false light invasion of privacy under Pennsylvania state law.<sup>2</sup>

Plaintiff first set forth similar employment discrimination claims in a lawsuit filed against her employer in 1996. The matter was tried before a jury. Following testimony in the Plaintiff’s case, the Defendants moved for a directed verdict which was granted. Plaintiff appealed to the Third Circuit Court of Appeals which affirmed the lower court’s decision. After the trial Plaintiff returned to the position she held in the Water Department for the previous eight years. She continued to report to the same supervisor, Drew Mihocko.

It is undisputed that upon her return to the workplace, Plaintiff resumed keeping a journal of events, conversations and activities that occurred in her workplace. Plaintiff’s manner of observing the activities of the workplace caused concern among some of her co-workers and supervisors. Eventually, the Department questioned Marion’s fitness for duty. The Department consulted with the City of Philadelphia’s Medical Evaluation Unit (“MEU”). The MEU interviewed the Plaintiff and ordered an evaluation by an independent psychiatrist, Miles Landenheim, M.D., named as a defendant herein. Dr. Landenheim suggested Plaintiff would benefit from a change in work environment and continued psychotherapy but found that she was

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<sup>2</sup> Many of the contentions of the Plaintiff were set forth in civil action 01-175, consolidated into this action by order of the Honorable Jan E. Dubois to whom the cases were assigned. Judge Dubois granted in part and dismissed in part certain of the causes of action asserted in 01-175 before transfer of the consolidated cases to my calendar. By order dated October 16, 2001, I granted in part and denied in part the motion to dismiss filed by Defendants in the consolidated action. Those orders in pertinent part provide for: dismissal of Plaintiff’s Title VII and ADEA claims against individual defendants, Plaintiff’s claims under the Americans with Disability Act, and Plaintiff’s tort claims under Pennsylvania law against the City of Philadelphia. Plaintiff’s Title VII, PHRA, ADEA and §1983 claims against the City of Philadelphia were allowed to proceed as were Plaintiff’s §§1981,1983 and 1985(3) claims, her PHRA and Pennsylvania state tort claims against the individual defendants.

capable of performing her job responsibilities without accommodation. The MEU recommended Plaintiff be transferred to another department and continue to receive treatment. Based on the MEU recommendation and the Landenheim evaluation, the Department barred Plaintiff from the workplace for medical reasons and sought her voluntary transfer to another department as well as continued therapy. Plaintiff rejected the recommendation and alleged the Department's actions were discriminatory and in retaliation for her earlier lawsuit. Eventually the Plaintiff was allowed to return to work. Plaintiff was paid for the time she did not work and eventually neither her personal leave or sick time was charged.

Once she returned to work, Plaintiff alleges she was closely monitored by her supervisor who she alleges manufactured performance issues to harass her and blemish her record in further retaliation for filing the 1996 lawsuit. Plaintiff also alleges she was denied a promotion because of her age and/or in retaliation for filing the 1996 lawsuit. In addition, she alleges she was harassed due to her race, gender and religious beliefs by her supervisor and co-workers and was discriminated against in terms of pay due to her gender. Finally, Plaintiff alleges the written evaluation by Doctor Landenheim portrayed her in a false light.

## **II. Legal Standard**

Pursuant to Rule 56 of the Federal Rules of Civil Procedure, Defendants, to be successful, must prove that, in considering the “pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, . . . there is no genuine issue as to any material fact and that they are entitled to a judgment as a matter of law.” See Fed. R. Civ. P. 56(c). An issue is “material” if the dispute may affect the outcome of the suit under the governing law and is “genuine” if a reasonable jury could return a verdict for the nonmoving party. See Anderson v.

Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). If, in response to a properly supported motion for summary judgment, an adverse party merely rests upon the allegations or denials in her pleading, and fails to set forth specific, properly supported facts, summary judgment may be entered against her. See Fed. R. Civ. P. 56(e). Of course, a court must draw all reasonable inferences in favor of the party against whom judgment is sought. See American Flint Glass Workers, AFL-CIO v. Beaumont Glass Company, 62 F.3d 574, 578 (3d Cir. 1995). The substantive law controlling the case will determine those facts that are material for the purpose of summary judgment. See Anderson, 477 U.S. at 248.

### **III. Discussion**

The record before me demonstrates Plaintiff's misplaced reliance on innocuous workplace comments that she would characterize as discrimination. Many of the events Plaintiff has labeled as discrimination occurred prior to the filing and trial of her 1996 civil rights lawsuit, and were addressed by this Court in Marion v. City of Philadelphia, Civ. No. 96-7092, 1998 WL 438495 (E.D. Pa. July 29, 1998) . While those events may inform the Court as to the historical relationship of the parties, they are precluded from serving as a basis for the current action as *res judicata* bars their consideration. Plaintiff has failed to provide evidence sufficient to create a disputed issue regarding any material fact, and instead relies on her own perceptions, beliefs, opinions, allegations, denials and her intent to demonstrate at trial what she is unable to demonstrate on summary judgement. I do not question the sincerity of the beliefs and perceptions of the Plaintiff; however they do not constitute evidence sufficient to defeat the motions for summary judgement. For the reasons discussed below Defendants' motions for summary judgement will be granted.

A. Racial, Sexual and Religious Harassment Claims under Title VII and PHRA

In support for her harassment claims Plaintiff points to the evaluation conducted by Dr. Miles Landenheim, at the request of the City, and with the consent of the Plaintiff. Plaintiff contends the instruction from her employer to meet with Dr. Landenheim is harassment as it conflicts with the tenets of her faith. It is undisputed that the Defendant required the Plaintiff to meet with Dr. Landenheim and that Dr. Landenheim asked questions, considered by Plaintiff to be of a personal nature, during his interview of the Plaintiff, including questions about her sexual history in relation to claims made by Plaintiff in the first lawsuit.<sup>3</sup> Accepting that these events occurred, there is no evidence that they were improperly motivated. These facts do not amount to discrimination so pervasive and regular that liability attaches under Title VII or the PHRA for racial, sexual or religious harassment. Plaintiff's evidence in its totality does not demonstrate a workplace that is permeated with racial, sexual or religious hostility severe or pervasive enough to alter the conditions of the Plaintiff's employment. Summary judgement will be granted to the Defendants as to the Title VII and PHRA harassment claims.

B. Retaliation

Plaintiff alleges that Defendants retaliated against her for filing the 1996 lawsuit. After the first trial, Plaintiff was sent to the MEU by the Department, received written warnings regarding her performance and was denied a promotion. I will assume these allegations establish Plaintiff's prima facie case.<sup>4</sup>

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<sup>3</sup> See Plaintiff's Motion in Opposition to Summary Judgement, Exhibit 32, pg. 64 ln. 8 - pg. 67 ln. 16.

<sup>4</sup> To establish a prima facie case of retaliatory discrimination under Title VII, a Plaintiff must demonstrate that (1) she engaged in protected activity; (2) an adverse employment action taken by the employer against the Plaintiff; and (3) a casual connection between his participation in the protected activity and the adverse employment

Defendants respond with legitimate non-discriminatory explanations for the employment actions in question. According to the Defendants, Plaintiff was barred from the workplace and sent to Dr. Landenheim because her unusual conduct in the workplace and information gleaned during discovery and trial of the first action indicated a potential medical problem. Plaintiff's second allegation of retaliation is that upon her return from the forced leave, her supervisor monitored her closely and wrote disparaging memos to her employee file criticizing her job performance. The memos in question, on their face, demonstrate a legitimate non-discriminatory reason for the employment action, Plaintiff's less than satisfactory work performance.<sup>5</sup> Finally, Defendants argue Plaintiff did not receive the promotion to Executive Assistant as the City's personnel guidelines only requires consideration of the two highest scoring candidates on the exam. It is undisputed that Plaintiff placed fourth and that the position was filled by the candidate who placed second on the exam.

The burden now becomes Plaintiff's to produce some evidence sufficient to raise a genuine issue of disputed fact as to the explanations offered by the Defendants. Plaintiff has offered no evidence to refute Defendants' explanations or any evidence from which a rational fact-finder could conclude that the Defendants' explanations are pretextual. As Plaintiff has failed to put forth any evidence that Defendant's explanations are implausible, untrue or

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action. Robinson v. Pittsburgh, 120 F.3d 1286, 1299 (3<sup>rd</sup> Cir. 1997) (citing Nelson v. Upsala College, 51 F.3d 383, 386 (3<sup>rd</sup> Cir. 1995)). Once the Plaintiff establishes the prima facie case, the defendant must offer a legitimate non-discriminatory reason for the adverse employment action. Olson v. General Electric Astrospace, 101 F.3d 947, 951 (3<sup>rd</sup> Circuit 1996). The burden then becomes the Plaintiff's to demonstrate that the reason presented was a pretext, or not the true reason for the employer's decision. Id. See also, Gomez v. Allegheny Heart Services, Inc., 71 F.3d 1079, 1083-84 (3<sup>rd</sup> Cir. 1995) (PHRA is construed consistently with Title VII).

<sup>5</sup> See Exhibit 33 of Plaintiff's Memo in Opposition to Summary Judgement.

otherwise a pretext her claim of retaliation must fail and Defendants' motion as to the retaliation claims will be granted.

C. Section 1981 Claim

Plaintiff offers no evidence to support her §1981 claim. Summary judgement will be granted to the Defendants on this claim.

D. Section 1985 Conspiracy

Plaintiff alleges that her employer, co-workers and Doctor Landenheim engaged in a conspiracy to discriminate against her based on gender, religion and/or age.<sup>6</sup> The Plaintiff fails to produce any evidence from which an agreement between the Defendants can be inferred, let alone an agreement to deprive her of rights under Section 1985. Plaintiff's response to the motion that the conspiracy will be proven at trial is insufficient to defeat summary judgement. Defendants' motion for summary judgement as to the conspiracy claim will be granted.

E. Age Discrimination

Plaintiff alleges that she was denied a promotion to Executive Assistant due to her age. Plaintiff is over 40, claims she was qualified for the position and that younger candidates received the promotions.<sup>7</sup> This showing creates a presumption of age discrimination that the employer can rebut by stating a legitimate non-discriminatory reason for the adverse employment

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<sup>6</sup> In order to state a claim under 42 U.S.C. § 1985(3), the plaintiff must allege "(1) a conspiracy; (2) motivated by a racial or class based discriminatory animus designed to deprive, directly or indirectly, any person or class of persons ... [of] the equal protection of the laws; (3) an act in furtherance of the conspiracy; and (4) an injury to person or property or the deprivation of any right or privilege of a citizen of the United States." Lake v. Arnold, 112 F.3d 682, 685 (3d Cir.1997).

<sup>7</sup> See Sempier v. Johnson & Higgins, 45 F.3d 724, 727 (3d Cir.), cert. denied, 515 U.S. 1159, 115 S.Ct. 2611(1995)(prima facie age discrimination claim requires plaintiff to demonstrate she is over 40, qualified for the position in question, suffered an adverse employment decision, and was replaced by a sufficiently younger person).

decision. Sempier, 45 F.3d at 728. The Plaintiff then has an opportunity to demonstrate the untruthfulness of the explanation and that it is a pretext for discrimination. Id.

Defendants state Plaintiff applied for an executive assistant position posted in 1999. The position was filled by an applicant higher on the eligibility list than Plaintiff. City regulations only require the Department to consider the top two candidates from the eligibility list, and Plaintiff placed fourth. The successful candidate was second on the list. Plaintiff does not challenge the policy or her position on the eligibility list. Plaintiff also believes she should have received an unposted executive assistant position. The Defendants state this position was not an open position but in fact a reclassification of the incumbent's job title with no change in the incumbent's job responsibilities or pay. Again, Plaintiff does not dispute this. Instead, to refute Defendants' explanation, Plaintiff offers statements allegedly made by unidentified co-workers.<sup>8</sup> As it is unclear not only who made these statements but when and in what context, they do not refute Defendant's proffered explanation or demonstrate a pretext on the part of the Defendants. Summary judgement as to the ADEA claim will be granted to the Defendants.

#### F. Equal Pay Act

Plaintiff has offered no evidence to supports this claim.<sup>9</sup> Her response to the absence of a prima facie case is that the payroll records provided by the Defendants during discovery are fraudulent. As Plaintiff offers no evidence to support her allegation of fraud or to support her Equal Pay Act claim, the Defendants' motion will be granted as to this claim.

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<sup>8</sup> "This is for young people — there is nothing in it for you", "If you haven't made it by 30, you won't", "It's nice to be young and wanted." See Plaintiff's Motion in Opposition to Summary Judgement at page 6.

<sup>9</sup> A plaintiff establishes a prima facie case by showing that employees of the opposite sex were paid differently for performing work of substantially equal skill, effort and responsibility, under similar working conditions. Stanziale v. Jargowsky, 200 F.3d 101 (3<sup>rd</sup> Cir. 2000).

G. Section 1983 Claims

To establish liability against the City, and the individual defendants employed by the City, for violations of §1983, Plaintiff must establish a municipal custom or policy.<sup>10</sup> Plaintiff has made vague references to a citywide custom of pitting employees against each other.<sup>11</sup> She has not demonstrated how this custom is so permanent and well-settled that it is tantamount to law. In addition, there is no evidence that this custom of pitting employees against each other was the proximate cause of her alleged injury.

To establish liability against Dr. Landenheim, a private party, Marion must demonstrate state action on his part. It is undisputed that Dr. Landenheim is a private physician in private practice. He is employed by a health care organization that has a contract with the City to conduct medical evaluations at the request of the MEU. Prior to conducting his evaluation of Marion, Dr. Landenheim spoke with MEU personnel to ascertain the scope of his review. The Plaintiff offers no other evidence of Dr. Landenheim's contacts with the City such that he could be liable under §1983. In fact, Plaintiff admitted during her deposition that she had no civil right claims against Doctor Landenheim.<sup>12</sup> Even if Plaintiff had evidence sufficient to establish a §1983 violation, she has not set forth any evidence establishing municipal liability or demonstrating Dr. Landenheim acted under color of law. Summary judgement on the §1983 claims will be granted to the Defendants.

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<sup>10</sup> See, Monell v. Dept. of Social Services of the City of New York, 436 U.S. 658, 696; 98 S.Ct. 2018 (1978) (municipal liability attached only when execution of government's policy or custom inflicts injury complained of). Policy or custom although not authorized by law may be established through practices so permanent and well settled as to constitute law. Andrews v. City of Philadelphia, 895 F.2d 1469, 1480 (3<sup>rd</sup> Cir. 1990).

<sup>11</sup> See Defendants Motion for Summary Judgement, Exhibit , page 92 line 17 - page 94 line 15.

<sup>12</sup> See Defendant Landenheim's Second Motion for Summary Judgement, Exhibit D, page 131 lines 4 - 16.

#### H. Invasion of Privacy - False Light

Plaintiff appears to allege that the written evaluation of Dr. Landenheim portrayed her in a false light and invaded her privacy.<sup>13</sup> False light invasion of privacy requires a showing of wide spread dissemination of the statement. Weinstein, 827 F.Supp. at 1202. As the evaluation was forwarded only to MEU personnel, there is no wide spread dissemination. Plaintiff does not contradict or challenge this. There are no facts that evidence a wide spread dissemination of the evaluation or any facts that call into question the sincerity of the medical opinion of Dr. Landenheim. Defendants motion for summary judgement as to the false light claim will therefore be granted.

#### I. Medical Malpractice Claim Against Dr. Landenheim

Plaintiff alleges Dr. Landenheim was negligent in not conducting an independent evaluation. Plaintiff argued Dr. Landenheim failed to read her journals, only considered the memos written by the Defendants and did not evaluate Plaintiff's co-workers. To prevail on a medical negligence claim in Pennsylvania, Plaintiff must produce an expert medical opinion to establish her prima facie case. Hail v. Bashline, 392 A.2d 1280, 1285 (1978). If Plaintiff fails to do so she may not proceed to trial and summary judgement to the moving party is appropriate. Miller v. Sacred Heart Hospital, 753 A.2d 829, 832 (Pa. Super. 2000). Plaintiff's inability to get an expert medical opinion compels my granting summary judgement to Defendant Dr. Landenheim on Plaintiff's medical negligence claim.

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<sup>13</sup> In Pennsylvania, the tort of false light invasion of privacy is defined as one who gives publicity to a matter concerning another that places the other before the public in a false light is subject to liability to the other for invasion of his privacy, if (a) the false light in which the other was placed would be highly offensive to a reasonable person, and (b) the actor had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the other would be placed. Weinstein v. Bullick, 827 F.Supp. 1193, 1202 (E.D.Pa.1993)(citing the Restatement (2nd) of Torts §652E).

#### **IV. Conclusion**

I conclude that Defendants have filed properly supported motions for summary judgement and that Plaintiff has failed to provide specific, properly supported evidence to contest Defendants' motions. Defendants' motions for summary judgement are granted in their entirety. An appropriate order follows.

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

PEARL MARION,

:

Plaintiff,

:

CIVIL ACTION

:

v.

:

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No. 00-3553

CITY OF PHILADELPHIA/WATER

:

DEPARTMENT, et al.,

:

Defendants.

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**ORDER**

AND NOW, this 6<sup>th</sup> day of December, 2002, upon consideration of the City of Philadelphia and individual defendants' Motion for Summary Judgment, *pro se* Plaintiff's Response, Defendants' Reply, *pro se* Plaintiff's Sur-Reply, Defendant Miles Landenheim's second Motion for Summary Judgment, and *pro se* Plaintiff's Response, **IT IS HEREBY ORDERED** that:

1)

The Motions for Summary Judgment filed by Defendants (Docket # 45 and Docket #54) are

**GRANTED.**

BY THE COURT:

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CLIFFORD SCOTT GREEN, S.J.