

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

MICHAEL C. JONES,	:	CIVIL ACTION
Plaintiff,	:	
	:	
v.	:	NO. 00-4687
	:	
BLOCKBUSTER, INC.,	:	
Defendant.	:	

ORDER

AND NOW, this day of January, 2003, upon consideration of the memoranda submitted by Plaintiff Michael C. Jones (“Plaintiff”) and Defendant Blockbuster, Inc. (“Defendant”) regarding the impact of the Court’s July 18, 2002 Order granting in part and denying in part Defendant’s Summary Judgment Motion, it is hereby **ORDERED** as follows.

The Court’s July 18, 2002 Order granted summary judgment “as to plaintiff’s claims of discrimination ‘due to plaintiff’s sexual orientation’ and ‘due to the fact that plaintiff is a homosexual male.’” Order of Judge Jay C. Waldman, filed July 18, 2002 (“Summary Judgment Order”) at 3. Summary judgment was granted as to this claim because, as a matter of law, “neither Title VII nor the PHRA encompass discrimination because of sexual orientation.” *Id.* The Summary Judgment Order denied summary judgment “as to the claim of harassment by Mr. Pierce because he was ‘sexually attracted to the plaintiff as a male.’” *Id.* Summary judgment was denied as to this claim because, as a matter of law, “same sex harassment based on sexual attraction or desire is actionable,” and because, as a factual matter, Plaintiff presented evidence

(1) “that because of sex he was subject to harassment by Mr. Pierce,” and (2) “that he provided management level personnel with information sufficient to alert a reasonable employer to some probability of sexual harassment and sufficient to warrant further investigation and remedial action.” *Id.* at 1-2. The parties have submitted memoranda addressing how the Summary Judgment Order should impact the factual and legal scope of the trial in this matter.¹ Based upon the Summary Judgment Order and the memoranda, the Court hereby concludes as follows:

1. Plaintiff shall be entitled at trial to offer evidence pertaining to the conduct of Mr. Brooks (Plaintiff’s supervisor) only if such conduct is relevant to (1) whether Mr. Brooks knew or should have known of the alleged hostile work environment to which Plaintiff claims to have been subjected, and/or (2) whether Mr. Brooks took prompt action to remedy the allegedly hostile work environment. Such evidence is relevant to Plaintiff’s surviving claim that he was subjected to harassment by Mr. Pierce, his co-employee, because the liability of an employer (here Defendant Blockbuster) for a hostile work environment created by a non-supervisory co-employee (here Mr. Pierce) exists only if the plaintiff can establish that the employer knew or should have known of the harassment and failed to take prompt remedial action. See Kunin v. Sears Roebuck and Co., 175 F.3d 289, 293-94 (3d Cir. 1999). Plaintiff shall not be entitled to present

¹ The parties were ordered to file memoranda setting forth their positions regarding the impact of the Summary Judgment Order. All issues raised by the parties in their memoranda that do not pertain to the Summary Judgment Order (such as, for example, whether a jury instruction concerning the gender stereotypes method for proving same-sex sexual harassment, see Bibby v. Philadelphia Coca Cola Bottling Co., 260 F.3d 257, 262-63 (3d Cir. 2001), would be appropriate in this case) will not be addressed herein.

evidence as to alleged discriminatory conduct by Mr. Brooks toward Plaintiff unless it falls within the above parameters. Furthermore, if specific evidence offered by Plaintiff relating to Mr. Brooks' conduct is objected to by Defendant (whether prior to trial or during trial), Plaintiff shall be required to reveal his proofs and demonstrate that the evidence is relevant, and the Court shall rule on the admissibility of the evidence before such evidence is presented to the jury.

2. **Plaintiff shall be entitled at trial to present evidence showing that the alleged harassment detrimentally affected him, including that the alleged harassment affected Plaintiff's job performance, but shall not be entitled at trial to seek damages related to Defendant's termination of Plaintiff's employment.** Plaintiff's Complaint alleges that at all times while working for Defendant, Plaintiff performed his job duties adequately and satisfactorily, and that "Plaintiff was . . . discharged by Defendant because of his sexual orientation" and "because Plaintiff is a homosexual male." Plaintiff's Second Amended Complaint ("Pl.'s Complaint") at 2-4. The Complaint notably does not allege that the harassment to which Plaintiff claims to have been subjected negatively affected his job performance which, in turn, resulted in his termination. However, Plaintiff now argues that he should be entitled to present evidence that the harassment in question detrimentally affected his work performance, that his poor work performance was one of the reasons for his termination, and that he should therefore be entitled to seek damages for loss of wages and benefits resulting from his termination. See Plaintiff's Memorandum of Law Regarding the Impact of the July 18, 2002 Order

(“Pl.’s Memo”) at 3-8. Plaintiff is, in a general sense, entitled to present evidence to establish that the alleged harassment detrimentally affected him (since this is an element of a hostile work environment claim, see Andrews v. City of Philadelphia, 895 F.2d 1469, 1482 (3d Cir. 1990)). However, the Court concludes that Plaintiff is not entitled to seek damages relating to Defendant’s termination of Plaintiff’s employment, including damages for loss of wages and benefits, because the factual theory upon which Plaintiff now argues that such damages would be based is contrary to the factual pleadings in the complaint, and the evidence presented at trial must conform to the pleadings in the complaint. See Fed. R. Civ. P. 15(b). Moreover, the Court concludes that allowing Plaintiff to amend the pleadings to conform to the evidence that he now seeks to present at trial, pursuant to Fed. R. Civ. P. 15(b), would be inappropriate under the circumstances. The Court has the discretion to allow the pleadings to be amended in order to conform with the evidence presented at trial, and “shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice the party in maintaining the party's action or defense upon the merits.” Id. Here, Plaintiff’s position throughout the course of litigation in this matter has been that he was terminated solely because of his sexual orientation, and Plaintiff’s new theory that he was terminated in part because of poor job performance caused by the harassment of Mr. Pierce suggests an attempt to find an alternate legal basis upon which to seek damages related to Plaintiff’s termination following the Court’s Summary Judgment Order dismissing Plaintiff’s claim that he was terminated because of sexual orientation. Moreover, Defendant has

conducted its factual discovery and prepared for trial based upon Plaintiff's initial position that he was terminated solely because of his sexual orientation, and an amendment of the pleadings at this late stage would be prejudicial to Defendant.

3. The vicarious liability standard for employer liability where an employee is subjected to a hostile work environment created by a supervisor is not applicable in this case. See Cardenas v. Massey, 269 F.3d 251, 266 (3d Cir. 2001) (“An employer is subject to vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over the employee.”) (citing Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 765 (1998), and Faragher v. City of Boca Raton, 524 U.S. 775, 807-08 (1998)). The only remaining claim following the Court's Summary Judgment Order is the claim that Plaintiff was subjected to a hostile work environment as a result of the harassment by Mr. Pierce, Plaintiff's co-worker. There is no surviving claim that Plaintiff was subjected to a hostile work environment created by a supervisor.

4. Plaintiff shall not necessarily be precluded from presenting evidence pertaining to Plaintiff's sexual orientation. Although the Summary Judgment Order granted summary judgment “as to plaintiff's claims of discrimination ‘due to plaintiff's sexual orientation’ and ‘due to the fact that plaintiff is a homosexual male,’” Summary Judgment Order at 3, such evidence may still be relevant to Plaintiff's remaining claim (for example, such evidence may be relevant to establishing the existence of a hostile work

environment, or to establishing that the employer knew or should have known of the harassment and failed to take prompt remedial action). However, evidence regarding Plaintiff's sexual orientation shall not be admitted if its only impact would be to establish that individual employees, including Mr. Brooks and Mr. Pierce, held discriminatory views about homosexual men or harassed Plaintiff because of his sexual orientation, since Plaintiff's claim alleging discrimination based on sexual orientation has been dismissed as a result of the Summary Judgment Order.

BY THE COURT:

Legrome D. Davis