

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

**KAREN OVERALL and  
ARTHUR DUNHAM,  
Plaintiffs**

v.

**THE UNIVERSITY OF PENNSYLVANIA  
and GAIL K. SMITH,  
Defendants**

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**CIVIL ACTION  
NO. 02-1628**

**MEMORANDUM OPINION**

**RUFE, J.**

**December 19, 2003**

This employment discrimination case comes before the Court on Defendants’ Motion for Summary Judgment. For the reasons set forth below, Defendants’ Motion is granted on all counts, and the Amended Complaint is dismissed with prejudice.

**I. FACTUAL BACKGROUND**

The following facts are taken from the memoranda and documentary evidence submitted to the Court and are placed in the light most favorable to Plaintiffs, the non-moving party. See Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986). This case is based on Defendant, the University of Pennsylvania’s (“Penn”) failure to hire Plaintiff Dr. Karen Overall for a new Clinical Educator position in its Veterinary School (the “Vet School”). In the Amended Complaint, Dr. Overall asserts eleven causes of action: 1) Hostile Work Environment under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq. (“Title VII”); 2) Gender Discrimination under Title VII; 3) Hostile Work Environment under the Pennsylvania Human

Relations Act, 43 Pa. Cons. Stat. Ann. § 951 et seq. (“PHRA”); 4) Gender Discrimination under the PHRA; 5) Violation of the Equal Pay Act of 1963, 29 U.S.C. § 206(d); 6) Retaliation under Title VII and the PHRA; 7) Defamation; 8) Intentional Infliction of Emotional Distress; 9) Tortious Interference with Prospective Contractual Relations; 10) Fraudulent Misrepresentation; and 11) Negligent Misrepresentation. Dr. Overall’s husband, Dr. Arthur Dunham, joins in the misrepresentation causes of action and also asserts a separate cause of action for loss of consortium.<sup>1</sup>

Dr. Overall began working as a resident for the Vet School in 1987. Overall Dep. at 22. From 1997 to 2001, she held the position of Lecturer “A” under three successive one-year contracts followed by a final one-year terminal contract. Id. at ¶ 21. As a Lecturer “A,” Dr. Overall’s responsibilities included running the behavior clinic, teaching and conducting research. Overall Aff. at ¶ 7.

Dr. Overall’s specialty is animal behavior, a relatively new field of study. See Overall Letter of Oct. 25, 1999 at 2. Because of its novelty, Penn had no professor-level positions in Dr. Overall’s field until 2000. In March 1999, Defendant Gail Smith became Chair of the Department of Clinical Studies at the Vet School. Overall Aff. at ¶ 8. Dr. Smith accepted the position of Chair partly because the Vet School created five new Clinical Educator positions, including one position in behavioral medicine. Id. It is this position for which Dr. Overall claims she was not hired because she is a woman.

Dr. Overall contends that Dr. Smith, the true decision-maker for the new behavioral medicine position, was responsible for her not being hired. Plaintiff’s Opp. at 16. Even so, she

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<sup>1</sup> In their Opposition Memorandum, Plaintiffs agreed to the voluntary dismissal of the Equal Pay Act, Tortious Interference and Negligent Misrepresentation claims. Accordingly, these claims shall be voluntarily dismissed in accordance with Federal Rule of Civil Procedure 41(a)(2).

alleges that Dr. Smith repeatedly assured her that she would get the position. Overall Aff. at ¶¶ 23, 27, 36. Dr. Smith first made such an assurance in June 1999, when Dr. Overall told him that her husband, Dr. Dunham, had received an attractive offer for a position at the University of Ohio. Id. at ¶ 19. She informed Dr. Smith that she and Dr. Dunham would be leaving Penn to move to Ohio unless he could give her a reasonable assurance that she would get the position. Id. She claims that he told her not to leave Penn, that everything would work out with the search committee, and that she would get the position. Id. at ¶ 23. She claims he even went so far as to say that he would overrule the committee if it recommended another candidate for the position. Id. In reliance on these assurances, Dr. Dunham turned down a job offer from the University of Ohio. Id. at ¶ 25.

Defendants argue that Dr. Smith was not the sole or final decision-maker on hiring. They contend that Dr. Smith was responsible for only one of seven levels of review in Penn's hiring process. First, a search committee composed of other faculty members within the school with the open position, in this case the Vet School, conducts a search and recommends a candidate to the Department Chair. Second, the Department Chair, in this case Dr. Smith, must approve the recommendation. Then, the candidate must receive the approval of: 1) the Department faculty; 2) the Committee on Academic Promotions; 3) the Dean's office; 4) the University Provost; and 5) the Board of Directors. Defendants' Statement of Undisputed Material Facts at 14 n.7; Smith Dep. at 41-43.

In this case, over a period of close to a year, the search committee seriously considered six candidates, five females and one male, and unanimously recommended Dr. Ilana Reisner, a woman, for the behavioral medicine position. See May 22, 2000 Interim Report and Sept.

15, 2000 Final Report from the Search Committee. Dr. Smith approved the committee's recommendation, and Dr. Reisner was eventually hired.

Dr. Overall's gender discrimination claim is based entirely on Dr. Smith's decision not to overrule the search committee nor to recommend her for the position. She does not claim that gender played a role in the search committee's recommendation. In her deposition testimony, Dr. Overall listed a number of statements from Dr. Smith that she contends support her claim that gender motivated his decision. She claimed that on different occasions he: 1) told her not to speak at a meeting with three female employees with whom she was having problems; 2) told her that she was "too assertive, that a lot of people were offended by [her] forthrightness, a quality that he actually liked, because he described it as perky. . ."; 3) told her that she should keep a low profile and not get engaged in anything too controversial; 4) asked her if she was having a "high testosterone" day; and 5) asked her if her husband liked to spank her. (Overall Dep. at 111-14, 116-17, 120)

In her affidavit accompanying her opposition to this motion, Dr. Overall made several additional claims about Dr. Smith. Specifically, she added that: 1) on numerous occasions, in addition to telling her to keep a low profile, he told her to be a "good girl"; 2) he once referred to another female employee as a "tall, leggy, good looking blond"; and 3) he instructed her to keep a low profile "so as not to offend the all male senior faculty." (Overall Aff. at ¶¶ 9, 12, 23, 26, 28, 30, 38, 40).<sup>2</sup>

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<sup>2</sup> Defendants argue in their Reply Memorandum that the Court should not consider any statements in Dr. Overall's affidavit that conflict with her deposition testimony or discovery responses. Defendants are correct that the nonmoving party cannot manufacture a genuine issue of material fact merely by submitting an affidavit with new or contradictory allegations along with her opposition to summary judgment. See Hackman v. Valley Fair, 932 F.2d 239, 241 (3d Cir. 1991) ("When, without satisfactory explanation, a nonmovant's affidavit contradicts earlier deposition testimony, the district court may disregard the affidavit in determining whether a genuine issue of material fact exists. 'The objectives of summary judgment would be seriously impaired if the district court were not free to disregard the affidavit.'") (quoting Martin v. Merrell Dow Pharm., Inc., 851 F.2d 703, 706 (3d Cir. 1988)). "When. .

Dr. Smith's statements notwithstanding, the two doctors had a good working relationship for much of Dr. Overall's time at the Vet School. In her deposition, Dr. Overall admitted that they were friends (Overall Dep. at 280), and several e-mails between them bear this out. See e.g., Feb. 7, 2000 e-mail from Dr. Overall to Dr. Smith. ("Thanks for listening and for your continuing support - it's been really nice to have this after so long, and I am and have been very very grateful."); June 22, 1999 e-mail from Dr. Overall to Dr. Smith. ("We are making incredible progress, but that's all your doing, none of mine. Many thanks.") It appears from the evidence that their relationship did not deteriorate until the Vet School decided to hire Dr. Reisner for the job.

Defendants contend that gender played no role in either Dr. Smith's decision not to overrule the search committee's recommendation or the Vet School's decision not to hire Dr. Overall as a professor. Defendants point out that in addition to hiring a woman for the behavioral medicine position, the Vet School hired women for the other three Clinical Educator positions it filled at the same time. Defendants' Mem. at 7. Defendants also claim that Dr. Smith and the search committee gave Dr. Overall greater consideration than other candidates. After initially rejecting her candidacy, the search committee, at Dr. Smith's request, considered Dr. Overall's candidacy a second time after giving her an opportunity to correct some misrepresentations on her curriculum vitae. Neither of the other two candidates was given such an opportunity. The Defendants also point to the Interim and Final Reports drafted by the search committee in which it articulated its reasons for rejecting Dr.

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. the affiant was carefully questioned on the issue, had access to the relevant information at that time, and provided no satisfactory explanation for the later contradiction . . . the subsequent affidavit does not create a genuine issue of material fact." Martin, 851 F.2d at 706. In this case, Plaintiffs have offered no explanation for Dr. Overall's failure to mention several of Dr. Smith's statements during her deposition, and this Court could choose to ignore these allegations in her affidavit. Nevertheless, because these additional allegations do not alter this Court's decision to grant Defendants' Motion for Summary Judgment, the Court accepts both Dr. Overall's deposition testimony and affidavit. However, where the deposition and affidavit directly conflict, the Court considers only the deposition testimony.

Overall.<sup>3</sup> These reports to Dr. Smith describe Dr. Overall's strengths and

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<sup>3</sup> The full text of the sections of the May 22, 2000 Interim Report that related to Dr. Overall stated the following:

In contrast to these foregoing, unanimous decisions, our decision not to recommend the appointment of Dr. Karen Overall was very much more difficult. I must make clear that the Committee found the decision difficult but not contentious. Initially, four members voted against appointment while two entertained the notion that a carefully crafted contractual [sic] understanding which addressed our concerns might be an alternative to rejection. In the end, we agreed unanimously that this alternative was at best clumsy, in fact unjustified, and hence, unacceptable.

Clearly, Dr. Overall displays an array of substantial strengths that do serve a Clinician-Educator well. She is at the same time, the subject of serious and we believe justified criticism from members of the Committee, other respected members of the Department and external sources who we consulted. This is not to say that we did not receive positive recommendations from our faculty and from outside reviewers. We did. Nevertheless, on balance and because of the nature and magnitude of the criticism, we cannot recommend her to you for appointment as a deserving and desirable colleague.

Our position may appear a tenuous one for it may be mistaken as a decision based on her lack of popularity, or because of a perceived contentious nature. Though not excluded from our deliberation, we think the issues are far more substantial. Indeed, the long interval between our penultimate meeting and the most recent was devoted to a careful consideration of all of the comments that appeared [sic] to be relevant. I am certain, that were Dr. Overall an outside candidate, even a hint of the criticism that surrounds Dr. Overall would have immediately excluded her from consideration.

I'm compelled to add that it is with personal sadness that I convey this report. Karen may have the potential to make substantial advances in her field of endeavor. Her textbook is already considered a valuable contribution to clinical medicine. Her interest in the role of genetics in behavior and her newly developed collaborations might lead to important discovery. Nevertheless, Dr. Overall's long relationship with our Department and Hospital has provided the insights and interactions which, in the end, determined the Committee's decision.

The September 15, 2000 Final Report had the following to say about Dr. Overall:

During the months (since our tentative report on April 12) we received several additional letters of support for Dr. Overall (which appear to have been solicited by Dr. Overall) and her revised C.V. The Committee chose, therefore, to consider Dr. Overall's application again and to review our previous position. Once again, our discussion can be characterized as troubling. Troubling because of its twisting, conflicting, oscillatory course. Troubling because we seek to be fair to our colleague of many years; because we must be honest, constructive and forward thinking; because of our admiration of strengths and our disappointment with human failings.

As on the previous occasions, we reviewed all aspects of Karen's accomplishments, her potential, and her reputation. We acknowledge that Karen is bright, articulate, and extremely energetic. Her record and our assessment suggests that Karen might become a productive investigator. (Please recognize that we speak of her potential for accomplishment. For despite many stated views lauding her research, her record does not reveal significant research accomplishment). Karen's teaching record is a successful one. Her lecture course is well received and her clinical elective attracts a significant number of students. Her professional speaking engagements are numerous, and hence it is assumed, well received. These and her textbook indicate that she has exerted substantial educational impact on

weaknesses and detail the committee's reasons for not recommending her for the position. Defendants contend that nothing in either of these reports could conceivably be construed as evidence that gender was a factor in the search committee's decision.

On September 15, 2000, the search committee decided to recommend Dr. Reisner for the job, and on September 26, 2000, Dr. Smith informed Dr. Overall of the decision. According to Dr. Overall, he told her she was not selected because of her personality and because she had not been a "good girl." Overall Aff. at ¶ 7. On October 23, 2000, because Dr. Overall did not get the Clinical Educator position, Dr. Smith requested that Penn terminate her appointment as a Lecturer "A" as of December 31, 2000. He claims that he and Dr. Overall had agreed that her terminal appointment for the year beginning on July 1, 2000 would extend only until the Search Committee had reached a decision. See July 17, 2000 email from Dr. Smith to Dr. Overall ("I understand that your reappointment will be in effect until the final decision is made regarding the ongoing behavior search.") Dr. Overall contends they never had such an agreement, and that her contract was supposed to run until June 30, 2001 even if the committee chose someone else for the Clinical

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the profession. She has international fame. These views are reiterated in several letters.

Nevertheless, we are seriously concerned by Karen's conflicted history of unsuccessful interpersonal interaction and her questioned integrity. She is perceived by some as dogmatic, arrogant, and unforgiving. One of our number projects that no aspiring young person will thrive under her tutelage. A damning comment, but one which is supported by her resident training program history.

The required, efficient operation of the Behavior Service is presently (and chronically) seriously compromised by a poisoned atmosphere which pits Karen against her staff. This is an extremely uncommon state in our institution, one that demands resolution, and in the end, one that reflects negatively on the senior member.

Karen's integrity has been questioned. We know of the evidence to support this accusation and the explanations intended to rebut the accusation.

In the end, three of us, voted to rank Karen as their second choice; the remaining three would not consider her candidacy at all.

Educator position. In the end, Penn agreed to pay Dr. Overall's salary through June 30, 2001. Amended Complaint at ¶ 29. However, as of October 23, 2000, the Vet School revoked Dr. Overall's clinical privileges. She continued to appear in the clinic, however, and on November 1, 2000, Dr. Smith angrily confronted her about her unauthorized presence there. Overall Aff. at ¶ 44; Smith Dep. at 148-49. In March 2001, after hearing reports that files were missing from the clinic, Dr. Smith allowed a padlock to be placed on the clinic door. Dr. Overall alleges that she was never permitted access to the clinic again, even to reclaim her personal items.

On November 15, 2000, Dr. Overall initiated the Faculty Grievance Procedure pursuant to Penn's policy. Penn found no wrong-doing on Dr. Smith's or the Vet School's part. Dr. Overall then filed a claim with the PHRC and cross-filed with the EEOC on February 5, 2001. The PHRC chose not to take action and issued a Right to Sue letter on December 27, 2001. On February 22, 2001, Plaintiffs brought suit in the Court of Common Pleas for Philadelphia County alleging causes of action for defamation, tortious interference, fraudulent misrepresentation, negligent misrepresentation, intentional infliction of emotional distress, and loss of consortium. On July 9, 2001, the Court of Common Pleas sustained Defendants' Preliminary Objections to Plaintiffs' Amended Complaint and dismissed all but her defamation claim. On September 17, 2001, Plaintiffs filed a Praecipe to Discontinue the State Action and then eventually filed the instant lawsuit on March 26, 2002.<sup>4</sup>

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<sup>4</sup> This case was originally assigned to the Honorable Harvey Bartle III. It was reassigned to the undersigned on June 14, 2002 pursuant to the United States District Court for the Eastern District of Pennsylvania's procedures for random reassignment of cases.

## **II. SUMMARY JUDGMENT STANDARD**

The underlying purpose of summary judgment is to avoid a pointless trial in cases where it is unnecessary and would only cause delay and expense. Goodman v. Mead Johnson & Co., 534 F.2d 566, 573 (3d Cir. 1976). Under Federal Rule of Civil Procedure 56(c), summary judgment is appropriate “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.” See Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). In order to avoid summary judgment, disputes must be both 1) material, meaning concerning facts that are relevant and necessary and that might affect the outcome of the action under governing law, and 2) genuine, meaning the evidence must be such that a reasonable jury could return a verdict for the nonmoving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986).

The moving party bears the initial responsibility for informing the Court of the basis for its motion and identifying those portions of the record that demonstrate the absence of a genuine issue of material fact. Celotex, 477 U.S. at 323. It is not required to produce any evidentiary materials to negate the opposing party’s claim. Id. The burden then shifts to the nonmoving party to designate, through the use of affidavits and other evidentiary materials, specific facts showing that there is a genuine issue for trial. Id. at 324; Fed. R. Civ. P. 56(e). In deciding a motion for summary judgment, all facts must be viewed and all reasonable inferences must be drawn in favor of the nonmoving party. Matsushita Elec. Indus. Co., Ltd., 475 U.S. at 587.

## **III. DISCUSSION**

Based on the facts set forth supra at Part I, nine causes of action remain from the

Amended Complaint: 1) Hostile Work Environment under Title VII; 2) Gender Discrimination under Title VII; 3) Hostile Work Environment under the PHRA; 4) Gender Discrimination under the PHRA; 5) Retaliation under Title VII and the PHRA; 6) Defamation; 7) Intentional Infliction of Emotional Distress; 8) Fraudulent Misrepresentation; and 9) Dr. Dunham's loss of consortium claim. Each of these remaining causes of action is discussed below.

#### **A. Gender Discrimination – Counts Two and Four**

Under Title VII and the PHRA, it is unlawful for an employer to discriminate on the basis of an individual's sex. 42 U.S.C. § 2000e-2(a)(1); 43 Pa. Cons. Stat. Ann. § 955(a) (West 2003).<sup>5</sup> A plaintiff can use both direct and indirect evidence to establish that her employer unlawfully discriminated against her. See Price Waterhouse v. Hopkins, 490 U.S. 228 (1989); McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). Furthermore, a plaintiff can use either of two tests to establish discrimination; these tests are commonly known as the pretext test and the mixed motive test. See McDonnell Douglas, 411 U.S. at 802-804; Price Waterhouse, 490 U.S. 228; see also Campetti v. Career Educ. Corp., No. Civ.A.02-1349, 2003 WL 21961438, at \*6 (E.D. Pa. June 25, 2003) (“A Title VII case may be advanced on either a pretext or a ‘mixed motive’ theory.”) (citing Starceski v. Westinghouse Elec. Corp., 54 F.3d 1089, 1095 n.4 (3d Cir. 1995)).

Until the recent Supreme Court decision in Desert Palace, Inc. v. Costa, \_\_\_ U.S. \_\_\_, 123 S. Ct. 2148, 156 L. Ed. 2d 84 (2003), whether a plaintiff presented direct or indirect evidence was very important as it determined which test the plaintiff could use. Before Desert Palace, the plaintiff could only use the more lenient Price Waterhouse mixed motive test if she could prove

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<sup>5</sup> There is no need to differentiate between Dr. Overall's Title VII and PHRA counts because the same analysis applies. See Weston v. Pennsylvania, 251 F.3d 420, 426 n.3 (3d Cir. 2001).

discrimination using direct evidence. See Price Waterhouse, 490 U.S. at 277 (O'Connor, J. concurring) ("What is required [for the mixed motive test to apply] is . . . direct evidence that decisionmakers placed substantial negative reliance on an illegitimate criterion in reaching their decision."); Fakete v. Aetna, Inc., 308 F.3d 335, 337 (3d Cir. 2002) (plaintiff could use mixed motive test if he "could present direct evidence of discrimination . . ."); Campetti, 2003 WL 21961438, at \*6 ("Traditionally, under [Price Waterhouse], the employee had the obligation to produce direct evidence of discrimination, *i.e.*, more direct evidence than is required for the McDonnell Douglas prima facie case.") This requirement created much consternation among the courts as even experienced lawyers and jurists can differ about whether some evidence is direct or circumstantial. See Fakete, 308 F.3d at 338 n.2 ("while courts agree on what is *not* direct evidence – *e.g.*, statements made by non-decisionmakers unrelated to the contested employment decision, and other 'stray remarks' – there is no consensus on what is."); Fernandes v. Costa Bros. Masonry, 199 F.3d 572, 581-82 (1st Cir. 1999) (discussing the differences among the circuit courts). In Desert Palace, the Supreme Court eased this confusion by holding that direct evidence is not required for a plaintiff to obtain a mixed-motive jury instruction. 123 S. Ct. at 2150.

Defendants argue that Plaintiffs' claim fails under the McDonnell Douglas pretext analysis. Plaintiffs argue that this is a mixed motive case, and that the pretext analysis is inapplicable. Therefore, Plaintiffs are deemed to have waived evaluation of their claim using a pretext analysis, and the Court will address Plaintiffs' claim using only a mixed motive analysis.

### **1. Mixed Motive Analysis**

The Supreme Court first established the mixed motive test in Price Waterhouse, but Congress codified it in the 1991 amendments to the Civil Rights Act of 1964. See 42 U.S.C. §§

2000e-2(m), 2000e-5(g)(2)(B) (2003). To obtain a mixed motive jury instruction, “a plaintiff need only present sufficient evidence for a reasonable jury to conclude, by a preponderance of the evidence, that ‘. . . sex . . . was a motivating factor for any employment practice.’” Desert Palace, Inc., 123 S. Ct. at 2155; see also Watson v. S.E. Penn. Transp. Auth., 207 F.3d 207, 215 (3d Cir. 2000) (“a plaintiff need only show that the unlawful motive was a ‘substantial motivating factor’ in the adverse employment action.”) (quoting Miller v. CIGNA Corp., 47 F.3d 586, 594 (3d Cir. 1995)). This standard is more generous to the plaintiff than the McDonnell Douglas pretext analysis.<sup>6</sup> See Campetti, 2003 WL 21961438, at \*7 (“It is generally to an employee’s benefit to show evidence of discrimination under a mixed motive theory.”). Nevertheless, “a plaintiff still has a high initial hurdle to clear. To obtain the benefits under a mixed motive theory, the employee must ‘offer stronger evidence . . . than that needed to establish a prima facie case under’ McDonnell Douglas.” Id. (quoting Weston-Smith v. Cooley Dickinson Hosp., Inc., 282 F.3d 60, 64 (1st Cir. 2002)).

## 2. Application to the Facts

Viewing the evidence in the light most favorable to Dr. Overall, the Court finds that no reasonable jury could find that sex was a motivating factor in Penn’s decision not to hire Dr. Overall for the Clinical Educator position. Dr. Overall alleges that Dr. Smith was the main decision-

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<sup>6</sup> The McDonnell Douglas pretext analysis contains three stages. First, the plaintiff establishes a prima facie case of discrimination. To satisfy this requirement, a plaintiff must show: “(i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant’s qualifications.” McDonnell Douglas, 411 U.S. at 802; see also Texas Dept. of Cmty. Affairs, 450 U.S. 248, 253-54 (1981) (applying these factors to gender discrimination claim). Second, if the plaintiff can show a prima facie case, the burden shifts to the employer “to articulate some legitimate, nondiscriminatory reason for the employee’s rejection.” McDonnell Douglas, 411 U.S. at 802. Third, if the employer satisfies this burden, the burden shifts back to the plaintiff to show that the employer’s reasons were pretextual. Id. at 804.

maker and that gender motivated his refusal to overrule the search committee's decision. As Dr. Overall has framed this issue, she faces a very high hurdle to overcome. She alleges that gender motivated Dr. Smith's decision, but not that of the search committee. However, the evidence demonstrates that it is highly unusual for a department chair to reject a search committee's recommendation under any circumstances. Even Dr. Dunham admitted that the chair in his department would never do so. Dunham Dep. at 43. Therefore, Dr. Overall has an especially high burden to show that Dr. Smith did not merely rubber stamp the search committee's recommendation of Dr. Reisner. Dr. Overall has failed to meet this burden.

Dr. Overall asserts that "the mixed motive analysis must focus on the overt actions and statements of Dr. Smith." Plaintiffs' Opp. at 17. To support this claim, however, she points to only three "overt actions and statements of Dr. Smith": 1) Dr. Smith's comment that he likes "perky and spunky women"; 2) his instruction to keep a low profile, especially because the senior faculty of the Vet School was a "male dominated group"; and 3) his explanation that she did not get the job because she did not take his advice to be a "good girl and keep a low profile." The Court conducted its own review of the evidence and considered not only these three proffered statements but also the additional allegations in Dr. Overall's affidavit and deposition testimony. See supra Part I. Even after this careful review of the record, the Court cannot find any evidence that gender motivated Dr. Smith's decision. Although some of Dr. Smith's statements, if made, were inappropriate, none of them could lead a jury to decide that his approval of the search committee's recommendation was based on Dr. Overall's gender.

Even considered in combination, the eight alleged actions and/or statements do not show a discriminatory motive. When viewed in light of all of the evidence, Dr. Smith appears to

have been more supportive of Dr. Overall than were the members of the search committee. No reasonable jury could find evidence of a discriminatory motive behind Dr. Smith's decision not to reject the search committee's recommendation. Accordingly, the Court grants summary judgment on Dr. Overall's gender discrimination claims.

### **B. Hostile Work Environment – Counts One and Three**

To bring a successful claim for a sexually hostile work environment under the PHRA and Title VII, a plaintiff must prove that: “(1) [she] suffered intentional discrimination because of [her] sex; (2) the discrimination was pervasive and regular; (3) the discrimination detrimentally affected [her]; (4) the discrimination would detrimentally affect a reasonable person of the same sex in that position; and (5) the existence of respondeat superior liability.”<sup>7</sup> Andrews v. City of Philadelphia, 895 F.2d 1469, 1482 (3d Cir 1990); Phillips v. Heydt, 197 F. Supp. 2d 207, 219 (E.D. Pa. 2002). When determining a Motion for Summary Judgment on this claim, the Court must look at the “totality of the circumstances,” as opposed to the individual acts in isolation. See Aman v. Cort Furniture Rental Co., 85 F.3d 1074, 1081 (3d Cir. 1996); Andrews, 895 F.2d at 1482. These circumstances include “the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance.” Harris v. Forklift Sys., Inc., 510 U.S. 17, 23

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<sup>7</sup> Defendants cite Faragher v. City of Boca Raton, 524 U.S. 775 (1998), to argue that Penn cannot be liable for Dr. Smith's harassment because Dr. Overall failed to take advantage of Penn's sexual harassment complaint policy. This argument fails for two reasons. First, Dr. Overall did take advantage of the sexual harassment policy by filing a grievance on November 15, 2000. Second, this affirmative defense is not available “when the supervisor's harassment culminates in a tangible employment action, such as discharge, demotion, or undesirable reassignment.” See Faragher, 524 U.S. at 807. Penn's termination of Dr. Overall's contract is certainly a “tangible employment action”; therefore, this defense is not available. Nevertheless, Dr. Overall's claim fails for other reasons, as stated herein.

(1993). In the case at hand, Defendants argue that Dr. Overall has failed to satisfy the first two elements of this cause of action. Each of these elements is discussed below.

**1. Was the discriminatory conduct gender-motivated?**

Defendants argue that because Dr. Smith's conduct was not overtly sexual, Plaintiffs have not shown that it was gender-based. Although Defendants are correct that Dr. Smith's conduct was not overtly sexual, overt sexual harassment is not necessary to establish a sexually hostile environment. Andrews, 895 F.2d at 1485. Instead, Plaintiffs need only "show that gender is a substantial factor in the discrimination, and that if [she] had been a man she would not have been treated in the same manner." Id. (quoting Tomkins v. Public Serv. Elec. & Gas Co., 568 F.2d 1044, 1047 n.4 (3d Cir. 1977)). "More specifically . . . pervasive use of derogatory and insulting terms relating to women generally and addressed to female employees personally may serve as evidence of a hostile environment." Andrews, 895 F.2d at 1485.

In support of this cause of action, Dr. Overall points to Dr. Smith's actions after Penn did not hire her for the Clinical Educator position, since Dr. Overall and Dr. Smith seemingly enjoyed a friendly relationship prior thereto. Even if, as Dr. Overall claims, their relationship became contentious thereafter, it is inconceivable that Dr. Smith could have caused a hostile work environment prior to this point. After Dr. Overall's rejection, however, Dr. Smith stripped her of her clinical privileges on October 23, 2000, angrily confronted her about her presence in the clinic on November 1, 2000, and approved the padlock on the door of the clinic in March 2001. Dr. Overall claims these actions show that she was subject to a hostile work environment. None of these actions, however, appear to be motivated by gender. Accordingly, Dr. Overall has failed to satisfy

this element of her hostile work environment claim. For this reason alone, summary judgment is warranted on this cause of action.

## **2. Was the harassment severe or pervasive?**

Title VII is not a “general civility code for the American workplace.” Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 80 (1998); see also Faragher, 524 U.S. at 788. “When the workplace is permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the conditions of the victim’s employment and create an abusive working environment, Title VII is violated.” Harris, 510 U.S. at 21 (internal quotations and citations omitted). However, “[m]ere utterance of an . . . epithet which engenders offensive feelings in an employee would not affect the conditions of employment to [a] sufficiently significant degree to violate Title VII.” Meritor Savings Bank, FSB v. Vinson, 477 U.S. 57, 67 (1986) (internal quotations and citation omitted).

In this case, the conduct of which Dr. Overall complains was not severe and did not even amount to the “mere utterance of an epithet.” Dr. Overall complains of the actions and statements of only one person, who was not her immediate supervisor, and who made most of the allegedly harassing statements in response to her requests for advice about the Clinical Educator position. Several of these statements may have been inappropriate and unprofessional, but they did not create a hostile work environment. Although Dr. Overall contends that she felt physically threatened during the November 1, 2000 confrontation, the incident was nothing more than Dr. Smith scolding her for being in the lab without permission.<sup>8</sup> This incident occurred in a public

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<sup>8</sup> It goes without saying that to have a hostile work environment, the plaintiff must actually have a job. It is undisputed that, although it continued to pay her until June 30, 2001, the Vet School terminated Dr. Overall’s appointment and revoked her clinical privileges on October 23, 2000. Therefore, the confrontation on November 1,

setting while another professor and several students were only a few feet away. Overall Aff. at ¶ 44. No reasonable jury could find Dr. Overall's fear to have been justified based on the circumstances, and even if her fear was justified, this one incident did not alter the conditions of her employment and create an abusive working environment.

“Harassment is pervasive when ‘incidents of harassment occur either in concert or with regularity.’” Andrews, 895 F.2d at 1484 (quoting Lopez v. S.B. Thomas, Inc., 831 F.2d 1184, 1189 (2d Cir. 1987)). Neither circumstance exists in this case. Moreover, and it bears repeating, Dr. Smith made most of the allegedly offensive statements only after Dr. Overall sought his guidance about the Clinical Educator position. Although the Court does not excuse Dr. Smith for making some of these statements, the fact that Dr. Overall sought out Dr. Smith for advice directly contradicts her argument that he subjected her to a hostile work environment. Accordingly, the Court grants Defendants' Motion for Summary Judgment on Dr. Overall's claim of hostile work environment.

### **C. Retaliation – Count Six**

To establish a prima facie cause of action for retaliation, a plaintiff must show that: 1) she engaged in a protected activity; 2) her employer took adverse employment action against her after or contemporaneous with the protected activity; and 3) there is a causal connection between the two. See Weston, 251 F.3d at 430 (citing Farrell v. Planters Lifesavers Co., 206 F.3d 271, 279 (3d Cir. 2000)); Woodson v. Scott Paper Co., 109 F.3d 913, 920 (3d Cir. 1997).

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2000 and the padlock incident could not have created a hostile work environment because Dr. Overall was not a Penn employee at the time. If Dr. Overall believes that she had a contractual right to continue using the clinic, she should bring a breach of contract claim and seek relief under contract law, but events occurring after an employee has been terminated cannot be a basis for a hostile work environment claim. Nevertheless, even considering these incidents in making its decision, the Court finds that this conduct is neither severe nor pervasive.

It is undisputed that Dr. Overall engaged in protected activity when she filed her grievance with Penn on November 15, 2000. Dr. Overall cannot overcome this motion for summary judgment, however, because she has failed to produce any evidence of an adverse employment action that occurred *after or contemporaneous* with the filing of this grievance. Dr. Overall contends that the adverse employment action occurred on October 23, 2000, over three weeks *before* she filed her grievance, when Dr. Smith revoked her clinical privileges. Further, there is no evidence that she had threatened to file this grievance before October 23, thereby creating a question as to whether Dr. Smith was aware that Dr. Overall planned to do so. Thus, it is elementary that Dr. Smith could not have been acting in retaliation against protected activity that had yet to occur, and that he had no idea was going to occur. Accordingly, Plaintiff has failed to assert a prima facie case of retaliation, and summary judgment is appropriate.

#### **D. Defamation – Count Seven**

Plaintiff bases her defamation claim entirely on statements made by Dr. Smith during Penn's internal grievance proceedings relating to Dr. Overall's discrimination claims. It is well-established under Pennsylvania law, however, that such statements cannot support a cause of action for defamation. "All communications pertinent to any stage of a judicial proceeding are accorded an absolute privilege which cannot be destroyed by abuse." Binder v. Triangle Publ'ns, Inc., 275 A.2d 53, 56 (Pa. 1971). Although the grievance proceedings were not "judicial proceedings," this absolute privilege has been applied to quasi-judicial proceedings as well. Cf. Milliner v. Enck, 709 A.2d 417, 419 n.1 (Pa. Super. Ct. 1998) ("The 'judicial proceeding' wherein absolute privilege attaches has not been precisely defined in our Commonwealth. However, it has been defined to include any hearing before a tribunal which performs a judicial function, including many

administrative officers, boards and commissions, so far as they have powers of discretion in applying the law to the facts which are regarded as judicial or ‘quasi-judicial’ in character.”).

In this case, the purpose of the grievance proceedings was to gather the facts and determine whether those facts supported Dr. Overall’s claim for discrimination and harassment. If the facts had supported Dr. Overall’s claims, Dr. Smith would have been disciplined. This application of the facts to Dr. Overall’s claims was clearly quasi-judicial in character. Therefore, the statements made by Dr. Smith during the grievance proceedings are absolutely privileged. Accordingly, Defendants’ Motion for Summary Judgment is granted on Dr. Overall’s defamation claim.

#### **E. Intentional Infliction of Emotional Distress – Count Eight**

Defendants argue that Dr. Overall’s intentional infliction of emotional distress claim is barred by the exclusivity provisions of the Pennsylvania Workers’ Compensation Act, 77 Pa. Cons. Stat. Ann. § 1, et seq (“PWCA”). The PWCA provides the exclusive remedy for all employees’ work-related injuries. See id. § 481(a).<sup>9</sup> However, the PWCA does recognize a limited exception, known as the “personal animus” or “third party attack” exception.<sup>10</sup> It allows claims 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). The “critical inquiry in determining the

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<sup>9</sup> The Pennsylvania Workers’ Compensation Act provides that the “liability of an employer under this act shall be exclusive and in place of any and all other liability to such employees . . . in any action at law or otherwise on account of any injury or death as defined in [77 Pa. Cons. Stat. Ann.] section 301(c)(1) and (2) or occupational disease as defined in [77 Pa. Cons. Stat. Ann.] section 108.” 77 Pa. Cons. Stat. Ann. § 481(a).

<sup>10</sup> See 77 Pa. Cons. Stat. Ann. § 411(1) (“the term ‘injury arising in the course of his employment’ . . . shall not include an injury caused by the act of a third person intended to injure the employee because of reasons personal to him, and not directed against him as an employee or because of his employment.”).

applicability of the third-party attack exception is whether the attack was motivated by personal reasons, as opposed to generalized contempt or hatred, and was sufficiently unrelated to the work situation so as not to arise out of the employment relationship.” Fugarino v. Univ. Servs., 123 F. Supp. 2d 838, 844 (E.D. Pa. 2000).

Numerous courts have addressed the applicability of this exception. In DeWyer v. Temple University, Civ. A.No.00-1665, 2001 U.S. Dist. LEXIS 1141, at \*14 (E.D. Pa. Feb. 6, 2001), Judge Buckwalter concluded that the personal animus exception was probably<sup>11</sup> inapplicable where the alleged discrimination occurred only at the workplace, and included work-related reprimands, suspensions, criticisms, and requiring plaintiff to park other than where she desired. See id.; see also Fleming v. Kramont Employer Royce Realty, Inc., No. Civ.A.02-2703, 2002 U.S. Dist. LEXIS 15806, at \*15-16 (E.D. Pa. Aug. 16, 2002) (exception does not apply where alleged discrimination included deprivation of necessary information, exclusion from essential meetings, public criticism, and differential treatment); Iacono v. Toll Bros., Inc., No. Civ.A.01-4486, 2001 WL 1632138, at \*2 (E.D. Pa. Dec. 19, 2001) (exception inapplicable “because all of the allegedly offensive conduct occurred at work and arose out of the employment relationship”); Winfrey v. Tokai Fin. Servs., No. Civ.A.99-2970, 2000 WL 233240, at \*9 (E.D. Pa. Mar. 1, 2000) (exception does not apply where allegations are “arguably directed at plaintiff as an employee” and “demonstrate that plaintiff was treated as he was on the basis of class characteristics, not personal animus.”); cf. Hammerstein v. Lindsay, 655 A.2d 597, 601 (Pa. Super. Ct. 1995) (“Where the animosity between the third party and the injured employee is developed because of work-related disputes, the animosity is developed

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<sup>11</sup> This tentative language reflects the fact that Judge Buckwalter did not hold the exception inapplicable as a matter of law. Rather, he rested his decision on the plaintiff’s failure to allege facts rising to the level of outrageousness necessary to state a cognizable claim for intentional infliction of emotional distress.

because of the employment, and the injured employee's remedy is exclusively under the Workmen's Compensation Act.") (exception does not apply where plaintiff did not plead any pre-existing animosity or personal reasons for alleged conduct).

Dr. Overall argues that the "personal animus" exception applies here because Dr. Smith's "campaign of harassment and misconduct" was "highly personal in nature." Plaintiffs' Opp. at 30. Dr. Overall, however, presents no evidence of Dr. Smith's actions being personal in nature. There is no evidence on the record that Dr. Smith and Dr. Overall had a relationship outside of the workplace, and all of the conduct Dr. Overall claims to support the application of the "personal animus" exception occurred in the work context and was directly related to workplace issues.<sup>12</sup> Accordingly, the "personal animus" exception does not apply, and Dr. Overall's intentional infliction of emotional distress claim is barred by the PWCA. Summary judgment is therefore appropriate as to this claim.<sup>13</sup>

#### **F. Fraudulent Misrepresentation – Count Ten**

Under Pennsylvania law, to succeed on a cause of action for fraudulent misrepresentation, plaintiffs must prove the following elements:

- 1) a representation;
- 2) which is material to the transaction at hand;
- 3) made falsely, with knowledge of its falsity or recklessness as to whether it is true or false;
- 4) with the intent of misleading another into relying on it;
- 5) justifiable

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<sup>12</sup> Specifically, as evidence of personal animus exception, Dr. Overall states: "Dr. Smith lied to Dr. Overall about his intention not to hire her for the behavior position, induced her and her husband not to pursue opportunities in Ohio, berated Dr. Overall, stripped her of clinical privileges, spread false and defamatory information about her, tried to terminate her appointment prematurely, locked her out of the office that housed her files and property, and refused to forward mail and telephone messages." Plaintiffs' Response Mem. at 30.

<sup>13</sup> Defendants also argue that summary judgment should be granted because Dr. Overall has failed to present evidence of extreme and outrageous conduct. The Court agrees. Even if this cause action was not barred by the PWCA, the Court would still grant summary judgment on this ground.

reliance on the misrepresentation; and (6) the resulting injury was proximately caused by the reliance.

Gibbs v. Ernst, 647 A.2d 882, 889 (Pa. 1994); see also Pacitti v. Macy's, 193 F.3d 766, 778 (3d Cir. 1999); Mill Run Assocs. v. Locke Prop. Co., Inc., No. Civ.A.02-8042, 2003 WL 21976078 (E.D. Pa. July 7, 2003) (citing Gibbs) (page numbers not available).

Defendants argue that summary judgment is warranted because Plaintiffs cannot show that their reliance on Dr. Smith's assurances was justifiable. Plaintiffs contend that Dr. Dunham turned down a job offer from the University of Ohio in reliance on "specific and emphatic statements that Dr. Smith would offer the position to Dr. Overall irrespective of the [search] committee's recommendation," and that "these promises were made over the course of more than a year." Plaintiffs' Opp. at 33.

The evidence, however, does not support this contention. Dr. Dunham was offered the position at the University of Ohio in the Spring of 1999, and Dr. Smith allegedly promised Dr. Overall that she would get the position in June 1999. Overall Aff. at ¶¶ 19, 22. On the basis of this promise, Dr. Dunham declined the job in Ohio, and Plaintiffs remained at Penn. Overall Aff. at ¶ 25. Because this June 1999 promise is the only representation Plaintiffs had admittedly received at the time Dr. Dunham decided to remain at Penn, it is the only representation relevant to Plaintiffs' fraud claim. Although Dr. Smith may have told Dr. Overall on future occasions that she would get the job, there is no evidence that the Ohio job was still available, or that Plaintiffs relied on these statements in any way. Thus, the only issue here is whether Plaintiffs' reliance on the June 1999 promise was justified. For the reasons set forth below, the Court holds that it was not.

The evidence shows that Dr. Dunham was well aware that department chairs approved of search committee recommendations as a matter of course. See Dunham Dep. at pp. 42-43 (“I know that in our department, *the chair would never override the decision* [of the search committee].” (emphasis added)). In addition, at the time of the alleged misrepresentation, Dr. Overall did not know whether Dr. Smith had the authority to overturn the search committee. Overall Dep. at 129.<sup>14</sup> Moreover, when Dr. Overall initially approached Dr. Smith about her chances for the job, she asked him “to put odds” on her application, Amended Complaint at ¶ 37, thereby indicating that she knew he did not have the only, or final, say on whether she would be hired. It is inconceivable that Plaintiffs could justifiably rely on the assurances of a person that they knew was not the sole person responsible for the hiring decision. Accordingly, summary judgment is granted as to Plaintiffs’ cause of action for fraudulent misrepresentation.

#### **G. Loss of Consortium – Count Twelve**

The parties agree that under Pennsylvania law, Dr. Dunham’s loss of consortium claim is derivative of Dr. Overall’s primary tort claims. See Stipp v. Kim, 874 F. Supp. 663, 666 (E.D. Pa. 1995). Above, the Court granted summary judgment in favor of Defendants on each of Dr. Overall’s primary tort causes of action. Because this cause of action is derivative of those claims, summary judgment is warranted.

An appropriate Order follows.

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<sup>14</sup> In this instance, Dr. Overall’s affidavit directly contradicts her deposition testimony, so the Court accepts as true her deposition testimony. See supra note 2. In her deposition, Dr. Overall testified that she “did not know what role the department chair played in the search committee decision.” In her affidavit, however, Dr. Overall claims that “she consulted with several senior faculty members at Penn and confirmed that Dr. Smith was within his rights to promise me the position.”

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

<b>KAREN OVERALL and</b>	:	
<b>ARTHUR DUNHAM,</b>	:	
<b>Plaintiffs</b>	:	
	:	
<b>v.</b>	:	<b>CIVIL ACTION</b>
	:	<b>NO. 02-1628</b>
<b>THE UNIVERSITY OF PENNSYLVANIA</b>	:	
<b>and GAIL K. SMITH,</b>	:	
<b>Defendants</b>	:	

**ORDER**

**AND NOW**, this 19th day of December, 2003, upon consideration of Defendants' Motion for Summary Judgment and the accompanying documents [Docs. # 42-44], Plaintiffs' Opposition thereto [Doc. # 46] and Defendants' Reply Memorandum [Doc. # 47], and for the reasons set forth in the attached Memorandum Opinion, it is hereby **ORDERED** as follows:

1. Plaintiff's claims for violation of the Equal Pay Act of 1963, 29 U.S.C. § 206(d) (Count V), tortious interference with prospective contractual relations (Count IX), and negligent misrepresentation (Count XI) are **DISMISSED WITHOUT PREJUDICE** in accordance with Federal Rule of Civil Procedure 41(a)(2);
2. Defendants' Motion for Summary Judgment is **GRANTED** as to Plaintiff's remaining claims. Judgment is hereby entered in favor of Defendants and against Plaintiffs. Counts I-IV, VI-VIII, X, and XII are **DISMISSED WITH PREJUDICE**; and
3. The Clerk of the Court shall mark this case closed for statistical purposes.

It is so **ORDERED**.

**BY THE COURT:**

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**CYNTHIA M. RUFÉ, J.**