

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

NATALEE MOSS HERCIK,)
) Civil Action
 Plaintiff) No. 03-CV-06667
)
 vs.)
)
 RODALE, INC.,)
)
 Defendant)

* * *

APPEARANCES:

JEFFREY S. STEWART, ESQUIRE
On behalf of plaintiff,

JOSEPH D. SHELBY, ESQUIRE
On behalf of defendant,

* * *

O P I N I O N

JAMES KNOLL GARDNER,
United States District Judge

This matter is before the court on Defendant's Motion to Dismiss, or in the Alternative, Motion for Summary Judgment on Part of Count I and All of Count II of Plaintiff's Complaint, which motion was filed February 27, 2004.¹ Specifically, defendant avers that the denial of a promotion to plaintiff (Count I) and the acts of sexual harassment (Count II) are time-barred. Additionally, defendant argues that plaintiff's allegations of sexual harassment are neither pervasive or severe enough to state a claim upon which relief may be granted.

¹ On March 12, 2004, Plaintiff's Answer to Defendant's Motion to Dismiss or, in the Alternative, Motion for Summary Judgment or Part of Count I and All of Count II of Plaintiff's Complaint was filed.

Because we conclude that plaintiff's claims are not time-barred and that plaintiff has stated a sexual harassment claim upon which relief may be granted, we deny defendant's motion.

Procedural History

Plaintiff initiated the within civil action by filing a three-count Complaint on December 11, 2003. Count One avers that defendant retaliated against plaintiff in response to plaintiff's complaints of sexual harassment.² Count Two alleges sexual harassment.³ Count Three alleges gender discrimination.⁴

The matter is before the court on federal question jurisdiction. See 28 U.S.C. §§ 1331, 1343. Venue is appropriate because the parties reside in Lehigh County and Northampton County, Pennsylvania, and the facts and circumstances giving rise to plaintiff's causes of action occurred in Lehigh County, Pennsylvania. See 28 U.S.C. § 118, 1391. Plaintiff has made a demand for trial by jury.

Standard for Motion to Dismiss

When considering a motion to dismiss the court must accept as true all factual allegations in the complaint and

² See 42 U.S.C. § 2000e-3.

³ See 42 U.S.C. § 2000e-2.

⁴ See 42 U.S.C. § 2000e-2.

construe all reasonable inferences to be drawn therefrom in the light most favorable to the plaintiff. Jurimex Kommerz Transit G.M.B.H. v. Case Corp., 65 Fed.Appx. 803, 805 (3d Cir. 2003) (quoting Lorenz v. CSX Corp., 1 F.3d 1406, 1411 (3d Cir. 1993)).

A Rule 12(b)(6) motion should be granted "if it appears to a certainty that no relief could be granted under any set of facts which could be proved." Morse v. Lower Merion School District, 132 F.3d 902, 906 (3d Cir. 1997) (citing D.P. Enter. Inc. v. Bucks County Community College, 725 F.2d 943, 944

(3d Cir. 1984)). But a court need not credit a complaint's "bald assertions" or "legal conclusions" when deciding a motion to dismiss. Morse, 132 F.3d at 906. (Citations omitted.)

When weighing a motion to dismiss, the court may consider the Complaint, attachments to the Complaint and "public records deemed to be undisputedly authentic." Greer v. Smith, 59 Fed. Appx. 491, 492 n.1 (3d Cir. 2003). The parties have provided plaintiff's EEOC Charge of Discrimination dated January 31, 2003. In addition, plaintiff has provided the Allegations of Employment Discrimination dated October 12, 2002 which plaintiff submitted to the Pennsylvania Human Rights Commission. Because these documents are public records, they are considered to be undisputedly authentic. See City of Pittsburgh v. West Penn Power Co., 147 F.3d 256, 259 (3d Cir. 1998).

Accordingly, we will not convert the motion to dismiss into a

motion for summary judgment pursuant to Rule 12(c) of the Federal Rules of Civil Procedure.

Facts

Based upon the allegations contained in plaintiffs' Complaint, which we must accept as true for the purposes of this motion, the operative facts are as follows. In October 1992, plaintiff Natalee Moss Hercik was hired as an Assistant Business Manager by defendant Rodale, Inc.⁵ In October 1998, she was promoted to Sales and Marketing Manager of Anyplace Wild Television, a position she held until her constructive discharge.⁶

In June 1999, plaintiff was named Marketing Manager for Wilderness Travel Group. In this position, she was responsible for managing all advertising-related marketing efforts for Backpacker Magazine, Anyplace Wild Television, and their associated computer internet web products. She also held this position until her constructive discharge.⁷

On November 13, 2001, John Viehman, the publisher of Backpacker Magazine, recommended that plaintiff be promoted to Marketing Director in March, 2002.⁸ Tom Beusse, the Vice Presi-

⁵ Complaint, paragraph 4.

⁶ Complaint, paragraph 5.

⁷ Complaint, paragraph 6.

⁸ Complaint, paragraph 7.

dent of the Sports Group for Rodale, who was responsible for overseeing Backpacker Magazine, indicated approval of plaintiff's promotion.⁹

On August 16, 2001, plaintiff and other Rodale employees attended the Outdoor Retailer Summer Market in Salt Lake City, Utah.¹⁰ In the evening of that day, Ms. Hercik, Mr. Beusse, Chris Marks, and Steve Madden were in a hotel elevator.¹¹ After Mr. Marks and Mr. Madden exited the elevator, Mr. Beusse placed his right arm around plaintiff's back and kissed her without permission.¹² Mr. Beusse's actions caused plaintiff to feel uncomfortable.¹³

On December 13, 2001, during a presentation at Rodale's facility, Mr. Beusse sat next to plaintiff.¹⁴ Ms. Hercik asked Mr. Beusse a question during the presentation. In response, Mr. Beusse leaned in, placed his hand on plaintiff's thigh, and asked her to repeat the question.¹⁵ The touching made plaintiff feel uncomfortable.¹⁶

⁹ Complaint, paragraph 8.

¹⁰ Complaint, paragraph 9.

¹¹ Complaint, paragraph 10.

¹² Complaint, paragraph 11.

¹³ Complaint, paragraph 12.

¹⁴ Complaint, paragraph 13.

¹⁵ Complaint, paragraph 14.

¹⁶ Complaint, paragraph 15.

On December 18, 2001, plaintiff contacted Paul Ivankevich, the Director of Corporate Human Resources for Rodale, and complained of sexual harassment by Mr. Beusse.¹⁷ Plaintiff met with Mr. Ivankevich on December 19, 2001 to discuss these allegations.¹⁸ Rodale did not respond to plaintiff's complaint.¹⁹

On January 6, 2002, plaintiff and Mr. Beusse were at an outdoor retailer winter meeting in Anaheim, California. When Mr. Beusse left the meeting he paused to shake hands with Kent Ebersole, then embraced and kissed the cheeks of Lori Ball, Lorraine Rodrigueaz, and plaintiff.²⁰ The touching made plaintiff and Ms. Ball feel uncomfortable.²¹

Upon returning from the winter meeting, plaintiff again complained to Mr. Ivankevich regarding her allegations of sexual harassment by Mr. Beusse.²² Mr. Ivankevich indicated that Michael Bruno, Rodale's Vice President of Human Services, had been informed of plaintiff's complaints.²³

On January 23, 2002, plaintiff followed up with both

¹⁷ Complaint, paragraph 16.

¹⁸ Complaint, paragraph 17.

¹⁹ Complaint, paragraph 19.

²⁰ Complaint, paragraph 20.

²¹ Complaint, paragraphs 21 and 22.

²² Complaint, paragraph 23.

²³ Complaint, paragraph 25.

Mr. Ivankevich and Mr. Bruno regarding her allegations.²⁴ Rodale took no action pertaining to plaintiff's complaints.²⁵

On February 22, 2002, plaintiff and Christopher Hercik were summoned for a meeting with Mr. Bruno and Carrie Hollar, Rodale's Director of Human Resources, to discuss the ramifications of the upcoming marriage between plaintiff and Mr. Hercik, an art director for Rodale's Backpacker Magazine.²⁶ During the meeting, Mr. Bruno indicated that he had made the decision that either plaintiff or Mr. Hercik would have to leave their current position with Rodale because of the wedding.²⁷

John Dorn, Editor of Backpacker Magazine, told Mr. Hercik that Mr. Hercik would not be the one to leave Rodale.²⁸

At the time of these events, Rodale had a policy regarding the employment of relatives and former employees which read, "If Rodale employees marry, both may continue in their positions. If a direct supervisor-subordinate relationship exists, the employee with the least years of service will be required to transfer to another position or change reporting relationships."²⁹

²⁴ Complaint, paragraphs 26 and 27.

²⁵ Complaint, paragraph 28.

²⁶ Complaint, paragraph 29.

²⁷ Complaint, paragraphs 30 and 31.

²⁸ Complaint, paragraph 33.

²⁹ Complaint, paragraph 34.

Plaintiff and Mr. Hercik did not have a direct supervisor-subordinate relationship.³⁰ Moreover, plaintiff had greater seniority than Mr. Hercik.³¹

Ms. Hercik was denied the promotion to Market Director which had been planned for March, 2002.³² Plaintiff was then constructively discharged.³³ These actions were taken against plaintiff in retaliation for her allegations of sexual harassment.³⁴

Discussion

Defendant moves to dismiss, or, in the alternative, for summary judgment, on part of Count I and all of Count II. Specifically, defendant avers that the denial of a promotion to plaintiff (Count I) and the acts of sexual harassment (Count II) are time-barred.

On October 12, 2002, plaintiff filed her sexual harassment, gender discrimination, and retaliation complaints with both the federal Equal Employment Opportunity Commission ("EEOC") and the Pennsylvania Human Rights Commission. Because

³⁰ Complaint, paragraph 35.

³¹ Complaint, paragraph 36.

³² Complaint, paragraph 42.

³³ Complaint, paragraphs 40 and 44.

³⁴ Complaint, paragraphs 39 and 42.

Pennsylvania, through the Pennsylvania Human Rights Commission, has a work-sharing agreement with the EEOC, the filing period is 300 days. See DuBose v. District 1199c, National Union of Hospital and Health Care Employees, 105 F.Supp.2d 403, 411 (E.D. Pa. 2000). Accordingly, we may consider those allegations in plaintiff's Complaint which occurred on or after Sunday December 16, 2001 (300 days prior to the October 12, 2002 date on which plaintiff filed the within Complaint). We may also consider those allegations which were part of a continuing course of conduct as of December 16, 2001. National Railroad Passenger Corporation v. Morgan, 536 U.S. 101, 105, 122 S.Ct. 2061, 2068, 153 L.Ed.2d 106, 117 (2002).

Because plaintiff avers that she was unlawfully denied a promotion to the position of Marketing Director in March 2002, we conclude that plaintiff's claim of unlawful discrimination regarding her failure-to-promote claim is not time-barred.

Plaintiff avers acts of sexual harassment that fall both before and after December 16, 2001. Acts outside the scope of the statutory period, may be considered "so long as any act contributing to that [harassment] takes place within the statutory period." Id. Because we must read the inferences in the Complaint in favor of the plaintiff, at this stage of the proceedings it is sufficient that plaintiff avers that the acts before and after the statutory period are part of a common course

of conduct. Accordingly, we conclude that none of plaintiff's sexual harassment allegations are time-barred.

Defendant also contends that Count II should be dismissed because plaintiff fails to state a claim upon which relief may be granted. In support of its motion, defendant cites a number of cases which grant summary judgment in cases which defendant believe are factually analogous to the within matter.

There is a significant difference between the standard of review and the procedural posture for a motion to dismiss and that for a motion for summary judgment. At the summary judgment stage, the parties have engaged in discovery and may present a complete factual record to the court. On the other hand, Rule 8(a)(2) of the Federal Rules of Civil Procedure requires only that a Complaint provide "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed.R.Civ.P. 8(a)(2).

We conclude that it is inappropriate to compel plaintiff to defend a motion to dismiss by submitting that which is required in defense of a motion for summary judgment. Accordingly, we find that plaintiff has sufficiently pled a cause of action for sexual harassment. Furthermore, because we determine that plaintiff has averred sufficient facts to support her claims, we deny defendant's motion for summary judgment without prejudice for defendant to re-file a motion for summary

judgment after the completion of discovery.

Conclusion

For the foregoing reasons, we deny defendant's motion to dismiss and its alternative motion for summary judgment.

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NATALEE MOSS HERCIK,)
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 RODALE, INC.,)
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 Defendant)

O R D E R

NOW, this 25th day of May, 2004, upon consideration of Defendant's Motion to Dismiss, or in the Alternative, Motion for Summary Judgment on Part of Count I and All of Count II of Plaintiff's Complaint, which motion was filed February 27, 2004; upon consideration of Plaintiff's Answer to Defendant's Motion to Dismiss or, in the Alternative, Motion for Summary Judgment or Part of Count I and All of Count II of Plaintiff's Complaint, which answer was filed March 12, 2004; upon consideration of plaintiff's Complaint; upon consideration of the briefs of the

parties; and for the reasons expressed in the accompanying
Opinion,

IT IS ORDERED that defendant's motions are denied.

BY THE COURT:

James Knoll Gardner
United States District Judge