

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

LEON E. WARMKESSEL,)	
)	Civil Action
Plaintiff)	No. 03-CV-02941
)	
vs.)	
)	
EAST PENN MANUFACTURING CO.,)	
INC.,)	
)	
Defendant)	

* * *

APPEARANCES:

JEFFREY R. ELLIOTT, ESQUIRE
On behalf of Plaintiff

JOSEPH D. SHELBY, ESQUIRE
JON W. TRYON, ESQUIRE
On behalf of Defendant

* * *

M E M O R A N D U M

JAMES KNOLL GARDNER,
United States District Judge

This matter is before the court on Defendant's Motion for Summary Judgment filed March 15, 2005. The Reply of Plaintiff in Opposition to Motion for Summary Judgment was filed April 5, 2005. For the reasons expressed below, we grant in part and deny in part Defendant's Motion for Summary Judgment.

Specifically, we grant Defendant's Motion for Summary Judgment on Count VI, plaintiff's claim of intentional infliction of emotional distress, and Count VII, plaintiff's claim of

negligence. In all other respects, we deny Defendant's Motion for Summary Judgment.

JURISDICTION AND VENUE

Jurisdiction is based on federal question jurisdiction pursuant to 28 U.S.C. §§ 1331, 1343, and 42 U.S.C. § 2000e-5(f). Venue is proper pursuant to 28 U.S.C. § 1391(b) because the events giving rise to the claims allegedly occurred in this judicial district, namely Berks County, Pennsylvania. The court has pendent jurisdiction over the state law statutory and common law claims. 28 U.S.C. § 1367.

PROCEDURAL HISTORY

On May 5, 2003 plaintiff Leon E. Warmkessel filed his Complaint alleging seven causes of action. Count I alleges sexual harassment pursuant to Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e to 2000e-17, (specifically 42 U.S.C. § 2000e-2); Count II alleges sexual discrimination pursuant to 42 U.S.C. § 2000e-2; Count III alleges sexual discrimination under the Pennsylvania Human Relations Act ("PHRA")¹; Count IV alleges sexual harassment

¹ Act of October 27, 1955, P.L. 744, No. 222, §§ 1-13, as amended, 43 P.S. §§ 951-963.

pursuant to the PHRA²; Count V alleges wrongful termination; Count VI alleges intentional infliction of emotional distress; and Count VII alleges negligence. Counts III through VII are all brought pursuant to Pennsylvania state law.

By footnoted Order of the undersigned dated March 19, 2004 we granted in part and denied in part Defendant's Motion to Dismiss, or in the Alternative, Motion for Summary Judgment on Counts V, VI and VII of Plaintiff's Complaint. Specifically, we granted defendant's motion to dismiss Count V of plaintiff's Complaint alleging wrongful termination and denied defendant's motion to dismiss in all other respects. Moreover, we declined to address defendant's alternative motion for summary judgment until the close of discovery because it did not include Counts I through IV.

By Rule 16 Status Conference Order dated October 21, 2004 we set numerous deadlines including deadlines for completion of discovery, production of expert reports, dispositive motions, motions in limine and a trial date.

² On June 14, 2005 a conference call between counsel for the parties and chambers of the undersigned was conducted. During the conference call, counsel for the parties agreed that Counts I through IV of plaintiff's Complaint collectively constitute causes of action for hostile work environment sexual harassment and retaliation pursuant to both Title VII and the PHRA.

STANDARD OF REVIEW

In considering a motion for summary judgment, the court must determine whether "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986); Federal Home Loan Mortgage Corporation v. Scottsdale Insurance Company, 316 F.3d 431, 433 (3d Cir. 2003). Only facts that may affect the outcome of a case are "material". Moreover, all reasonable inferences from the record are drawn in favor of the non-movant. Anderson, supra.

Although the movant has the initial burden of demonstrating the absence of genuine issues of material fact, the non-movant must then establish the existence of each element on which it bears the burden of proof. See Watson v. Eastman Kodak Company, 235 F.3d 851, 857-858 (3d Cir. 2000). Plaintiff cannot avert summary judgment with speculation or by resting on the allegations in his pleadings, but rather must present competent evidence from which a jury could reasonably find in his favor. Ridgewood Board of Education v. N.E. for M.E., 172 F.3d 238, 252 (3d Cir. 1999); Woods v. Bentsen, 889 F.Supp. 179, 184 (E.D. Pa. 1995).

Facts

Based upon the pleadings, record papers, depositions, exhibits, the concise statement of facts submitted by defendant and the counter-statement of facts submitted by plaintiffs we note that the parties disagree on virtually all of the facts in this matter. We conclude that there are numerous genuine issues of material fact which preclude granting summary judgment in favor of defendant on Counts I through IV. Our factual recitation contains plaintiff's general averments.

Defendant East Penn Manufacturing Company, Inc., ("East Penn") hired plaintiff Leon E. Warmkessel as a Maintenance Mechanic on July 13, 1989. In 1994 plaintiff assumed the position of Fabrication Technician. Plaintiff contends that from 1998 through June 13, 2002 he was continuously subjected to unwelcome sexual touchings, advances, overtures and comments by his supervisor Rodney Wahl. Plaintiff contends that he repeatedly rejected Mr. Wahl's sexual advances. Eventually, in January 2002 plaintiff complained to the Human Resources Department at East Penn about Mr. Wahl's conduct.

On June 13, 2002, plaintiff left his work area for several minutes to go to the company parking area to turn off his automobile headlights. Prior to going outside, plaintiff alleges he advised a supervisor and his co-workers of where he was going and why. Upon his return, Mr. Wahl accused plaintiff of

violating work rules. Plaintiff alleges that he told Mr. Wahl the reason why he temporarily left the workplace and that he had advised the appropriate persons and did so in a professional and courteous manner. However, plaintiff was terminated for alleged insubordination and disrespect to a supervisor. Plaintiff contends that this was in retaliation for his complaints of sexual harassment.

DISCUSSION

Hostile Work Environment

Title VII of the Civil Rights Act of 1964 makes it unlawful for an employer "to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(1). Claims brought pursuant to the PHRA should be interpreted consistent with Title VII. Weston v. Commonwealth of Pennsylvania, Department of Corrections, 251 F.3d 420 (3d Cir. 2001); Johnson v. Souderton Area School District, No. Civ.A. 95-7171, 1997 U.S. Dist. LEXIS 4354 (E.D. Pa. April 1, 1997).

A hostile work environment exists when a workplace is permeated with discriminatory intimidation, ridicule and insult so severe or pervasive as to alter the conditions of the victim's employment and create an abusive working environment. Harris v.

Forklift Systems, Inc., 510 U.S. 17, 114 S.Ct. 367, 126 L.Ed.2d 295 (1993). Incidents of harassment are considered pervasive if they occur in concert or with regularity.

Andrews v. City of Philadelphia, 895 F.2d 1469, 1484 (3d Cir. 1990).

To establish a claim for a hostile work environment, plaintiff must establish that: (1) he suffered intentional discrimination because of his gender; (2) the discrimination was pervasive and regular; (3) the discrimination detrimentally affected him; (4) the discrimination would detrimentally affect a reasonable person of the same gender in that position; and (5) respondeat superior liability applies. Cardenas v. Massey, 269 F.3d 251, 260 (3d Cir. 2001); Andrews, 895 F.2d at 1482.

When determining whether an environment is sufficiently hostile or abusive, the court must look at the totality of the circumstances. This review includes 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." Faraqher v. City of Boca Raton, 524 U.S. 775, 787-788, 118 S.Ct. 2275, 2283, 141 L.Ed.2d 662, 676 (1998).

In Oncale v. Sundowner Offshore Services, Incorporated, 523 U.S. 75, 118 S.Ct. 998, 140 L.Ed.2d 201 (1998) the United States Supreme Court settled a split between the United States

Circuit Courts of Appeal in holding that Title VII provides a cause of action for same-sex sexual harassment. Furthermore, the Supreme Court held that it is not the gender of the harasser or the victim that is important to a sexual harassment claim. Rather, the Court opined what is important is that plaintiff prove that the "conduct at issue was not merely tinged with offensive sexual connotations, but actually constituted '*discrimination ... because of... sex.*'" 523 U.S. at 81, 118 S.Ct. at 1002, 140 L.Ed.2d at 208. (Emphasis in original.)

In Bibby v. Philadelphia Coca Cola Bottling Company, 260 F.3d 257 (3d Cir. 2001) the United States Court of Appeals for the Third Circuit identified three specific bases for establishing that same-sex sexual harassment constitutes discrimination "because of sex" as follows: (1) where there is evidence that the harasser sexually desires the victim; (2) where the harasser displays hostility to the presence of a particular gender in the workplace; and (3) where the harasser believes that the victim does not conform to gender stereotypes. 260 F.3d at 364.

Upon review of the record in the light most favorable to plaintiff as the non-moving party Anderson, supra, and upon consideration of the totality of the circumstances involved in this case, Faraqher, supra, we conclude that there are genuine issues of material fact which preclude granting summary judgment

on plaintiff's Title VII and PHRA claims for hostile work environment.

Specifically, the disputes concerning material facts include, but are not limited to: (1) Mr. Wahl's sexual preference and whether he sexually desires plaintiff; (2) whether Mr. Wahl's conduct was motivated by a determination by Mr. Wahl that plaintiff did not conform to gender stereotypes; (3) whether Mr. Wahl held supervisory power over plaintiff to implicate respondeat superior liability on defendant; (4) whether all sexually inappropriate behavior by Mr. Wahl ceased after plaintiff complained to Human Resources on January 31, 2002; and (5) whether the reason offered for plaintiff's termination was pretextual.

Accordingly, because we conclude that there are genuine issues of material fact for resolution by a jury, we deny Defendant's Motion for Summary Judgment regarding plaintiff's hostile work environment claims under both Title VII and the PHRA.

Retaliation

Plaintiff's Complaint further alleges that defendant retaliated against him in violation of Title VII and the PHRA.

To establish a prima facie case of retaliation, plaintiff must show that (1) he engaged in a protected employee activity; (2) that defendant took an adverse employment action

after, or contemporaneous with, plaintiff's protected activity; and (3) a causal link exists between plaintiff's protected activity and defendant's adverse action. Farrell v. Planters Lifesavers Company, 206 F.3d 271, 279 (3d Cir. 2000).

Evidence that may be utilized by plaintiff to establish the necessary causal link may include: (1) temporal proximity between the protected activity and the adverse employment action; (2) a pattern of antagonism or retaliatory animus on the part of the employer; (3) that the employer gave inconsistent reasons for taking the adverse employment action against the employee; (4) the manner in which the employer behaves toward others; (5) a refusal on the part of the employer to provide a reference for plaintiff; or (6) a change in demeanor on the part of the employer. 206 F.3d at 279-286.

Retaliation claims follow the same burden-shifting paradigm as discrimination cases under Title VII. Woodson v. Scott Paper Co., 109 F.3d 913, 920 (3d Cir. 1997). Once plaintiff establishes a prima facie case, the burden shifts to defendant to articulate a legitimate, non-discriminatory reason for the employment action in question. Quiroga v. Hasbro, Inc., 934 F.2d 497 (3d Cir. 1991). If defendant satisfies its burden of production, plaintiff must demonstrate that defendant's stated reason for the action taken is pretextual. Waddell v. Small Tube Products, Inc., 799 F.2d 69 (3d Cir. 1986).

Protesting what an employee believes in good faith to be a discriminatory practice is clearly protected conduct. A plaintiff is not required to prove the merits of an underlying discrimination complaint to prove a cause of action for retaliation. However, plaintiff must demonstrate that he was acting in good faith and under a reasonable belief that a violation existed. Aman v. Cort Furniture Rental Corporation, 85 F.3d 1074, 1085 (3d Cir. 1996).

Taking the facts in the light most favorable to plaintiff as the non-moving party, we conclude that there are genuine issues of material fact which preclude granting defendant's motion for summary judgment on plaintiff's Title VII and PHRA retaliation claims. Specifically, we conclude that the genuine issues of material fact include, but are not limited to: (1) whether Mr. Wahl engaged in a constant course of retaliatory conduct after plaintiff complained to Human Resources including constantly following plaintiff, looking under bathroom stall doors when plaintiff was in the bathroom and checking up on plaintiff by Mr. Wahl frequently looking over his shoulder at plaintiff and writing plaintiff up for alleged Code of Conduct violations on February 8, 11 and 12, 2002; (2) whether defendant's proffered reason for termination was pretextual; (3) whether plaintiff was treated in a similar manner as other employees for similar conduct; and (4) the facts surrounding the

June 11, 2002 incident.

Accordingly, because we conclude that there are genuine issues of material fact, we deny defendant's motion for summary judgment on plaintiff's retaliation claims.

Intentional Infliction of Emotional Distress

Count VI of plaintiff's Complaint alleges a state law cause of action for intentional infliction of emotional distress. Defendant contends that it is entitled to summary judgment on this cause of action because (1) the claim is precluded by the Pennsylvania Workers' Compensation Act³ and (2) plaintiff has failed to meet his burden of establishing that the alleged conduct was extreme and outrageous.

Plaintiff contends that this court has already answered both questions in our March 19, 2004 decision on defendant's motion to dismiss. For the following reasons, we agree with plaintiff in part, with defendant in part, and grant Defendant's Motion for Summary Judgment on Count VI of plaintiff's Complaint.

Section 481(a) of the Workers' Compensation Act provides, in pertinent part, that "the liability of an employer under this act shall be exclusive and in place of any other liability to such employees...in any action at law or otherwise on account of any injury or death defined in[§ 411] or

³ Act of June 2, 1915, P.L. 736, art. III, § 303, as amended, 77 P.S. § 481(a).

occupational disease in [§ 27.1].”⁴

The Act provides a single narrow exception to preemption, known as the personal animus exception, for “employee injuries caused by the intentional conduct of third parties for reasons personal to the tortfeasor and not directed against him as an employee or because of his employment.” Durham Life Insurance Company v. Evans, 166 F.3d 139, 160 (3d Cir. 1999).

In Hoy v. Angelone, 554 Pa. 134, 720 A.2d 745 (1998) the Supreme Court of Pennsylvania held that the Worker’s Compensation Act will not bar an action for intentional infliction of emotional distress where the injury to the employee arose from harassment which was personal in nature and was not a proper part of the employer-employee relationship. However, the Court stated that a legally cognizable claim for intentional infliction of emotional distress must be based upon conduct that “was so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious and utterly intolerable in a civilized society.” 554 Pa. at 151, 720 A.2d at 754.

In our March 19, 2004 decision on defendant’s motion to dismiss, taking the facts pled in plaintiff’s Complaint as true, as required by the applicable standard of review, we found that the acts of sexual harassment as alleged by plaintiff in his

⁴ Id.

Complaint were personal in nature and not part of the proper employer-employee relationship. Furthermore, plaintiff's specific allegations contained in the Complaint include, among others: that Mr. Wahl would touch, grab or pinch plaintiff's groin, nipples, buttocks and genitals; look under bathroom stalls when plaintiff was using the bathroom; often creep up behind plaintiff and thrust his hips against plaintiff's buttocks, simulating a sexual act; and that plaintiff repeatedly complained about this activity to the Human Resources Department of East Penn and that no action was taken.

For purposes of the motion to dismiss, we concluded that the type of conduct alleged by plaintiff, together with the allegation that plaintiff informed defendant of the conduct and defendant allegedly did nothing, was the type of outrageous conduct contemplated by the Supreme Court of Pennsylvania.

We do not have to accept all of plaintiff's well-pled facts for purposes of the within motion for summary judgment. Rather, plaintiff cannot avoid summary judgment with speculation or by resting on the allegations in his pleadings, but instead must present competent evidence from which a jury could reasonably find in his favor. Ridgewood, supra.

However, we agree with plaintiff that the Workers' Compensation Act does not bar a cause of action for intentional infliction of emotional distress where the alleged conduct "was

so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious and utterly intolerable in a civilized society." 554 Pa. at 151, 720 A.2d at 754.

Accordingly, we conclude that plaintiff's claim for intentional infliction of emotional distress is not automatically barred by the Workers' Compensation Act.

Next, we address defendant's contention that plaintiff has failed to meet his burden that the alleged conduct was extreme and outrageous. As noted by the Supreme Court of Pennsylvania in Hoy, supra, a cause of action for intentional infliction of emotional distress based upon sexual harassment in the workplace is exceedingly difficult to maintain. In support of his claim that the conduct here is extreme and outrageous, plaintiff relies on the decision of our colleague United States District Judge John R. Padova in Merritt v. Delaware River Port Authority, No.Civ.A. 98-3313, 1999 U.S. Dist. LEXIS 5896 (E.D. Pa. April 20, 1999).

In Merritt, plaintiff was subjected to conduct which included the harasser repeatedly exposing himself to plaintiff, touching plaintiff's genitals on numerous occasions, and engaging in masturbation while calling out plaintiff's name, all of which took place over a nine-month period. In addition, when plaintiff reported this conduct to his supervisors, they reacted with

laughter, inaction and efforts to hide the harasser's conduct by asking plaintiff to keep quiet. 1999 U.S. Dist. LEXIS 5896 at *20-21.

The facts in Merritt and the case before this court are similar in that they both allege extremely outrageous, inappropriate, harassing, unwelcome, demeaning and degrading conduct by the harasser against an employee, which were personal in nature and which was not a proper part of the employer-employee relationship. Moreover, the cases are similar in that the alleged conduct occurred repeatedly in both cases. As noted above, in this case, plaintiff alleges that Mr. Wahl would touch, grab or pinch plaintiff's groin, nipples, buttocks and genitals; look under bathroom stalls when plaintiff was using the bathroom; and often creep up behind plaintiff and thrust his hips against plaintiff's buttocks, simulating a sexual act.

The important distinction between the cases is that the plaintiff in Merritt complained about the conduct more frequently, was rebuffed on every occasion and was specifically told not to complain or others would be in trouble as well as the harasser. Here, as noted above, plaintiff alleges in his Complaint that he repeatedly complained about Mr. Wahl's conduct to the Human Resources Department at East Penn and that no action was taken by the company.

However, contrary to those allegations, the record indicates that plaintiff complained to management only once. Furthermore, defendant alleges that it promptly investigated the allegations and that on that occasion plaintiff was told to report any further incidents, but never complained again. Plaintiff asserts that the investigation by defendant was incomplete but does not dispute that he never complained again.

Plaintiff's Complaint infers ongoing conduct and allegations of lax supervision and the turning of a blind eye and ear by defendant to his claims of outrageous conduct on the part of Mr. Wahl. However, plaintiff cannot rest on the facts averred in his Complaint. Ridgewood, supra.

If plaintiff had some evidence of this activity, there would be a genuine issue of material fact as to the outrageousness of the conduct of the defendant company. However, while there is evidence that supports a finding of outrageous conduct on the part of Mr. Wahl, he is not a party to this litigation and has not been alleged to have committed the intentional infliction of emotional distress.

Rather, it is the conduct of the company that is at issue here; and, based upon the record, there is no evidence that the company acted improperly. The company investigated the only complaint made by plaintiff; and even if that investigation were lacking, there is no evidence to support a finding that the

company had any knowledge about any alleged ongoing problems because plaintiff did not report any further problems to defendant as he was directed to do.

Based upon the evidence produced by plaintiff, or the lack thereof, and taking all reasonable inferences in the light most favorable to plaintiff as the non-moving party, we conclude that no reasonable jury could find that the conduct of East Penn (as opposed to that of Mr. Wahl) "was so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious and utterly intolerable in a civilized society." Hoy, supra. Accordingly, we grant defendant's motion for summary judgment on plaintiff's claim of intentional infliction of emotional distress and dismiss Count VI from plaintiff's Complaint.

Negligence

Finally, we address defendant's motion for summary judgment on Count VII of plaintiff's Complaint for negligence. In this regard, defendant asserts that plaintiff's negligence claim is barred by either the Workers' Compensation Act or the PHRA. Defendant raised the first issue in its motion to dismiss but not the second issue. In our decision on the motion to dismiss regarding the Workers' Compensation Act bar, we stated:

The Supreme Court of Pennsylvania has held that an employee's claims of negligence in failing to maintain a safe workplace where

the employee is injured by a co-worker for purely personal reasons is not preempted by the Act. Kohler v. McCrory Stores, 532 Pa. 130, 136-37, 615 A.2d 27, 30 (1992). Moreover, this court has found that this rule applies where the injury sustained is the result of sexual harassment by a co-worker. Merritt v. Delaware River Port Authority, No. Civ.A. 98-3313, 1999 U.S. Dist. LEXIS 5896 (E.D. Pa. Apr. 20, 1999) (Padova, J.); Lezotte v. Allegheny Health Education and Research Foundation, No. Civ.A. 97-4959, 1998 U.S. Dist. LEXIS 6119, at *19-20 (E.D. Pa. May 1, 1998). Because the basis of Count VII is plaintiff's injury allegedly caused by a co-worker's sexual harassment in the workplace, we find that plaintiff's claim of negligence is not preempted by the Act.

Warmkessel v. East Penn Manufacturing Co., Inc., 2004 U.S. Dist. LEXIS 7028 at *4 (E.D. Pa. March 19, 2004). We incorporate the above reasoning here and conclude that plaintiff's negligence claim is not barred by the Workers' Compensation Act.

With regard to defendant's contention that plaintiff's negligence claim is barred by the PHRA, as noted above, defendant did not raise this issue in its motion to dismiss. Plaintiff contends that not all negligence actions are barred by the PHRA if all or part of the facts which give rise to the discrimination claim would also independently support another common law claim. Keck v. Commercial Union Insurance Company, 758 F.Supp. 1034, 1039 (M.D. Pa. 1991). For the following reasons, we agree with defendant that plaintiff's negligence claim is barred by the PHRA.

In Pacheco v. Kazi Foods of New Jersey, Inc., No.Civ.A. 03-2186, 2004 U.S. Dist LEXIS 11280 (E.D. Pa. April 7, 2004), the undersigned held that where plaintiff's negligence claim is more precisely a claim for negligent supervision because the claim essentially alleges failure to train, supervise and investigate, the claim is preempted by the PHRA. Furthermore, our decision in Pacheco is consistent with the decision of our former colleague, then United States District Judge, now United States Court of Appeals for the Third Circuit Judge Franklin S. Van Antwerpen in McGovern v. Jack D's Inc., No. Civ.A. 03-5547, 2004 U.S. Dist LEXIS 1985 (E.D. Pa. February 3, 2004) and the decision of our colleague United States District Judge Mary A. McLaughlin in Shaup v. Jack D's, Inc., No. Civ. A. 03-5570 (E.D. Pa. June 7, 2004).

We conclude that plaintiff's within negligence claim is akin to the claims raised in Pacheco, McGovern and Shaup. As noted by defendant in its brief, the factual averments of plaintiff's Complaint are strikingly similar, if not exact in most respects, to the averments contained in the Complaints in Pacheco, McGovern and Shaup. Because defendant did not raise this issue in its motion to dismiss, we did not address the issue at that time.

The Pacheco and Shaup decisions were decided after our decision on defendant's motion to dismiss, and the McGovern

decision predates our decision on the motion to dismiss by approximately six weeks. It is generally not the role of the court to raise issues not raised by the parties. Thus, we did not raise the within issue at the time of the decision on the motion to dismiss.

However, because we find Pacheco, McGovern and Shaup to be persuasive authority, we conclude that Count VII of plaintiff's Complaint is barred by the PHRA. Thus, we grant defendant's motion for summary judgment and dismiss Count VII of plaintiff's Complaint.

CONCLUSION

For all the foregoing reasons, we grant in part and deny in part defendant's motion for summary judgment. Specifically, we deny the motion as it relates to Counts I through IV of plaintiff's Complaint and grant defendant's motion as it relates to Counts VI and VII.

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

LEON E. WARMKESSEL,)
) Civil Action
Plaintiff) No. 03-CV-02941
)
vs.)
)
EAST PENN MANUFACTURING CO.,)
INC.,)
)
Defendant)

O R D E R

NOW, this 25th day of July, 2005, upon consideration of Defendant's Motion for Summary Judgment, which motion was filed March 15, 2005; upon consideration of the Reply of Plaintiff in Opposition to Motion for Summary Judgment, which reply was filed April 5, 2005; upon consideration of the briefs of the parties; and for the reasons expressed in the accompanying Memorandum,

IT IS ORDERED that Defendant's Motion for Summary Judgment is granted in part and denied in part.

IT IS FURTHER ORDERED that Defendant's Motion for

Summary Judgment on Counts I through IV of plaintiff's Complaint is denied.

IT IS FURTHER ORDERED that Defendant's Motion for Summary Judgment on Counts VI and VII of plaintiff's Complaint is granted.

IT IS FURTHER ORDERED that Counts VI and VII are dismissed from plaintiff's Complaint.

BY THE COURT:

/s/ James Knoll Gardner

James Knoll Gardner

United States District Judge