

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

TRACY A. DEMSHICK,	:	CIVIL ACTION
	:	
Plaintiff,	:	
	:	
v.	:	
	:	
DELAWARE VALLEY CONVALESCENT	:	
HOMES, INC.,	:	
	:	
Defendant.	:	No. 05-2251

**MEMORANDUM**

Tracy A. Demshick filed this action against Delaware Valley Convalescent Homes, Inc., her former employer, on May 12, 2005, raising claims under the American with Disabilities Act (“ADA”), 42 U.S.C. § 12101, et seq., and the Pennsylvania Human Relations Act, 43 P.S. § 951, et seq. Demshick also asserts a claim for intentional infliction of emotional distress.

In her complaint, Demshick states that she was employed as a nurse by Delaware Valley Convalescent Homes, a two-story nursing and rehabilitation center, from October 13, 2003 until her discharge on July 28, 2004. Pl.’s Compl., at 1-3. Demshick contends that she suffers from Meniere’s disease, a disability that affects her balance and equilibrium. Id. at 2. According to Demshick, Kristen Parell, her supervisor, knew that she could not work upstairs due to her disability. Id.

In May 2004, Parell told her “that the schedule was to be rearranged and that plaintiff would . . . be required to work upstairs.” Id. at 3. Demshick states that when she reminded Parell that she could not work upstairs due to her disability, Parell told her “that the disability was not listed on her employment application, therefore she would have to work upstairs.” Id. Demshick states that she provided a doctor’s note that indicated that she could not work upstairs.

Id.

On or about July 22, 2004, Demshick “saw the schedule for the following week wherein she was scheduled to work upstairs for the first time beginning July 27, 2004.” Id. Demshick contends that when she reminded Parell that she could not work upstairs, Parell told her “we do not have to honor your disability.” Id.

Demshick did not report to work on July, 27, 2004, and, on July 28, 2004, she was discharged. Id. Demshick states that at all times, Delaware Valley Convalescent Homes “was acting by and through its employees, agents, servants and/or workmen who were acting within the course and scope of said agency and/or employment relationship with the express and/or implied permission of the defendant.” Id. at 3-4. Demshick notes that she filed with the Equal Employment Opportunity Commission a charge of discrimination against Delaware Valley Convalescent Homes for violations of the ADA. Id. at 4.

On June 27, 2005, Delaware Valley Convalescent Homes filed a motion to dismiss Demshick’s claim for intentional infliction of emotional distress, arguing that this claim is barred by Pennsylvania’s Workers’ Compensation Act (“WCA”), 77 P.S. § 1, et seq. Delaware Valley Convalescent Homes also argues that this claim should be dismissed because the alleged conduct was not sufficiently outrageous.

A court may grant a motion to dismiss only where “it appears beyond a reasonable doubt that the plaintiff can prove no set of facts in support of his claim that would entitle him to relief.” Carino v. Stefan, 376 F.3d 156, 159 (3d Cir. 2004). In deciding a motion to dismiss, a court must construe the complaint liberally, accept all factual allegations in the complaint as true, and draw all reasonable inferences in favor of the plaintiff. Id.

The WCA provides the sole remedy “for injuries allegedly sustained during the course of employment.” Matczak v. Frankford Candy and Chocolate Co., 136 F.3d 933, 940 (3d Cir. 1997). The exclusivity provision of the WCA bars claims for intentional infliction of emotional distress arising out of an employment relationship. Id. However, the WCA does recognize a limited “personal animus” or “third party attack” exception, which 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.” McInerney v. Moyer Lumber and Hardware, Inc., 244 F.Supp.2d 393, 400 (E.D.Pa. 2002). The “critical inquiry in determining the 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.” Id.

In Hettler v. Zany Brainy, Inc., 2000 WL 1468550, at \*6 (E.D.Pa. Sept. 27, 2000), a case in which the defendant ordered the plaintiff, who had an injured back, to lift heavy boxes, the court indicated that the exception did not apply because the alleged acts taken against the plaintiff were “too closely connected to the work situation.” However, in Brooks v. Mendoza, 2002 WL 467157, at \*4 (E.D.Pa. Mar. 26, 2002), a case in which the plaintiff’s manager taunted her with a vibrating object in his pants, pursued her around the workplace despite her protests, and uttered obscene remarks to her, the court found that the exception applied because the manager’s acts “were personal in nature and sufficiently disconnected from the work situation.”

This case is more closely analogous to Hettler than Brooks. In this case, the plaintiff was required to work on the second floor of a nursing and rehabilitation center despite a condition

that she alleges prevented her from doing so. The plaintiff states that the defendant's acts were committed within the course and scope of the employment relationship. Pl.'s Compl., at 3-4. The plaintiff has not indicated that the defendant's acts were personal in nature. Accordingly, because the defendant's acts were closely related to the work situation, the intentional infliction of emotional distress claim must be dismissed.

However, even if this claim were not barred by the WCA, this court finds that it must still be dismissed because the alleged conduct was not sufficiently outrageous. A plaintiff raising a claim of intentional infliction of emotional distress must show that his employer's conduct was of an "extreme or outrageous type." Matczak, 136 F.3d at 940. "The conduct complained of must be so outrageous, and so extreme in degree, as to be regarded as 'atrocious' and 'utterly intolerable in a civilized community.'" DeWyer v. Temple University, 2001 WL 115461, at \*5 (E.D.Pa. Feb. 5, 2001).

"[I]t is extremely rare to find conduct in the employment context that will rise to the level of outrageousness necessary to provide a basis for recovery for the tort of intentional infliction of emotional distress." Matczak, 136 F.3d at 940. Examples of sufficiently outrageous conduct include: hospital employees giving false reports so that the plaintiff was indicted for homicide; the defendant sexually harassing his employee and forbidding her from speaking with others, following her at work, and withholding necessary information from her; and the defendant hitting a child with his car and burying him on the side of the road only to be discovered by the child's parents months later. Clark v. Township of Falls, 890 F.2d 611, 623-24 (3d Cir. 1989).

The facts alleged by Demshick in this case are clearly not as objectionable as the examples set forth above. Demshick claims that she was required to work on the second floor of

the nursing and rehabilitation center even though she informed her supervisor that she could not work on the second floor because she suffered from Meniere's disease and even though she provided her supervisor with a doctor's note regarding the condition. Drawing all reasonable inferences in favor of Demshick, this court finds that the facts alleged do not rise to the level of atrociousness necessary to state a cognizable claim. Accordingly, Demshick's intentional infliction of emotional distress claim is dismissed. An appropriate order follows.

**ORDER**

AND NOW, this 9th day of August, 2005, upon consideration of defendant's motion for partial dismissal (Doc. # 3), and plaintiff's response (Doc. # 4), it is hereby ORDERED that said motion is GRANTED. Plaintiff's intentional infliction of emotional distress claim is DISMISSED.

/s/  
LAWRENCE F. STENGEL, J.