

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

GLENN TUTHILL & DEAN NIEDOSIK : CIVIL ACTION  
v. :  
CONSOLIDATED RAIL CORP. : NO. 96-6868

MEMORANDUM AND ORDER

Norma L. Shapiro, J.

August 22, 1997

Glenn Tuthill ("Tuthill") and Dean Niedosik ("Niedosik") brought an action against Consolidated Rail Corp. ("Conrail") arising out of their participation in an internal investigation of sexual harassment in Conrail's Special Audits Group ("the Group"). Counts I, III, IV and VI of Plaintiffs' Amended Complaint were dismissed with prejudice. Counts II and V of the Amended Complaint assert Conrail violated Section 704(a) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-3(a), by retaliating against Tuthill and Niedosik for their participation in the internal investigation. Conrail now moves for summary judgment on these two remaining counts.

**I. FACTS**

The Group investigates allegations of criminal wrongdoing at Conrail. Kathleen C. Wood ("Wood") was the only female special auditor in the Group. Wood filed a complaint in October, 1995, with the Human Resource Department of Conrail; it alleged that her supervisors, Thomas Brophy ("Brophy"), a manager in the Group, and Alexander Jacoski ("Jacoski"), Director of the Group, created a sexually offensive working environment. Upon receiving

the complaint, Conrail initiated an internal investigation into the allegations. Conrail hired Mark Blondman, Esq. ("Blondman") and Margaret McCausland, Esq. ("McCausland"), from the law firm of Blank, Rome, Comisky & McCauley ("Blank, Rome"), to conduct the investigation. Conrail's Chief Executive Officer, David LeVan ("LeVan"), instructed all employees to cooperate with Blank, Rome's investigation.

Tuthill and Nidosik were interviewed by Blondman regarding the actions of Brophy and Jacoski. In January, 1996, the confidential investigative report ("the Report"), critical of the Group's handling of sexual harassment issues, was delivered to Conrail. Thomas Bera ("Bera"), Assistant Vice President of the Audit Department, formulated a rebuttal to the Report with the help of Brophy and Jacoski. Among other things, the rebuttal referred to Tuthill and Nidosik as "malcontents."

Five days after the rebuttal was prepared, Nidosik received a performance review; Tuthill received his performance review the next day. Each of these reviews was conducted two months earlier than usual. The reviews were authored by Jacoski with the participation of Brophy. Tuthill and Nidosik each believed their performance scores were unfairly low and unjust.<sup>1</sup>

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<sup>1</sup> In 1995, Tuthill received a score of 4.2; his scores for years other than 1995 were not provided to the Court. In 1995, Nidosik received a score of 4.9; his scores for 1992, 1993 and 1994, respectively, were 4.8, 4.7 and 5.1. His 1995 score does not appear to be appreciably different than his previous scores. Nidosik characterized 1995 as a great year since he received some of the "highest recognition awards that [he could] (continued...)

Plaintiffs claimed the negative comments on the reviews were made in retaliation for their participation in the investigation. Tuthill did not object to his numerical ratings, because he believed all numerical ratings "arbitrary," but did object to the narrative comments. Niedosik took exception to both the numerical score and the comments.

Tuthill and Niedosik also objected to a "hostile working environment" from their participation in the investigation. They allege their supervisors treated them rudely and their co-workers were "snubbing" them. Tuthill and Niedosik concede that even after the Report, the atmosphere of the Group remained businesslike and professional. Despite alleged snubbing, each plaintiff claims he could carry out his job excellently.

Tuthill and Niedosik allege they became extremely emotionally upset, as a result of their negative reports and the hostile working environment. Each plaintiff was separately referred to Conrail Medical Department Counselor Veronica Neary ("Neary"). Neary suggested that each plaintiff seek outside psychological help for required emotional support. Because of their emotional conditions, Conrail gave each plaintiff a five

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<sup>1</sup>(...continued)  
receive in the department." See Defendant's Memorandum of Law in Support of its Motion for Summary Judgment ("Defendant's Memo"), at 7.

month leave of absence beginning in February, 1996, with full pay and benefits, similar to one Wood received.<sup>2</sup>

After returning to work in July, 1996, Tuthill and Niedosik felt the staff no longer acted "buddy-buddy." They do not allege management treated them badly or threatened to fire them. Tuthill remains employed in the Group; Niedosik accepted a higher-paying position in the Intermodal Operations Department. Each plaintiff continues to receive psychological therapy and has great concern about his future with Conrail because the company will be acquired within a year by joint purchasers CSX and Norfolk Southern. In April, 1996, Jacoski and Brophy accepted Voluntary Separation Packages from Conrail as of May 1, 1997.

## **II. Summary Judgment Standard**

Federal Rule of Civil Procedure 56© allows for summary judgment "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 judgment as a matter of law." The moving party must show there is an absence of a genuine issue of material fact given the relevant substantive law. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). An issue is genuine only if a reasonable jury could find for the non-moving party based upon the evidence. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986). The substantive

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<sup>2</sup> Wood eventually received a monetary settlement from Conrail and decided not to continue employment with Conrail.

law governing the suit dictates which facts are material. Id., at 250. All inferences must be drawn, and all doubts must be resolved, in favor of the non-moving party. United States v. Diebold, Inc., 369 U.S. 654, 655 (1962); Pollock v. AT&T, 762 F.2d 338, 341 (3d Cir. 1986).

The moving party bears the initial burden of identifying those portions of the record which show an absence of dispute as to any material fact. Celotex, 477 U.S. at 323. The burden is then on the non-moving party to show specific facts demonstrating that a genuine issue of material fact exists. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986). The non-moving party cannot merely rely upon the pleadings, but rather must offer concrete evidence warranting a verdict in its favor from a reasonable jury. Anderson, 477 U.S. at 256.

### III. DISCUSSION

To establish a prima facie case of discriminatory retaliation under Title VII, plaintiffs must demonstrate that: (1) they engaged in protected activity under Title VII; (2) the employer took some adverse employment action against them; and (3) there was a causal connection between their participation in the protected activity and the adverse employment action. Kachmar v. Sungard Data Sys., Inc., 109 F.3d 173, 177 (3d Cir. 1997); Nelson v. Upsala College, et al., 51 F.3d 383 (3d Cir. 1995).

Title VII makes it

an unlawful employment practice for an employer to discriminate against any of his employees . . . because he has opposed any practice made an unlawful employment practice by this subchapter or because he has made a charge, testified, assisted or participated in any manner in an investigation, proceeding or hearing under this subchapter.

42 U.S.C. § 2000e-3(a), Civil Rights Act of 1964, Title VII, § 704(a). There are two distinct clauses in Section 704(a): the "opposition clause" and the "participation clause." Robinson v. Southeastern Pa. Trans. Auth., 982 F.2d 892, 896 n.4 (3d Cir. 1993). "[T]he opposition and participation clauses are drafted in the disjunctive, indicating there is a distinction to be made in the actions protected by each. Put another way, the activity protected by each clause differs." Morris v. Boston Edison Co., 942 F. Supp. 65, 70 (D. Mass., 1996).

The "opposition clause" prohibits retaliation because the employee opposed any practice made unlawful by Title VII. Robinson, 982 F.2d at 896 n.4 The "participation clause" prohibits retaliation because the employee "charged, testified, assisted or participated" in an "investigation, proceeding or hearing" under Title VII. Id. Also, "the scope of protection afforded by the two clauses is different. While the 'participation clause' covers a narrower range of activities, it gives those activities stronger protection than the 'opposition clause' provides." Laughlin v. Metropolitan Wash. Airports Auth., 952 F. Supp. 1129, 1133 (E.D. Va. Jan. 9, 1997), quoting from, Croushorn v. Board of Trustees of Univ. of Tenn., 518 F. Supp. 9, 21 (M.D. Tenn. 1980).

Neither plaintiff claims he opposed any practice made unlawful by Title VII; each claim is for retaliation on account of participation. In order to establish a claim under the "participation clause," the investigation, proceeding or hearing must fall within the confines of the procedures set forth in Title VII. See, e.g. Turner v. Brown, No. 95-cv-3498, 1997 WL 158129, at \*7 (E.D. Pa. March 31, 1997)(insufficient allegation that plaintiff engaged in statutorily protected activity can be grounds for granting summary judgment on a retaliation claim). It is undisputed that an Equal Employment Opportunity Commission ("EEOC") complaint gives rise to protected activity. See Robinson v. City of Pittsburgh, No. 95-cv-3594, 1997 WL 386102, at \*10 (3d Cir. July 14, 1997); Nelson, 51 F.3d at 386.

One purpose of the "participation clause" is to protect access to the EEOC. Laughlin, 952 F. Supp. at 1133, quoting from, Croushorn, 518 F. Supp. at 22-23; see also Vasconcelos v. Meese, 907 F.2d 111, 113 (9th Cir. 1990)(purpose of the clause is to protect employee who "utilizes tools provided by Congress."); Booker v. Brown & Williamson Tobacco Co., 879 F.2d 1304, 1313 (6th Cir. 1989). The scope of an EEOC investigation defines the parameters of a Title VII civil action. Ostapowicz v. Johnson Bronze Co., 541 F.2d 394, 398 (3d Cir. 1976), cert. denied, 429 U.S. 1041 (1977); see also, Jones v. Dalton, No. 95-cv-0289, 1996 WL 421945 (E.D. Pa. July 18, 1996)(Shapiro, J.).

Title VII's definition of "protected activity" does not include participation in an internal investigation. See, e.g.

Vasconcelos, 907 F.2d at 113 (testifying during United States Marshal's Internal Affairs investigation is not participation) (9th Cir. 1990); Russell v. Stick Corp., No. 97-cv-806, slip op., p. 8 (E.D. Pa. July 8, 1997)(testifying at fellow employee's workers' compensation hearing about alleged racial discrimination suffered by fellow employee is not participation); Morris, 942 F. Supp. at 71 (testifying at employer's internal investigation into alleged discrimination is not participation); Laughlin, 952 F. Supp. at 1133 (copying documents and otherwise assisting internal Equal Employment Opportunity ("EEO") officer's investigation is not participation). There may be recovery under the "opposition clause" for participation in an internal investigation or other non-Title VII procedure. See Russell, slip op. at 8-9 (testifying at worker's compensation hearing regarding racial discrimination constitutes opposition); Laughlin, 952 F. Supp. (copying documents for use by internal EEO officer's investigation is best addressed as "opposition" rather than "participation" or "assistance").

Tuthill and Nidosik engaged solely in activities covered by the "participation clause" of Section 704(a). They have alleged no facts consistent with an "opposition clause" claim.<sup>3</sup> They did not have anything to do with Wood's filing the internal complaint. Tuthill and Nidosik admit they participated in the

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<sup>3</sup> There are facts on the record suggesting Tuthill and Nidosik not only did not oppose the alleged sexual harassment, but engaged in similar conduct (such as using vulgar language).

investigation only because LeVan's letter and Jacoski instructed them to do so. See Deposition of Niedosik, at 29-32, 125-26; Deposition of Tuthill, at 12, 24-25, 47-48, 76-77, 96, 337-38. Plaintiffs admit that there is no "opposition clause" claim, and "the court need not analyze the defendant's argument contra 'opposition clause' protection." Plaintiffs' Memorandum of Law in Opposition to Defendant's Motion for Summary Judgment, at 16.

Since this is a "participation clause" action, in order for the activity to be actionable, it must be within the narrow range of participation activities protected under Title VII, i.e., an investigation, proceeding, or hearing under Title VII. There was no EEOC claim filed and this investigation was carried out under the auspices of Conrail and its internally hired investigators, Blank, Rome. That internal investigation was not statutorily protected activity. The limited roles Tuthill and Niedosik played in this internal investigation are similar to the roles of the plaintiffs in Russell, Morris and Laughlin.

Because neither Tuthill, nor Niedosik engaged in "protected activity," which is the necessary first element of a prima facie Title VII case, the merits of their alleged "adverse employment action," and the causal connection between the activity and the alleged adverse action need not be analyzed. Without satisfying any one element of a prima facie Title VII case, there can be no genuine issue of material fact. Summary judgment will be granted to the defendants on the remaining two counts of Plaintiffs'

Amended Complaint. No counts remain; therefore, the action is dismissed with prejudice.

An appropriate order follows.

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ORDER

AND NOW, this 22nd day of August, 1997, upon consideration of Defendant's Memorandum of Law in Support of its Motion for Summary Judgment, Plaintiffs' Response thereto, and oral argument heard on July 17, 1997, it is **ORDERED** that:

1. The Motion is **GRANTED**; Counts II and V of Plaintiffs' Amended Complaint are **DISMISSED** with prejudice.

2. Defendant's Motion to Quash the Notice of Deposition for Dr. Jane Kasserman and/or for a Protective Order Enjoining the Plaintiffs from Using the Deposition at trial is **DISMISSED AS MOOT**.

3. Defendant's Motion in Limine to Preclude the Testimony of Harold Kulman is **DISMISSED AS MOOT**.

4. Judgment is entered in favor of defendants.

5. This case shall be marked as **CLOSED**.

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J.