

I. STANDARD OF REVIEW

Summary judgment is proper "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." Fed. R. Civ. P. 56(c). Upon a motion for summary judgment, the non-moving party, to prevail, must "make a showing sufficient to establish the existence of [every] element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). In evaluating whether the non-moving party has established each necessary element, the court must grant all reasonable inferences from the evidence to the non-moving party. See Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574 (1986). "Where the record taken as a whole could not lead a reasonable trier of fact to find for the non-moving party, there is no 'genuine issue for trial.'" Id. at 587.

II. FACTS

A. Relationship Among Temple, CCC & Salick

Temple's Cancer Center is an outpatient facility which provides comprehensive diagnosis, treatment and other services related to cancer. The operation of the Cancer Center is governed

by a management agreement among Temple, Comprehensive Care Centers, Inc., ("CCC"), and Salick. (Management Agreement Among Temple, CCC & Salick, at 1-2, 39). Pursuant to the agreement, Temple owns the Cancer Center, but CCC manages and develops it as an independent contractor. (Management Agreement, at 1); (Scanlon Dep. at 4-5). CCC is responsible for the hiring and firing of all Cancer Center personnel except medical staff, interns, residents and fellows. (Management Agreement, at 15). Salick agreed to guarantee all of CCC's obligations under the agreement. (Management Agreement, at 2, 39).

B. Kumar's Employment Relationship with Salick & Temple

Kumar, who is of Indian national origin, is a physicist with a Ph.D., not an M.D. From September, 1992 to June, 1994, he was employed as Chief Physicist of the Department of Radiation Oncology at the Cancer Center.

He was interviewed for the position of Chief Physicist by Dr. Scanlon, the Executive Director of the Cancer Center and Vice-President of Salick's Mid-Atlantic Region, and Dr. Patrick Thomas, a physician and Chairperson of the Department of Radiation Oncology at Temple. (Thomas Dep. at 16-17).

In an August 13, 1992 letter, Scanlon offered Kumar the position of Chief Physicist at the Cancer Center. The offer letter was written on stationary with "Temple University

Comprehensive Cancer Center" letterhead and was signed by Scanlon as a Salick Vice-President. (T-2). On the same date, Thomas wrote Kumar a letter offering him a faculty appointment in the Department of Radiation Oncology at Temple University School of Medicine. It was written on stationary with "Temple University-Temple University Hospital-Department of Radiation Oncology" letterhead and was signed by Thomas. (T-1). Scanlon's offer said it was "[b]ased on [Kumar's] conversation with Dr. Thomas" (T-2); Thomas' offer was based on "our discussion and Dr. Scanlon's offer." (T-1).

According to Scanlon's deposition, Kumar was to be hired as an exception to the general rule that all non-physicians were to be hired by Salick and that all physicians were to be hired by Temple. In this regard, Scanlon testified as follows:

Q: Do you know what his title was or his degree?

A: Ph.D.

Q: Now, in that capacity he was employed by whom?

A: The university.

Q: And he was also a member of the faculty; is that correct?

A: He had a title with the faculty, yes.

Q: Was that on the same level as a physician . . . ?

A: No. It was an exception to our general policy.

Q: Can you explain that exception?

A: Dr. Thomas and Dr. Kumar asked that in the recruiting of a Chief Physicist that that person have faculty privileges beyond the university faculty. We agreed to do that and to reimburse the university for that salary.

Q: Is the exception the fact that it will [sic] faculty or is it the exception that he's not a physician?

A: The exception was that both the chairman of the department and the candidate at that time requested that arrangement.

Q: That a person be engaged by Temple for which engagement it would be funded by Salick?

A: Correct.

(Scanlon Dep. at 8-10).

Kumar started work on September 28, 1992, pursuant to a contract ending June 30, 1993. Renewal of Kumar's contract was to be based on 1) satisfactory performance as determined by the Chairperson of the Department, 2) programmatic needs, and 3) the availability of financial support. (T-3). On February 23, 1993, Kumar's contract was renewed through June, 1994. (T-3) (signed by Myers on Temple letterhead).

Because Kumar's position involved the provision of medical care, he was supervised by Temple's medical staff. In this regard, Kumar's direct supervisor was Thomas. (Thomas Dep. at 28, 37). However, Salick supervised the technical, managerial and administrative aspects of Kumar's position. Kumar's requests for business travel, educational training, and equipment and textbook purchases were handled by Salick. Moreover, since his position was funded by Salick, it determined Kumar's salary and raises. With regard to these issues, Kumar was supervised by Scanlon. (Thomas Dep. at 37).

C. Kumar's Relationship with Scanlon

During the course of Kumar's employment as Chief Physicist, Scanlon and Kumar had many disagreements. A constant source of friction was Kumar's attendance at professional meetings and his compensation for business and professional expenditures.

For example, in November, 1992, Kumar requested that he be sent to St. Louis to attend a "CMS" training conference. However, Scanlon rejected this request because he believed that there were people at the hospital who could adequately train Kumar. (K-7).

In July, 1993, Kumar requested that he be allowed to attend the AAPM national convention in Washington, D.C., a yearly meeting of physicists. This time, Scanlon rejected Kumar's request "due to budget restrictions." (S-7, T-16-18). Scanlon's rejection infuriated Kumar because another physicist in the department, who was not Indian, was allowed to attend similar conferences in New Orleans and in Rio De Janeiro, Brazil. (S-7)(Kumar's handwritten notes).

On a related note, Kumar quarreled with Scanlon over Scanlon's refusal to fund Kumar's membership in various professional associations and to provide Kumar with his own secretary and computer. (T-28).

Kumar and Scanlon also disagreed about what administrative matters were to be handled without the intervention of Thomas and the medical staff. For example, in February, 1993, Scanlon was upset with Kumar because Kumar invited Thomas to attend an administrative meeting. In a strongly worded memo to Kumar, Scanlon stated: "I was very disappointed that you extended an invitation to Dr. Thomas to a meeting that I arranged for you and John White ² . . . I don't expect that you would be so presumptuous to repeat this performance." (T-4). Kumar responded with a letter of his own in which he stated that he would invite Thomas to any meeting where he believed Thomas' "involvement [would be] valuable." (S-18).

Kumar and Scanlon also clashed over salary and pay raises. In August, 1993, Scanlon authorized a pay raise of one and one-half percent for Kumar. According to Kumar, this was three to four percent less than the raises received by other non-Indian physicists and technicians in the department. (T-19). Kumar registered his unhappiness about this matter in the August 20, 1993 letter to Scanlon. (T-19).

D. Kumar's Performance Problems

According to the record, there were several problems

² John White was an employee of Salick.

with Kumar's performance as Chief Physicist. Thomas testified that several members in Kumar's department complained to him that Kumar was a slow, indecisive and uninspiring leader and Thomas himself agreed. (Thomas Dep. at 18-20). He testified that Kumar "was slow but competent and lacked confidence and lacked a lot of personal skills." (Thomas Dep. at 25). Scanlon confirmed Thomas' testimony as to the complaints of other members of the department and Scanlon also testified that he believed that Kumar's performance as Chief Physicist was poor. (Scanlon Dep. at 22).

E. Derogatory Comments Made by Scanlon to Kumar

According to Kumar, Scanlon made five derogatory remarks to Kumar during the course of Kumar's employment as Chief Physicist. The first remark came in October, 1992 and involved the department's linear accelerator machine. When Kumar advised Scanlon that the machine was broken, Scanlon allegedly asked Kumar if it was "beneath him, beneath his Indian dignity to go on his hands and knees [] under the machine in order to see the problem." (Kumar Dep. at 39).

The second remark occurred when Kumar asked Scanlon if he could attend the conference in St. Louis. During the conversation, Scanlon allegedly said to Kumar, "What do you have in that Indian brain of yours?" (Kumar Dep. at 43).

The third derogatory remark occurred at the February,

1993 meeting attended by Kumar, Scanlon, White and Thomas. After Scanlon ordered everyone except Kumar to leave his office, Scanlon allegedly said to Kumar, "You Indian." (Kumar Dep. at 52).

The fourth incident, which occurred around November, 1993, again involved the linear accelerator. However, it did not involve a direct comment to Kumar. Instead, according to Kumar, Thomas relayed to Kumar that Scanlon had said to Thomas, "that lousy Indian has screwed up the machine." (Kumar Dep. at 55).

The fifth derogatory remark occurred at or about the time Kumar's position at Temple was terminated. According to Kumar, when Kumar approached Scanlon to discuss Salick's refusal to fund his position of Chief Physicist, Kumar was told by Scanlon to "take his Hindu ass out of here." (Kumar Dep. at 56).

F. Kumar's Complaints

According to the record, Kumar often complained to Thomas about Scanlon's refusal to pay for Kumar's membership in professional societies, his refusal to sponsor Kumar's trip to Washington, D.C. for the AAPM conference, and his failure to provide Kumar with an office computer and secretary. (Kumar Dep. at 42-44, 48, 58); (T-4, T-9, T-16-19, T-22, T-28).

As for the discriminatory conduct, Kumar claims that he complained to Thomas on several occasions. (Kumar Dep. at 42-50,

55, 58-59, 148, 155-156, 182-184; Thomas Dep. at 62-65; K-22, T-18-22, T-28). After reviewing this evidence in the light most favorable to Kumar, the court can point to only three incidents where Thomas may have been notified of Scanlon's national origin discrimination.

The first involved Scanlon's second derogatory remark. Although he did not tell Thomas the exact words involved, ("What do you have in that Indian brain of yours?") (Kumar Dep. At 43), Kumar stated that he complained to Thomas that Scanlon "does not allow me to go to St. Louis, that he was very demeaning and he insulted me and my national origin." (Kumar Dep. at 43). Thomas stated that as a result of this incident he would attend all future meetings between Kumar and Scanlon and Kumar testified that he was satisfied with this remedial action. (Kumar Dep. at 45-46, 153-156).

The second incident occurred in August, 1993, when Kumar wrote a letter to Scanlon in which he complained of the amount of his salary increase, his lack of authority over other department employees and his not receiving a secretary and computer. The last word in the letter calls Scanlon's treatment of him "discriminatory." It was copied to Dr. Macdonald, the Medical Director, Thomas, Dr. Myers, the Dean of the Medical School, and Dr. Malmud, the Vice-President of the Health Sciences Center. (T-19).

The third incident occurred in November, 1993. In response to Scanlon's alleged comment to Thomas that the "lousy Indian has screwed up" the linear accelerator machine, Kumar told Thomas that Scanlon had made other demeaning remarks about his national origin in the past. (Kumar Dep. At 55, 58). He also wrote to Thomas: "I was appalled to hear that Bob Scanlon stated that 'that I have been screwing up the Varian linear accelerator'! It is so outlandish a remark that I feel that I should confront him to offer proof or refrain from making such irresponsible remarks." (T-22)(Kumar Dep. 55, 58). The letter did not make mention of the "lousy Indian" comment.³

G. Kumar's Termination

In December, 1993, Scanlon wrote a letter to Kumar stating the following:

Please accept my personal thanks for all your help in 1993. Your efforts are very much appreciated in the Center's continued service to our patients. . . . I fully recognize that our achievements as a company are a direct result of the energy and efforts of each and every employee. You have been and are essential to the company's success.

(T-25).

³At two other parts of his deposition, Kumar mentioned telling Thomas about Scanlon's conduct. However, that testimony appears to be just a summary of the three communications between Kumar and Thomas discussed here. (Kumar Dep. at 148, 156).

Nevertheless, in February, 1994, in a letter to Thomas Freitag, the Associate Dean for Administration, Scanlon stated that Salick no longer believed it appropriate to continue to support Kumar as Chief Physicist. As reasons for its withdrawal of funding, Scanlon listed Kumar's lack of demonstrated leadership and judgment, Kumar's inability to develop confidence in the staff, Salick's knowledge that Kumar was actively seeking other employment in early 1994, and "the general unhappiness and lack of loyalty with Salick Health Care, Inc." (T-31).

In February, 1994, over the initial objections of Thomas who favored Kumar's reappointment, (Thomas Dep. at 85), Kumar was denied reappointment as Chief of Physics. Myers, the Dean and Associate Vice President for the Health Sciences Center, wrote Kumar as follows:

This letter shall confirm that Dr. Patrick Thomas met with you on January 25, 1994 and advised you that Salick Health Care, Inc. will withdraw funding for your position effective July 1, 1994. No grant money or other funding sources have been identified to support your position. As a result, Dr. Thomas advised you that the University has no choice but to withdraw its offer of reappointment made by letter dated January 6, 1994.

Your signed acceptance of that letter, received by the Office of Faculty and Student Records on February 9, 1994 via inter-office mail, is ineffective in light of its earlier rescission.

As stated in the reappointment letter, the offer of reappointment was made with the expectation of continued financial support. I regret the most recent change in circumstance.

(T-32).

Myers' letter withdrawing Temple's offer of re-appointment was written on stationary with "Temple University-School of Medicine-Office of the Dean" letterhead. (T-32). Signed only by Myers, it was copied to Thomas. (T-32).

Kumar was replaced as Chief Physicist by Dr. Lee Myers, a Caucasian. Myers' employment arrangement was not the same as Kumar's; Myers was hired directly by Salick which paid him directly. (Thomas Dep. at 30).

On December 18, 1995, Kumar filed suit against Salick Health Care, Inc., Temple University Cancer Center, and Temple University School of Medicine claiming that during his employment he was discriminated against on the basis of his national origin, Indian, in violation of Title VII of the Civil Rights Act of 1964 and 1991 ("Title VII"), as amended, Title 42 U.S.C. § 2000e, et seq., and the Pennsylvania Human Relations Act ("PHRA"), 43 Pa. Const. Stat. Ann. §, et seq.⁴ After completing discovery,

⁴ Under Title VII, it is unlawful for an employer to "discharge an individual, or otherwise to discriminate against an 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). PHRA prohibits employers from discriminating in employment practices "because of race, color, religious creed, ancestry, age, sex, national origin or non-job related handicap or disability." 43 P.S. § 955(a).

defendants filed their respective motions for summary judgment.

III. DISCUSSION

A. Salick's Motion for Summary Judgment

Salick first argues that summary judgment is appropriate because the evidence fails to show that Kumar was an "employee" of Salick for purposes of Title VII and the Pennsylvania Human Relations Act.⁵

Title VII prohibits employers from discharging an employee because of that employee's national origin. See 42 U.S.C. § 2000e-2 (a) (1). Because the protection of Title VII extends only to those who are "employees" and does not extend to "independent contractors," it is the plaintiff's burden to prove the existence of an employment relationship. See EEOC v. Zippo Manufacturing Co., 713 F. 2d 32, 25 (3d Cir. 1983).

In examining whether an employer-employee relationship exists, courts generally apply either the "common law agency" test or the "hybrid" test. The factors to be applied under the common law agency test include inter alia: 1) the hiring party's right to control the means and manner of the worker's

⁵The state act is construed in the same manner as Title VII. See Chmill v. City of Pittsburgh, 412 A. 2d 860, 871 (Pa. 1980); Kryeski v. Schott Glass Technologies, Inc., 626 A. 2d 595, 598 (Pa. Super. 1993).

performance; 2) the skills required; 3) the source of the instrumentalities and tools; 4) the location of the work; 5) the duration of the relationship between the parties; 6) the extent of the hired party's discretion over when and how long to work; 7) the method of payment; 8) the hired party's role in hiring and paying assistants; 9) the provision of employee benefits; and 10) the tax treatment of the hired party. See, e.g. Walker v. Correctional Medical Systems, 886 F. Supp. 515, 520 (W.D. Pa. 1995) (citing Nationwide Mutual Insurance Co. v. Darden, 503 U.S. 318 (1992) (applying the agency analysis in an ERISA action)). Under the common law agency test, the most important factor is the hiring party's right to control the manner and means by which the work is accomplished. See id.

The factors to be applied under the hybrid test include inter alia: 1) the extent of the employer's right to control the means and manner of the worker's performance; 2) the kind of occupation, with reference to whether the work usually is done under the direction of a supervisor or is done by a specialist without supervision; 3) the skill required in a particular occupation; 4) whether the "employer" furnishes the equipment used and the place of work; 5) the length of time during which the individual has worked; 6) the method of payment; 7) the manner in which the work relationship is terminated; 8) whether the worker accumulates annual leave and retirement benefits; 9)

whether the worker is an integral party of the business of the employer; and 10) the intention of the parties. See E.E.O.C. v. Zippo Mfg. Co., 713 F. 2d 32, 37 (3d Cir. 1983).

Whichever test the court utilizes,⁶ a question of fact clearly remains as to whether an employer-employee relationship existed between Salick and Kumar. Kumar has presented evidence showing that Salick (through Scanlon) played a significant role in interviewing and offering employment to Kumar, in providing Kumar with office staff and equipment, in determining his pay raises and compensation for business expenses (i.e., attendance at professional meetings and membership in professional associations), and in the termination of Kumar's position as Chief Physicist at the Cancer Center. Thus, there is sufficient evidence for a jury to conclude that Kumar was Salick's employee. Salick's motion for summary judgment on this issue therefore will be denied.

Salick next argues that even assuming the existence of

⁶ Notwithstanding their differing names, the elements of the tests are so similar that it is unlikely to make a difference which test the court uses. Both tests consider the hiring party's right to control the manner and the means by which work is accomplished and a nonexhaustive list of factors as part of a flexible test of the "totality of the circumstances." Cox v. Master Lock Co., 815 F. Supp. 844, 845-46 (E.D. Pa.), aff'd, 14 F. 3d 46 (3d Cir. 1993); Walker, 886 F. Supp. at 521 (concluding that there is little discernible difference between the hybrid test and the common law agency test); Stouch v. Brothers of the Order of Hermits of St. Augustine, 836 F. Supp. 1134, 1139 (E.D. Pa. 1993)(same).

an employer-employee relationship, Kumar fails to state a claim of national origin discrimination under Title VII. In Title VII cases, the court must follow the evidentiary framework first set forth by the Supreme Court in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973), and subsequently refined in Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981), and St. Mary's Honor Center v. Hicks, 113 S. Ct. 2742, 2748 (1993).

Under this framework, plaintiff first must establish a prima facie case of unlawful discrimination. This may be done by showing 1) that he belongs to a protected class; 2) that he was qualified for the position in question; 3) that he was discharged; and 4) that the position was ultimately filled by a person not of the protected class. See, e.g. Waldron v. SL Industries, 56 F. 3d 491, 494 (3d Cir. 1995) (citing McDonnell Douglas and Burdine).

If the plaintiff succeeds in carrying this burden, the burden of production shifts to the defendant to "articulate some legitimate, nondiscriminatory reason" for the employee's discharge. McDonnell Douglas, 411 U.S. at 802. The employer satisfies its burden of production by introducing evidence which, taken as true, would permit the conclusion that there was a nondiscriminatory reason for the unfavorable employment decision. See Hicks, 113 S.Ct. at 2748; Fuentes v. Perskie, 32 F. 3d 759,

763 (3d Cir. 194) ("The employer need not prove that the tendered reason actually motivated its behavior as throughout this burden-shifting paradigm the ultimate burden of proving intentional discrimination always rests with the plaintiff.").

To defeat summary judgment when the defendant answers the plaintiff's prima facie case with a legitimate, non-discriminatory reason for its action, the plaintiff must point to some evidence, direct or circumstantial, from which a fact finder could reasonably either 1) disbelieve the employer's articulated reason;⁷ or 2) believe that an invidious discriminatory reason was more likely than not a motivating or determinative cause of the employer's action. See Sheridan v. E.I. DuPont de Nemours and Co., 100 F. 3d 1061, 1067 (3d Cir. 1996), cert. denied, 117 S. Ct. 2532 (1997); Fuentes, 32 F. 3d at 764.

With regard to his prima facie case, Kumar satisfactorily meets his burden. He is a member of a protected class, he was qualified for the position, he was discharged, and he was replaced by a person not in the protected class.⁸

⁷Plaintiff should present evidence that helps establish "such weaknesses, implausibilities, inconsistencies, incoherences, or contradictions in the employer's proffered legitimate reason[] for its action that a reasonable fact finder could rationally find [it] 'unworthy of credence.'" Fuentes, 32 F. 3d at 765.

⁸To the extent Salick argues that Kumar's record of poor performance makes him unable to be "qualified" for purposes of the second element of his prima facie case, that argument fails. The Third Circuit has stated that a plaintiff need not

In response to Kumar's prima facie case, Salick proffers a legitimate, non-discriminatory reason for Kumar's discharge, namely that he performed the job as Chief Physicist poorly. In this regard, Salick presents evidence showing that Kumar had several on-going disputes with Scanlon, had difficulties with his co-workers, lacked interpersonal skills and leadership qualities, and was generally ineffective as a Chief Physicist. (Thomas Dep. at 18-26); (Scanlon Dep. at 22).

In response to Salick's proffer, however, Kumar presents sufficient evidence that Salick's reason is pretextual. Crucial in this regard is evidence of discriminatory conduct by Salick's chief decision-maker, Scanlon, namely the derogatory remarks allegedly made by him during Kumar's employment and termination, and evidence of his differing treatment of Kumar and non-Indian employees with regard to business-related travel, membership in professional associations and pay raises. See Fuentes, 32 F. 3d at 764 (To survive a motion for summary judgment, plaintiff must point to some evidence, either direct or circumstantial, which would permit a fact finder to believe that

disprove poor performance in order to succeed at the first level of proof, "but rather it is more logically a defense that is raised at the second level to meet the plaintiff's prima facie case of discrimination." Jalil v. Avdel Corp., 873 F. 2d 701, 707 (3d Cir. 1989); Pollock v. A.T.& T., 794 F. 2d 860, 863-64 (3d Cir. 1986) (insubordination, poor performance, and misconduct asserted at the second level as legitimate reasons for employee discharge).

discrimination was, more likely than not, a motivating or determinative cause of the employer's action.).

Also important here is evidence that Thomas believed that despite some problems, Kumar should have been reappointed as Chief Physicist, (Thomas Dep. at 85), and that one month before his termination Scanlon sent a letter to Kumar praising his efforts. (December 28, 1993 Letter from Scanlon to Kumar). This evidence would permit a fact finder to "reasonably disbelieve" Salick's articulated reason. Fuentes, 32 F. 3d at 764. Thus, Kumar has created a triable issue of fact as to whether Salick's proffered non-discriminatory reason is pretextual and therefore Salick's motion for summary judgment will be denied.

B. Temple University's Motion for Summary Judgment

Kumar's sole assertion against Temple is that the University failed to take proper remedial action when it found out about Scanlon's discriminatory conduct and therefore Temple is liable to Kumar for hostile environment harassment under Title VII.⁹

⁹ Hostile environment harassment because of national origin and unlawful discharge because of national origin are separate and distinct violations under Title VII. Kumar does not make any claim that Temple discriminatorily discharged him (either directly or indirectly through Salick) because of his national origin. Instead, in his Memorandum in Opposition to Temple's Motion for Summary Judgment, Kumar states that he is "only pursuing a hostile environment claim against Temple." See

Although most hostile environment harassment cases are sexual harassment cases, not all are; they can be based on national origin discrimination. See Harris v. Forklift System, 114 S. Ct. 367, 371 (1993) (adopting a harassment definition that broadly encompasses discrimination based on "race, gender, religion, or national origin). In making out a hostile environment harassment case, a plaintiff must establish "by the totality of the circumstances, the existence of a hostile or abusive working environment which is severe enough to affect the psychological stability of the minority employee." Knabe v. Boury Corp., 114 F. 3d 407, 410 (3d Cir. 1997) (citing Andrews v. City of Philadelphia, 895 F. 2d 1469, 1482 (3d Cir. 1990)). "Even if a work environment is found to be hostile, a plaintiff must also show that the conduct creating the hostile work environment should be imputed to the employer." Knabe, 114 F. 3d at 410.

In Andrews, the Third Circuit set forth five factors a plaintiff must establish to bring a successful hostile work environment claim against an employer: 1) the employee suffered intentional discrimination because of his national origin; 2) the discrimination was pervasive and regular; 3) the discrimination detrimentally affected the plaintiff; 4) the discrimination would detrimentally affect a reasonable person of the same national

Pl's Memo. at p. 1.

origin in the same position; and 5) the existence of respondeat superior liability. See Andrews, 895 F. 2d at 1492.

With regard to the fifth element, the court is required to look to agency principles. See Meritor Savings Bank v. Vinson, 477 U.S. 57, 66 (1986) (rejecting the idea of strict liability for employers in harassment cases and holding that courts should look to agency principles for guidance). Thus, Title VII liability may be imposed on the employer on a variety of bases. An employer can be found liable if it was aware or should have been aware of the harassment and failed to take prompt remedial action, under the rationale that by failing to take such action the employer has contributed to the hostile work environment. See Knabe, 114 F. 3d at 411;¹⁰ Bouton v. BMW, 29 F. 3d 103, 106 (3d Cir. 1994); Andrews, 895 F. 2d at 1486.

¹⁰ In Knabe, the Third Circuit recapitulated the various bases for employer liability: "We made clear in Bouton that the liability of an employer is not automatic even if the [] hostile work environment is created by a supervisory employee. We recognized three potential bases in the Restatement (Second) of Agency for holding employers liable for harassment committed by their employees. First, under § 219(1), employers are liable for torts committed by employees within the scope of their employment. . . . [Second], [u]nder Restatement § 219(2)(b), employers are liable for their own negligence or recklessness: in this context, an employer is liable for 'negligent failure to discipline or fire, or failure to take remedial action upon notice of harassment.' [Third], under § 219(2)(d), employers are liable if the harassing employee 'relied upon apparent authority or was aided by the agency relationship.'" Knabe v. Boury Corp., 114 F. 3d 407, 411 (3d Cir. 1997) (citing Bouton v. BMW, 29 F. 3d 103, 106 (3d Cir. 1994)). The latter two are "more appropriate in a []hostile work environment case." Id.

Similarly, the Third Circuit has stated that "prompt and effective action by the employer will relieve it of liability in a hostile work environment claim." Bouton, 29 F. 3d at 107.

In the present case, there is support in the record to suggest there is an issue of material fact as to all five elements. Important in this regard is the fact that a reasonable jury could conclude that Temple and Salick were Kumar's joint employer.¹¹ This employment relationship is evidenced by the fact that in August, 1992, Temple and Salick jointly offered Kumar employment (T-1, T-2); in February, 1993, Temple offered Kumar re-appointment through June, 1994, (T-3)(signed by Myers on Temple University letterhead); in January, 1994, Temple offered re-appointment through June, 1995 (T-26) (signed by Myers on Temple University letterhead); and in February, 1994, Temple withdrew its re-appointment offer because Salick cut off funding. (T-31, T-32).

Also important in this regard is evidence that Temple knew or should have known about the existence of harassment and failed to take sufficient steps to remedy it. Although this evidence is weak, it is sufficient for purposes of Temple's motion for summary judgment. As discussed above, Kumar points to three incidents where Thomas (and therefore Temple) was put on

¹¹ Although Temple alleges that only it employed Kumar, Kumar alleges that both Salick and Temple employed him.

notice of Scanlon's discrimination. The first involved Kumar's telling Thomas that Scanlon insulted his national origin and demeaned him after Kumar asked to attend a conference in St. Louis. (Kumar Dep. at 42-49). However, according to Kumar's testimony, Thomas sufficiently remediated the situation by promising to attend all future meetings between Kumar and Scanlon. (Kumar Dep. at 153). The second incident involved the August 20, 1993 letter sent by Kumar to Scanlon, and copied to Thomas and other Temple officials, in which Kumar stated that Scanlon's actions were "discriminatory." However, there is no indication that Scanlon's actions were discriminatory against him because of his national origin and the allegation in the letter is simply too general and vague to support a claim that Temple knew of Scanlon's discrimination against him because of his national origin.(T-19). The third incident related to Scanlon's alleged comment to Thomas "the lousy Indian has screwed up the machine." (Kumar Dep. at 55). Kumar alleges that after Thomas told him of Scanlon's remark, he told Thomas that Scanlon had made other demeaning remarks about his national origin in the past.(Kumar Dep. at 55, 58). Moreover, on November 30, 1993, Kumar sent a letter to Thomas complaining about Scanlon's treatment, although the letter did not mention any discriminatory remarks whatsoever. (T-22).

The first two incidents would not have, in and of

themselves, constituted sufficient knowledge on the part of Temple. However, the third incident does, although perhaps just barely, particularly when occurring in the context of the first two incidents. Taken together, therefore, these communications are sufficient to raise a triable issue of fact as to Temple's awareness of Scanlon's discrimination. Thus, Temple's motion will be denied.

An appropriate order follows.

