

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

CHRISTINE DiIENNO and DAVID DiIENNO : CIVIL ACTION
:
v. :
:
GOODWILL INDUSTRIES OF MID-EASTERN :
PENNSYLVANIA and DREW HOSELEY : NO. 96-8053

MEMORANDUM AND FINAL JUDGMENT

HUTTON, J.

December 11, 1997

Presently before this Court is the Defendants' Motion for Summary Judgment (Docket No. 12). For the reasons stated below, the defendants' Motion is **GRANTED**.

I. BACKGROUND

Taken in the light most favorable to the non-moving party, the facts are as follows. Christine DiIenno ("plaintiff" or "DiIenno") began working at Goodwill Industries of Mid-Eastern Pennsylvania's ("Goodwill") store in Trexlertown, Pennsylvania in 1992. DiIenno Dep. of 4/24/97 at 6-7. Goodwill employed her as a "tagger" to price and tag items of clothing donated to Goodwill. Id. at 7-8; Brauner Dep. at 15; Dries Dep. at 9-10.¹

1. Goodwill employees distinguish between two entry-level tasks: "tagging" and "processing." The latter is considered unsavory because it requires sorting soiled clothing into piles for disposal or tagging. Brauner Dep. at 16. Plaintiff could not process because she suffered from phobias which prevented her from rooting through bags of donated garments. Id. at 54.

In November of 1994, the store manager, Lillian Lick, left on sick leave and gave DiIenno a set of keys to the store, effectively making DiIenno acting supervisor. DiIenno Dep. of 4/24/97 at 10, 14. At that time, and with the knowledge of Goodwill's sales director, Sandra O'Flaherty ("O'Flaherty"), DiIenno began arriving at 7:00 a.m. to open the store. Id. at 11.

In late November, Goodwill replaced Lick with Drew Hoseley ("Hoseley"), an assistant sales manager, who worked in Trexlertown two to three days a week. Id. at 15. Plaintiff worked under the immediate direction of two supervisors, Steven Brauner ("Brauner") and Suzanne Dries ("Dries"), as well as Hoseley, until he left Goodwill's employ on December 22, 1994. Id. at 14, 16.

Starting in the first week of December, 1994, Hoseley engaged DiIenno in conversations, asking DiIenno personal questions: if she was married and for how long; if she was happily married; where she grew up; and how someone raised in Chevy Chase, Maryland and "dripping in jewelry" came to work for Goodwill. Id. at 19-20, 26. In the course of these conversations, Hoseley represented that he had a background in therapy and 'counseled' DiIenno regarding her mother's terminal

illness and DiIenno's doctors and treatment.² Id. at 20-21, 25. Hoseley gave DiIenno his home phone number, telling her to call anytime day or night. DiIenno Dep. of 5/28/97 at 21. Not once during the course of any of these conversations did Hoseley make statements of a sexual nature. DiIenno Dep. of 4/24/97 at 26-27.

On December 5, 1994, Hoseley asked DiIenno to follow him to an automobile garage so he could drop off his car for repairs and then return to the store with her. DiIenno Dep. of 4/24/97 at 17-18, 26. DiIenno objected to this request, but acquiesced when Hoseley insisted. Id. at 26. When Hoseley demanded that she return with him to pick up his car, DiIenno refused and another employee did so. DiIenno Dep. of 5/28/97 at 23.

On December 16, DiIenno and Hoseley met in an office at the rear of the Trexlertown store. Id. at 27-28, 31-33. There, behind closed doors, DiIenno and Hoseley disagreed over DiIenno's pricing of designer clothing. DiIenno Dep. of 4/24/97 at 23-24. Hoseley became angry and revisited the issues of DiIenno's upbringing, jewelry and marriage. Id. In the course of this argument, Hoseley declared that he cared for DiIenno and that he loved her. Id. When DiIenno asked him to stop making personal

2. DiIenno was being treated for "anxiety, depression and agitation." Pls.' Mem. of Law in Opp. to Defs.' Mot. for Summ. J., Ex. K, pg. 1.

comments, Hoseley threw some objects down upon the desk between them. Id. at 22. Hoseley stated that things were going to change, and he threatened to demote DiIenno to a processor position. Id. at 29-30. During this incident, Hoseley did not make any sexual advances or any comments relating to sex. Id. at 28. DiIenno never saw Hoseley again. Id. at 16.

The incident with Hoseley upset DiIenno greatly. Dries saw her crying after the meeting. Dries Dep. at 17. DiIenno was unable to drive herself home that day and had to telephone for a ride. Id. at 20.

DiIenno then spoke with Jane Blanchard ("Blanchard"), a secretary, who told DiIenno, without disclosing the "gory details", that she too had been "harassed" by Hoseley. DiIenno Dep. of 4/24/97 at 33, 41; Blanchard Dep. at 44.³ On December 18, DiIenno reported the December 16 incident to Brauner, who gave her an employee manual revealing Goodwill's harassment policy. DiIenno Dep. of 4/24/97 at 35-36.

3. Plaintiffs describe in detail various encounters between Hoseley and Blanchard which plaintiffs characterize as sexual harassment. See Blanchard Dep. at 16-28. The Court does not discuss these instances because DiIenno had no detailed knowledge of them prior to her December 16 confrontation with Hoseley. Thus, the relationship between Hoseley and Blanchard did not effect the work environment experienced by DiIenno. See Hallberg v. Eat'n Park, No. 94-1888, 1996 WL 182212, at *10 (M.D. Pa. Feb. 28, 1996)(only those incidents of harassment that the plaintiff was aware of are relevant to the objective appraisal of the working environment)

On December 20, DiIenno met with O'Flaherty and Susan Gabriel ("Gabriel"), Goodwill's human resource director, to complain about Hoseley's harassing behavior. DiIenno Dep. of 4/24/97 at 37-39. O'Flaherty reacted with hostility to DiIenno's charge -- at one point storming out of the room -- and asked DiIenno if she had misunderstood Hoseley's intentions and intimated that plaintiff was premenstrual. Id. at 39-40. O'Flaherty and Gabriel informed Plaintiff that she would have to process clothing. DiIenno Dep. of 5/28/97 at 46. Plaintiff was later told that she was non-supportive of management, which was a grounds for dismissal known to DiIenno. DiIenno Dep. of 4/24/97 at 46-47.

Shortly after the December meeting and without informing plaintiff, O'Flaherty removed Hoseley and then assumed direct responsibility for managing the store. O'Flaherty Dep. at 98. DiIenno then began working on store displays, running the register, ordering supplies and handling truck deliveries. DiIenno Dep. of 5/28/97 at 26.

After expressing her complaints, DiIenno's keys were taken from her and she was no longer permitted to arrive early and to open the store. DiIenno Dep. of 5/28/97 at 57; O'Flaherty Dep. at 149-51, 205-06. Plaintiff was also forbidden to speak with Blanchard when she phoned the store; instead, her calls were routed to O'Flaherty or Gabriel. DiIenno Dep. of 4/24/97 at 42-

43. On January 25, 1995, plaintiff received a memo directing her to produce a medically documented excuse, or begin processing clothes. O'Flaherty Dep. at 172-73. Plaintiff's treating physicians provided a letter, dated February 1, authenticating plaintiff's phobias. Id. at 173-74. On February 6, DiIenno attempted to process clothing but her efforts proved fruitless; she was psychologically incapable of the task. DiIenno Dep. of 5/28/97 at 35; Brauner Dep. at 54.

DiIenno then took Family Medical Leave Disability. She was informed that when she returned she would have to continue processing clothing. DiIenno Dep. of 4/24/97 at 63; DiIenno Dep. of 5/28/97 at 46. While DiIenno was on leave, Goodwill failed to inform DiIenno that it would accommodate her phobias and did not communicate the results of any investigation of Hoseley to her. DiIenno Dep. of 5/28/97 at 45-46, 48; Gabriel Dep. at 181, 188.

Plaintiff commenced this action by filing a Complaint on December 4, 1996, asserting claims for hostile work environment sexual harassment, gender discrimination and retaliation in violation of Title VII, 42 U.S.C. § 2000e-2(a)(1) (Amended Complaint Counts I, II), for intentional and negligent infliction of emotional distress (Counts IV-VII), for violations of the Family Medical Leave Act, 29 U.S.C. 2601 et seq. (Count III), and for loss of consortium (Count VIII). On March 25, 1997, the Court granted defendants' Rule 12(b)(6) Motion,

dismissing the Title VII claims against Hoseley. Plaintiffs then filed an Amended Complaint on December 18, 1996. The instant motion followed.

II. SUMMARY JUDGMENT STANDARD

Summary judgment is appropriate "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 a judgment as a matter of law." Fed. R. Civ. P. 56(c). The party moving for summary judgment has the initial burden of showing the basis for its motion. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). Once the movant adequately supports its motion pursuant to Rule 56(c), the burden shifts to the nonmoving party to go beyond the mere pleadings and present evidence through affidavits, depositions, or admissions on file to show that there is a genuine issue for trial. Id. at 324. A genuine issue is one in which the evidence is such that a reasonable jury could return a verdict for the nonmoving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986).

When deciding a motion for summary judgment, a court must draw all reasonable inferences in the light most favorable to the nonmovant. Big Apple BMW, Inc. v. BMW of N. Am., Inc., 974 F.2d 1358, 1363 (3d Cir. 1992), cert. denied, 507 U.S. 912 (1993). Moreover, a court may not consider the credibility or weight of the evidence in deciding a motion for summary judgment, even if the quantity of the moving party's evidence far outweighs that of its opponent. Id. Nonetheless, a party opposing summary

judgment must do more than rest upon mere allegations, general denials, or vague statements. Trap Rock Indus., Inc. v. Local 825, 982 F.2d 884, 890 (3d Cir. 1992).

III. DISCUSSION

A. Sexual Harassment & Gender Discrimination

In order to recover on a claim for hostile work environment sexual harassment under Title VII, a plaintiff must show by a totality of circumstances that: "(1) the [plaintiff] suffered intentional discrimination because of [her] sex; (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 sex in that position; and (5) the existence of respondeat superior liability." Andrews v. City of Philadelphia, 895 F.2d 1469, 1482 (3d Cir. 1990)(footnote and citations omitted); see also West v. Philadelphia Elec. Co., 45 F.3d 744, 752-54 (3d Cir. 1995).

Because plaintiff's gender discrimination claim is based upon the same conduct that underlies plaintiff's sexually hostile work environment claim, DiIenno must show that "gender [was] a substantial factor in the discrimination, and that if the plaintiff 'had been a man she would not have been treated in the same manner.'" Andrews, 895 F.2d at 1485 (quoting Tomkins v. Public Serv. Elec. & Gas Co., 568 F.2d 1044, 1047 n.4 (3d Cir. 1977)). However, the plaintiff need not show "intimidation or

ridicule of an explicitly sexual nature." Id. (footnote omitted).

Defendants maintain that summary judgment is warranted on the gender discrimination/hostile work environment claims because plaintiff failed to adduce any evidence that Hoseley engaged in sexual or gender-based harassment. Am. Mem. of Law in Supp. of Defs.' Summ. J. Mot. at 8-9. Defendants correctly argue that the record lacks any reference to comments, innuendos or contact of a sexual nature or of behavior derogating DiIenno as a female. However, such a finding is not conclusive under the Andrews analysis. Andrews, 895 F.2d at 1485 ("To the extent that the [district] court ruled that overt sexual harassment is necessary to establish a sexually hostile environment, we are constrained to disagree.")

Instead, the Andrews court stated that in cases involving conduct that is not inherently sexual, the first element (intentional gender discrimination) requires a more "fact intensive" analysis. Andrews, 895 F.2d at 1482 n. 3. Moreover, the court found that element two (pervasive and regular harassment) merits a more holistic appraisal of the working environment. Id. at 1484.

Plaintiff has offered sufficient evidence in satisfaction of element one. The plaintiff has offered evidence that had DiIenno been a man, she would have been treated

differently. Plaintiff notes that "the record is devoid of any evidence that Hoseley acted in a similar manner towards men;" moreover, Hoseley harassed another female at Goodwill. Pls.' Mem. of Law in Opp'n to Defs.' Mot. for Summ. J. at 20; Blanchard Dep. at 16, 18, 28. A reasonable jury could infer that Hoseley would not have told plaintiff that he cared for her and loved her if she was a man. See Hall v. Gus Constr. Co., 842 F.2d 1010, 1014 (8th Cir. 1988)("Intimidation and hostility toward women because they are women can obviously result from conduct other than explicit sexual advances.").

However, Plaintiff has not offered sufficient evidence to constitute element two, requiring pervasive and regular harassment. Essentially, DiIenno's harassment/discrimination claims comprehend a hostile work environment created by three categories of conduct occurring over a period of about one month: (1) ongoing personal conversations with Hoseley about her background, medical condition and marriage; (2) driving Hoseley to a garage; and (3) a back-office conversation in which Hoseley stated that he cared for DiIenno and loved her. Plaintiffs' evidence, however, is inadequate as a matter of law, because the instances of harassment involved were not "sufficiently severe or pervasive to alter the conditions of [the victim's] employment and create an abusive working environment." Meritor Savings Bank v. Vinson, 477 U.S. 57, 67 (1986)(internal quotation omitted).

None of the factors articulated by the Third Circuit and Supreme Court are implicated here: plaintiff has not demonstrated that the challenged conduct, which occurred over a period of about one month, was frequent, severe, physically threatening or humiliating to a reasonable woman -- indeed, plaintiff admits that Hoseley did not engage in any sexual conduct at all. See West, 45 F.3d at 753 (citing Harris v. Forklift Systems, Inc., 114 S.Ct. at 371).

The Court is mindful that conduct giving rise to a claim of discrimination "is not necessarily required to include sexual overtones in every instance or that each incident be sufficiently severe to detrimentally affect a female employee." Andrews, 895 F.2d at 1485. Nevertheless, based upon the totality of circumstances, no reasonable jury could conclude on these facts that a reasonable woman in plaintiff's position would find the Goodwill store a hostile working environment. See, e.g., Konstantopoulos v. Westavco Corp., 112 F.3d 710, 715-16 (3d Cir. 1997); Miller v. Aluminum Co. of Am., 679 F. Supp. 495, 501-02 (W.D. Pa.) (noting that "the case law requires a sexual discrimination plaintiff to have been subjected to continued explicit propositions or sexual epithets or persistent offensive touchings to make out a hostile work environment claim"), aff'd, 856 F.2d 184 (3d Cir. 1988).

Although plaintiff describes her conversations with Hoseley as "ongoing", Hoseley was in the store only two or three times a week. DiIenno Dep. of 4/24/97 at 15. Moreover, plaintiff states only that the interchanges were "personal" and that they made her "uncomfortable." Id. at 19-20. Plaintiff admitted that the incident involving the ride to the garage was "minimally harassing." Id. at 18. No reasonable woman would conclude otherwise. The December 16 encounter is less innocuous and, objectively construed, may have constituted sexual harassment. However, these incidents, when considered in conjunction and viewed with the surrounding circumstances and the absence of sexual conduct, fail to establish that Goodwill's work environment was permeated with "discriminatory intimidation, ridicule and insult." See Meritor, 477 U.S. at 65; Baskerville v. Culligan Int'l. Co., 50 F.3d 428, 430-32 (7th Cir. 1995)(Posner, J.) (where defendant never touched plaintiff nor engaged in sexual conduct, defendant's grunts and statements about plaintiff's attractiveness did not create hostile work environment); Drinkwater v. Union Carbide Corp., 904 F.2d 853, 862-863 (3d Cir. 1990)(Becker, J.) (affirming summary judgment on hostile work environment claim: two stereotyping comments and a sexual office-relationship did not create a hostile environment). Accordingly, defendants are entitled to summary judgment on Count I. Moore v. Grove North Am., Inc., 927 F. Supp. 824, 830 (M.D.

Pa. 1996)(granting summary judgment upon finding that the use of vulgar language in absence of sexual innuendos or gender-related language does not show hostile environment); Williams v. Perry, 907 F. Supp. 838, 846-47 (M.D. Pa.), aff'd, 72 F.3d 125 (3d Cir. 1995) (granting summary judgment based on a lack of evidence that incidents were motivated by racial animus).

B. Retaliation

Title VII forbids an employer from discriminating against an employee "because he has made a charge . . . or participated in any manner in an investigation, proceeding or hearing under this subchapter." 42 U.S.C. § 2000e-3(a). In order to establish a prima facie case, plaintiff must show that: "(1) she engaged in activity protected by Title VII; (2) the employer took an adverse employment action against her; and (3) there was a causal connection between her participation in the protected activity and the adverse employment action." Nelson v. Upsala College, 51 F.3d 383, 386 (3d Cir. 1995).

Defendants contend that plaintiff has failed to establish the requisite element of adversity as required by element two, because Goodwill did not discipline, demote or act against DiIenno. Am. Mem. of Law in Supp. of Defs.' Summ. J. Mot. at 9. Thus, the defendants argue that the instant count should be dismissed. In response, the plaintiffs claim that the

defendants retaliated against DiIenno primarily⁴ in two ways: (1) the plaintiff's job duties were changed from tagging to processing and (2) plaintiff was "stripped . . . of her store keys." Pls.' Mem. of Law in Opp'n to Defs.' Mot. for Summ. J. at 21.

"Adversity" exists when the employer takes action that detrimentally affects the plaintiff's existing or future employment relationship. Id. at 387-88. A plaintiff may prove adversity by showing, inter alia, a demotion or a decrease in pay or benefits, Harley v. McCoach, 928 F. Supp. 533, 541-42 (E.D. Pa. 1996), "as opposed to conduct which the employee generally finds objectionable." Bellack v. County of Montgomery, No.CIV.A.97-3709, 1997 WL 688821, at * 1 (E.D. Pa. Oct. 8, 1997); Harley, 928 F. Supp. at 542 (conduct objectionable to plaintiff but objectively reasonable is not actionable). In some circumstances "a transfer, even without loss of pay or benefits, may . . . constitute adverse job action." Krause v. Security

4. Plaintiff also contends that following her "reports of sexual harassment, she found herself unable to contact or [to] communicate with a fellow employee, Jane Blanchard." Pls.' Mem. of Law in Opp'n to Defs.' Mot. for Summ. J. at 11. However, plaintiff was never told that she could not speak with Blanchard. Pl.'s Dep. of 4/24/97 at 43. Instead, when Blanchard was unavailable, plaintiff's calls were forwarded to O'Flaherty or Dries. Id. Plaintiff fails to explain why this seemingly innocent occurrence adversely affected her employment relationship, or whether this treatment was a result of her report. Accordingly, these acts do not constitute retaliatory conduct.

Search & Abstract Co. of Phila., Inc., No.CIV.A.96-595, 1997 WL 528081, at * 6 (E.D. Pa. Aug. 21, 1997). For example, the Third Circuit has held that a "transfer to a dead-end job" could constitute adverse treatment. Id. (citing Torre v. Casio, Inc., 42 F.3d 825, 834 (3d Cir. 1994)).

DiIenno has offered insufficient evidence to support a claim for retaliation. The defendants' alleged adverse treatment did not result in a reduction of the plaintiff's pay or benefits. Moreover, plaintiff's transfer from tagger to processor is not actionable. As plaintiff recognizes, the defendants' employees stated that tagging and processing were not separate positions, and that the employees assigned to those tasks were considered interchangeable. Pls.' Mem. of Law in Opp'n to Defs.' Mot. for Summ. J. at 22. Plaintiff points to Dries' deposition to contend otherwise, but even Dries stated that there was no "hierarchy or chain of command among the different positions." Dries Dep. at 10. The plaintiff's "transfer," even if it can be characterized as such, did not negatively effect the plaintiff's employment relationship, even if the plaintiff may have found it objectionable.

Finally, the fact that DiIenno's store keys were taken away, without a loss of salary or a demotion, is not decisive. The mere fact that the employee finds the employer's conduct "objectionable" does not lead to an actionable claim. Bellack,

1997 WL 688821, at * 1; Harley, 928 F. Supp. at 542. The defendants' alleged conduct does not rise to the level of retaliation. Accordingly, defendants' Motion shall be granted as to Count II of plaintiffs' Amended Complaint.

C. Intentional & Negligent Infliction of Emotional Distress

1. Intentional Infliction of Emotional Distress

The Supreme Court of Pennsylvania has not explicitly recognized the tort of intentional infliction of emotion distress. However, lower Pennsylvania courts have allowed plaintiffs to proceed "where the conduct in question is 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 community." Rinehimer v. Luzerne Co. Comm. College, 539 A.2d 1298, 1305 (Pa. Super.) (internal quotation omitted), appeal denied, 555 A.2d 116 (Pa. 1988).

The Third Circuit has observed that "it 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." Andrews, 895 F.2d at 1487 (quoting Cox v. Keystone Carbon Co., 861 F.2d 390, 395 (3d Cir. 1988)). "[T]he only instances in which courts applying Pennsylvania law have found conduct outrageous in the employment context is where an employer

engaged in both sexual harassment and other retaliatory behavior against an employee." Id. (quoting Cox, 861 F.2d at 395-96).

In the instant case, the plaintiff has failed to provide sufficient evidence to maintain a claim for intentional infliction of emotional distress. A number of personal conversations, a car ride, a back-office conflict and declaration of affection do not rise to the level of outrageousness required by Pennsylvania law. See id. (noting that outrageousness in the employment context requires that "an employer engage[] in both sexual harassment and other retaliatory behavior . . . for [plaintiff's] turning down sexual propositions") (citations omitted); Harley, 928 F. Supp at 542-43. Moreover, "the only instances in which courts applying Pennsylvania law have found conduct outrageous in the employment context is where an employer engaged in both sexual harassment and other retaliatory behavior against an employee." Andrews, 895 F.2d at 1487 (quoting Cox, 861 F.2d at 395-96) (emphasis added). This Court has found that plaintiffs' have not asserted a viable retaliation claim. Further, the plaintiffs have failed to set forth evidence sufficient to prove their harassment/discrimination claims. Therefore, summary judgment on Counts IV and VI, which allege intentional infliction of emotional distress, shall be granted.

2. Negligent Infliction of Emotional Distress

Pennsylvania courts have narrowly applied the tort of negligent infliction of emotional distress to two categories of cases. First, Pennsylvania courts have allowed 'bystander' cases, where the plaintiff directly perceives injury to a close relative and suffers foreseeable harm. Sinn v. Burd, 404 A.2d 672 (Pa. 1979). Second, Pennsylvania allows 'pre-existing duty' cases, where the defendant owes the plaintiff a pre-existing contractual or fiduciary duty, Crivellaro v. Pennsylvania Power & Light Co., 491 A.2d 207 (Pa. Super. 1985). Armstrong v. Paoli Memorial Hosp., 633 A.2d 605, 615 (Pa. Super. 1993)(discussing the categories and noting that, with one anomalous exception, "Pennsylvania has never recognized an independent tort of negligent infliction of emotional distress"), appeal denied, 649 A.2d 666 (Pa. 1994); see also Brown v. Philadelphia College of Osteopathic Med., 674 A.2d 1130, 1133-35 (Pa. Super. 1996) (discussing physical impact rule).

Defendants correctly argue that DiIenno's claim does not fit into either category. Plaintiff presented no evidence that she witnessed injury to a close relative; nor has she argued that Goodwill or Hoseley breached a contractual or fiduciary duty owed to her. See Am. Mem. of Law in Supp. of Defs.' Summ. J. Mot. at 10-11; Pls.' Mem. of Law in Opp'n to Defs.' Mot. for Summ. J. at 26.

Instead, plaintiff cites Riddle v. National Railroad Passenger Corp., 831 F. Supp. 442 (E.D. Pa. 1993), for the proposition that when an employer negligently creates an unsafe and hostile work environment by conducting a "sustained and intentional campaign of investigations and harassment" the employer is liable for foreseeable emotional injury. Pls.' Mem. of Law in Opp'n to Defs.' Mot. for Summ. J. at 26. Plaintiff's reliance on Riddle is inapposite; here there is no "sustained campaign" and the employer's duty of care under the Federal Employee's Liability Act ("FELA"), 45 U.S.C. § 51 et seq., is not implicated. See Armstrong, 633 A.2d at 613-14 (discussing Third Circuit application of the tort to FELA cases). This Court will not extend the tort, long regarded with suspicion by Pennsylvania courts, to the circumstances of this case. See id. at 615 (restricting the tort to avoid "opening the floodgates of litigation"). Therefore, the Court will grant summary judgment in favor of defendants on Counts V and VII. See Joseph v. B & K Medical Systems, Inc., No. 94-3226, 1994 WL 708193, at *2 (E.D. Pa. Dec. 15, 1994)(dismissing sexual harassment plaintiff's claim for negligent infliction of emotional distress).

D. Family Medical Leave Act

Congress enacted the Family Medical Leave Act ("FMLA"), 29 U.S.C. §§ 2601 et seq., in order to afford individuals with serious health conditions up to 12 weeks of unpaid medical leave

per year. See 29 U.S.C. § 2612(a)(1). The FMLA requires employers to reinstate employees to a same or similar position following their leave. 29 U.S.C. § 2614(a). An employer's failure to abide by this rule results in liability under section 2615(a)(1). Similarly, an employer who terminates an employee on FMLA leave for excessive absenteeism, for example, violates section 2615(a)(1).⁵ See Viereck v. City of Gloucester City, 961 F. Supp. 703, 708 (D.N.J. 1997).

The FMLA also prohibits an employer from discriminating against an employee who tries to exercise his FMLA rights. 29 U.S.C. § 2615(a)(2). A retaliation claim brought pursuant to the FMLA is analyzed by applying the McDonnell Douglas proof structure used in Title VII cases. See Beal v. Rubbermaid Commercial Prods. Inc., 972 F. Supp. 1216, 1229 (S.D. Iowa 1997).

In the instant case, the gravamen of plaintiff's FMLA claim appears⁶ to be that Goodwill failed to communicate the results of its investigation of Hoseley to DiIenno and never assured DiIenno that she would not have to "resume the processing

5. Generally, employers are liable for violating an employee's rights under the FMLA. 29 U.S.C. § 2615(a)(1) ("It shall be unlawful for any employer to interfere with, restrain, or deny the exercise of . . . any right provided under this subchapter.").

6. Plaintiffs do not cite any provision of FMLA, but state that the act "prohibits an employer from preventing an employee who takes leave from returning to the same or a similar position." Pls.' Mem. of Law in Opp'n to Defs.' Mot. for Summ. J. at 27.

duties which, in part, precipitated her leave." Pls.' Mem. of Law in Opp'n to Defs.' Mot. for Summ. J. at 27. Plaintiff suggests that, based upon such conduct, a jury could conclude that Goodwill "effectively demoted" DiIenno. Id.

On December 16, 1994, and again on December 20, 1994, plaintiff was informed that she would have to process clothing. DiIenno Dep. of 5/28/97 at 46-47. Plaintiff took her leave on February 6, 1994. She was told before she left that when she returned she would have to resume processing clothing. Thus, Goodwill cannot have retaliated against plaintiff by demoting her in response to her taking leave. See Oswalt, 889 F. Supp. at 259 (granting summary judgment for defendant where plaintiff did not produce "one scintilla of evidence that any adverse employment decision was based upon . . . a request for leave under the FMLA"). Accordingly, summary judgment on Count III is warranted.

E. Loss of Consortium

Plaintiff's claim for loss of consortium cannot withstand summary judgment for multiple reasons. Mr. DiIenno can only recover for loss of consortium if his wife's claim is successful. See Brown v. Peoples Security Ins., 890 F. Supp. 411, 416 (E.D. Pa. 1995); Little v. Jarvis, 280 A.2d 617 (Pa. Super. 1971). This Court has found that Mrs. DiIenno's claims must fail. Accordingly, Mr. DiIenno's claim for loss of consortium must also fail.

Even assuming that a loss of consortium claim was available to Mr. DiIenno, there is not sufficient evidence of plaintiff's claim to withstand summary judgment. "A loss of consortium claim arises from the marriage relationship and is grounded on the loss of a spouse's services after injury." Tiburzio-Kelly v. Montgomery, 681 A.2d 757, 772 (Pa. Super. 1996). When a defendant injures a married individual, that individual's spouse may recover for the deprivation of whatever "aid, assistance, comfort, and society [one spouse] would be expected to render or bestow upon [the other]." Burns v. Pepsi-Cola Metro. Bottling Co., 510 A.2d 810, 812 (Pa. Super. 1986)(quoting Hopkins v. Blanco, 302 A.2d 855, 856 (Pa. Super. 1973), aff'd, 320 A.2d 139 (Pa. 1974)).

Defendants contend that they are entitled to summary judgment on the loss of consortium claim because plaintiffs have presented "[n]o proof . . . pertaining to this claim." Am. Mem. of Law in Supp. of Defs.' Summ. J. Mot. at 11. In response, plaintiffs point to a June 3, 1997, report of DiIenno's treating psychologist, Seith Schentzel, Ph.D, which describes DiIenno's "heightened anxiety, startle response, nightmares, emotional lability, and avoidant behaviors." Pls.' Mem. of Law in Opp'n to Defs.' Mot. for Summ. J. Ex. K at p. 1.

Schentzel's report does not discuss the effects of DiIenno's symptoms on her relationship with her husband, noting

only that "her husband and family members have been very supportive and have facilitated [DiIenno's] ability to progress through this trauma." Id. at p. 2. Nor have Plaintiffs cited any evidence of record⁷ that illuminates the effects, if any, of DiIenno's illness on her marital relationship.

While the testimony of the consortium-plaintiff is not required to sustain his recovery, there must be "substantial evidence from other sources" that demonstrates the consortium-plaintiff's entitlement to damages. Burns, 510 A.2d at 813-14, (negligence plaintiff testified to "the changes which occurred in the couple's previously happy marital relationship because of his mood swings, idiosyncratic eating habits, and refusal to have sexual relations with [his wife]."); Thompson v. Anthony Crane Rental, Inc., 473 A.2d 120, 127 (Pa. Super. 1984) (negligence plaintiff presented "compelling testimony" as to the negative effects of his injury upon "his contribution to his family's comfort and enjoyment, [and] to his sexual life").

Plaintiffs proof falls far short of the "substantial evidence" required. Indeed, DiIenno's factual submissions suggest, at most, the "mere existence of a scintilla of evidence" that consortium was lost. Accordingly, this claim cannot survive a motion for summary judgment. See Anderson v. Liberty Lobby,

7. DiIenno's husband was not deposed nor did he file an affidavit.

Inc., 477 U.S. 242, 252 (1986). See also Tiburzio-Kelly, 681 A.2d at 772 (affirming trial judge's refusal to give consortium charge because the negligence plaintiff "offered no testimony regarding loss of spousal companionship or services"). Thus, Defendants' Motion shall be granted as to Count VIII.

III. CONCLUSION

For the foregoing reasons, the Court will grant summary judgment in favor of defendants on all Counts of the Amended Complaint.

An appropriate Order follows.

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

CHRISTINE DiIENNO and DAVID DiIENNO : CIVIL ACTION
: :
v. : :
: :
GOODWILL INDUSTRIES OF MID-EASTERN : :
PENNSYLVANIA and DREW HOSELEY : NO. 96-8053

FINAL JUDGMENT

AND NOW, this 11th day of December, 1997, upon
consideration of Defendants' Motion for Summary Judgment, IT IS
HEREBY ORDERED that the Defendants' Motion is **GRANTED**.

JUDGMENT is entered in favor of Defendants and against
Plaintiffs.

BY THE COURT:

HERBERT J. HUTTON, J.