

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

KELLIE ANNE KRAUSE, et al.,	:	CIVIL ACTION
	:	
Plaintiffs,	:	NO. 96-595
v.	:	
	:	
SECURITY SEARCH & ABSTRACT	:	
COMPANY OF PHILA., INC., et al.,	:	
	:	
Defendants.	:	

SEAN M. METTEE,	:	CIVIL ACTION
	:	
Plaintiff,	:	NO. 96-5742
v.	:	
	:	
SECURITY SEARCH & ABSTRACT	:	
COMPANY OF PHILA., INC., et al.,	:	
	:	
Defendants.	:	

MEMORANDUM

R.F. KELLY, J.

AUGUST 21, 1997

These consolidated actions allege violations under Title VII of the Civil Rights Act of 1964 ("Title VII"), the Pennsylvania Human Relations Act, 43 Pa. Cons. Stat. Ann. § 951 et seq. (Purdons Supp. 1995) ("PHRA"), the Pregnancy Discrimination Act, intentional and negligent infliction of emotional distress, negligence, wrongful discharge, defamation and loss of consortium. Defendants, Security Search & Abstract Company of Philadelphia, Inc. ("Security Search") and Jack Hornstein have filed a Motion for Summary Judgment on behalf of Security Search pursuant to Rule 56 of the Federal Rules of Civil Procedure. In addition, Defendants have filed a Motion for Reconsideration of this Court's Order, dated July 1, 1997, granting in part and denying in part Defendants'

Motion for Partial Summary Judgment in favor of Jack Hornstein, individually. For the following reasons, Defendants' Motions will be granted in part and denied in part.

PROCEDURAL BACKGROUND

On January 26, 1996, Plaintiffs Kellie Krause, Kenneth Krause, Regina Cathers, William Cathers, Frank Mettee, and Rose Marie Mettee commenced this action against the Defendants, alleging various federal and state law claims arising from their treatment as employees at Security Search. In their answer to Plaintiffs' Complaint, Defendants have made counterclaims that Plaintiffs committed RICO violations and engaged in civil conspiracy based on their belief that Plaintiffs' claims against Defendants are false. In addition Defendants have alleged false representations by the Plaintiffs, malicious abuse of civil process and fraud.

On August 19, 1996, Plaintiff Sean N. Mettee filed a related complaint against Defendants, alleging similar claims under Title VII, the PHRA, intentional and negligent infliction of emotional distress, negligence and defamation. Subsequently, on September 10, 1996, this Court approved a Stipulation of Counsel to consolidate the cases for all purposes.

On April 9, 1996, Defendants filed a Motion to Dismiss Defendant Jack Hornstein from Plaintiffs' claims under Title VII and the PHRA and this Court, by Order of April 29, 1996, dismissed Plaintiff's claims against Defendant Hornstein, individually, under Title VII, the Pregnancy Discrimination Act, and the PHRA. The remaining claims against Defendant Hornstein are common law claims.

More recently, Defendants have filed two separate motions for summary judgment, one on behalf of the Defendant Company and the other in favor of the individual Defendant. On July 1, 1997, this Court granted Defendants' Motion for Partial Summary Judgment in favor of Jack Hornstein with respect to Plaintiffs' claims for negligent infliction of emotional distress and denied the motion in all other respects. Defendants have now moved for reconsideration of that Order based on the arguments they made in a Reply Memorandum that was filed after the July 1st Order was entered and, thus, not previously considered by this Court. In addition, Defendants seek judgment as a matter of law as to all of Plaintiffs' claims against Security Search.

FACTS

In 1988, Defendant Security Search hired Plaintiff Frank Mettee, the father of Plaintiffs Kellie Anne Krause and Regina Cathers, to work as a processor of property titles. That same year, Kellie Anne Krause and Regina Cathers were hired as secretaries/clerks by Security Search. Later, in 1991, Plaintiff Kellie Krause was promoted to title clerk.

Plaintiffs allege that from February to September of 1994 the President and owner of Defendant Security Search & Abstract Co., Inc., Defendant Jack Hornstein, harassed the Plaintiff Kellie Anne Krause by making derogatory and disparaging remarks about her pregnancy. Plaintiffs further allege that after Kellie Krause returned from her maternity leave in December of 1994, Defendant Hornstein continued to make improper comments about her physical

appearance as a result of giving birth. In addition, Plaintiffs claim that Defendant Hornstein sexually harassed Ms. Krause by repeatedly making sexually offensive comments which continued until the date of her constructive termination.

According to Plaintiffs, the event that triggered Plaintiffs' terminations occurred in July of 1995 when Plaintiff Kellie Anne Krause refused to sign an affidavit stating that Defendant Hornstein did not discriminate against either Ms. Krause or a former employee, Anna Bogiatzis, on the basis of sex and pregnancy. This affidavit was being requested as a result of a lawsuit filed by Anna Bogiatzis against Defendants. As a result of Ms. Krause's refusal to sign said affidavit, Plaintiffs allege that Defendant Hornstein retaliated against them. Such retaliation included demoting Kellie Krause from the position of "out-of-town title clerk" to "entry clerk," threatening to terminate Plaintiffs if Kellie Krause did not sign the affidavit, using insults, profanity, and exhibiting mock behavior when addressing and referring to Plaintiffs, and verbally threatening Plaintiffs with bodily harm. By August of 1996, all of the Plaintiffs had been terminated from their respective positions.

I. SECURITY SEARCH'S MOTION FOR SUMMARY JUDGMENT

STANDARD

Pursuant to Rule 56(c), summary judgment is proper "if there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law." FED. R. CIV. P. 56(c). The moving party has the initial burden of informing the

court of the basis for its motion and identifying those portions of the record that demonstrate the absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). The non-moving party cannot rest on the pleadings, but rather that party must go beyond the pleadings and present "specific facts showing that there is a genuine issue for trial." FED. R. CIV. P. 56(e). If the court, in viewing all reasonable inferences in favor of the non-moving party, determines that there is no genuine issue of material fact, then summary judgment is proper. Celotex, 477 U.S. at 322; Wisniewski v. Johns-Manville Corp., 812 F.2d 81, 83 (3d Cir. 1987).

1. Exhaustion of Administrative Remedies

Both Title VII and the PHRA require a plaintiff to exhaust administrative remedies. To comply with the exhaustion requirement of Title VII, a complainant must have filed charges against a party before the EEOC and if the EEOC does not reach a conciliation agreement within one hundred and eighty days, Title VII permits the aggrieved party to file suit against the party named in the charge.¹ See 42 U.S.C. § 2000e-5(f)(1). Similarly,

Section 2000e-5(f)(1) states in relevant part:

If a charge filed with the Commission . . .
is dismissed by the Commission, or if
within one hundred and eighty days from
the filing of such charge . . . the
Commission has not filed a civil action
under this section or . . . the
Commission has not entered into a
conciliation agreement . . . , the
Commission . . . shall so notify the
person aggrieved and within ninety days

"[o]nce a complainant invokes the procedures set forth in the PHRA, failure to wait until either the Commission has dismissed the complaint or one year has elapsed since the filing of the complaint requires dismissal of a PHRA lawsuit for lack of subject matter jurisdiction. See Cassera v. The Scientist, Inc., No. CIV.A. 95-6467, 1996 WL 728759 (E.D. Pa. Dec. 18, 1996) (citing Clay v. Advanced Computer Applications, 559 A.2d 917, 919 (Pa. 1989)).

Here, Defendants contend that the Title VII claims of Francis Mettee, Sean Mettee and Regina Cathers should be dismissed because of their failure to follow the procedural requirements that would allow the administrative agencies the opportunity to investigate their claims.² Specifically, Defendants refer to these Plaintiffs' premature requests for and obtainment of right to sue letters from the EEOC.

In response, Plaintiffs concede that their claims under the PHRA may be dismissed due to their premature termination of the proceedings before the administrative agency, but Plaintiffs contend that their Title VII claims should not be defeated. (Plaintiffs' Opposition Memorandum at 9.) According to Plaintiffs, the 180 day exhaustion period is not jurisdictional and

after the giving of such notice a civil
action may be brought

42 U.S. C. § 2000e-5(f)(1).

Because Defendants do not dispute that Kellie Krause has complied with the EEOC procedures, review of any alleged failure to abide by Title VII's procedural requirements is only necessary with respect to the other Plaintiffs in this case.

their Title VII claims cannot be dismissed on the basis of failing to exhaust their administrative remedies because these claims flow from Plaintiff Kellie Krause's original charge of discrimination and the investigation arising therefrom. (Plaintiffs' Opposition Memorandum at 7-10) (citing Moteles v. University of Pennsylvania, 730 F.2d 913 (3d Cir. 1984), cert. denied, 469 U.S. 855 (1984); Walters v. Parsons, 729 F.2d 233 (3d Cir. 1984)). However, as set forth below, Plaintiffs have misinterpreted the law in this area.

In Occidental Life Ins. Co. v. EEOC, 432 U.S. 355 (1977), the Supreme Court described the 180-day time limitation as mandatory, requiring a complainant whose charge is not dismissed or promptly settled or litigated by the EEOC to wait 180 days before filing suit.³ Id. at 361. Then, in 1977, the EEOC published a regulation that allows it to issue right-to-sue letters before the expiration of 180 days, as long as EEOC officials believe that it is probable that the agency will not complete its administrative process within 180 days. See 29 C.F.R. § 1601.28 (1995). Thereafter, federal courts have been divided over the

More recently, the Court held, in Zipes v. Trans World Airlines, Inc., 455 U.S. 385 (1982), that "filing a timely charge of discrimination with the EEOC is not a jurisdictional prerequisite to suit in federal court, but a requirement that, like a statute of limitations, is subject to waiver, estoppel, and equitable tolling." Id. at 393. However, "Zipes does not stand for the proposition that administrative filings are no longer prerequisites to bringing a Title VII action in federal court; only that such administrative prerequisites are not 'jurisdictional' in nature." District Council 47 v. Bradley, 619 F. Supp. 381 (E.D. Pa. 1985), vacated on other grounds, 795 F.2d 310 (3d Cir. 1986); see also Baldwin County Welcome Center v. Brown, 466 U.S. 147, 152 n.6 (1984).

reasonableness of the EEOC regulation and its effect on the procedural requirements of Title VII.⁴

In Moteles, the Third Circuit Court of Appeals emphasized the importance of the administrative process. Although the court did not rule on the validity of the regulation at issue or the procedure followed in that case, the court did express a preference for exhaustion of the administrative process by stating:

It may well be that the 180-day exhaustion period is not jurisdictional. Even so, premature resort to the district court should be discouraged as contrary to congressional intent. The preference for conciliation as the dispute resolution method in employment discrimination proceedings should not be undermined by a party's deliberate by-pass of administrative remedies.

Moteles, 730 F.2d at 917. Thus, Plaintiffs' reliance on Moteles for the proposition that Plaintiffs properly filed their Complaint in federal court, despite their noncompliance with the statutory requirement that the EEOC investigate their claims for 180 days, is misplaced.

Plaintiffs reliance on Waiters is also misplaced. In Waiters, the Third Circuit held that "[t]he relevant test in determining whether appellant was required to exhaust her

When it enacted Title VII, Congress granted the EEOC the power "to issue, amend, or rescind suitable procedural regulations to carry out the provisions of this subchapter." 42 U.S.C. § 2000e-12(a). Section 1601.28(a)(2) is such a regulation and is valid as long as it is reasonably related to the purposes of Title VII. Pearce v. Barry Sable Diamonds, 912 F. Supp. 149, 154 (E.D. Pa. 1996) (citation omitted).

administrative remedies, was whether the acts alleged in the subsequent Title VII suit are fairly within the scope of the prior EEOC complaint, or the investigation arising therefrom." Id. at 237. In this regard, Plaintiffs contend that "the acts alleged in the subsequent EEOC Complaints filed by Plaintiffs Frank Mettee, Sean Mettee and Regina Cathers were all within the scope of Kellie Krause's EEOC Complaint and the investigation arising therefrom." (Plaintiffs' Opposition Memorandum at 10.) Thus, Plaintiffs argue that the Title VII claims of retaliatory discrimination alleged by Kellie Krause's family cannot be dismissed because they stem from her original charge of discrimination.

However, Defendants are correct in that the Waiters court says nothing about combining the claims of different plaintiffs. To the contrary, the court merely held that "if an employer discriminates against an employee while that employee has an outstanding charge of discrimination, the employee need not wait an additional 180 days before bringing suit for the second act as long as the two acts are related." Pearce v. Barry Sable Diamonds, 912 F. Supp. 149, 153 (E.D. Pa. 1996) (construing Waiters) (emphasis added). Because Plaintiffs cite no authority for the notion that a separate plaintiff need not wait 180 days to satisfy the exhaustion of administrative remedies requirement as long as his or her claims are related to the claims of another plaintiff which have been investigated, this Court will suspend the Title VII claims of Francis Mettee, Regina Cathers, and Sean Mettee until

they exhaust their administrative remedies before the EEOC.⁵ See Montoya v. Valencia County, 872 F. Supp. 904, 906 (D.N.M. 1994).

2. The Pregnancy Discrimination Act

Defendants argue that Kellie's claims under the Pregnancy Discrimination Act are barred because she failed to meet the EEOC filing deadline with regard to her first claim. Kellie's first claim against Defendants is for the alleged remarks made by Jack Hornstein concerning Kellie's weight and appearance because of her pregnancy. Defendants assert that even if Jack Hornstein made the alleged remarks on Kellie's last work day before taking maternity leave, September 12, 1994, her EEOC filing deadline would be July 15, 1995. Thus, by filing her EEOC complaint containing Claims One and Two on August 24, 1995, Defendants argue that Kellie failed to meet her deadline by 40 days as to the first claim.⁶

However, Kellie's first claim will be considered a

Defendants also argue that Plaintiffs Francis Mettee, Regina Cathers, and Sean Mettee have not engaged in a protected activity and, thus, their claims of discriminatory retaliation must be dismissed. However, Defendants fail to recognize that Plaintiffs' refusal to coerce Kellie Krause into signing a false affidavit is protected by Title VII. See Smith v. Columbus Metropolitan Housing Authority, 443 F. Supp. 61 (S.D. Ohio 1977) ("[W]hether an employee decides to assist the charging party, or refuses to assist the respondent employer, the employer may not retaliate against the employee, because this decision of the employee constitutes participation in an investigation or proceeding under Title VII.").

Kellie's second claim under the Act involves comments made by Defendant Hornstein allegedly in retaliation for Kellie's refusal to sign the affidavit. The second claim of alleged discriminatory conduct began in July of 1995; therefore, her second claim is well within the 300 day EEOC filing requirement.

continuing violation of the first claim. The continuing violation theory allows a plaintiff to pursue a Title VII claim for discriminatory conduct that began prior to the filing period if he or she can show that the act was part of an ongoing pattern of discrimination by the defendant. West v. Philadelphia Elec. Co., 45 F.3d 744, 754 (3d Cir. 1995). For a claim to fall under the continuing violation theory, a plaintiff must demonstrate that (1) at least one act occurred within the filing period and (2) that the harassment is "more than the occurrence of isolated or sporadic acts of intentional discrimination." West, 45 F.3d at 744, 754-55 (quoting Jewett v. International Tel. and Tel. Corp., 653 F.2d 89, 91 (3d Cir. 1981)). When considering whether a violation is continuous in nature the court should look at the following factors: (i) subject matter--whether the violation constituted the same type of discrimination; (ii) frequency; and (iii) permanence--whether the nature of the violations should trigger the employee's awareness of the need to assert her rights and whether the consequences of the act would continue even in the absence of a continuing intent to discriminate. West, 45 F.3d at 755 n.9 (quoting Martin v. Nannie and Newborns, Inc., 3 F.3d 1410 (10th Cir. 1993), aff'd after remand, 54 F.3d 788 (10th Cir. 1995)).

In her complaint to the EEOC, Kellie wrote "Additionally, Mr. Hornstein sexually harassed me by repeatedly making sexually offensive comments which occurred during and after my pregnancy." (Plaintiff Krause's Opposition Memorandum Ex. I.) The alleged remarks made by Hornstein in the first and second claim both were

of the same derogatory nature and of the same subject matter, her physical appearance. Therefore, Kellie's first and second complaints under the Pregnancy Act do fall under the continuing violations exception and, thus, Kellie Krause's first complaint will survive Defendants' Motion, despite the 300-day EEOC filing requirement.

3. Kellie Krause's Title VII Claim

Defendants argue that Kellie's retaliation claim does not meet the requisite elements to establish a cause of action. To establish a prima facie case of retaliation the plaintiff must establish that (1) they engaged in activity protected by Title VII; (2) the employer took adverse action against them; and (3) a causal link exists between their protected conduct and the employer's adverse action. Charlton v. Paramus Board of Educ., 25 F.3d 194, 201 (3d Cir.), cert. denied, 513 U.S. 1022 (1994). See also Azzaro v. County of Allegheny, 110 F.3d 968, 973 (3d Cir. 1997)(en banc).

If Plaintiff can make out their prima facie case, the burden shifts to the employer to articulate a legitimate, non-discriminatory reason for the employment action. Harley v. McCoach, 928 F.Supp. 533, 541 (E.D. Pa. 1996). The burden then shifts back to the plaintiff to show by a preponderance of the evidence that the reasons offered by the employer are unworthy of credence and a pretext for discrimination. Id. (citing Waddell v. Small Tube Products, Inc., 799 F.2d 69, 73 (3d Cir. 1986)).

Kellie was transferred from the second floor of the office to the third floor days after she refused to sign

Hornstein's affidavit. However, her salary remained the same despite the transfer. After the transfer Kellie was informed that she either had to resign or accept another transfer to a facility in Lehigh County. Kellie argues that the Defendants knew that she could not drive and therefore could not work at any of the Defendants' county offices. She testified that due to the stress she was experiencing as a result of the first transfer and the insinuation that she would be transferred to a county office outside of the city, she was forced to seek medical attention and not return to her job.

Defendants argue that Kellie has no evidence of any adverse employment action taken against her except her subjective belief that she was demoted and, therefore, she cannot meet the second element of a retaliation claim. However, Kellie claims that she was constructively discharged because she was transferred and then told that she had to relocate to the Lehigh office. (Plaintiff's Opposition Motion Ex. H, p.492-94.) Throughout these events Kellie maintains that she also had to endure ongoing harassment from Hornstein following her refusal to sign the false affidavit.

To make out a claim for constructive discharge, a plaintiff must show that there were "conditions of discrimination" so intolerable that a reasonable person would have resigned. Goss v. Exxon Office Systems Co., 747 F.2d 885, 888 (3d Cir. 1984). Here, Kellie has put forth such evidence by providing testimony showing that Hornstein verbally abused her and repeatedly made

derogatory comments about her physical condition. She has also provided evidence showing that Hornstein threatened to fire and physically harm her and all of her family members employed by Defendants. (Plaintiff's Opposition Memorandum Ex. K, p. 203.) Additionally, Kellie's deposition testimony states that Andrea Barone, Defendant's regional manager, explained to Kellie that she was being transferred "because of what you are involved in, and what you know, we have to get you off of this floor." (Plaintiff's Opposition Motion Ex. H, p.484.) The aforementioned actions, coupled with her sudden transfer to the third floor and the ultimatum that she quit or move to the Lehigh office, create a genuine issue of material fact as to whether Defendants took adverse action against Kellie for refusing to sign Defendant Hornstein's affidavit. Thus, Kellie has established a prima facie case of retaliation because she has met all of the requisite elements of the claim.

In an attempt to carry their burden of proving that a legitimate, non-discriminatory reason exists for the employment action, the Defendants argue that Kellie's transfer was a promotion and does not constitute an adverse employment action. Defendants point out that Kellie did not receive a pay cut and Kellie admitted that her new office was nicer than her previous office. However, a transfer, even without loss of pay or benefits, may, in some circumstances, constitute an adverse job action. Torre v. Casio, Inc., 42 F.3d 825, 831 n.7 (citing Collins v. Illinois, 830 F.2d 692, 702-704 (7th Cir. 1987)). In Torre, the defendant had

transferred the plaintiff alleging that plaintiff was a "subterfuge." Id. at 827. Plaintiff was eventually terminated as part of a reduction in force that defendant claimed was a legitimate, non-discriminatory reason. Id. at 828. The court held that a prima facie case of disparate treatment can be established by indirect evidence that "depends on the circumstances of the case." Id. at 830 (citing Massarsky v. General Motors Corp., 706 F.2d 111, 118 (3d. Cir. 1983)). The court further held that Torre met his burden of proof to overcome the trial court's granting of summary judgment by creating factual issues relating to his transfer to a dead-end job and whether his transfer and termination were part of a discriminatory scheme. Id. at 834. In making that determination, the court states:

"However, to survive summary judgment, a plaintiff need not go so far. At that preliminary stage, a plaintiff may prevail by either (i) discrediting the [employer's] proffered reasons, either circumstantially or directly or (ii) adducing evidence, whether circumstantial or direct, that discrimination was more likely than not a motivating or determinative cause of the adverse employment action." Id. at 830 (citing Fuentes v. Perskie, 32 F.3d 759 (3d Cir. 1994)).

In the case at bar, Kellie has provided both circumstantial and direct evidence that discrimination was more likely than not a motivating cause for the adverse employment action. Thus, Kellie has fulfilled her burden of proof by showing that Defendant's non-discriminatory reasons for their employment action were a pretext for discrimination. Accordingly, Defendant's Motion for Summary Judgment as to Kellie's claim for retaliation

under Title VII will be denied.

4. The Workmen's Compensation Act

Defendants also argue that Counts IV through VIII must be dismissed because they are barred by the exclusivity provision of the Pennsylvania Workmen's Compensation Act, 77 Pa.cons. Stat. Anno. §§ 1 et seq. (1992) ("PWCA"). The PWCA's exclusivity provision provides as follows: "The liability of an employer under this act shall be exclusive and in place of any and all other liability to such employees . . . or anyone otherwise entitled to damages in any action at law" Id. at § 481(a).

However, as Plaintiffs point out, district courts in this circuit have expressly recognized an exception in cases where an injury is caused by an act of a third person intending to injure the employee because of reasons personal to him, and not directed against him as an employee or because of his employment. See 77 P.S. § 411(1); see also Schweitzer v. Rockwell International, 586 A.2d 383 (Pa. Super. 1990) (holding that "the alleged emotional distress arose from harassment personal in nature and not part of the proper employer/employee relationship."). "Thus, the relevant inquiry for determining whether the exception is applicable centers on the motivation or intent of the third party." Price v. Philadelphia Electric Co., 790 F. Supp. 97, 100 (E.D. Pa. 1992). Viewing the allegations in the complaint in the light most favorable to Plaintiffs, it cannot be said that the conduct alleged clearly was not a result of personal animosity of Jack Hornstein toward Plaintiffs. Accordingly, summary judgment will be denied on

this basis.

5. Intentional and Negligent Infliction of Emotional Distress

Next, Defendants contend that Plaintiffs' claims of intentional infliction of emotional distress should be dismissed because the alleged conduct of Defendant Hornstein, even if taken as true, does not exceed "all possible bounds of decency" and is not "utterly intolerable in a civilized society." See Cox v. Keystone Carbon Co., 861 F.2d 390, 395 (3d Cir. 1988) (refusing to recognize such a cause of action where the employer had discharged an employee on the day the employee returned from a three month leave of absence after undergoing triple bypass surgery). Defendants also contend that Plaintiffs' claims for negligent infliction of emotional distress must be dismissed because neither of the two situations in which a party can recover under this tort -- observation of a physical injury or preexisting duty of care -- are present in the instant action. See Corbett v. Morgenstern, 934 F. Supp. 680, 682-83 (E.D. Pa. 1996).

With respect to Plaintiffs' claims for intentional infliction of emotional distress, Defendants are correct in that each Plaintiff has not suffered sexual harassment and retaliatory behavior and, by Plaintiffs' own admission, "the only incidences 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 the employee." Cox, 861 F.2d at 395. Here, only female Plaintiffs Kellie Krause and Regina Cathers can allege both sexual harassment

and retaliation.⁷ Based on the above, Defendants' Motion will be granted with respect to the male Plaintiffs, Frank and Sean Mettee.⁸

As for Plaintiffs' claims of negligent infliction of emotional distress, Plaintiffs argue that Plaintiffs Kellie Krause, Regina Cathers, Frank Mettee and Sean Mettee all worked together, witnessed Defendant Hornstein personally make verbal threats to the Plaintiffs about physically harming members of each Plaintiff's family, and experienced physical problems as a result. However, as Defendants point out, Plaintiffs have not identified any incidents that meet the standard recognized by Pennsylvania courts as constituting negligent infliction of emotional distress.⁹ Thus,

In Solomon v. City of Philadelphia, 1996 WL 20651, at *3 (E.D. Pa. Jan. 16, 1996), the court recognized that sexual harassment alone is insufficient to establish intentional infliction of emotional distress in an employment context and that "[t]he extra factor that is generally required is retaliation for turning down sexual propositions." See Andrews v. City of Philadelphia, 895 F.2d 1469, 1487 (3d Cir. 1990). However, the Solomon court held that "[a]lthough that particular brand of retaliation may be the "extra factor that is generally required," it is not the only "extra factor" that will suffice. See Solomon, 1997 WL 20651 at *3.

Plaintiffs argue that in this case they are not only alleging sexual harassment, but retaliation on the part of Defendants in the form of verbal threats to Plaintiffs about physically harming members of their families for failing to sign a false affidavit alleging that there was no improper conduct in the office. See Barb v. Miles, Inc., 861 F. Supp. 356, 363 (W.D. Pa. 1994). Plaintiffs also have cited convincing deposition testimony to support their allegations concerning Defendant Hornstein's behavior. However, such conduct has not been recognized by Pennsylvania courts as constituting intentional infliction of emotional distress.

It is worthy to note that Pennsylvania Courts have recognized a third way to sustain a claim for negligent infliction

Defendants' Motion for Summary Judgment will be granted on these claims.

6. Wrongful Discharge

Pennsylvania law holds that employment contracts are terminable "at-will" and, as a result, employers may discharge employees with or without just cause. Niehaus v. Delaware Valley Medical Center CTR, 631 A.2d 1314, 1315 (Pa. 1993). However, the Pennsylvania Supreme Court has recognized an exception to the at-will doctrine and allowed a common-law cause of action to exist for wrongful discharge where an employer's actions in firing an employee violates a clearly mandated public policy. See Geary v. United States Steel Corp., 319 A.2d 174, 180 (Pa. 1974). Here, the parties dispute whether any public policy issue is tied to their discharge.

In this regard, Plaintiffs contend that Plaintiff Kellie Ann Krause was asked to sign a false affidavit attesting to the fact that Defendant Hornstein did not discriminate against either herself or another employee, Anna Bogiatzis, on the basis of sex and pregnancy. This affidavit was being requested as a result of a lawsuit filed by Anna Bogiatzis against Defendant Hornstein and Security Search & Abstract Company of Philadelphia. According to Plaintiffs, if Ms. Krause had executed this affidavit, then she

of emotional distress -- where the plaintiff nearly experiences a physical impact in that he was in the zone of danger of the defendant's tortious conduct. However, Plaintiffs have failed to point to enough evidence that could sustain their tort claims on this basis.

would have been committing perjury which is a criminal offense and, thus, had a legal obligation to refuse to sign said affidavit. As a result of Krause's refusal to sign the affidavit, Plaintiffs allege that Defendants retaliated not only against Ms. Krause by involuntarily transferring her to another position, but also by retaliating against other family members that worked for the company. Thus, Plaintiffs correctly argue that Plaintiff Krause's refusal to sign the affidavit sets forth a basis for the public policy exception to apply, constituting a valid cause of action for wrongful discharge. See Dugan v. Bell Telephone of Pennsylvania, 876 F. Supp. 713, 724 (W.D. Pa. 1994) ("[A]n employee's dismissal offers clear mandates of public policy if its results from conduct on the part of the employee that is required by law or from the employee's refusal to engage in conduct prohibited by law.").

7. Defamation

Defendants further contend that there is no evidence of defamation. Defendants state that "even if Plaintiffs aver that Defendant Hornstein made annoying or embarrassing remarks, such communications are not sufficient as a matter of law to create an action in defamation." (Defendants' Memorandum at 13) (citing Maier v. Maretti, 671 A.2d 701 (Pa. Super 1995)).

However, Plaintiffs have alleged that Defendants defamed them

by advising co-employees in public that the Mettee family were liars and not to be trusted as they were allegedly obtaining company information and releasing it to former employees of the Company, including

Anna Bogiatzis [who] was suing the Company. In addition, Defendant Hornstein advised numerous individuals that the Mettee family was stealing and extorting money from the Company.

(Plaintiffs' Opposition Memorandum at 53.)

To prove defamation, Plaintiffs must establish: (1) the defamatory character of the communication; (2) publication by the defendant; (3) its application to the plaintiff; (4) understanding by the recipient of its defamatory meaning; (5) understanding by the recipient of it as intended to be applied to plaintiff; (6) special harm to the plaintiff; (7) abuse of a conditionally privileged occasion. See Maier, 671 A.2d at 704 (citing 42 Pa.C.S. § 8343(a)).

In Agriss v. Roadway Express, Inc., 483 A.2d 456 (Pa. Super. 1984), the court held that the statement published to the employee's supervisor and co-workers concerning plaintiff's opening of company mail was capable of defamatory meaning because it implied the employee had committed a crime. In the instant case, Plaintiffs have alleged that Defendant Hornstein told co-employees that Plaintiffs were trying to extort money from him. Such statements would, under Agriss, be defamatory.

Defendants also contend that Plaintiffs have not identified any damages that they have suffered. However, under Pennsylvania law, Plaintiffs are entitled to recover for injury to their reputation as well as for personal humiliation and mental anguish as long as they present competent evidence of such harm. Id. at 467; see also Marcone v. Penthouse Int'l Magazine for Men,

754 F.2d 1072, 1080 (3d Cir. 1985, cert. denied, 474 U.S. 864 (1985)). Here, the testimony presented by the Plaintiffs by way of deposition has sufficiently presented genuine issues of material fact in this regard. Thus, Defendants' Motion will be denied with respect to Plaintiffs' claims of defamation.

8. Loss of Consortium

Finally, Defendants contend that Plaintiffs' spouses' claims that they have been emotionally damaged as a result of this case does not constitute loss of consortium. According to Defendants, this tort arises from the marital relationship and is grounded upon the loss of a spouse's services after an injury which results from deprivation of the injured spouse's society and services. See Tiburzio-Kelly v. Montgomery, 681 A.2d 757, 772 (Pa. Super. 1996). Here, Defendants argue that a consortium claim is not a claim for emotional or mental trauma and should be dismissed. Defendants add that Plaintiffs' loss of consortium claims arise entirely from Defendant Hornstein's alleged violations of Title VII, the Pregnancy Discrimination Act, and the PHRA, all of which have been dismissed against Defendant Hornstein individually, and, thus, the loss of consortium claim must be dismissed.

Plaintiffs counter with excerpts of testimony from all the Plaintiffs on how their marital relationships have been affected. The testimony quoted in Plaintiffs' Opposition Memorandum shows that the frequency of sexual intimacy between the Plaintiffs and their spouses has decreased since the alleged harassment by Defendant Hornstein began, although Plaintiffs also

allege that the spouses have been deprived of the Plaintiffs' aid in the maintenance and support of the household, normal companionship, affection and love. Furthermore, Plaintiffs contend that their loss of consortium claims are part of their common law claims and do not arise solely from Defendant Hornstein's alleged violations of Title VII, the Pregnancy Discrimination Act, and the PHRA. Therefore, Defendants' Motion with respect to Plaintiffs' claims for loss of consortium will be denied.

II. Defendants Motion for Partial Summ. J. In Favor of Defendant Jack Hornstein, Individually.

RECONSIDERATION STANDARD

"[F]ederal courts always retain the discretion to reconsider issues already decided in the same proceeding, . . . [and] courts will reconsider an issue . . . when there is a need to correct a clear error or prevent manifest injustice." NL Indus., Inc. v. Commercial Union Ins. Co., 65 F.3d 314, 324 (3d Cir. 1995). Accordingly, a district court will grant a party's motion for reconsideration in any of three situations: (1) the availability of new evidence not previously available, (2) an intervening change in controlling law, or (3) the need to correct a clear error of law or to prevent manifest injustice. Reich v. Compton, 834 F. Supp. 753, 755 (E.D. Pa. 1993) (citing Dodge v. Susquehanna Univ., 796 F. Supp. 829, 830 (M.D. Pa. 1992)). Here, Defendants have filed a Motion for Reconsideration based on the arguments in their Reply Brief, which were not previously considered by this Court. The arguments in Defendants' Reply Brief that have merit will be

discussed below.

1. Intentional Infliction of Emotional Distress

As stated above, to prevail on their claims of intentional infliction of emotional distress, Plaintiffs must prove that Defendant Hornstein engaged in conduct "so outrageous in character, and so extreme in degree, so as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized society." Cox v. Keystone Carbon Co., 861 F.2d 390, 395 (3d Cir. 1988) (quoting Buczek v. First Nat'l Bank off Mifflintown, 366 Pa. Super. 551, 531 A.2d 1122, 1125 (1987)). Discrimination claims against the employer, rarely if ever rise to such a severe level. See, e.g., Kuhn v. Phillip Morris U.S.A., Inc., 814 F. Supp. 450 (E.D. Pa. 1993). Hornstein's alleged actions, if taken as true, would not rise to the level of outrageousness required to establish a claim for intentional infliction of emotional distress. Furthermore, the Cox court observed, "the only incidences 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 the employee." Cox, 861 F.2d at 395.

In this case, Kellie Ann Krause and Regina Cathers are the only Plaintiffs who have alleged sexual harassment and retaliation. Because Francis Mettee and Sean Mettee have failed to allege sexual harassment in their Complaints, Defendants' Motion will be granted with respect to these male Plaintiffs' claims for

intentional infliction of emotional distress. However, Defendants' Motion with regard to Kellie Ann Krause's and Regina Cather's claims will be denied.

2. Wrongful Discharge

Plaintiffs' claims for wrongful discharge cannot survive Defendants' Motion because Defendant Hornstein was not Plaintiffs' employer. All of the Plaintiffs were employed by Defendant Security Search & Abstract Company of Phila., Inc. Plaintiffs adduce absolutely no evidence that Defendant Hornstein was their employer. Furthermore, Plaintiffs admit that Defendant Hornstein is himself an employee of Defendant Security Search. (Plaintiffs Complaint Paragraph 16). Defendant Hornstein was President of Security Search; however, his status as President does not make him the "employer" so as to be responsible for a wrongful discharge claim. Therefore, Defendants' Motion with respect to Plaintiffs' claims for wrongful discharge will be granted.

3. Plaintiffs' Other Claims

Plaintiffs' claims for defamation and loss of consortium against Defendant Hornstein will survive Defendants' Motion because Defendants' fail to offer any new arguments to dismiss these claims in their Reconsideration Motion. Likewise, Defendants' argument that the Workmen's Compensation Act bars Plaintiffs' common law claims fails because for the reasons stated in the above section that deals with Defendant Security Search's Motion or Summary Judgment.

Based on the above, the following Order will be entered:

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

KELLIE ANNE KRAUSE, et al.,	:	CIVIL ACTION
	:	
Plaintiffs,	:	NO. 96-595
v.	:	
	:	
SECURITY SEARCH & ABSTRACT	:	
COMPANY OF PHILA., INC., et al.,	:	
	:	
Defendants.	:	

SEAN M. METTEE,	:	CIVIL ACTION
	:	
Plaintiff,	:	NO. 96-5742
v.	:	
	:	
SECURITY SEARCH & ABSTRACT	:	
COMPANY OF PHILA., INC., et al.,	:	
	:	
Defendants.	:	

ORDER

AND NOW, this 21st day of August, 1997, upon consideration of the Motion filed by Defendants, Security Search & Abstract Company of Philadelphia, Inc. ("Security Search"), and Jack Hornstein, for Summary Judgment on behalf of Security Search, pursuant to Rule 56 of the Federal Rules of Civil Procedure, and Defendants' Motion for Reconsideration of this Court's Order, dated July 1, 1997, granting in part and denying in part Defendants'

Motion for Partial Summary Judgment in favor of Jack Hornstein, individually, and all responses thereto, it is hereby ORDERED that Defendants' Motions will be GRANTED in part and DENIED in part as follows:

With respect to Defendants' Motion for Summary Judgment on behalf of Security Search:

1. Plaintiffs' claims under the PHRA are DISMISSED, as Plaintiffs concede that they prematurely terminated the proceedings before the proper administrative agency;

2. The Title VII claims of Plaintiffs Regina Cathers, Francis Mettee and Sean Mettee will be SUSPENDED until they exhaust their administrative remedies;

3. Defendants' Motion regarding Plaintiff Kellie Anne Krause's claim under the Pregnancy Discrimination Act is DENIED;

4. Defendants' Motion regarding Plaintiff Kellie Anne Krause's claim for retaliation is DENIED;

5. A genuine issue of material fact remains as to whether Counts IV through VIII of Plaintiffs' claims are barred by the Pennsylvania Workmen's Compensation Act and, thus, Defendants' Motion is DENIED with regard to these Counts;

6. Defendants' Motion regarding Plaintiffs Frank and Sean Mettee's claims for intentional infliction of emotional distress is GRANTED. However, Defendants' Motion is DENIED with respect to the claims of Plaintiffs Kellie Anne Krause and Regina Cathers for intentional infliction of emotional distress;

7. Defendants' Motion regarding Plaintiffs' claims for wrongful discharge is DENIED;

8. Defendants' Motion regarding Plaintiffs' claims for defamation is DENIED; and

9. Defendants' Motion regarding Plaintiffs' claims for loss of consortium is DENIED.

With respect to Defendants' Motion for Reconsideration of this Court's July 1, 1997 Order:

1. Genuine issues of material fact exist as to whether Counts IV through VIII of Plaintiffs' claims are barred by the Pennsylvania Workmen's Compensation Act and thus Defendants' Motion is DENIED with regard to these Counts;

2. Defendants' Motion is GRANTED with respect to the claims of Plaintiffs Francis Mettee and Sean Mettee for intentional infliction of emotional distress. However, Defendants' Motion with regard to the claims of Plaintiffs Kellie Anne Krause and Regina Cathers for intentional infliction of emotional distress is DENIED;

3. Defendants' Motion with respect to Plaintiffs' claims for wrongful discharge is GRANTED;

4. Defendants' Motion is DENIED with respect to Plaintiffs' claims of defamation; and

5. Defendants' Motion with respect to Plaintiffs' claims for loss of consortium is DENIED.

BY THE COURT:

ROBERT F. KELLY,

J.