

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

LESLIE FRYE	:	CIVIL ACTION
	:	
v.	:	
	:	
	:	
ROBINSON ALARM CO.,	:	
HERMAN E. ROBINSON, and	:	
RONALD SIHLER	:	NO. 97-0603

Yohn, J. February 1998

MEMORANDUM AND ORDER

This is an employment discrimination case wherein the plaintiff, Leslie Frye ("Frye"), claims that the defendants, Robinson Alarm Co. (the "Company"), Herman Robinson ("Robinson") and Ronald Sihler ("Sihler"), discriminated against her on the basis of her sex and discharged her for objecting to sexual harassment. The defendants now bring a partial summary judgment motion requesting that the court find (1) the plaintiff's claims under Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. § 2000e et seq. (1994) against the individual defendants Robinson and Sihler are not cognizable, (2) the plaintiff's claims under the Pennsylvania Human Relations Act (PHRA), 43 PA. CONS. STAT. ANN. §§ 951 et seq. (1991) against the individual defendants Robinson and Sihler are not cognizable, (3) the plaintiff has failed to introduce sufficient evidence to show that there is a genuine issue of material fact as to her claim that she was terminated in retaliation for protected conduct in violation of Title VII and the PHRA, and (4) the plaintiff has agreed to withdraw her claims under the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. §§ 12101 et seq. (1995). I will DENY the motion in part and GRANT it in part.

SUMMARY JUDGMENT STANDARD

Rule 56 of the Federal Rules of Civil Procedure provides that summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits . . . 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). In reviewing the record, the court must presume that the non-moving party's version of any disputed fact is correct. Eastman Kodak Co. v. Image Technical Services, Inc., 504 U.S. 451, 456 (1992). Additionally, the court must draw all reasonable inferences in favor of the non-moving party. Sempier v. Johnson & Higgins, 45 F.3d 724, 727 (3d Cir. 1995) cert. denied, 115 S. Ct. 2611 (1995). Although the moving party carries the burden of demonstrating the absence of a genuine issue of material fact, the non-moving party cannot merely rely upon the allegations contained in the complaint, but must offer specific facts contradicting the movant's assertion that no genuine issue is in dispute. See Coolspring Stone Supply, Inc. v. Amer. States Life Ins. Co., 10 F.3d 144, 147 (3d Cir.1993). An issue is genuine only if there is sufficient evidence from which a reasonable jury could find for the non-moving party. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986).

BACKGROUND

These are the undisputed facts or, if disputed, taken in the light most favorable to the nonmoving party.

Frye began working for the Company on September 23, 1985. (Pl.'s Response Mem. Ex. B, Compl. ¶ 9.) Throughout her tenure there Robinson and Sihler sexually harassed her and another employee. For instance, from the outset of Frye's employment, Robinson, the president and owner of the Company, referred to her as

“legs” and “stretch,” told her how much he likes “long legs,” and that “long legs tickle [his] ears.” (Pl.’s Response Mem. Ex. O, Pl.’s Dep. at 49-50 [hereinafter Pl.’s Response Ex. O].) On another occasion, Robinson pulled two condoms out in front of Frye. (See Pl.’s Response Mem. Ex. C, Pl.’s Answers to Interrogs. ¶ n [hereinafter Pl.’s Response Mem. Ex. C].) Sihler, the vice president of operations for the Company, was more aggressive than Robinson. In approximately March, 1988, Sihler grabbed Frye and kissed her on the mouth. (See Pl.’s Response Mem. Ex. E, Answers to Interrogs. ¶ aa [hereinafter Pl.’s Response Mem. Ex. E].) He then stated that he had “better get out of here before somebody gets me for sexual harassment.” (Id.) On another occasion, in April, 1993, Sihler gave Frye a hug, accompanied by moans and genital contact, on an elevator. (See id. ¶ cc.)

Sihler also sexually harassed another woman in the office, Elizabeth Cordero (“Cordero”), a secretary at the Company. Cordero often confided in Frye regarding Sihler and sometime in the beginning of 1994, Frye approached Robinson about this matter. (See Pl.’s Response Ex. C ¶ s.) Frye told Robinson that Cordero had complained that Sihler “gets too close to [her]” when they are working. (Id.) Frye also told Robinson that she had observed Sihler’s inappropriate behavior and that Frye had had “personal experience” with Sihler’s advances. (Id.) Robinson did not ask for details, but merely told Frye that Sihler’s wife had a beautiful body and that “if anything happens,” he would terminate Cordero. (Id.)

After this conversation, Robinson’s harassment and indifference to Frye’s objections intensified. In July, 1994, for example, Frye told Robinson that she felt Sihler was too aggressive with people. (See id. ¶ r.) Robinson responded that Frye “was a

two time loser who got hit with a terrible disease,” (id.), referring, presumably, to the fact that Frye had recently been diagnosed with multiple sclerosis. In December, 1994, while Frye was comforting Cordero in the bathroom over Robinson’s behavior, Robinson began kicking the bathroom door and yelling for them to come out. (Id. ¶ m.)

On December 14, 1994, Cordero told Frye that Sihler had sexually assaulted her. (See Pl.’s Response Mem. Ex. J, Pl.’s Answers to Interrogs. ¶ u [hereinafter Pl.’s Response Mem].) When Cordero told Robinson what occurred he laughed about it and said Sihler had a beautiful wife. (See id.) A few days later, Robinson called Frye while he was in Florida to talk about the incident. (See id.) He told Frye that Sihler had been warned to stay away from the office that week. (See id.) When Frye reminded Robinson that she had previously come to him regarding Sihler’s inappropriate behavior, Robinson added that “[Cordero] invites it” and laughed about Sihler’s wife’s reaction to the news. (Id.)

The final straw came toward the end of December. On December 22, 1994, Robinson told Frye to fire Cordero because of her accusations. (Pl.’s Response Mem. Ex. A, Frye Aff. ¶ 2 [hereinafter Pl.’s Response Mem. Ex. A].) When Frye refused, Robinson responded that “[Cordero] asks for it because she acts like a sleazy girl all the time” (Pl.’s Response Mem. Ex. J ¶ j.) He then told Frye that she would be fired if she did not fire Cordero. (Pl.’s Response Mem. Ex. A. ¶ 2.) When Frye called in sick the next day, December 23, Robinson called her at home. (Pl.’s Response Mem. Ex. J ¶ w.) He reiterated his insults toward Cordero and then said that if Cordero filed suit he would “make sure she loses her kid again because I’ll talk about how she acts around men and wears those goddamn tight shirts that show her breasts.” (Id.) Finally, he

instructed Frye to “stay out of this” and not to offer any information to anyone. (Id.)

Frye continued to call in sick for the next several work days. (Id. ¶ x.) On January 3, 1995, Joseph Breen, Robinson’s associate who had worked for the Company on a temporary basis in the past, called Frye and informed her that he was “replacing her.” (Pl.’s Response Mem. Ex. A ¶ 3.) Following this conversation, Frye believed that she had been fired for complaining about sexual harassment and for failing to support the Cordero’s termination. (Id.)

The defendants filed this motion for partial summary judgment requesting this court “to dismiss the portions of the plaintiff’s complaint” relating to (1) the Title VII and the PHRA claims against the individual defendants, Robinson and Sihler, (2) the Title VII and PHRA retaliation claims, and (3) the ADA claims. In her response memorandum, the plaintiff concedes that the Title VII claims against the individual defendants, Robinson and Sihler, are not cognizable and should be dismissed. She has also agreed to withdraw her ADA claims. She opposes, however, the defendants’ motion as to the PHRA claims against the individual defendants, Robinson and Sihler, and the retaliation claims. For the reasons that follow, I will deny the defendants’ motion as to the disputed issues and grant the motion as to the other grounds.

DISCUSSION

I. Section 955(e) of the Pennsylvania Human Relations Act

The PHRA forbids “any person, employer, employment agency, labor organization or employee to aid, abet, incite, compel or coerce the doing of any act declared by the section to be an unlawful discriminatory practice.” 43 PA. CONS. STAT.

ANN. § 955(e) (Supp. 1997). Thus, unlike Title VII, which holds only employers liable for discrimination, the PHRA establishes accomplice liability for individuals who aid and abet a violation of the statute by their employer. See Dici v. Commonwealth of Pennsylvania, 91 F.3d 542, 552 (3d Cir. 1996).

The individual defendants mistakenly contend that because the PHRA is generally applied in accordance with the law of Title VII, which does not create a cause of action against individual defendants, this court should find that the PHRA does not create any remedy against individual employees. Therefore, they argue that the plaintiff's PHRA claims against the individual defendants should be dismissed. As shown, this argument contradicts the terms of § 955(e), which explicitly provide for individual liability. See Dici, 91 F.3d at 552 (holding that individual employees may be held liable under § 955(e)).

Section 955(e), however, is not without its limits. In Dici, 91 F.3d at 552-53, for example, the plaintiff, Dici, argued that a non-supervisory employee, who had been sexually harassing Dici, could be held liable under § 955(e) solely by virtue of his direct acts of discrimination. Dici claimed that these direct acts aided and abetted the employer's failure to take corrective measures to prevent discrimination, thereby violating § 955(e). See id. The Third Circuit rejected this argument and instead found that the employee's conduct is sufficiently separate from the employer's response such that there is "no community of purpose between them." Id. at 553. In other words, a non-supervisory employee's direct acts of discrimination do not trigger § 955(e) because the employee "cannot be said to 'intend' that his employer fail to respond." Id. (quoting Tyson v. CIGNA Corp., 918 F. Supp. 836, 841 (D.N.J. 1996)).

On the other hand, noting the distinction between supervisory and nonsupervisory employees, Glickstein v. Neshaminy School District, No. CIV.A. 96-6236, 1997 WL 660636, *11-13 (E.D. Pa. Oct. 22, 1997), held that supervisors can be held liable under § 955(e) for their own direct acts of discrimination. Glickstein explained that, under agency principles, a supervisory employee, as opposed to nonsupervisory employees, at times shares the intent and purpose of the employer. See id. Thus, a supervisor's failure to take action to prevent discrimination, even when it is the supervisory employee's own practices at issue, can make him or her liable for aiding and abetting the employer's insufficient remedial measures. See id.

Frye asserts that Robinson and Sihler violated § 955(e) by failing to take corrective measures to prevent discrimination. (See Pl.'s Response Mem. at 8.) According to Frye, Robinson, the president and owner of the Company, repeatedly brushed off her complaints about Sihler's inappropriate advances. (See Pl.'s Response Mem. Ex. A ¶ 2.) Once apprised of the discriminatory conduct, a supervisor's failure to take action to end the harassment amounts to aiding and abetting an employer's unlawful practices. See Dici, 91 F.3d at 553 (supervisor who knew or should have known of discriminatory conduct and repeatedly refused to end the harassment could be liable under § 955(e)); see also Glickstein, 1997 WL 660636, at *12-13 (supervisors can be held liable under § 955(e) for refusing to terminate their own acts of harassment).

The plaintiff claims that Sihler, the vice president of operations for the Company, directly engaged in discriminatory conduct toward her. He actually grabbed her and kissed her on one occasion and hugged her in an offensive manner on another. (See

Pl.'s Response Mem. Ex. E ¶¶ aa-cc.) At this juncture, neither party disputes that Sihler was a supervisory employee or an agent of the Company.¹ See Dici, 91 F.3d at 553 (allegations that a supervisor knowingly failed to end harassment sufficient to overcome a motion to dismiss); Glickstein, 1997 WL 660636, at *12-13 (allegations that an employee was a supervisor and engaged in direct acts of discrimination sufficient to overcome a motion to dismiss). As such, the plaintiff can withstand the defendants' summary judgment motion because Sihler's own discriminatory conduct can make him liable under § 955(e) of the PHRA.

II. Retaliation under Title VII and the PHRA

The plaintiff alleges that the defendants retaliated against her by discharging her because she complained about sexual harassment and refused to support the termination of Cordero. (See Pl.'s Response Mem. Ex. B ¶¶ 30, 34, 37.) Under Title VII, "a plaintiff establishes a retaliation claim if she shows that she had a reasonable belief that her employer was engaged in an unlawful employment practice and that the employer retaliated against her for protesting against that practice." Drinkwater v. Union Carbide Corp., 904 F.2d 853, 865 (3d Cir.1990). The statute itself provides:

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

42 U.S.C.A. § 2000e-3. Similarly, the PHRA provides:

¹ In fact, the defendants do not address the issue of the PHRA's applicability to supervisory employees.

It shall be an unlawful discriminatory practice . . .

For any person, employer, employment agency or labor organization to discriminate in any manner against any individual because such individual has opposed any practice forbidden by this act, or because such individual has made a charge, testified or assisted, in any manner, in any investigation, proceeding or hearing under this act.

43 PA. CONS. STAT. ANN. § 955(d).

Under both statutes, the elements of a prima facie case of retaliation are: (1) a protected activity (i.e., a reasonable protest of an employment policy), (2) a subsequent or contemporaneous adverse employer action, and (3) a causal link between the two. See Griffiths v. CIGNA Corp., 988 F.2d 457, 468 (3d Cir. 1993) (applying this test to Title VII and PHRA retaliation claims), overruled on other grounds, Miller v. CIGNA Corp., 47 F.3d 586 (3d Cir.1995); Jalil v. Avdel Corp., 873 F.2d 701, 708 (3d Cir.1989) (applying this test to Title VII). The defendants allege that they did not discharge Frye and, therefore, she has failed to meet the evidentiary requirements for the second and third elements of this test.

A. Actual Discharge

i. Title VII

In the context of Title VII, a discharge occurs when an employer uses words or conduct that “would logically lead a prudent person to believe his tenure has been terminated.” Chertkova v. Connecticut General Life Ins. Co., 92 F.3d 81, 88 (2d Cir. 1996) (quoting NLRB v. Trumbull Asphalt Co., 327 F.2d 841, 843 (8th Cir. 1964) (Blackmun, J.)); see also Wade v. Metropolitan Life Insurance Co., No. CIV.A. 96-5420, 1997 WL 560248, at *4 (E.D. Pa. Aug. 26, 1997). Formal words of termination are not required and the inquiry should focus on the reasonable perceptions of the employee.

See Chertkova, 92 F.3d at 88; Trumball Asphalt, 327 F.2d at 843.

Thus, in circumstances similar to the instant case, the Second Circuit found that a genuine factual question existed regarding whether an employee was actually discharged. See Chertkova, 92 F.3d at 88-89. The plaintiff in Chertkova, who left her employment after suffering a nervous breakdown, asserted that the defendants terminated her the day after her departure. See id. The defendants claimed that she voluntarily resigned. See id. To support her characterization of her departure as a dismissal, the plaintiff introduced (1) the employer's threats that she would be fired, (2) the employer's termination letter to her that was never sent, and (3) a phone call from another employee who asked her disparaging questions about her condition and refused to discuss the work environment. See id. In light of this evidence, the court found that the defendants' proof that the plaintiff, after her alleged termination date, accepted benefits only available to employees merely suggested that the parties disputed the discharge issue. See id.

Likewise, Frye has presented sufficient evidence to enable a factfinder to find that she was actually discharged. Robinson told her that she would be fired if she did not terminate Cordero; she did not terminate Cordero; and then, after calling in sick for several days, she received a phone call from a temporary employee informing her that he had moved into her office and would be doing her work. (See Pl.'s Response Mem. Ex. A ¶¶ 2-3.) Like Chertkova, the plaintiff's receipt of the Company's health insurance benefits for several months after her departure suggests only that a question of fact surrounds the discharge issue. (See Pl.'s Response Mem. Ex. K, Pl.'s Dep. at 154.)

ii. PHRA

Courts interpreting the meaning of “discharge” within the context of both the PHRA and Pennsylvania common law have found that, “the employer’s language or actions must possess the immediacy and finality of a firing” for a discharge to occur. Hanson v. Commonwealth of Pa., 568 A.2d 991 (Pa. Commw. 1990). Expounding upon this principle, at least one court has surmised that, unlike federal law, Pennsylvania law focuses on the employer’s intent rather than the subjective expectations of the employee. See Wade v. Metropolitan Life Insurance Co., No. CIV.A. 96-5420, 1997 WL 560248, *5 (E.D. Pa. Aug. 26, 1997). Despite this arguably stricter standard, Pennsylvania courts have consistently held that an employer’s ultimatum such as “apologize or be discharged,” Slayton v. Unemployment Compensation Board of Review, 427 A.2d 322, 323 (Pa. Commw. 1981), could warrant a finding that the employee did not leave her employment voluntarily. See also Season All Industries, Inc. v. Unemployment Compensation Board of Review, 398 A.2d 1092 (Pa. Commw. 1979) (employee’s option of signing an agreement or leaving the corporation could amount to a discharge).

Frye has introduced sufficient proof on the issue of her actual discharge under the PHRA. Robinson essentially gave Frye an ultimatum; that if she did not terminate Cordero, Frye herself would be terminated. (See Pl.’s Response Mem. Ex. A ¶ 2.) Frye did not terminate Cordero and then called in sick for the next several days. (See id.) On January 3, 1995, an employee from the Company called Frye and informed her that he would be doing her work and moving into her office. (See id.) Following this conversation, Frye believed that Robinson discharged her, as he had promised, for objecting to sexual harassment and Cordero’s termination. (See id.) As such, there are

sufficient facts available for a jury to find that Frye had been discharged.

B. Constructive Discharge

In the alternative, Frye has also supported her claim of constructive discharge.² Under the applicable law, a plaintiff who has voluntarily resigned may maintain a case of constructive discharge when the employer's allegedly discriminatory conduct creates an atmosphere that is the constructive equivalent of a discharge. See Gray v. York Newspapers, Inc., 957 F.2d 1070, 1079 (3d Cir.1992). The court must look to whether “the conduct complained of would have the foreseeable result that working conditions would be so unpleasant or difficult that a reasonable person in the employee’s shoes would resign.” Id. (quoting Goss v. Exxon Office Systems Co., 747 F.2d 885, 887-888 (3d Cir. 1984)); see also Schafer v. Bd. of Pub. Educ., 903 F.2d 243, 248-50 (3d Cir.1990); Waite v. Blair, Inc., 937 F. Supp. 460, 469 (W.D. Pa. 1995) (applying same standard to PHRA and Title VII constructive discharge claims).

The Third Circuit has held that an employee’s resignation could be construed as a constructive discharge when the employer is aware that the employee has been subjected to a continuous pattern of harassment and the employer does not take any

² The defendants do not address the constructive discharge issue in their brief. The only explanation they offer for this failure is that the plaintiff does not allege constructive discharge. (Def.’s Mem. Supp. Mot. S.J. at 3.) The Federal Rules of Civil Procedure require, in relevant part, “a short and plain statement of the claim showing that the pleader is entitled to relief” FED. R. CIV. P. 8(a). Constructive discharge, however, is not a separate ground for relief but merely factors into accounting for damages in a discharge claim, Knabe v. The Boury Corp., 114 F.3d 407 n.1 (3d Cir. 1997), and therefore, need not be affirmatively pled. Moreover, the facts alleged in the complaint would place the defendants on notice of the charge. See Conley v. Gibson, 355 U.S. 41, 47 (1957) (complaint must give the defendant “fair notice of what the claim is and the grounds upon which it rests”).

action to stop it. See e.g., Aman v. Cort Furniture Rental Corp., 85 F.3d 1074 (3d Cir. 1996) (the fact that employee had been subject to a continuous pattern of racial harassment could support conclusion that her resignation was actually a constructive discharge). Thus, a pattern of harassment that included excluding the employee from management meetings, denying the employee the authority that others of her caliber exercised, falsely accusing the employee of stealing and drinking on the job, and the employer's refusal to speak to the employee could enable a jury to find that a reasonable person would be forced to quit. See Levandos v. Stern Entertainment, Inc., 860 F.2d 1227, 1231 (3d Cir. 1988).

Here, Frye has introduced evidence that, after she voiced her opposition to the discrimination at the Company, the harassment that had been occurring prior to her complaints intensified. See Aman, 85 F.3d at 1085 (holding that employee's endurance of intolerable workplace conditions prior to leaving does not, as a matter of law, preclude a jury from finding employee constructively discharged). After enduring Robinson's references to her as "legs" as well as Sihler's sexual advances, Frye complained to Robinson, in the beginning of 1994, about the harassment both she and Cordero had experienced at the hands of Sihler. (See Pl.'s Response Mem. Ex. C ¶ s.) After this complaint, Robinson repeatedly subjected the plaintiff to derogatory comments. In one instance, Robinson told Frye that she was "a two time loser who got hit with a terrible disease," referring, presumably, to the fact that Frye had recently been diagnosed with multiple sclerosis. (See id. ¶ r.) On yet another occasion, while Frye was in the bathroom comforting Cordero over Robinson's behavior, Robinson began kicking the bathroom door and screaming for the women to come out. (See id. ¶ m.)

Moreover, Frye's subsequent objections to Sihler's behavior were met with laughter and insults.

Robinson's mistreatment of Frye culminated in December, 1994 when he ordered Frye to fire Cordero based on Cordero's allegations of sexual harassment. (Pl.'s Response Mem. Ex. A ¶ 2.) When Frye refused, Robinson lodged subtle and direct threats toward Frye, telling her that Frye herself should be fired and that he would make sure Cordero "loses her kid" if she filed a law suit against him. (Pl.'s Response Mem. Ex. J ¶ w); see Clowes v. Allegheny Valley Hospital, 991 F.2d 1159, 1161 (3d Cir. 1993) (employer threatening discharge important factor in determining whether there is constructive discharge). In sum, I cannot say as a matter of law that the pattern of abuse Frye alleges would not enable a factfinder to find that she was constructively discharged.

III. Conclusion

The plaintiff has met her burden on both of the disputed claims. Frye has shown that both Robinson and Sihler are proper individual defendants under the PHRA and Frye has introduced sufficient evidence on her retaliation claims under the PHRA and Title VII. Accordingly, I will deny the defendants' motion for partial summary judgment as to the disputed claims and grant the motion as to the others.

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LESLIE FRYE	:	CIVIL ACTION
	:	
v.	:	
	:	
ROBINSON ALARM CO.,	:	
HERMAN E. ROBINSON,	:	
and RONALD SIHLER	:	NO. 97-0603

ORDER

AND NOW, this day of February, 1998, upon consideration of the defendants' motion for partial summary judgment and the plaintiff's response thereto, it is hereby ORDERED that:

- (1) By agreement of the parties, the defendants' motion for partial summary

judgment as to the plaintiff's claims under Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. § 2000e et seq. (1994) against the individual defendants, Herman Robinson and Ronald Sihler, is GRANTED;

(2) By agreement of the parties, the defendants' motion for partial summary judgment as to the plaintiff's claims under the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. §§ 12101 et seq. (1995) is GRANTED and those portions of the plaintiff's complaint alleging violations of the ADA are DISMISSED;

(3) The defendants' motion for partial summary judgment as to the plaintiff's claims under the Pennsylvania Human Relations Act (PHRA), 43 PA. CONS. STAT. ANN. §§ 951 et seq. (1991) against the individual defendants, Robinson and Sihler, is DENIED;

(4) The defendants' motion for partial summary judgment as to the plaintiff's retaliation claims under Title VII and the PHRA is DENIED.

William H. Yohn, Jr., J.