

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

NATALIE WHITE LESSER and : CIVIL ACTION
HARVEY LESSER, h/w :
 :
v. :
 : NO. 96-8121
NORDSTROM, INC., et al. : NO. 97-6070

MEMORANDUM AND ORDER

HUTTON, J.

September , 1998

Presently before the Court is the Plaintiffs' Motion for Reconsideration (Docket No. 22) and the Defendant's response thereto (Docket No. 24). For the reasons stated below, the Plaintiffs' Motion is **DENIED**.

I. BACKGROUND

On September 26, 1997, the Plaintiffs filed suit against Nordstrom, Inc. ("Nordstrom" or the "Defendant") in the United States District Court for the Eastern District of Pennsylvania. In their complaint, the Plaintiffs claim that Carmencita Aseron,¹ an employee of Nordstrom, while driving home from work negligently caused a car crash with the Plaintiffs resulting in personal injury

¹ The Plaintiffs initiated the instant action by filing a complaint against Carmencita Aseron on October 17, 1996, in the Court of Common Pleas of Philadelphia County. After the Plaintiffs filed suit against Nordstrom in the Eastern District and removed their suit against Ms. Aseron there as well, this Court consolidated the Plaintiffs' suits against Ms. Aseron and Nordstrom.

to the Plaintiffs. Alleging that Nordstrom was either vicariously liable for the negligent acts of its employee or that it was directly liable for failing to prevent the accident by employing "negligent employment practices," Plaintiffs asserted various claims against Nordstrom, based on the following state law tort theories: (1) negligence; (2) loss of consortium; and (3) negligent infliction of emotional distress. Nordstrom filed a motion for summary judgment on May 14, 1998. On August 13, 1998, this Court granted the Defendant's motion for Summary Judgment and ordered all claims against Defendant Nordstrom, Inc. dismissed with prejudice. See Mem. and Order dated Aug. 13, 1998, by Honorable Herbert J. Hutton, Lesser v. Nordstrom, Inc., et al., Civil No. 96-8121/97-6070, at 8 (the "Order"). In the instant motion, Plaintiffs request that the Court reconsider that earlier Order. This Court denies the Plaintiffs' motion for the foregoing reasons.

II. DISCUSSION

"The standards controlling a motion for reconsideration are set forth in Federal Rule of Civil Procedure 59(e) and Local Rule of Civil Procedure 7.1." Vaidya v. Xerox Corp., No. CIV.A97-547, 1997 WL 732464, at *1 (E.D.Pa. Nov. 25, 1997). "The purpose of a motion for reconsideration is to correct manifest errors of law or fact or to present newly discovered evidence." Harsco Corp. v. Zlotnicki, 779 F.2d 906, 909 (3d Cir. 1985); see also Drake v. Steamfitters Local Union No. 420, No. CIV.A97-CV-585, 1998 WL

564886, at *3 (E.D.Pa. Sep. 3, 1998). Generally, a motion for reconsideration will only be granted on one of the following three grounds: (1) there has been an intervening change in controlling law; (2) new evidence, which was not previously available, has become available; or (3) it is necessary to correct a clear error of law or to prevent manifest injustice. Smith v. City of Chester, 155 F.R.D. 95, 96-97 (E.D.Pa. 1994); see also D'Allesandro v. Ludwig Honold Mfg. Co., No. CIV.A95-5299, 1997 WL 805182, at *1 (E.D.Pa. Dec. 18, 1997).

In the instant motion, the Plaintiffs do not allege that there has been any change in controlling law or that there is any newly discovered evidence. Plaintiffs can only succeed, therefore, on the third ground for reconsideration. Under the third ground for granting a motion for reconsideration, this Court must grant the Plaintiffs' motion to "correct a clear error of law or prevent manifest injustice" resulting from its earlier order on Nordstrom's motion for summary judgment. Walker v. Spiller, No. CIV.A97-6720, 1998 WL 306540, at *2 (E.D.Pa. Jun. 9, 1998) (citing Smith, 155 F.R.D. at 96-97). In their motion, the Plaintiffs assert that this Court erred in dismissing the Plaintiffs' case against the Defendant because the Court issued its Order "based upon an incomplete record." Furthermore, Plaintiffs contend that the Court's Order was "Premature and unfair" because it failed to consider "outstanding discovery." Pls.' Mem. at 1.

A. No Clear Error of Law

A trial court has discretion to grant a summary judgment motion while discovery is still in progress. See Koplove v. Ford Motor Co., 795 F.2d 15, 17-18 (3d Cir. 1986). In Koplove, the Third Circuit found that the trial court's decision to grant the defendant's motion for summary judgment while discovery was still in progress was "warranted" based on the "evidence of record." Id. at 17. Similarly, this Court's Order was warranted based on the evidence before the Court as of the date summary judgment was granted in Nordstrom's favor. The evidence of record established that Aseron was driving home from work when the accident occurred. Moreover, she was not conducting business on Nordstrom's behalf at the time of the accident. Thus, this Court correctly found that Nordstrom could not be held vicariously liable for Aseron's alleged negligent driving at the time of the accident.

Likewise, the Plaintiffs offered no proof establishing that Nordstrom caused the Plaintiffs injuries or that fatigue was a cause of the accident. Furthermore, even if the Plaintiffs offered evidence that Aseron had been tired, that weariness caused the accident, and that Nordstrom knew or should have known that Aseron was fatigued, this Court held that it would still be required to grant Nordstrom's motion. Pennsylvania courts have not extended liability to employers in this scenario, and the Court rightfully

declined to do so. Accordingly, this Court did not abuse its discretion by granting the Defendant's motion for summary judgment while discovery was still in progress.

The Court in Koplove found that the "only debatable question on [that] appeal [was] whether the district court's grant of summary judgment was premature." Koplove, 795 F.2d at 18. In upholding the trial court's decision to grant summary judgment while discovery was still in progress, the Third Circuit noted that the plaintiffs' "Rule 56(f) affidavit did not specify what discovery was needed or explain why it had not been previously secured." Id. This Court's Order granting Nordstrom's summary judgment motion was not premature. In the instant case, in their response to Defendant's Motion for Summary Judgment the Plaintiffs pointed out to the Court that there was outstanding discovery addressed to Nordstrom regarding some or all of the issues involved in its Motion for Summary Judgment. Pls.' Mot. for Recons. ¶ 4. The Plaintiffs, however, failed to explain to the Court how that supplemental discovery would change the outcome of the motion for summary judgment. Indeed, in this motion the Plaintiffs have failed in that regard once again. See discussion infra Part B. Because the Plaintiffs were unable to convince the Court that additional discovery would present an issue of material fact, this Court properly acted within its discretion in granting summary judgment while discovery was still in progress.

B. No Manifest Injustice

This Court must grant the Plaintiffs' motion if necessary to correct a "manifest injustice" resulting from its earlier order on Nordstrom's motion for summary judgment. Walker, 1998 WL 306540, at *2 (citing Smith, F.R.D. at 96-97). A manifest injustice, however, did not result from the granting of Nordstrom's summary judgment motion even though the Court did not consider the additional evidence presented in the Plaintiffs' Motion for Reconsideration. Such discovery would have had absolutely no bearing on the outcome of the motion for summary judgment.

Plaintiffs contend that the Court's Order was "premature and unfair" because it failed to consider "outstanding discovery," which includes a Notice of Deposition for the Nordstrom employee who is responsible for travel expense reimbursements and Plaintiffs' Interrogatories and Request for production of Documents regarding Nordstrom policies and procedures on the alertness and health of its employees. As stated above, in its Order granting Nordstrom's motion for summary judgment, this Court concluded based on the evidence of record as of August 13, 1998, that Nordstrom could not be found liable to the Plaintiffs under a respondent superior theory because Aseron was not acting within the course and scope of her employment at the time of the accident. Nordstrom produced all cash vouchers, mileage reimbursements and special

activity time sheets covering a greater than four month period surrounding the accident. This discovery demonstrated that there were no such cash vouchers, mileage reimbursements or special activity time sheets covering the date of the accident. This evidence was consistent with Aseron's testimony that she was not on company business at the time of the accident. The corporate designee deposition therefore would have no bearing on the entry of summary judgment in favor of Defendant Nordstrom, Inc.

Furthermore, any Nordstrom policies and procedures regarding the alertness and health of its employees is irrelevant because the Plaintiffs' alleged cause of action for "negligent employment practices" is not recognized in Pennsylvania. Even if such a cause of action did exist, any such policies or procedures would not change the finding in favor of Nordstrom because the record is uncontradicted that Ms. Aseron was not tired at the time of the accident, and fatigue was not the cause of the accident. Thus, the Nordstrom policies and procedures have no bearing on the entry of summary judgment in favor of Defendant Nordstrom, Inc.

III. CONCLUSION

For the foregoing reasons, the Plaintiffs failed to establish how this Court abused its discretion in granting Nordstrom's motion for summary judgment or how the additional evidence that it seeks would have changed the outcome of that Order. As such, this Court denies the Plaintiffs' motion for reconsideration.

An appropriate Order follows.

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O R D E R

AND NOW, this day of September, 1998, upon consideration
of the Plaintiffs' Motion for Reconsideration (Docket No. 22), and
the Defendant Nordstrom, Inc.'s response thereto (Docket No. 24),
IT IS HEREBY ORDERED that Defendant's Motion is **DENIED**.

BY THE COURT:

HERBERT J. HUTTON, J.