

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

MICHAEL WESTON and : CIVIL ACTION
DEBORAH WESTON, h/w, :
Plaintiffs :
 :
v. :
 :
COMMONWEALTH OF PENNSYLVANIA :
DEPARTMENT OF CORRECTIONS :
and DOLORES MERITHEW :
Defendants : NO. 98-CV-3899

MEMORANDUM AND ORDER

J.M. KELLY, J.

SEPTEMBER 29, 1998

Presently before the Court is Defendant, Commonwealth of Pennsylvania Department of Correction's Motion to Dismiss (Document No. 3). For the reasons set forth below, Defendant's motion with respect to Count II of Plaintiffs' Complaint is denied. The Department of Correction's ("DOC") motion as it relates to Counts I, III, and IV, however, is granted.

I. BACKGROUND

Plaintiffs Michael and Deborah Weston have brought this action due to events that occurred during Mr. Weston's employment with the DOC. Plaintiffs allege that on February 11, 1997, Defendant Dolores Merithew, a co-worker, rubbed Mr. Weston's back while he performed his duties as a Food Service Instructor in Graterford Prison's staff dining room. (Compl. ¶ 10.) Plaintiffs further allege that despite Mr. Weston's immediate and emphatic objection to the back rub, Ms. Merithew three days later

directly touched Mr. Weston's buttocks by placing her finger through a hole in the seat of Mr. Weston's pants. (Compl. ¶ 12.) Mr. Weston filed a complaint describing Ms. Merithew's behavior with his supervisor on February 15, 1997. (Compl. ¶ 15.)

As a result of this complaint, the DOC issued Ms. Merithew a written reprimand that stated Ms. Merithew had violated the DOC's sexual harassment policy.¹ (Compl. ¶ 16.) Plaintiffs do not allege any further harassment by Ms. Merithew. They do allege, however, that Mr. Weston is the victim of offensive comments and jokes concerning Ms. Merithew's actions by co-workers and his manager. (Compl. ¶ 18.) Plaintiffs claim these comments and jokes, as well as Mr. Weston's subsequent transfer to a "less desirous [sic] position," are in retaliation for his complaints. (Compl. ¶ 18; Pls.'s Mem. Opp'n Mot. to Dismiss at 5.)

Mr. and Mrs. Weston have sued Ms. Merithew and the DOC under Title VII and the Pennsylvania Human Relations Act ("PHRA"), and also have brought claims against the Defendants for intentional and negligent infliction of emotional distress.² Plaintiffs additionally have sued Ms. Merithew individually for assault and battery. In response to Plaintiffs' Complaint, Defendant DOC has

¹Plaintiffs also allege that Mr. Weston filed a criminal complaint against Ms. Merithew, Pls.'s Mem. Opp'n Mot. to Dismiss at 3 n.1, who was found guilty of harassment under 18 Pa. Cons. Stat. Ann. § 2709 (a)(3), Compl. ¶ 17.

²Mrs. Weston also has sued for loss of consortium.

moved to dismiss the claims pending against it.

II. DISCUSSION

Under Rule 12(b)(6), the Court may dismiss the Complaint, or specific counts within it, only if, after accepting the facts Plaintiffs alleged as true and drawing all reasonable inferences from those facts in Plaintiffs' favor, the Court concludes it cannot grant Plaintiffs relief "under any set of facts consistent with the allegations." Trump Hotels & Casino Resorts, Inc. v. Mirage Resorts Inc., 140 F.3d 478, 483 (3d Cir. 1998). The Court, however, is not required to accept as true allegations that are merely conclusory. Villanova v. Solow, No. 97-6684, 1998 WL 643649, at *1 (E.D. Pa. Sept. 18, 1998).

A. Count I - Plaintiffs' Title VII and PHRA Claims

Plaintiffs have alleged two bases on which they claim the DOC is liable under Title VII: 1) the DOC only reprimanded Ms. Merithew, and did not suspend or "adequately discipline" her; and 2) the DOC has failed to prevent Mr. Weston's co-workers and manager from teasing him about the incidents with Ms. Merithew.³ (Compl. ¶¶ 16, 18; Pls.'s Mem. Opp'n Def.'s Mot. to Dismiss at 4, 5.) The DOC asks the Court to find that these allegations fail to support Plaintiffs' Title VII and PHRA claims, based on the

³In its response to the DOC's memorandum of law, Plaintiffs seem to want the issue of whether the DOC promptly remedied the harassment to embrace both the adequacy of Ms. Merithew's reprimand and the taunting Mr. Weston experienced after he complained.

Third Circuit's test for employer liability under Title VII.⁴ Under this test, which the Third Circuit established in Andrews v. City of Philadelphia, 895 F.2d 1469, 1482 (3d Cir. 1990), an employer is liable under Title VII when: 1) the employee suffered intentional discrimination because of the plaintiff's gender; 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) respondeat superior liability exists. The DOC apparently seeks to address the second and fourth prongs of this test by arguing that the incidents of sexual harassment were isolated and "may [have been] offensive to him and made work unpleasant for him." (Def.'s Mem. Supp. Mot. to Dismiss at 6.) The DOC also argues that it is not liable under respondeat superior because its reprimand of Ms. Merithew was reasonably calculated to prevent further harassment. Id.

Plaintiffs' argument that the DOC created a hostile work environment by failing to suspend or "adequately discipline" Ms. Merithew is entirely unpersuasive. An employer is liable under

⁴It is significant to note that federal and Pennsylvania courts have evaluated liability under the PHRA using the same standards as under Title VII. See, e.g., Smith v. Pathmark Stores, Inc., No. 97-1561, 1998 WL 309916, at *3 (E.D. Pa. June 11, 1998); Fairfield Township Volunteer Fire Co. v. Pennsylvania Human Relations Comm'n, 609 A.2d 804, 805 (Pa. 1992). Therefore, the discussion that follows, while discussing only Title VII standards, applies equally to Plaintiffs' PHRA claims.

respondeat superior, the fifth prong of the Andrews test, if the harassment 1) is committed within the scope of the offender's employment; 2) the employer was negligent or reckless in failing to train, discipline, fire, or take remedial action when learning of the harassment; or 3) the offender relied upon apparent authority or was aided in the commission of the tort by the agency relationship. Bonenberger v. Plymouth Township, 132 F.3d 20, 26 (3d Cir. 1996). Plaintiffs' claim that the DOC failed to "adequately discipline" Ms. Merithew clearly seems geared toward the second of these three avenues of respondeat superior liability.⁵

Contrary to Plaintiffs' claim, however, the DOC's remedial action has been highly effective: Plaintiffs have not alleged that even one further offensive interaction with Ms. Merithew occurred since the DOC reprimanded her. Based upon the pleadings, Plaintiffs have failed to allege facts that even remotely support a conclusion that the DOC was negligent in its discipline of Ms. Merithew, and Plaintiffs therefore cannot show that respondeat superior liability exists. Accordingly, the DOC's reprimand of Ms. Merithew does not provide a viable theory of Title VII liability against the DOC.

Similarly, the DOC is not liable under Title VII for its

⁵Neither of the other two theories were pled, even impliedly, by Plaintiffs.

failure or inability to prevent Mr. Weston's co-workers and manager from joking with him about Ms. Merithew's behavior. The Supreme Court recently repeated that conduct not severe enough to create an objectively hostile or abusive work environment is beyond Title VII's purview. Oncale v. Sundowner Offshore Servs., Inc., 118 S. Ct. 998, 1003 (1998) (citing Harris v. Forklift Sys., Inc., 510 U.S. 17, 21 (1993)). The Court further instructed district courts to consider the social context in which particular behavior occurs when judging the severity of the harassment. Id. "Common sense, and an appropriate sensitivity to social context, will enable courts and juries to distinguish between simple teasing or roughhousing . . . and conduct which a reasonable person in the plaintiff's position would find severely hostile or abusive." Id.

Plaintiffs allege Mr. Weston "has been subjected to unnecessary sexually offensive comments, jokes, and jibes made by fellow co-workers, managers, and even inmates." (Compl. ¶ 18.) These comments, jokes, and jibes fall easily into the category of simple teasing when considered in light of the social context of prison. It is difficult for the Court to imagine a more caustic environment, or one more likely to promote harsh or even acidic banter, than prison. Working in the staff dining room, Mr. Weston works with those regularly confronting the criminal population; the abrupt or insensitive demeanor of those whose

duty it is to maintain order in prison and the stress borne out of daily conflict with the prison population pervades Mr. Weston's working environment. These conditions almost necessarily must foster "offensive comments, jokes, and jibes." In light of the social context of prison, the Court finds the joking and jibing Mr. Weston alleges neither demonstrates an inadequacy in the DOC's response to Mr. Weston's complaints nor is severe enough to create a hostile work environment. Defendant's motion with respect to Count I is granted.

B. Plaintiffs' Retaliation Claim

In their Complaint, Plaintiffs attempt to use the taunting Mr. Weston experienced as the factual basis for their retaliation claim.⁶ (Compl. ¶ 18.) Later, in their reply brief, Plaintiffs claim Mr. Weston has been transferred to a less desirable position. (Pls.'s Mem. Opp'n Mot. to Dismiss at 5.)

Plaintiffs have alleged facts, however casually, consistent with a retaliation claim under Title VII. "All that is required to establish a prima facie case of retaliatory discrimination is proof (1) that the plaintiff engaged in protected activity, (2) that the employer took an adverse action against [him], and (3) that a causal link exists between the protected activity and the

⁶Plaintiffs make this allegation in Count I of the Complaint; Count II, in which they plead retaliation, vaguely refers to retaliation for Mr. Weston's complaints without providing any specific factual foundation.

employer's adverse actions." EEOC v. L.B. Foster Co., 123 F.3d 746, 755 (3d Cir. 1997). Reading the pleadings in the light most favorable to Plaintiffs, the Court cannot say Plaintiffs have failed to allege facts sufficient to state a claim under Title VII. The DOC's motion, therefore, is denied with respect to Count II.

C. Plaintiffs' Intentional and Negligent Infliction of Emotional Distress Claims

The DOC moves to dismiss Counts III and IV of Plaintiffs' Complaint on the ground that Pennsylvania's sovereign immunity bars Plaintiffs' claims. Plaintiffs concede the DOC's position.

The parties are correct that Plaintiffs' claims are barred. It is well settled that the DOC is a state agency entitled to Eleventh Amendment immunity, in the absence of Pennsylvania's consent to be sued. Alabama v. Pugh, 438 U.S. 781, 782 (1978); see also Wisconsin Dept. of Corrections v. Schacht, 118 S. Ct. 2047, 2050 (1998). Pennsylvania has not waived its sovereign immunity in a way applicable here, see 42 Pa. Cons. Stat. Ann. § 8522, and Plaintiffs' infliction of emotional distress claims therefore are barred. Accordingly, the DOC's motion is granted with respect to Counts III and IV of the Complaint.

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ORDER

AND NOW, this 29th day of September, 1998, upon consideration of Defendant Department of Correction's Motion to Dismiss, it is hereby **ORDERED**:

1. Defendant's Motion to Dismiss (Doc. No. 3) is **GRANTED** with respect to Counts I, III, and IV of Plaintiffs' Complaint; and

2. Defendant's Motion to Dismiss (Doc. No. 3) is **DENIED** with respect to Count II of Plaintiffs' Complaint.

BY THE COURT:

JAMES MCGIRR KELLY, J.