

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

HAZEL ANN LEE	:	CIVIL ACTION
	:	
v.	:	
	:	
VIRGINIA GECEWICZ and RELIANCE	:	
STANDARD LIFE INSURANCE COMPANY	:	NO. 99-158

MEMORANDUM AND ORDER

YOHN, J.

May 20, 1999

Hazel Ann Lee (“Lee”) filed this action seeking compensatory and punitive damages against her supervisor, Virginia Gecewicz (“Gecewicz”), and her employer, Reliance Standard Life Insurance Co. (“Reliance”), because they allegedly sexually harassed her, and retaliated against her for filing discrimination claims with the Equal Employment Opportunity Commission (“EEOC”). The defendants filed a motion to dismiss the complaint under Fed. R. Civ. P. 12(b)(6), claiming that Lee has not adequately alleged the elements of either a sexual harassment claim or a retaliation claim under Title VII, that Lee’s claims based on Pennsylvania public policy are preempted by the Pennsylvania Human Relations Act, and that all claims against Gecewicz must be dismissed because individuals are not liable under Title VII. For the reasons described below, the defendants’ motions will be granted in part, and Lee will be permitted to amend her complaint in accordance with this memorandum.

FACTUAL BACKGROUND

Lee has been employed by Reliance since February, 1989, and has held several positions

since that time. On September 29, 1997, Lee took a position in the Individual Processing Department where she was supervised by Gecewicz. See Complaint, ¶ 14. At about that time, Lee began to work on a significant project involving the “Rock-Tenn” account and her work on that project required her to deal closely with Gregory Eemplare (“Eemplare”), an Assistant Vice-President of Sales and Marketing. See Complaint, ¶¶ 15-17. Lee alleges that Gecewicz became jealous of her close professional relationship with Eemplare, and that, beginning in December, 1997, Gecewicz began to make comments suggesting that her relationship with Eemplare was sexual. See Complaint, ¶¶ 20-22.

Lee further alleges that Gecewicz began to sexually harass her and contends that the following three episodes were part of a pattern of sexual harassment:

On [December 31, 1997], within plaintiff’s hearing and sight, defendant Gecewicz suggested to co-worker Anjana Smith [sic] should ask Eemplare to take her to lunch and give Eemplare a big kiss on the mouth. On January 14, 1998, plaintiff informed defendant Gecewicz that she had just spoken to Eemplare over the phone and that Eemplare said he was coming by the department. Defendant Gecewicz asked plaintiff at that time why Eemplare came to plaintiff’s desk so often. On January 14, 1998, when Eemplare came to the department, he expressed a concern about flying [sic] a plane in bad weather. Defendant Gecewicz at that time, in front of plaintiff, suggested to Eemplare that he take plaintiff on the plane with him to hold his hand.

Complaint, ¶¶ 23-25. Lee also alleges that, on June 23, 1998, Gecewicz sent an e-mail message to all the employees in her department referring to Lee as “girlfriend.” See Complaint, ¶ 32.

Lee claims that Gecewicz’s harassment culminated in Gecewicz’s decision to give her an unfair performance evaluation, and to deny her a promotion on January 23, 1998. See Complaint, ¶¶ 26-27. Gecewicz again denied Lee a promotion on March 24, 1998, purportedly because she did not work overtime. See Complaint, ¶ 30. Lee claims that when she “continued

to assert her right to” the promotion, “the position was eliminated but the same job was assigned to another employee.” Complaint, ¶ 31. Lee further implies that Gecewicz was also responsible for Lee being charged with insubordination on February 20, 1998, for presumably unauthorized contact with Eemplare. See Complaint, ¶ 28.

On July 21, 1998, these events caused Lee to file a charge with the EEOC, alleging that Reliance discriminated against her because of her race and her sex. See Complaint, ¶ 35. She alleges that shortly after she filed the EEOC charge, she was informed that she “must attend a meeting immediately at Reliance and if she did not, [she] would be suspended and escorted from the premises by a security guard. At the meeting, [she] was issued a final written warning, dated August 4, 1998, for violation of the ‘Employee Rules of Professionalism.’” Complaint, ¶ 36. In response to the written warning, Lee filed a retaliation charge with the EEOC on August 6, 1998. See Complaint, ¶ 37. The EEOC issued right to sue letters to Lee on both charges. See Complaint, Ex. A.

STANDARD OF REVIEW

In ruling on a motion to dismiss for failure to state a claim upon which relief may be granted, the court must accept as true all well-pleaded allegations of fact, and any reasonable inferences that may be drawn therefrom, in the plaintiff's complaint and must determine whether "under any reasonable reading of the pleadings, the plaintiff may be entitled to relief." Nami v. Fauver, 82 F.3d 63, 65 (3d Cir.1996) (citations omitted); see Weiner v. Quaker Oats Co., 129 F.3d 310, 312 (3d Cir. 1997) Although the court must construe the complaint in the light most favorable to the plaintiff, it need not accept as true legal conclusions or unwarranted factual inferences. See Conley v. Gibson, 355 U.S. 41, 45-46 (1957). Claims should be dismissed under

Rule 12(b)(6) only if "it appears beyond doubt that the plaintiff can prove no set of facts in support of [her] claim which would entitle [her] to relief." Id.

DISCUSSION

I. Viability of Lee's Title VII Claims

In Count I of her complaint, Lee alleges that defendants sexually harassed her in violation of Title VII, and in Count II, she alleges that defendants retaliated against her in violation of Title VII.¹ Sexual harassment claims under Title VII may proceed under either of two theories, quid pro quo or hostile work environment. See Burlington Indus., Inc. v. Ellerth, 118 S. Ct. 2257, 2264-65 (1998) (explaining the usefulness of these terms in making a "threshold" determination of whether a plaintiff has pled a violation of Title VII). The difference between these types of cases is whether the plaintiff has been subjected to a threat that has been carried out, or whether the plaintiff has been subjected to severe or pervasive offensive conduct that constructively alters the terms and conditions of her employment. See id. Defendants assert that Lee has failed to plead a sexual harassment claim under either the quid pro quo or hostile environment theories, and has failed to plead that the defendants subjected her to an adverse employment action in retaliation for her protected activity of filing an EEOC charge. See Defendants' Brief, at 3-6. The court will discuss each of Lee's Title VII claims separately.

¹ In Count I, Lee does not specify whether she is proceeding on a quid pro quo or a hostile environment theory of sexual harassment. See Complaint, ¶¶ 12-34. She later includes a claim, under the heading "Regarding Both Counts" that "Defendants have directly and vicariously created a severe and pervasive hostile work environment for plaintiff and has [sic] sexually harassed her, discriminated against her and retaliated against her in violation of Title VII and Pennsylvania public policy." Complaint, ¶ 39. The court will therefore treat Count I as alleging both quid pro quo and hostile environment theories of sexual harassment liability under Title VII.

A. Quid Pro Quo Sexual Harassment

Defendants assert that Lee has not pled a quid pro quo claim in Count I because she has not alleged that there was “a link between a tangible job detriment or benefit, and a request for sexual favors.” Defendants’ Reply Brief, at 4. Relying on Burlington, defendants contend that because Gecewicz never sought sexual favors from Lee, Lee cannot allege that there was a causal link between the job detriment she suffered and threats related to her sex. See id. Lee counters by arguing that Gecewicz implicitly threatened to take adverse action against her if “Gecewicz continued to misperceive the relation between plaintiff and supervisor Gregory Esemplare as sexual.” Lee’s Brief, at 3. Lee also contends that the threatened adverse action occurred when she was given an unfairly poor performance review, when she was denied a promotion, and when the job she sought was eliminated. See Complaint, ¶¶ 26, 27, 30, 31.

The Third Circuit has held that

[u]nwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute [quid pro quo] sexual harassment when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual’s employment [or] (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual.

Bonenberger v. Plymouth Township, 132 F.3d 20, 27 (3d Cir. 1997) (quoting Robinson v. City of Pittsburgh, 120 F.3d 1286, 1296 (3d Cir. 1997)); Barbara Lindemann & Paul Grossman, 1 Employment Discrimination Law 759-63 (3d ed. 1996) (discussing the requirements of a prima facie quid pro quo case and reporting that all circuits agree that the plaintiff must have been subjected to an unwelcome sexual advance). After Burlington, a quid pro quo plaintiff must also “demonstrate either that she submitted to the sexual advances of her alleged harasser or suffered

a tangible employment action as a result of her refusal to submit to those sexual advances.”

Hurley v. Atlantic City Police Dep’t, No. 96-5634, 1999 WL 150301, at * 31 (3d Cir. Mar. 18, 1999) (Cowen, J., concurring).

Here, Lee has explicitly agreed that Gecewicz never sought sexual favors from her, or made sexual advances to her. See Lee’s Brief, at 2. Instead, Lee asserts that Gecewicz was jealous of her relationship with Esemplare, and therefore gave her an unfair performance evaluation and denied her a promotion. See id. at 3. Lee has not pled that her continued job success was contingent upon her submission to Gecewicz’s, or anyone else’s, sexual demands or that she was forced to endure “verbal or physical conduct of a sexual nature” in return for job benefits. Robinson, 120 F.3d at 1296. At best, Lee is claiming that she was forced to endure offensive treatment from Gecewicz, and felt obligated to convince Gecewicz that her relationship with Esemplare was purely professional as a condition of obtaining a promotion. This assertion may support Lee’s claim that she was subjected to a hostile work environment, but does not support her claim for quid pro quo sexual harassment. As explained in Bonenberger, “quid pro quo harassment requires a direct conditioning of job benefits upon an employee’s submitting to sexual blackmail, or the consideration of sexual criteria in work evaluations.” See Bonenberger, 132 F.3d at 28. Lee has not, therefore, pled the “quid” necessary to bring a quid pro quo sexual harassment claim, and to the extent that Count I should be construed as asserting such a claim, it must be dismissed.

B. Hostile Environment Sexual Harassment

Defendants also contend that Count I should be dismissed to the extent it states a claim for hostile environment sexual harassment because the alleged incidents of harassment are

neither pervasive nor severe enough to alter the terms or conditions of Lee's employment, and thus do not rise to the level of actionable conduct under Title VII. See Defendants' Brief, at 4; Defendants' Reply Brief, at 2-4. Despite the persuasiveness of defendants' arguments, plaintiff has pled the existence of "a severe and pervasive hostile work environment" and under the notice pleading requirements embodied in Fed. R. Civ. P. 8 (a), that pleading is sufficient to state a claim for hostile environment sexual harassment. Complaint, ¶ 39. There may be incidents other than those alleged in the complaint which will demonstrate that Lee was subjected to a more continuous and severe pattern of harassment than that revealed by the complaint, and indeed, such other incidents are suggested by the complaint. See Complaint, ¶¶ 21, 33. Though the court may ultimately be convinced that the alleged harassment was neither on account of Lee's gender,² nor was severe and pervasive such that it altered the terms and conditions of Lee's employment, those questions are more appropriately resolved upon consideration of a complete summary judgment record. See Oncale v. Sundowner Offshore Servs., Inc., 118 S. Ct. 998, 1002-03 (1998) (specifying that Title VII prohibits same-sex harassment which occurs solely because of an employee's gender). Lee may therefore proceed on Count I, to the extent it asserts a hostile environment sexual harassment claim under Title VII.

C. Retaliation

Defendant seeks to dismiss the Title VII retaliation claim contained in Count II on grounds that the alleged retaliation, the requirement that Lee immediately attend a meeting and

² Based solely on the allegations of the complaint, the court questions whether Lee was an alleged target of harassment because of her gender or because of her close professional relationship with an assistant vice president, a relationship that any employee may desire, particularly where, as here, that relationship may allow greater access to special projects like the Rock-Tenn project described in the complaint.

her receipt of a final written warning for violating the Employee Rules of Professionalism, does not constitute an adverse employment action as a matter of law. See Defendants' Brief, at 5-6; Complaint, ¶ 36. Lee contends that the final written warning she received for insubordination constituted an adverse employment action within the meaning of Barber v. CSX Distrib. Servs., 68 F.3d 694, 701 (3d Cir. 1995). See Lee's Brief, at 3.

To state a prima facie retaliation claim under Title VII, Lee must allege that (1) she engaged in a protected activity, (2) her employer took adverse action against her "either after or contemporaneous with [her] protected activity," and (3) "a causal connection [exists] between [her] protected activity and [her employer's] adverse action." Krouse v. American Fertilizer Co., 126 F.3d 494, 500, 506 (3d Cir. 1997) (explaining elements of prima facie retaliation case under the Americans with Disabilities Act); Robinson v. City of Pittsburgh, 120 F.3d 1286, 1299 (3d Cir. 1997) (describing elements of Title VII retaliation claim); Nelson v. Upsala College, 51 F.3d 383, 386 (3d Cir. 1995) (same). To constitute an adverse employment action, the retaliatory conduct must "alter[] the employee's compensation, terms, conditions, or privileges of employment, deprive[] him or her of employment opportunities, or adversely affect[] his or her status as an employee" for "not everything that makes an employee unhappy qualifies as retaliation." Robinson, 120 F.3d at 1300 (quotations omitted).

Defendants assert that the written warning Lee received does not constitute an adverse employment action because it did not change her salary or her position with Reliance and because a written warning which is not an "ultimate employment decision" is not an adverse employment action as a matter of law. Defendants' Brief, at 5-6 (citing Mattern v. Eastman Kodak Co., 104 F.3d 702, 707-08 (5th Cir.), cert. denied, 118 S. Ct. 336 (1997); Dollis v. Rubin,

77 F.3d 777, 781-82 (5th Cir. 1995)). Though the Fifth Circuit cases upon which defendants rely appear to sanction retaliation claims only when the plaintiff has been subjected to an “ultimate employment decision . . . such as hiring, granting leave, discharging, promoting, and compensating,” the Third Circuit will permit a plaintiff to maintain retaliation claims when her “status as an employee” has been adversely affected. Robinson, 120 F.3d at 1300; Mattern, 104 F.3d at 707 (quoting Dollis, 77 F.3d at 782). A number of other circuits, and even another court within this circuit, have commented that the Fifth Circuit’s view of the scope of actionable retaliatory acts is too narrow. See Gunnell v. Utah Valley State College, 152 F.3d 1253, 1264 (10th Cir. 1998); Saylor v. Ridge, 989 F. Supp. 680, 689 (E.D. Pa. 1998) (“Thus, the Third Circuit has not required that an employer’s adverse action must be an ‘ultimate’ one as defined by the Mattern and Dollis courts and as we are not bound by the Fifth Circuit’s decisions, we decline to adopt the Fifth Circuit’s definition of ‘adverse employment action.’”). Also, unlike the Fifth Circuit, it is not clear that the Third Circuit would conclude that written warnings can never constitute an adverse employment action. See Robinson, 120 F.3d at 1298 (explaining that “[f]ormal reprimands that result in a notation in an employee’s personnel file could be sufficiently concrete” to affect an employee’s terms of employment). As the court cannot determine, from the face of the complaint, whether Lee’s written warning was included in her personnel file, or resulted in other changes to the terms or conditions of her employment, such as the imposition of a probationary period, her retaliation claim cannot be dismissed at this stage.

II. Viability of Lee’s Claims for Violations of Pennsylvania Law and Public Policy

Both Counts I and II assert that the defendants have violated Pennsylvania public policy

in addition to Title VII. See Complaint, ¶ 39, title of Count II. As defendants correctly assert, these claims must be dismissed because they are preempted by the Pennsylvania Human Relations Act (“PHRA”), Pa. Stat. Ann. tit. 43, § 951, et seq. (West 1991 & Rev. Supp. 1998).

The Pennsylvania Supreme Court has held that the PHRA preempts common law tort claims for wrongful discharge based upon sexual harassment and retaliation because the PHRA prohibits this conduct and provides an exclusive statutory remedy for the violation. See Clay v. Advanced Computer Applications, Inc., 559 A.2d 917, 918 (Pa. 1989); see also Pa. Stat. Ann. tit. 43, § 955(a) (West 1991 & Rev. Supp. 1998) (prohibiting discrimination on the basis of sex); Pa. Stat. Ann. tit. 43, § 955 (d) (West 1991 & Rev. Supp. 1998) (prohibiting retaliation against a person who has opposed any practice forbidden by this act, or . . . has made a charge, testified or assisted, in any manner, in any investigation, proceeding or hearing under this act”). Lee asserts that the defendants violated Pennsylvania public policy by engaging in activity made unlawful by the PHRA, and has not asserted that she has distinct common law tort remedies for the defendants’ conduct. As such, her sexual harassment and retaliation claims must be brought under the PHRA. See Lezotte v. Allegheny Health Educ. & Research Found., No. 97-4959, 1998 WL 218086, at * 8 (E.D. Pa. May 1, 1998); Lantz v. Hospital of the Univ. of Penn., No. 96-2671, 1996 WL 442795, at * 5 (E.D. Pa. July 30, 1996).

In her opposition to the defendants’ motion to dismiss, Lee seems to agree that her claims based on violations of Pennsylvania law and public policy must be framed as claims under the PHRA, but argues that those claims should not be dismissed because she has complied with the prerequisites to bringing suit under the PHRA. See Lee’s Brief, at 4. Despite her apparent intention to have asserted sexual harassment and retaliation claims under the PHRA, Lee’s

complaint is devoid of these allegations. As a result, all claims for violations of Pennsylvania public policy contained in Lee's complaint will be dismissed, without prejudice to Lee's ability to amend her complaint to plead properly that defendants violated the PHRA and that she has complied with the jurisdictional prerequisites for filing suit.

III. Improper Defendants

A. Virginia Gecewicz

In both Counts I and II, Lee asserted Title VII claims against defendant Gecewicz. As Lee concedes, these claims must be dismissed because individuals like Gecewicz are not "employers" and are thus not liable for violations of Title VII. See Sheridan v. E.I. DuPont de Nemours & Co., 100 F.3d 1061, 1077-78 (3d Cir. 1996), cert. denied, 117 S. Ct. 2532 (1997); Lee's Brief, at 4. Lee urges the court, however, not to dismiss Gecewicz from the case entirely, because she has also asserted state law claims against Gecewicz. See id. As discussed above, Lee's has not properly pled PHRA claims, and thus, her state law claims have been dismissed. See supra, pt. II. Because there are no remaining claims in the complaint for which Gecewicz may be held liable, she is dismissed as a defendant. If Lee chooses to amend her complaint to plead proper PHRA claims, however, she may also assert those claims against Gecewicz, as she has already alleged that Gecewicz aided and abetted Reliance's violation of the PHRA. See Dici v. Pennsylvania, 91 F.3d 542, 552-53 (3d Cir. 1996) (permitting aiding and abetting claims against a supervisory employee under the PHRA); Davis v. Levy, Angstreich, Finney, Baldante, Rubenstein & Coren, 20 F. Supp. 2d 885, 887 (E.D. Pa. 1998) (finding that "an individual supervisory employee can be held liable under an aiding and abetting/accomplice liability theory pursuant to § 955 (e) for [her] own direct acts of discrimination or for [her] failure to take action

to prevent further discrimination by an employee under supervision”).

B. The School District of Philadelphia

Paragraph 11 of Lee’s complaint contains a rather cryptic reference to “defendant School District of Philadelphia.” As Lee has asserted no specific claims against the School District, and has not explained its role in the Title VII violations alleged, the School District will be dismissed as a defendant.

CONCLUSION

Lee has stated valid hostile environment and retaliation claims under Title VII against Reliance. Her other allegations, however, fail to state claims for quid pro quo sexual harassment and violations of Pennsylvania law and public policy, and therefore, defendants’ motion to dismiss those claims will be granted. Lee may amend her complaint within thirty days to replead these allegations or face dismissal with prejudice.

An appropriate order follows.

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VIRGINIA GECEWICZ and RELIANCE	:	
STANDARD LIFE INSURANCE COMPANY	:	NO. 99-158

ORDER

AND NOW, this 20th day of May, 1999, after consideration of Defendants' motion to dismiss the Plaintiff's complaint, the Plaintiff's opposition to the motion to dismiss, and the response thereto, IT IS HEREBY ORDERED that the Defendants' motion is GRANTED IN PART, as explained in the preceding memorandum. IT IS FURTHER ORDERED that Plaintiff may file an amended complaint in accordance with the court's memorandum, to the extent that she is able to do so, within thirty days of the date hereof.

William H. Yohn, Jr., J.